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# **CATHOLIC SOCIAL THOUGHT AND UNITED STATES FAMILY LAW: MODELS OF INTERACTION**

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# Catholic Social Thought and United States Family Law: Models of Interaction

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## I. Introduction

It should come as no surprise that bringing family law and religion into dialogue with one another is not a simple matter. In the United States today, political, moral and cultural disputes are waged over topics of intense interest to both disciplines. There is also a lot to know within each discipline; experts in one area can easily misstate or misunderstand the other. Furthermore, United States family law has always been a strictly and self-consciously civil venture, never ecclesiastical. Yet one can also justify today the claim that the future looks quite promising for those attempting either to resolve a complex family law problem with a religious insight or “metaphor,” or for those seeking to promote within family law the appreciation or even embodiment of a particular religious insight.

This situation is due in large part to the quality of the scholars who are currently and successfully writing about family law and religion in furtherance of these and other tasks.<sup>1</sup> It is also due to a critical mass of literature tending to indicate that religious observance correlates with healthy family outcomes.<sup>2</sup> At the same time, however, some of the groups in the United States experiencing the greatest difficulties forming and maintaining stable family bonds – economically

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<sup>1</sup> See, e.g., MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* (2000); DON S. BROWNING, ET AL, *FROM CULTURE WARS TO COMMON GROUND* (2d ed.) (2000); Charles J. Reid, Jr., *The Unavoidable Influence of Religion Upon the Law Of Marriage*, 23 QUINNIPIAC L. REV. 493 (2004); JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT: MARRIAGE RELIGION AND LAW IN THE WESTERN TRADITION* (1997).

<sup>2</sup> For a further discussion of the difficulties of forming and maintaining stable family relationships, see *infra*, Section III.D.

disadvantaged African Americans and Hispanics – describe themselves as quite religious.<sup>3</sup> Undoubtedly, some scholars and lawmakers are hoping that religious actors and messages can reach these communities in ways that the state and private actors have failed to do.

The vitality of the “family law and religion” project in the United States is also likely attributable to the complexity and foundational importance of the legal questions that have emerged today as a consequence of changing behaviors concerning sex, marriage and parenting. By itself, this provocation is not a positive good, save perhaps in the sense communicated by Thomas Aquinas’ “O happy fault.”<sup>4</sup> In other words, it appears that our nation’s high rates of divorce, out of wedlock births and cohabitation, and the challenges to long-held definitions of marriage, are raising questions, which are difficult for strictly legal sources to handle on their own. These include terribly basic questions about the legal significance, if any, of an individual’s sex, the relationship between sex and parenting, the relative social weight of adults’ desires versus children’s needs, and the relationship between marriage and the public good. Increasingly, scholars and lawmakers have come to believe that answering these questions intelligently, and making responsive family law, is important not only for the well-being of children, but also for social cohesion between races and socioeconomic groups.

After nearly five decades of rapid changes and troubling statistics, the public and private actors who have been grappling with family issues are more explicitly turning to religion for help. One can see this in the explicit outreach and program suggestions made to religious leaders and institutions by the White House Office of Faith-Based Initiatives,<sup>5</sup> the National Campaign to Prevent Teen Pregnancy,<sup>6</sup>

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<sup>3</sup> The Pew Forum on Religion and Public Life, *New Analysis Finds African Americans are Markedly More Religious than Overall U.S. Population*, Jan. 30, 2009, available at <http://pewforum.org/press/?ReleaseID=59>; Pew Hispanic Project and the Pew Forum on Religion and Public Life, *Changing Faiths: Latinos and the Transformation of American Religion*, available at <http://pewforum.org/surveys/hispanic/> (2007).

<sup>4</sup> ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* III, 1, 3 ad 3 (“O happy fault, . . . which gained for us so great a Redeemer!”).

<sup>5</sup> U.S. Dep’t. of Health and Human Services (HHS), *The White House’s Faith Based and Community Initiative Conference on Research, Outcomes, and Evaluation*, <http://aspe.hhs.gov/fbc/conf08/index.shtml> (last visited Feb. 17, 2010).

<sup>6</sup> Barbara Dafoe Whitehead et al., *Keeping the Faith: The Role of Religion and Faith Communities in Preventing Teen Pregnancy*, Sep. 2001 (National Campaign to Prevent Teen Pregnancy).

and the Department of Health and Human Services' Fatherhood Initiative.<sup>7</sup>

Needless to say, despite some openness to religious collaboration, resistance and even hostility toward religious participation are still very much alive. There are groups, for example, who sharply contest Christian stances on "hot-button" issue like abortion; the same groups apparently continue to harbor suspicions about Christianity's agreement with basic American family law norms, even including the equality of the sexes. There are others who interpret the First Amendment of the United States Constitution to impair the citizenship prerogatives of religiously motivated institutions or persons, even when the latter are offering secular-type contributions. This paper will treat these and other objections below in Section II. More importantly, however, I hope that my descriptions of various models for bringing Catholic Social Thought ("CST") and United States family law into dialogue, will persuade readers that these and other objections are not well founded.

CST pertaining to marriage and the family is obviously too extensive to rehearse here. It is as old as *Genesis*' description of the strengths and the weaknesses of the heterosexual relationship, Jesus' teachings about marital indissolubility, and Saint Paul's writings on sexual discipline. It is as new as a series of documents – beginning in 1965, with *Gaudium et Spes* and continuing with Pope John Paul II's Theology of the Body<sup>8</sup> and *Familiaris Consortio*,<sup>9</sup> and Pope Benedict XVI's *On the Collaboration of Men and Women* and *Deus Caritas Est*,<sup>10</sup> which both recognize the social and cultural significance of marriage and

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<sup>7</sup> See HHS, *Promoting Responsible Fatherhood, Federal Resource Site*, <http://fatherhood.hhs.gov/Evaluation/index.shtml> (last visited Feb. 21, 2010).

In March 2000, HHS approved ten state waivers for the Partners for Fragile Families Demonstration projects. Working at the community level with non-profit and faith-based partners to provide employment, health, and social services, these projects will test new approaches to involving young fathers with their children and to helping mothers and fathers build stronger parenting partnerships.

*Id.*

<sup>8</sup> MICHAEL WALDSTEIN, *Introduction to POPE JOHN PAUL II, MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY* (Michael Walstein, trans., 2006) [hereinafter THEOLOGY OF THE BODY].

<sup>9</sup> POPE JOHN PAUL II, *FAMILIARIS CONSORTIO* (1981).

<sup>10</sup> SECOND VATICAN COUNCIL, *GAUDIUM ET SPES* (1965); *A THEOLOGY OF THE BODY*, *supra* note 8; *FAMILIARIS CONSORTIO*, *supra* note 9; Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World* (2004); POPE BENEDICT XVI, *DEUS CARITAS EST* (2005).

family, and take up the most essential challenges to these institutions. Today, not only is the Catholic Church in the United States (and globally) active intellectually and pastorally on the subjects of human sexuality, marriage and the family, but it is also present in the legal arena. There, the church struggles to explain the “rational heart” of Catholic thought about marriage and the family.

Particularly during the past two decades, a group of scholars have demonstrated how family law and religion can work together for good ends. The greater part of the remainder of this article is an attempt to “collect” extant approaches, describe their operation presently or potentially using CST, and to suggest the leading practical hazards, if any, associated with a particular approach. The question of the intersection of CST and family law is too vast to do more here than offer a roadmap, although it is a roadmap intended to generate further scholarship. It is also intended to overcome the simplified portrait of religion as a giant “no” obstructing the freedoms of families or individual members of families. This caricature looms so large, in fact, that before moving into a description of models of interaction between CST and family law, it is wise first to consider several of the most well-known objections to this interdisciplinary project.

## II. Initial Objections

### A. *Anthropological Pessimism and Irrationality*

Some scholars have thrown up their hands in the face of negative trends affecting the family. Respecting the future, they employ the language of “adaptation” and compromise, and see no role for religion. Prominent family law scholar Harry Krause articulates this compactly when he writes that “[t]o make progress in any sensible adaptation of marriage and family to current conditions, civil marriage must be distinguished clearly from the continuing romance with religious images of ‘marriage’ as a status of supra- (or indeed super-) natural virtue . . . . [r]eligion has no role in secular affairs.”<sup>11</sup> A similar sentiment is expressed in an essay offered by a family law practitioner who states baldly that “[r]eligion, by definition, defies rationality and militates against compromise.”<sup>12</sup>

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<sup>11</sup> Harry D. Krause, *Comparative Family Law: Past Traditions Battle Future Trends—And Vice Versa*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1116 (2006).

<sup>12</sup> Joanne Ross Wilder, *Religion and Best Interests in Custody Cases*, 18 J. AM. ACAD. MATRIM. LAW 211, 220 (2002).

Together, both writers are making the following claims: human beings cannot today abide by the kinds of family laws which governed their behavior until only about five decades ago; family laws in harmony with religious views of marriage and the family, ask too much of human beings and are in that sense irrational; “rationality” within family law is roughly equivalent to what a large or vocal group of adults do at a particular period of time; and, religious and secular interests and concerns regarding the family share no common ground. Possibly the latter observation is intended to claim that religions’ only source of knowledge is Revelation, which, in turn, does not overlap with reason. (The last quotation in the paragraph immediately above further suggests that an “incremental legislative” strategy is always foreclosed to religious believers; this is wrong,<sup>13</sup> but will not be treated further here).

These are naturally appealing objections. Religion is not labeled a “higher calling” for nothing; it demands considerable virtue from adherents. Vast numbers of people are refusing to behave in conformity with moral and legal norms which commanded a rough consensus within the recent past. Law alone has not proved able to move people to virtue in their family lives. Some CST concerning marriage and the family flows directly from Christian scriptures. Yet this list does not exhaust the relevant facts.

For example, it is still the case that a large majority of young Americans aspire to life-long marriage. The percentages holding that a good marriage and family life is “extremely important” have varied little over the last three decades.<sup>14</sup> Most marriages still last a lifetime, and most children are reared by their own biological parents within a marriage.<sup>15</sup> That these accomplishments are disproportionately achieved by more privileged Americans – those who are white, college-educated and economically middle class or above – indicates that they are neither irrational nor impossible. It suggests rather, that behind our current rates of family breakdown lies a story involving poverty, past and present racial, ethnic and socio-economic discrimination, and too few or

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<sup>13</sup> POPE JOHN PAUL II, *EVANGELIUM VITAE* ¶ 73 (1995).

<sup>14</sup> See THE NATIONAL MARRIAGE PROJECT, *THE STATE OF OUR UNIONS, 2008 UPDATE*, Fig. 14 (2009), available at <http://marriage.rutgers.edu/Publications/SOOU/2008update.pdf> (summarizing Monitoring the Future Surveys conducted by the University of Michigan’s Survey Research Center).

<sup>15</sup> U.S. Census Bureau, *Household Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex* (2009), <http://www.census.gov/population/socdemo/hh-fam/cps2008/tabC2-all.xls>.



misdirected investments into vulnerable American subgroups.<sup>16</sup> It does not suggest that the plight of these groups, or of others unable to form or stabilize married families, is coextensive with the set of “rational” family choices.

What about some more particular positions about marriage and family held by CST, but persistently critiqued over the last few decades? Has the weight of these criticisms sunk any realistic hopes that CST might be a viable dialogue partner in the family law arena? Some of the most hotly contested Catholic positions include, for example the insistence upon the goods of indissoluble marriage, of opposite-sex marriage partners, of complementarity between males and females, as well as the good of maintaining the tie between marriage and parenting. There are additional disputed questions, but we have identified a sufficient quantity to set up the problem, which is this: how can CST possibly speak about such topics (and get a hearing) in a nation with a high divorce rate, a shifting opinion toward same-sex unions, a forty percent nonmarital birth rate, and historical evidence that sexism and an emphasis upon sex-differences traveled together?

These are large objections. Broad answers might include, first, pointing to the persistent aspirations of Americans generally, including bureaucrats, to ameliorate our nation’s current divorce and nonmarital birth rates. Here, there is already ample common ground for dialogue between citizens, lawmakers and CST. Second, regarding marriage, the decibel level of published opinion supporting same-sex marriage should not blind observers to the fact that the citizenry of thirty-one states – i.e. 100% of popular contests – have refused to redefine marriage to include same-sex pairs. Third, respecting complementarity, while this notion is perhaps the most feared and the least understood dimension of Catholic teaching about marriage and family, it has its constituency – even if the word “complementarity” is not regularly invoked to describe a proponent’s position, and even if the position does not overlap completely with the full Catholic sense of it. The notion of complementarity – sex differences as mutual gifts – can be seen, for example, lurking beneath the surface of now-Supreme Court Justice Sonia Sotomayor’s comments about the value of being a “wise Latina woman.”<sup>17</sup> It is partially represented in

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<sup>16</sup> See generally, KAY HYMOWITZ, *MARRIAGE AND CASTE IN AMERICA: SEPARATE AND UNEQUAL FAMILIES IN A POST-MARITAL AGE* (2006).

<sup>17</sup> Sonia Sotomayor, *Lecture: “A Latina Judge’s Voice,”* N.Y. TIMES, May 14, 2009, available at <http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html>, discussed in Frank James, *Sotomayor’s “Wise Latina” Remark Maybe Not so Wise,*

Martha Fineman's proposal to reorganize family law around women and their children, on the ground that there are unique gifts women bring to the parenting enterprise.<sup>18</sup> Researchers considering fathers' social contributions to children, also find themselves inquiring not only about the differing gifts mothers and fathers bring, but also about the possible role of interacting gifts/complementary in successful childrearing.<sup>19</sup> In sum, there is no basis whatsoever for concluding that CST has been or could be written off as irrelevant or "fringe" by mainstream scholars, lawmakers or citizens, albeit biases against Catholic interventions in this area will undoubtedly continue to exist.

Furthermore, a variety of more general Catholic principles applicable to marriage and family – principles such as the equality of all persons, the importance of commitment and mutual sacrifice, and the ties between freedom and solidarity – are endorsed by a variety of family scholars who are not working from within the CST tradition.<sup>20</sup> Certainly, scholars adopting these principles do not always follow them to the same conclusion as do Catholic thinkers. But their work helps to establish considerable common ground for a discussion between themselves and CST.

Finally, concerning the general question of rationality and family law: there exist today, a critical mass of family laws and norms, which appear to have no rational warrant. Yet they persist and exert influence upon the culture and upon the development of the law. A good example is the state of the law regarding assisted reproductive technologies ("ARTs"). Over the past thirty years, it has become common knowledge that doctors are willing to compromise the health of women and children in order to attract additional clients to their practices. Recent headlines describe clinics in which poor women from Eastern Europe receive massive hormone shots in order to produce ten or more eggs for harvest and sale to

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NPR, May 27, 2009, available at [http://www.npr.org/blogs/thetwo-way/2009/05/sotomayors\\_wise\\_latina\\_line\\_ma.html](http://www.npr.org/blogs/thetwo-way/2009/05/sotomayors_wise_latina_line_ma.html).

<sup>18</sup> Martha Albertson Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181 (1995); Martha Albertson Fineman, *Why Marriage?* 9 VA. J. SOC. POL'Y & L. 239 (2001).

<sup>19</sup> See e.g., W. Bradford Wilcox, *The Necessity of Both Sexes in Parenting: Reconciling Differences: What Social Sciences Show about the Complementarity of the Sexes and Parenting*, at <http://www.family-men.com/The%20necessity%20of%20both%20sexes%20in%20parenting.htm> (last visited Feb. 19, 2010).

<sup>20</sup> See e.g., Marsha Garrison, *An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41 (1998); Martha Minow, *All in the Family and in All Families: Membership, Loving and Owing*, 95 W. VA. L. REV. 275 (1992-1993).



wealthy Westerners.<sup>21</sup> Another well-known story involves the fertility doctor who enabled a single woman to have octuplets, following her prior delivery of sextuplets.<sup>22</sup> These stories create a flurry of commentary, but little else. ARTs remain virtually unregulated in the United States. Instead, doctors, who wish to belong to trade associations of for-profit fertility businesses, might agree voluntarily to abide by association regulations designed to walk the line between maintaining high incomes and avoiding public condemnation.<sup>23</sup>

When family laws fail to comport with available data, it is fair to ask why. Are the lawmakers or those who influence them committed in advance to a particular principle or philosophy? Professor Don Browning has suggested that part of the answer lies in the unwillingness of secular lawmakers to acknowledge their own “deep metaphors,” which “function analogously to the metaphors of explicitly religious legal traditions.” These might include, Browning continues, principles from psychotherapy, cultural individualism, technical rationality, or “thin views of moral rationality built on either Kantianism, utilitarianism, or rational-choice ethical egoism.”<sup>24</sup> In the face of this sort of approach to family-law-making, it seems hypocritical at best to charge religious sources with irrationality, without any further investigation of their offerings, while at the same time leaving unchallenged those legal regimes within family law which are themselves grounded upon religious-type metaphors.

A final response to commentators’ anthropological pessimism or charges of “irrationality” is to direct them to the primary documents of CST about marriage and the family. Even a casual review will indicate two things: first, how much of CST in this area is derived from the natural law; and second, how firmly and how long the Church has insisted that the data and the conclusions derived from faith and reason must never contradict. A very recent example is the November 2009

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<sup>21</sup> Antony Barnett & Helena Smith, *Cruel Cost of the Human Egg Trade*, THE OBSERVER, Apr. 30, 2006, at 6, available at <http://www.guardian.co.uk/uk/2006/apr/30/health.healthandwellbeing>.

<sup>22</sup> Raina Kelly, *Octomom Hypocrisy: Four Reasons Nadya Suleman Drives us Crazy and Why We’re Wrong*, NEWSWEEK, Mar. 30, 2009, available at <http://www.newsweek.com/id/187344>.

<sup>23</sup> THE PRESIDENT’S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 8-12, 46-79 (2004) available at [http://www.bioethics.gov/reports/reproductionandresponsibility/\\_pcbe\\_final\\_reproduction\\_and\\_responsibility.pdf](http://www.bioethics.gov/reports/reproductionandresponsibility/_pcbe_final_reproduction_and_responsibility.pdf).

<sup>24</sup> Don Browning, *Modern Law and Christian Jurisprudence on Marriage and Family*, 58 EMORY L.J. 31, 32-33 (2008) [hereinafter *Modern Law and Christian Jurisprudence*].

United States Bishops marriage pastoral letter, *Love and Life in the Divine Plan*. There, the bishops describe their approach as “informed by human reason and enlightened by Divine Revelation.”<sup>25</sup> They further devote its first long part to the “natural institution of marriage.” Part two considers what the Christian sacramental theology of marriage can add or illuminate. Particularly throughout the first part, the text relies upon rationally accessible argumentation, and relevant data generated by credible, secular sources.

### B. Sexism

Some argue that religions are so historically tainted with sexism that their pronouncements on the family are consequently suspect.<sup>26</sup> The charge of sexism is pertinent to the question about who may speak on family law because a good deal of family law’s recent “work” – particularly over the past 50 years – has been directed to improving the situation of women in their familial roles. For a variety of reasons, however, whether due to its all-male priesthood and/or its teachings about contraception and abortion, some presume that the Church is opposed to this work. In fact, not a few of modern feminism’s most visible leaders have made support for access to contraception and abortion tantamount to acknowledging women’s equal status.<sup>27</sup>

Of course, it would be impossible to treat here the entire question of Catholic teachings regarding the equality and dignity of women. An excellent summary of the church’s most developed position, however, is John Paul II’s *Letter to Women*.<sup>28</sup> There, he not only apologizes for any role the church has played in denying women’s equality, but also reaffirms the Catholic commitment to recognizing the full equality and dignity of women.<sup>29</sup> In his *Mulieris Dignitatem*, John Paul II offers that the relationship between men and women is always one of “mutual

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<sup>25</sup> U.S. CONF. OF CATHOLIC BISHOPS (USCCB), MARRIAGE: LOVE AND LIFE IN THE DIVINE PLAN 5 (2009) available at <http://www.usccb.org/laity/LoveandLife/MarriageFINAL.pdf>.

<sup>26</sup> See, e.g., José Casanova & Anne Phillips, *A Debate on the Public Role of Religion and its Social and Gender Implications*, Gender and Development Program Paper No. 5, United Nations Research Institute for Social Development, at 39 (Sep. 2009).

<sup>27</sup> *Casey v. Planned Parenthood*, 505 U.S. 833, 851-52 (1992) (describing centrality of decision to keep or to abort an unborn child as central to a woman’s dignity, autonomy, destiny and place in society); *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (“[L]egal challenges to undue restrictions on abortion . . . center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship status.”) (Ginsburg, J., dissenting).

<sup>28</sup> POPE JOHN PAUL II, LETTER TO WOMEN (1995).

<sup>29</sup> *Id.* ¶ 3.

submission” – never unilateral – out of reverence to Christ.<sup>30</sup> Popes John Paul II and Benedict XVI have also clearly affirmed the place of women in every aspect of society – public and private – not merely as a matter of bare equal rights, but from the perspective of the indispensable gifts of women and the corresponding needs of the economic, political, academic, and other spheres.<sup>31</sup> There is also the fact that it is no longer primarily Catholic males, let alone ordained males, who are exploring questions about marriage and family from within the Catholic tradition; lay Catholic females are also assuming leadership on these questions.<sup>32</sup> Of course this is not a dispositive answer to substantive claims of sexism, but it is indicative.

Regarding the claim that ready access to contraception and abortion are essential to women’s freedom – it should be noted that Catholics do not stand alone in their claims to the contrary. Secular rebuttals to the centrality of these issues have been offered. Several women’s groups, for example, have argued that abortion did not usher in more freedom for women but has rather compounded problems such as the objectification of women’s bodies, the pressure to conform to men’s sexual demands, increased non-marital pregnancies and births, and post-abortion distress.<sup>33</sup> An argument persuasively linking more easily available abortion and contraception to increased pressures on women to be sexually active against their wishes, and outside of any marital commitment, has also been made by several well-regarded secular economists.<sup>34</sup> Finally, it should be pointed out that movements, which

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<sup>30</sup> POPE JOHN PAUL II, *MULIERIS DIGNITATEM* ¶ 24 (1988).

<sup>31</sup> LETTER TO WOMEN, *supra* note 28, ¶¶ 13-14.

<sup>32</sup> See Elizabeth R. Schiltz, *Motherhood and the Mission: What Catholic Law Schools Could Learn From Harvard About Women*, 56 CATH. U. L. REV. 405 (2007); MICHELE M. SCHUMACHER, *WOMEN IN CHRIST: TOWARD A NEW FEMINISM* (2004); Mary Ann Glendon, *What Happened at Beijing?*, FIRST THINGS (Jan. 1996); Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage and Family: Same-Sex Marriage and its Predecessors*, 16 STAN. L. & POL’Y REV. 135 (2005); Jane Adolphe, *The Holy See and the Universal Declaration of Human Rights: Working Toward a Legal Anthropology of Human Rights and the Family*, 4 AVE MARIA L. REV. 343 (2006); Katherine Shaw Spaht, *Covenant Marriage: An Achievable Legal Response to Inherent Nature of Marriage and its Various Goods*, 4 AVE MARIA L. REV. 467 (2006).

<sup>33</sup> See, e.g., Feminists for Life, <http://www.feministsforlife.org> (last visited Feb. 20, 2010). See also Brief of Sandra Cano, the former "Mary Doe" of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner at app. 8, *Gonzalez v. Carhart*, 550 U.S.124 (2007); MELINDA TANKARD REIST, *DEFIANT BIRTH: WOMEN WHO RESIST MEDICAL EUGENICS* (2000); Susan B. Anthony List, SBA List, <http://www.sba-list.org> (last visited Feb. 20, 2010).

<sup>34</sup> George A. Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q. J. OF ECON. 277 (1996).

claim to be in conflict with Christianity, including the feminist movement, are nevertheless likely to find themselves borrowing Christianity's "moral capital."<sup>35</sup> For example, it is difficult to imagine a full-blown ontological argument for the equality of the sexes, which does not have reference to the situation of human creatures of both sexes vis-à-vis their creator. Certainly this reliance upon Christian ideas characterized the arguments of first wave feminists in the United States during the nineteenth century.

These various rebuttals to sweeping claims about Catholic sexism, have at the very least to be grappled with fully by those who would dismiss family law interventions from CST on this ground.

### *C. Religion is so Yesterday*

Recent figures released by the Pew Forum,<sup>36</sup> seemed to indicate a modest backing away from religious beliefs and practices in the United States President Barack Obama's outreach to atheists during his inaugural address is cited to further confirm the trend.<sup>37</sup> Could it now be convincingly argued that religion is less a part of our shared national future, than of our past, and therefore hardly merits an important place at the table of law and policymaking? Probably not. While religious patterns are changing, religion remains a robust feature of our national landscape as well as our international relations strategies.<sup>38</sup>

On a far more general level, it might be observed that the "classic" virtues promoted by many of the world's leading religions continue to garner global admiration. These include principles such as the "golden rule," the absolute equality of all human persons, and sacrificial generosity, to name just a few. Whether practiced by popes, or religious sisters, or human rights activists, such virtues command widespread attention and respect.

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<sup>35</sup> See, e.g., *Cardinal Pell to Debate Christopher Hitchens: Festival of Dangerous Ideas Aims to Provoke Discussion*, ZENIT NEWS AGENCY, Sep. 15, 2009, available at <http://www.zenit.org/article-26871?l=english>.

<sup>36</sup> The Pew Forum on Religion and Public Life, *The U.S. Religious Landscape Survey* (2009), available at <http://religions.pewforum.org/>.

<sup>37</sup> Herb Silverman, *Inaugural Prayerfest no Godsend*, WASHINGTONPOST, Jan. 21, 2009, available at [http://newsweek.washingtonpost.com/onfaith/guestvoices/2009/01/inaugural\\_prayerfest\\_no\\_godsen.html](http://newsweek.washingtonpost.com/onfaith/guestvoices/2009/01/inaugural_prayerfest_no_godsen.html).

<sup>38</sup> See ADRIAN WOOLDRIDGE & JOHN MICKLETHWAIT, *GOD IS BACK: HOW THE GLOBAL REVIVAL OF FAITH IS CHANGING THE WORLD* (2009); U.S. Dep't of State, *2009 Report on International Religious Freedom* (2009), available at <http://www.state.gov/g/drl/rls/irf/2009/index.htm>.

Furthermore, as Part III.D, *infra*, describes, scientific research about the well being of family members indicates that there are benefits associated with religion's presence in the family. On the basis of these findings, those who make family law and policy will likely wish to continue to consult with religious scholars and institutions in the future.

#### *D. Moral Norms are Out*

A possible and amorphous hurdle facing the project of bringing CST into dialogue with American family law is Justice Kennedy's famous utterance in *Lawrence v. Texas* that "[m]oral disapproval of a group cannot be a legitimate government interest under the Equal Protection Clause."<sup>39</sup> Later in the same case, he wrote that "the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval asserted as the only state interest for the law."<sup>40</sup> These declarations might suggest that contributions from religious sources – which propose moral arguments about rights and wrongs – are out. That proposition, however, is weak. On its face, it is not difficult to construe these passages from *Lawrence* narrowly, so as to forbid only laws, which *both* distinguish between classes of persons *and* have as their *sole* rationale, a moral argument. Other commentators have concluded similarly that *Lawrence*:

could not have been serious that morality has *no* constitutionally permissible role in making law. It is not difficult to think of laws that have a clear moral pedigree but that certainly remain on solid constitutional ground after *Lawrence* . . . . [I]t must be that the Court believed that morality cannot be the sole (or perhaps dominant) rationale for a given law.<sup>41</sup>

This interpretation of *Lawrence* does nothing to threaten the constitutional validity of laws supported by moral as well as other arguments. It also does nothing to threaten laws which do not distinguish between classes of persons. Many family laws do not so distinguish. When they do, (e.g., using categories such as married versus unmarried or biological parents versus third parties with interests in the child, etc.) they are regularly supported by additional rationales concerning public health, children's welfare, the state's *parens patriae* obligations, fiscal effects, etc.

<sup>39</sup> *Lawrence v. Texas*, 539 U.S. 558, 583 (2003).

<sup>40</sup> *Id.* at 584.

<sup>41</sup> Michael P. Allen, *The Underappreciated First Amendment Importance of Lawrence v. Texas*, 65 WASH. & LEE L. REV. 1045, 1048 (2008).

Having considered the most likely objections to the dialogue between family law and CST, we now turn to a discussion of the ways in which the dialogue might proceed.

### III. Models for the Interrelationship of CST and Family Law

There are at least four models today used by scholars whether they are attempting to ameliorate a complex family law problem with a religious insight or “metaphor,” or to promote within family law the appreciation or even the embodiment of a particular religious insight. The first employs empirical data to illustrate and/or confirm a CST insight regarding norms for various family relationships. The second identifies an insight or norm held in common by CST and a secular source for family lawmaking, as a foundation for a particular family law. The third offers an insight from CST toward the project of addressing a particularly thorny family law dilemma. And the fourth explores the implications of the correlation between religiosity as a personal trait and good outcomes for families.

#### *A. Show how Emerging Data Regarding Some Aspect of the Family Tends to Demonstrate a Catholic Insight about Family Relationships*

There is an enormous amount of data produced each month in professional sociological, biological or medical journals about family relationships. Often, the research is intended to determine the existence of correlation or causation between the well-being (physical, mental, financial, educational, etc.) of one or more family members, and a particular family form, behavior, event, or social program. Not infrequently, the emerging data tends to affirm a proposition about family life supported by CST. This has been the case concerning, for example, the correlation between cohabitation and an increased risk for divorce,<sup>42</sup> and between premarital sex and depression.<sup>43</sup> Such findings help CST to better understand and articulate its teachings about the meaning and expression of human love – its intrinsic embodiedness, for example, or its aspirations toward “forever” and its longing for

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<sup>42</sup> See Jay Teachman, *Premarital Sex, Premarital Cohabitation, and the Risk of Subsequent Marital Dissolution Among Women*, 65 J. MARRIAGE & FAM. 444, 445 (2003) (calling correlation between cohabitation and divorce one of the “most robust predictors of marital dissolution that has appeared in the literature.”).

<sup>43</sup> Martha W. Waller et al., *Gender Differences in Associations Between Depressive Symptoms and Patterns of Substance Use and Risky Sexual Behavior among a Nationally Representative Sample of U.S. Adolescents*, 9:3 ARCHIVES OF WOMEN'S MENTAL HEALTH, 139-50 (May 2006).



reciprocal self-giving. At the same time, they might suggest to sociological and legal scholars treating cohabitation that Catholic thinking about the inseparability of body and soul and the multiple meanings of the one-flesh union, has some explanatory powers in the area of the dynamics of non-marital sexual partnering. The dialogue between lawmakers and Catholic scholars might even lead each to recognize dimensions of sexual intercourse not formerly understood fully by either.

Another intriguing, but more complicated application of this method involves the data showing that women are less amenable to cohabitation, and more desirous of marriage at an earlier age, than men. Furthermore, where populations have a high ratio of women to men, there is more cohabitation; when the opposite ratio prevails, there is less.<sup>44</sup> This data points to the possibility that men and women have somewhat different preferences regarding sexual fidelity and the willingness to express commitment. After marriage, though, it is women who file for over two-thirds of all divorces.<sup>45</sup> It appears this is the case outside the United States as well.<sup>46</sup> CST might suggest that these phenomena bear an interesting resemblance to the behavior described in the Christian scriptures resulting from “his and hers” versions of hereditary original sin. In other words, the data depict a situation in which the man wants sexual intimacy but no long-term commitment; the woman wants to secure the man’s attention and even commitment, but then later, rejects the relationship she has helped to fashion. The *Genesis* account of original sin states: “[t]o the woman [God] said . . . in pain shall you bring forth children. Yet your urge shall be for your husband, and he shall be your master.”<sup>47</sup> Pope John Paul II, writing about this portion of *Genesis*, suggests that this indicates a persistent temptation in heterosexual relations toward the objectification of the woman and toward a rejection of a relationship of communion in favor of one involving male domination and a lack of fundamental equality.<sup>48</sup> Even if she has connived or cooperated in achieving this relationship, John Paul II writes, still “the experience of such domination shows itself . . . in the woman as

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<sup>44</sup> See Karen Benjamin Guzzo, *How Do Marriage Market Conditions Affect Entrance into Cohabitation v. Marriage?*, University of Pennsylvania, NSF dissertation Improvement Grant SES - 0220543 (Sept 4, 2003) available at <http://paa2004.princeton.edu/download.asp?submissionId=40104>.

<sup>45</sup> Margaret F. Brinig & Douglas W. Allen, “*These Boots are Made for Walking*”: *Why Most Divorce Filers are Women*, 2 AM. ECON. & L. REV. 126 (2000).

<sup>46</sup> See JOHN-FRANCOIS MIGNOT, WHY IS IT WOMEN WHO FILE FOR DIVORCE: SOME STEPS TOWARD SOLVING AN ENIGMA, Observatoire Sociologique du Changement (2007), available at [http://osc.sciences-po.fr/equipe/Mignot\\_Londres07.pdf](http://osc.sciences-po.fr/equipe/Mignot_Londres07.pdf).

<sup>47</sup> *Genesis* 2:18.

<sup>48</sup> POPE JOHN PAUL II, MULIERIS DIGNITATEM, *supra* note 30, ¶ 9.

the insatiable desire for a different union.”<sup>49</sup> Perhaps this inclination helps to explain women’s greater readiness to consider severing even vowed relationships? Perhaps, with further analysis and a review of additional social science data concerning divorce, some family law scholars and lawmakers might be persuaded that Christian scriptures and social encyclicals have an insight into the fragility of modern male-female relations. CST theorists, in turn, might wish to seek out further relevant empirical data regarding cohabitation and divorce in order to help shape a better understanding of the possible effects of “original sin” in heterosexual relationships and marriage in the modern world.

This first model is sufficiently complex to warrant several cautions. First, one must take care to avoid any temptation to overread empirical data in misplaced zeal to find support for a particular Catholic teaching or to condemn a particular social trend. In addition to the possibility that a particular piece of research was not conducted according to accepted scientific standards, there is also the fact that many of even the most careful and important studies draw quite narrow conclusions. Furthermore, scientists often can only suggest correlations between several factors, not causation. There is also the limitation that many studies apply only to particular sub-populations. Finally, readers of empirical studies need to attend carefully to each author’s statements of what his or her study does *not* conclude, but rather leaves for future studies.<sup>50</sup>

*B. Suggesting that an Extant Law or Family Norm, Accepted and Relied upon in Secular Society, Incorporates an Insight held too by Catholics*

Certainly there have been and remain numerous family laws and norms which reflect some insight or hope that comports with CST, even if not perfectly. One might point, for example, to the United States laws’ assumptions that parents are the primary educators of their children, or that parents’ rights respecting children are premised on parents’ pre-existing duties. There is also United States family law’s continuing willingness to offer privileged status to heterosexual marital unions, on the grounds primarily of these unions’ procreative potential and relatively superior stability. These important preferences have persisted in our family law for a very long time.

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<sup>49</sup> POPE JOHN PAUL II, *THE THEOLOGY OF THE BODY*, *supra* note 10, ¶ 254.

<sup>50</sup> See generally, Margaret F. Brinig, *The Role of Socioeconomics in Teaching Family Law*, 41 SAN DIEGO L. REV. 177 (2004); Sarah H. Ramsey & Robert S. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 S. CAL. INTERDISC. LJ. 631 (1994).

On the other hand, even to list these norms and preferences is to bring to mind situations in which they are being denied: judicial decisions have compromised parents' authority over their children's education, including their freedom to home-school their own children.<sup>51</sup> There is also a strong movement to divorce marriage from procreation within arguments and judicial decisions justifying the extension of legal marriage status to couples of the same sex.

What might CST contribute here? If a new rule contradicts a principle formerly agreed upon by CST and the civil law, CST might suggest that there has been either a "forgetting" or an incorrect development of the reasoning underlying the prior rule. Perhaps the rationale for the earlier rule was never fully or excellently formulated, either in the legislative history, or the scholarship, or the public commentary considering the prior rule. This could easily happen if, at the time the prior rule was made, there was a broad social consensus in favor of the rule, and thus no perceived need to engage in a full-blown debate. In such a scenario, CST could offer substantial assistance setting forth the necessary reasoning to support the continuation of the prior agreement – including data from a variety of scientific and philosophical sources, for example – and to suggest how the contradictory proposal might undermine individual or family or social well-being.

*C. Extant Solutions to a Family Problem are Missing an Important Insight or Element. An Insight from CST both Explicitly Affirms the Role of Reason in Solving the Problem, while Assisting by Means of Suggesting an Additional Dimension to the Subject Matter or Problem under Consideration*

Popes John Paul II and Benedict XVI have both requested Catholic scholars to engage regularly in the project of "illuminating" faith with reason. They promote this project regularly both within their formal writings and within their less formal public presentations.<sup>52</sup> As noted

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<sup>51</sup> See *Voydatch v. Kurowski*, No. 2006-M-66, Decree on Pending Motions (N.H. Laco-  
nia Family Division July 13, 2009) available at [http://www.telladf.org/UserDocs/  
KurowskiOrder.pdf](http://www.telladf.org/UserDocs/KurowskiOrder.pdf) (While the family court was settling a dispute between divorced  
parents over their child's education, the court's language went further, to suggesting  
that home-schooling in one religious tradition is harmful to minor children).

<sup>52</sup> See, e.g., POPE JOHN PAUL II, *FIDES ET RATIO* (1998); Zenit.org, *Faith-Reason Friend-  
ship Clear in Theology, Says Pope* [Benedict XVI], Oct. 28, 2009, [http://www.zenit.org/  
article-27371?l=portuguese/](http://www.zenit.org/article-27371?l=portuguese/) (General Audience remarks of Benedict XVI on the "syn-  
thesis between authority and reason to attain a more profound understanding of the  
word of God."); The International Theological Commission, *The Search for Universal  
Ethics: A New Look at Natural Law*, Oct. 17, 2009.

in the Introduction, more than a few scholars, representing several Christian denominations, are enthusiastically pursuing this project. Still, sophisticated practitioners Don Browning and John Witte are undoubtedly correct when they observe that family law scholars, ordinary citizens and government,<sup>53</sup> remain “insufficiently aware of the resources that Christian jurisprudence” could bring to help ameliorate various alarming family trends.<sup>54</sup>

A good deal of CST’s untapped talent in this regard consists in its embedded practice of approaching marriage and the family first from the perspective of what nature has revealed, while also asking what more is suggested by Revelation. This theme pervades Pope John Paul II’s *Theology of the Body* wherein the very structures of males’ and females’ bodies, and their observed behavior, help guide the development of norms. The *Theology of the Body* additionally mines the *Genesis* creation accounts for all of the light they can shed upon men and women’s relationships with God and with one another. As already described *supra* in Part II.A, this approach also characterizes the United States Conference of Catholic Bishops’ new marriage pastoral.

Professors Don Browning and Margaret Brinig have demonstrated another way in which the resources of a religion can assist in the formulation of family laws or norms. Professor Browning writes that there are “deep metaphors” within Christian scriptures about marriage and male-female relationships, which metaphors uniquely and fully (if sometimes also mysteriously) capture what individuals and communities expressly hope for or intend. These metaphors are often superior to what legislators or scholars have managed to capture in their work on the same subject. The metaphors might help improve our existing understanding of a family relationship or problem, or help to express better a legal rule or norm. These include, for example, the metaphors of “covenant” or “equal-regard,” or “one-flesh union” to express the marital promise, as well as the deepest realities and development of marital life. Professor Brinig’s book, *From Contract to Covenant* proposes that United States family law move toward an understanding of marriage, which, as a covenant – a solemn agreement – likely also includes deference to God, or to religious or family values.<sup>55</sup> Don Browning writes that Christian scriptures propose a model of marriage as an “equal-regard”

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<sup>53</sup> John Witte, *Exploring the Frontiers of Law, Religion, and Family Life*, 58 EMORY L.J. 87, 91 (2009).

<sup>54</sup> *Modern Law and Christian Jurisprudence*, *supra* note 24, at 37.

<sup>55</sup> See generally, BRINIG, *From Contract to Covenant*, *supra* note 1 at 274-77.

relationship.<sup>56</sup> This vision of the marital pair is in harmony with Pope John Paul II's interpretation of Saint Paul's teachings about marriage.<sup>57</sup> Such metaphors might assist those who shape law and policy to understand better the dynamics of decisions involving marriage, divorce, or sexual intimacy. Some observed behavior in these areas which does not seem "rational" when considered strictly from the perspective of, for example, economics, might be more explicable from the religious angle. Here I am referring to questions such as why women initiate divorce in situations when this is economically disadvantageous? Why some single women seek deliberately or nearly-deliberately to become pregnant even when this will complicate or compromise their personal and economic future? Why divorced fathers stay in far more regular contact with their children than do never-married fathers?

Presently, in another project I am attempting to plumb the phenomenon of rising non-marital births in the United States, with the assistance of religious metaphors. Today, more young couples are open to conceiving a child without any near-term plans for marriage. Even if young adults cannot find a stable bond with a member of the opposite sex, or perhaps especially when they cannot, they will engage in sexual intimacies with the vague or specific notion that it would be nice to have a baby to love and to be loved by. How can Catholic insights about human beings' longing for communion (as a Trinitarian God *is* communion), about our being made in God's image and likeness, and about the meanings of the one-flesh union, be developed in order to help young women and men delay childbearing until they have a mutual commitment to one another and to the child in order to improve their situations and their children's futures?

More *theological* formulations of this proposal – demonstrating how CST can and has dialogued with legal and cultural norms – have been offered recently by the Cardinal Cormac Murphy-O'Connor (President of the Catholic Bishops' Conference of England and Wales),<sup>58</sup> Cardinal Francis George (President of the United States Conference of Catholic Bishops),<sup>59</sup> and in 1991 by then Cardinal Joseph Ratzinger (now Pope Benedict XVI). Cardinal Murphy-O'Connor suggested that opportunities to speak

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<sup>56</sup> DON S. BROWNING, ET AL., *FROM CULTURE WARS TO COMMON GROUND* 303-05 (2d ed. 2000).

<sup>57</sup> For a discussion of John Paul II's interpretation of St. Paul's teachings about marriage, see *supra*, Section II.B.

<sup>58</sup> Cardinal Cormac Murphy-O'Connor, *The Cardinal's Lectures at Westminster Cathedral 2008: Faith in Britain: A Personal Perspective* (Mar. 3, 2009), available at [www.rcdow.org.uk/lectures/2008](http://www.rcdow.org.uk/lectures/2008).

<sup>59</sup> FRANCIS CARDINAL GEORGE, O.M.I. *THE DIFFERENCE GOD MAKES: A CATHOLIC VISION OF FAITH, COMMUNION, AND CULTURE* (2009).

understandably about Catholic ideas may be found in modern situations analogous to that experienced by St. Paul when he spoke to the Greeks in his famous address at the Areopagus. Saint Paul's "missionary attitude" first begins by "expressing deep esteem for 'what it in man' – secular man who does not even know Jesus yet" – and by manifesting "respect" for "everything that has been brought about in [human society] by the Spirit."<sup>60</sup> It suggests that we might have success speaking from CST to our own culture if we begin by recognizing those situations or hopes regarding family life, which indicate an openness to CST themes, and then drawing out the implications or lessons of these situations or hopes.

Then-Cardinal Ratzinger proposed such an outreach on the basis of what he called an "*anamnesis*" in every human person. By this he means a "memory" or knowledge at the core of every person, which is like an *original memory* of the good and the true, implanted in us by God, giving us an inner ontological tendency toward the divine. "Even though this *anamnesis* may not be a conceptually articulated knowing" he writes, it is at least an inner sense or capacity to recall, that can be stirred in another for the purpose of promoting the good of the listener, or of society.<sup>61</sup>

Cardinal George has applied such a method to the United States context broadly in his book, *The Difference God Makes*.<sup>62</sup> He urges Catholics to seek and to find common ground between Catholic teachings and United States culture. He rejects Catholic self-identification as "counter-cultural" in favor of our working to find and illuminate narratives shared by Catholics and Americans generally.<sup>63</sup> In the tradition of Pope John Paul II, Cardinal George proposes, for example, that both Catholics and Americans affirm the goodness of gathering diverse persons into one unified whole. They also insist upon the absolute equality of every human person.<sup>64</sup>

I would suggest that respecting even the most neuralgic issues, this proposed method of attempting to speak into American culture from the

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<sup>60</sup> Cardinal Cormac Murphy-O'Connor, *supra* note 62, at 8.

<sup>61</sup> See Joseph Cardinal Ratzinger, Conference on Catholic Conscience: Foundation and Formation (Proceedings of the Tenth Bishops' Workshop 1991): Conscience and Truth, *reprinted in* JOSEPH CARDINAL RATZINGER, ON CONSCIENCE: TWO ESSAYS 32 (2007). Ratzinger develops what he regards as the central anthropological and ontological meaning of conscience as *anamnesis*. See *id.* at 32.

<sup>62</sup> FRANCIS CARDINAL GEORGE, O.M.I., *supra* note 59.

<sup>63</sup> *Id.* at 30-40 (including narratives about equality of all human beings, freedom, justice, an openness to diversity alongside a will to unity, participatory decision making, and effective communication).

<sup>64</sup> *Id.* at 25-54.



perspective of American ideals, or inner awareness of the truth, is quite promising. With respect to abortion, for example, recently there has been more acknowledging of some women's suffering after abortion, and of the violence of the abortion procedure itself. Women's reactions to abortion were a pivotal element of the Supreme Court's reasoning in the 2007 partial-birth abortion opinion, *Gonzales v. Carhart*.<sup>65</sup> There, the majority concluded that it was not an undue burden to ban a procedure so gruesome that the doctors who performed it did not wish to reveal its exact nature to the mothers of the children aborted.<sup>66</sup> Concerning the violence of the act of abortion, a recent, widely-noted article<sup>67</sup> by a late-term abortionist described her involuntary physical repugnance when, during the dismemberment of another woman's second-trimester unborn child, her own unborn child moved in her womb. First person accounts of the abortion experience strike a chord, which can be heard and addressed by CST because it approaches abortion as the destruction of human life.

This is a strategy full of opportunity, not pitfalls, beginning as it does with seeing what is true and/or positive in existing behaviors or beliefs, or legal regimes. Of course, it will still have its detractors depending upon the law or norm at issue. Abortion advocates, for example, will continue to insist that women experience no significant regret following abortion. Marriage-skeptics might claim that reported aspirations for lasting marriage and marital children are simply culturally-conditioned responses and no essential part of human nature. It is not likely, however, that these objections will halt the progress of this strategy. There is too much evidence lying on the ground, too many personal narratives sounding similar themes, to completely discount the veracity of what is reported and observed.

An important caveat here is already suggested by the method itself. In its first move, where an observer suggests that existing laws, norms, ideas and programs are failing, it is only too easy to fall into the anthropological pessimism criticized in Part II.A, *supra*. It is too easy to dismiss the possibility that good will or logic moved the architects of plans and programs now judged inadequate, or worse. It is best if some

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<sup>65</sup> *Gonzales v. Carhart*, 550 U.S. 124, 159-60 (2007) ("Respect for life finds an ultimate expression in the bond of love a mother has for her child.").

<sup>66</sup> *Id.*

<sup>67</sup> Second Trimester Abortion Provision: Breaking the Silence and Changing the Discourse, <http://abortionneers.blogspot.com/2009/10/second-trimester-abortion-provision.html> (last visited Oct. 5, 2009). After the article received widespread attention, it was removed from the website on which abortion providers discuss their lives and abortion practices.

common idea or aspiration or metaphor between CST and current practices can first be identified as part of the warrant for CST's entering the conversation. The good news is that this should not be terribly difficult when the subject is marriage. The bad news is that it is likely far more difficult when the subject matter is sexual expression. There remains much work to be done, much "mining" of the sociological, medical, scientific and other literature, including the "qualitative" research (e.g. substantive interviews with active participants in the current sexual culture) in order to understand the frequent practice today of sexual intercourse outside of marriage, shorn of any reference to procreation.

#### *D. The Influence of Religion on Practices or Outcomes within Families*

Another path that has been taken by scholars seeking to think about family law and religion together is to generate empirical data on questions about the role religion plays within families. How does it affect relationships or behavior? Can religion help stave off harmful behaviors and/or can it promote good behaviors? There is a good deal of research indicating that religious beliefs and observance are often correlated with positive marital situations,<sup>68</sup> and positive outcomes for children.<sup>69</sup> Margaret Brinig, for example, has recently conducted research which indicates that children's positive outlook on life is correlated with their parents' religiosity, and that some behavioral patterns – e.g., delinquency, substance abuse and general behavioral problems – are more positive if children have religious peers.<sup>70</sup>

Findings such as these indicate the importance of preserving religious freedom within the family. This is a foundational principle of CST: parents' rights to educate their children, particularly respecting religion and human sexuality.<sup>71</sup> Preserving this religious freedom will require attention to several particular legal issues, of course, including public schools' human sexuality curricula, and curricula treating religion, the affordability of religious education, school vouchers, and parents' freedom to

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<sup>68</sup> See, e.g., Andrew J. Weaver et al., *A Systematic Review of Research on Religion in Six Primary Marriage and Family Journals: 1995–1999*, 30 AM. J. OF FAM. THERAPY 293, 293-09 (2002).

<sup>69</sup> See, e.g., Byron R. Johnson et al., *Escaping from the Crime of Inner Cities: Church Attendance and Religious Salience Among Disadvantaged Youth*, 17 JUSTICE QUARTERLY 377, 377-439 (2000).

<sup>70</sup> See Margaret F. Brinig, *Children's Beliefs and Family Law*, 58 EMORY L.J. 55 (2008).

<sup>71</sup> UNITED STATES CATHOLIC CONF., CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2221, 2225-26 (2d ed. 1997).

home-school their children. It also includes attention to the role of religion in parental disputes over the legal custody of children.

Several caveats are in order here. First, care must be taken with this research, not to imply causation when the studies confirm only correlation. Second, those pursuing this model need to take care to avoid treating religion as nothing more than a therapeutic instrument in the hands of lawmakers. Religious beliefs and rites are more than means of guaranteeing personal virtue or preventing family breakdown. Religion cannot be reduced to a series of propositions or programs or even disciplines for producing good behavior. As a practical note, it is quite likely that strictly instrumental uses of religious teachings or observances are also unlikely to produce the desired effects.

CST would also highlight the risk of emphasizing the I-God relationship to the exclusion or impoverishment of an individual's relationship with fellow human beings. Several recent and important Catholic texts – Benedict XVI's encyclical, *Caritas in Veritate* and Cardinal Francis George's book, *The Difference God Makes* – stress the essential place of the "horizontal" dimension within Christian life. For Christians, it is never just "the whole man" and his or her relationship with God, it is always simultaneously, ". . . and all men."<sup>72</sup> Sociologist Andrew Cherlin's conclusions about the origins of the United States divorce crisis affirm the importance of avoiding a religious self-identity, which stresses only the vertical dimension. He charges in *The Marry Go-Round* that Christianity's stress upon personal salvation may in fact have formed part of the cultural environment, which actually facilitated Americans' self-regarding divorce practices.<sup>73</sup>

### III. Conclusion

Family practices, norms and laws are changing in the United States, often not for the better. Governmental and private institutions are explicitly asking religious leaders and institutions for assistance, particularly in order to help stabilize marriage and improve outcomes for children. Catholic scholars should resist the temptation to be of merely instrumental or therapeutic assistance in their contemporary endeavors in this arena. Rather, in addition to supporting charitable assistance to families currently in need, they should offer lawmakers the kind of foundational, intellectual and systematic analyses of which CST is capable.

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<sup>72</sup> POPE BENEDICT XVI, *CARITAS IN VERITATE*, ch. I (2009).

<sup>73</sup> ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND*, 107-15 (2009).