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## Motherhood and the Mission: What Catholic Law Schools Could Learn from Harvard about Women

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# MOTHERHOOD AND THE MISSION: WHAT CATHOLIC LAW SCHOOLS COULD LEARN FROM HARVARD ABOUT WOMEN

*Elizabeth R. Schiltz*<sup>+</sup>

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Family and work, so closely interdependent in the experience of the vast majority of people, deserve finally to be considered in a more realistic light, with an attention that seeks to understand them together, without the limits of a strictly private conception of the family or a strictly economic view of work. In this regard, it is necessary that businesses, professional organizations, labor unions and the State promote policies that, from an employment point of view, do not penalize but rather support the family nucleus.<sup>1</sup>

### I. INTRODUCTION

In January 2005, the president of Harvard University, Lawrence H. Summers, touched off a firestorm with remarks that he made at a conference on “diversifying the science and engineering workforce.”<sup>2</sup> A little more than a year later, President Summers announced his resignation, citing “rifts between me and segments of the Arts and Sciences faculty [that] make it infeasible for me to advance the agenda of renewal that I see as crucial to Harvard’s future.”<sup>3</sup> While not the only cause of the rift between President Summers and segments of his faculty, his remarks at this conference are widely acknowledged to have been a significant factor.<sup>4</sup> The part of his speech garnering the most outrage was his speculation about differences in innate aptitudes of men and women in the fields of science and math.<sup>5</sup>

What did not receive as much attention was the part of Summers’ remarks addressing another possible cause of the persistent underrepresentation of women in high-powered jobs in general—not only in

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1. PONTIFICAL COUNCIL FOR JUSTICE & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH para. 294 (2004).

2. Lawrence H. Summers, Remarks at National Bureau of Economic Research Conference on Diversifying the Science & Engineering Workforce (Jan. 14, 2005) (transcript available at <http://www.president.harvard.edu/speeches/2005/nber.html>).

3. Letter from Lawrence H. Summers, President, Harvard Univ., to the Harvard community (Feb. 21, 2006) (on file with author), available at [http://www.president.harvard.edu/speeches/2006/0221\\_summers.html](http://www.president.harvard.edu/speeches/2006/0221_summers.html).

4. See, e.g., Alan Finder, Patrick D. Healy & Kate Zernike, *President of Harvard Resigns, Ending Stormy 5-Year Tenure*, N.Y. TIMES, Feb. 22, 2006, at A1; Piper Fogg & Paul Fain, *Summers Says Faculty ‘Rancor’ Led Him to Quit Harvard Presidency, as Professors Wonder What Comes Next*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 22, 2006 (online edition) (on file with author).

5. This is the only part of his remarks noted in the press coverage of his resignation cited in the preceding footnote. Finder, Healy & Zernike, *supra* note 4; Fogg & Fain, *supra* note 4.

science and engineering, but also in business, law, medicine, and higher education. He said:

[T]he most prestigious activities in our society expect of people who are going to rise to leadership positions in their forties near total commitments to their work. They expect a large number of hours in the office, they expect a flexibility of schedules to respond to contingency, they expect a continuity of effort through the life cycle, and they expect—and this is harder to measure—but they expect that the mind is always working on the problems that are in the job, even when the job is not taking place. And it is a fact about our society that that is a level of commitment that a much higher fraction of married men have been historically prepared to make than of married women.<sup>6</sup>

In his speech, Summers speculated that this “general clash between people’s legitimate family desires and employers’ current desire for high power and high intensity” was a more significant cause of the underrepresentation of women in science and engineering than intrinsic differences in aptitude, socialization, or overt discrimination.<sup>7</sup> Summers proceeded to forcefully challenge his audience about the legitimacy of these social expectations. He asked:

[I]s our society right to expect that level of effort from people who hold the most prominent jobs? Is our society right to have familial arrangements in which women are asked to make that choice and asked more to make that choice than men? Is our society right to ask of anybody to have a prominent job at this level of intensity . . . [?]<sup>8</sup>

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6. Summers, *supra* note 2.

7. *Id.*

8. *Id.* In addition to this rather extraordinary challenge about fundamental social presumptions, President Summers identified a handful of issues related to the underrepresentation of women in the academy that were often the subject of speculation, but that he thought would be susceptible to rigorous analysis. Two of these were directly related to the social assumptions he urged his audience to challenge. One was the impact “of financial incentives and other support for child care [on] . . . people’s career patterns.” *Id.* Summers noted:

I’ve been struck at Harvard that there’s something unfortunate and ironic about the fact that if you’re a faculty member and you have a kid who’s 18 who goes to college, we in effect, through an interest-free loan, give you about \$9,000. If you have a six-year-old, we give you nothing. And I don’t think we’re very different from most other universities in this regard, but there is something odd about that strategic choice, if the goal is to recruit people to come to the university. But I don’t think we know much about the child care issue.

*Id.* The second was the impact of career interruptions on academic careers. He observed: We would like to believe that you can take a year off, or two years off, or three years off, or be half-time for five years, and it affects your productivity during the time, but that it really doesn’t have any fundamental effect on the career path. And a whole set of conclusions would follow from that in terms of flexible work arrangements and so

It is perhaps not surprising that the press and disaffected members of the Harvard community would focus exclusively on the more controversial aspects of Summers' remarks, but I think Catholic universities would be remiss to do the same. Catholic universities have a particular responsibility to consider seriously the more fundamental questions that Summers posed about "the general clash between people's legitimate family desires and employers' current desire for high power and high intensity,"<sup>9</sup> and how that clash impacts women faculty members. This special responsibility stems from their charge, as set forth in the *Apostolic Constitution Ex Corde Ecclesiae of the Supreme Pontiff John Paul II on Catholic Universities*, to be both the intellectual vehicle by which Catholic ideals are brought to bear on the pressing problems of our time and the practical model for an institution structured around these same Catholic ideals.<sup>10</sup>

The Catholic Church is one of the world's most forceful advocates for the need to preserve the family structure. In this advocacy, the Church has never shied away from emphasizing the particular responsibility and aptitude of mothers in performing much of the crucial work involved in preserving the family.<sup>11</sup> This has led the Church to advocate consistently for a social reevaluation of the traditionally unpaid and undervalued work of mothers in what is often characterized as the private sphere—the home.<sup>12</sup> At the same time, though, the Church has, especially in the past few decades, become increasingly emphatic about the crucial role that

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forth. And the question is, in what areas of academic life and in what ways is it actually true. . . . I think it's an area in which there's conviction but where it doesn't seem to me there's an enormous amount of evidence.

*Id.*

9. Summers, *supra* note 2.

10. JOHN PAUL II, APOSTOLIC CONSTITUTION EX CORDE ECCLESIAE OF THE SUPREME PONTIFF JOHN PAUL II ON CATHOLIC UNIVERSITIES para. 14 (1990) [hereinafter EX CORDE]. As the text states:

"[I]t is evident that besides the teaching, research and services common to all universities, a Catholic university, by *institutional commitment*, brings to its task the inspiration and light of the *Christian message*. In a Catholic university, therefore, Catholic ideals, attitudes and principles penetrate and inform university activities in accordance with the proper nature and autonomy of these activities. In a word, being both a university and Catholic, it must be both a community of scholars representing various branches of human knowledge, and an academic institution in which Catholicism is vitally present and operative."

*Id.* (quoting SECOND INT'L CONGRESS OF DELEGATES OF CATHOLIC UNIVS., THE CATHOLIC UNIVERSITY IN THE MODERN WORLD § 1 (1972)).

11. See, e.g., JOSEPH CARD. RATZINGER & ANGELO AMATO, LETTER TO THE BISHOPS OF THE CATHOLIC CHURCH ON THE COLLABORATION OF MEN AND WOMEN IN THE CHURCH AND IN THE WORLD § 13 (2004), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html) [hereinafter LETTER ON COLLABORATION].

12. See JOHN PAUL II, LABOREM EXERCENS, reprinted in THE PAPAL ENCYCLICALS 1958-1981, at 299, 318 (Claudia Carlen Ihm ed., 1981) [hereinafter LABOREM EXERCENS].

women must play in what is characterized as the public sphere—the private or governmental workplace, paid or volunteer.<sup>13</sup> The particular “genius” of women is something that the Church believes must be applied to the public sphere in order to transform culture to more fully reflect the fundamental truth about the human person—that every person is created in the image and likeness of God.<sup>14</sup> The need to facilitate expression of the feminine genius in the public, as well as the private, sphere has led the Church to advocate for reforms in the workplace to permit mothers to participate in the public sphere without neglecting their responsibilities toward their families.

The Catholic university’s charge both to model and to conceptualize the model for the application of Catholic ideals to contemporary social problems demands engagement with the practical consequences of the two aspects of Catholic thought set forth above and direct confrontation with the tension that they pose. In this Article, I argue that Catholic universities should be aggressive in adopting academic workplace reforms that support the continued participation of mothers. In making my arguments, I focus in particular on the responsibilities of Catholic law schools toward faculty members. I do so for a number of practical reasons: this is the sector of academia with which I am most familiar, which I am most likely to engage, and in which this Article is most likely to be read. However, my arguments and conclusions are, for the most part, applicable to Catholic universities in general and to all their employees.

In making my arguments, I also focus specifically on employees who are mothers, rather than fathers. Again, this focus is dictated largely by practical reasons. First, as I will demonstrate, parenthood has a far more significant impact on the careers of women than on the careers of men. Second, women, rather than men, are currently under-represented on law school faculties (indeed, in the public sphere in general); therefore, if this under-representation is a problem, the solution will require restructuring to accommodate the needs of women, not of men. Third, the Church’s recent teachings on the genius of women were prompted by the recognition that this genius has not been appreciated or properly valued by contemporary social structures. Much of my argument rests on sex-specific aptitudes that the Church argues have the potential for being developed more fully in women than in men. Nevertheless, many of my arguments and conclusions will apply to fathers and mothers, and I would argue that the proposals for restructuring the workplace that I endorse would benefit and should be made available to fathers as well as mothers.<sup>15</sup>

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13. LETTER ON COLLABORATION, *supra* note 11, para. 13.

14. See PONTIFICAL COUNCIL FOR JUSTICE & PEACE, *supra* note 1, para. 295.

15. Indeed, although this argument is beyond the scope of this Article, I believe that the Church’s concern for the preservation of the family will best be served by encouraging fathers, as well as mothers, to take seriously what President Summers so aptly character-

In Part II of this Article, I discuss the evidence that suggests that, at least in the United States, it is motherhood rather than gender that presents the largest barrier to participation in the public sphere. I will show that this is true in the workforce generally and in academia in particular, and I will suggest that the same is most likely true on law school faculties, including the faculties of Catholic law schools.

In Part III, I will explore Catholic teachings on the need for social revaluation of the crucial work of preserving families, a function that has traditionally and persistently been performed by women. I then address the teachings of the Church on the nature of the feminine genius, and why it is important that this genius find expression in the public and private spheres. I argue that the Church acknowledges the tension between these two areas of its teachings and calls for society to do the same by restructuring the workplace to help alleviate this tension.

In Part IV of this Article, I will discuss the growing acknowledgment in the academic world over the past few decades that the persistent underrepresentation of women in academia is largely due to incompatibility of motherhood with certain aspects of the traditional academic career path. I will also examine the accelerating calls for reform of the academic workplace to address this problem. I will conclude with an analysis of why Catholic law schools should be particularly open to adopting such proposals for reform.

## II. THE IMPACT OF MOTHERHOOD ON CAREER PROSPECTS IN ACADEMIA

In order to understand the particular situation of women in academia, it is helpful to understand the context of the conditions and legal framework applicable to working women in the United States. After providing this background, I will discuss the position of American women in academics, and in particular, female faculty in American law schools. Then, I will analyze what publicly available statistics show about the position of women faculty at Catholic law schools.

### A. *Women in the Workplace in the United States*

The position of women in the workplace in the United States, relative to the rest of the world, presents a curious paradox. On the one hand, we have some of the world's most favorable laws and a relatively hospitable social climate for full and equal access to the workforce by women. On the other hand, we have some of the world's *least* favorable laws and a relatively inhospitable social climate for full and equal access to the workforce by *women with children*.

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ized as "the general clash between people's legitimate family desires and employers' current desire for high power and high intensity." Summers, *supra* note 2.

The United States has relatively strong laws aimed at ensuring that women have equal access to the workforce.<sup>16</sup> American society is also marked by generous social attitudes toward women in all levels of the workforce.<sup>17</sup> By at least one measure, this combination of legal protection and social acceptance appears to be successful in procuring equal access to the workplace for women and men.<sup>18</sup> Salary differentials between men and women as they enter the workforce in the United States have been largely eradicated.<sup>19</sup> There is almost no wage gap between young women without children and men.<sup>20</sup> The former earn 98% of what the latter earn.<sup>21</sup>

The picture is not so rosy, however, when motherhood is factored in. The wage gap between *all* men and *all* women—including working mothers this time—is an astonishing 59%.<sup>22</sup> Even if part-time workers are not considered, a large wage gap remains: women working full-time, including working mothers, earn 77% of the wages of men working full-time.<sup>23</sup>

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16. See generally ANNE-MARIE MOONEY COTTER, *GENDER INJUSTICE: AN INTERNATIONAL COMPARATIVE ANALYSIS OF EQUALITY IN EMPLOYMENT* 155-68 (2004) (concluding that the standards of judicial review developed in the United States have been effective in addressing overt discrimination but still require work by the courts); see also JODY HEYMANN ET AL., *THE PROJECT ON GLOBAL WORKING FAMILIES, THE WORK, FAMILY, AND EQUITY INDEX: WHERE DOES THE UNITED STATES STAND GLOBALLY?* 1 (2004), available at <http://www.hsph.harvard.edu/globalworkingfamilies/images/report.pdf> (“When it comes to the right to work, the United States is well-situated, in the company of many other countries that ensure the equitable right to work across racial and ethnic groups, for men and women, regardless of age or disability.”).

17. Cf. Salma M. Al-Lamki, *Paradigm Shift: A Perspective on Omani Women in Management in the Sultanate of Oman*, *ADVANCING WOMEN IN LEADERSHIP* J., Spring 1999, available at <http://www.advancingwomen.com/awl/spring99/Al-Lamki/allamk.html> (“Although gradually changing among the more educated modern Arab/Islamic societies, conservative Arab societies hold traditional socio-cultural stereotypes and attitudes about the role of women. These conservative and traditional attitudes . . . portray women’s primary role as a wife and mother. Women are not necessarily looked upon as having the abilities and potential for developing professional careers. They are portrayed as being inferior to men, naturally emotional and unsuitable for leadership positions. Such conservative attitudes negate the concept of professional working women in traditional Arab societies . . . . This negative attitude and traditional stereotype towards women in Arab/Islamic societies has been, and still is, a major resisting force to progress for professional working women . . . .” (citation omitted)).

18. Cf. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 87 & 286 n.1 (2001) (citing calculations by economist June O’Neill, based on data from the National Longitudinal Survey of Youth, comparing the wages of men with the wages of women aged twenty-seven to thirty-three who never had children).

19. See *id.*

20. *Id.*

21. *Id.*

22. *Id.* at 93 (citing U.S. Census Bureau statistics showing that in 1999 the average earnings of all female workers were 59% of men’s earnings).

23. *Id.* The fact that working mothers work less than full-time is a significant factor in explaining the over-all wage gap between men and women. As one author notes:



Childless working women earn at least 20% more than working mothers.<sup>24</sup> By contrast, becoming a father seems to have no effect on wages, and may even have a positive effect on men's income.<sup>25</sup>

Although it is unlikely that the wage gap women suffer after having children can be simply explained by any one factor,<sup>26</sup> it would be irrational not to accord significant weight to the fact that working mothers in America receive relatively little institutional or social support for their obligations as parents.<sup>27</sup> It is not an exaggeration to claim that family-leave policies in the United States are among the least generous in the world. Let us begin with the most immediate form of support for working women who become mothers—maternity leave policies. Of the 168

Today, two out of three mothers are employed less than forty hours a week during the key years of career advancement—and eighty-five percent of women become mothers. In an economy where many of the best jobs (blue as well as white collar) require overtime, overtime work among mothers is rare: ninety-two percent work less than fifty hours a week.

Joan Williams, *"It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 828-29 (2002) (footnote omitted).

24. CRITTENDEN, *supra* note 18, at 90; *see also* JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* 36, 45-48 (2003) (documenting inequalities in employment and earnings experienced by mothers relative to both men and childless women); SYLVIA ANN HEWLETT, *CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN* 140-41 (2002) (describing similar inequalities); Williams, *supra* note 23, at 827 (citing work of economist Jane Waldfogel documenting the same wage gaps); *cf.* Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 103 (2002) (demonstrating poverty rates by family type). There are countries where the wage gap between working mothers and childless working women is not as pronounced as it is in the United States, and other countries where it is more pronounced. *See, e.g.*, CRITTENDEN, *supra* note 18, at 90 (claiming that "[t]he earnings differential between working mothers and childless working women in France is about 8 to 10 percent, compared with at least 20 percent in the United States and 50 percent in Great Britain and Germany"); *see also* GORNICK & MEYERS, *supra*, at 63 (documenting similar findings with respect to women's part-time wages).

25. HEWLETT, *supra* note 24, at 140-41 (citing LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER OFF FINANCIALLY* 99 (2000)) (suggesting the existence of a "family premium" for men's wages, with married men with children out-earning other men by 10-40%); *see also* GORNICK & MEYERS, *supra* note 24, at 47-48. *But see* CRITTENDEN, *supra* note 18, at 99 (citing Tamar Lewin, *Men Whose Wives Work Earn Less*, *Studies Show*, N.Y. TIMES, Oct. 12, 1994, at A1) (suggesting that having a working wife depresses male incomes by almost 20%).

26. *See generally* WARREN FARRELL, *WHY MEN EARN MORE* (2005) (arguing that the wage gap between men and women cannot be understood without considering at least twenty-five separate factors).

27. Of course, this lack of support applies to working fathers as well as working mothers. However, it is still the case in the United States that mothers—working or not—assume significantly more caregiving responsibilities than fathers. *See* GORNICK & MEYERS, *supra* note 24, at 34-36. Since motherhood, rather than fatherhood, results in the demonstrable wage disparities noted above, this Article will focus on working mothers. *See supra* notes 22-25 and accompanying text.

countries included in a 2004 study by The Project on Global Working Families at the Harvard School of Public Health, the United States is identified as one of only five countries that guarantee absolutely no paid maternity leave to working women.<sup>28</sup> The other four are Australia, Lesotho, Papua New Guinea, and Swaziland.<sup>29</sup> Australia, the only other industrialized country on this list, provides at least one year's *unpaid* leave in connection with childbirth.<sup>30</sup> In contrast, the Family and Medical Leave Act (FMLA)<sup>31</sup> requires only public employers and certain private employers (those with more than fifty workers) to offer employees who have been with them for at least twelve months a number of benefits, including: twelve weeks of *unpaid* leave for new mothers, continued health-care coverage during this unpaid leave, and a guaranteed return to their previous job or an equivalent position.<sup>32</sup> Some states have enacted laws that provide more coverage than the FMLA; for example, some states require a broader range of employers to offer unpaid maternity leave, and some states require leave of more than twelve weeks.<sup>33</sup> The FMLA applies only to a limited number of working mothers—perhaps less than half<sup>34</sup>—and women with greater needs are less likely to be cov-

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28. HEYMAN ET AL., THE PROJECT ON GLOBAL WORKING FAMILIES, *supra* note 16, at 23.

29. *Id.* at 23-24.

30. *Id.* at 23.

31. Family and Medical Leave Act of 1993, 29 U.S.C.A. §§ 2601-2654 (West 2000 & Supp. 2006).

32. 29 U.S.C. §§ 2611(2)(a), 2612(a)(1), 2612(c), 2614(a)(1), 2614(c)(1) (2000).

33. GORNICK & MEYERS, *supra* note 24, at 115. State laws reaching more employers include, for example, ME. REV. STAT. ANN. tit. 26, § 844(1) (Supp. 2005) (covering employers with fifteen or more employees); MASS. GEN. LAWS ANN. ch. 149, § 105D (West 2000) (including employers with six or more employees); MINN. STAT. ANN. § 181.940 (West 2006) (including employers employing twenty-one or more employees); OR. REV. STAT. § 659A.153(1) (2005) (applying to employers of twenty-five or more employees); VT. STAT. ANN. tit. 21, § 471(1) (1998) (including employers of ten or more employees for parental leave, and employers of fifteen or more employees for family leave). State laws extending the period of leave include, for example, CONN. GEN. STAT. ANN. § 5-248a (West Supp. 2006) (providing a maximum of twenty-four weeks within two-year period upon birth or adoption of a child); OR. REV. STAT. § 659A.162(2)(a) (providing that in addition to twelve weeks of maternity leave, twelve weeks of family leave may be taken in any one-year period); R.I. GEN. LAWS § 28-48-2(a) (2003 & Supp. 2006) (providing employees with leave of up to thirteen consecutive work weeks in any two calendar years); TENN. CODE ANN. § 4-21-408(a) (2005 & Supp. 2006) (providing leave for a period of four months). See generally STEVEN K. WISENSALE, FAMILY LEAVE POLICY 123-32 (2001) (summarizing such provisions in seventeen states).

34. Indeed, one study reports that only 44% of female workers and 52% of male workers in the United States are employed in jobs covered by the FMLA. ROBERTA M. SPALTER-ROTH & HEIDI I. HARTMANN, INST. FOR WOMEN'S POLICY RESEARCH, UNNECESSARY LOSSES: COST TO AMERICANS OF THE LACK OF FAMILY AND MEDICAL LEAVE 44 tbl.18 (1990); see also GORNICK & MEYERS, *supra* note 24, at 177-78 (concluding that more than 40% of the American private sector workforce is not covered by the

ered.<sup>35</sup> The working poor<sup>36</sup> are the least likely to have jobs with employers who are covered by the FMLA; moreover, those fortunate enough to be covered are unlikely to be able to afford to take a significant amount of leave without pay.<sup>37</sup>

Paid maternity leave in the United States is generally available only at the discretion of the employer.<sup>38</sup> Under the Pregnancy Discrimination Act (PDA) of 1978,<sup>39</sup> public and private employers who choose to offer disability benefits must extend those benefits to employees for pregnancy, childbirth, and pregnancy-related medical conditions.<sup>40</sup> In addition, five states—California, Hawaii, New Jersey, New York, and Rhode Island—have enacted laws providing financial support for workers who become unable to work because of short-term disability.<sup>41</sup> Under the PDA, these benefits must also be extended for pregnancy and childbirth.<sup>42</sup>

This limited right of only a small percentage of relatively privileged American women to any maternity leave, let alone paid maternity leave, contrasts sharply with policies in most other countries, which guarantee

FMLA, and that more than 20% of those covered are ineligible to take advantage of the protections because they do not satisfy the work history prerequisites).

35. GORNICK & MEYERS, *supra* note 24, at 118.

36. Another issue beyond the scope of this Article is the lack of generosity toward mothers and children evinced by social welfare policies in the United States. As Carol Sanger explains:

There is a general consensus, as reflected in recent welfare legislation at state and federal levels, that poor mothers should—indeed must—leave their children to work and that the question of where or with whom these mothers leave their children is a matter for them to solve on their own. It simply matters less what becomes of poor children than that their mothers work.

Carol Sanger, *Leaving Children for Work*, in MOTHER TROUBLES: RETHINKING CONTEMPORARY MATERNAL DILEMMAS 97, 103 (Julia E. Hanigsberg & Sara Ruddick eds., 1999); see also Sheila B. Kamerman, *Parental Leave Policies: An Essential Ingredient in Early Childhood Education and Care Policies*, SOC. POL'Y REP., 2000, at 3 (describing welfare reforms that generally compel poor mothers to accept jobs before their baby reaches one year of age); cf. THOMAS MASSARO, CATHOLIC SOCIAL TEACHING AND UNITED STATES WELFARE REFORM 101 (1998) (describing generally how 1996 welfare policy reforms will impact welfare recipients, including mothers).

37. GORNICK & MEYERS, *supra* note 24, at 118-19. See generally DAVID K. SHIPLER, THE WORKING POOR (2004).

38. See GORNICK & MEYERS, *supra* note 24, at 117. Gornick and Meyers report that approximately “43% of women who were employed during their pregnancies received any paid leave during the first twelve weeks after childbirth.” *Id.* (citing KRISTEN SMITH, BARBARA DOWNS & MARTIN O’CONNELL, U.S. DEP’T OF COMMERCE, MATERNITY LEAVE AND EMPLOYMENT PATTERNS: 1961-1995, at 10-11 & tbl.F (2001)).

39. Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2000)).

40. See *id.*

41. GORNICK & MEYERS, *supra* note 24, at 113. These five states have about one quarter of the country’s population. *Id.* at 117.

42. See 42 U.S.C. § 2000e(k).

at least some paid maternity leave to all women.<sup>43</sup> The contrast is sharpest with respect to other industrialized countries. For example, the European Union (EU) requires its member nations to provide at least fourteen weeks of paid maternity leave and a three-month parental leave.<sup>44</sup> Many EU countries have enacted significantly more generous provisions, such as Sweden's eighteen-month, job-protected parental leave, the first year of which is generally paid at 80% of wages.<sup>45</sup>

The FMLA provides some limited support for working mothers beyond the immediate time after childbirth. Eligible employees are entitled to twelve weeks of unpaid leave per year to care for seriously ill family members.<sup>46</sup> In addition, a handful of states are more generous in this regard—guaranteeing the right to leave to attend to family members' non-emergency medical appointments or school activities.<sup>47</sup> Again, this contrasts sharply with more generous policies in many other countries. At least thirty-seven countries guarantee parents some paid leave for attending to ill children, and many other countries guarantee discretionary paid leave that can be used for the same purpose.<sup>48</sup>

In summary, while women in the United States benefit from fairly strong and effective laws and social conditions that provide equal access to the workplace, they do not receive much institutional support for mothering once they are in the workplace.<sup>49</sup> The consequences of this lack of support are evident in the glaring disparities in wages of women who are mothers compared to women who are not mothers, and in working mothers compared to working fathers.<sup>50</sup>

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43. HEYMANN ET AL., THE PROJECT ON GLOBAL WORKING FAMILIES, *supra* note 16, at 23-24. Other comparisons of America's maternity leave policies with those in other nations can be found in SHEILA B. KAMERMAN & ALFRED J. KAHN, STARTING RIGHT: HOW AMERICA NEGLECTS ITS YOUNGEST CHILDREN AND WHAT WE CAN DO ABOUT IT 23-24 (1995); *see also* GORNICK & MEYERS, *supra* note 24, at 121-33 (discussing leave policies in other countries).

44. Kamerman, *supra* note 36, at 7.

45. *Id.* at 10. Sweden's law also provides the option of working 75% time, for 75% of wages, as long as the parent has a child under the age of eight. *Id.*

46. 29 U.S.C. § 2612(a)(1)(c) (2000).

47. GORNICK & MEYERS, *supra* note 24, at 115. Examples of state laws guaranteeing the right to leave work for non-emergency medical appointments and school activities include, for example, MASS. GEN. LAWS ANN. ch. 149, § 52D(b) (West 2004) (providing an additional twenty-four hours of leave for school activities and medical appointments of children or elderly relatives); MINN. STAT. ANN. § 181.9412 (West 2006) (allowing up to sixteen hours leave for parents to attend school conferences and activities).

48. HEYMANN ET AL., THE PROJECT ON GLOBAL WORKING FAMILIES, *supra* note 16, at 33; *see also* GORNICK & MEYERS, *supra* note 24, at 130-33; KAMERMAN & KAHN, *supra* note 43, at 84-85.

49. Compare *supra* notes 16-21 and accompanying text (discussing women's equal access to the workplace), with GORNICK & MEYERS, *supra* note 24, at 118-19 (discussing the absence of any guarantee of wage replacement under the FMLA).

50. See *supra* notes 22-25 and accompanying text.

### B. Mothers in Academia

Relative to most American working mothers, women employed in academia have many significant advantages. They almost certainly have access to most of the statutory family leave benefits provided by American law, as inadequate as those benefits may be. Educational institutions are unlikely to be exempt from the requirements of the FMLA; they are typically public institutions or private institutions with over fifty employees.<sup>51</sup> Furthermore, academics are privileged with a rare luxury in the workplace—significant independence and a fairly high degree of flexibility in the daily schedule, which can facilitate dealing with family emergencies.<sup>52</sup> At the same time, the academic profession is extremely competitive and demanding. One study concludes that “faculty members at research universities spend about fifty-seven hours a week working on professional duties.”<sup>53</sup> Professional advancement often requires that this work be done late at night, on weekends, or at academic conferences away from home.<sup>54</sup> Most significant for working mothers, though, is the fact that the most prestigious jobs in the legal academy—tenured positions—are typically only attainable through intense, sustained productivity at work during the first years of one’s career.<sup>55</sup> These years typically coincide with the years in which a woman is most likely to be bearing and raising children.<sup>56</sup>

As is true in the global workplace, women in academia continue to be less successful than men in achieving the conventional indicia of success:

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51. GORNICK & MEYERS, *supra* note 24, at 114 (explaining applicability and requirements of FMLA).

52. As law professor Joan Williams reminds us:

[W]omen as work-identified as the typical law professor need to remember that we have it easy: We have had access to jobs that are highly-paid, high-status, and extraordinarily flexible (at least after tenure). We do not have jobs where, once we are at work, we cannot even make a phone call to check whether our kids, at home alone, are okay—as is true of many low-income women. Nor do we have jobs where the “full-time” option requires working such long hours of overtime that we rarely see our children awake, as is the case with many blue-collar workers in unionized factory jobs and many practicing professionals.

Moreover, few tenured law professors face the depressing interaction most women face: the demoralizing combination of inadequate child care, a flawed system for delivering child services, and exploitative conditions on the job.

Williams, *supra* note 23, at 831 (footnotes omitted).

53. OFFICE OF WOMEN IN HIGHER EDUC., AM. COUNCIL ON EDUC., AN AGENDA FOR EXCELLENCE: CREATING FLEXIBILITY IN TENURE-TRACK FACULTY CAREERS 6 (2004); see also Joan Williams, *What Stymies Women’s Academic Careers? It’s Personal*, CHRON. REV., Dec. 15, 2000, at B10 (stating that “ambitious academics generally work not only full-time but overtime—often 10- to 14-hour days”).

54. See Williams, *supra* note 53.

55. *Id.*

56. OFFICE OF WOMEN IN HIGHER EDUC., AM. COUNCIL ON EDUC., *supra* note 53, at 5.

higher pay, tenure, and chaired positions. Working mothers are even less successful than childless women. A recent analysis of data collected by the National Center for Education Statistics from 1975 through 1998 reveals that, while the number of women faculty in higher education has grown, the gap between the percentage of men faculty with tenure (approximately 65%) and the percentage of women faculty with tenure (approximately 45%) has not changed significantly during that period.<sup>57</sup> Moreover, the gender gap in salaries of full-time faculty during the last thirty years has actually increased.<sup>58</sup>

A notable development in the academic world—the increase in “non-ladder-rank” faculty such as lecturers, adjuncts, and part-time faculty—reflects another increasing gender gap.<sup>59</sup> This “is the fastest growing segment in higher education.”<sup>60</sup> One study has concluded that “more than 50% of all undergraduate courses are now taught by non-ladder-rank instructors.”<sup>61</sup> This sector of academia, which typically pays less and provides less job security than the tenure-track sector, is disproportionately comprised of women.<sup>62</sup>

The evidence suggests that having children adversely affects women academics’ prospects of securing tenure. A recent analysis of data from 1973 to 1999 reveals similar findings throughout the sciences, the social sciences, and the humanities.<sup>63</sup> Having a baby within five years after completing a Ph.D. adversely affects the mother’s chances of obtaining tenure twelve to fourteen years after completing the Ph.D.<sup>64</sup> The gap in tenure achievement between men who have early babies and women who have early babies is 24% in the sciences and nearly 20% in humanities and the social sciences.<sup>65</sup> In contrast, “men who have early babies achieve tenure at slightly higher rates than people who do not have early babies.”<sup>66</sup> Women who have babies more than five years after obtaining their Ph.D.’s do not appear to suffer any negative consequences.<sup>67</sup>

Looking at the data from another perspective, women in academia who have tenure are unlikely to have children at all. The same study found that twelve to fourteen years after receiving their Ph.D.s, 62% of tenured

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57. See Mary Ann Mason & Marc Goulden, *Do Babies Matter? The Effect of Family Formation on the Lifelong Careers of Academic Men and Women*, *ACADEME*, Nov.-Dec. 2002, at 21, 23.

58. *Id.*

59. *Id.* at 22.

60. *Id.*

61. *Id.*

62. *Id.* at 22, 27.

63. *Id.* at 24.

64. *See id.*

65. *Id.*

66. *Id.*

67. *Id.*

women in the humanities and 50% of tenured women in the sciences have no children.<sup>68</sup> These numbers mirror the proportion of women without children in other professional fields.<sup>69</sup> However, these proportions stand in rather striking contrast to the general population; one analysis of United States census data indicates that 80-86% of women will bear at least one child by the age of forty-four.<sup>70</sup> As Mason and Goulden point out:

[I]t is the unbending nature of the American workplace, configured around a male career model established in the nineteenth century, that forces women to make choices between work and family. Rather than a thousand paper cuts [of explicit discrimination], it is the sixty-hour work weeks and the required travel that force women with children to leave professions, including academia. Because the academic job market demands that workers relocate for their jobs, women with families face an additional difficulty. . . . [M]ost women do not get as far as reaching tenure at MIT, but take a different route earlier. . . . [A]t MIT, only seven of sixteen tenured women professors had children in 2000, suggesting that most women scientists who have children do not make it that far.<sup>71</sup>

### C. Women Faculty at Law Schools

Recent analyses of data on gender ratios of law school faculties demonstrate that law schools do not differ substantially from the rest of academia.<sup>72</sup> Women continue to constitute a minority of law school faculty on

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68. *Id.* at 25. Another study found that 50% of all women in academia are childless, "with only 15% having three or more children, as compared to 33% of men" in academia. Regina M. Watkins, Margie Herrin & Lonnie R. McDonald, *The Juxtaposition of Career & Family: A Dilemma for Professional Women*, *ADVANCING WOMEN IN LEADERSHIP J.*, Winter 1998, available at [http://www.advancingwomen.com/awl/winter98/awlv2\\_watkins5.html](http://www.advancingwomen.com/awl/winter98/awlv2_watkins5.html); see also Sharon Rabin Margalioth, *Women, Careers, Babies: An Issue of Time or Timing?* 13 *UCLA WOMEN'S L.J.* 293, 304 (2005).

69. Studies in recent years have reported that 61% of female managers, 36% of women in corporate leadership, and 50% of women working on Wall Street were childless. Margalioth, *supra* note 68, at 304-05.

70. The range of this statistic reflects differences among ethnic groups. The percentage is 80.5% for white, non-Hispanic women, 83% for African-American and Asian-American women, and 85.5% of Hispanic women. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *COLUM. L. REV.* 181, 196 (2001).

71. Mason & Goulden, *supra* note 57, at 23.

72. Professors Deborah Jones Merritt and Barbara Reskin have extensively analyzed a database of professors hired by accredited U.S. law schools between fall 1986 and spring 1991. The database was drawn primarily from the *Directory of Law Teachers*, which is a directory published each year by the Association of American Law Schools (AALS), supplemented by responses to a survey conducted by the authors in 1991. Deborah J. Merritt, Barbara F. Reskin & Michelle Fondell, *Family, Place, and Career: The Gender Paradox in*

the conventional, doctrinal tenure track, but they constitute an increasing majority of law school faculty teaching skills or clinical courses. According to an analysis of the data from the 2002-03 edition of the *Directory of Law Teachers* published by the Association of American Law Schools (AALS), women constitute 25% of full professors, 47% of associate professors, 50% of assistant professors, and 67% of lecturers and instructors.<sup>73</sup> If teachers whose job titles indicate that they are clinical or legal writing professors are not considered, the numbers are even worse: women constitute 23% of full professors, 43% of associate professors, 44% of assistant professors, 62% of clinical or legal writing professors, and 67% of lecturers and instructors.<sup>74</sup>

Despite the fact that law school enrollment is approaching equality in gender composition,<sup>75</sup> the percentage of women being hired by law schools seems to be holding steady for the past two decades at roughly 35% of all hires.<sup>76</sup> Moreover, women are hired at lower ranks than

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*Law School Hiring*, 1993 WIS. L. REV. 395, 398-400 (1993). The data was further analyzed in a series of articles. See, e.g., Deborah Jones Merritt, *Are Women Stuck on the Academic Ladder?*, 10 UCLA WOMEN'S L.J. 241, 241-42 (2000); Deborah Jones Merritt, *Are Women Stuck on the Academic Ladder? An Empirical Perspective*, 10 UCLA WOMEN'S L.J. 249 (2000) [hereinafter Merritt, *Empirical Perspective*]; Deborah Jones Merritt, *The Status of Women on Law School Faculties: Recent Trends in Hiring*, 1995 U. ILL. L. REV. 93 (1995); Deborah Jones Merritt & Barbara F. Reskin, *New Directions for Women in the Legal Academy*, 53 J. LEGAL EDUC. 489, 489 (2003); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 206-30 (1997) [hereinafter Merritt & Reskin, *Sex, Race, and Credentials*]. Another analysis of similar data shows that women are more likely than men to take non-tenure-track positions, although this gender difference disappears when the data is controlled for geographic constraints placed on job searches. Merritt, *Empirical Perspective*, *supra*, at 250. More recently, in 2000, Professor Richard Neumann analyzed similar data from AALS directories from 1996-1997 through 1998-1999 and updated that analysis in 2004. Richard K. Neumann Jr., *Women in Legal Education: A Statistical Update*, 73 UMKC L. REV. 419, 419-20 (2004) [hereinafter Neumann, *Statistical Update*]; Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 313 (2000) [hereinafter Neumann, *What the Statistics Show*].

73. Neumann, *Statistical Update*, *supra* note 72, at 425-26.

74. *Id.* at 428.

75. According to the American Bar Association Commission on Women in the Profession, as of the fall of 2004, women comprise 48% of the student body nationwide. Michelle Lore, *Law School Students Are Half Women, But Faculty Still Lags Behind*, MINN. LAWYER, Mar. 20, 2006, at 17.

76. In the 1980s, this number was proportional to the number of female graduates from law school overall. Merritt and Reskin found that the average percentage of women in the graduating classes between 1986 and 1991 was 35.38%, and the average percentage of women hired in tenure-track positions was 37%. Merritt & Reskin, *Sex, Race and Credentials*, *supra* note 72, at 233-34 & tbl.2. Since then, the percentage of women graduating from law school has increased to 48% in 2002, while the percentage of women hired into tenure-track positions has remained relatively stable. See Neumann, *Statistical Update*, *supra* note 72, at 434-35. Neumann notes that the number of female applicants for law school faculty positions, at least through the AALS Faculty Appointments Register,



equally credentialed men; women are more likely to enter teaching as assistant professors rather than as associate or full professors.<sup>77</sup> In one study of law professors, men were more successful than women in moving up the promotion ladder; men were less likely than women to have left teaching<sup>78</sup> and more likely than women to have attained the rank of full professor or to hold a chair.<sup>79</sup>

There is little, if any, research on the effect of having children on the professional advancement of law professors, such as that conducted on academics in humanities and the sciences. However, since the gender ratios of law school faculties so closely replicate those of academia in general,<sup>80</sup> and since the tenure-based model of career progression is the same,<sup>81</sup> it is fair to assume that childbearing has a similarly negative effect on the career prospects of women in law schools.

#### D. Women Faculty at Catholic Law Schools

There has not been any published statistical analysis of the gender composition of Catholic law school faculties. Comparing the *Directory of Law Teachers* data on the gender composition of the faculty at Catholic law schools with the results of Professor Richard Neumann's recent analysis of the gender composition of all law schools in the directory reveals no apparent differences in the numbers.<sup>82</sup> As demonstrated by the

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peaked at 37% from 1995 to 1998, and has since dropped to 30% (2000-01) and 33% (2001-02). *Id.* He speculates that this may be related to the fact that most of the thirteen law schools that historically produce the highest percentage of law professors have smaller percentages of women in their student bodies and on their faculties than do most law schools. *Id.* at 436-41.

77. Merritt & Reskin, *Sex, Race, and Credentials*, *supra* note 72, at 252; Neumann, *Statistical Update*, *supra* note 72, at 435; Neumann, *What the Statistics Show*, *supra* note 72, at 340-41.

78. By 1998, the percentage of professors who had left teaching after being on the tenure track was: white men, 22.3%; white women, 26.5%; men of color, 28.6%; and women of color, 32.9%. Merritt, *Empirical Perspective*, *supra* note 72, at 252.

79. By 1998, 73.1% of the white males still teaching were full professors, while only 62.9% of the minority males, 67.8% of the white women, and 50.9% of the minority women had reached that rank. Merritt, *Empirical Perspective*, *supra* note 72, at 253. Men were more than twice as likely as women to hold chairs—12.4% of the white men, as compared to 6.7% of the white women, and 7.1% of the men of color, as opposed to 3.5% of the women of color. *Id.*

80. See *supra* note 72 and accompanying text.

81. See Neumann, *Statistical Update*, *supra* note 72, at 429-31.

82. To compile these tables, the numbers of men and women listed in the AALS *Directory of Law Teachers* were counted for each of the relevant years. See *supra* note 72. The list of Catholic law schools was based on the list in John J. Fitzgerald, *Today's Catholic Law Schools in Theory and Practice: Are We Preserving Our Identity?*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 245, 247 n.8 (2001). The following are identified as Catholic law schools: Ave Maria School of Law, Barry University Law School, Boston College Law School, The Catholic University of America Columbus School of Law, Creighton Univer-

tables below, Catholic law schools have approximately the same number of female deans, associate deans, assistant deans, full professors, associate professors, and assistant professors as do the rest of America's law schools.<sup>83</sup>

Female Percentages of All Full-time Faculty, According to Rank					
	All Schools, 2002-2003 <sup>84</sup>	Catholic Schools, 2002-2003	Catholic Schools, 2003-2004	Catholic Schools, 2004-2005	Catholic Schools, 2005-2006
Full Professors	25% 1179 of 4681	13.3% 106 of 794	25.3% 202 of 799	25.8% 206 of 799	27.3% 226 of 827
Associate Professors	47% 558 of 1191	49.4% 116 of 235	53.3% 129 of 242	52.3% 135 of 258	50.0% 123 of 246

sity School of Law, University of Dayton School of Law, DePaul University College of Law, University of Detroit Mercy School of Law, Duquesne University School of Law, Fordham University School of Law, Georgetown University Law Center, Gonzaga University School of Law, Loyola Law School at Loyola Marymount University, Loyola University Chicago School of Law, Loyola University New Orleans School of Law, Marquette University Law School, Notre Dame Law School, Pontifical Catholic University of Puerto Rico, Saint Louis University School of Law, University of San Diego School of Law, University of San Francisco School of Law, Santa Clara University School of Law, Seattle University School of Law, Seton Hall University School of Law, St. John's University School of Law, St. Mary's University School of Law, St. Thomas University School of Law (Florida), University of St. Thomas School of Law (Minnesota), and Villanova University School of Law. *Id.*

83. One divergence that is striking is the increasing percentage of female clinical and legal writing professors, lecturers, and instructors in more recent years, as compared to the baseline for all schools in 2002-2003. The percentage in 2002-2003 for Catholic schools is similar to the baseline, but the gap grows as the years progress. This is not the case in any other category. Because comparable baseline data is unavailable for other years, it is unknown if this reflects a difference with respect to Catholic law schools or reflects a trend that would be played out in secular law schools. The latter explanation appears most plausible, based on the documented stability of the percentage of women faculty hired by law schools generally over the past few decades. *See supra* note 76 and accompanying text. Academia, in general, experienced a documented increase in hiring of non-tenure-track faculty. *See supra* notes 61-62 and accompanying text.

84. Neumann, *Statistical Update*, *supra* note 72, at 426 tbl.4.

Female Percentages of All Full-time Faculty, According to Rank					
Assistant Professors	50%	50.3%	50.0%	55.2%	54.8%
	378 of 755	79 of 157	80 of 160	95 of 172	80 of 146
Lecturers and Instructors	67%	70.3%	71.4%	78.2%	77.8%
	406 of 610	45 of 64	45 of 63	43 of 55	42 of 54

Female Percentages of All Full-time Faculty, According to Rank, with Skills Job Titles Separated					
	All Schools, 2002-2003 <sup>85</sup>	Catholic Schools, 2002-2003	Catholic Schools, 2003-2004	Catholic Schools, 2004-2005	Catholic Schools, 2005-2006
Full Professors	23% 1031 of 4417	23.2% 175 of 755	23.2% 178 of 766	23.8% 182 of 765	24.9% 197 of 790
Associate Professors	43% 417 of 974	45.8% 87 of 190	52.7% 97 of 184	47.6% 98 of 206	46.2% 97 of 210
Assistant Professors	44% 249 of 562	45.9% 62 of 135	42.7% 56 of 131	47.4% 63 of 133	45.1% 51 of 113
Clinical or Legal Writing Professors	62% 418 of 674	63.2% 67 of 106	67.5% 81 of 120	74.4% 93 of 125	76.8% 86 of 112
Lecturers and Instructors	67% 406 of 610	70.3% 45 of 64	71.4% 45 of 63	78.2% 43 of 55	77.8% 42 of 54

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85. *Id.* at 428 tbl. 5.

Female Percentages of Deans, According to Rank					
	All Schools, 2002-2003 <sup>86</sup>	Catholic Schools, 2002-2003	Catholic Schools, 2003-2004	Catholic Schools, 2004-2005	Catholic Schools, 2005-2006
Law School Deans	16% 29 of 187	17.2% 5 of 29	13.8% 4 of 29	13.8% 4 of 29	13.8% 4 of 29
Associate Deans with Professorial Titles	29% 82 of 285	36.9% 17 of 46	26.7% 12 of 45	28.9% 13 of 45	28.3% 13 of 46
Associate Deans without Professorial Titles	58% 103 of 179	63.2% 12 of 19	58.8% 10 of 17	52.6% 10 of 19	55.0% 11 of 20
Assistant Deans	69% 316 of 457	69.2% 63 of 91	69.3% 61 of 88	70.9% 61 of 86	68.7% 68 of 99

These compilations show that the gender composition of the faculty at Catholic law schools is essentially the same as the gender composition of faculty at all law schools.<sup>87</sup> These statistics do not suggest any self-selection by the population of law professors at Catholic law schools, any discrimination for or against women by Catholic law schools, or anything about Catholic law schools that makes them particularly attractive or unattractive to women. It is reasonable to assume that the similarity between gender statistics at Catholic law schools and the national averages reflects the fact that Catholic law schools are indistinguishable from non-Catholic law schools in most respects,<sup>88</sup> including workplace structures

86. *Id.* at 424 tbl. 3.

87. See Neumann, *What the Statistics Show*, *supra* note 72, at 334-35 & tbl.14.

88. See JAMES TUNSTEAD BURTCHAELL, *THE DYING OF THE LIGHT: THE DISENGAGEMENT OF COLLEGES AND UNIVERSITIES FROM THEIR CHRISTIAN CHURCHES* 828-33 (1998) (describing the process by which religiously-affiliated universities in the United States generally ceased to consider religious identity in hiring faculty); *cf.* Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 *STAN. L. REV.* 1859, 1859, 1864 & n.18 (1993) (asserting that almost all religiously-affiliated law schools in the United States are functionally secular).

that affect both childless women and mothers. The next question is whether, given the teachings of the Catholic church on families and women, Catholic law schools *should* look different from other law schools in those respects.

### III. CATHOLIC TEACHINGS ON MOTHERS IN THE WORKPLACE

Despite the popular characterization of the Catholic Church as hostile toward women,<sup>89</sup> a careful reading of Church teachings on social issues, family, and women reveals a consistent record of support for many significant issues on the secular<sup>90</sup> feminist agenda, as well as a substantial body of work supporting some of the theoretical arguments made by many secular feminists in support of that agenda.<sup>91</sup> Unfortunately, the Catholic Church's emphatic rejection of the strand of feminism that refutes the legitimacy of any gender-based distinctions,<sup>92</sup> as well as the Church's continued opposition to contraception, abortion, and the ordination of women,<sup>93</sup> has obscured a fair consideration of the truly revolu-

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89. See Jean Bethke Elshtain, *Ethical Equality in a New Feminism*, in *WOMEN IN CHRIST: TOWARD A NEW FEMINISM* 285, 292 (Michele M. Schumacher ed., 2004) (noting that Pope John Paul II was the target of feminist protest since the beginning of his papacy). This was recently illustrated in the newspaper headlines describing a letter from Cardinal Ratzinger discussing the dignity and rights of women in society and in the Church. LETTER ON COLLABORATION, *supra* note 11. Although this letter evidences respect for working mothers, the headline of an article about the letter in my local newspaper read: "Vatican Issues Another Anti-Feminism Pamphlet." See Frances D'Emilio, *Vatican Issues Another Anti-Feminism Pamphlet*, MINNEAPOLIS STAR TRIB., Aug. 1, 2004, at A10.

90. I use the term "secular" to describe theories found in feminist literature that do not explicitly rely on religious teachings or beliefs for support, as well as feminists who do not explicitly refer to religious teachings in setting forth their arguments.

91. For an excellent discussion of the philosophical and theological basis of Pope John Paul II's "new feminism," see Prudence Allen, *Philosophy of Relation in John Paul II's New Feminism*, in *WOMEN IN CHRIST*, *supra* note 89, at 67.

92. See Elshtain, *supra* note 89, at 292-93 (describing "[t]he dominant feminist project" as being based on conviction "that there is no distinction to be marked between male and female for the purpose of distribution of any good or goods"); Elizabeth Fox-Genovese, *Catholic and Feminist: Can One Be Both?*, 2 *LOGOS* 11, 11-12, 20-21 (1999) (describing how the suggestion of any significant differences between men and women has become increasingly an anathema in many feminist circles).

93. See, e.g., Leslie Griffin, *Citizen-Soldiers Are Like Priests: Feminism in Law and Theology*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 194 (Michael W. McConnell et al. eds., 2001) (suggesting that feminism cannot advance in the Catholic Church absent ordination of women); Corrine L. Patton, *Catholic and Feminist: We Are Called to be Both—A Response to Elizabeth Fox-Genovese*, 2 *LOGOS* 27, 33 (1999) (characterizing the issue of male priesthood as "a controversy over the nature of the God we worship" and "the very question of what is essentially Catholic"). But see R. Mary Hayden Lemmons, *Equality, Gender, and John Paul II*, 5 *LOGOS* 111, 126 (2002) (arguing that Pope John Paul II's position on differentiated gender roles, including an all-male priesthood, does not preclude commitment to gender equality).

tionary and progressive aspects of the Church's teachings with respect to working women and working mothers in particular.<sup>94</sup>

The Church's teachings on families and women present two paradoxical arguments. The first argument is that the preservation of the family is crucial to solving many of contemporary society's most critical problems, and therefore, the work of preserving the family—historically the work of mothers—needs to be properly valued by society.<sup>95</sup> The second argument is that women have unique contributions to make in solving many of contemporary society's most critical problems, and thus, women must have access to the public sphere in order to make these contributions.<sup>96</sup> These arguments closely mirror arguments made by secular feminist theorists, despite significant differences in the perspectives from which the Church and the secular feminists begin their arguments.<sup>97</sup> Within the Church, these two arguments were developed most clearly over the past few decades in the writings of Pope John Paul II and his successor, Pope Benedict XVI.<sup>98</sup> Let us examine the evolution of these arguments, noting the ways in which the Church's arguments coincide with arguments being made by contemporary secular feminist theorists.

#### A. *The Need for Social Revaluation of Family Care Work*

Pope John Paul II strongly criticized society's general devaluation of the work done predominantly by women in what is often called the private sphere—most significantly, the work of caring for family members.<sup>99</sup> It is crucial to appreciate that the Church's traditional concern for the importance of preservation of the family rests on the fundamental, foundational concept that all humans are created in the image and likeness of God.<sup>100</sup> This profound truth is “the main thread and . . . the guiding principle . . . of all of the Church's social doctrine.”<sup>101</sup> The Church believes that the family plays a vital role in preserving and transmitting this fundamental truth about the human person—the building block for all of the Church's social doctrine. The family structure is to be protected and preserved not out of some sentimental attachment to the ideal of the “nu-

94. See *infra* notes 99-108, 118-78 and accompanying text.

95. LABOREM EXERCENS, *supra* note 12, at 318.

96. *Id.*

97. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* xix-xx (2004); EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* x-xii (1999).

98. See, e.g., LETTER ON COLLABORATION, *supra* note 11 (discussing differences between men, women, and gender roles in society).

99. LABOREM EXERCENS, *supra* note 12, at 318.

100. See *id.* at 308.

101. JOHN PAUL II, CENTESIMUS ANNUS § 11 (1991) [hereinafter CENTESIMUS ANNUS].

clear family” as a good in itself, but rather because it is this structure that best fosters the formation of human beings who can grasp the truth that all humans are created in the image and likeness of God; people who understand this truth can best shape society in accordance with the Church’s social doctrines.<sup>102</sup>

In *Familiaris Consortio*, Pope John Paul II explained:

[F]aced with a society that is running the risk of becoming more and more depersonalized and standardized and therefore inhuman and dehumanizing, with the negative results of many forms of escapism—such as alcoholism, drugs and even terrorism—the family possesses and continues still to release formidable energies capable of taking man out of his anonymity, keeping him conscious of his personal dignity, enriching him with deep humanity and actively placing him, in his uniqueness and unrepeatability, within the fabric of society.<sup>103</sup>

This conviction that the preservation of the family is key to the development of society prompted Pope John Paul II to decry the persistent devaluation of the difficult work of preserving the family, which is, of course, traditionally the unpaid work of women.<sup>104</sup> In *Laborem Exercens*, the Church offers three prescriptions for society’s devaluation of care work.<sup>105</sup> First, it calls for economic compensation for this important work, either in the form of a family wage sufficient to support the needs of the entire family, or in the form of financial support for mothers who devote themselves exclusively to their families.<sup>106</sup> Second, it calls for a revaluation of the work of mothers in preserving families, to ensure that women who do not work outside the home are not penalized for dedicat-

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102. *See id.* This is an argument that several Catholic scholars are developing with research and scholarship on the efficacy of the traditional family structure in addressing serious social problems. *See, e.g.,* MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 306-11 (1989); Helen M. Alvaré, *The Consistent Ethic of Life: A Proposal for Improving its Legislative Grasp*, 2 U. ST. THOMAS L.J. 327, 332-40 (2005).

103. JOHN PAUL II, *FAMILIARIS CONSORTIO* § 43 (1981) [hereinafter *FAMILIARIS CONSORTIO*].

104. *Familiaris Consortio* states:

[T]he true advancement of women requires that clear recognition be given to the value of their maternal and family role, by comparison with all other public roles and all other professions. . . .

. . . [The work of women] in the home [should] be recognized and respected by all in its irreplaceable value. . . .

. . . .

Furthermore, the mentality which honors women more for their work outside the home than for their work within the family must be overcome.

*Id.* § 23.

105. *LABOREM EXERCENS*, *supra* note 12, at 317-18.

106. *Id.* at 318.

ing their energy to a function so vital for social development.<sup>107</sup> Third, the Church calls for a restructuring of the workplace to ensure that women are not penalized in the workplace for the work they do within the family.<sup>108</sup>

The belief that there is significant social utility to the work of preserving the family finds expression in secular contexts as well.<sup>109</sup> Indeed, this was among the stated purposes behind the enactment of the FMLA.<sup>110</sup> The first purpose listed in its preface is “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity.”<sup>111</sup> The popular press is full of examples of politicians and scholars from all sides of the political spectrum calling for social revaluation of the role of child-raising.<sup>112</sup> However, none of this rhetoric appears to be having much effect in persuading our society to adopt significant, concrete measures to recognize this value, such as measures of the type suggested by the Church.

In recognition of this lack of progress, these same types of arguments about the need for a social revaluation of the traditionally unpaid care work done predominantly by women are also being made with increasing urgency by secular feminists, in particular the group of feminists known as the “care feminists” or “relational feminists.”<sup>113</sup> These feminists argue that the advancement of women requires a social revaluation of the work that women do in caring for their families.<sup>114</sup> Some of these feminists propose this social revaluation of motherhood and other dependency care obligations as the only humane and realistic reaction to the reality that most of the world’s care work is done by women and most likely always will be done by women.<sup>115</sup> Others are motivated by a conviction

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107. *Id.*

108. *Id.*

109. *See, e.g.*, 29 U.S.C. § 2601 (2000).

110. *Id.*

111. *Id.* § 2601(b)(1).

112. *See, e.g.*, HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US* 7, 90-91 (1996); CRITTENDEN, *supra* note 18, at 87; KAMERMAN & KAHN, *supra* note 43, at 3; RICK SANTORUM, *IT TAKES A FAMILY: CONSERVATISM AND THE COMMON GOOD* 3-4 (2005).

113. *See, e.g.*, FINEMAN, *supra* note 97, at xiii-xv; KITTAY, *supra* note 97, at xi-xii; ROBIN L. WEST, *RE-IMAGINING JUSTICE* 6-7 (2003); JOAN WILLIAMS, *UNBENDING GENDER* (2000); Becker, *supra* note 24, at 60-62; Williams, *supra* note 23, at 816-17.

114. Becker, *supra* note 24, at 58-60.

115. FINEMAN, *supra* note 97, at 171 (“[W]e must reject the notion that the problem of work/family conflict should be cast as the problem of a lack of equal sharing between women and men of domestic burdens within the family. We have gone down that road and it is a dead end. Our arguments for reform must now acknowledge that the societally constructed role of mother continues to exact unique costs for women.”); Becker, *supra* note 24, at 93 (“There is no known society in all of human history in which carework went



that the relational orientation manifested by women focused on dependency care is objectively preferable to the male orientation that has led to the social devaluation of such work.<sup>116</sup> Although the secular arguments for this revaluation of care work do not have the same starting points as the Church's arguments, the convergence of interests around this idea is noteworthy.<sup>117</sup>

*B. The Need for a Restructuring of the Workplace to Accommodate Family Care Work*

The Catholic Church's agenda for revaluing the work of preserving the family is not limited to proposals that make it economically feasible for mothers to stay home and take care of their children. The Church also argues—equally forcefully—that labor must be structured in such a way that women in the workforce are not penalized for the work they do in caring for their families.<sup>118</sup> In this respect, the teachings of the Church have evolved to keep pace with the increasing participation of women, including mothers, in the workplace.

In the 1891 encyclical *Rerum Novarum*, Pope Leo XIII reflected then-prevalent notions of the respective roles of men and women in the workplace and family, writing:

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from being women's work to equally divided between the sexes. . . . Perhaps an equal division of carework might be possible in the future. Who can say? Even if it is, however, we need alternative strategies for the short term, ways in which women's well being can be improved and inequality lessened even though women continue to do most caretaking work."); Williams, *supra* note 23, at 828.

116. Eva Feder Kittay writes:

Radical visions in which dependency work is taken out of the family have left many women cold—largely, I suggest, because they have failed to respect the importance of the dependency relationship. A view of society as consisting of nested dependencies, so constituted as to provide all with the means to achieve functioning that respects the freedom and relatedness of all citizens, is a view that can only emerge now, as women taste the fruits of an equality fashioned by men—and find it wanting. This equality has not left room for love's labors and love's laborers. It is time to shape a new vision by creating new theories and by forging the requisite political will. We need to revise our social and political commitment to ourselves as dependents and as dependency workers. Only through these efforts may we come to see what it means for men and women to share the world in equality.

KITTAY, *supra* note 97, at 188; *see also* Becker, *supra* note 24, at 71 & n.72 (citing studies emphasizing rewarding nature of motherhood).

117. *See* Prudence Allen, *Can Feminism be Humanism?*, in *WOMEN IN CHRIST*, *supra* note 89, at 251, 282 (noting convergence in thought of Pope John Paul II and Edith Stein, with radical feminists in the care feminist camp, around the notion that women have a greater propensity than men to be concerned with other human beings); Teresa Stanton Collett, *Independence or Interdependence? A Christian Response to Liberal Feminists*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT*, *supra* note 93, at 178, 192 (noting possible compatibility of relational feminism with the Christian idea "of community and the complementarity of the sexes").

118. *See* LABOREM EXERCENS, *supra* note 12, at 318.

It is a most sacred law of nature that a father should provide food and all necessities for those whom he has begotten . . . .

. . . .

. . . Women . . . are not suited for certain occupations; a woman is by nature fitted for home-work, and it is that which is best adapted at once to preserve her modesty, and to promote the good bringing up of children and the well-being of the family.<sup>119</sup>

By the 1960s, papal writings began to recognize and validate the growing role of women in the public and private spheres.<sup>120</sup> But it is in the work of the current Pope, Benedict XVI, and his immediate predecessor, Pope John Paul II, that the Church has begun to articulate more precisely the particular value of the unique contributions of women, including mothers, in the public sphere.<sup>121</sup> It is these writings, too, that have begun to acknowledge the tension between the value of women's contributions to the public and the private spheres.<sup>122</sup> As theologian Claire Wolfteich explained, "church teachings struggled to acknowledge and affirm women's gifts in public work without relinquishing the particular and irreplaceable feminine vocation to motherhood."<sup>123</sup>

Pope John Paul II's charge to restructure the workplace to accommodate family life was a constant refrain throughout his pontificate; it can be found in *Laborum Exercens*<sup>124</sup> and *Familiaris Constorio*,<sup>125</sup> both issued in

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119. LEO XIII, RERUM NOVARUM paras. 13, 42 (1891), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html). Claire Wolfteich notes similar sentiments critical of mothers working outside the home in Pope Pius XI's encyclical *Casti Connubi*, written in 1930, and his 1931 encyclical *Quadragesimo Anno*. CLAIRE E. WOLFTEICH, NAVIGATING NEW TERRAINS: WORK AND WOMEN'S SPIRITUAL LIVES 8 (2002).

120. Wolfteich documents the increasing comfort with changes to women's traditional roles evidenced in the writings of Pope John XXIII, as well as the documents generated by the Second Vatican Council, during the 1960s. WOLFTEICH, *supra* note 119, at 64-66.

121. *See id.* at 74-76.

122. *See id.* at 73-75.

123. *Id.* at 75.

124. *Laborem Exercens*, written in 1981, states:

It is a fact that in many societies women work in nearly every sector of life. But it is fitting that they should be able to fulfill their tasks *in accordance with their own nature*, without being discriminated against and without being excluded from jobs for which they are capable, but also without lack of respect for their family aspirations and for their specific role in contributing, together with men, to the good of society. The *true advancement of women* requires that labor should be structured in such a way that women do not have to pay for their advancement by abandoning what is specific to them and at the expense of the family, in which women as mothers have an irreplaceable role.

LABOREM EXERCENS, *supra* note 12, at 318.

125. Pope John Paul II notes:

There is no doubt that the equal dignity and responsibility of men and women fully justifies women's access to public functions. On the other hand the true advancement of women requires that clear recognition be given to the value of their maternal and

1981, as well as in *Evangelium Vitae*, written fourteen years later.<sup>126</sup> This conviction about the need to restructure the workplace to accommodate mothers was rooted in the same concern that motivated his calls for the preservation of the family. In *Mulieris Dignitatem*, Pope John Paul II's Apostolic Letter "On the Dignity and Vocation of Women,"<sup>127</sup> he argued that women possess a particular "genius" that is crucial to transforming culture so that it reflects the truth about the human person.<sup>128</sup> This genius consists of a special ability to appreciate each human being's obligation to love every other human being—an obligation that arises out of the truth that we are all loved by God and all created in the image and likeness of God. Recall that this teaching is "the main thread and . . . the guiding principle of . . . *all of the Church's social doctrine*"<sup>129</sup> and the truth that motivates the Church's calls for preservation of family life.

This transformation of culture to reflect the truth about the human person is the task of all human beings and is ultimately the subject of everyone's "work," whether that work is conducted in the private or the public sphere. *Laborem Exercens* explains, "[t]he church is convinced that work is a fundamental dimension of man's existence on earth."<sup>130</sup> God's charge to Adam and Eve in the book of *Genesis* to "fill the earth and subdue it" reflects yet another aspect of the image of God reflected in man.<sup>131</sup> Each and every individual—whether man or woman, whether parent or not, whether working as a wage-earner outside the home or not—has some

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family role, by comparison with all other public roles and all other professions. Furthermore, these roles and professions should be harmoniously combined if we wish the evolution of society and culture to be truly and fully human.

FAMILIARIS CONSORTIO, *supra* note 103, § 23.

126. As Pope John Paul states:

[T]here need to be set in place social and political initiatives capable of guaranteeing conditions of true freedom of choice in matters of parenthood. It is also necessary to rethink labour, urban, residential and social service policies so as to harmonize working schedules with time available for the family, so that it becomes effectively possible to take care of children and the elderly.

JOHN PAUL II, *EVANGELIUM VITAE* § 90 (1995) [hereinafter *EVANGELIUM VITAE*].

127. JOHN PAUL II, *MULIERIS DIGNITATEM* (1988) [hereinafter *MULIERIS DIGNITATEM*].

128. *See id.* § 31.

129. *CENTESIMUS ANNUS*, *supra* note 101, § 11 (emphasis added).

130. *LABOREM EXERCENS*, *supra* note 12, at 301-02.

131. *Id.* at 302. Pope John Paul II writes:

Man is the image of God partly through the mandate received from his creator to subdue, to dominate, the earth. In carrying out this mandate, man, every human being, reflects the very action of the creator of the universe.

....

. . . Each and every individual, to the proper extent and in an incalculable number of ways, takes part in the giant process whereby man "subdues the earth" through his work.

*Id.* at 302.

role to play in the herculean task of “subdue[ing] . . . the earth,” and reflecting the image of God by participating in the continuing work of the creation of the universe.<sup>132</sup>

Pope John Paul II argued that women have a particular role to play in this task.<sup>133</sup> That role arises out of their innate and special sensitivity to the fact that humans exist *to be loved* and their special awareness that each and every human is entrusted to all other human beings.<sup>134</sup> Both men and women have the same responsibility to live their lives in accordance with this truth, but Pope John Paul II argued that God gives women a special ability to understand this truth. Pope John Paul II spoke of this talent as a predisposition of women that can be developed more fully through the experience of motherhood.<sup>135</sup> This talent, though, does not spring out of, or require, physical motherhood for its full development. There are numerous other ways in which women who never become mothers can develop the same disposition. There are many forms of “[s]piritual motherhood” that cultivate this same openness to others.<sup>136</sup>

It is abundantly clear that, for Pope John Paul II, this feminine genius is *not* something that can be reduced to the idea that women are better than men at nurturing, nor is it something that can only find fruitful expression within the family sphere.<sup>137</sup> This is powerfully and consistently illustrated in *Mulieris Dignitatem*’s discussion of Jesus Christ’s relationships with the women in his life.<sup>138</sup> *Mulieris Dignitatem* emphasizes that Jesus consistently entrusted women with some of the most profound truths of his

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132. See *id.*

133. See MULIERIS DIGNITATEM, *supra* note 127, § 30.

134. Pope John Paul II explains:

The moral and spiritual strength of a woman is joined to her awareness that *God entrusts the human being to her in a special way*. Of course, God entrusts every human being to each and every other human being. But this entrusting concerns women in a special way . . . .

. . . .

*A woman is strong because of her awareness of this entrusting*, strong because of the fact that God “entrusts the human being to her,” always and in every way, even in the situations of social discrimination in which she may find herself.

*Id.*

135. See *id.* § 18 (“Motherhood involves a special communion with the mystery of life, as it develops in the woman’s womb . . . . This unique contact with the new human being developing within her gives rise to an attitude towards human beings—not only towards her own child, but every human being—which profoundly marks the woman’s personality.”).

136. *Id.* § 21.

137. See JOHN PAUL II, LETTER OF POPE JOHN PAUL II TO WOMEN § 10 (1995).

138. See *infra* note 149 and accompanying text.

ministry *before* he shared them with the men in his life.<sup>139</sup> It was the unique genius of women that enabled them to understand these truths and gave them the strength to act on these truths before—and sometimes to a greater extent than—the men in his life.

The first human to encounter Jesus was, of course, his mother Mary. Her “fiat”—her acceptance of the truth about her son at the moment of the Annunciation—was compared by Pope John Paul II in his 1987 Encyclical *Redemptoris Mater* to the faith of Abraham.<sup>140</sup> Pope John Paul II wrote, “[i]n the salvific economy of God’s revelation, Abraham’s faith constitutes the beginning of the Old Covenant; Mary’s faith at the Annunciation inaugurates the New Covenant.”<sup>141</sup> Pope John Paul II then proceeded to trace the active role that Mary continued to play in Jesus’ ministry.<sup>142</sup> Jesus grew, and:

[A]s the messianic mission of her Son grew clearer to her eyes and spirit . . . *in a sense* Mary as Mother became *the first “disciple” of her Son*, the first to whom he seemed to say: “follow me,” even before he addressed this call to the Apostles or to anyone else.<sup>143</sup>

Mary played an instrumental role in launching Jesus’ public ministry through her intercession with Jesus on behalf of the hosts of the wedding at Cana, who had run out of wine.<sup>144</sup> Although Jesus’ initial response to Mary was a refrain familiar to mothers through the ages who have asked their children for help in the kitchen—“My hour has not yet come”<sup>145</sup>—Mary persisted, and Jesus performed his first miracle, turning jugs of water into wine. Mary’s steadfast presence at the foot of the cross at Jesus’ crucifixion,<sup>146</sup> and her presence with the apostles in the upper room on the day of Pentecost,<sup>147</sup> are accorded profound significance in the establishment and continued vitality of the Church.<sup>148</sup>

Pope John Paul II, however, did not limit his appreciation of Jesus’ reliance on women in furthering his ministry to Jesus’ relationship with

139. See MULIERIS DIGNITATEM, *supra* note 127, §§ 15-16; see also JOHN PAUL II, REDEMPTORIS MATER, *reprinted in* MARY: GOD’S YES TO MAN 43, 98 (1988) [hereinafter REDEMPTORIS MATER].

140. REDEMPTORIS MATER, *supra* note 139, at 69.

141. *Id.*

142. *Id.* at 85.

143. *Id.* (citation omitted).

144. *Id.* at 85-86.

145. *John* 2:4 (New Revised Standard); REDEMPTORIS MATER, *supra* note 139, at 86 (“[T]hat ‘hour’ means the time appointed by the Father when the Son accomplishes his tasks and is to be glorified.”).

146. REDEMPTORIS MATER, *supra* note 139, at 90-94.

147. *Id.* at 99-100.

148. See *id.* at 100 (“But above all, in the Church of that time and of every time Mary was and is the one who is ‘blessed because she believed’; *she was the first to believe.*”).

Mary. *Mulieris Dignitatem* devotes an entire chapter to Jesus' relationships with other women in the Gospel.<sup>149</sup> Pope John Paul II emphasized that it was a woman, Martha, with whom Jesus had the conversation characterized as "one of the most important in the Gospel."<sup>150</sup> He stated:

Jesus said to her: "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. Do you believe this?" "Yes, Lord; I believe that you are the Christ, the Son of God . . . ." <sup>151</sup>

It is striking that this profound truth was first explained to and then professed by Martha, who, during another visit by Jesus, was the subject of Jesus' rebuke for what Pope John Paul II called her "preoccupation with domestic matters."<sup>152</sup> When Martha complained to Jesus that her sister, Mary, was listening to Jesus' teachings rather than helping out with the care of the guests, Jesus claimed that "Mary has chosen the better part, which will not be taken away from her."<sup>153</sup> With this rebuke, Jesus rejected the notion that the genius of women lies only in their ability to nurture others.<sup>154</sup> Rather, he clearly appreciated the genius of women as an intellectual or emotional talent, facilitating their grasp of profound truths of faith.<sup>155</sup> Pope John Paul II wrote, "Christ speaks to women about the things of God, and they understand them; there is a true resonance of *mind and heart*, a response of faith. Jesus expresses appreciation and admiration for this distinctly 'feminine' response."<sup>156</sup>

This particular genius not only enabled the women in Jesus' life to understand profound truths, but it also gave them the courage to act upon their faith—in public—when it was most difficult.<sup>157</sup> *Mulieris Dignitatem* reminds us that, with the exception of John, only the women in Jesus' life remained with him until the end.<sup>158</sup> Women were the first to see his empty tomb on Easter morning, and women were called on to announce the resurrection to the apostles.<sup>159</sup>

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149. MULIERIS DIGNITATEM, *supra* note 127, §§ 12-16.

150. *Id.* § 15 (emphasis omitted).

151. *Id.* (citation omitted).

152. *Id.*

153. *Luke* 10:38-42 (New Revised Standard).

154. See Lemmons, *supra* note 93, at 118-19. In discussing *Mulieris Dignitatem's* treatment of this interaction between Martha and Mary, Lemmons notes that it illustrates that "[f]emininity is not reducible to the realm of practicality—and husbands. The husband is not the adequate object of all feminine yearning: this yearning includes a thirst for God and for learning about His handiwork." *Id.* at 119.

155. See *id.*; see also MULIERIS DIGNITATEM, *supra* note 127, § 15.

156. MULIERIS DIGNITATEM, *supra* note 127, § 15 (emphasis added).

157. See *id.*

158. *Id.*

159. *Id.* § 16.

This genius that enabled the women in Christ's life to receive and act on these most profound mysteries of faith is the same genius that enables contemporary women to understand and act on mysteries of faith that could shed light on some of our most pressing contemporary social problems.<sup>160</sup>

As Prudence Allen suggests, John Paul II argues that the genius of women, "if it can enter the workplace as well as the home, has the possibility of bringing in the personalistic norm—to evaluate whether a person is being treated as a [sic] someone worthy of love."<sup>161</sup> It is this conviction that the personalist perspective is needed in the public sphere to address the world's pressing social problems, together with the conviction that women must play a special role in preserving the family, that has motivated consistent calls to restructure the workplace to allow women to participate in the public sphere while still caring for their families.<sup>162</sup>

Although these ideas were developed in the writings of his predecessor, the same convictions are evident in the writings of Pope Benedict XVI, both before and after assuming the papacy.<sup>163</sup> As Prefect of the Congregation for the Doctrine of the Faith, then-Cardinal Ratzinger issued a *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World*.<sup>164</sup> That letter echoed many of Pope John Paul II's refrains. Ratzinger demonstrated the same appreciation for the social value of the traditionally female work of preserving the family,<sup>165</sup> and he affirmed the need for women's genius in the public

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160. *Id.* § 30. *Mulieris Dignitatem* explains:

In our own time, the successes of science and technology make it possible to attain material well-being to a degree hitherto unknown. While this favours some, it pushes others to the edges of society. In this way, unilateral progress can also lead to a gradual *loss of sensitivity for man, that is, for what is essentially human*. In this sense, our time in particular *awaits the manifestation* of that "genius" which belongs to women, and which can ensure sensitivity for human beings in every circumstance: because they are human!—and because "the greatest of these is love."

*Id.* (citation omitted).

161. Allen, *supra* note 117, at 282.

162. See LETTER ON COLLABORATION, *supra* note 11, § 13. Compare Allen, *supra* note 117, at 282 (demonstrating the conviction that the workplace be restructured to allow more female participants), with WOLFTEICH, *supra* note 119, at 29-31 (demonstrating an earlier held conviction that women must play a special role in preserving the family).

163. See *infra* notes 164-68 and accompanying text.

164. LETTER ON COLLABORATION, *supra* note 11.

165. Pope Benedict XVI called the family

"the primordial and, in a certain sense sovereign society," since it is here above all that the features of a people take shape; it is here that its members acquire basic teachings. They learn to love inasmuch as they are unconditionally loved, they learn respect for others inasmuch as they are respected, they learn to know the face of God inasmuch as they receive a first revelation of it from a father and a mother full of attention in their regard. Whenever these fundamental experiences are lacking, society as a whole suffers violence and becomes in turn the progenitor of more violence.

sphere to address the world's pressing economic and social problems.<sup>166</sup> Ratzinger also honestly acknowledged the inescapable tension between the need for the genius of women in both spheres of activity, writing:

[T]he interrelationship between these two activities—family and work—has, for women, characteristics different from those in the case of men. The harmonization of the organization of work and laws governing work with the demands stemming from the mission of women within the family is a challenge. The question is not only legal, economic and organizational; it is above all a question of mentality, culture, and respect. Indeed, a just valuing of the work of women within the family is required. In this way, women 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, with negative consequences for one's own equilibrium and the harmony of the family.<sup>167</sup>

As Pope, Benedict XVI has continued to display a clear appreciation for the complexities of these issues. In a meeting with Mexican bishops in the first months of his papacy, the Pope referred them to *Mulieris Dignitatem* and challenged them to put the theological ideals of respect for the genius of women into practical effect.<sup>168</sup> He told them: "In Mexico, where so many times the 'genius' of women is manifested,' . . . 'in ecclesial communities, in social assistance and in other areas of civic life at times there is the paradox of a theoretical exaltation and practical or discriminatory depreciation of the same' [genius]."<sup>169</sup>

Theologian Claire Wolfeich has documented among the Catholic bishops in the United States a similarly cautious evolution in acceptance of the growing role of mothers in the public sphere.<sup>170</sup> During World War II, American bishops' reluctance to accept the necessity of mothers in the workplace was plain:

*Id.* § 13 (quoting JOHN PAUL II, LETTER TO FAMILIES § 17 (1994)).

166. *See id.* (noting that the genius of women "means also that women should be present in the world of work and in the organization of society, and that women should have access to positions of responsibility which allow them to inspire the policies of nations and to promote innovative solutions to economic and social problems").

167. *Id.*; *see also* LABOREM EXERCENS, *supra* note 12, at 318.

168. *Pope Urges Concrete Gestures to Honor Women's "Genius": Calls for a "Change of Mentality" to Overcome Contradictions*, ZENIT, Sept. 29, 2005, <http://www.zenit.org/english/visualizza.phtml?sid=77364>.

169. *Id.*

170. WOLFTEICH, *supra* note 119, at 29-31, 181-82.



Every effort must be made to limit, as far as necessity permits, the employment of mothers in industry, particularly young mothers. Due provision in harmony with American traditions should be made for the day care of the children of working mothers. The health and moral welfare of mothers employed in industry should be thoroughly safeguarded. With a full realization of the role which women must play in winning the war and of the extreme measures that our government must take, we ask that all try to realize the dangers involved, especially the moral dangers.<sup>171</sup>

By 1986, however, in the pastoral letter *Economic Justice for All*, the National Conference of Catholic Bishops called for social welfare and tax policies that properly valued the work of caring for the family;<sup>172</sup> for “affordable, quality day care”;<sup>173</sup> parental leave policies;<sup>174</sup> and consideration of options such as “job sharing, flex time, and a reduced work week” to accommodate working parents.<sup>175</sup>

Many of the specific proposals espoused by secular feminist theorists are consistent with the positions of the U.S. Catholic bishops, such as proposals to reform welfare and tax policies to subsidize child care work by mothers,<sup>176</sup> proposals for paid maternity leaves and guarantees of job protection while on maternity leave,<sup>177</sup> and more radical proposals to restructure the workplace itself to permit mothers (and, incidentally, fathers) to spend significant time caring for their families without undue cost to career advancement.<sup>178</sup> The agreement between secular feminists and the Church on many of the concrete policy proposals necessary to

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171. *Statements Issued by the Archbishops and Bishops of the United States on Victory and Peace*, in OUR BISHOPS SPEAK: NATIONAL PASTORALS AND ANNUAL STATEMENTS OF THE HIERARCHY OF THE UNITED STATES, 1919-1951, at 110, 112 (Raphael M. Huber ed., 1952); accord WOLFTEICH, *supra* note 119, at 29-30.

172. NAT'L CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY 101-02 (1986).

173. *Id.* at 102.

174. *Id.*

175. *Id.* at 82-83; see also U.S. CATHOLIC CONFERENCE, PUTTING CHILDREN AND FAMILIES FIRST: A CHALLENGE FOR OUR CHURCH, NATION, AND WORLD 10-11 (1991).

176. CRITTENDEN, *supra* note 18, at 115-16, 265-66 (criticizing U.S. tax policy); *id.* at 186-201, 262-64 (criticizing welfare policy); see also Becker, *supra* note 24, at 105-09 (proposing family allowances, as offered in France).

177. CRITTENDEN, *supra* note 18, at 258-59; KITTAY, *supra* note 97, at 133-40; WILLIAMS, *supra* note 113, at 112, 274.

178. See CRITTENDEN, *supra* note 18, at 260-61; Becker, *supra* note 24, at 79-83. Examples include: amending the Fair Labor Standards Act to eliminate the exemption from overtime pay requirements for managerial workers for all work over 35 to 37.5 hours per week; and creating nonmarginalized alternative work schedules, instituting flextime or shorter work hours without career advancement penalties, for persons with caregiving responsibilities. WILLIAMS, *supra* note 113, at 111-13.

effectuate such a restructuring is noteworthy, precisely because the secular arguments for restructuring the workplace to accommodate family life have very different starting points than the Church's arguments.

#### IV. GENERAL PROPOSALS FOR REFORMING THE ACADEMIC WORKPLACE TO ACCOMMODATE MOTHERHOOD

Summers' notorious remarks and the subsequent media attention to the persistent under-representation of women in the ranks of tenured faculty gave some renewed urgency to the debate about ways in which the traditional academic workplace might be reformed in order to retain qualified women who were also raising families. It is important to note, though, that this debate has been going on for a long time. The substantial body of writing about women in academia and women in law schools discussed previously<sup>179</sup> generated many specific proposals. In 1996, the American Bar Association's Commission on Women in the Profession recommended that all law schools consider, among other things, on-campus day care and tenure track flexibility for faculty with significant family responsibilities.<sup>180</sup> In 2001, the American Association of University Professors (AAUP), the body responsible for writing and enforcing tenure rules, recommended that all colleges and universities provide paid parental leave and reduced workload options for faculty with family commitments, and permit faculty members to extend the tenure clock for up to one year per child following the birth or adoption of a child.<sup>181</sup>

Over the past few years, the Alfred P. Sloan Foundation has funded a series of projects by organizations in higher education<sup>182</sup> and by universities,<sup>183</sup> exploring various ways to enhance academic career flexibility to support the simultaneous participation by women in work and family life. One representative project was the American Council on Education's (ACE) project, *Creating Options: Models for Flexible Tenure-Track Faculty Career Pathways*.<sup>184</sup> ACE's 2004 report said that "[t]he goal of th[e] project [wa]s to encourage the development of flexible tenure-track faculty career paths that recognize different stages in faculty members'

179. See *supra* notes 57–79 and accompanying text.

180. COMM'N ON WOMEN IN THE PROFESSION, AM. BAR ASS'N, *ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION* 50-51 (1996).

181. AM. ASS'N OF UNIV. PROFESSORS, *STATEMENT OF PRINCIPLES ON FAMILY RESPONSIBILITIES AND ACADEMIC Work* (2001), available at <http://www.aaup.org/AAUP/pubsres/policydocs/workfam-stmt.htm?PF=1>.

182. These include the American Association for Higher Education, the American Association of University Professors, and American Women in Science. OFFICE OF WOMEN IN HIGHER EDUC., AM. COUNCIL ON EDUC., *supra* note 56, app. at 35.

183. These include Brandeis University, Pennsylvania State University, Purdue University, University of California at Berkeley, University of Kansas, University of Michigan, and University of Virginia. *Id.* app. at 36-37.

184. *Id.* at 1.

professional lives and acknowledge that not all faculty members will reach traditional career milestones at similar intervals.”<sup>185</sup> Some of ACE’s proposals are aimed at the recruiting stage of academic careers: creating reentry opportunities for academics seeking tenure-track positions after either working part-time or leaving academia because of family responsibilities, and not penalizing candidates for “dependent care-related résumé gaps.”<sup>186</sup> Other proposals are aimed at improving the success rates of faculty on the tenure track in achieving tenure. They include:

1. creating a professional climate that encourages, rather than penalizes, use of family-friendly policies;<sup>187</sup>
2. developing clear promotion and tenure guidelines that do not discriminate against those who have proceeded along nontraditional career paths, and making sure all evaluators are trained to apply these guidelines fairly;<sup>188</sup>
3. providing part-time tenure track options (for up to five years);<sup>189</sup>
4. providing multiple-year leave options;<sup>190</sup>
5. offering flexible time frames of up to ten years for the “probationary period for tenure review without altering standards or criteria”;<sup>191</sup> and
6. providing quality, affordable child care.<sup>192</sup>

In addition, ACE stressed that tenured professors have many of the same work-life balance stresses as junior faculty, and recommended that family-friendly policy choices be made available throughout the academic life cycle to support promotion and ascension to university leadership positions.<sup>193</sup>

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185. *Id.*

186. *Id.* at 9.

187. *Id.* The importance of such a climate was also stressed in another project supported by the Sloan Foundation, the Mapping Project of Pennsylvania State University. The researchers conducting this project conducted a web-based survey of seven hundred American colleges and universities and conducted more focused research at eleven other institutions. ROBERT DRACO & CAROL COLBECK, FINAL REPORT FROM THE MAPPING PROJECT: EXPLORING THE TERRAIN OF U.S. COLLEGES AND UNIVERSITIES FOR FACULTY AND FAMILIES 16-17 (2003), available at <http://lsir.la.psu.edu/workfam/mapping/project.htm>. They made specific recommendations similar to ACE’s, but also emphasized the importance of an institutional climate that openly rejects “bias against caregiving,” and informal measures to signal institutional support of family commitments. *Id.* at 95.

188. OFFICE OF WOMEN IN HIGHER EDUC., AM. COUNCIL ON EDUC., *supra* note 56, at 9.

189. *Id.*

190. *Id.* at 10.

191. *Id.*

192. *Id.*

193. *See id.* at 13-14.

Some universities began to implement elements of these proposals even before the Summers controversy.<sup>194</sup> A 1999 report at Massachusetts Institute of Technology (MIT) School of Science about the marginalization of women in that institution led to an intense effort to recruit and retain more women faculty, such as automatically stopping the tenure clock for women and offering child care on campus.<sup>195</sup> In addition, the University of California at Berkeley has been working toward implementing many of the more generous ACE proposals.<sup>196</sup>

Harvard, of course, could hardly fail to react to the Summers speech, and its reaction has attracted significant attention to the ACE proposals.<sup>197</sup> Within a month of making his controversial remarks, Summers created the Task Force on Women Faculty and the Task Force on Women in Science and Engineering. Three months later, these task forces submitted to President Summers comprehensive sets of recommendations to improve the recruitment and retention of female faculty members.<sup>198</sup> President Summers promptly “pledged to spend \$50-million over the next decade” addressing the issues raised in the reports.<sup>199</sup> Many of the Task Force on Women Faculty’s recommendations were aimed at accommodating working mothers.<sup>200</sup> Specifically, the task force recommended increasing the availability of child care on campus,<sup>201</sup> increasing financial support to offset expenses for child care,<sup>202</sup> instituting a mini-

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194. See *id.*; DRAGO & COLBECK, *supra* note 187, at 13-14 (summarizing accommodations for parenthood adopted at colleges and universities in the last few decades).

195. OFFICE OF WOMEN IN HIGHER EDUC., AM. COUNCIL ON EDUC., *supra* note 56, at 16.

196. See *infra* notes 207-13 and accompanying text.

197. Since the Summers controversy, Princeton adopted a new policy granting male and female faculty who become parents “automatic one-year extensions on the tenure track.” Piper Fogg, *Princeton Gives Automatic Tenure Extension to New Parents*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 19, 2005 (online edition) (on file with author).

198. TASK FORCE ON WOMEN FACULTY, HARVARD UNIV., REPORT OF THE TASK FORCE ON WOMEN FACULTY 4-7 (2005), available at <http://www.hno.harvard.edu/gazette/daily/2005/05/women-faculty.pdf> [hereinafter REPORT ON WOMEN FACULTY]; TASK FORCE ON WOMEN IN SCI. & ENG'G, HARVARD UNIV., REPORT FROM THE TASK FORCE ON WOMEN IN SCIENCE AND ENGINEERING 4, 6-7 (2005), available at <http://www.hno.harvard.edu/gazette/daily/2005/05/wise.pdf>.

199. Piper Fogg, *Harvard Panels Suggest Steps for Improving the Lot of Female Professors; Some Proposals Already Have Been Endorsed*, CHRON. HIGHER EDUC. (Wash., D.C.), May 17, 2005 (online edition) (on file with author).

200. Among the recommendations of a more general nature were: creating a senior administrative position to oversee efforts to diversify the faculty body across the university; launching a climate survey and comprehensive data collection processes; increase funding for recruitment of diverse faculty; instituting a dual-career program to facilitate relocation of working spouses of recruits; and improving sexual harassment policies and programs. REPORT ON WOMEN FACULTY, *supra* note 198, at 6.

201. *Id.* at 37.

202. *Id.* at 39.

mum “maternity benefit of 13 weeks at full pay,”<sup>203</sup> and automatically extending the appointment or tenure review time line in connection with all grants of maternity leave and parental leave.<sup>204</sup> In addition, the task force recommended that each of the schools at Harvard examine a host of work-life issues and compare its practices with what were identified as best practices at a group of peer universities.<sup>205</sup> Among the “best practices” identified for consideration were:

1. *Childbearing Active Service Modified Duties*.<sup>206</sup> As an alternative or supplement to maternity leave, this option would provide teaching relief to faculty for up to one semester, at full pay, allowing them to concentrate on child care, scholarship, and some administrative duties. This would be offered to birth mothers only, with no limit on the number of children for whom this could be requested.<sup>207</sup>

2. *Substantial Care-Giving Active Service Modified Duties*. This program would offer the same kind of teaching relief, at full pay, for one semester to any substantial caregiver, “include[ing] birth mothers, fathers, partners, adoptive parents,” foster parents, and both parents in shared parenting.<sup>208</sup> Birth mothers would be eligible for relief after a semester of childbearing leave, with no limit on the number of times this could be requested.<sup>209</sup>

3. *Unpaid Dependent Care Leave*. This relief would be available to anyone caring for parents, children, partners, and spouses, subject to the terms of the institution.<sup>210</sup>

4. *Part-Time Tenure Track or Tenured Positions*. To accommodate family needs, persons on the tenure track could apply for permanent or temporary reductions in teaching loads, scholarly productivity expectations, pay, and lengthened timetables for promotion and tenure.<sup>211</sup> Persons with tenure could also apply for a permanent or temporary reduction in work and pay, to permit them to care for family members.<sup>212</sup>

5. *Tenure Clock Extension*. The tenure track would be automatically extended upon a grant of a childbearing or parental leave for the length of the leave, unless the faculty member opted out.<sup>213</sup> New faculty mem-

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203. *Id.* at 41-42.

204. *Id.* at 43.

205. Peer schools included: “University of California Berkeley, University of Chicago, Columbia, MIT [Massachusetts Institute of Technology], University of Michigan, Princeton, Stanford, University of Wisconsin, and Yale.” *Id.* at 10.

206. *Id.* at 49.

207. *Id.* (prospective policy at University of California at Berkeley).

208. *Id.* at 50 (prospective policy at University of California at Berkeley).

209. *Id.* (prospective policy at University of California at Berkeley).

210. *Id.* at 51 (available at many universities).

211. *Id.* at 51, 57 (prospective policy at University of California at Berkeley).

212. *Id.* at 57 (prospective policy at MIT).

213. *Id.* at 51 (prospective policy at University of California at Berkeley).

bers could request tenure track extensions for births or adoptions preceding the employment date.<sup>214</sup>

#### V. RESPONSES OF CATHOLIC LAW SCHOOLS TO PROPOSALS FOR ACCOMMODATION OF MOTHERHOOD

How have law schools in general, and Catholic law schools in particular, reacted to this discussion of academic workplace reforms? The latest comprehensive research into maternity leave policies in law schools was published in 1985, and, although written by a faculty member at a Catholic law school, it does not differentiate between Catholic and non-Catholic law schools.<sup>215</sup> As of that date, with respect to law schools in general, the author concluded:

[F]ew schools have given much thought to the handling of parenthood . . . [M]ost schools handle the problem on an *ad hoc* basis, and . . . there is considerable variety in the ways law schools respond to new parents. More specifically, the data indicate that most schools do not provide day care services, that obtaining a leave of absence or a reduction in teaching load for child care is more difficult than obtaining a leave or reduction for other reasons, and that women may be leaving law teaching for family reasons more frequently than men.<sup>216</sup>

Family leave policies of Catholic law schools appear to be indistinguishable from those of non-Catholic law schools. Policies at both secular and Catholic law schools span the spectrum of types of support for parenting.<sup>217</sup> The two schools at which I have taught are representative of these approaches. Notre Dame Law School has already adopted most of the best practices identified by the Harvard Task Force on Women Faculty. Its policies provide for: (1) six weeks paid maternity leave after childbirth; (2) up to twelve weeks unpaid leave to care for a newborn child, an adopted child, a foster child, or a seriously ill family member; (3) relief from all teaching responsibilities during any semester in which a child is born; (4) discretionary relief from teaching responsibilities for children born outside of the semester or for semesters during which employees take family leave for reasons other than childbirth; (5) at the option of an untenured faculty member who is primary caregiver, a one-

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214. *Id.* at 52 (prospective policy at University of Wisconsin).

215. See Richard H. Chused, *Faculty Parenthood: Law School Treatment of Pregnancy and Child Care*, 35 J. LEGAL EDUC. 568, 569-70 (1985). Professor Chused is a member of the faculty at Georgetown University Law Center.

216. *Id.* at 570.

217. Cf. STANFORD UNIV., FACULTY HANDBOOK ch. 3, art. III (2006), available at <http://facultyhandbook.stanford.edu/ch3.html>; UNIV. OF ST. THOMAS, FACULTY HANDBOOK art. III, available at <http://www.stthomas.edu/facultyhandbook/fringebenefits.htm>.

year extension of the tenure clock following the birth or adoption of a child (not to exceed a total of two years); and (6) a part-time tenure track option for appropriate reasons,<sup>218</sup> pursuant to which tenure track, salary, and responsibilities are adjusted proportionately.<sup>219</sup> Notre Dame also offers on-campus child care, with tuition scaled to income.<sup>220</sup>

The University of St. Thomas offers less generous accommodations, but has adopted some measures that come close to some of the recommended best practices.<sup>221</sup> It offers: (1) paid parental leave of up to two weeks for either the father or mother upon the birth or adoption of a child; (2) for childbirth resulting in a disabling condition, the option of taking a six-month short-term disability leave (at full pay for the first two months, 80% pay for the second two months, and 60% pay for the last two months) in addition to the two weeks paid parental leave; (3) as an alternative to the two-week parental leave and the six-month short-term disability leave, some relief from teaching for one semester for birth or adoption;<sup>222</sup> (4) up to twelve weeks unpaid leave to care for a newborn child, adopted child, foster child, or any seriously ill family member; and (5) a one-year extension of the tenure track after the birth or adoption of a child or the significant illness of a family member, no more than twice during the tenure period.<sup>223</sup> St. Thomas also offers on-campus child care, although long waiting lists mean that few faculty members can be accommodated.<sup>224</sup>

At the other end of the spectrum, Catholic University of America and Duquesne University appear to offer only the unpaid leave mandated by the federal or applicable local law and the option of applying accumulated sick leave and annual leave in the case of a pregnancy.<sup>225</sup> Other

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218. Based on the author's experience, primary child-raising responsibility can be considered an appropriate reason.

219. UNIV. OF NOTRE DAME, FACULTY HANDBOOK 104-05, available at <http://provost.nd.edu/faculty-handbook/documents/facultyhandbook06.pdf>.

220. See, e.g., University of Notre Dame Office of Human Resources, Early Childhood Development Center, <http://hr.nd.edu/worklife/ecdc.shtml> (last visited Jan. 12, 2007) (describing income-based tuition scale at Notre Dame's Early Childhood Development Center).

221. See generally UNIV. OF ST. THOMAS, *supra* note 217, art. III, pt. K.

222. The University of St. Thomas' policy is drafted with reference to the general university three-course load requirement. During the semester of teaching relief, the parent is relieved entirely of the obligation to teach two courses, but must make up the third course at some time, either during or after the semester of teaching relief. *Id.* art. III, pts. E, K.

223. *Id.* art. III, pt. K.

224. University of St. Thomas, Child Care Providers, <http://www.stthomas.edu/life/workcenter/childcare/default.html> (last visited Jan. 12, 2007) (noting that the University of St. Thomas child care center "has had long waiting lists"). On-campus child care is only provided on one of St. Thomas' several campuses.

225. Duquesne University Human Resources, Family and Medical Leave and Personal Leave, <http://www.hr.duq.edu/tap/tap23.html> (last visited Jan. 12, 2007); The Catholic

schools, such as Boston College, fall somewhere in the middle, offering, for example, more generous periods of paid leave following childbirth (eight weeks), but not providing any specific guidelines for course relief or the effect of taking leaves on the tenure track.<sup>226</sup> Anecdotal evidence suggests that deans of Catholic law schools can and do use their discretion to offer arrangements that are more generous than the minimums provided in the published faculty handbooks, such as offering semesters of course relief following childbirth.<sup>227</sup>

Based on this informal survey, it appears that family leave policies at Catholic law schools range from extremely generous to the bare minimum required by law. Moreover, I am not aware of any initiatives by Catholic law schools to adopt any of the ACE recommendations directed at the recruiting stage, such as creating reentry opportunities for persons in academia who left teaching or worked part-time to accommodate family responsibilities or not penalizing job candidates for family-care-related résumé gaps.<sup>228</sup>

Should Catholic law schools be comfortable with family leave policies that satisfy the statutory minimums, or those policies that exceed the minimums but fall far short of the best practices? The Church's arguments on the need to restructure the workplace to accommodate family life are compelling, but these arguments do not include a specific blueprint for implementing such a restructuring.<sup>229</sup> The Church does offer one possible model: the maternity leave policies of Vatican City are extremely generous. Employees of the Vatican receive six months paid leave in connection with the birth or adoption of a child, the option of taking an additional six months of leave at 50% pay, and a cash bonus equal to 66% of one month's salary.<sup>230</sup> In general, though, the Church believes that it is not appropriate to propose global solutions to social problems that cannot be solved without accommodating local cultures,

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University of America, Family and Medical Leave Policy, <http://policies.cua.edu/employment/compensation/familymedicalfull.cfm> (last visited Jan. 12, 2007); The Catholic University of America, Pregnancy Leave, <http://policies.cua.edu/employment/compensation/pregnancy.cfm> (last visited Jan. 12, 2007).

226. BOSTON COLL., EMPLOYEE HANDBOOK (2006), available at <http://www.bc.edu/offices/hr/resources/handbook/hbk-benefits/#fmlp> (providing for eight weeks of paid maternity leave).

227. E-mail from John H. Garvey, Dean, Boston Coll. Law School, to author (Feb. 28, 2006, 21:05 EST) (on file with author); E-mail from Thomas M. Mengler, Dean and Ryan Chair in Law, Univ. of St. Thomas School of Law, to author (Mar. 20, 2006, 13:57 CST) (on file with author).

228. See *supra* notes 187-88 and accompanying text.

229. See *infra* note 231 and accompanying text.

230. ANGELO SODANO, REGOLAMENTO GENERALE DELLA CURIA ROMANA art. 61 (1999), available at [http://vatican.va/roman\\_curia/labour\\_office/docs/documents/ulsa\\_b08\\_1\\_it.html](http://vatican.va/roman_curia/labour_office/docs/documents/ulsa_b08_1_it.html); PROVVIDENZE A FAVORE DELLA FAMIGLIA art. 1 (1999), available at [http://vatican.va/roman\\_curia/labour\\_office/docs/documents/ulsa\\_b08\\_7\\_it.html](http://vatican.va/roman_curia/labour_office/docs/documents/ulsa_b08_7_it.html).



concerns, and political structures.<sup>231</sup> Thus, on issues of concern to working mothers, as on other issues, the Church leaves the details to be worked out by those best suited to handle the issues—the lay faithful.<sup>232</sup>

*Lumen Gentium* explains:

[T]he laity, by their very vocation, seek the kingdom of God by engaging in temporal affairs and by ordering them according to the plan of God. They live in the world, that is, in each and in all of the secular professions and occupations. . . . Therefore, since they are tightly bound up in all types of temporal affairs it is their special task to order and to throw light upon these affairs in such a way that they may come into being and then continually increase according to Christ to the praise of the Creator and the Redeemer.<sup>233</sup>

Even *Ex Corde*, the Church's most direct instruction to lay faithful immersed in the world of Catholic universities, is silent on the issue of accommodation of family life.<sup>234</sup> However, *Ex Corde* has much to say about the tasks of Catholic universities, and it suggests that the work of a university demands the specific contributions of the genius of women.<sup>235</sup> *Ex Corde* expresses the Church's particular need for the active assistance of Catholic universities in safeguarding contemporary culture.<sup>236</sup> It calls on

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231. In the words of Cardinal Avery Dulles, “[t]he specific competence of the Church . . . is not to propose particular social and economic systems but to lay down principles and criteria that can direct work toward the authentic progress of society, safeguarding the dignity and rights of all persons, including very specifically those who work.” AVERY DULLES, *THE SPLENDOR OF FAITH* 131 (1999); see also CENTESIMUS ANNUS, *supra* note 101, § 43 (“The church has no models to present; models that are real and truly effective can only arise within the framework of different historical situations, through the efforts of all those who responsibly confront concrete problems in all their social, economic, political and cultural aspects, as these interact with one another.”). This approach is echoed by political scientist Christopher Wolfe, who began his article laying out his vision of an ideal Catholic law school with the caution that, not being immersed in that particular world, he is not competent to give specific advice as to how the ideas he proposes would be practically implemented, saying:

[F]or the most part, I will *not* be taking up the often difficult questions of how to actually *realize* the ideal, given the enormous number of practical problems that arise from less than ideal conditions or circumstances. I recognize that these limitations will often require prudent compromises to achieve the best that is possible under a given set of conditions.

Christopher Wolfe, *The Ideal of a (Catholic) Law School*, 78 MARQ. L. REV. 487, 487 (1995).

232. CENTESIMUS ANNUS, *supra* note 101, § 43.

233. PAUL VI, LUMEN GENTIUM § 31 (1964), available at <http://www.ewtn.com/library/councils/v2church.htm>; see also JOHN PAUL II, CHRISTIFIDELES LAICI § 15 (1988), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_30121988\\_christifideles-laici\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_30121988_christifideles-laici_en.html).

234. EX CORDE, *supra* note 10, paras. 12-13.

235. See *id.* para. 15.

236. See *id.* para. 18.

Catholic universities to renew their commitment to their Catholic identities, warning, “[w]hat is at stake is the *very meaning of scientific and technological research, of social life and of culture*, but, on an even more profound level, what is at stake is *the very meaning of the human person*.”<sup>237</sup>

*Ex Corde* describes the Catholic university’s basic mission as one of service to Church and society.<sup>238</sup> To an extent, the Church consciously removes itself from society and asks its universities, which are immersed in society, “to help the Church respond to the problems and needs of this age.”<sup>239</sup> In the words of Father Theodore Hesburgh, former president of the University of Notre Dame, the Catholic university is where the “Catholic Church can do its thinking.”<sup>240</sup> *Ex Corde* explains:

A Catholic University, as any University, is immersed in human society; as an extension of its service to the Church . . . it is called on to become an ever more effective instrument of cultural progress for individuals as well as for society. Included among its research activities, therefore, will be a study of *serious contemporary problems* in areas such as the dignity of human life, the promotion of justice for all, the quality of personal and family life, the protection of nature, the search for peace and political stability, a more just sharing in the world’s resources, and a new economic and political order that will better serve the human community at a national and international level.<sup>241</sup>

In addition to this general litany of serious social problems to which the attention of the Catholic university should be directed, two particular areas of study are particularly urgent. One is science and technology.<sup>242</sup>

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237. *Id.* para. 7 (quoting John Paul II, Allocation to the International Congress on Catholic Universities (Apr. 25, 1989)).

238. *See id.* paras. 1, 31.

239. *Id.* para. 31.

240. Herold Weiss, *Where the Catholic Church Does Its Thinking*, ADVENTIST TODAY, Jul-Aug. 1994, available at <http://www.atoday.com/magazine/archive/1994/julaug1994/articles/CatholicChurch.shtml>.

241. EX CORDE, *supra* note 10, para. 32.

242. *Id.* para. 7 (“Scientific and technological discoveries create an enormous economic and industrial growth, but they also inescapably require the correspondingly necessary *search for meaning* in order to guarantee that the new discoveries be used for the authentic good of individuals and of human society as a whole. . . . [A] Catholic University [can] . . . include the moral, spiritual and religious dimension in its research, and . . . evaluate the attainments of science and technology in the perspective of the totality of the human person.”); *see also id.* para. 18 (“[The Catholic University’s] concern for the *ethical and moral implications* both of its methods and of its discoveries . . . is particularly important in the areas of science and technology. . . . Men and women of science will truly aid humanity only if they preserve ‘the sense of the transcendence of the human person over the world and of God over the human person.’” (quoting John Paul II, Address at UNESCO (June 2,

The other is the impact of modern cultural norms on the development of the human person, with specific reference to the family as “the primary unit of every human culture.”<sup>243</sup> Recall that these areas are identified in the Church’s writings on women as areas in which application of the feminine genius is particularly needed.<sup>244</sup> Thus, *Ex Corde* effectively demands that a Catholic university must ensure that women are amply represented on its faculty, so that their distinct genius can be brought to bear on the topics identified as particularly urgent to the Church. Further, the women represented on the faculties of Catholic law schools must include a generous proportion of women who are mothers. Professor Mary Ann Glendon stressed the importance of mothers’ voices in the public sphere in an interview in 2000. She said:

[F]or the first time in history large numbers of women occupy leadership positions and almost half of these new female leaders—unlike male leaders—are childless. Will this affect our goals and values? Will it affect our programmatic agenda? You bet it will. People without children have a much weaker stake in our collective future. As our leadership group tilts toward childlessness, we can expect it to become even harder to pay for our schooling system or for measures that might prevent global warming. America’s rampant individualism is about to get a whole lot worse.<sup>245</sup>

At the same time, a Catholic university should have a strong incentive to respect the crucial role that many women academics play in caring for their families. Together, these competing considerations should compel

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1980)); *id.* para. 46 (“An area that particularly interests a Catholic university is the *dialogue between Christian thought and the modern sciences.*”).

243. *Id.* para. 45 (“A Catholic university must become *more attentive to the cultures of the world of today*, and to the *various cultural traditions existing within the Church* in a way that will promote a continuous and profitable dialogue between the Gospel and modern society. Among the criteria that characterize the values of a culture are, above all, the *meaning of the human person*, his or her liberty, dignity, *sense of responsibility*, and openness to the transcendent. To a respect for persons is joined the *preeminent value of the family*, the primary unit of every human culture. Catholic universities will seek to discern and evaluate both the aspirations and the contradictions of modern culture, in order to make it more suited to the total development of individuals and peoples. In particular, it is recommended that by means of appropriate studies, the impact of modern technology and especially of the mass media on persons, the family, and the institutions and whole of modern culture be studied deeply.”); *id.* para. 33 (“A specific priority is the need to examine and evaluate the predominant values and norms of modern society and culture in a Christian perspective, and the responsibility to try to communicate to society those *ethical and religious principles which give full meaning to human life*. In this way a university can contribute further to the development of a true Christian anthropology, founded on the person of Christ, which will bring the dynamism of the creation and redemption to bear on reality and on the correct solution to the problems of life.”).

244. See *supra* notes 134-35, 160 and accompanying text.

245. HEWLETT, *supra* note 24, at 158-59.

Catholic universities to seriously consider the current proposals for reforming certain aspects of academic life to accommodate working mothers.

Although *Ex Corde* has spurred extensive soul-searching among Catholic law schools about how best to live up to their Catholic identities,<sup>246</sup> none of the literature generated as a result seems to focus on how workplace structures might better accommodate Catholic concerns about preservation of families. My colleague Jerome Organ has argued that a Catholic law school should promote in its students an understanding of the law as a vocation. Organ has urged that Catholic law schools focus attention on “the ways in which the principles of [Catholic Social Teaching] can inform one’s understanding of how one can live out one’s multiple vocations as a law student, spouse, parent, child, friend, coworker and volunteer while discerning one’s vocation to the law.”<sup>247</sup> However, Organ’s main focus is on acknowledging this as a formation issue affecting students, rather than as a workplace structure issue affecting faculty.<sup>248</sup> Unfortunately, judging from what is published in law journals about how Catholic law schools should be distinct from non-Catholic law schools, it appears that the criticism that Christopher Wolfe aims particularly at law schools embracing a “social justice” model of Catholic identity is valid more generally: “Catholic social thought on the family . . . is sometimes ignored and even rejected.”<sup>249</sup>

Dean Mark Sargent argues that the invigorated debate about the meaning of Catholic identity presents deans at Catholic law schools with a unique opportunity to rethink all aspects of a law school’s life, including the scope of its curriculum, the parameters of its intellectual and scholarly life, the direction of faculty appointments, admissions policies, the allocation of resources, the thrust of career counseling and, most globally, the way the law school defines, articulates, and lives its values. The dean of a Catholic law school thus need not fight a rear-guard action, but should share in an adventure whose outcome is still incalculable, but which will force us to stretch our imaginative and sympathetic capacities to the utmost.<sup>250</sup>

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246. For a comprehensive list of the articles about this topic, see Jerry Organ, *From Those to Whom Much Has Been Given, Much is Expected: Vocation, Catholic Social Teaching, and the Culture of a Catholic Law School*, 1 J. CATH. SOC. THOUGHT 361, 362 & n.2 (2004); see also Mark A. Sargent, *An Alternative to the Sectarian Vision: The Role of the Dean in an Inclusive Catholic Law School*, 33 U. TOL. L. REV. 171, 172 (2001) (collecting articles on this topic).

247. Organ, *supra* note 246, at 365; see also *supra* notes 28-61 and accompanying text.

248. See Organ, *supra* note 246, at 361-63.

249. Wolfe, *supra* note 231, at 494-95.

250. Sargent, *supra* note 246, at 172.

It is time for Catholic law schools to meet this challenge and “stretch [their] imaginative and sympathetic capacities to the utmost,” by addressing the persistent under-representation of women on their faculties.<sup>251</sup> Like Harvard, Catholic law schools must examine how their practices compare to the best practices identified above. In light of the Church’s teachings on women and families, any justifications for gaps between the best practices and the practices of Catholic law schools must be examined skeptically and closely.

The Harvard Task Force on Women Faculty indicated that its recommendations were developed hastily and were subject to revision upon further analysis.<sup>252</sup> One of the most glaring omissions from the Harvard recommendations is how to accommodate parenting by staff or students.<sup>253</sup> Any Catholic university that accepts the challenge to consider restructuring to support parenting for faculty members must accept that the arguments made above apply just as strongly to non-faculty employees and students. It is possible that analysis by a Catholic law school could lead to the conclusion that a particular practice is not appropriate for that specific institution or, more generally, for an institution concerned with modeling Catholic ideals. However, the Church clearly calls on Catholic law schools to at least deliberate about whether their life-work practices reflect Catholic teachings in their debates about their Catholic identity.

Recall that *Ex Corde* challenges Catholic universities both to model and to assist the Church in conceptualizing the model for the application of Catholic ideals to contemporary social problems.<sup>254</sup> *Ex Corde* and the Catholic teaching it reflects require Catholic universities to adopt generous family policies in order to facilitate the application of the feminine genius to contemporary social problems.<sup>255</sup> This is crucial in particular for law schools, where the scholarship and teaching has the potential for affecting the legal structures by which our society orders its affairs. It is important, as well, not to underestimate the power of the witness afforded by a law school that models in its own workplace structures the application of Catholic ideals.

A few years ago, the Australian Catholic University (ACU) provided a potent illustration of the impact of modeling—not merely talking the talk, but walking the walk.<sup>256</sup> In August 2001, ACU announced that it was

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251. *Id.*

252. REPORT ON WOMEN FACULTY, *supra* note 198, at 45.

253. *See generally id.*

254. *See supra* note 10 and accompanying text.

255. *See supra* notes 234-54.

256. DENISE THOMPSON, MICHAEL BITTMAN & PETER SAUNDERS, SOC. POLICY RESEARCH CTR., THE IMPACT OF THE AUSTRALIAN CATHOLIC UNIVERSITY’S PAID MATERNITY LEAVE PROVISION: FINAL REPORT 7 (2004) [hereinafter ACU REPORT].

implementing a new maternity leave policy for its staff. Every staff member who had been employed for at least two years was entitled to a full year's paid maternity leave—the first twelve weeks at full pay, and an additional forty weeks at 60% pay.<sup>257</sup> A few months later, this same policy was extended to faculty.<sup>258</sup> The adoption of this generous maternity benefit caught Australia by surprise. Recall that Australia is the only industrialized nation other than the United States whose maternity leave laws do not require any paid maternity leave.<sup>259</sup> ACU did not adopt this policy in response to any union pressure, lawsuit, or threat of more stringent regulation. It did so as a result of an administrative initiative in which two senior level administrators conducted a wide-ranging listening program, pursuant to which employees were questioned generally about what they liked and disliked about working at ACU.<sup>260</sup> The chief motivation given by the administration for taking this radical step was to support families and to openly acknowledge parenting as a significant aspect of the life of its employees. As one ACU administrator stated, “we can't treat our employees as if parenting doesn't matter. We believe it does and are committed to that value.”<sup>261</sup> This generous support of families was characterized as being “in line with a progressive tradition of social justice and equity . . . consistent with our ethos as a Catholic institution.”<sup>262</sup> While ACU hoped that its new policies would have the incidental effect of “attract[ing] and retain[ing] high-quality staff,” the university stressed that the decision was made “because it was right: parents, women and men, should not be disadvantaged in the workplace because they have children.”<sup>263</sup>

## VI. CONCLUSION

Shortly after Summers' controversial remarks hit the press, the presidents of Stanford, MIT, and Princeton published a response in the *Boston Globe*.<sup>264</sup> Although I doubt that they relied on any Catholic teachings in drafting their response, portions of it could almost have been lifted from the encyclicals of Pope John Paul II. They wrote:

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257. *Id.* Mothers who do not return to work for twenty-six weeks after the period of leave are required to repay any pay received beyond the first twelve weeks of the maternity leave. *Id.*

258. *Id.* at 7 n.5.

259. *See supra* note 30 and accompanying text.

260. ACU REPORT, *supra* note 256, at 6.

261. *Id.* at 7 (citation and internal quotation marks omitted).

262. *Id.* (citation and internal quotation marks omitted).

263. *Id.* (citation and internal quotation marks omitted).

264. John Hennessey, Susan Hockfield & Shirley Tilghman, Op-Ed., *Women and Science: the Real Issue*, BOSTON GLOBE, Feb. 12, 2005, at A14.

Colleges and universities must develop a culture, as well as specific policies, that enables women with children to strike a sustainable balance between workplace and home. Of course, achieving such a balance is a challenge in many highly demanding careers. As a society we must develop methods for assessing present and future productivity that take into account the long-term potential of an individual and encourage greater harmony between the cycles of work and life so that both women and men may better excel in the careers of their choice.<sup>265</sup>

With respect to the need to take advantage of what Pope John Paul II called the genius of women, they explained:

[I]t is imperative that we tap the talent and perspectives of both males and females. Until women can feel as much at home in math, science, and engineering as men, our nation will be considerably less than the sum of its parts. If we do not draw on the entire talent pool that is capable of making a contribution to science, the enterprise will inevitably be underperforming its potential.<sup>266</sup>

The presidents of Stanford, MIT, and Princeton are challenging the academy to develop a culture that facilitates full participation of women with significant caregiving responsibilities. If Catholic universities are to be true to their task "of proclaiming the meaning of truth,"<sup>267</sup> they must take the lead in modeling such a culture.

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265. *Id.*

266. *Id.*

267. EX CORDE, *supra* note 10, para. 4 (emphasis omitted).