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**The Institute for Christian Legal Studies (ICLS)**, directed by Michael P. Schutt, trains and encourages Christian law students, law professors, pre-law advisors, and practicing attorneys to seek and study biblical truth, including the natural law tradition, as it relates to law and legal institutions, and to encourage them in their spiritual formation and growth, their compassionate outreach to the poor and needy, and the integration of Christian faith and practice with their study, teaching, and practice of law.

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Given the depth and sophistication of so much of the best Christian legal scholarship today, the *Journal* recognizes that sometimes these two purposes will be at odds. While the *Journal of Christian Legal Thought* will maintain a relatively consistent point of contact with the concerns of practitioners, it will also seek to engage intra-scholarly debates, welcome inter-disciplinary scholarship, and encourage innovative scholarly theological debate. The *Journal* seeks to be a forum where complex issues may be discussed and debated.

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The *Journal* seeks original scholarly articles addressing the integration of the Christian faith and legal study or practice, broadly understood, including the influence of Christianity on law, the relationship between law and Christianity, and the role of faith in the lawyer's work. Articles should reflect a Christian perspective and consider Scripture an authoritative source of revealed truth. Protestant, Roman Catholic, and Orthodox perspectives are welcome as within the broad stream of Christianity.

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# LAW'S IMAGE OF WOMAN

BY ANDREW R. DELOACH

Are women human? This is not a trick question, but the answer is not entirely clear either. Reflecting on it fifty years after the adoption of the Universal Declaration of Human Rights in 1948, Catharine MacKinnon concluded that it "takes a lot of imagination … to see a real woman in the Universal Declaration's majestic guarantees of what 'everyone is entitled to.'"[1] Consistently cynical (and mostly accurate) is her thesis that sex equality—and sex equality *law*—uses men and maleness as the standard for analysis.[2] If women were recognized, understood as human, they would not be violated and mistreated as they are.[3] It is male dominance in law that subordinates women to the legal status of *not-yet*-human.

Whether it would have altered her approach or not, MacKinnon was evidently unaware that Dorothy Sayers had, in 1938, asked and answered this same question. Sayers thought it so obvious it was liable to go unnoticed that "a woman is just as much an ordinary human being as a man."[4] This was no mere inability on Sayers's part to understand the stakes for women's rights, a cause that found its way even into her beloved detective stories and her correspondence with C. S. Lewis. In fact, it was MacKinnon who lost sight of not only the obvious but also the indispensable. Basing her (or any) prescription on women's legal plight puts the emphasis in the wrong place—on law's object, equality of legal entitlement, instead of on law's subject, the "ordinary" human being—and all but guarantees we will never advance beyond grasping for understanding.

That ordinary human being, Woman, has an image problem in today's domestic and international law. Much of the women's rights movement, fractured as it is, tends not to speak for all women and particularly tends not to speak about what Woman is. Rights advocates of all stripes, when they are not simply ignoring traditional human anthropology, unite in a sort of secular ecumenism to undermine or overthrow it. Some, like MacKinnon, undermine it by acknowledging biological difference yet advocating female empowerment to quash male dominance.[5] More radically, today's anthropological revisionists eschew the "material reality of female embodiment" and instead embrace the notion that "'woman' is an oppression-based identity, rather than a natural category" or, more radical still, nothing but internal conception and social construction.[6] What we might call anthropological positivism (like its well-known cousin, legal positivism) assumes that human beings—not God or nature—are the authoritative source of anthropological norms. The nature of Woman—that is, the ultimate criterion of her humanity—is simply a matter of social facts that exist only because they are in fact presumed and performed.

At stake is the imprint that our image of Woman leaves on the legal order. Supplementing the general recognition in human rights treaties of the rights of "all human beings" with new and specific women's rights seems like an improvement—a recognition of women's special need for special protections. But what these efforts

1 CATHARINE MACKINNON, *Are Women Human?, in* ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 42 (2006).

2 *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32-34 (1987); *see also* Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 279-80 (1999).

3 *See* Karima Bennoune, *Why Does It Matter If Women Are Human: Catharine MacKinnon's Contributions to International Law*, 46 TULSA L. REV. 107, 111-12 (2013).

4 DOROTHY L. SAYERS, *Are Women Human?, in* ARE WOMEN HUMAN? 19 (1971).

5 *See* MACKINNON, *supra* note 2; *see also* Erika Bachiochi, *Sex Differences, Power Politics, and Self-Mastery, in* Margaret Harper McCarthy, Leah Libresco Sargeant & Angela Franks, *Can Contemporary Feminism Come to Grips with Reality? Four Responses to Abigail Favale*, PUBLIC DISCOURSE (July 18, 2021), https://www.thepublicdiscourse.com/2021/07/76816/.

6 Abigail Favale, *Feminism's Last Battle*, PUBLIC DISCOURSE (July 17, 2021), https://www.thepublicdiscourse.com/2021/07/76717/.

expose is a need for the correct conception of Woman in law. Added protections for women based on equality, empowerment, or experience dilute (or disdain) the unique nature and dignity of Woman and, therefore, weaken the ground for protecting women's rights. What is needed is a shift in focus, away from general observation and criticism of women's place in law and how law affects women to law's subject: Woman herself.

## LAW'S IMAGE OF THE HUMAN

In his inaugural lecture at the University of Heidelberg in 1926, legal philosopher Gustav Radbruch addressed what he saw as a fundamental question of law: "not how law judges the individual, or how law affects the individual … [but] how law imagines the individual human being whom it aims to affect, the kind of individual for whom law is made."[7] Radbruch's aim was to reflect critically on "the reasons that inform a given (legal) state of affairs"—that is, the content and operation of law—which he connected to an era's image of the human.[8] "Nothing defines the character of a legal era more clearly than the conception of the individual upon which it relies."[9] Radbruch shifted the focus "away from general questions about the state of law to law's subject."[10] The result of this shift is that we are able to see law as "a manifestation of the acts and intentions of human actors."[11] Crucially, this draws our attention away from law in the abstract, and properly orients that attention toward law's human subjects, and the characteristics of the human person that shape the legal order.[12]

Radbruch's investigation remains of great value to us today, particularly in a consideration of women's rights. It is not that concern for the women's rights movement in general happens to be wrong. The articles in this issue of the *Journal* demonstrate this concern with properly urgent attention. But for any true progress, urgency requires action. Radbruch would have us re-orient our concern toward the ways in which law's image of Woman—its conception of Woman whom it aims to affect—shapes the content and operation of law affecting women.

*Law—good or bad—informs our cultural moral sense and teaches us what is important, what is acceptable, and what is not. In other words, law shapes a society's "moral self-conception and identity."*

How then do we discern law's image of Woman? Radbruch explains: "A legal order's conception of the individual becomes clearly apparent when one considers the subjective rights and the legal duties a particular order has fashioned."[13] That is, the best way to find that image is not to study "how legal provisions define legal concepts like 'individual', 'person' and 'human.'"[14] Rather, "a legal order's intention to guide behavior is expressed both by the rights it confers and by the duties it imposes."[15] Attention to the rights and duties constructed by the legal order (specifically the women's rights movement within that order) is, therefore, paramount to understanding its image of Woman, and how that image shapes the law. Equally important, however, is the corollary easily missed above: law guides human behavior. Law—good or bad—informs our cultural moral sense and teaches us what is important, what is acceptable, and what is not. In other words, law shapes a society's "moral self-conception and identity."[16]

We can now see how this shakes out. Legal rights and duties affecting women tell us what image of Woman a society has. The image of Woman a society has shapes the ongoing content and operation of its law. And the

7 Gustav Radbruch, *Law's Image of the Human (1926)*, 40 Oxford. J. Legal Stud. 667, 672-73 (Valentin Jeutner trans., 2020).

8 *Id.* at 669 (translator's introduction).

9 *Id.* at 673.

10 *Id.* at 669 (translator's introduction).

11 *Id.*

12 *Id.* at 670 (translator's introduction).

13 *Id.* at 673.

14 *Id.* at 670 (translator's introduction).

15 *Id.* at 673.

16 *See* Thomas D. Williams, Who Is My Neighbor? Personalism and the Foundation of Human Rights 19 (2005).

content and operation of that law will continuously shape the society's identity.[17]

We must, therefore, be aware of the danger that lies in a conception of Woman that becomes increasingly inaccurate or altogether false.[18] Radbruch is clear that the legal order will fail to function if its *image* of the human being diverges too far from the *actual* "empirically concrete" human being.[19] How can we even begin to answer the question "What is acceptable treatment of women?" or "What protection is owed to women?" if we don't understand who and what Woman is? Our law must maintain the correct image of Woman if women's rights are to be more reality than imaginary.

## ASSESSING LAW'S IMAGE OF WOMAN

What conception does law have of Woman today? Is it "one that champion[s] women's rights so that women, with men, c[an] virtuously fulfill their familial and social duties"?[20] Or is it one that "has cheapened sex and objectified women, belittled the essential contributions of both mothers and fathers, and has contributed to upending the American promise of equal opportunity for the most disadvantaged men, women, and children today"?[21]

According to Radbruch, we know a society's image of Woman by the rights and duties it imposes. Listen to the demands of modern feminist rights advocates and they will tell you what a woman is. The most radical voices are often loudest—and most willing to suppress dissenting opinion, especially if it smacks of tradition or religion. The answer to women's omission from human rights protections seems to be: more. More rights, more policies, more mechanisms, more projects. "Rather than question the premise of sexual autonomy as true freedom, the modern women's movement holds on to the misguided hope that some mix of new and better government programs will solve women's problems."[22]

In the U.S., the core of women's rights is abortion. Apparently, "[t]he ability of women to participate equally in the economic and social life of the Nation [is] facilitated by their ability to control their reproductive lives."[23] An image of Woman that insists "on sexual license as a precondition for female freedom and fulfillment" and "female autonomy and pleasure" ensured by the availability of abortion will skew the legal order toward liberalizing that license.[24]

Abortion—euphemistically termed "sexual and reproductive health[25]—is likewise sacred in international law, increasingly seen as fundamental to "what women need for equality."[26] Abortion restrictions continue to teeter and fall like dominoes in historically Catholic Latin and South America, as well as in Christian Europe and "pre-Christian" Africa, once firmly protective of unborn life.[27] In similar ways at both domestic and international levels, reproductive freedom is treated as the prerequisite to a legal order of equality and empowerment for women.[28] Get that, and all else falls into place.

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17 For example, a legal right "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" tells us this society sees Woman as an asocial, atomistic, and nonteleological individual. That image shapes the legal order by institutionalizing legal protections for Woman's self-defining solipsism. Protecting the right to self-define the existence and meaning of human life shapes society into one which devalues all human life, loathes natural limits and rewards deviancy, and prefers conglomerate individual goods over the common good.

18 Radbruch, *supra* note 7, at 674.

19 *Id.* at 673.

20 ERIKA BACHIOCHI, THE RIGHTS OF WOMEN: RECLAIMING A LOST VISION 11 (2021).

21 *Id.*

22 Alexandra DeSanctis, *The Original Feminist Plan for Women's Equality: Marriage, Family, and Sexual Integrity*, PUBLIC DISCOURSE (July 14, 2021), https://www.thepublicdiscourse.com/2021/07/76785/.

23 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856; (1992). Not necessary in this view is self-control in their reproductive lives.

24 DeSanctis, *supra* note 22.

25 *See, e.g.,* Johanna B. Fine, Katherine Mayall & Lilian Sepúlveda, *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*, HEALTH & HUM. RTS. J. (June 2, 2017), https://www.hhrjournal.org/2017/06/the-role-of-international-human-rights-norms-in-the-liberalization-of-abortion-laws-globally/.

26 MACKINNON, *On Torture*, in ARE WOMEN HUMAN?, *supra* note 1, at 27.

27 How to explain the contradictory view in liberalized human rights laws protecting abortion, on the one hand, and on the other hand the numerous international treaties prohibiting the imposition of the death penalty on pregnant women? It appears that what women most need for equality, even while incarcerated, is control over the fate of their unborn children.

28 *See, e.g.,* Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARVARD J. LAW & PUB. POL'Y 889, 890 (2011).

But beyond particular rights is the *rights talk* that animates modern feminism. The more specific rights talk surrounds particular legal solutions—most of them concentrated on equality and empowerment and what must change for women to be free, but few if any addressing what Woman is.[29]

A few examples are illustrative. The ACLU Women's Rights Project warns that women's rights "are under attack" by "[e]fforts to erase voting rights, trans rights, and abortion rights." The proposed solution is "true equality" for women by striking down "legal barriers."[30] Seminars sponsored by the European Court of Human Rights have lamented that "women's full equality has not yet been achieved" despite "an increasingly gender-sensitive reading of different international and regional legal norms."[31] Why not? Because "stereotyping leads to disadvantage" and "redressing disadvantage [through] protective legislation for women" may be insufficient if it perpetuates stereotypes.[32] What is needed, among other solutions, is "structural change" that recognizes women's need for "reproductive choice."[33] Notable as well is the conclusion that "[e]veryone has an ethnicity, a color, a gender, a sexual orientation, an age, a range of ability" and the "synergism" of these things "focuses on the reality of the experience of deprivation of the right."[34] But this misses the forest for the intersectional weeds: human rights are the equal entitlements of all human beings, independent of narrow categories of human experience based on inconsequential or transitory characteristics. "What is repugnant to every human being," Sayers reminds us, "is to be reckoned always as a member of a class and not as an individual person."[35]

The great hope for many women's rights advocates is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the legal regime it has generated. CEDAW was "intended to combat prejudice or inferior conceptions of women,"[36] and provides "hope for equality to women."[37] To achieve this, it envisions "a legal landscape where states are under multiple interacting international, regional and national obligations to respect, protect and fulfil women's right to equality and non-discrimination."[38] It "requires fundamental changes in society in order to create more room for diversity and freedom for women (and men) to decide for themselves what it means to be a woman (or a man)."[39] Even when its interaction with other legal regimes is complex or conflicted, CEDAW forms the backbone of "adequate policy and legal frameworks to promote gender equality and women's empowerment."[40] Likewise, "agenda setting" is seen as crucial to CEDAW's function and realization. Women's rights organizations strategically construct issues and take every available opportunity to frame the agenda, "mobilize" ideas and tactics, develop state interests, and legitimize new norms.[41] Agenda setting extends well beyond CEDAW, however, and part of any "transformative feminist

[29] *See* Jean Bethke Elshtain, Public Man, Private Woman: Women in Social and Political Thought 320 (2d ed. 1993).

[30] ACLU Women's Rights Project, https://www.aclu.org/other/about-aclu-womens-rights-project (last visited Aug. 9, 2021).

[31] *Women's Human Rights in the 21st century*, Institut Int'l des Droits de l'Homme—Fondation René Cassin (Feb. 14, 2020), https://www.iidh.org/Design/Wysiwyg/Colloques%202019-2020/Womens%20Rights%202020%20F%C3%A9vrier%20CEDH.pdf.

[32] Sandra Fredman Rhodes, "Taking Gender Seriously: Substantive Equality and the ECHR" (Feb. 14, 2020), https://vodmanager.coe.int/cedh/webcast/cedh/2020-02-14-1/lang.

[33] *Id.* Again, abortion is the lynchpin, even when the number of those structures remaining to be changed is dwindling. Not considered, or at best unasked: could that structural change perpetuate any stereotypes or disadvantages—such as the guarantee that *men's* "reproductive choice" and responsibility always ends with the sexual act?

[34] *Id.*

[35] Sayers, *supra* note 4, at 19.

[36] Cecilia M. Bailliet, *From the CEDAW to the American Convention: elucidation of women's right to a life's project and protection of maternal identity within Inter-American human rights jurisprudence*, *in* Women's Human Rights: CEDAW in International, Regional and National Law 158, 158 (Anne Hellum & Henriette Sinding Aasen eds., 2013).

[37] MacKinnon, *The Promise of CEDAW's Optional Protocol*, *in* Are Women Human?, *supra* note 1, at 67.

[38] Anne Hellum & Henriette Sinding Aasen, *Introduction*, *in* Women's Human Rights, *supra* note 36, at 1, 3.

[39] Rikki Holtmaat, *The CEDAW: a holistic approach to women's equality and freedom*, *in* Women's Human Rights, *supra* note 36, at 95, 96.

[40] *See, e.g.,* Daniel E. Alemayehu, *Multiple Legal Orders in Ethiopia: An Impediment on the Enforcement of Women Rights*, 19 Nw. J. Hum. Rts. 38, 40, 43 (2021).

[41] *See, e.g.,* Jutta M. Joachim, Agenda Setting, the UN, and NGOs: Gender Violence and Reproductive Rights 16-19 (2007).

project" is the "struggle to translate [that] project into policy imperatives."[42]

The success of the CEDAW regime is uncertain. MacKinnon's own verdict might be called cautious optimism: "Observably gendered against women's interests, the international [legal] system has nonetheless produced gains for women unavailable elsewhere."[43] Even so, women are not yet "permitted to live a life that meets international law's 'human' standards"—that is, "not yet received and recognized as fully human."[44] And "[t]he lack of laws against the harms women experience in society because [they] are women . . . violates human rights."[45]

The notion of women's experience, while less concrete than the advocacy surrounding legal mechanisms, is more prominent and arguably more important to modern feminism. Ruth Bader Ginsburg famously advocated for "a woman's autonomous control of her full life's course."[46] Similarly, international advocates press for women's "right to a life's project."[47] These and other varied expressions emphasize "women's experience" as a solution to inferiority and undervaluing of women.[48] And (perhaps unsurprisingly) women alone define their experiences. We must not "presume that analyses of human experience that are offered by even the most brilliant of men...are, in themselves, sufficient to give us an adequate account of the human. Critical attention must be paid to the experiences of women (and other oppressed persons)."[49] Using narratives in human rights "gives voice to individual subjective experience as a legitimate source of truth with claims to rights and justice."[50] Thus, the *subjective experience* of women, rather than the *objective nature* of Woman, is the proper indicator of what women need and the rights they have.[51]

Occasionally, the experiential approach comes close to a proper focus on Woman as human being. Feminist scholar Robin West explains that feminists take women's humanity seriously but the law does not, assailing "the 'human being' constructed, described, or simply assumed by masculine jurisprudence."[52] According to West, the abolition of patriarchy is the "precondition of a truly ungendered jurisprudence."[53] Jurisprudence—the legal order as a whole—"must be about the relationship of human beings to law, and feminist jurisprudence must be . . . one that is built upon feminist insights into women's true nature, rather than upon masculine insights into 'human' nature."[54] But if *women's true nature* is not the same as *human nature*, what is it?

Well, experience. West urges adopting "a legal method directed at women's subjective well-being, one that would measure the effectiveness of a law by its hedonic effect on women. In other words, a law that increases women's happiness is good, and a law that ignores or increases women's pain is bad."[55] Evidently, the ambition is to appropriately frame women's experiences and "re-articulate rights in terms that will reveal and accommodate women's distinctive state of being."[56]

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42 *See* NEW DIRECTIONS IN WOMEN, PEACE AND SECURITY xxi-xxii (Soumita Basu, Paul C. Kirby & Laura J. Shepherd eds., 2020).

43 MACKINNON, *Introduction: Women's Status, Men's States*, *in* ARE WOMEN HUMAN?, *supra* note 1, at 12.

44 *See* Bennoune, *supra* note 3, at 111-13. It is worth noting that this discussion is based entirely on women's status in society, not on Woman's human nature, *telos*, or dignity.

45 MACKINNON, *On Torture*, *in* ARE WOMEN HUMAN?, *supra* note 1, at 27.

46 Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 383, *quoted in* BACHIOCHI, *supra* note 20, at 228.

47 Bailliet, *supra* note 36.

48 *See generally* Margaret McCarthy, *Something Not to Be Grasped: Notes on Equality on the Occasion of the Twentieth Anniversary of Mulieris Dignitatem*, 8 Ave Maria L. Rev. 121, 134-139, 142 (2009).

49 Diana Fritz Cates, *Taking Women's Experience Seriously: Thomas Aquinas and Audre Lorde on Anger*, *in* AQUINAS AND EMPOWERMENT: CLASSICAL ETHICS FOR ORDINARY LIVES 78 (G. Simon Harak, S.J. ed., 1996). Cates acknowledges that *analysis of experience* is insufficient as an "adequate account of the human"—yet prescribes *greater attention to women's experiences.* She worries that "definitions of humanness" can "render certain humans invisible to the dominant culture . . . and overwhelmed with vague doubts regarding whether or not they really *count* as human." *Id.* at 77-78. But can all the women's experiences in the world gives us an adequate account of whether Woman is human?

50 *See generally* Bailliet, *supra* note 35, at 164.

51 *Id.* at 165, 170.

52 Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3-4 (1988).

53 *Id.* at 4.

54 *Id.*

55 Wong, *Anti-Essentialism*, *supra* note 2, at 279.

56 *Id. But see* Gustav Radbruch, *Five Minutes of Legal Philosophy (1945)*, 26 OXFORD. J. LEGAL STUD. 13, 13-14 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 2016): "Practically speaking, this means that whatever state authorities

West's prescription is to "insist loudly upon the normative significance" of "women's subjective, hedonic lives, [so that] the conception of the 'human being' assumed by that discourse—the substantive description of experienced human life that the phrase 'human being' denotes—might change so as to actually include women."[57]

Close, but not quite there. Improved though it is, this approach is ineluctably susceptible to extreme conceptions of "experienced human life." It may be advocacy of "erotic labor" rights: "A pro-sex, pro-pleasure politic that is specifically centered on the multiply marginalized"—the sex work of "poor, queer, trans, and disabled nonwhite peoples and our comrades."[58] Or it may be the notion that there is no right or wrong way to be a woman: "[W]hat set of core experiences supposedly make someone who was assigned female at birth a 'real' woman"? "[W]hat it's like to be a woman varies drastically" across numerous factors, and "the varied experiences of trans women have a thing or two to teach us" about who counts as a woman. And "surely we don't want to go back to the days of defining women by their hormones or even their chromosomes."[59] It sounds as if anyone counts as a woman who wills it so.

> *'Tis in ourselves that we are thus or thus. Our bodies are our gardens, to the which our wills are gardeners.*[60]

## THE NEGATION OF LEGAL ORDER

Despite Radbruch's focus on the human subject, his concern was "not the real individual, but law's notion of the individual."[61] And this is a valuable insight in consideration of modern feminism's prioritization of women's experience in defining Woman and women's rights. Why? As Radbruch explains:

> A legal order cannot be tailored to the actual, real human being who walks the surface of the earth, to their peculiarities and moods, to their dottiness, to the entire herbarium of strange plants that we call mankind. From the empirically concrete individual human being, the road does not lead to a legal order but to the negation of a legal order. If one … begins with the unique 'individual', one can logically … only end with anarchism.[62]

The modern women's movement—and the international human rights movement generally—seems unaware or uninterested in this point. Rather, it largely considers only the unique experiences of individual women. It sees Woman as (subject *and* object of) a project, an agenda, but not as a human person. There is no room for talk about who and what Woman is, nor for the kind of people women (and therefore, men, children, and society as a whole) are becoming.[63] Family is an afterthought in much feminist legal theory, which remains focused on workplace equality, violence, and sexuality.[64]

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deem to be of benefit to the people is law, including every despotic whim and caprice … . Indeed, it was the equating of the law with supposed or ostensible benefits to the people that transformed a Rechtsstaat into an outlaw state."

57 Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 Wis. Women's L.J. 149, 213 (2000).

58 femi babylon, *Introduction: Sex Workers' Rights, Advocacy, and Organizing*, 52 Colum. Hum. Rts. L. Rev. 1062, 1073, 1080-81. How, one may wonder, are such rights realized? By confronting "moral and social objections to whoredom with an anarcho-Black, community-centered, antiwork/anticapitalist, womanist stance"—in other words, with "pro-hoe" policies. *Id.* at 1081-83.

59 Carol Hay, Opinion: *Who Counts as a Woman?*, N.Y. Times (Apr. 1, 2019), https://www.nytimes.com/2019/04/01/opinion/trans-women-feminism.html.

60 William Shakespeare, Othello act 1, sc. 3, ll. 320-322 (E. A. J. Honigmann ed., Bloomsbury 2016) (c. 1603).

61 Radbruch, *supra* note 7, at 673.

62 *Id.* Radbruch's point is that the actual human being, with her "peculiarities and moods," is too shifting a foundation on which to build a legal order. Instead, a legal order must "be geared towards a general type of individual human being—and, for different legal eras, many different human characteristics appear to be typical or essential." He is certainly correct that law's conception of the individual must be grounded on what is common or *essential* to all human beings *in general*. We would, of course, carry this further by focusing on what is common to *all* human beings in *all* legal eras.

63 Gerard V. Bradley, *Missing Persons, Fugitive Families, and Big Brother: The Government in Relation to the Family and the Person*, *in* The Thriving Society: On the Social Conditions of Human Flourishing 163 ( James R. Stoner, Jr. & Harold James eds., 2015). See generally pages 166-170 for the ways society and law view and shape human beings and our culture.

64 *See* Bailliet, *supra* note 36, at 159 (quoting Martha Albertson Fineman, The Neutered Mother, the Sexual Family and other Twentieth-Century Tragedies 12 (1995)). Bailliet's chapter is a welcome examination of "maternal identity" as an "important manifestation of human dignity." *Id.*

Woman's existence and dignity are defined instead by her right to be an independent self and subject of rights, a "self-centered agent defined primarily in terms of the independent power of self-determination."[65] Indeed, "whatever liberates a woman in her independence as disposer of her own person and possessions . . . becomes, *ipso facto*, integral to her reality *qua* subject of rights."[66]

Woman in this conception is an identity, a category. Ironically, the experiences of these "empirically concrete" individual women are anything but concrete. Indeed, the flawed anthropology of the postmodern project gives us a "conception of human identity and flourishing as merely that of an atomized individual will seeking to discover and follow its own interior authentic truths."[67] Tragically, the atomized individual and her "self-determining, self-constructing freedom" virtually eliminate human dignity and the essence of being human.[68] The women's rights movement needs the proper understanding of human existence unless it is "prepared to accept the dangerous presumption that individuals are nothing more than products of social forces, having no dignity, meaning, or inherent presumptive force of their own against abuses of public power."[69]

*Women's experience cannot be unanchored from Being. After all, if all that matters is experience, why worry who "counts" as a woman at all? Counting as a woman only matters, only makes sense, if "Woman" is more than the sum of her experiences.*

Radbruch himself admits that law's conception of the individual can be inaccurate. When it is, the legal order becomes disordered. Law's image of Woman, therefore, must be grounded on what is essential to all women.[70] Women's experience cannot be unanchored from Being. After all, if all that matters is experience, why worry who "counts" as a woman at all? Counting as a woman only matters, only makes sense, if "Woman" is more than the sum of her experiences. To treat all women as if they must have some subjective experiences in common is to treat them as an undifferentiated mass defined and categorized solely by their non-maleness.

MacKinnon and others are quite right to argue that a legal order designed for men, with men as the aim, will never be fully fair for women and never fully protect their human rights.[71] But an over-emphasis on rights based on subjective experience neglects the *subject* of those rights, and the duties of justice owed to women.[72] Dependence on human rights, and the ever-expanding mechanisms and agendas to protect them, actually diminishes the reasons all human beings (as opposed to a certain class of human beings) are entitled to protection at all.

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65 David L. Schindler, *The Repressive Logic of Liberal Rights: Religious Freedom, Contraceptives, and the "Phony" Argument of The New York Times*, 38 COMMUNIO: INT'L CATHOLIC REV. 523, 533 (2011).

66 *Id.* at 537.

67 Brief For Professors Mary Ann Glendon & O. Carter Snead as Amici Curiae in Support of Petitioners at 28, Dobbs v. Jackson Women's Health Organization, No. 19-1392 (filed July 29, 2021), https://www.supremecourt.gov/DocketPDF/19/19-1392/185180/20210729085701253_19-1392%20Amici%20Brief.pdf. Glendon and Snead conclude that this conception "is not required by the Constitution, and is certainly not consistent with the complexity of lived experience or the rich variety of American attitudes."

68 Margaret H. McCarthy, *Gender Ideology and the Humanum,* 43 COMMUNIO: INT'L CATHOLIC REV. 274, 274-275 (2016).

69 ELSHTAIN, *supra* note 29, at 343.

70 This is often denigrated by some feminists as *essentialism*—"the idea that all women share some intrinsic property that characterizes 'woman-ness,' making it thus possible to speak of women as a universal category.... [But an] essentialist perspective does not deny the shaping influence of culture [i.e., experience], but rather claims that 'the natural provides the raw material and determinative starting point for the practices and laws of the social.'" Favale, *supra* note 6, *quoting* DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE 3 (2013).

71 *See, e.g.,* CAROL PATEMAN, THE DISORDER OF WOMEN 197 (1989).

72 MacKinnon suggests that when law includes "what violates women," the word "human" will begin to have a woman's face." MACKINNON, *Postmodernism and Human Rights*, *in* ARE WOMEN HUMAN?, *supra* note 1, at 48. But this just shifts the emphasis from the *violations* women experience to the *protections* women have. It does not provide the ground for any deeper, moral obligation to respect Woman.

## WHAT CAN BE DONE?

Our society's (and our law's) image of Woman is not a human person created in *imago Dei* but an atomistic will created in *imago hominis.* There are "grave consequences" to our "radical redefinition of what it means to be a woman and a man."[73] To be sure, the threat to women's rights is not law's failure to recognize women as human. Rather, it is "the metaphysical revolt" of a modern feminism that has become "blind to the supernatural" and, consequently, gives law no image of Woman recognizable as truly human.[74]

To be fair, some feminist scholars come close to comprehending the problem. Robin West rightly recognizes that "[i]f we embrace a false conception of our nature we can be sure of only one thing, and that is that legal reform based on such a conception will only occasionally—and then only incidentally—benefit real instead of hypothetical women."[75] Unfortunately, by proposing a utilitarian legal order that aims simply "to increase women's happiness, joy and pleasure, and to lessen women's suffering, misery and pain," her prescription benefits only some real women, and harms them all in the end.[76] What seems to trouble West and others is the inability to conceive of objective human nature and subjective personal experience *together* informing our understanding of the human being. While women's lived experience and subjective well-being are indeed important to the uniqueness of each person, nevertheless they must not be made central to who Woman is. Desiring to treat women as human beings, we should not look only to their experiences, but primarily to the "fundamental and equally distributed dignity of *being human.*"[77]

## STEP ONE: GET HUMAN NATURE RIGHT

How then can we correct law's image of Woman? We begin with Scripture's image of humans. In Genesis 1:27, we are told that both Man and Woman were made in the image and likeness of God—"this image was part of the created human nature."[78] Human beings were the crown of God's creation; all things were created on behalf of man and woman.[79] From Ephesians 4:24 and Colossians 3:10 we understand that in God's mercy, undeserving sinners who have come to faith in Christ are restored and renewed "after the likeness of God" and "in the image of [their] creator."[80] Significantly, man and woman "stand on equal terms" in their relationship with God, and their relationship with each other is "one of mutual love and service."[81] Scripture is clear in forbidding "distinctions that ascribe lesser worth to particular human beings"—Jesus himself commands that all humans are equally to be loved and served as neighbors.[82] Thus, "[a]gainst any attempt to marginalize or exploit certain human beings as 'less than human,' it is the Christian confession that all people are created in the image of God; they therefore have inherent dignity and worth, and consequently are to be loved and respected."[83]

Crucial to the application of this teaching is the concept of the person, particularly as found in Christian ethics. Instantiating the proper understanding of the human person is the only lasting solution to a problematic legal order aimed at increasing the happiness and lessening the pain of women with similar subjective experiences. While all human beings are similar in varying respects, human persons are "equal in their distinctive uniqueness and incommensurable

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73 Alice von Hildebrand, The Privilege of Being a Woman xiv (2002).

74 *Id.* at 65.

75 West, *supra* note 57, at 211.

76 *Id.* at 212. West specifically proposes "a critical legal method which aims directly for women's subjective well-being, rather than indirectly through a gauze of definitional presuppositions about the nature of human life which almost invariably exclude women's lives." Only in a utopian dream could we possibly ensure a world of sheer joy and pleasure for women without excluding some of them. Every utilitarian calculus excludes or harms someone. It is only by aiming for the nature of human persons that we attain a radically inclusive and *real* legal order.

77 McCarthy, *supra* note 48, at 121.

78 Called to Believe, Teach, and Confess: An Introduction to Doctrinal Theology 133 (Steven P. Mueller ed., 2005).

79 I*d.* at 128-129.

80 *See* Johann Gerhard, *The Nature of the Image of God in Man*, *in* The Doctrine of Man in the Writings of Martin Chemnitz & Johann Gerhard 35-38 (Herman A. Preus & Edmund Smits eds., Colacci, et al. trans., 2005).

81 Called to Believe, *supra* note 78, at 140-141. *See* 1 Corinthians 11:11; Colossians 3:18-19; 1 Peter 3:1-7.

82 Called to Believe, *supra* note 78, at 141. *See* Luke 10:25-37.

83 Called to Believe, *supra* note 78, at 141.

dignity."[84] No person is merely identified by what she happens to feel or experience, nor on the basis of certain empirical qualities, as if she were simply one generic instance or part of a whole, interchangeable with any other member. Every person is an irreplaceable human being in the community of persons we call humankind.[85] We are not bound "just to respect worthy qualities and excellences"; we are "bound to respect this or that person, that is, to show a respect that is not transferable to other persons but which refers to each as incommunicable person."[86]

*No person is merely identified by what she happens to feel or experience, nor on the basis of certain empirical qualities, as if she were simply one generic instance or part of a whole, interchangeable with any other member. Every person is an irreplaceable human being in the community of persons we call humankind.*

Put simply, personhood helps us describe the difference between *someone* and *something*, and hence what is distinctive about humanity and how human beings should be treated.[87] Roger Scruton explains: "When we refer to human rights, human dignity, what we owe to each other . . . we are making use (directly or indirectly) of the concept of the person, which provides the shared perspective from which we address virtually all such issues."[88] The origin of personality, according to Scruton, is in the I-You encounter: "I am answerable to you for what I say and do, and you likewise to me. . . . My freedom . . . brings with it the full burden of accountability to the other and the recognition that his voice has just as much authority as mine."[89] At the heart of human society is the search for "reasons that will be valid for all of us" and every person must always be "taking account of others in order to coordinate his presence with theirs."[90]

Taking account of others—that is, of another's needs, interests, and entitlements—begins when "we make them our own and defend them before third parties."[91] Recognition by one person of another person generates duties of the one to the other and, with them, corresponding rights.[92] Modern feminism emphasizes a woman's "right to a life project," which encourages her to make expansive claims to the things she is owed by all other persons, to see other persons as objects subservient to her own project. On the contrary, recognizing another person means restraining one's own "potentially unlimited urge for self-expansion" and resisting "the inclination to see the other only as a factor in [one's] own life-project."[93]

## STEP TWO: GET HUMAN RIGHTS RIGHT

If we get human nature right, we will get human rights right. For the question of human rights is fundamentally "a question of what is due to the human person"— an understanding of "how the person is to be treated and, above all, why he must be treated in that way and not in another."[94] This is because rights are intimately related to the personhood of the right bearer, such that respecting the rights of others respects them as persons. Conversely, "to violate the rights of a person is nothing other than to try to dispose over what is that person's own, or to commit a kind of theft against the very being of the person."[95]

84 ROBERT SPAEMANN, PERSONS: THE DIFFERENCE BETWEEN 'SOMEONE' AND 'SOMETHING' 185 (Oliver O'Donovan trans., 2017).

85 *Id.* at 247; *see also* WILLIAMS, *supra* note 16, at 129-130.

86 JOHN F. CROSBY, THE SELFHOOD OF THE HUMAN PERSON 66 (1996).

87 SPAEMANN, *supra* note 84, at 1.

88 Roger Scruton, *The Person and the Parson*, *in* THE THRIVING SOCIETY, *supra* note 63, at 38.

89 *Id.* at 40.

90 *Id.* at 41.

91 SPAEMANN, *supra* note 84, at 183.

92 *Id.* at 184.

93 *Id.* at 186.

94 WILLIAMS, *supra* note 16, at 146.

95 CROSBY, *supra* note 86, at 22.

Focus on how the other ought to be treated—the "art of living together"[96]—is the basis of justice, and the object of justice is rights.[97] When we owe a duty to another person, "it is a duty of justice, and that other person's right is its very object or point."[98] We must beware of an over-emphasis on rights, which juridifies human relationships and the duties we owe to each other, recasting them in legal terms and eroding our personal commitment and responsibility to each other.[99] But all human beings are protected by the duties of justice.[100] Protecting women's right to be treated justly is the particular obligation of all human beings.

By now this should strike a familiar tone for many readers. After all, taking account of the needs of others and how they ought to be treated is nothing other than love of neighbor. Love of neighbor entails identification with the other, affirming the inherent dignity of the other, and loving the other as an end.[101] "True human flourishing is possible only when one goes beyond seeking goods for oneself and learns to make of oneself a gift."[102] Women's rights will never be respected if our image of Woman is a mere disembodied will pursuing her own pleasure and project. On the contrary, we must recognize the "objective reality" of Woman's embodied human nature as "the *condition* for love and respect of all persons."[103]

At the end of the day, the only available candidates for human rights are (to paraphrase Robert Capon), every last one of them, sinners; therefore, we need virtue, and (the history of human relations makes clear) only the grace of God will deliver it.[104] Every individual person has an obligation to the common good, but the common good needs the virtue of all individual persons.[105] The virtue of justice, especially, requires great courage in the society of sinners and a culture of individualistic wills. For it is justice that requires we disregard our own interests and needs and disposes us "to realize interpersonal relations in such a way that the absolute value of other persons is recognized, actualized, and promoted."[106] But it is love of neighbor that undergirds and completes justice. Love must be the standard by which we measure our respect and protection of the rights of women and all human beings.

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This issue of the *Journal*, the third to focus on the theme of human rights, concentrates on the rights—as well as the duties, challenges, and privileges—of women.

Erika Bachiochi writes about women's early joint property rights claims and the value of the work of the home, tracing Mary Wollstonecraft's argument that such work affords the character development men, women, and children need for true success in the public sphere, which provides a renewed rationale for family policy today.

Helen Alvaré critically examines marriage in Scripture and in society, exploring the "horizontal and vertical Christian love" that springs from permanent, faithful union, and highlighting the goods that marriage promotes for women, children, and men. She concludes with a call to Christians in the law to embrace their Christian vocations by embodying "family values" in every area of life.

Elizabeth Schiltz weighs the fallout of COVID-19 in its effects on the crucial work of caregiving. Criticizing the prioritization of the right to abortion—as an escape from the responsibility of caregiving—over the right to care for children without suffering severe economic penalty, she defends a public ethic of care by which we accept our social responsibility to care for the caregiver.

In "Aborting Motherhood," David Smolin investigates the tragic history of forced separations of children from unmarried mothers, who unwillingly relinquished their children for adoption. He contrasts this sad era with early Christian efforts to keep unmarried mothers and their children together, recounting the stories of two unique Christian advocates who resisted the systematic repudiation of motherhood.

Kelsey Zorzi brings a practitioner's analysis to the issue of religious freedom and its intersection with the

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96 Josef Pieper, The Christian Idea of Man 18 (Dan Farrelly trans., St. Augustine's Press 2011).

97 John M. Finnis, *Grounding Human Rights in Natural Law*, 60 Am. J. Juris. 199, 214 (2015).

98 *Id.* at 216.

99 *See, e.g.*, Joshua Neoh, *Jurisprudence of Love in Paul's Letter to the Romans*, 34 L. in Context 7, 19 (2016).

100 Finnis, *supra* note 97, at 218.

101 Williams, *supra* note 16, at 118, 147.

102 *Id.* at 171.

103 McCarthy, *supra* note 68, at 276.

104 Robert Farrar Capon, Bed & Board: Plain Talk About Marriage 41-42 (Mockingbird 2018).

105 Pieper, *supra* note 96, at 21.

106 Carlo Caffarra, Living in Christ: Fundamental Principles of Catholic Moral Teaching 168 (Christopher Ruff trans., Ignatius Press 1989), *quoted in* Williams, *supra* note 16, at 278.

rights of women. She cogently argues that tackling real human rights issues (such as forced conversions of women) requires a view of religious freedom capable of facilitating collaboration between advocates for religious freedom and advocates for women's rights.

Finally, Mary Hasson enquires into the Equality Act and gender ideology, demonstrating that they privilege "gender identity" claims over the sex-based rights of females and thereby lead to erasing females, destroying the difference that grounds the idea of woman and women's rights. She closes by calling all of us to defend the truth about the human person or witness the erasure of human beings.

Our hope is that these articles encourage and equip our readers to defend the truth about women and all human beings as created images of God, in law and life.

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*Professor DeLoach served as the editor for this issue of the Journal.*

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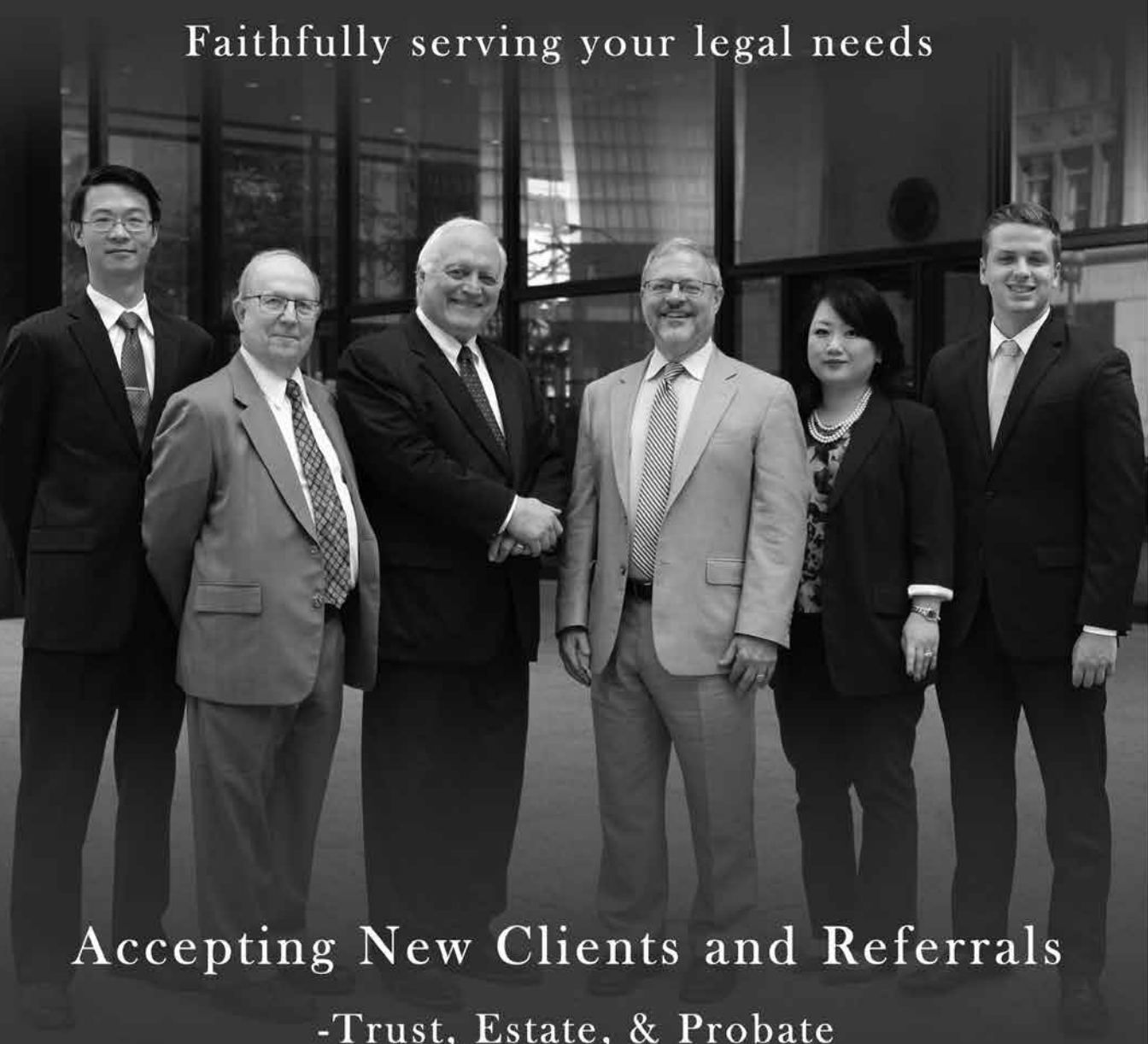

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# EARLY CLAIMS FOR JOINT PROPERTY

## *Recognizing the Preindustrial Work of the Home*

BY ERIKA BACHIOCHI

In *Democracy in America*, Alexis de Tocqueville assumed that American women freely sacrificed themselves for the new nation; perhaps most did. He saw in them an interior strength and independence that inspired them to dedicate their lives, not to their own personal aggrandizement or wealth, as American men seemed wont to do, but to the cultivation of virtue and the building of families, churches, schools, and civic associations. All of these Tocqueville viewed as essential to the survival of the new democratic enterprise. American women took republican self-governance seriously and knew the essential role they played in it, "tak[ing] pride in the free relinquishment of their will" for the sake of the new country.[1] These women maintained networks of kinship, solidarity, and reciprocity in and through their productive family homes, thereby creating what historian Allan Carlson aptly called "islands of antimodernity within the industrial sea."[2]

But the common law doctrine of coverture also promoted the assumed sodality—and separate spheres—of husband and wife, too. Under the doctrine, the spouses were regarded as a single legal entity, with the wife "incorporated" into the husband. Upon marriage, the woman lost any property rights she had had as a *femme sole*; the husband gained full use of his wife's real property and full rights to her personal property and services. In exchange, he was bound by law to protect and provide for her. Thus, in common law jurisdictions, married women held no legal title to the common family enterprise; title was held by the husband alone, who served as the legal and, assuming he owned land, political representative of the family. Were the husband to predecease his wife, she would inherit a mere third of a life interest in their shared investment. In the handful of civil law jurisdictions, such as Louisiana, however, husband and wife owned their property "in community," with the husband as head of the family legally empowered to manage the property.

British philosopher Mary Wollstonecraft, in her 1792 treatise, *A Vindication of the Rights of Woman*, argued that unjust marital laws undermined the capacity of husband and wife to share fruitfully in the collaborative duties and goods of the home; the wife's legal subservience worked against authentic marital intimacy and the development of virtue for both husband and wife—and, therefore, domestic happiness. For nearly two hundred years, arguments against coverture were a central theme in the cause of women's rights. Indeed, in the movement's very earliest legal claims, advocates for joint property ownership maintained the very closest philosophical kinship with Wollstonecraft's original rationale. As we'll see, "joint" property rights within marriage were not urged for the separate or individualistic undertakings of each spouse; rather, these rights were advocated by Wollstonecraft's American disciples for the sake of greater union of husband and wife engaged together in their most essential task: shaping themselves and their children through the productive work they carried out in their homes.

With the cooperative and interdependent management of household duties in the young agrarian republic, the shared, if male-headed, legal status between spouses caused little public protest among American women early on. But as the industrializing American economy grew increasingly more commercial, and American men claimed their "individual rights" vis-à-vis the new republican government, more American women began to challenge the fitness and justice of applying the traditional common law approach to new economic circumstances. As work valued with wages began to command more economic power and cultural respect, women grew simultaneously more and more vulnerable to familial and social inequalities. Wollstonecraft's concerns about the ways in which married women's economic dependence upon their husbands could corrupt the essential goods of the marital relationship, and so the nation, became even more pressing as industrialization wore on. Equally relevant was her concern that the growing commercial mentality would undermine the development

[1] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 602 (George Lawrence trans., J. P. Mayer ed., Harper Perennial Modern Classics 1969) (1835).

[2] ALLAN C. CARLSON, FROM COTTAGE TO WORK STATION 34 (1993).

of virtue in a people. Was women's essential work in the private sphere—a sphere increasingly cut off from the hustle and bustle of American markets, trade, and politics—truly valued, if such work enjoyed no economic or legal status whatsoever?

The first married women's property legislation amending the common law was passed in the United States in the 1840s. Though different states enacted the law with slight differences, these new "separate property" acts allowed married women to hold property acquired separately in their own name, before and even during the marriage. They often protected wives' real property from the debts of their husbands, as equitable trusts drawn up for wealthy families had for centuries before.[3] A decade later, states began to enact earnings statutes that also gave married women rights to their own wages and often provided these women with the legal capacity to contract and sue. Although these acts amended the common law in discernible ways, their effect on the lives of most married women was not discernible at all.[4] Fewer than five percent of married women worked for wages during the nineteenth century; the rest, who continued to labor in their own homes, received little or no benefit from these legal amendments.[5] Something more would be needed to recognize more publicly women's work in the home.

In the 1850s, the women's movement began to focus its organizing efforts on claims for "joint" property rights, in contrast to the "separate" property acts passed a decade earlier. The movement argued not only that women's household labor was valuable "work," but that it also entitled women to an equal legal share in their families' assets. As industrialization drew more and more men out of the agrarian home to work for wages, the traditional and productive work of the home became increasingly synonymous with family life *simpliciter*. This downgrading of the economic value of the work of the home was further exacerbated by the growing cultural depiction of the private sphere as the moral and spiritual counterpoise to the often harsh realities of industrial society. Economist Nancy Folbre observes: "The moral elevation of the home was accompanied by the economic devaluation of the work performed there."[6] The great moral contributions that Tocqueville had noticed women were making to the new nation were not easily, nor desirably, counted in the new economic terminology.

And yet, the household economy remained enormously productive. Indeed, its productivity, and the industriousness, thrift, and cooperation such work required, was a good part of the reason Wollstonecraft had regarded middle-class homes, especially, as enjoying the capacity to shape the characters of both children and their parents. Although such household productivity varied by region, household capacity, and the wealth of the family, women were actively laboring to improve the economic well-being of their families, either by sale of home-produced goods and services or by their own frugality and inventiveness. As the market economy grew more sophisticated, new economic measures of local and national productivity were developed. Such measures excluded household labor, characterizing such work as "unproductive," and women who labored in the still-productive home were uncounted among the "gainfully employed."[7] As a result, says Yale legal scholar Reva Siegel in a lengthy 1994 essay devoted to the topic, a notable rhetorical shift occurred in the depiction of marriage.[8]

Before industrialization, as we've seen, married women were "under the cover" of their husbands' protection and provision at common law, and so were regarded *legally* as "dependent." But given the interdependent communal nature of the productive agrarian home, the substantial *economic* contribution women made to the family unit was never in doubt, even if that unit was represented legally by husbands alone. If they

3 As far back as the thirteenth century, courts of equity had allowed lawyers to create separate estates, by way of trust, for married women to ensure the family property they brought into the marriage would be kept in their family of origin's bloodline, protecting that property from their husbands' creditors. These marital trusts, created for wealthy families, provided the legal mechanism to, centuries later, extend the "separate" marital property concept to all families, regardless of their capacity to hire an attorney.

4 Mary Ann Glendon, The Transformation of Family Law: State, Law, and Family in the United States and Western Europe 111 (1989).

5 Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, Yale L.J. 1073, 1084 (1994).

6 Nancy Folbre, *The Unproductive Housewife: Her Evolution in Nineteenth Century Economic Thought*, 16 Signs: J. Women in Culture & Soc'y 465 (1991).

7 Siegel, *supra* note 5, at 1092.

8 *Id*. at 1093.

were dependent on their husbands, so too were their husbands dependent on them. Historian Alice Clark states that women could "hardly have been regarded as mere dependents on their husbands when the clothing for the whole family was spun by their hands."[9]

But once the mechanism measuring productive labor was altered by the new wage economy, married women's legal subordination to their husbands took on an all-new economic cast. As the productive work of the home became more and more economically invisible—winning cultural esteem for its moral and spiritual qualities alone—the traditional interdependence of spouses was transformed into the image of an economically and legally *autonomous husband* and an economically and legally *dependent wife*. But the culturally powerful image was grossly inappropriate: spousal interdependence remained the economic reality in the industrial age, even if that reality was now obscured by the new accounting. Just as homebound wives were economically dependent on their husbands to bring home the new currency, wage-earning husbands were economically dependent on their wives to maintain and grow the family household. Husband and wife still built up their family assets together.

*Just as homebound wives were economically dependent on their husbands to bring home the new currency, wage-earning husbands were economically dependent on their wives to maintain and grow the family household. Husband and wife still built up their family assets together.*

But the common law doctrine of coverture, now enlarged by the new economic visage of "productive" husband and "dependent" wife, made married women increasingly marginalized in the market-based economy and increasingly vulnerable to their husbands' bad choices. The new stresses of factory work, more time spent away from the home, and the enhanced accessibility of urban bars and brothels made those choices all the more tempting. The Christian Temperance movement of the late nineteenth century, spearheaded by and composed mainly of women, demonstrated the growing concern. Siegel writes that although joint property advocates initially hoped to protect economically vulnerable wives from profligate husbands, the movement increasingly sought to "empower . . . economically productive women to participate equally with men in managing assets both had helped to accumulate."[10] The target of their advocacy was not yet the division of labor in the family wherein husbands left home to work for wages while women remained working in the home; rather, the focus was on the disparate value now accorded each of the separate spheres.

At the First National Woman's Rights Convention in Worcester, Massachusetts, in 1850, the following resolution was presented, modeled on the community property regime of civil law jurisdictions, but dropping the legal authority of husband as head of the partnership:

> *Resolved*, That the laws of property, as affecting married parties, demand a thorough revisal, so that all rights may be equal between them;—that the wife may have, during life, *an equal control over the property gained by their mutual toil and sacrifices*, be heir to her husband precisely to the extent that he is heir to her, and entitled, at her death, to dispose by will the same share of the joint property as he is.[11]

The women's movement sought to match better the laws of marriage and inheritance with the interdependent reality taking place in their homes.

Joint property statutes did not become a reality until a full century later, in the 1960s and 70s.[12] One reason for the marked delay was the shift in nineteenth-century women's rights advocacy itself. In the years following the Civil War and Reconstruction amendments, as arguments for women's suffrage began to gain more steam, these early efforts to pass joint property legislation took a back seat, even as the injustices brought to the forefront by joint property advocates had become more rhetorically effective in efforts to garner support for the vote. Husbands' vicarious representation of the family—the single most prevalent argument

[9] ALICE CLARK, WORKING LIFE OF WOMEN IN THE SEVENTEENTH CENTURY 145 (1968).

[10] Siegel, *supra* note 5, at 1116.

[11] THE PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTION, HELD AT WORCESTER, OCTOBER 23D AND 24TH, 1850, at 15 (photo. reprint) (1851) (emphasis added), https://babel.hathitrust.org/cgi/pt?id=hvd.rslfbk&view=1up&seq=5.

[12] Siegel, *supra* note 5, at 1115, *citing* Glendon, *supra* note 4, at 123.

against married women's suffrage—lost its resonance as women began to see their domestic industriousness culturally disregarded and their economic dependence on their husbands culturally assumed. More outspoken suffragists, such as Susan B. Anthony, began to describe then extant marital law as imposing a "condition of servitude," akin to slavery, which was abolished by the Thirteenth Amendment in 1865.[13] If women were denied the equal cultural accord and legal share their essential work in the home merited, then "family" representation on the part of their husbands no longer seemed just.

In an effort to assuage suffragists' growing demands for the vote, state legislatures in the 1870s began more aggressively to pass *separate* property statutes ensuring married women's title in her own earnings.[14] But, in an explicit knock against decades-old arguments for joint property, these statutes now often explicitly exempted wives' domestic contribution from their coverage. In excluding wives' marital service to their husbands from legal recognition, state legislators sought to preserve husbands' spousal duty of support to their wives and children, duties that the growing temperance movement suggested they often abrogated. But for joint property advocates, the spousal duty on the part of the husband ought to have justified a correlative right on the part of the wife, not to bring suit against him (which was apparently the legislators' fear), but to share fully in legal management, and justly in inheritance, should he predecease her. Instead, these separate property statutes doubled down on the common law view that the joint earnings of husband and wife together belonged properly to him alone; in the new separate property regime, she individually owned legal title only to that work she performed outside of the home. In common did they labor, but only separately did they own.

By the 1870s, some involved in the growing women's movement, now more likely than their predecessors to engage household help, began themselves to disparage the traditional, productive work of the home.[15] In step with the logic implied by the newly enacted separate property statutes, they began to argue that if married women wanted true economic independence, they ought to seek wage labor outside of the home. Some even expressly denounced the assumption inherent in decades of joint property advocacy: that both the public and private spheres were of equal value, committed interdependently to the well-being of the family. Rather, to these more radical elements, cultural efforts to extol home labor would keep women content in their subordinate position, uninterested in freeing themselves from such burdens to pursue more culturally valued opportunities in the public sphere.

With this shift came a radical transformation in discourse about women's traditional work: no longer was the work of the home so culturally essential that it defied market valuation. Now work began to be regarded, by some in the movement, as mere "unpaid labor," with "real work" regarded as what earns a wage. The very arguments that early advocates had strongly denounced in their efforts to hold back the culturally ascendant market mentality had now become fair game. Indeed, in 1898, with the publication of *Women and Economics*, Charlotte Perkins Gilman flipped those early arguments on their head.[16]

Expressly repudiating the joint property view that husbands and wives were economically interdependent partners in marriage and so ought to be treated as such by the law, Gilman instead argued that wives were *in fact* dependents in marriage and that only a repudiation of the family as an economic unit as such would free women from such marital inequality. Because of the increasingly dramatic split between the private and public spheres wrought by industrialization, Gilman suggested that women and men had each been overdeveloped in their respectively feminine and masculine traits. In her view, the work of the home, theoretically requiring less rigorous thought than market labor, had a stifling effect on women's authentic development. Moreover, Gilman argued, the public sphere would benefit from women's influence in it. Thus did Gilman trade domestic (in her mind, "feminine") values for modern ("masculine") economic ones. For her, no longer should the home remain an antimodern island in the industrializing sea, preserving a sphere of solidarity and kinship from market forces. She sought instead to bring the home, and the women in it, sharply in line with the modern economizing project.

In Gilman's view, the home should be freed from all work in order to become a pure refuge of rest and relaxation; likewise, women should be freed from home labor to seek wage labor and, therefore, economic autonomy, of their own. Gilman writes: "Specialization and organization are the basis of human progress, the

[13] Siegel, *supra* note 5, at 1148.

[14] *Id.* at 1168.

[15] *Id.* at 1189-90.

[16] *Id.* at 1203.

organic methods of social life. They have been forbidden to women almost absolutely."[17] And so, the traditional work of the home ought to be contracted out as much as possible: childcare professionals should take over the most important work of caring for and educating children (since most mothers were, according to Gilman, incompetent in this regard); household cleaning ought to be conducted by professionals too; and meals ought to be shared among families in common kitchens, with professional cooks. Kitchen-less houses would be preferable since "a family unity which is only bound together with a table-cloth is of questionable value."[18] Modern efficiency, now applied to the home, was Gilman's watchword.

To be sure, Gilman was not repudiating motherhood altogether: like many of her time, she regarded motherhood as the "common duty and common glory of womanhood."[19] But she sought to decouple motherhood from the time-consuming household tasks that kept women from the kind of professional work that would ensure better personal development and so give way to a more nurturing relationship with her husband and children. Where women might find this kind of professional work during the Industrial Revolution flexible enough to allow them valuable time with children, including a year off after each child, Gilman does not say. Perhaps hers was a theory for another time. Gilman's quest for efficiency and specialization was the women movement's forebearer for contemporary promotion of professional caregivers, household cleaners, and restaurant dining.[20] Yet it would remain, to our day, a vision that only the more well-off could afford. Gilman's theories, which gained immediate currency in the halls of newly opened women's colleges such as Vassar, portrayed married women working in the home as economically subordinate while repudiating the robust joint property arguments that once responded to their unjust situation.

Siegel writes, "Whether or not women … viewed their work for the family as intrinsically degrading, they were in no position to escape it; nor, for that matter, were their prospects in the market such that wage work necessarily promised 'personal development.'"[21] More still, many women (and men) still viewed the work of the home, productive as it remained, and deeply meaningful in its educative and nurturing elements, as the more essential of the two spheres: the place where their family's flourishing was rooted and would grow strong. One notable public rebuttal to the view advanced by those like Gilman that "all work becomes oppressive that is not remunerative" was printed in *The New Northwest*: "To this idea, more than any other, may be traced the prejudice against bearing children which has become so ingrafted upon the minds of married women, that tens of thousands annually commit ante-natal murder."[22]

Although Wollstonecraft, like Gilman, believed women, the family, and the public sphere would be served by women's greater educational and professional opportunities, Wollstonecraft argued that the work of the home afforded the character development men, women, and children needed for true success in the public sphere. Without that intentional human development properly prioritized in the life of the home, persons (and markets) would do little good outside of it.



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[17] CHARLOTTE PERKINS GILMAN, WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATION BETWEEN MEN AND WOMEN AS A FACTOR IN SOCIAL EVOLUTION 67 (1898), https://archive.org/details/womeneconomicsst00gilmuoft.

[18] *Id.* at 244.

[19] *Id.* at 246.

[20] Allan C. Carlson, *The Productive Home vs. The Consuming Home*, *in* LOCALISM IN THE MASS AGE 116 (Mark T. Mitchell & Jason Peters eds. (2018).

[21] Siegel, *supra* note 5, at 1208.

[22] *Id.* at 1166.

# IF WE TOOK THE SCRIPTURES ON MARRIAGE SERIOUSLY…

By Helen M. Alvaré

> You don't have to be in a relationship with me. You don't have to marry me. You don't have to have a happy little family with me. You don't have an obligation to me. You're good. Don't worry. Good night.[1]

## INTRODUCTION

In the United States today, relations between men and women—and, therefore, between parents and their children—are too often fragile, hurting, or broken. Because women will spend more time parenting than men, especially in nonmarital households,[2] this situation specially penalizes women and children.

Yet Christians believe that God is saying something incredibly important about who He is, how He loves us, and how He wants us to love Him and one another by way of male-female relations. Scripture is riddled with *spousal* descriptions of the love between God and the human person, alongside Jesus' instruction to love one another as He has loved us.

We have secular evidence, too, that the quality of relationships between men and women are pivotal for the health, happiness, freedom, dignity, and equality of both adults and children. They also matter to communities. Likely, we have more empirical evidence of this today than at any other time in history.

But there is a great deal of distressing news in the U.S. about the health of relations between men and women, and thus about the health of children and the mothers who disproportionately rear them. Compounding this, leading scholars in family law and leading political, media, and corporate forces regularly demonstrate either outright hostility or reckless indifference to the health of these relations. They often characterize marriage as a toxic place for women and children, while painting men as intrinsically threatening. They also valorize nonmarital relations, especially same-sex and cohabiting couples, and today even polyamorous households.

If, however, we are to heed Scripture's frequent insistence that God is trying to tell us something quite important by means of the bride/bridegroom pair, Christians—including scholars, churches, family lawyers, clergy, and laypersons—need to seriously reflect on the significance of marriage, in light of its current predicament. From the perspectives of both faith and reason, they need to explore diligently what God is asking us to understand about both horizontal and vertical Christian love from this permanent, faithful, fruitful union we call marriage. And they need to speak about it more often in ways that respond to the signs of the times, using appropriate language and concepts.

We may believe we have done all we can in this regard. Christians seem to talk about the family all the time! Clearly, however, more and better is required.

In what follows, therefore, I will first rehearse Christianity's convictions regarding the salience of marriage for coming to understand God's love and ours. Second—and briefly, relative to the volume of evidence that exists—I will summarize the empirical evidence about the goods that marriage promotes for women, children, and men and the particular suffering experienced by largely female-led nonmarital households. Third, I will describe the mixed reception accorded marriage especially by family law and family scholars. Finally, I will broadly describe the task awaiting Christian advocates of the family, including legal practitioners and those active in supporting law and policy.

## MARRIAGE AS AN ICON OF LOVE IN SCRIPTURE

Many generations of Scripture scholars have highlighted the Bible's use of marriage as a model for understanding

[1] Text sent by a pregnant young woman in Colorado to the boyfriend charged with murdering her, https://www.chieftain.com/story/news/2021/02/08/donthe-lucas-trial-cbi-agent-details-texts-between-lucas-and-schelling-days-before-her-disappearance/4439533001/.

[2] U.S. Dep't. of Commerce, U.S. Census Bureau, Historical Living Arrangements of Children (Dec. 2020), https://www.census.gov/data/tables/time-series/demo/families/children.html.

not only God's love for human beings, but also how we are to love Him and one another. The image is not perfect, obviously, given that human beings are not equal to God, as woman is to man. But its presence from the beginning of the Old Testament to the end of the New is not meaningless or nominalistic either. It provides an opening into the Mystery that is God's love and a privileged means for our coming to know how we are to love in a Christian fashion.

The references are many, and I will only highlight here some of the most well-known. "In the beginning," we have God's creation of male and female "in His image" (Genesis 1:27). There, God presents Himself from the start as a community of persons, whose love is creative of more community, of more loving relations. The physical and even ontological complementarity of the male and female He creates indicate that human beings are "for" one another. And the means of procreation indicate that every human being is especially "for" the vulnerable other, as well as "from" a community of other. Every person is a gift given, which is in turn, capacitated to give gifts to others.

Throughout the Old Testament, Israel is reminded that it is the bride to God's bridegroom: "For your husband is your Maker: the LORD of hosts is his name" (Isaiah 54:5). The relationship is depicted when Israel is faithful, and when it is defiled by adultery. "Thus says the LORD, 'I remember the devotion of your youth, how you loved me as a bride'" (Jer. 2:2). He later analogizes Israel to a harlot for its idol worship: "You defiled the land by your wicked prostitution" (Jer. 3:2). As Pope Benedict XVI wrote in his stunning encyclical *Deus Caritas Est* (God is Love), in Christianity

> [c]orresponding to the image of a monotheistic God is monogamous marriage. Marriage based on exclusive and definitive love becomes the icon of the relationship between God and his people and vice versa. God's way of loving becomes the measure of human love. This close connection between *eros* and marriage in the Bible has practically no equivalent in extra-biblical literature.[3]

In the New Testament's Gospel of John, John the Baptist refers to Jesus Christ as the bridegroom: "The one who has the bride is the bridegroom; the best man, who stands and listens to him, rejoices greatly at the bridegroom's voice" (John 3:29). Jesus does likewise: "And Jesus said to them, 'Can the wedding guests mourn as long as the bridegroom is with them?'" (Matt 9:15).

Perhaps the most well-known passages analogizing God's love to that of a bridegroom and urging Christians to love likewise appear in St. Paul's letter to the Ephesians, where Paul likens marriage to God's love for his people. He states: "This is a great mystery, but I speak in reference to Christ and the church" (Eph. 5: 32). Shortly afterward Paul urges: "Husbands, love your wives, even as Christ loved the church and handed himself over for her" (Eph. 5: 25).

The last book of the New Testament is likewise replete with references to marriage. The Book of Revelation characterizes the last Judgment as a wedding feast. "For the wedding day of the Lamb has come, his Bride has made herself ready" (Rev. 19:7). It continues: "And the angel said to me, 'Write this: Blessed are those who have been called to the wedding feast of the Lamb'" (Rev. 19:9).

In sum, there is no doubt that the spousal love between a man and a woman is a centrally important feature of Scripture, intended to assist human beings to grasp the kind of love God has for us, and how we are to love one another—given that we are *imago Dei* and specifically instructed by Jesus: "As I have loved you, so you also should love one another" (Jn. 13: 34).

Early Christians took this to heart. In fact, their sex, marriage, and parenting practices attracted a great deal of attention and commentary from the non-Christian world and played an important role in Christianity's growth too, particularly among women.[4] As distinguished from the Roman society in which they existed, Christians did not evaluate sexual morality according to social status, with men and masters permitted sexual license denied to women and slaves.[5] Instead, Christians' morality was a response to the person and message of Jesus Christ. As such, it charged *all* persons, without distinction, to love as He loved: faithfully, permanently, fruitfully, sacrificially. Thus from a very early point, Christians rejected abortion and infanticide, divorce, polygamy, adultery, and same-sex relations. They regarded their practices as ways of manifesting both their *imago Dei* and Jesus' quite radical command to love one another as He loves us.

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[3] Pope Benedict XVI, Encyclical Letter on Christian Love, *Deus Caritas Est* § 11 (Dec. 25, 2005), https://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est.html.

[4] *See generally* KYLE HARPER, FROM SHAME TO SIN: THE CHRISTIAN TRANSFORMATION OF SEXUAL MORALITY IN LATE ANTIQUITY (2016), *and* RODNEY STARK, THE RISE OF CHRISTIANITY: A SOCIOLOGIST RECONSIDERS HISTORY (1996).

[5] *See* Harper, *supra* note 4, at 78, 89, 132.

## REASON AFFIRMS THE IMPORTANCE OF MARRIAGE

While sociologists and other scholars have generated empirical evidence for a long time about the costs of the decline of marriage, recent decades have produced nothing short of an avalanche of literature. This has emerged, in important part, in response to myriad legal and cultural changes (described in the next section) that cast doubt on the importance of stable marriage between a man and a woman, and on children's need of this.

The decline of healthy stable relations between men and women can be depicted plainly. First, there are simply fewer long-lasting, *committed* alliances between men and women in the United States today than in the past. Between 1978 and 2018, the share of Americans between eighteen and thirty-four who were ever married plummeted from fifty-nine to twenty-nine percent.[6] Current trends are predicted to hold, resulting in high percentages of Americans who never marry at all. Over seventy percent of Americans will at some point in their lives cohabit without marriage, however, and increasingly they are serial cohabiters.[7] Yet cohabitations dissolve at a far higher rate than marriages. Also, fewer cohabitations transition into marriage than did so in the past, even though cohabitation has become the site of a large fraction of nonmarital parenting. Instead these unions later transition into lone-mother households.[8]

While divorce rates have dipped below their 1980s levels—in important part because fewer people are marrying in the first place—they have plateaued at high levels. Poor and working class Americans suffer divorce at substantially higher rates than those possessing a college degree or more.[9]

Study after study also reveals a high level of "gender mistrust" between men and women.[10] This, too, is suffered more among poorer Americans and fuels an epidemic of nonmarital parenting and loneliness.

All of this, of course, takes a serious toll upon women and children. Women head more than eighty percent of nonmarital households,[11] and men unlinked from the mothers of their children have far more attenuated or nonexistent relations with the children.[12] Today, men are *often* unlinked to the mothers of their children, not only after a divorce, but also upon the dissolution of cohabitations and because of our country's forty percent nonmarital birth rate.

*Today, men are often unlinked to the mothers of their children, not only after a divorce, but also upon the dissolution of cohabitations and because of our country's forty percent nonmarital birth rate.*

Solid empirical data reveals that the long-term economic, educational, cognitive, and emotional suffering of children reared without both of their parents is not only because of the relative dearth of money in their households, but also because of less parenting time, the loss of the father and his unique gifts, the loss of parents' mutual support for one another's parenting, the presence of unrelated men (mothers' new partners) in the house, and the loss of social and familial networks that married and extended families enjoy.[13] In the words of Nobel Prize-winning economist James Heckman at the University of Chicago, "[n]obody wants to talk about the family and the family is the whole story.

6 U.S. Dep't. of Commerce, U.S. Census Bureau, Percent Married Among 18-34 Year Olds: 1978 and 2018 (Nov. 14, 2018), https://www.census.gov/library/visualizations/2018/comm/percent-married.html.

7 Scott Stanley, *Cohabitation is Pervasive*, Inst. for Fam. Stud. Blog (June 20, 2018), https://ifstudies.org/blog/cohabitation-is-pervasive; Daniel T. Lichter, et al., *National estimates of the rise in serial cohabitation*, 39 Soc. Sci. Res. 754 (2010).

8 Scott Stanley, *Moving in and Moving on: Cohabitation is Less Likely Than Ever to Lead to Marriage*, Sliding vs. Deciding: Scott Stanley's Blog (July 25, 2014), http://slidingvsdeciding.blogspot.com/2014/07/moving-in-and-moving-on-cohabitation-is_25.html.

9 *See generally* Claire Cain Miller, *The Upshot: Modern Families: The Divorce Surge is Over but the Myth Lives On*, N.Y. Times, Dec. 2, 2014.

10 *See generally* Helen M. Alvaré, *Gender Mistrust as a Public Health Crisis: A Preliminary Proposal*, 108 Georgetown L.J. 20 (2020).

11 *Id.*

12 Jacob E. Cheadle, et al., *Patterns of Nonresident Father Contact*, 47 Demography 205 (2010).

13 Jane Anderson, *The Impact of Family Structure on the Health of Children: the Impact of Divorce*, 81 Linacre Q. 378 (2014); Helen M. Alvaré, Putting Children's Interests First in U.S. Family Law and Policy: With Power Comes Responsibility 58-65 (2018).

And it's the whole story about a lot of social and economic issues."[14]

Finally, research suggests that boys in single-parent households (usually led by women) suffer more than their sisters, likely because of father-absence, combined with the role modeling that multi-tasking mothers can provide their daughters. This may help to explain men's lesser college attendance rates, as well as their retreat from the labor market and their higher rates of drug addiction and suicide.[15]

These family structure deficits also appear to have intergenerational effects. Children of nonmarital or divorced households are more likely to enter into unstable romantic relations when they later become adults. Well-off children mate "assortatively" with others like themselves who have also benefited from stable families of origin. And the social gaps between the haves and the have-nots grow.[16]

## SUSPICION OF MARRIAGE

Most of the material in the preceding section is so well-known that it's like getting a long-lost telegram from the 1990s, when a great deal of cultural and legal attention began to be devoted to this subject.

But a powerful set of actors—lawmakers, academics, the media, and the entertainment industry—continues to ignore or even deny this material. They also ignore the testimony of their own eyes: that wealthier and more-educated Americans would not continue to choose marriage and marital childbearing at exceedingly high rates if they didn't know that it advantaged themselves and their children. (Charles Murray's landmark book *Coming Apart*[17] called this phenomenon among privileged Americans their "refusal to preach what they practice.") In particular, those suspicious of marriage have ignored—all predictions to the contrary notwithstanding[18]—that highly-educated women are marrying at higher rates than their less privileged sisters today. They did not "substitute" their well-paid jobs for the presence of a husband in their lives; they chose both.

Before approximately the 1970s, men's relationship with children was closely associated with their relationship with the mother, to the benefit of all parties. Higher percentages of men and women were married. In the event of a nonmarital pregnancy, social and familial forces pressured the couple to marry. Divorce rates were lower. While of course life was not all sunshine and roses for American couples, these trends allowed men more often to play a stable role in the lives of their children.

Evolutionary theorists have even proposed[19] from time to time that men's ongoing relationships with their wives strengthen their connections to their children, in part because of the man's desire to please his wife and men's interest in their children's thriving then leads them to attend to the well-being of the mothers of those children—their wives. If this is true, it also helps to explain some of what we see today: unmarried fathers' often attenuated relations with their children and an epidemic of violence against children by men living with women who are parenting children fathered by *another* man.[20]

Fifty years ago, the law had a large set of tools for supporting stable male-female partnerships in marriage and, therefore, marital parenting. Laws disadvantaged nonmarital children. Many states made cohabitation and adultery illegal. Divorce was attainable on the limited grounds of adultery, cruelty, and desertion. Abortion was illegal. Contraception was unavailable to single persons on the fear that it would boost nonmarital sex and pregnancy.

None of these laws were perfect. Illegitimacy laws wrongly punished children for the behavior of their

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[14] Andrea Mrozek, *Nobel Laureate James Heckman: "The Family is the Whole Story,"* INSTITUTE FOR FAMILY STUDIES BLOG (Mar. 15, 2021), https://ifstudies.org/blog/nobel-laureate-james-heckman-the-family-is-the-whole-story.

[15] Claire Cain Miller, *A Disadvantaged Start Hurts Boys More than Girls*, N.Y. TIMES, Oct 22, 2015, https://www.nytimes.com/2015/10/22/upshot/a-disadvantaged-start-hurts-boys-more-than-girls.html; David Autor et al., *Family Disadvantage and the Gender Gap in Behavioral and Educational Outcomes* (Inst. for Policy Research, Northwestern Univ., Working Paper No. 15-16, 2015), https://www.ipr.northwestern.edu/our-work/working-papers/2015/ipr-wp-15-16.html; Marianne Bertrand and Jessica Pan, *The Trouble with Boys: Social Influences and the Gender Gap in Disruptive Behavior*, 5 AM. ECON. J. OF APPLIED ECON. 1 (2013).

[16] Robert D. Mare, *Educational Homogamy in Two Gilded Ages: Evidence from Intergenerational Social Mobility Data*, 663 ANNALS AM. ACAD. POL. & SOC. SCI. 117-139 (2016).

[17] CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA, 1960-2010 (2013).

[18] GARY S. BECKER, A TREATISE ON THE FAMILY (2d ed. 1993).

[19] *See, e.g.*, Glenn E. Weisfeld & Carol F. Weisfeld, *Marriage: An Evolutionary Perspective*, 23 NEUROENDOCRINOLOGY LETTERS 47 (2002), https://www.researchgate.net/publication/10977856_Marriage_an_evolutionary_perspective.

[20] *See* Catherine T. Kenney and Sarah S. McLanahan, *Why are Cohabiting Relationships More Violent than Marriages?* 43 DEMOGRAPHY 127 (2006); Helen M. Alvaré, *Is This Any Way to Make Civil Rights Laws? Judicial Extension of Marital Status Nondiscrimination to Protect Cohabitants*, 17 GEORGETOWN J. L. & PUB. POL'Y 247, 278-80 (2019).

parents. Couples colluded to achieve a "fault" divorce. Single people cohabited and had sexual relations anyway.

Still, when all of these laws were abolished—either by the will of state legislatures or by constitutional rulings from the U.S. Supreme Court—lawmakers not only failed to craft alternative ways to link men, women, and their children in stable relations, but also moved in an opposite direction. They virtually disclaimed the importance of the male-female relationship. Among the low points in this series of laws? Speedy, unilateral, no-fault divorce; mostly unregulated assisted reproductive technologies; legalized abortion; refusing husbands any say respecting the abortion of their offspring; constitutionalizing a right to nonmarital sex; and forbidding states from specially valuing male-female relationships, procreation, or allowing children to know and be known by the parents who made them (i.e., same-sex marriage).

Scholarship in the leading law journals often not only embraced all of these changes, but also urged judges and legislators to do *more* to distance men and women and thereby distance men from their children. Leading family scholars advocated everything from the abolition of marriage, to treating cohabitation equally with marriage, to requiring men to contract with women in order to have access to their children. They painted men generally as abusers (while failing to mention that the greatest amount of abuse occurs in nonmarital relationships, not in marriage). They demanded surrogacy rights for male couples. They claimed that same-sex relations lead to greater marital happiness and freedom and better parenting. Today, they also increasingly defend polyamory and state-recognized "throuples."

A review of the top twenty-five law schools' law reviews since 2000 resoundingly affirms these conclusions. Considering every single family-related article in these journals for the past twenty-one years, one overwhelmingly finds articles valorizing nonmarital relations and parenting, with the greatest concentration of articles favoring legal rights for same-sex and cohabiting pairs. Interestingly, too, the majority of these articles are penned by female law professors almost certainly refusing to "preach what they practice" insofar as less-privileged women are concerned.

Law and culture supporting marriage and marital parenting has not stood completely still during this time, but their counter-efforts seem relatively feeble considering what's at stake. After a plethora of important books and articles and even legal attention (e.g., welfare reform[21]) in the 1990s, some federal, state, and private programs attended to marriage promotion.[22] Some churches stepped up marriage programs. Reformers proposed laws at least to slow down divorce for parents of young children.[23] They offered a new, more durable form of marriage ("covenant marriage").[24] None of these efforts, however, caught sufficient fire, even as some achieved a bit more traction than others.

## THE TASK AHEAD FOR LAWMAKERS, SCHOLARS, ATTORNEYS, AND CHURCHES

Christian attorneys, scholars, and lawmakers should be active in this arena. This is not for the purpose of imposing a theological world view, but rather to assist fellow Americans—especially the least advantaged—on the basis of reason illuminated by, and always in harmony with, faith. Likely, it would be particularly healthy if more female scholars would take up the cause. This would help counteract efforts to delegitimize marriage, so often undertaken in the name of women's rights, even as these efforts disproportionately leave women and their children without a father in the house.

Believing communities and individuals need first to educate themselves regarding the crucial importance of marital and parental love according to Scripture and the precarious situations of both today. As outlined above, marriage and marital childbearing are clearly in the bull's-eye, and this has weighty implications for love of God and one another. In a troubling message sent to a Catholic bishop founding a school of family studies, by one of the three children to whom the Virgin Mary appeared at Fatima, Sister Lucia wrote: "The final battle between the Lord and the kingdom of Satan will be about Marriage and the Family.... [W]hoever works for the sanctity of Marriage and the Family will always be fought against and opposed in every way, because this is the decisive issue."[25]

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21 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

22 *See* Julia M. Fisher, *Marriage Promotion Policies and the Working Poor: A Match Made in Heaven?* 25 B. C. Third World L. J. 475 (2005).

23 *See, e.g.*, Coalition for Divorce Reform, Parental Divorce Reduction Act (2012), https://divorcereform.us/wp-content/uploads/2012/11/Bullet-Points-PDF.pdf.

24 Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its as Yet Unfulfilled Promise*, 65 La. L. Rev. 605 (2005).

25 Diane Montagna, *Cardinal Caffarra: "What Sister Lucia Wrote to Me is Being Fulfilled Today,"* Aleteia (May 19, 2017), https://aleteia.org/2017/05/19/exclusive-cardinal-caffarra-what-sr-lucia-wrote-to-me-is-being-fulfilled-today/.

Christians must also find the words to speak to the world in language incorporating empirical and experiential insights. On the one hand, the reasons why marriage and family are decisive for "getting love right" may not be completely clear to us. God's ways are *never* perfectly clear to us, but reflections on experience and on the empirical data summarized above, can help give voice to the insights available from Scripture.

For example, that God made a two-sexed humanity immediately tells us that human beings are constitutively "in relation" at all times and that bridging differences matters. We are never just for ourselves. Individualism is a category mistake. Our bodies, too, indicate that every human is "for another." Our manner of procreation tells us further that we did not make ourselves, but are "from another," and that our existence is an expression of love. God could have brought human beings into being in some other way—could have avoided love and oneness as ingredients—but He didn't.

Furthermore, and practically speaking, our romantic partners, spouses, children, and relatives are the "neighbors" most frequently "strewn" on our path in the course of our lives, inviting us to respond "Good Samaritan" style. We are profoundly mistaken if we think that people will easily learn to love and be loved without a foundation in familial love.

No matter how rightly compassionate most people feel about the plight of convicts on death row or immigrants stranded on the U.S. border, only a relatively few of us will have the beautiful opportunity directly to assist them. For the vast majority of us, our primary opportunities to demonstrate Good Samaritan-like charity in person will happen within the four walls of our family home. Family members are simply the largest group of "unchosen" objects of most people's care, *daily* strewn across our paths and requiring considerable help. Yes, we choose our spouses, but (as the witty French philosopher Fabrice Hadjadj wisely notes in his book, *Qu'est-ce qu'une famille?*[26]), twenty years into the marriage or so, they are not quite the same person they were at first! Nor are we! Hadjadj also notes that we do not choose our in-laws, but that these persons and the rest of our extended family are rather *given* to us. Likewise, even though we invite children into our lives, we do not know who they will be. Instead, we accept and serve them as they are, when they come.

Not only does family life strew across the path of *every single person* the human beings she is most likely to affect during a lifetime, but these effects are potentially *profound* and likely to affect the other person for a very long time, probably his or her whole life. For example, common sense and empirical evidence overwhelmingly support the conclusion that it matters to another—deeply and for a long time—whether we have sex with them with or without any intention of a future relationship; whether we cohabit with them or not; whether we welcome a child with them or not; whether we undergo an abortion or allow a child to be born; whether a child is born within or outside of a marriage; and whether we have a same- or opposite-sex sexual encounter. These choices also have spillover and intergenerational effects within a family.

The presence or absence of certain lessons learned in families also produces communal effects. It is in families realistically that we receive our first and often most formative lessons about how to love "the other." How to love the other despite differences of age, personality, interests, and talents. How to understand that equality exists alongside diversity. In families we learn to forgive, to make peace, and to preserve relations over the very long term. We observe the constant interdependence of human life and the need both to give and to receive aid on innumerable occasions including, but not limited to, the periods of childhood and old age and in circumstances involving disability, sickness, unemployment, loneliness, and addiction, among many others.

In short, when the family is the "school of love," an intergenerational chain of virtue is begun. If we don't get Good Samaritan love right in the family, there will not be enough to go around in the world.

Consequently, Christian lawyers and scholars should work to embody "family values" in religious, cultural, and legal venues in terms appealing to a pluralistic democracy. Many of the insights about family discussed above will be helpful in this effort. Programs like those offered by *Communio*[27] are a great assistance to churches looking to boost the quality of dating, marriage, and parenting among their members and in their community. Laws—always imperfect but nonetheless helpful—could better ensure reflection and preparation before marriage, slow down divorce, support marital parenting, and promote sexual responsibility. All are needed and likely to have good effects, even as no legal regime can overcome original sin.

Finally, men and women and children everywhere stand in need of a legal and popular culture that properly grasps the importance of the family. But the poor need this support the most. Currently they are ill-served by the ways that law and culture ignore or recklessly disparage stable marriage and marital parenting. The future of

[26] FABRICE HADJADJ, QU'EST-CE QU'UNE FAMILLE? SUIVI DE LA TRANSCENDANCE EN CULOTTES (2014).

[27] *See generally* Communio.org. Disclosure: I am on their board.

civil rights in the United States must include meaningful opportunities to establish strong, stable male-female and parenting relationships.

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# CAREGIVING, COVID-19, AND THE FAILED PROMISE OF ABORTION

BY ELIZABETH R. SCHILTZ

It will take decades to sort through all the impacts of the many upheavals of the year 2020—from the COVID-19 pandemic to the killing of George Floyd and others. The aftermath of the killing of George Floyd accelerated conversations about the extent to which many social problems are rooted in social structures—deeply entrenched structures that shape and color our perceptions in powerful and subtle ways. One of the flawed structures that has been dramatically exposed during the pandemic is our support for the work of caregiving.

The implosion of our workplaces and schools into our private homes has blurred the lines between those seemingly separate spheres of "work" and "life" and turned the notion of "work-life" balance into a sad joke. The massively disproportionate effect on women of the economic disruptions of the pandemic is so striking that the media is calling it a "she-session."[1] To quote Emily Marin of the National Women's Law Center: "COVID set off a bomb in the middle of these jerry-rigged ways of getting by in this country that individual families had created."[2] The light from that bomb blast is shining a glaring spotlight on the gaps in the social structures we have established to support caregivers—who are predominantly women. In the United States, we continue to rely on the employment market as the only source of support for caregiving work. This structure is utterly inadequate for supporting care work even in the best of times. But the devastating effect of the collapse of even that feeble structure during the COVID-19 pandemic has made even more urgent the need for what philosopher Eva Feder Kittay has characterized as "a public ethic of care by which we acknowledge the social responsibility to care for the caregiver."[3]

A robust body of work by a school of feminist scholars over the past decades has documented the need for a social re-evaluation of the work of caring for dependents—not only children, but also elderly or disabled family members.[4] One of these scholars, Joan Williams, demonstrates how employment in the U.S. is structured to accommodate the "ideal worker"—namely, the person with no obligations for caring for other people, with the ability to devote oneself fully and totally to the demands of one's job.[5] This structural reality disadvantages women economically, psychologically, and spiritually because it devalues the work of caregiving that is predominantly done by women.

In my past work, I have explored the extent to which much of this emerging feminist theory is compatible with the writings of the Catholic Church on the roles of women and family, arguing that both support arguments for restructuring workplaces and legal schemes to accommodate caregivers.[6] One point, however, on which the Catholic Church (indeed, the Church catholic) parts ways with much of the work of feminist theorists is, of course, on the

1 *See, e.g.*, Alisha Haridasani Gupta, *Covid Shuttered Schools Everywhere. So Why Was the 'She-cession' Worse in the U.S.?* N.Y. TIMES, May 28, 2021, https://www.nytimes.com/2021/05/28/us/shecession-america-europe-child-care.html; Ric Edelman, *Will The She-Cession Lead To A She-Covery?* FORBES, Apr. 8, 2021, https://www.forbes.com/sites/ricedelman/2021/04/08/will-the-she-cession-lead-to-a-she-covery/?sh=1fbfe4f1c518.

2 Eliana Dockterman, *Women are Deciding Not to Have Babies Because of the Pandemic. That's Bad for All of Us*, TIME (Oct. 15, 2020), https://time.com/5892749/covid-19-baby-bust/.

3 Feder Kittay, Eva, *A Feminist Public Ethic of Care Meets the New Communitarian Family Policy,* 111 ETHICS 523, 533 (2001).

4 Some of the major works of these scholars include: JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000); EVA FEDER KITTAY, LOVE'S LABOR (1999); ROBIN L. WEST, CARING FOR JUSTICE (1997); JOAN C. TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE (1993).

5 Williams's classic book on this theme is UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT, *supra* note 4.

6 Elizabeth R. Schiltz, *Should Bearing the Child Mean Bearing All the Cost? A Catholic Perspective on the Sacrifice of Motherhood and the Common Good*, 10 LOGOS: J. CATH. THOUGHT & CULTURE, no. 3, Summer 2007, at 15; Elizabeth R. Schiltz, *Motherhood and the Mission: What Catholic Law Schools Could Learn from Harvard about Women*, 56 CATH. U. L. REV. 405 (2007); Elizabeth R. Schiltz, *West, MacIntyre and Wojtyła: Pope John Paul II's Contribution to the Development of a Dependency-Based Theory of Justice*, 45 J. CATH. LEG. STUD. 369 (2006).

role of abortion. In this article, I will argue that the insistence of many feminists that the availability of abortion is an absolute necessity for achieving equality and autonomy for women has become, in fact, an entrenched structural flaw in our support for caregivers that stands in the way of the radical reforms needed to fully empower women. Like many other structural deficiencies in our social edifices, the pandemic has exposed this in startling ways.

Legal scholar Julie Suk published an article in the Columbia Law Review in 2010 called "Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict."[7] She contrasts the U.S.'s pathetically feeble family leave with that offered in most other countries in the world. The United States is one of the handful of countries in the world that does not generally require that employers provide any paid parental leave. (A handful of states do mandate some paid leave,[8] and the federal government workers who are new parents have recently been extended twelve weeks of paid leave.[9]) In contrast, countries like France and Sweden guarantee months of paid maternity and paternity leave, with robust job protections. Suk analyzes the different commitments of feminist theory that led to the generosity of France and Sweden, but make it impossible for laws mandating any paid maternity leave to get anywhere in the United States, despite decades of efforts.

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Suk explains that, in Europe, the issue of maternity leave was historically considered entirely separately from the issue of general sick leave or disability leave. In those countries, legal schemes evolved that considered childbirth to be something unique—not a disability or an illness—and an endeavor in which the women who were primarily affected by it deserved the support of the entire social network. Maternity (or paternity) benefits are not the responsibility of the employer—they are the responsibility of the state—provided in recognition of the social value of care work.[10]

In contrast, in the United States, the issue of maternity leave has always been inseparably intertwined with employment law. Suk points out that the trajectory of the American approach was shaped primarily by feminists in the 1960s and 1970s who argued for equality based on sameness; they worried that distinguishing between childbirth and any other medical condition, by requiring employers to offer maternity benefits, would perpetuate negative stereotypes about women's ability to work, resulting in discrimination against women.[11] Suk argues that family leave should be disaggregated from medical leave.[12] And she also argues that "gender stereotypes are not necessarily bad for women."[13] She writes, "The American stereotyping approach attempts to give women the same chance as men to prove their mettle, but fails miserably by ignoring the gendered barriers to their ability to do so."[14]

A careful look at that last quote reveals, I think, precisely what the problem is with the American approach and points to how abortion finds itself embedding in the

7 Julie Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 Colum. L. Rev. 1 (2010). The discussion of Suk's arguments contained herein is an abbreviated form of the discussion in my book chapter, Elizabeth R. Schiltz, *A Contemporary Catholic Theory of Complementarity*, *in* Feminism, Law, and Religion 1, 18-20 (Marie Failinger, Elizabeth R. Schiltz & Susan J. Stabile eds., 2013).

8 Deborah Widiss, *Equalizing Parental Leave,* 105 Minn. L. Rev. 2175, 2203-2208 (2021) (analyzing state paid parental leave laws in the District of Columbia, California, Colorado, Connecticut, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Washington).

9 Federal Employee Paid Leave Act, Pub. L. No. 116-92, §§ 7601–7606, 133 Stat. 2304 (2019) (enacted as part of the National Defense Authorization Act for Fiscal Year 2020). See Widdis, *supra* note 8, at 2208-2209, for a discussion of this law.

10 Suk, *supra* note 7, at 18.

11 *Id.* at 47-48.

12 *Id.* at 68.

13 *Id.*

14 *Id.* at 54.

structures of employment. (Let me be clear, Suk does *not* make anything like this argument in her article.[15]) Suk explains that the American approach "attempts to give women the same chance *as men* to prove their mettle."[16] If women can become like men, they have an equal chance to succeed. And the single most important protection for women's equality has come to be seen as abortion, which is women's ultimate way to become just like men. Abortion has become embedded into the institutional structure of employment in this country. It has come to be seen as a non-negotiable feature of the social and legal support that women need to succeed in the workplace, to achieve equality and autonomy, and to escape poverty. The right to abortion—to escape from the responsibility of caregiving—has been prioritized over the right to care for children (or the elderly or people with disabilities) without suffering severe economic penalty. The fight for the right of women to become more like ideal male workers has been prioritized over the fight to restructure the workplace to accommodate caregiving or to institute social supports for caregivers outside of the structures of the workplace.

It has been almost fifty years since *Roe v. Wade*[17] was decided. Since then, the only substantial form of federal support for caregiving that has been enacted is the Family and Medical Leave Act of 1993[18] (FMLA) providing job-protection and twelve weeks of *unpaid* leave for qualified medical and family reasons; even that is only available to employees who work for a public agency, a public or private elementary or secondary school, or a private-sector employer with fifty or more employees, and who have worked for this employer for at least twelve months.[19] The only other federal statutory protections related to pregnancy that have been enacted are the Pregnancy Discrimination Act of 1978,[20] which prohibits any form of discrimination by employers on the basis of pregnancy, and a 2010 addition to the Fair Labor Standards Act,[21] which guarantees nursing mothers the right to reasonable break time to express milk at work.

The pandemic-related economic collapse has vividly demonstrated the inadequacy of that feeble legal structure. In contrast to typical recessions, women's employment has been negatively impacted significantly more than men's.[22] Women have lost a net of 4.5 million jobs since February 2020; in April 2021, the Bureau of Labor Statistics reported women's labor force participation rate of 57.2%, the lowest since 1988.[23] The pace of recovery of women's jobs is proving to be slower than that of men's jobs.[24] Because there is no precedent for such a mass exodus of women from the workforce, predictions of the course of recovery are difficult, but the long-term economic impact of women's career pauses for childcare pre-pandemic does not augur well for women. The economic impact is not limited to wages lost during the period of unemployment; such job gaps also result in difficulty being rehired, lower future income growth, and reduced retirement benefits.[25]

Some of the explanation for the disproportionate impact of the pandemic on women's employment is attributable to the fact that women are more likely to be employed in job sectors such as travel and hospitality, which were most directly affected by pandemic-related shut-downs, and are less likely to be amenable to telecommuting.[26] An even more significant explanation, however, clearly lies in the disproportionate caregiving

15 The one oblique reference to abortion in Suk's article suggests she would not agree with my arguments in this essay. *Id*. at 52, note 312 and accompanying text.

16 Suk, *supra* note 7, at 54 (emphasis added).

17 410 U.S. 113 (1973).

18 Family Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 7 (codified at 29 U.S.C. § 2601 et seq. (2018)).

19 U.S. Dep't of Labor, *Fact Sheet #28: The Family and Medical Leave Act* (2012), https://www.dol.gov/agencies/whd/fact-sheets/28-fmla.

20 Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2018)).

21 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4207 (2010) (codified at 28 U.S.C. § 207(r)(1) (2010)).

22 Titan Alon, et al., *The Impact of Covid-19 on Gender Equality* 3-19 (Nat'l Bureau of Econ. Research, Working Paper No. 26947, 2020) [hereinafter NBER Report], https://www.nber.org/papers/w26947.

23 Emily Peck, *Pandemic Could Cost Typical American Woman Nearly $600,000 in Lifetime Income,* NEWSWEEK (May 26, 2021), https://www.newsweek.com/2021/06/11/exclusive-pandemic-could-cost-typical-american-woman-nearly-600000-lifetime-income-1594655.html.

24 *Id*.

25 *Id*.

26 NBER Report, *supra* note 20, at 9-12.

demands on women.[27] The COVID-19 shutdowns have closed schools and daycare centers around the country, keeping kids at home and making it even harder for parents (especially mothers who tend to provide the majority of childcare) to keep working. For the lowest-paid women, the closure of the biggest source of free public child care—schools—has been devastating. The dangers of COVID-19 eliminated many of the other most common sources of free or low cost child care—help from neighbors or grandparents or other family members. The same issue has bedeviled those caring for the disabled and the elderly—again, mostly women. Day centers and supported employment programs for the disabled, and day centers for the elderly, also shut down. Their caregivers have had to cobble together care, too—often at the expense of their paying jobs. It is not lack of access to abortion that has been responsible for this crisis; it is lack of support for caregiving.

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One would think that this extraordinary collapse of the female employment market would be the occasion for serious examination of the existing edifice. Instead, the response has been a set of piecemeal, unimaginative patches to this creaky structure. The Families First Coronavirus Response Act[28] enacted in April 2020, expanded the leave available under the FMLA, providing two weeks of paid sick leave if an employee is quarantined or has COVID-19 symptoms, or two weeks of paid sick leave at two-thirds pay to care for person with COVID-19, and up to twelve weeks at two-thirds pay for a child whose school has closed. This is a temporary patch (available only to leave taken between April 1, 2020 and December 31, 2020) directly related to COVID-19, rather than any systemic adjustment to support for caregiving. Similarly, the America Rescue Plan of 2021,[29] enacted on March 11, 2021, instituted a one-year increase in the tax credit for children, and more than $40 billion for supporting child care providers. In the words of one commentator: "Make no mistake—this was a back-up-the-Brinks-truck approach to policy-making, without much emphasis on reform."[30]

The cataclysmic collapse of female employment because of the lack of support for caregiving has not moved policy-makers to embrace more radical restructuring such as the proposed Pregnant Workers Fairness Act,[31] which would require employers to make reasonable accommodations for workers affected by limitations related to pregnancy, childbirth, or related medical conditions. This bill was first introduced in Congress in 2012, and has been reintroduced in the House almost every legislative session since, but, as the *New York Times* reported in March, "it's repeatedly failed because it lacked bipartisan support and a sense of urgency."[32]

So it has been fifty years since *Roe v. Wade*, abortion is widely available to women, and yet in the face of devastating female employment outcomes tied to caregiving, there has been no movement toward recognition of a social responsibility to care for the caregiver in the broader contexts in which caregiving is crucial to our society—not just for our children, but also for the elderly and disabled.

How are women reacting to what they are seeing and experiencing over this past year? The Brookings Institute

27 *Id.* at 12-18. *See also* Anu Madgavkar, et al., McKinsey Global Inst., Covid-19 and Gender Equality: Countering the Regressive Effects (2020), available at: https://www.weforum.org/agenda/2020/09/covid-19-gender-inequality-jobs-economy/ ("By our calculation, women's jobs are 1.8 times more vulnerable to this crisis than men's jobs. Women make up 39 percent of global employment but account for 54 percent of overall job losses. One reason for this greater effect on women is that the virus is significantly increasing the burden of unpaid care, which is disproportionately carried by women").

28 Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 177 (2020).

29 America Rescue Plan Act of 2021, Pub. L. No. 117-2 (2021).

30 Patrick Brown, *What's Next for Child Care Policy?*, Inst. for Fam. Stud. Blog (Mar. 22, 2021), https://ifstudies.org/blog/whats-next-for-child-care-policy-.

31 H.R. 1065, 117th Cong. (2021).

32 Alisha Haridasani Gupta and Alexandra E. Petri, *There's a New Pregnancy Discrimination Bill in the House. This Time It Might Pass*, N.Y. Times (Mar. 4, 2021), https://www.nytimes.com/2021/03/04/us/pregnancy-discrimination-congress-women.html.

is predicting 300,000 fewer births than usual this year.[33] In other words, women are protecting themselves by retaining the flexibility to mold themselves into the ideal workers that our workplace structures demand. They are choosing the same result that access to abortion gives them, because it is the only rational option really available to them, faced with the institutional structures of our workplace that simply will not yield to the demands of caregiving, and faced with the lack of any social support for caregiving outside of the workplace.

Women should not be forced to rely on abortion as a "release valve" for society's devaluation of the work of caring for others. Women need the much more radical sorts of changes suggested over twenty years ago by visionary care feminists like Eva Feder Kittay, such as monetary compensation and pay for the work of caregivers;[34] de-gendering and de-racing care work, through efforts like establishing a "Care Corps," modelled on the Peace Corps, in which young people spend part of their youth in care work;[35] and provide visiting nurses to help new mothers, as well as any caregiver who is new to the responsibility of caring for an elderly person or disabled person.[36] In a recent essay, Joan Williams argued that the recent pandemic has exposed many of the heretofore hidden pressures of child raising that have up until now been the predominant burden of mothers. She writes: "Before COVID, many parents quietly skulked off to attend the school play or coach a soccer game, workers nursed their babies in cars parked outside factories, and adult children slid away unobtrusively to take elders to the doctor. Now there's a lot less of a taboo because you can't hide it."[37] She notes that, to her astonishment:

> With most of us working from home these days, Americans' workday has increased by 40%—roughly 3 hours a day—the largest increase in the world. Yes, I fact-checked that. I couldn't believe it either. The problem with all this busyness and productivity is that it comes at a huge price. Many employees are now doing the work of three or more people. They're doing their own jobs, their childcare worker's jobs, and their children's teacher's jobs. Yet, many employers seem oblivious. I hear reports of companies cheerfully assuring their employees, and themselves, that everyone is working at, or close to, 100%. Why don't more managers see the problem here?[38]

Her response: "It's because there's still a widespread reverence for the 'ideal worker.'"[39]

Might some of that "reverence" be, in fact, facilitated and enabled by the enshrining of abortion—a highly efficient mechanism for ensuring a constant supply of "ideal workers"—as the primary value in the quest of equality for women? As we sort through the ramifications of the pandemic, we are being given a chance to examine carefully the structures of employment in this country. Even if we cannot resolve all of our differences about abortion, perhaps we can expend more of our energy in working to implement more radical reforms to promote equality, autonomy, and economic power for women.

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[33] Melissa Kearney and Phillip Levine, *We Expect 300,000 Fewer Births Than Usual This Year,* N.Y. TIMES (March 4, 2021), https://www.nytimes.com/2021/03/04/opinion/coronavirus-baby-bust.html.

[34] Kittay, *supra* note 3, at 544-547.

[35] *Id.* at 544.

[36] *Id.* at 543.

[37] Joan C. Williams, *The Pandemic Has Exposed the Fallacy of the 'Ideal Worker'*, HARV. BUS. REV. (May 11, 2020), https://hbr.org/2020/05/the-pandemic-has-exposed-the-fallacy-of-the-ideal-worker.

[38] *Id.*

[39] *Id.*

# ABORTING MOTHERHOOD

## *Adoption, Natural Law, and the Church*

By David Smolin

Is it right or natural that a woman should be expected to go through pregnancy and childbirth, surrender her baby to strangers, and then go on with her life as though nothing had occurred, never knowing what happened to her child, as though she was never a mother? Is it right or natural that an entire segment of society would be denied the opportunity to ever know, or even know about, their natural parents, including the women who carried and birthed them?

This is what society and the church expected of single pregnant women and their children in the United States between 1945 and 1973.[1] The United States was a part of a global "baby-scoop era" in which single pregnant women in Australia, Belgium, Canada, Ireland, New Zealand, and the U.K. were often pressured and even forced to relinquish their children through intermediaries to unknown strangers.[2] This coercive and cruel treatment of the unwed mother and her child is also expressed in the industrial school and mother and baby home scandals in Ireland.[3] Catholic and Protestant churches and institutions, in concert with the state, society, and the social work profession, normalized the separation of mother and child in the context of unmarried births.[4] This normalization of separation of children from natural parents was also fueled by the popularity of eugenics in the early twentieth century, with single mothers labeled "imbeciles" and the United States Supreme Court upholding forced sterilization with its infamous line that "three generations of imbeciles are enough."[5]

For Christians, this issue concerns the intersection of ideals, rules, and the gospel. Traditionally, Christianity has expressed the norm of a two-parent family, and sexuality and child-bearing as appropriately situated within marriage.[6] The baby-scoop era occurred in contexts where those norms were enforced by coercing and pressuring vulnerable single, pregnant women to relinquish their babies within the context of adoption systems dominated by secrecy and shame. While the law theoretically required consents to be voluntary, there is overwhelming documentation that for many women—including especially many middle-class and churched young women—the pressures were overwhelming. Women were given the impression, and treated as though, they had no choice in the matter. Priests, ministers, churches, parents, relatives, doctors,

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1 *See, e.g.*, Ann Fessler, The Girls Who Went Away: The Hidden History of Women Who Surrendered Children for Adoption in the Decades Before Roe v. Wade (2006); Cecilia E. Donovan, Taking Matters Into Their Own Hands: Social Workers and Adoption Practices in United States Maternity Homes (Apr. 3, 2019) (unpublished B.A. thesis, University of Colorado) (on file with University of Colorado), https://www.colorado.edu/history/sites/default/files/attached-files/donovan_thesis.pdf; Elizabeth J. Samuels, *Surrender and Subordination: Birth Mothers and Adoption Law Reform*, 20 Mich. J. Gender & L. 33 (2013).

2 *See, e.g.*, Int'l Soc. Serv., Responding to illegal adoptions: A professional handbook 35-39, 187-88 (Christina Baglietto, Nigel Cantwell & Mia Dambach eds., 2016), https://www.iss-ssi.org/images/News/Illegal_Adoption_ISS_Professional_Handbook.pdf; Senate Standing Committees on Community Affairs, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (Report, Feb. 29, 2012) [hereinafter *Commonwealth Contribution*], https://www.aph.gov.au/parliamentary_business/committees/senate/community_affairs/completed_inquiries/2010-13/commcontribformerforcedadoption/report/index; Origins Australia, http://www.originsnsw.com/ (last visited July 27, 2021).

3 *See, e.g.*, Gov't of Ir., Department of Children, Equality, Disability, Integration and Youth, Final Report of the Commission of Investigation into Mother and Baby Homes (Jan. 12, 2021), https://www.gov.ie/en/publication/d4b3d-final-report-of-the-commission-of-investigation-into-mother-and-baby-homes/; Clann: Ireland's Unmarried Mothers and their Children: Gathering the Data, http://clannproject.org/.

4 *See* sources cited *supra* notes 1-3.

5 Buck v. Bell, 274 U.S. 200, 207 (1927).

6 *See, e.g.*, Catechism of the Catholic Church, art. 7 (2d ed. 2012).

nurses, social workers, and friends sent the message that the only legitimate pathway was to hide the pregnancy and birth and secretly relinquish the child for adoption. The motherhood of these women was systematically repudiated by church and society, leading them to believe that they could not regard themselves as the mothers of the children they bore. Whether denigrated and shamed as uniquely fallen sinners—as seems to very frequently have been the case—or treated more gently as fellow redeemed sinners, the message was clearly that they must forever hide their pregnancies and births. Their motherhood could only be a shameful thing, never something to be embraced or acknowledged.[7] The most descriptive term, although shocking perhaps to those used to hearing of adoption as an alternative to abortion, is to say that *in this way of practicing adoption their motherhood was aborted*.

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To state it in this way is admittedly provocative, but properly so. For the same churches that have insisted that life begins at conception, that there is no such thing as being "a little bit pregnant," and that a pregnant woman is *already* a mother, systematically repudiated the motherhood of single pregnant women. For purposes of abortion, Catholics and evangelicals maintain that the woman is a mother starting at conception,[8] yet for purposes of adoption they repudiated the motherhood of women who went through nine months of pregnancy and childbirth.

The numbers are staggering: an estimated 1.5 million babies placed for adoption by single mothers from World War II to 1974, in the United States alone.[9] This is not to say that every single adoption during that era was unethical; however, the adoption practices of the recent past have brought into question not just the ethics of individual adoptions, but also an entire way of doing adoptions, both in the United States and globally.[10] The baby-scoop era crystallized, legally and culturally, our current model of adoption, suggesting that the foundation of contemporary adoption practice is essentially flawed.

The narratives of women who regret losing their children to adoption echo the narratives of women who regret their abortions. There is the same sense of being pressured by difficult circumstances, manipulative intimates, and powerful strangers into an irredeemably painful "choice." There is the same denial of one's nature as a woman and a mother, and of one's relationship to a child. There is the same gnawing, endless regret often twisted into a self-loathing that can make it difficult to deem oneself worthy of life or love. There is the same difficulty with special anniversaries, such as the child's birthdays (real in adoption but only projected in abortion). There is the same sense of trauma that makes it difficult to follow the promised path of being "freed" by the abortion/adoption for a "normal" life; instead, all too often it is as though a part of the woman was left dead back at the hospital. There are the same difficulties about having and loving another baby: the struggle to overcome depression and trauma in order to be fully present for and worthy of the mother's later-born children. There are strangely similar accounts of the clinical settings, with detached medical providers who remove fetuses/babies seemingly as though the mother were a piece of unfeeling flesh; of metal stirrups and drugs that blur one's consciousness; and being acted upon rather than acting; of losing the baby,

7 See sources cited *supra* notes 1-3; *see also* E. Wayne Carp, *Jean Paton, Christian Adoption, and the Reunification of Families*, J. CHRISTIAN LEGAL THOUGHT, Spring 2012, at 20-22; Clara Daniels, *A Mother's Story*, J. CHRISTIAN LEGAL THOUGHT, Spring 2012, at 23-25 (recounting a narrative of a more recent adoption that mirrors those which occurred during the baby-scoop era).

8 *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH, §§ 2270-2275 (2d ed. 2012); Southern Baptist Convention, *Resolution on Abortion* (June 1, 1984), https://www.sbc.net/resource-library/resolutions/resolution-on-abortion-7/.

9 *See* Penelope L. Maza, *Adoption Trends: 1944-1975*, THE ADOPTION HISTORY PROJECT, https://darkwing.uoregon.edu/~adoption/archive/MazaAT.htm (last visited on July 27, 2021); Samuels, *supra* note 1, at 35 n.2 (explaining estimates).

10 *See* sources cited *supra* note 1.

often in adoption without even being permitted to lay eyes upon one's own child.[11]

Recognition of these wrongs has begun outside of the United States. After an inquiry in Australia revealed an estimated 150,000 forced adoptions of children of single mothers,[12] Catholic Health Australia, representing seventy-five Catholic hospitals, issued a national apology.[13] The inquiry had described women during labor and childbirth being "drugged and shackled to beds"[14] and prevented from seeing their children being born or holding them afterwards, sometimes through having "a pillow or sheet … placed over their heads."[15] Mothers whose children were targeted for adoption were told that they could not oppose the decision and were not told of their rights to revoke consents. Catholic Health Australia admitted that wrongful practices had been "regrettably common in many maternity hospitals across Australia." Admitting that prior adoption practices had "devastating and ongoing impacts on mothers, fathers, children and families," Catholic Health Australia acknowledged "the pain of separation and loss felt then and felt now by the mothers, fathers, children, families and others involved in the practices of the time."[16] The government of Australia also issued an official national apology on March 21, 2013.[17]

Unfortunately, too many remain oblivious both to the harms of past adoption practices and to continuing abusive adoption practices. We are nowhere near a national apology in the United States, despite heart-rending accounts coming increasingly into view of cruelties committed commonly against mothers.[18] In addition to apologies, remedies are required, and also investigation and analysis of what went wrong and how those mistakes have become incorporated into law, culture, and adoption practice.

## THE LOST HISTORY OF CHRISTIAN EFFORTS TO HELP SINGLE MOTHERS KEEP AND RAISE THEIR CHILDREN

The history of Christian ministry to single mothers and their children prior to the baby-scoop era has been described by historians, and yet remains unknown to most. Originally, Christian maternity homes in the United States were designed to help keep mother and child together, but eventually the homes became a central part of the baby-scoop process of pressuring and coercing single mothers to place their babies for adoption. Christian institutions transitioned to their policies of separating single mothers and their child under the influence of the secular experts of the time from social work, psychology, and psychiatry, as these increasingly prestigious professions viewed single mothers as unfit to raise their own children.[19] This is one instance in which religious organizations following the trends of secular experts produced profound harm.

One way to describe the earlier Christian efforts to keep unmarried mother and child together is to focus on the largest group of homes, called Florence Crittenton homes, and incorporated under the banner of the National Florence Crittenton Mission (NFCM). The story can be dramatized through recounting the story of a little girl named Florence Crittenton who died of scarlet fever at age four, her heartbroken father Clarence Nelson Crittenton, and Dr. Kate Waller Barrett.

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11 *See* sources cited *supra* notes 1-3, 7; David Reardon, Aborted Women, Silent No More (1987); Rosalind P. Petchesky, Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom 109, 133 n.7 (rev. ed. 1990).

12 *See Commonwealth Contribution to Former Forced Adoption Policies and Practices*, *supra* note 2; *see also* Department of Social Services, *Forced Adoption Practices* (Austl.), https://www.dss.gov.au/our-responsibilities/families-and-children/programs-services/forced-adoption-practices.

13 *CHA delivers formal apology for forced adoptions*, CathNews (Sept. 26, 2011), https://cathnews.com/cathnews/2566-cha-delivers-formal-apology-for-forced-adoptions (describing Opening Statement of Martin Laverty, CEO of Catholic Health Australia, to the Senate Community Affairs Committee Inquiry into the Commonwealth Contribution to Former Forced Adoption Policies and Practices on Sept. 28, 2011).

14 See *Forced Adoption Practices*, *supra* note 12.

15 See *Commonwealth Contribution*, *supra* note 2, at 48, § 3.53.

16 *See* sources cited *supra* note 13.

17 See *Forced Adoption Practices*, *supra* note 12.

18 *See, e.g.*, sources cited *supra* notes 1, 7.

19 *See* Katherine G. Aiken, Harnessing the Power of Motherhood: The National Florence Crittenton Mission, 1883-1925 (1998); *see also* sources cited *supra* note 1; Regina G. Kunzel, Fallen Women, Problem Girls (1993); Diane Bernard & Maria Bogen-Oskwarek, Wash. Post, November 19, 2018, https://www.washingtonpost.com/history/2018/11/19/maternity-homes-where-mind-control-was-used-teen-moms-give-up-their-babies/.

### *Florence and Clarence Crittenton*

Clarence Nelson Crittenton was born in 1833; he was raised by a large family on a farm in rural New York and then moved to New York City to seek his fortune in business.[20] He became extremely successful in the wholesale drug business.[21] Although raised in a Christian family, Crittenton described himself as having been worldly and unconverted when he was a successful and reputable businessperson, being addicted to financial success and conspicuous consumption.[22]

Crittenton married, had a son who died of scarlet fever, and a daughter, Addie, a gifted musician.[23] When Addie was thirteen another daughter, Florence, was born to the family.[24] Crittenton became extremely attached to little Florence, and she to him; Florence called herself "Papa's Baby."[25] Each night he got her ready for bed and sang her favorite hymn, "The Golden Harp," with Florence often joining in the chorus: "I want to be with Jesus/And play on the golden harp."[26]

His autobiography describes a Sunday morning he spent with little Florence, taking a long walk "instead of being at church where I should have been."[27]

> As we went along the street I looked at [Florence] with pride, thinking how beautiful she was, dressed so daintily in her little velvet coat and bonnet, and with her dark eyes dancing with pleasure, her cheeks like roses. When we returned home … I was sitting alone in the parlor and the thought came to me, "What would you do if she should be taken from you? You are loving that child too much. You are making an idol of her." … [T]he thought went through me like a dagger.[28]

Shortly afterward Florence became ill with scarlet fever.[29] His first thought, "sinner though I was," was "to go to God in prayer."[30] He took his daughter Addie into a room to pray.[31] However, he then remembered with guilt that when Addie had been ill with typhoid fever, he had promised God that "if He would spare her life, I would serve Him the remainder of my days, but my child had no sooner been restored to health than I forgot my promise…. This thought chilled the prayer on my lips."[32]

As Florence lay burning with fever, she asked her father to sing "In the Sweet Bye and Bye":

> With a voice choked with sobs, and a breaking heart, I tried to sing the hymn. As I sang, her little bosom began to heave, and she had to struggle for breath. As I looked at her, I longed that I could only breathe for her, do something to help her ease her sufferings; but I was perfectly helpless, and just had to sit and see her little life go out.[33]

Florence was four years, four months, and four days old when she died.[34] Crittenton was struck with a deep depression.[35] He became obsessed with the question of "why God had taken my child."[36] "Business and the world and all that pertained to it had lost its charm."[37] Crittenton found comfort only in going constantly to Florence's grave.[38]

Eight months later, a verse of Scripture kept coming to Crittenton's mind: "As many as I love, I rebuke and

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20 AIKEN, *supra* note 19, at 1-2.

21 *Id.* at 2.

22 See CHARLES N. CRITTENTON, THE BROTHER OF GIRLS: THE LIFE STORY OF CHARLES N. CRITTENTON AS TOLD BY HIMSELF (1910), 20-23, 36-38, 48-52, 54-56.

23 *Id.* at 39-42, 53, 57-61.

24 *Id.* at 62; AIKEN, *supra* note 19, at 2.

25 AIKEN, *supra* note 19, at 2; CRITTENTON, *supra* note 22, at 62-64.

26 AIKEN, *supra* note 19, at 2; CRITTENTON, *supra* note 22, at 63-64.

27 CRITTENTON, *supra* note 22, at 64.

28 *Id.*

29 *Id.* at 65.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*; *see also* AIKEN, *supra* note 19, at 2.

34 AIKEN, *supra* note 19, at 2.

35 AIKEN, *supra* note 19, at 19; CRITTENTON, *supra* note 22, at 67.

36 CRITTENTON, *supra* note 22, at 68.

37 *Id.*

38 *Id.* at 67.

chasten; be zealous, therefore, and repent."[39] He seemed to hear little Florence say: "Papa, I can't come to you, but you can come to me."[40] Crittenton realized the possibility that God loved him and was going to reunite him with Florence in heaven.[41] He threw himself on his knees in prayer, pouring out his heart to God in prayer.[42] Determined to pray until he knew whether he was lost or saved, Crittenton emerged with assurance of salvation and peace in his soul.[43]

The narrative of Florence's short life and early death, and its impact on her father, became central to the evangelical work of Charles Crittenton. Known popularly as the merchant evangelist, Crittenton retold the story innumerable times as a famed traveling evangelist.[44]

The narrative became foundational for the "Florence Crittenton homes," which became the largest group of rescue and maternity homes in the United States, existing in at least seventy-three cities in the United States by the early 1900s.[45] The initial purpose of Crittenton's rescue homes was as a means to reclaim sex workers.[46] The call to such "rescue work" came when Crittenton was invited to minister in the slums and there was introduced to two young sex workers. Crittenton told them the story of God's giving him a little child named Florence and how "He had taken her home, and how this sorrow had been the cause of my conversion. When I finished … the girls were weeping as if their hearts would break, and both of them expressed the desire to lead a Christian life."[47] "As they prepared to say good-bye, Crittenton said 'Go and sin no more.'"[48] "One of the girls, weeping, replied 'But where can I go?' WHERE can she go?" wondered Crittenton to himself.[49] Thus came Crittenton's call to rescue work.[50]

In 1883, Crittenton open the first "Florence Mission."[51] The mission held nightly religious services, while also offering food and shelter to sex workers and homeless women.[52] A picture of Florence Crittenton was a focal point of the meeting room where the services were held, as well as a vase of white flowers, which symbolized Mary Magdalene, the woman that Jesus had healed from demons, and who is sometimes thought to have been a sex worker before becoming a follower of Jesus.[53] The premise of the work was that sex workers could be converted and, from that point on, live a consecrated Christian life, some of them going on to full-time Christian service.[54]

### *Kate Waller Barrett*

Dr. Kate Waller Barrett was a remarkable woman who was much honored in her own day, in both church and society, and yet has been largely forgotten. Although she was a product of a prior age including its flaws, nonetheless she still has much to teach us.

Barrett was the decisive figure in the work of the Florence Crittenton homes with unwed mothers.[55] In 1892, Barrett's husband was the Dean of St. Luke's Episcopal Cathedral in Atlanta, Georgia, and she was the mother of six children.[56] Barrett was attempting to overcome local resistance and start a rescue home for women.[57] She wrote to Charles Crittenton, requesting financial assistance; he responded by sending a representative and a generous donation, asking that the home join the growing chain of Florence Crittenton

39 *Id.* at 70 (quoting Revelation 3:19 (King James)).
40 *Id* at 70.
41 *Id.*
42 *Id.*
43 *Id.* at 70-71.
44 Aiken, *supra* note 19, at 1, 12-13; *see also* Crittenton, *supra* note 22, at 95.
45 Aiken, *supra* note 19, at 1.
46 *Id.*
47 *Id.* at 3; Crittenton, *supra* note 22, at 84-85.
48 Aiken, *supra* note 19, at 3; Crittenton, *supra* note 22, at 86.
49 Aiken, *supra* note 19, at 4.
50 *Id.*; *see also* Crittenton, *supra* note 22, at 84-89.
51 Aiken, *supra* note 19, at 8; Crittenton, *supra* note 22, at 96-97.
52 Aiken, *supra* note 19, at 8.
53 *Id.* at 8, 16.
54 *Id.* at 4-22.; *see also* Crittenton, *supra* note 22, at 101-112.
55 Aiken, *supra* note 19, at 33-66.
56 *Id.* at 36.
57 *Id.* at 36-37.

homes.[58] Barrett and Crittenton first met in 1893, when he visited Atlanta to attend the Christian Worker's Convention and to preach at her husband's church.[59] She was profoundly moved by his sermon and, from thenceforth to the end of Crittenton's life, they were increasingly drawn together in the work of the Crittenton homes.[60] After Barrett's husband died in 1896, the thirty-nine-year-old widow became the general supervisor and organizer of the National Florence Crittenton Mission (NFCM).[61] Charles Crittenton continued as president but, with his busy schedule of itinerant evangelism, left most of the supervision of the growing network of Crittenton rescue homes to Barrett.[62] As the homes gradually turned predominately to assisting unwed mothers, rather than sex workers, Barrett defined the approach taken to the unwed mother and her child.[63] When Crittenton died in 1909, Kate Barrett became the president of the NFCM, heading a movement of over seventy maternity homes.[64] She held that post until her death in 1925. After Kate Barrett's death, her son, Robert Barrett, became president, and her daughter, Reba Barrett Smith, became general superintendent; hence Barrett's approach and influence, albeit with some modifications, continued for another generation after her death.[65]

Barrett was a national figure in her day. She was a charter member and the vice president of the League of Women Voters, the president of the National Conference of Women, the vice president of Virginia Equal Suffrage, and the president of the American Legion Auxiliary.[66] She served as a special representative of the United States government in Europe for the Bureau of Immigration, advising on women's issues.[67] President Wilson appointed her as an observer at the Versailles Peace Conference.[68] She was a delegate and gave an acclaimed speech at the 1924 Democratic Party National Convention.[69] At her death in 1925, the flag over the State Capitol in Richmond was flown at half-mast, the first time in the history of Virginia that this had been done for a woman.[70]

Kate Waller was born in 1857 to a prominent Virginia family; she was the oldest of ten children.[71] She is described as having been a very curious, adventurous, lively, and self-confident girl who as an adolescent chafed under the many restrictions and conventions required by her family and society.[72] She was educated largely at home by governesses, although she did attend a neighborhood school for one year, with her childhood education completed with two years at the Arlington Institute for Girls.[73] Later, at age thirty-four, she completed a medical degree at the Women's Medical College of Georgia.[74]

In 1876, Kate Waller married the Rev. Robert South Barrett, a twenty-five-year-old Episcopal priest and rector.[75] After the marriage, Rev. Barrett shifted to a parish in a slum area of Richmond, Virginia, known as "Butchertown," and so young Kate Barrett moved out of her protected, rural enclave to life as a pastor's wife in a poverty-stricken urban area.[76] Rev. Barrett energetically ministered to the many needs of the people of the slums, with Kate working as a

58 *Id.* at 37; OTTO WILSON, FIFTY YEARS' WORK WITH GIRLS, 1883-1933: A STORY OF THE FLORENCE CRITTENTON HOMES (Robert H. Bremner et al. eds., Arno Press 1974) (1933), 164-65.

59 AIKEN, *supra* note 19, at 165; WILSON, *supra* note 58, at 165.

60 AIKEN, *supra* note 19, at 57-58; WILSON, *supra* note 58, at 165-67.

61 AIKEN, *supra* note 19, at 38.

62 *Id.* at 38-39.

63 *Id.* at 58-59, 66.

64 *Id.* at 68.

65 AIKEN, *supra* note 19, at 210.

66 WILSON, *supra* note 58, at 176-200; AIKEN, *supra* note 19, at 196-209; *see also Dictionary of Virginia Biography*, LIBR.VA., https://www.lva.virginia.gov/public/dvb/bio.php?b=Barrett_Katherine_Harwood_Waller (last visited on July 27, 2021).

67 AIKEN, *supra* note 19, at 163-66.

68 See *Dictionary of Virginia Biography*, *supra* note 66.

69 AIKEN *supra* note 19, at 197; WILSON, *supra* note 58, at 200.

70 AIKEN, *supra* note 19, at 198; WILSON, *supra* note 58, at 202.

71 WILSON, *supra* note 58, at 141, 143.

72 *Id.* at 147-48.

73 WILSON, *supra* note 58, at 148.

74 See *Dictionary of Virginia Biography*, *supra* note 66.

75 AIKEN, *supra* note 19, at 34; WILSON, *supra* note 58, at 150-52.

76 AIKEN, *supra* note 19, at 34; WILSON, *supra* note 58, at 152-53.

pastor's wife at his side.[77] She later described her four years in "Butchertown" as among the happiest of her life, where she first "found opportunity for unimpeded energies, and myself free to follow out the God-given impulses within me."[78] She soon became pregnant and described the impact of the "increased happiness" upon her:

> The mysterious impulse of motherhood deepened my religious convictions, and standing at the portals of life and death I found out more clearly than ever before my relations to my Creator. I had been accustomed from my childhood to religious observances, but up to this time I do not think I had ever had any feeling of personal responsibility for sin or of a personal Savior.[79]

One evening shortly after the birth of her first child, Robert South, Jr., a woman with a small baby knocked on their door.[80] Dr. Barrett's description of this transformative encounter captures it best:

> Up to this point the so-called "social evil" and the "scarlet woman" lay almost beyond my ken. I had occasionally had women pointed out upon the street who by their dress and behavior were marked out as belonging to the *demi monde*, but I had never been brought into personal contact with one. One night … I was sitting in my cozy little parlor, my husband reading aloud to me, and on the sofa lay my sleeping boy, only a few months old. It was just before Christmas, and a cold, biting rain was falling. There was a ring at the door, my husband went to answer it, and when he returned he brought with him a young girl who held in her arms a baby. He said: "Can you not do something for this woman and child? She has no friends and nowhere to go, and she has no money; get some dry clothes for her and the baby."
>
> I immediately busied myself with getting some clothes for the baby and some supper for the girl, and when the baby was comfortably clothed I took it and laid it on the other end of the sofa upon which my baby slept…. As she sat there her heart, touched by my sympathy, opened to me and little by little she unfolded to me her sad story…. She too, like myself, was a country girl; she had been reared in almost similar circumstances in Virginia; up to a certain point her life might have been a reflection of mine, but from that time on, how different! The man who had come and wooed me had been honorable and good; the man who had wooed her had been dishonorable and unfaithful, and to this fact more than anything else, possibly, was due the great difference in our lives….
>
> There the two babies lay, side by side, my boy and hers, both with equal possibilities for good, and terrible possibilities for evil; both innocent and pure; both equal in the sight of God; and yet, in the eyes of the world, how different. My boy, with an honored name and a considerate and loving father; her boy, an alien without name or father. My boy, with every door open to him, with every hand stretched out to aid him; her boy, with every door closed to him, with every agency of society against his future progress. And when I realized that in this unequal struggle against this helpless, trusting, heartbroken woman and her nameless baby, good men and bad men, good women and bad women stood shoulder to shoulder to keep her down and out, and to make it almost impossible for her to be an honest woman and true mother—that the unjust laws of society denied to her the right to deem the mistakes of the past by an unblemished future—my very blood boiled within me. It was all so different from what I had thought and imagined. Where, was the terrible degradation, the hopeless depravity, the groveling nature with which I had always been taught to associate the fallen woman? I heard, with startling directness, our Savior's question to Simon: "Seest thou this woman?" Almost unknown to myself there entered into my heart at that moment a covenant with God that so long as I lived my voice should always be lifted in behalf of this outcast class, and my hand always held out to aid them.[81]

[77] Wilson, supra note 58, at 153.

[78] *Id.* at 154.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 154-56 (quoting Luke 7:44); for a somewhat different telling of the same story, see Kate Waller Barrett, Maternity Work: Motherhood a Means of Regeneration 58-59 (Nat'l Florence Crittenton Mission, 1897).

## "THOSE WHOM GOD HATH JOINED TOGETHER …"[82]

Barrett is pivotal to a modern Christian history of adoption because of her firm rejection of its use to separate single mothers and their children.[83] Without in any way sacrificing her Christian and conventional views of sexual morality, she insisted that the verse "Those whom God hath joined together, let no man put asunder" applied to unwed mothers and their children.[84] Her viewpoint was determinative for the large group of over seventy Crittenton maternity homes and influenced the larger group of some 200 religiously-motivated maternity homes throughout the United States.[85]

Barrett's views of the link between unwed mothers and their children had multiple components, which are outlined in her essay, "Motherhood as a Means of Regeneration." She began ironically:

> Were I going to take a text for this subject, I should take the sentence from the marriage service: "Those whom God hath joined together, let no man put asunder." Sometimes we may have very grave doubts as to whether God has really had any part in the making of a marriage, but we cannot doubt that he joins together mother and child by the strongest of all human ties.[86]

Barrett discussed the relationship between "maternity work" (assisting unwed mothers) and "rescue work" (outreach and assistance to sex workers). She argued that maternity work was a preventive form of rescue work, as the large majority of sex workers "began their downward course by being deceived, and no door being opened to them by which they could make an honest living, they fell deeper…. When we take away from a woman the chance to make an honest living, she will in most cases make a dishonest one."[87] She noted:

> It is appalling to find how often the street girl will confess to you that she has a child living in some public institution, that she consented to give it up but that she has never been happy, that her conscience has given her no peace, and being out of harmony with her surroundings she was driven to drink or drugs to drown her remorse.[88]

Elsewhere, Barrett in a very similar passage also added adoption to this picture:

> By experience we have found that a large percentage of the girls upon the street have, or had, a child that had been given up to some foundling asylum or else adopted. A short-sighted kindness often makes people interested in such cases take away from them the most potent instrument in their reclamation. For this reason our work does all that it can to help the mother care for her own child. We do not help her to shirk her responsibilities, but to bear them.[89]

Barrett argued that it was better for the mother, the child, and society that unwed mothers rear their own children. As to the mothers, Barrett was emphatic:

> A woman who has trusted her all to one man, and been deceived, and finds herself under the ban of society, is in a deplorably lonely position. All the opportunities and most of the ties of her past life have fallen away from her. Just now she must have a new motive in life. If, in pursuing the plain path of duty, she can have a motive of love and of self-interest, as well as of duty, to give color and aim to her in life, one of the most important factors for her happiness and usefulness has been found…. How often do I hear beautiful, talented girls in our Home say: "If it wasn't for my child I would not want to live, but having him, my life is full of happiness."[90]

Barrett's essay also may explain why Crittenton's narrative of being saved through little Florence sometimes had a powerful impact on the street girls to whom he spoke. If, as Barrett says, a large proportion of these young women had a child they had left in an asylum or placed for adoption, and were in fact in despair at the

82 BARRETT, *supra* note 81, at 53 (paraphrasing Mark 10:9 as adapted for wedding services).

83 *See, e.g.,* AIKEN, *supra* note 19, at 59-61; BARRETT, *supra* note 81, at 52-62.

84 AIKEN, *supra* note 19, at 59-61; BARRETT, *supra* note 81, at 52-62.

85 BARRETT, *supra* note 81, at 60; WILSON, *supra* note 58, at 139-203.

86 BARRETT, *supra* note 81, at 52.

87 *Id.* at 53.

88 *Id.* at 54.

89 BARRETT, *supra* note 81, at 91.

90 BARRETT, *supra* note 81, at 54-55.

loss of their child, such a story would have reached them at a principal source of their loss and trauma.

Barrett's explanation of why it was better for the child to remain with her mother reflected a two-fold rejection of institutional care and adoption. Institutional care, she argued, "is very bad for fitting children for the battle of life":

> Many of the girls that are to-day in our Florence Crittenton homes have been reared in Christian orphan asylums…. The … failure of these institutions lies in the fact that … the children are reared up into automatons instead of thinking and reasoning beings. They have had every question decided for them, and have had good forced upon them; they have not chosen it.… Their individuality is not considered. There is but little attention given to developing strength of character. They own nothing of their own, not even the toy they play with. Just at the time when they most need a watchful hand, they are turned loose.[91]

Barrett responds to the charge that the unwed mother is unfit by comparing her favorably to the workers in institutions:

> In many instances, the persons placed in charge of children in institutions have had no children of their own, and often are not suited for the work. I have seen a child taken from a mother because it was agreed she was not competent to take charge of it, and placed in the hands of another woman who was just as incompetent to fill the requirements of a mother. The only difference was that the other woman was paid to do what the mother would so willingly have done for love.[92]

## THE GOSPEL FIRST, IN LIFE AND LAW

Kate Waller Barrett and Charles Crittenton demonstrated the priority of gospel in Christian social ethics. Barrett and Crittenton understood that classes of people deemed disreputable and immoral by society—sex workers, single mothers, and their children—could be in God's eyes spiritually equal or superior to those esteemed by society. Barrett's realization was that the single, shamed mother and child she met as a young wife were in God's eyes no less than herself and her son, and that she and the single mother were equally mothers in God's eyes. Crittenton's realization was that he, as a reputable but greedy and unconverted businessperson, was in God's eyes in the same position as an unconverted sex worker. Further, both realized the role of tragic circumstances in pushing people toward negative pathways, and the priority of love, acceptance, and assistance in providing pathways toward a better life.

*The mother-child bond was an aspect of divine and natural law, a bond intended and created by God, which also was a basic aspect of human nature. Breaking the mother-child bond was a completely wrong consequence for the breach of the moral law.*

These realizations did not cause Barrett or Crittenton to change their view of the moral law. Both maintained traditional Christian views of marriage and sexuality. Instead, they realized that society was more concerned with appearance and reputation than with God and God's children. They recognized the hypocritical manner in which some who sinned—unwed fathers, greedy businesspersons, the customers of sex workers—experienced no negative legal or societal consequences, while society piled punishments even on the completely innocent children of unmarried parents. It would be interesting to explore the gender implications of this insight for, in the patriarchal contexts of the time, those stigmatized were often women, and those who escaped consequences for their actions were often men.

Barrett also realized that natural law was more fundamental than moral law. The mother-child bond was an aspect of divine and natural law, a bond intended and created by God, which also was a basic aspect of human nature. Breaking the mother-child bond was a completely wrong consequence for the breach of the moral law. Indeed, violating the natural law bond between mother and child was more likely to lead to further breaches of the moral law, placing the women separated from their children on a negative life spiral.

[91] Barrett, *supra* note 81, at 55-56.

[92] *Id.* at 56.

Barrett's insights were to be cast aside by both church and society, leading to the normalization of the separation of mother and child in the baby-scoop era. The church became complicit in aborting motherhood, with continuing negative consequences for both church and society. There may be a link between the normalization of elective abortion in American law and society since 1973,[93] and the church's complicity in aborting motherhood during the baby-scoop era. Both represent a choice to separate rather than assist and to reject parenthood in less than ideal circumstances. When appearance and reputation are more important than the fundamental bonds built into human nature, there is no end to what we can justify.

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[93] Roe v. Wade, 410 U.S. 113 (1973).

# THE INTERSECTION OF WOMEN'S RIGHTS AND INTERNATIONAL RELIGIOUS FREEDOM

By Kelsey Zorzi

Religion plays a critical role in the lives of women around the world. In fact, global statistics show that women are more likely than men to affiliate with a religious group and be devout in their religious commitment.[1] And yet, in the international human rights context, religious freedom is seldom included as a component of the women's rights agenda. The ongoing campaign to sterilize Uyghur women in China, the uptick of Hindu and Christian girls in Pakistan being forcibly converted to Islam, and the daily instances of minority religious women being targeted for and subjected to sexual violence highlight the inextricable link between religious — and gender-based persecution around the world.

## IGNORING WOMEN'S RIGHT TO RELIGIOUS FREEDOM

Rarely, if ever, has a United Nations resolution dedicated to the rights of women made mention of a woman's right to religious freedom. During the world's largest annual conference on the rights of women, the Commission on the Status of Women, over one hundred events are held each March, and usually only one event, hosted by the religious freedom committee I currently chair,[2] focuses on women's right to religious freedom. Women's rights advocates regularly promote women's rights as an intersectional, cross-cutting field; one of the only internationally recognized rights they almost never highlight as a point of intersection is the freedom of religion or belief. This even though the right to religious freedom is enshrined in the Universal Declaration of Human Rights and multiple core international human rights treaties.[3] So why is it that religious freedom is consistently left out of the women's rights conversation?

The most commonly cited answer to this question is that religious freedom and women's rights are antithetical pursuits.[4] Any progress on freedom of religion, the argument goes, may directly "hinder gender-related anti-discrimination policies," causing the advancement of both rights to amount to a "zero-sum game."[5] As explained in the concept note of a recent U.N. "parallel event," progress on certain women's rights issues "remains intractable, not least because religion is used both as a source of law and to justify resistance to reform."[6]

One obvious point of tension, particularly in the West, between the women's rights agenda and many traditional religious institutions is "the unfortunate

1 Pew Research Center, *The Gender Gap in Religion Around the World* (Mar. 22, 2016), https://www.pewforum.org/2016/03/22/the-gender-gap-in-religion-around-the-world/.

2 U.N. NGO Committee on Freedom of Religion or Belief.

3 The core international human rights treaty that most explicitly includes the right to the freedom of religion or belief is the International Covenant on Civil and Political Rights (Article 18). Other relevant international treaties include relevant articles of the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on the Prevention and Punishment of the Crime of Genocide; and the Convention relating to the Status of Refugees (as set forth by the mandate of the U.N. Special Rapporteur on Freedom of Religion or Belief, available here: https://www.ohchr.org/en/issues/freedomreligion/pages/standards.aspx).

4 Marie Juul Petersen, *Women's rights and freedom of religion or belief*, Universal Rts. Group (Dec. 11. 2019), https://www.universal-rights.org/blog/womens-rights-and-freedom-of-religion-or-belief/.

5 Heiner Bielefeldt (Special Rapporteur on freedom of religion or belief), *Elimination of all forms of religious intolerance*, ¶ 32, U.N. Doc. A/68/290 (Aug. 7, 2013).

6 Virtual Meeting Details for *Reconciling Religion and Rights: Equality and Justice in Muslim Family Laws*, NGO CSW65 Virtual Forum, https://ngocsw65forum.us2.pathable.com/meetings/virtual/cx9vQ8tcbpYmHMQEZ (last visited Jul. 9, 2021).

truth [] that women's rights have become nearly synonymous with 'sexual and reproductive rights,' which in U.N. speak includes abortion."[7] But international law provides no right to abortion.[8] So while there may be conflicts between traditional religious institutions and those who promote abortion, that does not mean there is conflict between women's rights and religious freedom. There need not be any conflict between religious freedom and women's rights, understood in their standard, internationally agreed-upon sense: "women's rights are human rights," [9] meaning that women should never be denied enjoyment of their human rights on the basis of their sex.

Indeed, while the sentiment that women's rights and religious freedom are in conflict is often attributed to both women's rights and religious freedom advocates, it appears that religious freedom advocates, in general, do not shy away from exploring the intersection of women's rights and religious freedom. The current international human rights landscape offers little evidence that anyone advocating for religious freedom actually fears that progress on women's rights would "indicate a defeat of religious freedom."[10] The highest-level proponents of international religious freedom routinely promote the rights of women as an integral component of religious freedom. The U.N. Human Rights Council, for example, has directed the U.N. Special Rapporteur on Freedom of Religion or Belief since as early as 2007 to "apply a gender perspective" to his or her mandate—meaning, to consider the impact that religious freedom advocacy might have on the rights of women and girls.[11] Accordingly, gender equality, and women's rights specifically, are among the most common themes of the U.N. Special Rapporteur's reports. Similarly, the U.S. Commission on International Religious Freedom (USCIRF) regularly includes women's rights among its policy focuses.[12] And the International Religious Freedom or Belief Alliance—a relatively new, high-level intergovernmental group of thirty-two countries committed to advancing religious freedom—has dedicated one of its six working groups to the topic of "religious freedom and gender."

Despite the fact that religious freedom advocates are increasingly exploring synergies with women's rights, there is growing concern that some proponents of religious freedom are pursuing this intersectional approach in a way that will ultimately shift their focus away from the promotion of religious freedom. In the past few years, several prominent steps have been taken to direct the attention of religious freedom advocates and institutions toward criticizing or impeding the actions of those motivated by religion. Consider the most clear-cut examples of this conflation's growing influence in the field of international religious freedom advocacy. To begin with, the 2020 report from the U.N. Special Rapporteur on Freedom of Religion or Belief devotes the balance of its attention to illustrating how religious groups interfere with women's so-called "reproductive rights" and "sexual rights."[13] And in 2019, several United States senators zealously lobbied for expanding USCIRF's mandate to include the ways in which religion is abused to "justify human rights violations."[14] Despite their efforts ultimately failing, in 2021, USCIRF nevertheless included

7 Grace Melton, *U.N. Should Recommit to Pro-Woman Agenda by Dropping Push for Abortion*, THE HERITAGE FOUNDATION: GLOBAL POLITICS (Oct. 1, 2020), https://www.heritage.org/global-politics/commentary/un-should-recommit-pro-woman-agenda-dropping-push-abortion.

8 ADF International, *Contribution to the General Discussion on the preparation for General Comment No.36 Article 6 of the ICCPR: Right to life* (June 12, 2015).

9 *See, e.g.*, *Women's Rights*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/discrimination/womens-rights/ (last visited July 26, 2021).

10 Bielefeldt, *supra* note 5.

11 Human Rights Council Res. 6/37, U.N. Doc. A/HRC/6/37, at 18(d) (Dec. 14, 2007).

12 For recent examples, Elise Goss-Alexander, *Policy Focus: Women and Religious Freedom*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM (May 2018), https://www.uscirf.gov/sites/default/files/Policy%20Focus%20-%20Women%20and%20Religious%20Freedom%205-16-18_0.pdf; Meeting details for *Congressional Staff Briefing—Women and Religious Freedom: Synergies and Opportunities*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM (Mar. 16, 2018), https://www.uscirf.gov/events/congressional-staff-briefing-women-and-religious-freedom-synergies-and-opportunities; and Nazila Ghanea, *Women and Religious Freedom: Synergies and Opportunities*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM (July 2017), https://www.uscirf.gov/sites/default/files/WomenandReligiousFreedom.pdf.

13 *See* Ahmed Shaheed (Special Rapporteur on freedom of religion or belief), *Report on freedom of religion or belief and gender equality*, A/HRC/43/48 (Feb. 27, 2020), https://undocs.org/A/HRC/43/48.

14 Kristina Arriaga, Opinion, *Congress May Set Back Religious Freedom*, WALL ST. J. (Nov. 14, 2019), https://www.wsj.com/articles/congress-may-set-back-religious-freedom-11573775212.

such a section—entitled "Violations of Human Rights on the Basis of Religion"—in its annual report.[15] Interestingly the vast majority of the violations outlined in this new section of USCIRF's report are violations of religious freedom and are, therefore, already covered in other sections of the report, so the utility of a separate section on this topic would seem to depend on an anticipated expansion into other human rights violations carried out in the name of religion.[16]

## CONFLATING RELIGIOUS FREEDOM WITH RELIGIOUS IDEOLOGY

It appears that the absence of religious freedom in women's rights advocacy, on the one hand, and the shifting focus in religious freedom advocacy towards the ways in which religions are used to justify human rights violations, on the other, are both rooted, at least partially, in a growing misperception around the meaning of religious freedom.

This misperception can be understood as a conflation between the promotion of the right to religious freedom and the promotion of specific religious doctrines or practices. When these two concepts are conflated, the advancement of religious freedom risks becoming tantamount to the advancement of any number of harmful practices carried out in the name of a religion. When conflated with religious doctrine, religious freedom becomes a vehicle for protecting religious ideas themselves rather than protecting the rights of individuals to choose, change, or speak about religious ideas. Such conflation appears to be responsible for the notion held by some that religious freedom is "holding women down."[17]

But a proper understanding of the right to religious freedom—one that accords with the right as outlined in the core international human rights documents and one that remains widely held among international religious freedom advocates[18]—reveals that religious freedom does not offer a blanket protection to any action carried out on the basis of religious belief or carried out by a religious institution.[19] It is highly problematic, therefore, to conflate the promotion of religious freedom with the promotion of any given religious ideology.

*Rather than "giving patriarchal structures more power over women," the freedom of religion "gives women the same right as men to think freely, to make their own choices regarding religion or belief, and to practice those choices without fear of being discriminated against, harassed and punished—even if they break with social and religious norms."*

## RELIGIOUS FREEDOM IS CRITICAL TO ADVANCING WOMEN'S RIGHTS

Not only is this conflation misguided, it also proves counterproductive in promoting women's equality. Religious freedom leads to the empowerment of women, especially so for women whose human rights are violated by religious laws or practices. Religious freedom grants women full agency to formulate core understandings of their identity and the world around them.[20] Rather than "giving patriarchal structures more power over women," the freedom of religion "gives women the same right as men to think freely, to make their own choices regarding religion or belief, and to practice those choices without fear of being discriminated against, harassed and punished—even if they break with social and religious

[15] *Annual Report 2021*, U.S. Comm'n on Int'l Religious Freedom 4 (Apr. 2021), https://www.uscirf.gov/sites/default/files/2021-04/2021%20Annual%20Report.pdf.

[16] See, for example, the new section's discussion of blasphemy and conversion laws, both of which are covered in several other sections of the report.

[17] Thomas Reese, *Religious freedom and women's rights share common ground*, Nat'l Cath. Rep.: Faith & Just. (Sept. 15, 2016), https://www.ncronline.org/blogs/faith-and-justice/religious-freedom-and-womens-rights.

[18] Particularly Article 18 of the UDHR and Article 18 of the International Covenant on Civil and Political Rights.

[19] Reese, *supra* note 17, quoting Bielefeldt, *supra* note 5.

[20] Lisa Winther, *Freedom of Religion or Belief—an enemy or an ally in our struggle for gender equality?*, G20 Interfaith Forum: Viewpoints (Jan. 8, 2021), https://blog.g20interfaith.org/2021/01/08/freedom-of-religion-or-belief-an-enemy-or-an-ally-in-our-struggle-for-gender-equality/.

norms."[21] Moreover, the freedom of religion, which includes the freedom to speak about, question, and even criticize religious beliefs and practices, is the very right that allows those women who face religiously motivated violations to advocate for their rights. Because religious freedom allows for "different views and interpretations to exist alongside each other," it creates the "necessary space for people to advocate for greater gender equality and reform, both within religious communities and in society at large."[22] When religious freedom is properly understood, there is "no *inherent* contradiction between [it] and gender equality."[23]

If women's rights advocates were convinced that religious freedom is a critical component of women's empowerment, perhaps they would be more ready to collaborate with religious freedom advocates on issues of shared concern, such as honor killings, forced conversion, unjust child custody arrangements,[24] and female genital mutilation, among other violations. While the perceived clash between religious freedom and women's rights is among the reasons that actors working to promote these rights "rarely work together," the reality on the ground in many parts of the world is that the challenges women face "seem to be about violations of both [religious freedom] and gender equality rather than about a clash between the two."[25] The failure of women's rights advocates to reconcile religious freedom and the rights of women has likely perpetuated legal gaps of protection for women minorities.[26]

Because the human rights violations experienced by millions of women and girls around the world fall squarely "within the intersection of discrimination on the grounds of their religion or belief and discrimination on the ground of their gender,"[27] a cross-cutting approach rooted in a thorough understanding of and respect for both internationally-agreed rights could lead to mutually reinforcing efforts to advance the rights of women belonging to minority religious groups. All women benefit from exercising their right to choose or change their religion. Or from being able to speak about their most deeply held beliefs and worship in community with others. All women benefit from protection against harmful practices. Because religious freedom is beneficial to all women, women's rights advocates should not shy away from championing the right to religious freedom.

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21 *Id.*

22 *Id.*

23 Petersen, *supra* note 4.

24 In many Muslim-majority countries, when a couple separates, the woman can be granted equal custody of her children only if she is Muslim. If the woman is Christian or of another religious minority group, she, in some jurisdictions, will lose all custody rights over her children once they turn a certain age (usually between five and seven). *See* Imen Gallala-Arndt, *The Impact of Religion in Interreligious Custody Disputes: Middle Eastern and Southeast Asian Approaches*, 63 AM. J. COMP. L. 829, 837, (2015).

25 Petersen, *supra* note 4.

26 *Id.*

27 Bielefeldt, *supra* note 5, ¶ 68.

# ERASING FEMALES IN LANGUAGE AND LAW

By Mary Rice Hasson

Two days into the new year, Nancy Pelosi unveiled disturbing changes to House rules: to "promote inclusion and diversity," members of the House would be expected to "honor all gender identities by changing pronouns and familial relationships in the House rules to be gender neutral."[1] Words like "mother," "son," or "grandfather" were suddenly stigmatized as remnants from a less-enlightened past when people still believed biological sex and identity were inherently connected. It was a sign of things to come under a new administration fervid in its commitment to gender ideology.

The Equality Act ("the Act") ranks high among Democrat legislative priorities.[2] The Act is a sweeping civil rights bill that purports to "prohibit discrimination on the basis of sex, gender identity, and sexual orientation, and for other purposes."[3] It sailed through the House in late February and, by mid-March 2021, the Senate Judiciary Committee had initiated hearings to consider the bill. The Democrat narrative was—and still is—deceptively simple: because LGBTQ Americans suffer daily discrimination, America's civil rights laws must protect "sexual orientation" and "gender identity" and stamp out bigotry wherever it exists, regardless of the resulting burdens on religious institutions and believers. Democrats flat out deny that the Act holds any negative consequences for females. In fact, they maintain the Act would "strengthen civil rights protections" for women.[4]

Nothing could be further from the truth. The Equality Act presents numerous substantive problems, including potentially devastating effects on the rights of religious believers and religious institutions to participate in the public square (concerns beyond the scope of this article).[5] The Act's fatal flaw, however, is that it enshrines "gender identity" as a protected classification under civil

1 Marisa Schultz, *Pelosi's new House rules are gender-neutral, curtail GOP's ability to force 'gotcha' votes*, Fox News (January 2, 2021), https://www.foxnews.com/politics/new-democratic-house-rules-gender-neutral-curtail-gops-ability-force-gotcha-votes.

2 H.R. 5, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/5?s=2&r=3. Although various pieces of legislation aiming to advance anti-discrimination goals relating to sexual orientation and gender identity were introduced in years past, the current version under consideration is largely similar to the bill introduced in the 2015-2016 legislative session and subsequent sessions as the Equality Act: H.R. 3185, 114th Cong. (2015), https://www.congress.gov/bill/114th-congress/house-bill/3185/all-actions-without-amendments.

3 The Equality Act was passed by the U.S. House of Representatives on February 25, 2021. The Senate Judiciary Committee held hearings on March 17, 2021. As of this writing, it appears unlikely that the U.S. Senate will pass the Equality Act in 2021.

4 *See, e.g.*, *FACT SHEET: The Equality Act Will Provide Long Overdue Civil Rights Protections for Millions of Americans*, White House (June 25, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/25/fact-sheet-the-equality-act-will-provide-long-overdue-civil-rights-protections-for-millions-of-americans/.

5 The Act is sweeping in its intended scope, enacting broad changes to the historic Civil Rights Act of 1964: it expands the definition of "sex discrimination" to include sexual orientation and gender identity; extends the law's reach in unprecedented ways by redefining "public accommodations" to include, for example, "public gatherings," "any establishment that provides a good, service, or program," including "online retailers" and "healthcare" providers; and expressly prohibits the use of the Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb to -4 (1993)) as "a claim concerning, or a defense to a claim" arising under the Equality Act. *See generally* H.R. 5, § 3 ("Public Accommodations") and § 1107 ("Claims"). Section 1107 reads in full: "The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title." The net result is that the Equality Act would greatly expand the potential for liability or harassment from claimants alleging discrimination on the basis of sex, gender identity, or sexual orientation, while restricting the availability to raise a religious freedom claim or defense under the Religious Freedom Restoration Act. Although the Equality Act purports to build on the recent Supreme Court decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)—which the Equality Act describes as holding that the

rights law, redefines "sex" *as* "gender identity,"[6] then continues in circular fashion to define "gender identity" as "the gender-related identity, appearance, mannerisms, or other gender-related characteristics … *regardless of the individual's designated sex at birth.*"[7] It's a wordy entitlement that privileges "gender identity" claims over the sex-based rights of females.

## WHY "GENDER IDENTITY" ANYWAY?

The Act's amorphous definition of "gender identity," unprecedented in federal legislation, betrays a far-reaching, ideological agenda.[8] "Gender identity" gained currency in the 1960s, arising from the work of Dr. John Money, and later Robert Stoller. Their clinical experience with transsexuals and patients with disorders of sexual development led them to theorize the possibility of a social identity divergent from the biological reality of the person's sexed body. This theory of gender identity "left behind the idea of sexuality as a natural relation between the sexed body and subjectivity," writes attorney and moral theologian David Crawford. It was later "popularized" by second-wave feminists in the 1970s and soon embraced in academia, leading to the development of gender theory and later queer theory.[9] Gender ideologues today reject the idea of human nature and the "natural" order that underlies Christian norms of sexuality, often framing beliefs in human nature and sexual difference as biological "essentialism" and "ontological oppression."[10]

In contrast to the Christian understanding of sexual identity as "given," gender ideology insists that identity is the choice of the individual, regardless of biological sex.[11] Rejecting the unity of body and soul, gender ideology views the person as a composite of various dimensions of self, each existing on a spectrum (e.g., "sex

"prohibition on employment discrimination because of sex under title VII of the Civil Rights Act of 1964 inherently includes discrimination because of sexual orientation or transgender status"—it far exceeds *Bostock* in scope and implications.

6 In full, the Equality Act redefines "sex" to include "a sex stereotype," "pregnancy, childbirth, or a related medical condition," "sexual orientation or gender identity," and "sex characteristics, including intersex traits." H.R. 5, § 1101(a)(4). For a short commentary on the implications of this redefinition of "sex," see Mary Rice Hasson, *The Equality Act and the End of Females*, Newsweek (February 24, 2021), https://www.newsweek.com/equality-act-end-females-opinion-1571432.

7 H.R. 5, § 1101(a)(4) (emphasis added). The Equality Act redefines "sex" to include "a sex stereotype," "pregnancy, childbirth, or a related medical condition," "sexual orientation or gender identity," and "sex characteristics, including intersex traits."

8 "Gender identity" appears in "Hate Crimes" legislation, at 18 U.S.C. § 249, and in the Violence Against Women Act Reauthorization Act of 2021, H.R. 1620, 117th Cong. The definition used in both instances is limited, still circular in its language, but does not conflate "sex" and "gender identity" (unlike the Equality Act): "the term 'gender identity' means actual or perceived gender-related characteristics." 18 U.S.C. § 249(c)(4).

9 David Crawford, *Against the Fairness for All Act*, First Things (December 14, 2019), https://www.firstthings.com/web-exclusives/2019/12/against-the-fairness-for-all-act. "Gender" concepts took root in academia first in "women's studies" and "gender theory," and later in "queer theory," which generally rejected norms of sexuality and identity in favor of transgressive acts and identities.

10 Robin Dembroff, *Real Talk on the Metaphysics of Gender*, 46 *Phil. Topics, no. 2, Fall 2018, at* 21-50. Modern gender theorists argue that cultural institutions and social structures that reinforce "ontological oppression" are unjust and a "heterosexist state that fails to recognize queer and polyamorous relationships constructs … [and] perpetuate[s] its heterosexist structures" must go. Language opposing "heterosexist" and "cis-normative" structures and assumptions are features of the modern educational landscape and beyond, as the most powerful institutions in our society—corporations, media, entertainment, big medicine, and public education—are fully onboard with the ontological revolution. Our legal systems and customary practices are already shifting to privilege gender identity in law. According to the Movement Advancement Project, twenty-one states permit an individual to change the sex ("gender") designated on his or her driver's license, no questions asked. An additional eleven permit changes to the listed sex as long as a healthcare provider confirms the person has taken steps towards expressing a transgender identity. Twenty states plus the District of Columbia permit individuals to self-identify as "X" instead of male or female on their driver's license. All but one state permit an individual to change the sex listed on his or her birth certificate, although some may require a healthcare provider to attest to the person's transgender status, although usually without specific medical requirements. *Identity Document Laws and Policies, Birth Certificates*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/identity_document_laws/birth_certificate (last visited July 24, 2021).

11 For a Catholic critique of gender theory, see Congregation for Catholic Education, *Male and Female He Created Them: Towards a Path of Dialogue on the Question of Gender Theory* (2019), https://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20190202_maschio-e-femmina_en.pdf.

assigned at birth," "gender identity," "gender expression," "sexual orientation"). In this fractured vision of the person, none of these dimensions need align with any other. As Crawford observes,

> the new sexual economy thinks that "gender" is "assigned" and "presented." The language conveys an external and arbitrary relationship between a given individual's sexed body and the mental factors of self-experience.… [T]he implication is that there is nothing natural in the relationship between the sexed body and one's sense of self as a sexed being. The organic unity of the embodied subject is thereby radically fragmented.… [T]he implicit philosophical anthropology presupposed by this move is precisely that of the "gender identity" movement … [perceiving] the human subject according to an essentially "trans" paradigm and … [imposing] that paradigm on the entire population as a matter of law.[12]

Untethered from the reality of the sexed body then, "gender identity" is a purely subjective notion, a label that indicates "how individuals perceive themselves and what they call themselves."[13] This understanding of gender identity elevates a personal narrative (that defies biology) to the status of protected characteristic, backed by the force of law. "What's important," the Human Rights Campaign tells young people, "is that you know your truth, and that you don't let other peoples' uninformed opinions direct your own narrative. You know who you are, and that is enough."[14] By privileging one person's "gender identity" narrative, even over the reality of biological sex, the law stands ready to compel others to play a role in that narrative, whether they want to or not, using proposed federal legislation like the Equality Act, state or local "gender identity" laws, or the power of the administrative state.[15] Gender identity ideology (or the "trans paradigm," as Crawford calls it) has become a government-promoted anthropology, an alternative belief system that proposes its own (false) "truth" about the human person.

U.S. laws that protect the individual's right to self-determine "gender identity," regardless of sex, reflect the same faulty anthropology promoted by global LGBTQ activists. The U.N.'s Independent Expert on Sexual Orientation and Gender Identity, Victor Madrigal-Borloz, recently released a report to the U.N. Human Rights Council on gender theory and, in his press conference, linked "gender" not to the biological reality of "male" or "female," but to the exercise of personal autonomy. According to Madrigal-Borloz, "gender is … the relationship between a person's free will and a series of stereotypes that assign behaviors or patterns or roles to a particular sex."[16] The state, Madrigal-Borloz insisted, has no grounds to justify "restricting" a person's "freedom" to self-determine an identity.[17]

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12 David Crawford, *The Metaphysics of Bostock*, First Things (July 2, 2020), https://www.firstthings.com/web-exclusives/2020/07/the-metaphysics-of-bostock.

13 Human Rights Campaign, *Coming Out: Living Authentically as Transgender or Non-Binary* 44 (2020), https://hrc-prod-requests.s3-us-west-2.amazonaws.com/ComingOut-TNB-Resource-2020.pdf.

14 *Id.* at 20.

15 The Supreme Court's recent rebuff to florist Baronelle Stutzman suggests that those who refuse to genuflect before gender ideology will pay a heavy price. *Devastating News: U.S. Supreme Court Refuses to Hear Baronelle Stutzman's Case*, Alliance Defending Freedom (July 2, 2021), https://adflegal.org/blog/devastating-news-us-supreme-court-declines-hear-barronelle-stutzmans-case.

16 Madrigal-Borloz also repudiated claims that "gender" is "inherent" in the person. Victor Madrigal-Borloz, U.N. Indep. Expert on Sexual Orientation & Gender Identity, Press Conference on Gender Theory at Human Rights Council (June 25, 2021), https://media.un.org/en/asset/k10/k10or8mypu. In contrast, the lone official definition of "gender" agreed to by U.N. member nations is found in the Rome Statute of the International Criminal Court, which states: "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above." Rome Statute of the International Criminal Court art 7, ¶ 3, July 17, 1998, 2187 U.N.T.S. 90, https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx#article7.

17 *See* Madrigal-Borloz, *supra* note 16. Madrigal-Borloz's position reflects the consistent view of the U.N. bureaucracy, which has long supported the ideological blueprint for LGBTQ rights expressed in the unofficial, non-binding, but influential Yogyakarta Principles (2006) and Yogyakarta Principles + 10 (2017). The Yogyakarta documents claim a human right to self-determination expressed in the individual's asserted gender identity, and that includes the right to access medical and surgical body modifications as an expression of gender identity. The Yogyakarta Principles, https://yogyakartaprinciples.org/ (last visited July 24, 2020).

## THE HARMFUL IMPACT OF "GENDER IDENTITY" PROVISIONS

As many have noted, the practical consequences of inverting "sex" to include an individual's self-perceived identity "regardless of … sex" are enormous, particularly for females.[18] Under the Equality Act, for example, "access to a shared facility, including a restroom, a locker room, and a dressing room" must be granted "in accordance with the individual's gender identity."[19] As a result, males can gain access to private spaces otherwise reserved for females on the basis of a self-declared "gender identity" ("I am a woman"). Single-sex spaces, such as shelters for female victims of domestic violence, hospital rooms in female-only wards, or cells in a women's prison, would be open to any male who asserts a self-perceived identity as a "woman," even temporarily. In schools and universities, sports teams, sororities, and other single-sex programs for females would, for all practical purposes, become co-ed. "Sex" as a "bona fide occupational qualification" would become meaningless, as the Act requires that "individuals [be] recognized as qualified in accordance with their gender identity," regardless of sex.[20] Religious individuals and institutions adhering to biblical beliefs about the person (created male or female) or marriage (between a male and a female) would be cast as bigots and face an untenable choice: compromise their beliefs or be exiled from the public square. These are but a few of the foreseeable effects of privileging "gender identity" claims over the sex-based rights of females.

There is, however, a smidgen of good news. As of this writing, the Equality Act seems unlikely to pass the Senate in 2021. Now the bad news: even without the Equality Act, the gender tsunami threatens to bring about the "end of females" in both law and language.[21]

Although conservatives, churches, religious believers, and women of all political stripes banded together in an apparently successful effort to stop the Equality Act, the gender juggernaut continues, as powerful as ever.[22] Thanks to activist judges and their ideological allies in law, business, medicine, media, education, and state legislatures, gender ideology is pervasive across our culture and its institutions—and the Biden Administration has accelerated those efforts. They know what they want: to force public acceptance of "gender identity," seed the culture with an erroneous anthropology, and promote the perverse practice of "gender-affirming" care for adolescents as if it were an exciting "gender journey."

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Beginning on day one of his administration, President Biden issued a series of Executive Orders extending anti-discrimination protections to "gender identity" across the federal government. These new provisions attach to every aspect of the federal bureaucracy, affecting federal grants, benefit programs, contracting, and hiring and promotion, as well as substantive areas

[18] *See The Equality Act: LGBTQ Rights are Human Rights: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. (Mar. 17, 2021) (statement of Abigail Shrier, independent journalist; statement of Mary Rice Hasson, Fellow, Ethics and Public Policy Center), https://www.judiciary.senate.gov/meetings/the-equality-act-lgbtq-rights-are-human-rights. *See also Statement for the Record for hearing on the Equality Act*, Women's Liberation Front (Mar. 23, 2021), https://www.womensliberationfront.org/court-filings; Erika Bachiochi, *The Equality Act's Implications for Abortion Would be Devastating for Pregnant Women in the Workplace*, America (Feb. 25, 2021), https://eppc.org/publication/the-equality-acts-implications-for-abortion-would-be-devastating-for-pregnant-women-in-the-workplace/.

[19] H.R. 5, § 1101(b)(2).

[20] H.R. 5, § 701A(b)(3).

[21] *See* Hasson, *supra* note 6.

[22] Opposition to the Equality Act has been fierce, uniting a diverse coalition of conservatives (who reject the Act's expansive gender ideology and intrusive re-definition of "public accommodations" subject to anti-discrimination laws); radical feminists (unflinching in their defense of the sex binary), pro-life advocates (who decry the loophole that would fund abortion and potentially force medical providers to perform them), and religious individuals and institutions (who believe the person is created male or female and marriage is only between a man, and a woman and who refuse to be coerced into saying otherwise).

such as education (Title IX) and healthcare (Affordable Care Act, Section 1557).[23]

Public schools in most states have been deeply engaged in promoting gender ideology for over a decade already through anti-bullying initiatives, diversity and inclusion programs, LGBTQ-inclusive sex education and, in a few states, LGBTQ curriculum mandates.[24] The teachers' unions, state schools of education, and the education establishment have all embraced the LGBTQ agenda for years. Except for a few brave holdouts here and there, local school boards have toppled like dominoes, caving under intense pressure (and threats of lawsuits from the ACLU, Lambda Legal, and other activist litigators) to enact transgender-inclusive policies and "gender identity" protections.

In employment law, the Supreme Court already worked a sea change with its 2020 decision in *Bostock v. Clayton County*, ruling that discrimination because of "sexual orientation" and "transgender status" (or "gender identity") constitutes illegal sex discrimination under Title VII.[25] Although the Court "punted" on several important related issues, such as *Bostock's* application to Title VII exemptions for religious employers and to the Religious Freedom Restoration Act, the EEOC chair recently released an expansive, non-binding "technical guidance" applying the *Bostock* decision to employment law.[26]

The EEOC guidance is instructive: it illustrates how the "doublespeak" now common in media and government publications is designed to camouflage the anthropological transformation at work under "gender identity" provisions. The EEOC technical guidance first assures employers that it is still legal to have "separate bathrooms, locker rooms, and showers for men and women," or to designate "unisex or single-use bathrooms, locker rooms, and showers." It then subverts the logic of single-sex, private facilities by instructing that "employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity. In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men's facilities and all women (including transgender women) should be allowed to use the women's facilities."[27] Like other arms of the federal government, and some federal courts, the EEOC has stripped biological sex of social and legal significance.[28] It redefines "all men" to include "transgender men" (who are actually biological females) and similarly redefines "all women" to include "transgender

[23] *See* U.S. Dep't of Health and Human Serv., *HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity* [Press Release] (May 20, 2021), https://www.hiv.gov/blog/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation, *and* U.S. Dep't of Educ., *U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity* [Press Release] (June 16, 2021), https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity. *See, e.g.,* Department of Labor regulations regarding federal contracts resulting from Biden Executive Order 11246, https://www.dol.gov/agencies/ofccp/faqs/lgbt, *and* Office of Personnel Mgmt., Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/Guidance-Regarding-Employment-of-Transgender-Individuals-in-the-Federal-Workplace.pdf.

[24] *See* Mary Hasson and Theresa Farnan, Get Out Now: Why You Should Pull Your Child from Public School Before It's Too Late (2020).

[25] In *Bostock*, the Supreme Court assumed the meaning of sex referred to "biological distinctions between male and female" and not "norms concerning gender identity." Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020). The Court found that Title VII's prohibition on discrimination because of sex included discrimination because of sexual orientation or transgender status. As Justice Alito noted in his dissent, "The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.' If 'sex' in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female, not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender." *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting).

[26] U.S. Equal Emp't Opportunity Comm'n, Sexual Orientation and Gender Identity (SOGI) Discrimination, https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination.

[27] Chair of the EEOC, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, Technical Assistance document, June 15, 2021.

[28] *See, e.g.*, Grimm v. Gloucester Cty. Sch. Bd., No. 19-1952 (4th Cir. 2020), *and* Adams v. Sch. Bd. of St. Johns Cty. 968 F.3d 1286, 1292-93 (11th Cir. 2020).

women" (who are biological males). Sex no longer matters, which means the rights of females no longer matter either. "Gender identity" enjoys privileged status, overriding sex-based protections in every circumstance.

In language and in law, the fact of sexual difference is being overwritten (and, in some cases, directly repudiated) and replaced with deceptive terminology and an erroneous narrative about the person. Truth be told, the left has gained an almost insurmountable advantage. The gender tsunami is bearing down, and the casualty count—in damaged lives and souls lost—is growing daily.[29] The present moment seems particularly daunting as well in light of the number of religious believers who seem to view "gender issues" as just another skirmish in the perennial "culture wars," a cloudburst amid generally sunny skies. Perhaps they think they can sit this one out, waiting for the storm to move on.

But just as there are no safe havens in a tsunami, it is impossible to "sit out" a cultural battle over what it means to be a human person. Everyone, from Supreme Court justices to kindergarten teachers, must take a stand. In a blistering critique of the *Bostock* decision, Hadley Arkes observed that "the stumbling block, which pops up on every path, is the question of whether there is indeed … a 'truth' that cannot be evaded, a truth about the way in which human beings are constituted as males and females.… as long as there are in the world human beings, there must be males and females. That is the very reason or purpose for which we have the bodies we have, marking us males and females. That is the telos that marks the hard meaning of 'sex.'"[30]

David Crawford makes a similar observation. "Nothing," writes Crawford, "is more basic to human nature than the division of humanity into men and women and the correlation of their bodies. Nothing is more central to history, civilization, and the future of the species. Nothing is more fundamental to personal well-being, integrity, and authentic personal identity. Our ties of kinship are inscribed in our bodies from birth. All of this is now to be subjected to the fragmenting and arbitrary tendencies of the new sexuality, with its reduction of the body to mechanism and function and its consignment of the individual to the vagaries of mental states."[31]

Our culture, and even our courts, appear to have forgotten the "hard meaning" of sex, the purpose of the sexed body, and the integral nature of sexual identity. It is time to remember. It is time to speak the truth about "who we are." It is time to defend the truth about the human person or witness the erasure not only of "females and males" but also "mothers and fathers" and "sons and daughters," and all we hold dear, in both language and law.

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[29] The number of adolescents identifying as transgender or non-binary has skyrocketed to nearly ten percent, a stark contrast to past figures suggesting a mere fraction of a percent of individuals identify as transgender over a lifetime. Although the number of youth gender clinics providing medical or surgical "gender affirmation" interventions is also up sharply, the true number of adolescents pursuing transgender body modification is not known, as the government does not collect data on this. Dan Avery, *Nearly 1 in 10 teens identify as gender-diverse in Pittsburgh study*, NBC News (May 21, 2021), https://www.nbcnews.com/nbc-out/out-news/nearly-1-10-teens-identify-gender-diverse-pittsburgh-study-rcna993.

[30] Hadley Arkes, *Conservative Jurisprudence Without Truth*, First Things (July 20, 2020), https://www.firstthings.com/web-exclusives/2020/07/conservative-jurisprudence-without-truth.

[31] Crawford, *supra* note 12.

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