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THE CHALLENGES OF OPENING A DIALOGUE BETWEEN CATHOLIC AND SECULAR FEMINIST LEGAL THEORISTS

SUSAN J. STABILE[†]

INTRODUCTION

For some time, I have been interested in exploring the contours of a Catholic Feminist Legal Theory¹ and in what such a theory might contribute to our analysis of various legal questions.² This project flows from my conviction that Catholic

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¹ Although some might term Catholic feminism an oxymoron, Catholic Feminist Legal Theory is more properly thought of as another anti-essentialist feminist approach to law. "Feminist theory began to be challenged in the late 1980s and early 1990s as being essentialist, 'as presuming the universality of women and defining them according to a white middle-class heterosexual model.'" Susan J. Stabile, *Can Secular Feminists and Catholic Feminists Work Together To Ease the Conflict Between Work and Family?*, 4 U. ST. THOMAS L.J. 432, 433 (2007) [hereinafter *Secular Feminists*] (quoting FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER 11 (Nancy E. Dowd & Michelle S. Jacobs eds., 2003)).

² See *id.* This is not a task on which I am engaged alone. Among others, my colleague Elizabeth Schiltz has been exploring this question. See, e.g., Elizabeth R. Schiltz, *Catholic Feminism: An Oxymoron or 'Deeper Truths?': The Challenge of Integrating Faith with Reason*, ST. THOMAS LAW., Winter 2008, at 18; Elizabeth R. Schiltz, *Motherhood and the Mission: What Catholic Law Schools Could Learn from Harvard About Women*, 56 CATH. U. L. REV. 405, 424–25 (2007) [hereinafter

thought has something of value to contribute to our thinking about social, political, and legal issues.³

I also believe, however, that in order for a Catholic Feminist Legal Theory to make a contribution to the public dialogue about issues of law and public policy, it has to be able to speak effectively to those outside of the Catholic faith tradition. In particular, it has to get past the instinctive reaction of many people that a Catholic feminist theory cannot be reconciled with secular feminist theory.

The question addressed in this Article is whether it is possible for a Catholic Feminist Legal Theory⁴ to be taken seriously by secular feminists and other legal scholars. The Article identifies and discusses some of the major challenges to the articulation of a persuasive Catholic Feminist Legal Theory to a non-Catholic feminist audience. Each of the challenges discussed here is an issue I have heard raised with tremendous force at various times by secular feminists with whom I have engaged. With respect to each of the issues identified as a

Motherhood and the Mission] (discussing the interaction between Catholic teachings and womens' issues in the workplace); Elizabeth R. Schiltz, *West, MacIntyre and Wojtyla: Pope John Paul II's Contribution to the Development of a Dependency-Based Theory of Justice*, 45 J. CATH. LEGAL STUD. 369, 370–71 (2006) [hereinafter *West, MacIntyre and Wojtyla*].

³ As I have said elsewhere, I am convinced that Catholic thought has something of value to contribute to these discussions, without regard to whether one is Catholic. See, e.g., Susan J. Stabile, *A Catholic Vision of the Corporation*, 4 SEATTLE J. FOR SOC. JUST. 181, 183 (2005); Susan J. Stabile, *Using Religion To Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839, 847–50 (2004) (discussing how various religions provide a beneficial perspective from which to view corporations). In the words of one commentator:

Ultimately the doctrines and conclusions of [Catholic Social Thought] are based on the life and teachings of Jesus, yet they are developed and argued in terms of human reason and thus can be accepted or rejected (by non-Catholics) on the criteria of reason and experience. This allows the tradition to engage secular and non-Catholic/Christian based analysis of economic and social issues.

Charles M.A. Clark, *John Paul II and the Value Theory of Labor*, in PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *WORK AS KEY TO THE SOCIAL QUESTION* 147, 149 (2002).

⁴ My efforts have been to explore the contours of a Catholic Feminist Legal Theory because Catholicism is the tradition out of which I operate. It may or may not be that a Catholic Feminist Legal Theory would look (or feel) different from a Christian Feminist Legal Theory, but that question is beyond the scope of this Article. For one non-Catholic, Christian feminist perspective, see Marie A. Failing, *Women's Work: A Lutheran Feminist Perspective*, 4 U. ST. THOMAS L.J. 405, 406–07 (2007).

challenge to secular feminists,⁵ my focus in this Article is not to persuade secular theorists that the Church's position on the issue in question is correct. Rather, the focus is whether the position of the Church on the issue can be shown to be grounded in truth claims that do not sound in subordination of women or otherwise do violence to the aims of secular feminism. For a Catholic Feminist Legal Theory to be able to dialogue with secular legal feminists, the latter do not need to accept the truth of the Church's position but merely to appreciate that the arguments underlying the Church's position are not inherently oppressive from a feminist perspective.

The Article addresses five issues: (1) the place and role of Mary within Catholicism; (2) a historical narrative of subordination in the Church; and the Church's position on (3) contraception; (4) marriage and family; and (5) the ordination of women. It concludes that the first two of those issues, properly understood, do not present any problem from a secular feminist perspective. The next two present different challenges. Although they are grounded in claims that do not, on the surface, seem inherently oppressive to women, the Church's positions on contraception and marriage/family do imply a view of homosexuality, which will be difficult for secular feminists (as well as other secular theorists) to accept. Compounding the difficulty, the fifth issue, ordination presents a more directly challenging problem from a secular perspective. Thus, ultimately I am pessimistic about the ability of a Catholic Feminist Legal Theory to be able to engage in meaningful dialogue with secular feminists.

I. SURMOUNTABLE CHALLENGES

A. *The Place and Role of Mary Within Catholicism*

For many feminists, Mary is a potent symbol of the Church's treatment of women as subordinate and inferior.⁶ "They contend that Catholic moral theology, formulated by a misogynist male

⁵ The issues I identify herein as challenges are ones on which there has been much scholarly as well as popular discussion. This Article is not meant to be an exhaustive treatment of each of the issues.

⁶ See Angela L. Padilla & Jennifer J. Winrich, *Christianity, Feminism, and the Law*, 1 COLUM. J. GENDER & L. 67, 86 (1991).

hierarchy, has used Mary to guarantee ‘the perpetuation of compulsory heterosexuality, the valorization of virginity, and the denigration of female sexuality.’⁷ Mary is seen critically as a model of female self-effacement, silence and modesty.⁸ This perception is not helped by the fact that through the years much of the pious devotion to Mary has not, at least to appearances, appreciated Mary in her fullness. Thus, part of the task of articulating a Catholic Feminist Legal Theory is to provide a fuller account of Mary that corrects the misunderstanding of her by secular feminists and others.

Within the Catholic faith, Mary is the most revered among all human beings (apart from Jesus, whose divinity does not detract from his full humanness); she is considered the greatest Saint in heaven.⁹ Mary is honored as the Mother of Jesus,¹⁰ who participated intimately in his life, suffering, and death and as a model of virtue and of perfect submission to the will of God.¹¹ She is viewed as having an important role in redemption and

⁷ Elizabeth Fox-Genovese, *Catholic and Feminist: Can One Be Both?*, 2 LOGOS 11, 17 (1999) (quoting MAURICE HAMINGTON, HAIL MARY?: THE STRUGGLE FOR ULTIMATE WOMANHOOD IN CATHOLICISM 74 (1995)).

⁸ See, e.g., Padilla & Winrich, *supra* note 6, at 85; MARINA WARNER, ALONE OF ALL HER SEX: THE MYTH AND THE CULT OF THE VIRGIN MARY 179 (1976).

⁹ ALBAN BUTLER, BUTLER’S LIVES OF THE SAINTS: CONCISE EDITION 249 (Michael Walsh ed., Harper & Row, Publishers 1985) (1756-59) (“Mary is the spiritual mother of all living, and veneration is due to her with an honour above that accorded to all other saints . . .”); JEAN LECLERCQ, WOMEN AND SAINT BERNARD OF CLAIRVAUX 94 (Marie-Bernard Saïd OSB trans., Cistercian Publications 1989) (“Just as Jesus is Lord and King, so Mary is lady and queen, because she is the mother of the Lord, the mother of the King. This entitles her to be queen of the world.”) (internal quotation marks omitted).

¹⁰ The first instance of this occurs in Luke’s Gospel, where Elizabeth calls Mary “the mother of my Lord” and blessed among women. *Luke* 1:42–43 (New American). In 431, the Council of Ephesus ruled that Mary was the Mother of God (“theotokos”). BUTLER, *supra* note 9, at 249–50; Pope John Paul II, *Church Proclaims Mary ‘Mother of God’*, L’OSSERVATORE ROMANO, Dec. 4, 1996, at 11, available at <http://www.ewtn.com/library/papaldoc/jp2bvm37.htm>. Vatican II also said that Mary is “acknowledged and honored as being truly the Mother of God and of the redeemer.” DOGMATIC CONSTITUTION ON THE CHURCH, LUMEN GENTIUM, in 1 VATICAN COUNCIL II: THE CONCILIAR AND POSTCONCILIAR DOCUMENTS 350, 414 (Austin Flannery, O.P. ed., new rev. ed., Costello Publishing Co., 1996); see also CATECHISM OF THE CATHOLIC CHURCH, ¶ 963 (2d ed. 1997); ST. AUGUSTINE, DE SANCTA VIRGINITATE (P.G. Walsh & Henry Chadwick eds., Oxford Scholarship 2001).

¹¹ JOHN PAUL II, ENCYCLICAL LETTER *REDEMPTORIS MATER* ¶ 13 (1987) (focusing on Mary as one who was “obedien[t] of faith”).

acts as an intercessor on behalf of all other humans.¹² Pope Benedict XVI, while he was still Cardinal Ratzinger, wrote that

without Mary, God's entrance into history would not achieve its intended purpose. That is, the very thing that matters most in the Creed would be left unrealized—God's being a God with us, and not only a God in and for himself . . . [Mary] is an indispensable, central component of our faith in the living, acting God . . . The Incarnation required consenting acceptance. Only in this way do Logos and flesh really become one.¹³

The Church proclaims Mary as so highly exalted by God that she was raised body and soul into heaven.¹⁴

¹² Bernard of Clairvaux originated the notion that God meant for humans to have "everything through Mary," a sentiment that has been re-echoed over the years. LECLERCQ, *supra* note 9, at 87–95; Peter D. Heinegg, *Literature and the Bible: European Literature*, in OXFORD COMPANION TO THE BIBLE 447 (Bruce M. Metzger & Michael D. Coogan eds., 1993) (quoting Bernard of Clairvaux's statement "De Maria numquam satis"); see MARK I. MIRAVALLE, "WITH JESUS": THE STORY OF MARY CO-REDEMPTRIX (2003) (discussing the unique role of Mary with Jesus in the mission of redemption in her subordinate cooperation and suffering with Jesus).

A decade ago, there was some thought that the Pope would declare Mary as "co-Redemtrix of humanity," making her a participant with Christ in salvation. Richard N. Ostling, *The Pope's Hail Mary*, TIME MAG., June 17, 1997, at 16. The Pope, however, made no such declaration. This is consistent with a view that Mary is an "advocate, and not a source of mercy." 2 JOHN HENRY CARDINAL NEWMAN, CERTAIN DIFFICULTIES FELT BY ANGLICANS IN CATHOLIC TEACHING CONSIDERED: IN A LETTER ADDRESSED TO THE REV. E.B. PUSEY, D.D., ON OCCASION OF HIS EIRENICON OF 1864, at 101 (1900), available at <http://www.newmanreader.org/works/anglicans/volume2/pusey/section5.html>.

¹³ Joseph Cardinal Ratzinger, *Et Incarnatus Est De Spiritu Sancto Ex Maria Virgine*, in MARY: THE CHURCH AT THE SOURCE 81, 83 (2005).

¹⁴ This is the Catholic belief in the Assumption, one of the very few subjects on which Popes have spoken infallibly. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, ¶ 966 ("Finally the Immaculate Virgin, preserved free from all stain of original sin, when the course of her earthly life was finished, was taken up body and soul into heavenly glory, and exalted by the Lord as Queen over all things.") (internal quotation marks omitted); see also catholic-pages.com, Blessed Virgin Mary: Assumed into Heaven, <http://www.catholic-pages.com/bvm/assumed.asp> (last visited Aug. 16, 2009) (stating that it is "infallible dogma that Our Lady was assumed body and soul into heaven"). The idea behind the Assumption is that the body that gave life to Jesus does not undergo corruption, and so, Mary's body is glorified, not just her soul. Pope Pius, in explaining the Assumption, stated that God wished that the Blessed Virgin Mary be exempt from this general law [that the full effect of victory over death to the just shall come at the end of time]. For she, by a completely singular privilege, conquered sin in her Immaculate Conception, and thus was not liable to that law of remaining in the corruption of the grave, nor did she have to wait for the end of time for the redemption of her body.

Some feminists object to Mary's significance being tied to her relation to Christ—her role as Mother—preferring to establish independent status for Mary.¹⁵ The stress here is on the autonomy of women. They similarly object to her “kneel[ing] before her son . . . [and] freely accept[ing] her inferiority[.]”¹⁶ viewing this as an example of an unacceptable female subservience to a male. These objections reflect a fundamental misunderstanding of Mary and of human relationship to God.

The problem with such objections is that they proceed from a wrongful equation of God as man. The significance of Mary's “kneel[ing] before her son” is neither that of a mother kneeling to her son or of a woman kneeling before a man. Mary does not bow to Jesus as mother to son or woman to man, but as a human before God.¹⁷

In this context, it is important to understand that Mary is not a model for *women*, but rather a model for *all humans*.¹⁸

Father William G. Most, *The Assumption of Mary into Heaven*, Theology 523: Our Lady in Doctrine and Devotion (1994), <http://www.ewtn.com/faith/teachings/marya5.htm> (internal quotation marks omitted). There is no scriptural support for the Assumption, the belief in which began during the 4th century. See Valerie Abrahamsen, *Mary, Mother of Jesus*, in THE OXFORD COMPANION TO THE BIBLE, *supra* note 12, at 499–500 (“The accounts of Mary's later years, death, and assumption into heaven are found only in traditions outside the Bible, some as late as the fourth century CE.”).

¹⁵ See MARY DALY, BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION 84–85 (1973) [hereinafter BEYOND GOD] (“The message of *independence* in the Virgin symbol can itself be understood apart from the matter of sexual relationships with men.”); Padilla & Winrich, *supra* note 6, at 85–86 (discussing objection to submissiveness of Mary in conceiving “by an act of the Holy Spirit in relationship to whom she is simply a receptacle”); ROSEMARY RADFORD RUETHER, MARY—THE FEMININE FACE OF THE CHURCH 3 (1984) (speaking of Mary imaging “the principle of passive receptivity in relation to the transcendent activity of the male gods and their agents, the clergy”).

¹⁶ SIMONE DE BEAUVOIR, THE SECOND SEX 171 (H. M. Parshley trans. & ed., Vintage Books 1989) (1949).

¹⁷ I recognize that for some people the centrality of Christ is problematic. Some feminist theologians would prefer to see Jesus as simply a “partial and fragmentary [model of redemptive humanity], disclosing from the perspective of one person, circumscribed in time, culture, and gender, something of the fullness we seek.” ROSEMARY RADFORD RUETHER, SEXISM AND GOD-TALK: TOWARD A FEMINIST THEOLOGY 114 (1983) (suggesting that the life and death of Jesus is simply “one such memory, one such paradigm”); see *also infra* note 191.

¹⁸ POPE BENEDICT XVI, ENCYCLICAL LETTER *DEUS CARITAS EST* ¶ 41 (2005) [hereinafter *DEUS CARITAS EST*] (discussing Mary as model for both men and women); POPE PAUL VI, APOSTOLIC EXHORTATION *MARIALIS CULTUS* ¶ 16–23 (1974) [hereinafter *MARIALIS CULTUS*] (discussing Mary as model for the Church).

Mary, although herself a woman, is a model for how *all* persons of faith should respond to God's invitation:¹⁹ by listening, discerning, and trusting in God.²⁰ She hears God's call and chooses to act in accordance with it.²¹ She is thus a model of faith in, and obedience to, God. And she is a model for how Christians—male and female—participate in the life and death of Christ.²²

Mary's submissiveness is not timidity.²³ Her consent to the Incarnation "is active and participatory. She wills what God wills, and in so doing she brings to the situation the one absolute power with which God has invested his creation."²⁴ Moreover, the Scriptures portray "Mary as a woman of inner strength . . . a woman of integrity, insight and compassion."²⁵ Mary, who commanded the servants to do Jesus' bidding at the wedding

¹⁹ In the words of Elizabeth Johnson, "Mary walked by faith, not by sight . . . Scripture tells us she asked questions. She pondered things in her heart. And she went on faithfully believing even when grief stabbed her to the heart." Elizabeth Johnson, C.S.J., *In Search of the Real Mary*, CATHOLIC UPDATE (St. Anthony Messenger Press, Cincinnati, Ohio) May 2001, at 2–3, available at <http://www.americancatholic.org/newsletters/cu/ac0501.asp>. Johnson describes the Annunciation as a "prophetic call" to participate with God in the work of redemption; a call to which she "gives her free assent." *Id.* at 3; see *DEUS CARITAS EST*, *supra* note 18, ¶ 41 (describing Mary's program of life as "not setting herself at the centre, but leaving space for God, who is encountered both in prayer and in service of neighbour").

²⁰ See Joyce Rupp, *What Mary Can Teach Us*, MILLENNIUM MONTHLY (St. Anthony Messenger Press, Cincinnati, Ohio) Sept. 2000, at 1 (describing how Mary's life teaches about discernment and spiritual freedom, noting that the "conversation of the Annunciation is a parallel for everyone invited into fuller relationship with God").

²¹ Rosemary Radford Ruether points out that "Luke goes out of his way to stress that Mary's motherhood is a free choice. When the angel arrives, Mary does not consult Joseph, but makes her own decision. Luke sees this free choice as an expression of her faith." RUETHER, *supra* note 17, at 153.

²² Mary is one of the few who is present at the foot of the cross when Jesus dies. *John* 19:25–27 (New American). She supported and shared in His suffering. She was also present with the Apostles at Pentecost. *Acts* 1:14.

²³ In his *Marialis Cultus (To Honor Mary)*, Pope Paul VI suggested that presentations of Mary as timidly submissive reflect outmoded notions and "[t]he modern woman will note with pleasant surprise that Mary of Nazareth, while completely devoted to the will of God, was far from being a timidly submissive woman or one whose piety was repellent to others." *MARIALIS CULTUS*, *supra* note 18, ¶ 37.

²⁴ JOYCE LITTLE, *THE CHURCH AND THE CULTURE WAR: SECULAR ANARCHY OR SACRED ORDER* 136 (1995).

²⁵ Rupp, *supra* note 20.

feast of Cana, even after Jesus had told her it was not yet his time, is not a woman easily dismissed.²⁶ Moreover, Mary's humility is not a prescription for women to be humble before men. Rather, it is something for all to emulate, as evidenced by the emphasis of Christ's own humility by Paul in his Letter to the Philippians²⁷—the humility of God taking human form, incarnating as an infant and allowing Himself to be so completely dependent on humans. To the extent that the positive qualities of Mary that humans are called upon to emulate are qualities we associate with the feminine, perhaps feminine characteristics are simply closer to the human ideal (in the eyes of God) than are male ones.²⁸

The Church has perhaps complicated matters and helped create this misfocus by overemphasizing Mary as a model wife and mother. She may also have been such, but to "reduce her faith to a doting mother-son relationship" ignores the fact that "before Jesus was born she had her own relationship to God that wasn't focused on Jesus."²⁹ Jesus Himself made clear that it is not in Mary's qualities as mother and wife in which her greatness lays, but in her faith. Jesus' response to the woman who called out, "Blessed is the mother who gave you birth and nursed you," was, "Blessed rather are those who hear the word of God and obey it."³⁰ And when a crowd to whom he was teaching told him that his mother and brothers

²⁶ See *John* 2:4–5. As Pope Paul VI observed, Mary

was a woman who did not hesitate to proclaim that God vindicates the humble and the oppressed, and removes the powerful people of this world from their privileged positions. The modern woman will recognize in Mary, who "stands out among the poor and humble of the Lord," a woman of strength, who experienced poverty and suffering, flight and exile. These are situations that cannot escape the attention of those who wish to support, with the Gospel spirit, the liberating energies of man and of society.

MARIALIS CULTUS, *supra* note 18, ¶ 37 (scriptural citations omitted). This spirit is reflected in the words put in Mary's mouth by Luke, the words we refer to as the Magnificat. See *Luke* 1:46–55.

²⁷ See *Philippians* 2:5–8.

²⁸ There is much to support such a conclusion. Carol Gilligan finds that men reach decisions with individual autonomy as their primary concern, whereas women decide things relationally, taking account of all who are affected by her decisions. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY & WOMEN'S DEVELOPMENT* 21–22 (1993). The latter is clearly more consistent with Christian notions than the former.

²⁹ Johnson, *supra* note 19, at 4.

³⁰ *Luke* 11:27–28.

had arrived, Jesus responded, “[w]ho are my mother and my brothers? . . . [W]hoever does the will of God is my brother and sister and mother.”³¹ The reaction of Jesus in both cases emphasizes that Mary’s identity and spirituality is separate from her role as mother; what makes Mary (and thus all of us) worthy of praise and welcome is not the fact of her biological relationship with Christ but her doing the will of God.

Let me come back to two points. First, it appears that part of the feminist objection on this matter may not be to female subservience to males, but rather to the idea of Mary as embodying an unacceptable subordination of humans to God.³² Some feminists seem to argue exactly that, desiring to erase any distinction between God and humans.³³

There is no question that for Christians, Mary is not God; as are all humans, she is subordinate to God and to Jesus as the human incarnation of God. Humans are born in the image and likeness of God³⁴ and through their relationship with God become more perfectly human. But we are not God.

I think the discomfort at least some feminists have with the subordination of humans to God may stem from a discomfort of the idea of any external authority; the presumption here appears to be that authority always means domination.³⁵ Christians, however, have a very different understanding of the authority of

³¹ *Mark* 3:31–35; see also *Luke* 8:19–21.

³² See MANFRED HAUKE, GOD OR GODDESS? FEMINIST THEOLOGY: WHAT IS IT? WHERE DOES IT LEAD? 180–203 (David Kipp trans., 1995) (discussing feminist rejection of subordination of mankind to God).

³³ See LITTLE, *supra* note 24, at 74–75 (discussing the feminist search for “a liberation from the constraints of being called to image God” and feminist view of reality “in which there is no Creator God”); see, e.g., RUEYER, *supra* note 17; MARY DALY, GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM 44–105 (Beacon Press 1978) [hereinafter GYN/ECOLOGY].

³⁴ *Genesis* 1:27; CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, ¶¶ 41, 2501; JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶ 7 (1995) [hereinafter *EVANGELIUM VITAE*]; PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CATHOLIC CHURCH* ¶ 34 (2004) [hereinafter *COMPENDIUM*].

³⁵ See, e.g., Elizabeth Fox-Genovese, *Feminism and the Unraveling of the Social Bond*, VOICES, Michaelmas 2004, available at <http://www.wf-f.org/04-3-Feminism.html> (arguing that secular feminism “rests upon the conviction that no one has the right to tell a woman what to do—to abridge her right to self-determination—or to compromise her absolute equality with men. All the variants on feminism are thus united by a fierce commitment to individualism and equality, and all fundamentally reject the notion of legitimate authority”).

God, viewing it as freeing rather than limiting, in that God creates us with the freedom to make choices that allow us to break out of the condition of alienation of self, from others, and from God.³⁶

One may disagree with that as a matter of theology. That disagreement, however, is irrelevant to the question with which I am here concerned, that is, whether Christianity, at its core, marginalizes or disrespects women in relation to men.

Second, the Church's belief in the virginity of Mary is one that creates difficulty for some feminists and is a source of her autonomy from men for others. Some view the teaching of the virgin birth of Christ as a myth used as a tool of oppression, as holding up virginity as an ideal to be maintained and forcing women to maintain the purity of the virgin.³⁷ This is viewed as unattainable, and therefore, dangerous because it creates the potential for young women to believe that if they are less than perfectly chaste, they are not valuable.³⁸ Others view the

³⁶ See PAUL VI, PASTORAL CONSTITUTION *GAUDIUM ET SPES* ¶ 17 (1965) [hereinafter *GAUDIUM ET SPES*] (contrasting freedom as a "license for doing whatever [one] pleases" with authentic freedom); JOHN PAUL II, APOSTOLIC EXHORTATION *FAMILIARIS CONSORTIO* ¶ 6 (1981) [hereinafter *FAMILIARIS CONSORTIO*] (speaking of the "corruption of the idea and the experience of freedom, conceived not as a capacity for realizing the truth of God's plan for marriage and the family, but as an autonomous power of self-affirmation, often against others, for one's own selfish well-being"). As I have argued elsewhere, "the reality that we exist in relation to God . . . invites us to reconsider secular feminism's rejection of any notion of external authority." Stabile, *supra* note 1, at 438.

³⁷ See *BEYOND GOD*, *supra* note 15, at 81–84 (discussing how the virgin birth puts Mary on an unreachably high pedestal, which means she can not be a genuine model for real women); see also Rupp, *supra* note 20 (noting that Mary was at times "put on a pedestal and overly idealized" such that she seemed untouchable, and that "some so emphasized her virginity that they demeaned the vocation of marriage").

³⁸ Some feminists have lamented that women are caught between the only two images presented to them of women: the virgin and the sinful woman, Mary and Eve (or Mary and the woman caught in adultery). The concern is that since it is impossible to live up to the former, women are then cast as the latter—as sinners. See, e.g., ELIZABETH A. JOHNSON, *FRIENDS OF GODS AND PROPHETS* 1 (1998) (explaining feminist critique of the way traditional Mariology separates Mary from all other women and puts her on a pedestal from which "her figure looms as the feminine ideal against which patriarchy judges her sisters to their endless detriment"); ELIZABETH A. JOHNSON, *TRULY OUR SISTER* 8–11 (2003); María-Victoria Castro, *La Mujer Argentina Que Soy Yo/The Argentinean Woman That I Am*, 9 *CARDOZO WOMEN'S L.J.* 321, 327 n.39 (2003) (citing Norma Alarcón, *Chicana's Feminist Literature: A Re-Vision Through Malintzin/or Malintzin: Putting Flesh Back on the Object*, in *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL*

virginity teaching as something that devalues Mary, treating her as a mere vessel in the birth of Christ, as someone who plays no important role.³⁹ Those feminists who see Mary's virginity in positive terms, view it as something that makes her stronger and independent of males.⁴⁰

I think there is a danger of making too much of Mary's virginity as reason for either disparagement or praise. At least in its origins, the teaching on Mary's virginity was intended to say more about Christ than about Mary.⁴¹ That is, Mary's virginity was used as a way to combat heresies that denied either Christ's humanity or his divinity. The writings of St. Ignatius of Antioch on this subject focus on the virgin birth of Jesus, apparently in response to the Adoptionist heresy, which denied Jesus' divinity, arguing Jesus was human only.⁴² Others in the early Church, focused on the virgin birth as a way to combat the

WOMEN OF COLOR 186 (Anzaldúa, et al. eds., 1981) (noting that there are dual roles of servitude given to women—wife and mother (saints) or traitors (sinners)).

³⁹ See GYN/ECOLOGY, *supra* note 33, at 83–85 (discussing how the notion of a virgin birth takes away from any meaningful contribution by Mary and characterizing Mary's role as servant in God's incarnation as "rape").

From a Christian standpoint, the empty vessel image is a positive one, not a negative one. One cannot be filled with the Holy Spirit unless one is empty of self. Christians long to become empty vessels through which God's will can be done. Thus, to call Mary a "vessel" of God is to make a positive, not a negative, statement about her.

⁴⁰ See BEYOND GOD, *supra* note 15, at 84–85 ("The image of Mary as Virgin, moreover, has an (unintended) aspect of pointing toward independence for women.").

⁴¹ There is always a danger when citing Scripture of not paying sufficient attention to context. Here, the Church has used Mary's virginity for its own purposes, ignoring the context out of which the emphasis on virginity arose. One sees the same ignoring of context in other situations, where scriptural statements are used as "proof-texts" to suppose certain "truths" that are clearly not supported by the context of the statements. See, e.g., Judith Moore, Teaching Series 1—About the Bible, Part 4: Context and Prooftext, *available at* <http://www.epiphany.org/index.php?id=80> (last visited July 15, 2009) (discussing misuse of Bible to make a point by proof-texting, giving as examples of the danger of ignoring context, the use of the Biblical phrases "an eye for an eye" and "let the women keep silent in the churches").

⁴² See E. DE PRESSENSÉ, THE EARLY YEARS OF CHRISTIANITY: HERESY AND CHRISTIAN DOCTRINE 128–31 (Annie Harwood trans., Kessinger Publishing 2006) (1873) (discussing Adoptionism heresy and St. Ignatius of Antioch response); WomenReligious.org, In the Early Church: Mary: The Beginning of Tradition, http://www.womenreligious.org/~education/Mariology/Units/In_Church_Fathers/in_c_hurch_fathers.html (last visited July 15, 2009) ("Ignatius' writings were concerned with Mary's pre-natal virginity and Jesus' virginal conception and appear to have been written in response to the "human only" heresy of Adoptionism.").

Docetists and Gnostics, who denied a physical birth, claiming that Jesus was solely divine and not in any way human.⁴³

Thus, Mary's virginity is less important for what it says about Mary (and therefore, women) than what it says about Jesus (and therefore, God). To be sure, there have been times when the Church has appeared to overemphasize the virginity of Mary, insisting, for example, not only on the virgin birth of Christ, but that Mary remained a virgin throughout her life,⁴⁴ a position that is seen as untenable by some.⁴⁵ Regardless of

⁴³ Ignatius of Antioch is an example. He viewed the virgin birth of Jesus as a powerful response to the denial of Docetists of the physical reality of Christ's incarnation. See Rev. Rodney Hacking, *St. Ignatius of Antioch and the Renewal of the Anglican Episcopate*, Project Canterbury, 2001, <http://anglicanhistory.org/essays/hacking1.html>; see also New Advent Catholic Encyclopedia, "Docetae," available at <http://www.newadvent.org/cathen/05070c.htm>. It was not until later that Christian writers started to focus on the question of Mary's continued virginity after the birth of Christ, leading to the view that Mary remained a virgin throughout her life. See *infra* note 44.

⁴⁴ JOHN PAUL II, THEOTÓKOS: WOMAN, MOTHER, DISCIPLE: A CATECHESIS ON MARY, MOTHER OF GOD 130 (2000) (discussing early Christian belief in perpetual virginity of Mary); SCOTT HAHN, HAIL HOLY QUEEN: THE MOTHER OF GOD IN THE WORD OF GOD 103 (2001) ("Heretics in the early Church occasionally challenged this teaching, but they never gained much ground. Their purportedly scriptural arguments were easily refuted by the likes of Saint Jerome, the great Biblical scholar of the ancient church."); DWIGHT LONGENECKER & DAVID GUSTAFSON, MARY, A CATHOLIC-EVANGELICAL DEBATE 64 (2003) (observing that the belief in Mary's perpetual virginity appears very early in the church); *Protoevangelium of James*, in 8 Ante-Nicene Fathers ¶¶ 8–9 (Alexander Roberts et al. eds., Christian Literature Publishing Co. 1886), available at <http://www.newadvent.org/fathers/0847.htm> (recounting the relationship of Mary and Joseph, specifically noting that the High priest Zechariah arranged the marriage between Joseph and Mary and that Mary was the Virgin of the Lord; also noting that Joseph had children from a previous marriage); Origen, *Commentary on the Gospel of Matthew*, 2:17, available at <http://www.newadvent.org/fathers/101614.htm>; Hilary of Poitiers, *Commentary of the Gospel of Matthew*, 1:14 (arguing that the "brothers" of Jesus were not conceived by Mary otherwise Jesus would have never given John the responsibility of caring for Mary after his death); Jerome, *The Perpetual Virginity of Blessed Mary: Against Helvidius*, ¶ 19, available at <http://www.newadvent.org/fathers/3007.htm>; Ambrose of Milan, *Letters*, 63:111, available at <http://www.newadvent.org/fathers/340963.htm>; Augustine, *Of Holy Virginity*, 4:4, available at <http://www.newadvent.org/fathers/1310.htm>; Augustine, *Sermons* 186:1; Augustine, *Heresies* 56.

⁴⁵ See, e.g., RUETHER, *supra* note 17, at 150 (suggesting that "the virgin birth was not seen by Matthew as precluding sexual relations between Mary and Joseph after Jesus' birth"); RAYMOND E. BROWN ET AL., MARY IN THE NEW TESTAMENT 292 (1979).

In respect to the church tradition of the perpetual virginity of Mary, we agreed that the intention of Matt[hew] 1:25 was to exclude sexual relations between Joseph and Mary before the birth of Jesus, so that the verse does

whether she did or did not remain a virgin for her entire life, it is Mary's relationship with God—her discipleship—that matters most, not her physical relationship.⁴⁶

Properly understood, Mary is a powerful tool against the claim that Catholicism, at its core, embodies a notion of subjugation of women to men. It is incumbent on Catholic feminists to tell a more empowered story about Mary.

B. Historical Narrative of Subordination

Another reason secular feminists might hesitate to take seriously a Catholic Feminist Legal Theory is a sense that Catholicism has historically viewed women as subservient to men, a sense created or aggravated by passages in scripture and early papal documents that suggest women's subordination to men.⁴⁷

not necessarily indicate what took place afterwards in the marital relationship of Joseph and Mary.

Id.; see also ELIZABETH JOHNSON, *TRULY OUR SISTER* 28 (2003) (citing rejection by some fourth century theologians of the view that Mary was a perpetual virgin); BROWN ET AL., *supra*, at 272 (citing Tertullian's opposition to the idea of perpetual virginity).

⁴⁶ A Jesuit with whom I once discussed this question opined that we see more balance in the Church's treatment of Mary as the Church has come to a more balanced view of Christ. His suggestion was that overemphasis on Christ's divinity led many to a distorted view of Mary. Thus, as Jesus recovers his humanity, so also does Mary, allowing her to come off of the pedestal on which she had been placed.

⁴⁷ See, e.g., Padilla & Winrich, *supra* note 6, at 73 ("The Bible defines woman in relation to man: she is subordinate to man and she is his property. Male power over women is rooted in the Bible's construction of woman as guilty for the introduction of sin into the world, deserving of pain and suffering, seductive, wily, and sexualized."); Sandra M. Schneiders, *The Bible and Feminism*, in *FREEING THEOLOGY: THE ESSENTIALS OF THEOLOGY IN FEMINIST PERSPECTIVE* 31, 34 (Catherine Mowry LaCugna ed., 1993) (discussing scriptural presentation of women as inferior).

Scripture is not the only source of this belief. There are also statements by early theologians and in earlier papal documents that sound in subordination of women. See, e.g., ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I, Q. 98, art. 2 (2d ed., Dominican Fathers trans., 1920) (1266-1273) ("[W]oman was made to be a help to man. But she is not fitted to help man except in generation, because another man would have proved a more effective help in anything else."); PIUS XI, *ENCYCLICAL CASTI CONNUBII* ¶ 72 (1930) [hereinafter *CASTI CONNUBII*] (suggesting women should be subordinate to husband's authority and should not even control their own economic affairs). More recently, many of us have heard stories of priests during the 1940s and 1950s advising women to stay in abusive spousal relationships.

One can certainly find numerous references in Scripture that suggest women's subordination to men.⁴⁸ The Scripture as transmitted, however, reflects the time in which it was written, that is, a male dominated society in which women were regarded as property. "Theological language was fixed in the era of the early patriarchy and has never shaken itself loose in spite of our changing conceptions of reality"⁴⁹ And given the diversity of literary forms in the Bible and the individual style and goals of the different Bible authors, the Church as well as Biblical scholars understand the need to read Scriptures carefully and not literally.⁵⁰

⁴⁸ See, e.g., *Ephesians* 5:22–23 (New American) ("Wives, be subject to your husbands . . . For the husband is the head of the wife."); *1 Corinthians* 14:34–35 ("Let your women keep silence in the churches: for it is not permitted unto them to speak."); *Titus* 2:3–5 (advising women to be "submissive to their husbands"); *1 Peter* 3:1–7 (saying women appropriately adorn themselves "by accepting the authority of their husbands"). As the above citations suggest, many of the objected-to New Testament passages about the role of women are attributed to Paul. Notwithstanding some of these statements attributed to Paul, it is clear, however, from other of his writings, that he viewed women as co-workers. His picture of women in the early days of the church is one of active involvement in the ministry. For a good discussion, see Barbara Leonhard, *St. Paul and Women*, ST. ANTHONY'S MESSENGER, July 2006, at 13 (discussing Paul's pictures of Prisca, Phoebe, and others). "Paul's radical vision of an equality of persons in Christ is incompatible with subordination directives ascribed to him." Padilla & Winrich, *supra* note 6, at 111 ("There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female: for you are all one in Christ Jesus." (citing *Galations* 3:28)).

⁴⁹ Sheila D. Collins, *Toward a Feminist Theology*, 89 THE CHRISTIAN CENTURY 796 (Aug. 2, 1972); see RUETHER, *supra* note 17, at 22 (observing that patriarchy was the "social context for both the Old and the New Testament and that this social context has been incorporated into religious ideology on many levels"); Schneiders, *supra* note 47, at 34 (observing that patriarchy was the "virtually universal pattern of social organization in the world of the Bible").

⁵⁰ In the words of the Catechism of the Catholic Church:

In Sacred Scripture, God speaks to man in a human way. To interpret Scripture correctly, the reader must be attentive to what the human authors truly wanted to affirm and to what God wanted to reveal to us by their words.

In order to discover *the sacred authors' intention*, the reader must take into account the conditions of their time and culture, the literary genres in use at that time, and the modes of feeling, speaking, and narrating then current. "For the fact is that truth is differently presented and expressed in the various types of historical writing, in prophetic and poetical texts, and in other forms of literary expression."

....

The *literal sense* is the meaning conveyed by the words of Scripture and discovered by exegesis, following the rules of sound interpretation: "All other senses of Sacred Scripture are based on the literal."

With that in mind, several things make it difficult to claim that Catholicism views women as inherently inferior to men. First, fundamental to Catholicism is the belief that all humans are created in the image and likeness of God,⁵¹ making them equally sacred and precious and investing them with a dignity that requires equality of treatment.⁵² The Catechism of the Catholic Church speaks of creation in the image of God as meaning that all created beings have the same and “inalienable dignity which comes to them immediately from God.”⁵³ What is in the image of God is human nature, not gender, race, nationality, or any other human attribute, and thus, from the side of God’s act of creation, no basis upon which to suggest superiority of one group over another.⁵⁴

CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, ¶¶ 109–10, 116; *see also*, PETER WILLIAMSON, CATHOLIC PRINCIPLES FOR INTERPRETING SCRIPTURE ¶ 12 (2001), (stating that Catholics do not take the Bible “literally,” but rather in a literal sense).

The literal sense of Scripture is that which has been expressed directly by the inspired human authors. Since it is the fruit of inspiration, this sense is also intended by God, as principal author. One arrives at this sense by means of a careful analysis of the text, within its literary and historical context.

The literal meanings of many texts possess a dynamic aspect that enables them to be re-read later in new circumstances.

Id.; *see also* PAUL VI, DOGMATIC CONSTITUTION ON DIVINE REVELATION *DEI VERBUM* ¶ 12 (1965) (“God speaks in Sacred Scripture through men in human fashion, [it follows that] the interpreter of Sacred Scripture, in order to see clearly what God wanted to communicate to us, should carefully investigate what meaning the sacred writers really intended.”).

⁵¹ *Genesis* 1:26. “[D]eeply rooted in Christian thought is an affirmation of the equivalence of maleness and femaleness in the image of God.” RUETHER, *supra* note 17, at 93.

⁵² *See* John J. Coughlin, O.F.M., *Law and Theology: Reflections on What It Means To Be Human from a Franciscan Perspective*, 74 ST. JOHN’S L. REV. 609, 619–20 (2000) (grounding human dignity in status as creations of God).

⁵³ CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, ¶¶ 357, 369. The Catechism specifically provides that “[m]an and woman are both with one and the same dignity ‘in the image of God.’” *Id.* ¶ 369.

⁵⁴ “The starting point for Christian feminism is the affirmation that God embraces, dignifies, and elevates the personhood of woman as much as that of man; woman is equal as *imago dei* (image of God) and not beneath or subordinate.” Padilla & Winrich, *supra* note 6, at 103.

In *Mulieris Dignitatem*,⁵⁵ Pope John Paul II wrote:

[T]he human race, which takes its origin from the calling into existence of man and woman, crowns the whole work of creation; *both man and woman are human beings to an equal degree*, both are created *in God's image*. This image and likeness of God, which is essential for the human being, is passed on by the man and woman, as spouses and parents, to their descendants: "Be fruitful and multiply, and fill the earth and subdue it" (*Gen 1:28*). The Creator entrusts dominion over the earth to the human race, to all persons, to all men and women, who derive their dignity and vocation from the common "beginning."⁵⁶

Being created "in the image" of God, all humans partake of a divine nature, meaning that all are equal. Our creation in God's image implies, as one scholar has observed, that "God has invested all human beings with sufficient value to entail a duty of government to accord to each person the same, or at least equivalent, rights and duties."⁵⁷

It is true that Catholicism accepts that "[m]an and woman constitute two different ways of the human 'being in the body' in the unity of [the image of God.]"⁵⁸ That is, there are essential ways in which women differ from men, a reality captured by the notion of complementarity, which recognizes that men and women complement each other by bringing different gifts to the world and to each other.⁵⁹ Although men and women are both

⁵⁵ JOHN PAUL II, APOSTOLIC LETTER *MULIERIS DIGNITATEM*, (1988) [hereinafter *MULIERIS DIGNITATEM*].

⁵⁶ *Id.* at ¶ 6 (emphasis omitted).

⁵⁷ George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608, 1611 (1999). Fletcher views this claim for equality as a holistic one that applies to all persons simply because they are persons, without being dependent on any particular context of circumstance. *See id.* at 1611, 1619.

⁵⁸ JOHN PAUL II, *Creation as a Fundamental and Original Gift*, in CATECHESIS ON THE BOOK OF GENESIS ¶ 7 (1980).

⁵⁹ *See GAUDIUM ET SPES*, *supra* note 36, ¶ 48; JOHN PAUL II, PAPAL LETTER *LETTER TO WOMEN* ¶ 7 (1995) [hereinafter *LETTER TO WOMEN*] ("Woman complements man, just as man complements woman: men and women are *complementary*. Womanhood expresses the 'human' as much as manhood does, but in a different and complementary way."); Teresa Stanton Collett, *Independence or Interdependence? A Christian Response to Liberal Feminists*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 178, 192 (Michael W. McConnell et al. eds., 2001); *Motherhood and the Mission*, *supra* note 2, at 428–31. *See generally* Prudence

created in the image of God, they reveal different aspects of God's image. "God exists as a Trinity of beings in relationship with each other By creating humanity as two distinct types of humans, man and woman, God gives us access to this aspect of Himself."⁶⁰

Although some feminist theologians reject the notion,⁶¹ complementarity does not diminish the equality of men and women. Pope John Paul II's discussion of complementarity in *Mulieris Dignitatum* makes clear that the "fundamental equality" of men and women is a gift and right deriving from God.⁶²

Second, one cannot talk about how Scripture treats women without also discussing how Jesus related to women. Two things are important to emphasize here. The first is that women were not excluded from hearing Jesus' teaching or participating actively in His ministry. In his treatment of the historical Jesus, *A Marginal Jew*, John Meier engages in an extensive analysis of Gospel references supporting the notion that women were among Jesus' close followers, shared his preaching tours, and were treated by Him as disciples.⁶³ He finds "multiple attestation of sources" supporting "the existence of devoted female followers. More specifically, the Gospels present us with a picture of women traveling with Jesus, supporting and serving Jesus out of their own means, and standing by Jesus at his crucifixion when most if not all of his male disciples deserted him."⁶⁴

Allen, *Man-Woman Complementarity: The Catholic Inspiration*, 9 LOGOS 87 (2006) (tracing the development of the concept of complementarity).

⁶⁰ West, *MacIntyre and Wojtyla*, *supra* note 2, at 407.

⁶¹ See, e.g., RUETHER, *supra* note 17, at 111 (suggesting that "all humans possess a full and equivalent human nature and personhood, as male and female" and that "[m]aleness and femaleness exist as reproductive role specialization" with "no necessary (biological) connection between reproductive complementarity and either psychological or social role differentiation"); see also ELIZABETH A. JOHNSON, *TRULY OUR SISTER* 53-54 (2006) (rejecting that "patriarchal idea" that differences between men and women signify different natures and showing concern that "the assignment of characteristics in traditional dualism does not grant women an equal say in how the world is run").

⁶² *MULIERIS DIGNITATEM*, *supra* note 55, ¶ 10.

⁶³ JOHN P. MEIER, *A MARGINAL JEW* 73-77 (2001). These include, for example, a reference in Luke to the fact that as Jesus journeyed from town to town he was joined by "some women who had been healed of evil spirits and infirmities: Mary, called Magdalene, from whom seven demons had gone out, and Joanna, the wife of Chu'za, Herod's steward, and Susanna, and many others who provided for them out of their means." *Luke* 8:2-3 (New American).

⁶⁴ MEIER, *supra* note 63, at 76-77.

Jesus, as revealed in the Gospels, never spoke disparagingly of women, and he treated them as equals. He never said or did anything that suggested that he viewed women as inferior to men,⁶⁵ a fact all the more striking given the status of women in Palestine during that time. In fact, his actions went contrary to many prevailing customs;⁶⁶ for example, by talking to women in public,⁶⁷ teaching them,⁶⁸ and by allowing himself to be touched by women considered ritually unclean.⁶⁹ In one instance, he shocked people by defending “the woman who outraged an all-male banquet not only by entering it but also by (unveiled and with hair unbraided) washing his feet with her hair.”⁷⁰ Indeed, the central element of the Christian faith—Jesus himself as the Resurrection—is revealed by Jesus to a woman, in his conversation with Martha after the death of Lazarus; Martha is

⁶⁵ “[N]owhere does he display the generally negative attitude toward women that was prevalent in Palestine.” ROSEMARY RADER, *BREAKING BOUNDARIES: MALE/FEMALE FRIENDSHIP IN EARLY CHRISTIAN COMMUNITIES* 40 (1983). That is not to say that he never disagreed with women. See, e.g., *John* 2:4 (“O woman, what have you to do with me? My hour has not yet come.”) (internal quotation marks omitted); *John* 4:7–26 (disagreement with Samaritan woman).

⁶⁶ At the time, women were not allowed to study the Scriptures; they could not speak to men in public. They also could not bear witness in court. See Mishna Shabuot 4:1 (“[The law governing] an oath of testimony (Lev. 5:1) applies (1) to men and not to women . . .”); Mishna Sotah 3:4 (“R. Eliezer says, ‘[w]hoever teaches Torah to his daughter is as if he teaches her sexual satisfaction.’”); BABA KAMA, *THE BABYLON TALMUD*, v.5 88a (Michael L. Rodkinson, trans., *The Talmud Society* 2d ed. 1918) (1916) (noting the inability of women to testify); see also 4 FLAVIUS JOSEPHUS, *Antiquities of the Jews* ¶ 219, in *THE WORKS OF JOSEPHUS* 117 (William Whiston trans., Hendrickson Publishers 1987) (93 CE) (“But let not the testimony of women be admitted, on account of the levity and boldness of their sex . . .”); Elizabeth Achtemeier, *Women: An Overview*, in *THE OXFORD COMPANION TO THE BIBLE*, *supra* note 12, at 806–07 (“In the Second Temple period, women were excluded from testifying in a court trial; they were not to be seen in public or speak with strangers . . . They could not even teach or be taught the Torah in their homes . . . The actions of Jesus of Nazareth toward women were, therefore, revolutionary.”).

⁶⁷ One notable example is Jesus speaking to the Samaritan woman at the well. *John* 4:7–9. And in that instance, “not only did he speak openly with a woman stranger, but as a Jew he asked to drink from the ritually unclean bucket of a Samaritan.” RADER, *supra* note 65, at 40.

⁶⁸ See, e.g., *Luke* 10:38–42 (telling the story of Martha and Mary).

⁶⁹ *Mark* 5:27–34. Jesus performed a large number of healings of women. See, e.g., *Luke* 13:10–17 (bent woman); *Mark* 1:29–31 (Peter’s mother-in-law); *Mark* 5:21–24, 35–43 (Jairus’ daughter).

⁷⁰ MARCUS J. BORG, *MEETING JESUS AGAIN FOR THE FIRST TIME: THE HISTORICAL JESUS & THE HEART OF CONTEMPORARY FAITH* 57 (1994).

the first person to express faith in the Resurrection.⁷¹ Moreover, Jesus used women as well as men in his parables to convey the image of God.⁷²

The second is that, in comparative terms, women during the time of Christ, are presented manifestly more favorably than are the men.⁷³ Think about the pictures we are given. One woman, Mary, is told she is about to become the Mother of the King who will be the Savior. Instead of sitting around self-satisfied, she immediately runs to assist her older cousin, Elizabeth, who is with child. When Mary arrives, Elizabeth, instead of feeling any jealousy that the younger cousin gets to be the mother of the Savior and she only gets the messenger (John the Baptist), rejoices and honors the younger woman.⁷⁴

⁷¹ When Jesus tells Martha her brother will rise, she tells him that she understands Lazarus will rise on the judgment day. *John* 11:23–24. Jesus responds by saying, “I am the resurrection and the life; he who believes in me, though he die, yet shall he live, and whoever lives and believes in me shall never die.” *John* 11:25–26. In an earlier scene involving Martha and her sister Mary, Mary sits at Jesus’ feet, listening to his teaching, a position Jesus says “shall not be taken away from her.” *Luke* 10:38–42 (internal quotations omitted). As discussed by Leonard Swindler in his article *Jesus Was a Feminist*, Jesus also revealed himself as the Messiah for the first time to a Samaritan woman, and it was to a woman that he first appeared after the Resurrection. See Leonard Swindler, *Jesus Was a Feminist*, CATHOLIC WORLD, Jan. 1971, at 177, 182.

⁷² In Luke’s gospel, Jesus uses three stories to illustrate God’s love for those who have been lost and subsequently found—the shepherd finding the lost sheep, the women finding the lost coin, and the father of the prodigal son. *Luke* 15:3–32. He uses a similar male/female pairing in his parables describing the kingdom of heaven, explaining that it is like a mustard seed a man sows and like leaven a woman puts in her dough. *Matthew* 13:31–33.

⁷³ See RUEATHER, *supra* note 17, at 136 (“Women play an important role in [the] Gospel vision of the vindication of the lowly in God’s new order.”). The normal example of a woman badly dealt with in Jesus’ time is Mary Magdalene, often portrayed as a prostitute. There is no evidence in the scriptures, however, that she was one, and the conclusion that she is results from the conflation of several gospel stories; scripture scholars have repudiated the prostitute label. See J. Andrew Overman, *Mary Magdalene*, in THE OXFORD COMPANION TO THE BIBLE, *supra* note 12, at 499 (“Contrary to subsequent Christian interpretation . . . there is no evidence from the Gospels that Mary Magdalene was a prostitute or for the later identification of Mary Magdalene with the women who anoint Jesus’ feet or with Mary of Bethany.” (internal citations omitted)); see also Karen L. King, *Women in Ancient Christianity: The New Discoveries*, PBS, April 1998, <http://www.pbs.org/wgbh/pages/frontline/shows/religion/first/women.html> (“Mary the apostle, prophet, and teacher had become Mary the repentant whore. This fiction was invented at least in part to undermine her influence . . .”).

⁷⁴ *Luke* 1:31–33, 36–45.

More significantly, the one human being who had a significant impact on Jesus' thinking during his human life was a woman. The only respect in which the Gospel shows Jesus changing His position on a fundamental matter is the scene in which the Syrophoenecian woman persuades Him that he is wrong in viewing himself as "sent only to the lost sheep of the house of Israel,"⁷⁵ and that his view of who are His people should be broadened.⁷⁶ Finally, one of the first people to "get it" during Jesus' lifetime, one of the first to gain a true understanding of Jesus and who He really is, is a woman—and a foreign (Samaritan) woman at that—and through her efforts virtually her entire town comes to believe in Christ.⁷⁷

In contrast, the men are presented as frequently confused by Jesus and lacking in understanding of His message. The four disciples most frequently mentioned in the Gospel are Peter, Andrew, James, and John. James and John spend nearly the entire public ministry of Christ worrying about which of them is going to be seated closest to the head of the table in heaven, Andrew runs off (along with most of the other men) at the first sign of trouble, and Peter (who throughout the Gospels frequently is portrayed as weak and wavering) denies Christ three times after Christ is arrested. As Meier notes, with rare exception (that is, John), only the women are left at the crucifixion.⁷⁸

Let me underscore the fact that the picture of women presented in the Gospels is particularly striking because the then prevailing attitude in Palestine toward women was

⁷⁵ *Matthew* 15:21–28; see also *Mark* 7:24–30. As one commentator has observed, "[o]ne of the most dramatic gospel teachings is delivered to Jesus, not by him." Terrance R. Kelly, *Canaanites, Catholics and the Constitution: Developing Church Doctrine, Secular Law and Women Priests*, 7 *RUTGERS J.L. & RELIGION* 3, ¶ 1 (2005).

⁷⁶ The only other possible candidate for someone who changed Jesus' view is also a woman. The story, regarded as Jesus' first miracle, is the changing of water to wine at the wedding feast of Cana. As reported in the story, Jesus' first reaction is that it is not yet his time, and it is through Mary's persistence that he performs the miracle. See *John* 2:1–12. But the change in theology affected by the Syrophoenecian woman seems more significant.

⁷⁷ See *John* 4:4–42.

⁷⁸ The force of these observations does not require belief that the stories are absolutely accurate historical accounts. The fact that Gospels written by men (and men of that time) record women in this light suggest a basis in the reality of Jesus' dealings with women.

extraordinarily negative.⁷⁹ That each of four different Gospel accounts, each written by men of the time, portray women as they do, underscores that Jesus himself had a positive attitude toward women, treating them with no less respect and dignity than he treated men.⁸⁰ As expressed by Pope John Paul II in *Mulieris Dignitatem*:

In all of Jesus' teaching, as well as in his behaviour, one can find nothing which reflects the discrimination against women prevalent in his day. On the contrary, *his words and works always express the respect and honour due to women . . .* [His] way of speaking to and about women, as well as his manner of treating them, clearly constitutes an "innovation" with respect to the prevailing custom at that time.⁸¹

Thus, a fuller historical narrative that takes into account the Catholic belief of our creation in God's image and Jesus' treatment of women makes it difficult to claim that, at its core, Catholicism devalues women. Notwithstanding some earlier Church statements that might suggest otherwise,⁸² more recent

⁷⁹ See *supra* note 66 and accompanying text.

⁸⁰ Nonetheless, for some, the mere maleness of Jesus "reinforce[s] a patriarchal image of God. If Jesus is a man, so uncritical reasoning goes, and as such the revelation of God, then this must point to maleness as an essential characteristic of divine being itself." ELIZABETH A. JOHNSON, *SHE WHO IS* 152 (1992) (suggesting that such an interpretation is "exacerbated by exclusive use of father and son metaphors to interpret Jesus' relationship to God"); see also Schneiders, *supra* note 47, at 36 (observing that the "problem of a male-gendered God is exacerbated by the fact that God's ultimate self-revelation in human history is a human being, Jesus of Nazareth, who seemed to prefer to address God as [father]"). See *infra* text accompanying notes 191–193.

⁸¹ *MULIERIS DIGNITATEM*, *supra* note 55, ¶ 13. It is also clear that women had significant roles in the early church:

Women were active evangelists, coworkers, patrons, even apostles in the early Pauline churches, that is in assemblies meeting in Roman atrium houses where women had more freedom to speak and act than they did in Greco-Roman town squares. Gender roles were under discussion and debate in Roman society, and we see this conflict reflected in the Gospels and epistles . . . [T]he Corinthian Christian women prophets were among the new voices beginning to make themselves heard. Two of the women in the Philippian church were such key leaders that Paul seems to have structured the whole epistle to deal with their power struggle.

CAROLYN OSIEK & DAVID BALCH, *FAMILIES IN THE NEW TESTAMENT: HOUSEHOLDS AND HOUSE CHURCHES* 217 (1997).

⁸² The 1891 encyclical, *Rerum Novarum*, for example, reflects a 19th century view of women and speaks in language that would be very uncomfortable to the ears of many women today. See *Motherhood and the Mission*, *supra* note 2, at 428–29

Church statements about dignity and vocation of women are consistent with a view of women as different from, but equal to, men.⁸³ In one recent address, Pope Benedict XVI observed that:

[T]here still persists a macho mentality that ignores the novelty of Christianity, which recognizes and proclaims the equal dignity and responsibility of women with respect to men In the face of such grave and persistent phenomena the commitment of Christians appears all the more urgent, so that they become everywhere the promoters of a culture that recognizes the dignity that belongs to women in law and in reality.⁸⁴

II. CONTRACEPTION, MARRIAGE, AND THE FAMILY

A. *The Church's Position on Contraception*

A major challenge to the articulation of a Catholic Feminist Legal Theory is the difficulty of persuading many that the Church's positions on human sexuality,⁸⁵ fertility, and marriage are not inherently oppressive to women. I focus in this Section on the Church's opposition to artificial contraception and, in Section B, on the Church's view of marriage and the family.

For many, the Church's continuous and strenuous opposition to the use of artificial birth control is a strong signal of the Church's subjugation of women and lack of commitment to women's equality.⁸⁶ The issue has played out very noticeably in

(discussing *Rerum Novarum* and evolving Church recognition of role of women in public sphere).

⁸³ *MULIERIS DIGNITATEM*, *supra* note 55, ¶ 7; *LETTER TO WOMEN*, *supra* note 59, ¶¶ 7–8.

⁸⁴ Pope Benedict XVI, Papal Address to Participants in Congress on Women (Feb. 10, 2008) (transcript available at <http://www.zenit.org/article-21737?l=english>) (emphasizing both the equality of women and the fact that the design of God was “the human being male and female, with a unity and at the same time an original and complementary difference”).

⁸⁵ The Church's position on matters sexual is a lightning rod for criticism. Even Pope Benedict XVI, in his first encyclical, *Deus Caritas Est*, acknowledged that the Church's historical attitude toward sex created ambiguities and difficulties. *DEUS CARITAS EST*, *supra* note 18, ¶ 5 (discussing misunderstanding of Church's seeming opposition to the body).

⁸⁶ See, e.g., Luke Timothy Johnson, *Sex, Women & The Church*, COMMONWEAL, June 20, 2003 (noting the perception by many people that “lacking a convincing theological basis, the magisterium's intractability on [contraception] is really about keeping women in their place and maintaining the aura of papal authority”); Ann Pettifer, *Papal Politics and Women*, ON THE ISSUES, Fall 1998, available at

recent times with respect to the question of employer-provided coverage for prescription contraception⁸⁷ and of the availability of emergency contraception⁸⁸—although I think the latter issue is better viewed as an abortion issue⁸⁹ and not a contraception one.

The position of the Catholic Church on contraception is unambiguous. The Catechism of the Catholic Church labels as

<http://www.population-security.org/pett-98-10.htm> (suggesting that the Church's position on birth control is "basically aimed at keeping women subservient—making childbearing their primary function"); REPRODUCTIVE JUSTICE IN A JUST SOCIETY (Planned Parenthood of New York City Religious Leaders Task Force), Mar. 7, 2006, at 6, available at [http://www.plannedparenthood.org/nyc/files/NYC/clergy_statement\(1\).pdf](http://www.plannedparenthood.org/nyc/files/NYC/clergy_statement(1).pdf); see also Linda C. McClain, *Some ABCs of Feminist Sex Education (In Light of the Sexuality Critique of Legal Feminism)*, 15 COLUM. J. GENDER & L. 63, 63 (stating that abstinence-only sex education "is laden with gender role stereotypes about 'his' and 'her' sexuality that reinforce women's role as sexual gatekeepers").

Although the Catholic Church today stands alone in its strenuous opposition to the use of artificial contraception, it was once the case that all Protestant denominations had the same opposition. It was not until the Lambeth Conference in 1930 that Protestants, beginning with the Anglicans, began to accept the use of artificial contraception. See Catholic Answers, Birth Control, http://www.catholic.com/library/Birth_Control.asp (last visited Aug. 28, 2008); see also JOHN T. NOONAN, JR., CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIAN AND CANONISTS 409 (1965).

⁸⁷ See, e.g., Susan J. Stabile, *State Attempts To Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741, 741–49 (2005); Leslie Griffin, *What Might Have Been: Contraception and Religious Liberty*, 1 U. ST. THOMAS L.J. 632, 639–45 (2003).

⁸⁸ See, e.g., Ron Stein, *Protection Set for Antiabortion Health Workers*, WASH. POST, Aug. 22, 2008, at A1 (stating that health care workers may not be forced to provide emergency contraception when it goes against their beliefs); Robert Pear, *Protests over a Bush Rule To Protect Health Providers*, N.Y. TIMES, Nov. 18, 2008, at A14.

⁸⁹ See Stabile, *supra* note 87, at 752 n.48. Although I do not view the Church's position on abortion as at all fairly characterized as rooted in subordination of women, I recognize that some secular feminists undoubtedly view it that way. Thus, for some, a pro-life position on abortion dooms the attempt to articulate a Catholic Legal Theory that can be called feminist. See Susan Frelich Appleton, *Unraveling the "Seamless Garment": Loose Threads in Pro-Life Progressivism*, 2 U. ST. THOMAS L.J. 294, 294, 296 (2005) (arguing that "women's reproductive self-determination is an indispensable element of gender equality" and that "a core principle of feminism requires respect for women's own choices, especially in matters concerning their bodies and their reproductive destinies"); Shannon Crounse, *Cheering for Change*, AMERICA, July 7, 2008, at 18 (referring to view that "anti-choice" is "anti-woman," which suggests that seeking to end legal abortion is "equivalent to hating women"); Johnson, *supra* note 86 (citing "non-Catholic feminists' charge that the church's objection to abortion is only the most radical form of its demand above all that women be controlled").

“intrinsically evil” any “action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible.”⁹⁰ In his 1930 encyclical, *Casti Connubii*, Pope Pius XI reaffirmed earlier Church statements that procreation was the primary end of human sexuality and that the use of means to deprive the sexual act of its power of procreating life violates “the law of God and of nature, and those who indulge in such are branded with the guilt of a grave sin.”⁹¹

Despite recognizing the substantial opposition to the Church’s teachings on artificial contraception,⁹² Pope Paul VI

⁹⁰ CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, ¶ 2370 (quoting POPE PAUL VI, ENCYCLICAL LETTER *HUMANAE VITAE* ¶ 14 (1968)) (internal quotation marks omitted). The Church’s early—and consistent—opposition to contraception is something that separated Christianity from the pagan culture. See Catholic Answers, Contraception and Sterilization, http://www.catholic.com/library/Contraception_and_Sterilization.asp (quoting Augustine, *Marriage and Concupiscence* 1:15:17); see, e.g., Catholic Answers: Contraception and Sterilization, www.catholic.com/library/Contraception_and_Sterilization.asp (quoting Chrysostom, *Homilies on Romans* 24). I discuss the historical development of the Church’s position on artificial contraception in my Article, *State Attempts To Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*. Stable, *supra* note 87.

⁹¹ *CASTI CONNUBII*, *supra* note 47, ¶ 56. Although the Church now speaks of the unitive and procreative aspects of marriage and sexuality as being equally important, thus moving away from the position that human sexuality is primarily procreative, it continues to reaffirm the ban on artificial birth control. Twenty years later, Pope Pius XII claimed that the condemnation of artificial contraception “is as valid today as it was yesterday; and it will be the same tomorrow and always, because it does not imply a precept of the human law but is the expression of a law which is natural and divine.” Pius XII, Address to the Midwives on the Nature of Their Profession (1951), available at <http://www.papalencyclicals.net/Pius12/P12midwives.htm>. This reflects the belief that the unitive and procreative values “cannot be separated without altering the couple’s spiritual life and compromising the goods of marriage and the future of the family.” CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, ¶¶ 2363, 2366. Some dispute the conclusion that the Church’s opposition to artificial contraception is demanded by natural law. See Richard H. Beis, *Contraception and the Logical Structure of the Thomist Natural Law Theory*, 75 *ETHICS* 277 (1965).

⁹² See PAUL VI, ENCYCLICAL LETTER *HUMANAE VITAE*, ¶ 18 (1968) [hereinafter *HUMANAE VITAE*]; Charles E. Curran, *Humanae Vitae: Still Controversial at 30*, NCROnline, July 31, 1998 (observing that many Catholics were expecting a change in church teaching and quoting Fr. Andrew M. Greeley that the issuance of *Humanae Vitae* was “the occasion for massive apostasy and for notable decline in religious devotion and belief”). *Id.*

reiterated the position in 1969 in *Humanae Vitae*, stating that “there are certain limits, beyond which it is wrong to go, to the power of man over his own body and its natural functions,” limits which “are expressly imposed because of the reverence due to the whole human organism and its natural functions.”⁹³ In his 1995 encyclical, *Evangelium Vitae*,⁹⁴ Pope John Paul II expressed the Church’s continued moral opposition to birth control, based on the “sacredness” and “inviolability” of life.⁹⁵

Convincing many people, particularly feminists, that the Church’s position is the right and true one is more than an uphill battle, especially given the insistence by some that artificial birth control is a necessary tool in the fight against Third World poverty.⁹⁶ Although there may have been a time when people accepted the Church’s position on contraception without openly questioning it, today there is widespread acceptance of the use of artificial contraception, including among Catholics. A significant number of Catholics do not follow the Church’s teachings on this matter,⁹⁷ including many Catholic women who are very

This included opposition by the Birth Control Commission established at the request of Pope John XXIII to study the issue. The Commission, which consisted of theologians, priests, bishops, cardinals, and laypersons, concluded that artificial contraception was not intrinsically evil and that Catholic couples should be free to determine for themselves what method of family planning to employ. See *Birth Control Commission Texts: Translation of the Final Report to Pope Paul*, NAT’L CATHOLIC REP., Apr. 19, 1967, at 8; Griffin, *supra* note 87, at 633–34 (2003).

⁹³ *HUMANAE VITAE*, *supra* note 92, ¶ 17.

⁹⁴ *EVANGELIUM VITAE*, *supra* note 34.

⁹⁵ *Id.* ¶¶ 13, 40; see SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, *PERSONA HUMANA: DECLARATION ON CERTAIN QUESTIONS CONCERNING SEXUAL ETHICS* § V (1975); *FAMILIARIS CONSORTIO*, *supra* note 36, ¶ 30; JOHN PAUL II, *ENCYCLICAL LETTER VERITATIS SPLENDOR* ¶ 80 (1993).

⁹⁶ See Editorial, *Birth Control ‘for All People,’* N.Y. TIMES, Apr. 2, 1993, at A32; see also NOONAN, *supra* note 86, at 408 (citing the Sixth International Congress of 1925 declaration that “[o]verpopulation produces war”). *But see* Does Population Growth Really Exacerbate Poverty? (May 28, 2007), <http://mamador.wordpress.com/2007/05/28/does-population-growth-really-exacerbate-poverty/>.

⁹⁷ See, e.g., *Large Majorities Support More Access to Birth Control Information, and Agree That It Is a Good Way To Prevent Abortions*, HARRIS INTERACTIVE, June 22, 2006, <http://www.harrisinteractive.com/NEWS/allnewsbydate.asp?NewsID=1064> (citing Wall Street Journal Online/Harris Interactive Health Care Poll findings that “Catholics appear to be on the same page as the general public in regard to [contraception] issues”). The same survey finds that 53% of Catholics support the availability of the “morning after pill.” *Id.* Catholics for Choice published a study stating that “[s]exually active Catholic women above the age of eighteen are just as likely (97%) to have used some form of contraception banned by the Catholic church as women in the general population (97%).” CATHOLICS FOR

committed to their faith. In addition, there are several Catholic feminist theologians⁹⁸ who join with their secular counterparts⁹⁹ in arguing that contraception is necessary for women's equality. However, again, for purposes of persuading people that the Church's position on contraception does not make the attempt to articulate a Catholic Feminist Legal Theory an oxymoron, the relevant question is whether the Church's opposition to contraception can be expressed in a way that seems objectively cogent and as having a basis that is not linked to a negative view of woman.

Although there is language in *Casti Connubii* that seem to tie the Church's position on contraception to male (husband) dominance,¹⁰⁰ the view of the Church in more recent times does not carry that same attitude of male primacy. There are three things that explain the Church's adamant opposition to contraception, the first two of which are related. The first is based on a view of human relations to God, and the second has to do with the relationship between spouses; the two positions argue that contraception adversely affects, respectively, our relationship with God and the relationship between spouses. The

CHOICE, THE FACTS TELL THE STORY: CATHOLICS AND CONTRACEPTION (1996), <http://www.catholicsforchoice.org/topics/reform/documents/2006catholicsandcontraception.pdf>.

Even the Papal Commission that met from 1963 to 1966 at the behest of Pope John XXIII to advise the Church on the issue ultimately recommended that couples be free to use non-abortive means of artificial contraception. The Commission was composed of theologians, bishops, and cardinals as well as lay people. See ROBERT MCCLORY, TURNING POINT: THE INSIDE STORY OF THE PAPAL BIRTH CONTROL COMMISSION, AND HOW *HUMANÆ VITAE* CHANGED THE LIFE OF PATTY CROWLEY AND THE FUTURE OF THE CHURCH 55, 62–63 (1995).

⁹⁸ See, e.g., LISA SOWLE CAHILL, SEX GENDER AND CHRISTIAN ETHICS 201, 205 (1996) (discussing necessity of control of reproduction for equality of women); JEAN PORTER, NATURAL AND DIVINE LAW: RECLAIMING THE TRADITION FOR CHRISTIAN ETHICS 225–27 (1999) (rejecting the idea that contraception should be forbidden); ROSEMARY RADFORD RUETHER, CHRISTIANITY AND THE MAKING OF THE MODERN FAMILY 215 (2000) (discussing temporary sexual covenants that would avoid pregnancy through the use of birth control); ROSEMARY RADFORD RUETHER, WOMEN AND REDEMPTION 234–36 (1998) (discussing work of Ada Maria Isasi-Diaz).

⁹⁹ Appelton, *supra* note 89, at 298 (suggesting that confidence in the ability to control reproduction is “an important element of a full, free, and equal life” for women).

¹⁰⁰ *CASTI CONNUBII*, *supra* note 47, ¶26; see MATTHEW CONNELLY, FATAL MISCONCEPTION: THE STRUGGLE TO CONTROL WORLD POPULATION 85 (2008) (arguing that the Church's view on birth control expressed in *Casti Connubii* had less to do about contraception than about preserving male dominance over women).

third is part of a broad concern with the potential impact of a “contraceptive mentality,” particularly in its potential to weaken a culture of life.

The first basis of opposition has to do with human (male and female) openness to God’s plan. A central aspect of marriage is the “power to create a new life with God”;¹⁰¹ the life-giving power of a couple, therefore, comes from God. From the Catholic perspective, spouses, through their loving marital intimacy, participate in the co-creation of new life with God.¹⁰² Fertility itself is a gift from God, and the use of artificial contraceptives suppresses God’s power and “denies the sovereign role of God in the transmission of human life.”¹⁰³ The use of artificial contraception asserts that humans “alone have ultimate control over this power to create a new human life.”¹⁰⁴ It removes God from the picture and recasts the act of creating life as one subject only to human desire and convenience. In place of co-creation with God, we have human creation.

Participating in God’s plan does not mean a couple need have an unlimited number of children. The Church approves of the use of natural family planning,¹⁰⁵ viewing it as fundamentally different from artificial contraception. The Church’s position is that natural family planning does not involve the same denial of God’s sovereign role because it is not simply a means of avoiding unwanted pregnancy. Rather, natural family planning is about

¹⁰¹ UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Married Love and the Gift of Life* 3 (2006) [hereinafter *Married Love*].

¹⁰² See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Human Sexuality from God’s Perspective: Humanae Vitae 25 Years Later* 1 (1993) [hereinafter *Human Sexuality*] (referencing God’s will “to share with women and men a unique role in his creative generativity”).

¹⁰³ PONTIFICAL COUNCIL FOR THE FAMILY, DOCUMENT, *VADEMECUM FOR CONFESSORS CONCERNING SOME ASPECTS OF THE MORALITY OF CONJUGAL LIFE* (1997) (also noting that artificial contraception “contradict[s] God’s design of love, in which it has been granted to married couples to participate”).

¹⁰⁴ *Married Love*, *supra* note 101, at 7.

¹⁰⁵ *HUMANAE VITAE*, *supra* note 92, ¶ 16. The Church’s position is that spouses have the inalienable right to found a family and to decide on the spacing of births and the number of children to be born, taking into full consideration their duties toward themselves, their children already born, the family and society, in a just hierarchy of values and in accordance with the objective moral order [which permits natural but not artificial means of birth control].

HOLY SEE, *CHARTER OF THE RIGHTS OF THE FAMILY* art. 3 (1983).

couples being in touch with their bodies and “cooperat[ing] with the body as God designed it.”¹⁰⁶

The second basis of the Church’s opposition to artificial contraception has to do with the loving and complete giving of spouses to each other.¹⁰⁷ For Catholics, marriage is “a lifelong covenant of love . . . [A]n intimate partnership in which husbands and wives learn to give and receive love unselfishly,”¹⁰⁸ making it a model of Trinitarian love.¹⁰⁹ This total giving was beautifully expressed by Pope John Paul II in *Familiaris Consortio*:

[S]exuality, by means of which man and woman give themselves to one another through the acts which are proper and exclusive to spouses, is by no means something purely biological, but concerns the innermost being of the human person as such

When couples, by means of recourse to contraception, separate these two meanings that God the Creator has inscribed in the being of man and woman and in the dynamism of their sexual communion, they act as “arbiters” of the divine plan and they “manipulate” and degrade human sexuality—and with it themselves and their married partner—by altering its value of “total” self-giving. Thus the innate language that expresses the total reciprocal self-giving of husband and wife is overlaid, through contraception, by an objectively contradictory language, namely, that of not giving oneself totally to the other. This

¹⁰⁶ *Married Love*, *supra* note 101, at 5; see also The Couple to Couple League, About NFP, <http://www.ccli.org/nfp> (last visited Feb. 7, 2009); UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Natural Family Planning*, <http://www.usccb.org/prolife/issues/nfp/> (last visited Feb. 8, 2009). For complete information on one type of family planning, see JOHN F. KIPPLEY & SHEILA F. KIPPLEY, *THE ART OF NATURAL FAMILY PLANNING* (4th ed. 1996).

¹⁰⁷ CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, ¶ 2364 (stating that, in marriage, the spouses give themselves “definitively and totally to one another”). This argument is criticized in Charles E. Curran, *Pope John Paul II’s Teaching on Sexuality and Marriage: An Appraisal*, 1 U. ST. THOMAS L.J. 610, 623–24 (2003).

¹⁰⁸ *Married Love*, *supra* note 101, at 2.

¹⁰⁹ JASON EVERT, *IF YOU REALLY LOVED ME: 100 QUESTIONS ON DATING, RELATIONSHIPS AND SEXUAL PURITY* 136 (2003).

[Sex is] a reflection of the life-giving love of the Trinity. In the words of Carlo Cardinal Martini, “In the Bible, the man-woman couple is not meant to be simply a preservation of the species, as is the case for the other animals. Insofar as it was called to become the image and likeness of God, it expresses in a bodily, tangible way the face of God, which is Love.”

leads not only to a positive refusal to be open to life but also to a falsification of the inner truth of conjugal love, which is called upon to give itself in personal totality.¹¹⁰

Thus, the total love of a Catholic marriage, that complete and mutual gift of self, includes openness to the possibility of the gift of new life.¹¹¹

The use of artificial contraception is viewed by the Church as an act inconsistent with an expression of full gift of self.¹¹² “Whatever their intentions, couples who engage in contraceptive sex are ‘saying’ with their bodies that they want only a momentary union of pleasure; couples engaging in non-contraceptive sex are expressing a willingness to share a lifetime union, since children help to create such a union.”¹¹³

The final aspect of the Church’s opposition to artificial contraception relates to fears about the implications of a “contraceptive mentality.” In *Humanae Vitae*, Pope Paul VI expressed the concerns that artificial contraception allows one

¹¹⁰ *FAMILIARIS CONSORTIO*, *supra* note 36, ¶¶ 11, 32.

¹¹¹ See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, ¶ 2366 (“A child does not come from outside as something added on to the mutual love of the spouses, but springs from the very heart of that mutual giving, as its fruit and fulfillment.”); PONTIFICAL COUNCIL FOR THE FAMILY, *supra* note 103 (“Contraception, directly opposed to the transmission of life, betrays and falsifies the self-sacrificing love proper to marriage, ‘altering its value of total self-giving.’”); *Married Love*, *supra* note 101, at 1–2 (stating that the question asked of two people when they marry in a Catholic ceremony really asks whether one is “ready to accept this person, and all that may come from your union, completely and forever” and that “the sexual union of husband and wife is meant to express the full meaning of love, its power to bind a couple together and its openness to new life”); *Human Sexuality*, *supra* note 102, at 2 (noting that by remaining open to new life with each sexual act, “married couples reverence the presence of God in their union” and strengthen their union).

¹¹² PONTIFICAL COUNCIL FOR THE FAMILY, *supra* note 103 (“The persons called to live in the married state realize their vocation to love in the full gift of self, which adequately expresses the language of the body Contraception . . . betrays and falsifies the self-sacrificing love proper to marriage.”).

¹¹³ Janet E. Smith, *Why the Church Isn't Crazy on Contraception*, NAT'L CATHOLIC REG., May 27, 2005, available at <http://catholicexchange.com/2005/05/27/94054/print/>; see *Married Love*, *supra* note 101, at 3 (noting that committed love is expressed not only with words but with body language). The U.S. Bishops observe that “[w]hen married couples deliberately act to suppress fertility, however, sexual intercourse is no longer fully marital intercourse. It is something less powerful and intimate, something more ‘casual.’ Suppressing fertility by using contraception denies part of the inherent meaning of married sexuality and does harm to the couple’s unity.” *Id.*

spouse to treat the other like an object, especially reducing male respect for women and encourages infidelity.¹¹⁴

Even more seriously, the concern is that the contraceptive mentality devalues life, weakening the Deuteronomic command to choose life over death.¹¹⁵ In *Humanae Vitae*, Pope Paul VI obliquely raised the prospect that this mentality was one that encourages eugenics,¹¹⁶ and in *Evangelium Vitae*, Pope John Paul II suggested that the contraceptive mentality increased temptation to abortion,¹¹⁷ calling artificial contraception and abortion “fruits of the same tree,” “despite their differences [in] nature and moral gravity.”¹¹⁸

These concerns are not fanciful; indeed, looking back, Pope Paul VI appears to have been quite prescient. Even some who are critical of the Church’s positions on sexuality admit that “the effective cultural dissociation of sex from responsibility for procreation[] has contributed to widespread [acceptance of abortion] and to the destabilization of families in industrialized nations.”¹¹⁹ In the words of one woman:

¹¹⁴ *HUMANAE VITAE*, *supra* note 92, ¶ 17. From the Catholic perspective, pornography, like contraception, “does grave injury” to the dignity of women because it removes the “real or simulated sexual acts from the intimacy of the partners” and perverts the conjugal act. The resulting effect of pornography is that women become an “object of base pleasure and illicit profit for others.” CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, ¶ 2354.

¹¹⁵ *Deuteronomy* 30:19 (New American) (“I have set before you life and death, the blessing and the curse. Choose life, then, that you and your descendants may live . . .”).

¹¹⁶ *HUMANAE VITAE*, *supra* note 92, ¶ 17.

¹¹⁷ *EVANGELIUM VITAE*, *supra* note 34, ¶ 13; *see also* John T. Bruchalski, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *The Contraceptive Revolution and Its Fruits* 4 (1997) (discussing negative side effects of “contraceptive mentality,” including development of “a foundation for the mentality that accepts abortion: if a child results from sexual activity, whether inside or outside marriage, the *right* not to have to ‘deal’ with that comes into play”).

¹¹⁸ *EVANGELIUM VITAE*, *supra* note 34, ¶ 13.

¹¹⁹ CAHILL, *supra* note 98, at 206 (suggesting that “[e]ven progressive Catholics are likely to agree that ‘widespread unchastity has corrosive effects’”). Cahill calls abortion as a means of birth control “a threat to social support of pregnancy, birth, and childrearing in the family.” *Id.* at 214. Nonetheless, she is critical of the Church’s failure to understand why so many Western women advocate a right to abortion. *Id.* at 215; *see also* Jennifer Fulwiler, *A Sexual Revolution*, AMERICA, July 7, 2008, at 12–13 (discussing how the mind-set “that sex [is] for pleasure and bonding [and] that its potential for creating life [is] purely tangential” leads to a pro-choice position).

As long as I accepted the premise that engaging in sex with a contraceptive mentality was morally acceptable, I could not bring myself to consider that abortion might not be acceptable. It seemed inhumane to make a woman deal with life-altering consequences for an act that was not supposed to have life-altering consequences.¹²⁰

The line between abortion and contraception is becoming increasingly blurred. For example, in some states, laws that require religious employers to provide contraceptive coverage to their employees without distinguishing between contraceptives that operate to prevent contraception and those that are abortifacients.¹²¹ Additionally, the easy access to abortion, combined with a culture increasingly intolerant of imperfection, has led to increasing abortions of fetuses identified as having Down Syndrome and, indeed, reports of pressure being placed on women who decide to bear such children rather than to abort them.¹²² There are also reports that diseases associated with risky behaviors and unsafe sex are on the rise.¹²³

¹²⁰ Fulwiler, *supra* note 119, at 13. The Catholic Church recognizes that its pro-life message must necessarily contain more than simply the anti-abortion component. In order to have a truly pro-life message, the church takes a pro-woman message. The United States Council of Catholic Bishops has consistently reiterated that the Church is committed to addressing the needs of women with problems related to pregnancy. See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Pastoral Plan for Pro-Life Activities: A Campaign in Support of Life* 5 (2001). Additionally the Church maintains that “no woman in need with a child, born or unborn, whether she is Catholic or not, should feel herself without help.” See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Faithful for Life: A Moral Reflection* 8 (1995). Further, the Church believes that the Catholic faithful should “[r]each out to women who are pregnant and in need of help, to families struggling with financial or emotional difficulties. Stand by those who wish to choose life with the witness of solidarity, hope, and service.” CONFERENCE OF CATHOLIC BISHOPS, *Light and Shadows* 2 (1997). In the words of Priests for Life, “the role of the Church is not simply to stand up and say, ‘Abortion is wrong—don’t do it,’ but rather to say to the women of our day, ‘[w]e are with you; we will help you to do what is right, and to find healing if you have done what is wrong.’” Coming to the Aid of Women, <http://www.priestsforlife.org/news/responsetobishopsonpostab.htm> (last visited Feb. 7, 2009).

¹²¹ See Stabile, *supra* note 87, at 764–66 (arguing that mandatory contraceptive statutes blur the line between birth control and abortion).

¹²² See, e.g., Susan W. Enouen, *Down Syndrome and Abortion*, LIFE ISSUES CONNECTOR, Jan. 2007, http://www.lifeissues.org/connector/2007/Jan_DownsAbortion.htm (citing studies showing that 84–94% of babies diagnosed prenatally with Down Syndrome were aborted and that about half of the women making the decision to abort felt rushed or pressured into doing so); MELINDA TANKARD REIST, *DEFIANT BIRTH: WOMEN WHO RESIST MEDICAL EUGENICS* (2006)

One can agree or disagree with any or all three of these arguments and, certainly, there are people who do. With respect to marriage as a total self-gift, for example, some reject the idea that each sexual act must be a total self-gift, in part acknowledging the reality that there are all sorts of things that will hamper the act of sexual sharing on one occasion or another.¹²⁴ Others believe that the Church's position is less about any of these arguments than it is about a need to assert power, arguing that the Church's position on contraception reflects the fear that any change in the Church's teaching on birth control would undermine the authority of its teachings.¹²⁵ Others doubtless view the Church's position on contraception as something of consequence to Catholics only, and thus, as having no bearing on the promulgation of public policy. One can debate and disagree on each of these positions. None of that disagreement, however, does damage to the proposition I seek to advance here, that is, that the Church's arguments do not imply a subordinate view of women.¹²⁶

(telling stories of women who were advised to abort babies with disabilities and discussing social aversion to birth of those with Down Syndrome and other disabilities); see also Darrin P. Dixon, *Informed Consent or Institutionalized Eugenics? How the Medical Profession Encourages Abortion of Fetuses with Down Syndrome*, 24 ISSUES L. & MED. 3, 5 (2008) (arguing in favor of an unbiased, non-directive approach to pre-natal testing in order to circumvent the bias against fetuses with disabilities).

¹²³ See Sarah Kershaw, *Syphilis Cases on the Increase in New York City*, N.Y. TIMES, Aug. 12, 2007, at A25.

¹²⁴ See CAHILL, *supra* note 98, at 203–04.

¹²⁵ See, e.g., GARRY WILLS, PAPAL SIN: STRUCTURES OF DECEIT 74 (2000) (“*Humanae Vitae* is not really about sex. It is about authority. Paul decided the issue on that ground alone. He meant to check the notion that church teaching could change.”); Curran, *supra* note 92; Luke Timothy Johnson, *Sex, Women & the Church*, COMMONWEAL, June 20, 2003, at 16 (calling *Humanae Vitae* “above all an act of papal authoritarianism in the face of a participatory process of discernment the pope himself had supported”). This is suggested to some people because the Papal Commission that ultimately resulted in the promulgation of *Humanae Vitae* was charged by Pope Paul VI with determining whether and how the Church could change its previously articulated position on birth control without doing damage to papal authority. See MCCLORY, *supra* note 97, at 69–70; WILLS, *supra*, at 74–75; John M. Swomley, *The Pope and the Pill: The Catholic Church's Teaching Against Contraceptive Birth Control Has “Laid a Heavy Burden on” Innumerable People*, CHRISTIAN SOC. ACTION, Feb. 1998, at 12. At the time, the “Church . . . felt itself threatened on all sides by expanding technologies, new materialistic philosophies, and the surge of European nationalism.” MCCLORY, *supra* note 97, at 28.

¹²⁶ Clearly, some will not accept these arguments, viewing any attempt to argue against artificial contraception as evidencing a “fear of women's social equality with

The conclusion that the Church's position on artificial contraception is consistent with the equality and dignity of women, however, may not be enough. As Section C will discuss, I do not believe it is possible to reconcile the Church's position on contraception with a view of homosexuality that would be acceptable to a secular feminist audience.

B. Catholic View of the Marriage and the Family

I have elsewhere discussed the centrality of family to Catholic thought.¹²⁷ From the Catholic perspective, family is indispensable in promoting the conditions necessary for the flourishing of the human person, and therefore, indispensable to the common good.¹²⁸ "It is in the context of family that people learn that they are not born as isolated, autonomous monads, but rather as a precious part of a social unit."¹²⁹ We are born into a covenantal relationship,¹³⁰ which is a blueprint for our relation to the broader human community. Though the "complex of interpersonal relationships" set up in matrimony and in the

men and a tenacious grip on subordinating practices." CAHILL, *supra* note 98, at 205 (suggesting that fear of women's equality and an attitude of subordination "lie not far below the surface of readings of women's 'dignity' which equate it with maternity and limit reliable control of pregnancy"); *see also* cases cited *supra* note 86.

¹²⁷ *See Secular Feminists*, *supra* note 1, at 439–41; Susan J. Stabile, *Workers in the Vineyard: Catholic Social Thought and the Workplace*, 5 VILLANOVA J. CATHOLIC SOC. THOUGHT 371 (2008).

¹²⁸ *See* Christopher P. Vogt, *The Family as Cornerstone of the Good Life and the Good Society: Family Life in the Compendium of the Social Doctrine of the Church*, 27 ST. JOHN'S U. REV. BUS. 13, 13 (2006) (observing that the family is "an institution that is indispensable for society's effort to foster the social conditions necessary for all persons to flourish"); *see also* CAHILL, *supra* note 98, at 207 (calling the family a "school for critical contribution to the common good"). *Gaudium et Spes* defines the common good as "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment." GAUDIUM ET SPES, *supra* note 36, ¶ 26; *see also* JOHN PAUL II, *LETTER TO FAMILIES* ¶¶ 17, 18 (1994) (defining the family as "an institution fundamental to the life of every society," whose "true vocation" is "the transformation of the earth and the renewal of the world, of creation and of all humanity").

¹²⁹ Vogt, *supra* note 128, at 14. Thus, what we are really saying here is not that the family is something non-family is not, but rather that the family is the model for what all human relation ideally is.

¹³⁰ *See id.* at 14–15 (discussing contract versus covenant model and idea that "each and every person is always born into a network of relationships with duties and obligations").

family, “each human person is introduced into the ‘human family’ and into the ‘family of God,’ which is the Church.”¹³¹

From a Catholic perspective, the family is an important counterbalance to the individualism that is increasingly prevalent in the United States. Family teaches that there are obligations that do not depend on contract. Family incorporates a notion of sacrifice, helping us to understand that the well-being of our entire community may require some sacrifice of unlimited personal freedom as well.¹³²

The challenge in terms of secular feminist thought is that Catholic thought has definite views, not only of the role and importance of family, but on what “family” means. From the standpoint of Catholic thought, “indissoluble monogamous marriage [is] the only authentic form of the family.”¹³³

There are several essential attributes to a Catholic understanding of marriage and family. First, is a monogamous marriage—one in which the parties give themselves to each other “with a love that is total and therefore unique and exclusive.”¹³⁴ Second, is that marriage is necessarily characterized by indissolubility and fidelity, the absence of which “compromises the relationship of exclusive and total love that is proper to the

¹³¹ *FAMILIARIS CONSORTIO*, *supra* note 36, ¶ 15. As one commentator observed, “the family is a key venue in which human beings come to know the deepest truth about themselves.” Vogt, *supra* note 128, at 13; CAHILL, *supra* note 98, at 210 (suggesting that a Christian perspective of family “takes biological kinship as a base, but not as a limit” and that “the specifically Christian meaning of family does not stop with biology”).

¹³² See Vogt, *supra* note 128, at 15 (discussing sacrifice within the family and observing that “[t]he willingness of Jesus to sacrifice everything—even his own life—out of love for the church is the model of married love”).

¹³³ *COMPENDIUM*, *supra* note 34, ¶ 229; CONGREGATION FOR THE DOCTRINE OF THE FAITH, *LETTER TO THE BISHOPS OF THE CATHOLIC CHURCH ON THE COLLABORATION OF MEN AND WOMEN IN THE CHURCH AND IN THE WORLD* ¶ 2 (2004) [hereinafter *COLLABORATION OF MEN AND WOMEN*] (speaking of the “natural two-parent structure of mother and father”). In the words of the Catechism:

The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament.

CATECHISM OF THE CATHOLIC CHURCH, *supra* note 10, ¶ 1601.

¹³⁴ *FAMILIARIS CONSORTIO*, *supra* note 36, ¶ 19; see also *GAUDIUM ET SPES*, *supra* note 36, ¶ 49 (speaking of the equal dignity of husband and wife “acknowledged by mutual and total love” and leading to the “unity of marriage”).

marriage bond, bringing great pain to the children and damaging repercussions also on the fabric of society.”¹³⁵ Third, is that the family is “born of the intimate communion of life and love founded on the marriage between one man and one woman”,¹³⁶ authentic family possesses the complementarity of mother and father. In *Centesimus Annus*, Pope John Paul II explained that by family the Church means “the family founded on marriage, in which the mutual gift of self by husband and wife creates an environment in which children can be born and develop their potentialities, become aware of their dignity and prepare to face their unique and individual destiny.”¹³⁷

Thus, the Catholic Church views divorce, polygamy, and homosexual unions¹³⁸ as threats to “the community of marriage and the family.”¹³⁹ And from the perspective of the Catholic Church, the significant rise in the number of children born out of wedlock and living in single-parent homes is indicative of a problem, as is the rising divorce rate.¹⁴⁰

The Catholic position here is obviously at odds with secular feminist thought. From the perspective of many secular feminists, marriage (at least as we traditionally understand it) is inherently oppressive toward women.¹⁴¹ Thus, some feminists

¹³⁵ *COMPENDIUM*, *supra* note 34, ¶ 225.

¹³⁶ *Id.* ¶ 211; see Collett, *supra* note 59, at 186 (discussing *Genesis* 2:22-23 as an explanation of “the divine plan that men and women attain their mutual fulfillment in communion with one another”); *Concept of Marriage is Eroding, Warns Pope*, ZENIT, Jan. 29, 2007, <http://www.zenit.org/article-18766?1=english> (citing address of Pope Benedict XVI discussing the “truth of marriage” as including an “indissoluble conjugal bond” between husband and wife).

¹³⁷ JOHN PAUL II, *ENCYCLICAL LETTER CENTESIMUS ANNUS* ¶ 39 (1991).

¹³⁸ See *FAMILIARIS CONSORTIO*, *supra* note 36, ¶ 20 (stating that marriage, the mutual gift of man and woman, is characterized by unity and indissolubility).

¹³⁹ *FAMILIARIS CONSORTIO*, *supra* note 36, ¶ 18.

¹⁴⁰ See, e.g., Father John Flynn, L.C., *Marriage and Religion: A Package Deal*, ZENIT, June 18, 2007, <http://www.zenit.org/article-19910?1=english> (citing study findings that “[f]rom 1960 to 2000, the percentage of children born out of wedlock rose from five percent to thirty-three percent,” “[t]he divorce rate more than doubled to almost fifty percent,” and “[t]he percentage of children living in single-parent families rose from nine percent to twenty-seven percent”). The study cited by Flynn addresses the link between religion and family life, finding that “[r]eligious institutions promote norms strengthening marriage, for example, the idea that sex and childbearing ought to be reserved for marriage, and broader moral norms that support happier, more stable marriages.” *Id.*

¹⁴¹ See, e.g., ANDREA DWORKIN, *Feminism: An Agenda*, in *LETTERS FROM A WAR ZONE* 133, 146 (1983) (observing that “[l]ike prostitution, marriage is an institution that is extremely oppressive and dangerous for women”); CATHARINE MACKINNON,

argue for more expansive definitions of family that are not based on the traditional male/female monogamous model. Martha Fineman, for example, in arguing in favor of a collective societal responsibility for dependency,¹⁴² takes pains to point out that an “important concern is to ensure that any theory of collective responsibility not concede the right of collective control over individual intimate decisions, such as . . . how to form one’s family.”¹⁴³ Implicit is a rejection of traditional notions of marriage and family in place of the idea that each person should be free to define family, with the law refraining from favoring any one form over another.¹⁴⁴

FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 59 (1987) (viewing marriage as indistinguishable from prostitution or sexual harassment). While some feminists are concerned that women may be forced into a childrearing role, others do not believe women should even have the choice to take on such a role. See, e.g., CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? 256–57 (1994) (quoting an interview in which Simone de Beauvoir declared that “[n]o woman should be authorized to stay at home to raise her children . . . Women should not have that choice, precisely because if there is such a choice, too many women will make that one”).

¹⁴² See generally Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13 (1999). Fineman argues for such a collective or societal responsibility based on the fact that “dependency is a universal and inevitable part of the human development,” in the sense that we were all “dependent as children, and many of us will be dependent as we age, become ill, or suffer disabilities,” and that “dependency needs must be met if a society is to survive.” *Id.* at 18.

¹⁴³ *Id.* at 16; see also MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* xvii (2004) (arguing that the state should not promote any one form of family over others); Eva Feder Kittay, *A Feminist Public Ethic of Care Meets the New Communitarian Family Policy*, 111 ETHICS 523, 525–26 (2001) (suggesting that the traditional form of family has been oppressive to women and “must give feminists pause”). Professor Kittay has expressed the concern “that limiting family to the heterosexual two-parent monogamous family will stand in the way of achieving the sort of well-being for ourselves and our neighbors that [secular and Catholic feminists] may both wish to see.” *Mirror of Justice: Kittay’s Response to Michael S.* (Mar. 21, 2007) http://www.mirrorofjustice.com/mirrorofjustice/2007/03/kittays_respons.html; see also Jamie Alan Aycock, *Contracting out of the Culture Wars: How the Law Should Enforce and Communities of Faith Should Encourage More Enduring Marital Commitments*, 30 HARV. J.L. & PUB. POL’Y 231, 232 (2006) (arguing that the law should permit individuals to further their own visions of the family, without imposing a single vision of family on society as a whole).

¹⁴⁴ Fineman’s position raises a question at the theoretical level of how there can be a collective responsibility toward something as to which we have no common definition; presumably the collective responsibility has to be toward something—something as to which we have a shared value. That question aside, there is no question that her claim is one that is fundamentally at odds with a Catholic view of

The question here is whether a traditional marriage, as conceived by the Church, is inherently oppressive to women.¹⁴⁵ In its ideal state, clearly the answer is no. The Church's conception of marriage is "a relationship of equal persons who ideally unite their whole lives, and not only their bodies for procreation and their property for the formation of new households."¹⁴⁶ And the Church's opposition to divorce developed at a time when divorce was used "to the advantage of individual men and of powerful and wealthy families" and generally operated to women's disadvantage.¹⁴⁷

On the other hand, the Church's emphasis on the role of women in the family suggests to many secular feminists a subordinate role for women. "Feminists have frequently portrayed marriage and family life, inspired and upheld by religious values, as a patriarchal conspiracy that renders women little more than domestic slaves."¹⁴⁸ They fear that Catholic statements about the family are aimed at keeping women out of the workforce and in "the kitchen and nursery."¹⁴⁹

A careful reading of Church statements about women and family addresses this concern. It is true that in his *Letter to Women*, Pope John Paul II emphasized women's role in the family, lamenting that "the gift of motherhood is often penalized rather than rewarded,"¹⁵⁰ and in *Laborem Exercens*, he argued that society must make it possible for a mother "to devote herself to taking care of her children and educating them in accordance with their needs."¹⁵¹ But he also made clear that he viewed the

the family. See Stabile, *supra* note 1, for a discussion of the Catholic feminist versus secular feminist grounding for societal support of care work.

¹⁴⁵ It appears that many women do not believe it is. Although "marriages in which spouses actually match the hours and energy they devote to market and family work signal an abandonment of gender-determinative roles that has long been the goal of many feminists," a recent study "found that women, including those with egalitarian beliefs about marriage, were happiest in marriages marked by traditional gender roles." Cynthia Lee Starnes, *Mothers, Myths, and the Law of Divorce: One More Feminist Case for Partnership*, 13 WM. & MARY J. WOMEN & L. 203, 203-04 (2006).

¹⁴⁶ CAHILL, *supra* note 98, at 184.

¹⁴⁷ *Id.* at 188, 197.

¹⁴⁸ Tina Beattie, *Feminism, Vatican-style*, THE TABLET, Aug. 7, 2004, <http://www.thetablet.co.uk/articles/2190>.

¹⁴⁹ William J. Byron, *Children of Great Price*, AMERICA, Apr. 28, 2003, at 13, 15.

¹⁵⁰ LETTER TO WOMEN, *supra* note 59, ¶ 4.

¹⁵¹ JOHN PAUL II, ENCYCLICAL LETTER *LABOREM EXERCENS* ¶ 19 (1981).

increased presence of women in “social, economic and political life at the local, national and international levels”¹⁵² as a positive development, arguing that women “have a full right to become actively involved in all areas of public life.”¹⁵³ And in his *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World*, then-Cardinal Ratzinger wrote of the need to keep in mind the interrelationship of family and work and the need to harmonize the needs of both, so that:

[W]omen who freely desire will be able to devote the totality of their time to the work of the household without being stigmatized by society or penalized financially, while those who wish also to engage in other work may be able to do so with an appropriate work-schedule, and not have to choose between relinquishing their family life or enduring continual stress.¹⁵⁴

C. *Looking from Outside the Feminist Box*

The fact that the Catholic Church’s position regarding contraception and marriage rests on arguments that do not directly imply subordination of women does not necessarily mean that secular feminists will not have difficulty with the Church on these issues. For many secular feminists, opposition to homosexuality is linked to a “gender caste” system of male dominance.¹⁵⁵

Catherine MacKinnon views homophobia “as a reflex of male dominant ideology against challenges to the heterosexually gendered sexuality that is made compulsory to keep women sexually for men and men sexually inviolable”¹⁵⁶ and believes that acceptance of alternative sexual relationships would fundamentally change the male role in a way beneficial to

¹⁵² JOHN PAUL II, MESSAGE OF HIS HOLINESS FOR THE XXVII WORLD DAY OF PEACE *WOMEN: TEACHERS OF PEACE* ¶ 9 (1995).

¹⁵³ *FAMILIARIS CONSORTIO*, *supra* note 36, ¶ 23.

¹⁵⁴ *COLLABORATION OF MEN AND WOMEN*, *supra* note 133, ¶ 13. The same letter observes that “[a]lthough motherhood is a key element of women’s identity, this does not mean that women should be considered from the sole perspective of physical procreation.” *Id.*

¹⁵⁵ Catherine A. MacKinnon, *The Road Not Taken: Sex, Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1085 (2004).

¹⁵⁶ *Id.* at 1087.

women.¹⁵⁷ Mary Becker argued that “heterosexual relationships are more problematic for women than lesbian relationships” and that the taboo against lesbianism “tends to hide from women options that might enable them to find moral and more equitable intimate relationships with other women.”¹⁵⁸ The same link between opposition to homosexuality and subordination of women is made by other secular feminists¹⁵⁹ and other commentators.¹⁶⁰

Even feminist scholars who do not directly tie opposition to homosexuality to an oppressive view of women are troubled by the Church’s opposition to homosexuality. Some find opposition to homosexual marriage to be fundamentally unequal.¹⁶¹ Others believe allowing homosexuals the right to marry “is affirmatively good for the democratic state,”¹⁶² in that it better conveys the virtue of autonomy, which is believed to be “a critical virtue that

¹⁵⁷ See *id.* at 1085–86 (arguing that a substantive sex equality approach to the Fourteenth Amendment would break down the “gender caste” system of sexual relationships where males dominate women).

¹⁵⁸ Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN’S L.J. 165, 170 (1998).

¹⁵⁹ See Pamela M. Jablow, *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 HOFSTRA L. REV. 1095, 1142 (2000) (“[D]iscrimination on the basis of homosexuality is a part of the larger scheme of male domination over women.”); Catherine E. Lhamon, *Mother as Trope in Feminist Legal Theory*, 105 YALE L.J. 1421, 1424 (1996) (reviewing MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD (Martha Albertson Fineman & Isabel Karpin eds., 1995)) (arguing that women are “presumed to be mothers and penalized for departing from the male norm of individualism or treated as individuals and penalized for their familial deviance from the individual model”); cf. Padilla & Winrich, *supra* note 6, at 73 (using the sodomy laws in the Bible as an example of how Christian patriarchy is “replicated in the law to harm women”).

¹⁶⁰ See, e.g., William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1510 (1994) (“[D]enying two gay men the right to marry is driven by an ideology that oppresses straight women.”); Justin Reinheimer, *Recent Development, Same-Sex Marriage Through the Equal Protection Clause: A Gender Conscious Analysis*, 21 BERKELEY J. GENDER L. & JUST. 213, 239 (2006) (arguing that same-sex marriage bans foster gender hierarchy “by enforcing a rigid distinction between the genders”).

¹⁶¹ See, e.g., Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 708, 777 (2002). Revealing how far the chasm is between some secular feminists and Catholic views, Robson suggests that “marital incest prohibitions and polygamy prohibitions are as problematic as same-sex marriage prohibitions.” *Id.* at 819.

¹⁶² See, e.g., Tiffany C. Graham, *Something Old, Something New: Civic Virtue and the Case for Same-Sex Marriage*, 17 UCLA WOMEN’S L.J. 53, 118 (2008).

is necessary for raising citizens in a modern, liberal, tolerant democracy.”¹⁶³

The point here is not to debate the merits of the secular feminist view of homosexuality or homosexual marriage, but rather to suggest that the Church’s positions on these matters make it difficult for secular feminists to dialogue with Catholic feminists.

III. THE EXCLUSION OF WOMEN FROM CERTAIN POSITIONS WITHIN THE CHURCH

The exclusion of women from positions of authority within the church¹⁶⁴ is visible not only to Catholics but to non-Catholics as well.¹⁶⁵ The Church’s position on ordination to the priesthood is a particular lightning rod because, for many, the continued exclusion of women from ordination is symbolic of a broader exclusion of women from positions of influence and power in the Church.¹⁶⁶ Thus, one commentator has suggested that it is impossible for feminism to advance in the Catholic Church if women cannot be ordained.¹⁶⁷

The Church has been consistent in recent years in expressing the position that women may not be ordained to the priesthood. Under Canon Law, only baptized men can be ordained.¹⁶⁸ In 1976, the Congregation for the Doctrine of the Faith issued its *Declaration on the Question of Admission of Women to the Ministerial Priesthood*, stating the Church’s belief

¹⁶³ *Id.* at 60.

¹⁶⁴ See, e.g., PHYLLIS ZAGANO, HOLY SATURDAY 2 (2000) (“Women are clearly not well-integrated into the Church’s structure, primarily because even offices that may be filled and ministries that may be performed by women are provided or assigned to women only when a qualified man is not available.”).

¹⁶⁵ *Id.* at 3 (observing that the lack of women in leadership roles “sends mixed signals to the whole Church, and beyond, to the world it expects to evangelize”).

¹⁶⁶ See, e.g., Cheryl Y. Haskins, *Gender Bias in the Roman Catholic Church: Why Can’t Women be Priests?*, 3 MARGINS 99, 100 (2003); Kelly, *supra* note 75, ¶ 70 (2005). Indeed, when I spoke at a feminist legal theory conference several years ago, a woman came up to me afterwards and said to me that she just did not see how one could be both Catholic and a woman given the Church’s position on ordination of women.

¹⁶⁷ Leslie Griffin, *Citizen-Soldiers Are Like Priests: Feminism in Law and Theology*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 194, 204 (Michael W. McConnell et al. eds., 2001).

¹⁶⁸ CODEX IURIS CANONICI c. 1024 (Canon Law Society of America trans., 1983) (1983).

that it was not authorized to admit women to priestly ordination.¹⁶⁹ In 1994, in *Ordinatio sacerdotalis*, Pope John Paul II spoke in similar terms, stating that “the Church has no authority whatsoever to confer priestly ordination on women and . . . this judgment is to be definitively held by all the Church’s faithful” and suggesting that there could be no further debate on the issue.¹⁷⁰ Four years later, in its *Doctrinal Commentary to Ad Tuendam Fidem*, the Congregation for the Doctrine of the Faith suggested that the prohibition against women priests was an example of a doctrine that, although never formally declared as infallible, should be regarded as infallible because of constant proclamation by the “ordinary and universal Magisterium.”¹⁷¹ More recently, Pope Benedict XVI reiterated the importance of an all-male, celibate priesthood in his 2007 Apostolic Exhortation on the Eucharist.¹⁷² Although there is dissent from the position among some Catholics,¹⁷³ statements

¹⁶⁹ FRANJO CARDINAL SEPER, *INTER INSIGNIORES DECLARATION ON THE QUESTION OF ADMISSION OF WOMEN TO THE MINISTERIAL PRIESTHOOD* (1976), available at <http://www.papalencyclicals.net/Paul06/p6interi.htm> [hereinafter *INTER INSIGNIORES*].

¹⁷⁰ JOHN PAUL II, *APOSTOLIC LETTER ORDINATIO SACERDOTALIS* ¶ 4 (1994) [hereinafter *ORDINATIO SACERDOTALIS*]. Discussing *Ordinatio Sacerdotalis*, then-Cardinal Ratzinger affirmed the view that the teaching on ordination

requires definitive assent, since, founded on the written Word of God, and from the beginning constantly preserved and applied in the Tradition of the Church, it has been set forth infallibly by the ordinary and universal Magisterium [during the Second Vatican Council, in the Dogmatic Constitution on the Church]. Thus, in the present circumstances, the Roman Pontiff, exercising his proper office of confirming the brethren (cf. Lk. 22:32), has handed on this same teaching by a formal declaration, explicitly stating what is to be held always, everywhere, and by all, as belonging to the deposit of the faith.

JOSEPH CARDINAL RATZINGER, *CONCERNING THE TEACHING CONTAINED IN ORDINATIO SACERDOTALIS RESPONSUM AD DUBIUM* (1995), available at http://www.newadvent.org/library/docs_d95os.htm.

¹⁷¹ CONGREGATION FOR THE DOCTRINE OF THE FAITH, *DOCTRINAL COMMENTARY ON THE CONCLUDING FORMULA OF THE PROFESSIO FIDEI* ¶ 11 (1998), available at <http://www.ewtn.com/library/CURIA/CDFADTU.HTM> (quoting JOHN PAUL II, *ENCYCLICAL LETTER EVANGELIUM VITAE*, ¶ 65 (1995)).

¹⁷² BENEDICT XVI, *POST-SYNODAL APOSTOLIC EXHORTATION SACRAMENTUM CARITATIS* ¶ 24, 26 (2007).

¹⁷³ Examples of groups within the Catholic Church expressing opposition to the Church’s position on ordination include Roman Catholic Women Priests, the Women’s Ordination Conference, and Women-Church Convergence. Information about these groups can be found on their websites. See Roman Catholic Womenpriests, <http://www.romancatholicwomenpriests.org/> (last visited Feb. 8,

such as these make it unlikely that we will see a change in the Church's position on this issue any time soon.

The Catholic Church's position poses a challenge to articulation of a Catholic Feminist Legal Theory capable of engaging in dialogue with secular feminists. Many believe that the refusal to ordain women reflects "the male-dominated Church [defining] women as a lesser class of human beings,"¹⁷⁴ despite the assurance by the Church that

the fact that the Blessed Virgin Mary, Mother of God and Mother of the Church, received neither the mission proper to the Apostles nor the ministerial priesthood clearly shows that the non-admission of women to priestly ordination cannot mean that women are of lesser dignity, nor can it be construed as discrimination against them.¹⁷⁵

The feeling is so strong that some feminists argue that women should abandon the hierarchical church structure altogether.¹⁷⁶ Thus, in order for a Catholic Feminist Legal Theory to be taken seriously by secular feminists and others, it is necessary to explain the Church's position on the ordination of women in

2009); Women's Ordination Conference, <http://www.womensordination.org/> (last visited Feb. 8, 2009); Women-Church Convergence, <http://www.women-churchconvergence.org/home.htm> (last visited Feb. 8, 2009).

¹⁷⁴ Haskins, *supra* note 166, at 101 (suggesting that it is the "[m]ale projection of females as an incarnation of lower human nature . . . [that] has limited women's ability to be recognized as equal members of the Church"); Kelly, *supra* note 75, ¶ 50 (calling male-only priesthood doctrine "the offspring of the ancient doctrine of female inferiority"); Mary Jo Anderson, *Back with a Vengeance: The Return of the Women's Ordination Question*, *CRISIS*, Mar. 1, 2002, 36 (reporting on "growing coordination among the associations who insist that equality and justice for women in the Church can be met only when women are ordained").

This is an issue that creates difficulty for many Catholics as well as non-Catholics. "With women running corporations and universities, serving as Speaker of the House and campaigning to become President of the United States, many Catholics find incomprehensible a church declaration that one cannot even discuss the ordination of women." Richard G. Malloy, *Religious Life in the Age of Facebook*, *AMERICA*, July 7, 2008, at 14.

¹⁷⁵ *ORDINARIO SACERDOTALIS*, *supra* note 170, ¶ 3; see *INTER INSIGNIORES*, *supra* note 169, ¶ 2.

¹⁷⁶ A number of women with whom I have spoken have identified the ordination issue as the major ground of their inability to call themselves Catholic. Indeed, some would argue that women should not accept ordination even if offered. Elisabeth Schussler Fiorenza has suggested that "ordination means subordination," so long as the Catholic Church remains "an elite, male-dominated, sacred pyramidal order of domination." Peter Steinfeld, *Women Wary About Aiming To Be Priests*, *N.Y. TIMES*, Nov. 14, 1995, at A17.

terms that do not sound in subordination of women, that is, as based on a defensible theology¹⁷⁷ that is not tied to a view of women as lesser than men. This, I confess, is a task I find difficult, and I have struggled to try to understand the Church's position on ordination.

Several arguments have been advanced against the ordination of women. A major argument stressed by the Congregation for the Doctrine of the Faith in its *Declaration* and elsewhere, is based on Christ's choice and the history of the Church. Christ chose only men as Apostles, and the priesthood is a succession from the Apostles.¹⁷⁸ The *Declaration* states that

[t]he Catholic Church has never felt that priestly or episcopal ordination can be validly conferred on women. . . . [for] this essential reason, namely, that by calling only men to the priestly Order and ministry in its true sense, the Church intends to remain faithful to the type of ordained ministry willed by the Lord Jesus Christ and carefully maintained by the Apostles.¹⁷⁹

In his *Letter to Women*, Pope John Paul II spoke of the diversity of roles of men and women and argued that the all-male priesthood reflects Christ's choice that this particular position be held by only men, rather than a diminution of the role of women.¹⁸⁰ Christ clearly chose only twelve men to be Apostles

¹⁷⁷ Some argue there is no such defensible theology. See, e.g., Luke Timothy Johnson, *Sex, Women & The Church: The Need for Prophetic Change*, COMMONWEAL, June 20, 2003, at 11 (observing that "theological arguments advanced for an all-male clergy are laughable (at best) and blasphemous (at worst)"); RICHARD P. MCBRIEN, *THE REMAKING OF THE CHURCH* 123 (1973) ("There is absolutely no biblical, doctrinal, or theological basis for suggesting that [Jesus'] maleness was a necessary precondition for the incarnation."); ZAGANO, *supra* note 164, at 63 (arguing that since the Church accepts that men and women are ontologically the same, its refusal to admit women into holy orders is irrational); NICOLA SLEE, *FAITH AND FEMINISM: AN INTRODUCTION TO CHRISTIAN FEMINIST THEOLOGY* (2003) (suggesting that only Christ's humanity is necessary for salvation not his maleness); DAPHNE HAMPSON, *THEOLOGY & FEMINISM* 59 (Janet Martin Soskice & Diana Lipton eds., 2003) (arguing that it is not a person's maleness that constitutes the image of Christ, rather it is the sacerdotal character).

¹⁷⁸ See *INTER INSIGNIORES*, *supra* note 169, ¶ 1; see also Mary DeTurris, *Why Women Can't Be Priests*, OUR SUNDAY VISITOR, Dec. 17, 1995, at 6 (citing theologian Sister Sara Butler commenting the "Catholics have always insisted that the ordained ministry has its origin in Jesus' own choice of the Twelve [Apostles] and that they are the foundation of the Church").

¹⁷⁹ *INTER INSIGNIORES*, *supra* note 169 ¶ 1.

¹⁸⁰ See *LETTER TO WOMEN*, *supra* note 59, ¶ 11.

and, when the need to replace one of the twelve arose, a man, Matthias, was chosen as the replacement. This argument is buttressed by the historical claim that the early church viewed the idea of women as priests as heretical, as allowing something not willed by Christ and inconsistent with the apostolic succession.¹⁸¹

Some respond to this by arguing that Jesus' choice of only men as Apostles reflects historical context, that is, a concern on the part of Jesus that women would not be accepted as leaders given the prevailing norms.¹⁸² It is true, as the discussion in Section I.B., suggested, that Jesus thwarted prevailing norms all of the time in his dealings with woman.¹⁸³ Because "Jesus broke with the prejudices of his time by widely contravening the discriminations practiced with regards to women," the Declaration argues that it is difficult to maintain "that, by not calling women to enter the group of the Apostles, Jesus was simply letting himself be guided by reasons of expediency."¹⁸⁴

That response is not completely satisfactory. It is true that Jesus broke with social norms in his own dealings with others. However, if the norms of the time meant that women would be taken less seriously than would men, "reasons of expediency"¹⁸⁵ could very well have been part of Jesus motivation in calling only men as Apostles.

The other primary response to the claim that Jesus chose only men as Apostles is a rejection of the idea that the priesthood represents a succession from the Apostles. Elizabeth Johnson argues that "Jesus never ordained twelve men, thus setting up an all-male priesthood," calling that interpretation "an anachronism projected backward onto the Gospels in light of

¹⁸¹ See *The Canons of the Synod of Laodicea*, 11 (365 A.D.) (instructing that Presbydes (women presidents) are not to be appointed in the Church); 1 ST. IRENAEUS, ST. IRENAEUS OF LYONS AGAINST HERESIES 56 (Dominic J. Unger trans., 1992) (A.D. 189); Tertullian, *The Prescription Against Heretics*, 41:4-5.

¹⁸² DeTurris, *supra* note 178 (citing critics who insist that the ban on women priests reflects bias and "that if Jesus were living in an age with a greater appreciation of women's dignity and gifts, He would have chosen female disciples and ordained women priests").

¹⁸³ See *supra* text accompanying notes 63-84.

¹⁸⁴ *INTER INSIGNIORES*, *supra* note 169, ¶ 4.

¹⁸⁵ *Id.*

later development.”¹⁸⁶ The reality, she argues, is that “Jesus never ordained anyone; that a distinction must be made between the Twelve (who had no long-term successors), the apostles, and the disciples; and that women were among the most active and faithful of apostles and disciples.”¹⁸⁷ Unless one is persuaded that the priesthood is necessarily a succession from the Apostles, the argument based on Jesus’ choice of only men as Apostles fails.

Another major argument for the Church’s opposition to women serving as priests is the “iconic” character of the priestly office, that is, the argument that the priest represents Christ, the Bridegroom and spouse of the Church.¹⁸⁸ The priest, therefore, must be male. In commenting on the argument, Avery Cardinal Dulles observes that the iconic argument shows

why it was fitting for Christ to have decided freely to reserve priestly service to men. If the maleness of the priest is essential to enable him to act symbolically *in persona Christi* in the eucharistic sacrifice, it follows that women should not be priests. The ‘iconic’ argument is complex and difficult to handle, but it does in the end give intelligibility to the authoritative teaching.¹⁸⁹

Viewed from the other side, “[w]omen are called to be unique examples and witnesses for all Christians of how the Bride is to respond in love to the love of the Bridegroom.”¹⁹⁰

This argument, of course, requires accepting that the maleness of Christ has significance, something that is not universally accepted.¹⁹¹ If the maleness of Christ has no more than “a social symbolic significance in the framework of societies of patriarchal privilege[,]” then we can as easily “encounter

¹⁸⁶ Elizabeth A. Johnson, *Responses to Rome*, COMMONWEAL, Jan. 26, 1996, at 11.

¹⁸⁷ *Id.*

¹⁸⁸ See *INTER INSIGNIORES*, *supra* note 169, ¶ 5; *MULIERIS DIGNITATUM*, *supra* note 55, ¶ 23.

¹⁸⁹ Avery Dulles, *Women’s Ordination and Infallibility: 2: Tradition Says No*, 249 THE TABLET 1572, 1573 (1995).

¹⁹⁰ *COLLABORATION OF MEN AND WOMEN*, *supra* note 133, ¶ 16.

¹⁹¹ See, e.g., RUETHER, *supra* note 17, at 117 (rejecting as “unwarranted” the idea that “there is a necessary ontological connection between the maleness of Jesus’ historical person and the maleness of *Logos* as the male offspring and disclosure of a male God”). Ruether believes that “[t]heologically speaking, . . . the maleness of Jesus has no ultimate significance.” *Id.* at 137.

Christ in the form of our sister” as in a male form.¹⁹² Rosemary Ruether expresses the additional concern that “[b]ehind this argument of the necessary maleness of Christ lies the theological assumption of the maleness of God.”¹⁹³

The bridegroom/bride imagery is equally problematic for some. Since men can be included in the concept of “bride” because they are part of the Church, goes the argument, why can women not be included in “bridegroom.”¹⁹⁴ One answer is that men can represent Christ in a way women cannot because of the difference in their relation to creation. As one commentator has suggested, men “better serve as an image of transcendent love, a love that is wholly other but seeks only the welfare of the other. As primarily relational beings, women are images of immanence and ultimately of the Church, which is prepared, at all times, to receive Christ’s love.”¹⁹⁵ One can understand, I think, that secular feminists might view this argument as problematic in that it is based on stereotypes of how women and men behave.

There is no question that acceptance of any of the Church’s arguments regarding ordination depends upon a willingness to accept the belief that there are fundamental differences between men and women. Therefore, to the extent that secular feminists remain unconvinced that the Church’s position on complementarity¹⁹⁶ is not oppressive to women, they will be unconvinced that denying ordination to women has a nondiscriminatory basis. That makes it all the more important for Catholic feminists to affirmatively define what “full development of women” means.¹⁹⁷

¹⁹² See *id.* at 137–138 (emphasis omitted) (discussing the personhood of Christ continuing “in our sisters and brothers” and encountering “Christ in the form of our sister”).

¹⁹³ RUETHER, *supra* note 17, at 126.

¹⁹⁴ See ZAGANO, *supra* note 164, at 26 n.42.

¹⁹⁵ Jennifer Ferrara, *Ordaining Women: Two Views*, FIRST THINGS, Apr. 2003, at 33, available at http://www.firstthings.com/article.php3?id_article=472.

¹⁹⁶ See *supra* note 61; CAHILL, *supra* note 98, at 82 (observing that “[m]uch feminist social criticism depends on the proposition that masculine and feminine gender need not follow from male and female sex, and in fact is no more than a socially constructed mechanism for ensuring male power”); LITTLE, *supra* note 24, at 128 (discussing feminist challenge to traditional views of human sexuality and feminist belief that “there is no fundamental differentiation between male and female”).

¹⁹⁷ Prudence Allen, *Can Feminism Be a Humanism?*, in *WOMEN IN CHRIST: TOWARD A NEW FEMINISM* 251, 284 (Michele M. Schumacher ed., 2004) (defining

As a final note, Pope John Paul II stressed the importance of making “full use of the ample room for a lay and feminine presence recognized by Church law,”¹⁹⁸ and in recent years, there has been movement to elevate women to some significant seats of power within the Church. For example, at the diocesan and local levels, women have been installed as diocesan chancellors, tribunal judges, pastoral associates, and parish administrators.¹⁹⁹ In 2004, Pope John Paul II appointed a woman to the position of under-secretary of the Congregation for Religious, the first appointment of a woman to a superior’s level position in the Roman Curia.²⁰⁰ Also in 2004, he named Mary Ann Glendon President of the Pontifical Academy for Social Sciences and appointed two female theologians to the International Theological Commission.²⁰¹ Continued appointment of women to positions of leadership in the Church will go a long way in persuading people that the Church’s refusal to ordain women is

feminism as “an organized way of thought and action that gives special attention to removing obstacles to the full development of women”); see, e.g., CAHILL, *supra* note 98, at 46–72 (discussing human flourishing).

¹⁹⁸ JOHN PAUL II, *Women’s Role in the Church*, in POPE JOHN PAUL II ON THE GENIUS OF WOMEN 34, 35–36 (1997), quoted in ZAGANO, *supra* note 164, at 2. This theme has been echoed by the American Bishops. See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Strengthening the Bonds of Peace: A Pastoral Reflection on Women in the Church and in Society* (1994). While accepting the teaching that woman cannot be ordained as priests as something to “be definitively held by all the faithful,” the pastoral emphasizes the “need to look at alternative ways in which women can exercise leadership in the Church.” *Id.* In this vein, it discusses the importance of women having a voice in the governance of the Church through both “consultation and through cooperation in the exercise of authority.” *Id.*; see also NATIONAL CONFERENCE OF CATHOLIC BISHOPS COMMITTEE ON WOMEN IN SOCIETY AND IN THE CHURCH, *Continuing Reflections on the Role of Women in the Church* (1998) [hereinafter *Role of Women*] (expressing the goal of appointing women to church leadership positions and reminding that the Code of Canon Law “reserves only a few offices or ecclesiastical roles to the ordained”).

¹⁹⁹ See, e.g., Colleen McNicholas, *Overcoming Visible and Not So Visible Barriers to Women’s Leadership in the Roman Catholic Church in the United States*, FORUM ON PUBLIC POLICY ONLINE, Winter 2007, at 5–7, <http://www.forumonpublicpolicy.com/archive07/mcnicholas.pdf> (discussing a study that shows the prevalence of women in leadership roles); Denise Gellene, *Woman Gains a Role in Church, People’s Lives*, L.A. TIMES, Sept. 10, 2007, at B4; *Role of Women*, *supra* note 198.

²⁰⁰ See John L. Allen, Jr., *Sister Named to High-Level Vatican Post: Some See Appointment as Attempt To Open Doors to Women*, NAT’L CATHOLIC REP., May 7, 2004, at 9.

²⁰¹ See Daniel Williams, *U.S. Professor Becomes Top Female Vatican Adviser*, WASH. POST, Mar. 10, 2004, at A19.

not borne of excluding women from power.²⁰² Pope Benedict XVI's comments about women suggest an openness on his part to considering a greater role for women within the Church.²⁰³

Allowing women to serve in functions that the Church does not view to be foreclosed theologically may not be enough. But it is an important step if the Church is to convince secular feminists and others that its refusal to ordain is not a matter of a discriminatory view toward women. The argument here is not that women have a "right" to such positions; but rather that how the Church approaches this issue has an important signaling effect.²⁰⁴

CONCLUSION

I think a good argument can be made that secular feminism risks asking women to give up part of who they are. As one commentator lamented:

In the United States—and much of the Western world—women have always borne a disproportionate responsibility to embody moral precepts, and women have been noticeably more likely than men to practice the virtues of faith in everyday life. Today, feminism has taught us to view the practice of these virtues as work fit only for servants.²⁰⁵

There is a danger in that path.

On the other hand, secular feminism has a lot to contribute on matters of interest to Catholic feminists. Out of that belief grew my conviction that there would be benefit if an overlapping consensus could be forged between secular and Catholic feminist legal theorists.

²⁰² See ZAGANO, *supra* note 164 at 138–42. Conversely, “[u]nless the Catholic Church can show the world concrete models of male/female cooperation in positions of responsibility and decision-making, the church will continue to struggle against charges that it is chauvinistic.” *Church Must Show It Believes Women are Equal, Speakers Say in Rome*, THE TIDINGS, Dec. 22, 2006, available at http://www.the-tidings.com/2006/1222/newsbriefs_text.htm (citing comments of Mary Ann Glendon).

²⁰³ See, e.g., *Expert Says Pope Opened Way for Women*, ZENIT, May 16, 2007, <http://www.zenit.org/article-19648?l=english> (discussing Benedict's inaugural address at the bishop's general conferende in Aparecida).

²⁰⁴ For example, the opposition that is sometimes expressed to women serving as lectors or Extraordinary Ministers of Communion creates the same negative signaling.

²⁰⁵ Fox-Genovese, *supra* note 35, at 9.

With the aim of promoting dialogue between secular and Catholic legal feminists, I began this project with the hope that a discussion of the challenges identified here could demonstrate to secular feminists that the Church's position on these matters is not grounded in subordination of women. At the end of the day, however, I am pessimistic about the ability to accomplish that goal. For some secular feminists, nothing short of the willingness of Catholic feminists to "check their insistence on having hold of the deeper truths"²⁰⁶ will be enough. For others, the failure of the Church to ordain woman is a deal breaker. For still others the Church's opposition to homosexuality will doom any attempt to explain the Church's position on contraception and family in terms that do not denigrate women.

None of this is intended to suggest there is not value in articulating a Catholic Feminist Legal Theory. I remain convinced that Catholic thought has much to contribute to the analysis of issues of law and public policy. However, the ability of such a theory to speak to secular feminists and others suspicious of religion in general, and Catholicism in particular, may be limited.

²⁰⁶ Eva Feder Kittay, *Searching for an Overlapping Consensus: A Secular Care Ethics Feminist Responds to Religious Feminists*, 4 U. ST. THOMAS L.J. 468, 473 (2007).

