

SYMPOSIUM: A CELEBRATION OF THE TWENTIETH ANNIVERSARY OF MULIERIS DIGNITATEM, PART I: ARTICLE: COMMUNION OR SUSPICION: WHICH WAY FOR WOMAN AND MAN?

Fall, 2009

Reporter

8 Ave Maria L. Rev. 167 *

Length: 23898 words

Author: Helen M. Alvare+

+ Associate Professor of Law, George Mason University School of Law. I am grateful to the summer research grant program of the George Mason University School of Law, to Jane Adolphe, and the participants in the conference A Celebration of the Twentieth Anniversary of Mulieris Dignitatem (Washington, D.C., Oct. 3-4, 2008). I would also like to thank Christine Ciambella and Sophie Coy for their research assistance, and Professor Don Browning for his very helpful comments.

Text

[*167]

Introduction

In recent decades, the Roman Catholic Church has contributed considerable intellectual resources to the subject of intimate, heterosexual relationships. These resources also feature historically unprecedented attention to the question of the identity, roles, and situations of women. Citing only the most significant documents, these resources include the 130 Wednesday audiences of Pope John Paul II on the Theology of the Body between 1978 and 1982.¹ They also include his 1988 apostolic letter *Mulieris Dignitatem*.² In 1995, in connection with the United Nation's Fourth World Conference on Women, Pope John Paul II addressed his Letter to Women.³ Also in 1994, he issued the comprehensive Letter to Families.⁴ In 2004, Joseph Cardinal Ratzinger (now Pope Benedict XVI), in his position as Prefect for the Congregation of the Doctrine of the Faith, wrote a letter to all the bishops of the world entitled *On the Collaboration of Men [*168] and Women in the Church and in the World*.⁵ Finally, in 2005 Pope Benedict XVI issued his first encyclical, *Deus Caritas Est*, the first half of which treated at length the nature of love, beginning with the love between a man and a woman.⁶

¹ Pope John Paul II, *The Theology of the Body* (1997) [hereinafter *Theology of the Body*].

² Pope John Paul II, *Mulieris Dignitatem* [Apostolic Letter on the Dignity and Vocation of Women] (1988) [hereinafter *Mulieris Dignitatem*].

³ Pope John Paul II, *Letter to Women* (1995), reprinted in *Pope John Paul II on the Genius of Women* 45 (Comm. on Women in Soc'y & in the Church, U.S. Catholic Conference ed., 1997) [hereinafter *Letter to Women*].

⁴ Pope John Paul II, *Gratissimam Sane* [Letter to Families] (1994), in 23 *Origins* 637 (1994).

⁵ Congregation for the Doctrine of the Faith, *Letter on the Collaboration of Men and Women in the Church and in the World* (2004), in 34 *Origins* 169 (2004) [hereinafter *On the Collaboration of Men and Women*].

⁶ Pope Benedict XVI, *Deus Caritas Est* [Encyclical Letter on Christian Love] PP 2-18 (2005).

Painting with a very broad brush, it can be said that these documents together propose a model for intimate heterosexual relationships between men and women. This model is grounded in an anthropology of woman and man based first and foremost upon the creation of each in God's image and likeness. Consequently, it understands man and woman as radically equal. It also understands their sexual difference to be oriented intrinsically to communion, in mutual service to one another. This is indicated, though not completely constituted, by their biophysical beings. Marriage is the way most human beings will live out this call to communion and service. The man and the woman, and the pair together, also are always subject to Christ. Their relationship is essentially good, but at the same time it suffers a brokenness as a result of original sin. Each sex manifests this brokenness somewhat differently, as well as in relation to the other. Christ's life, death, and Resurrection show humanity the way of love, including the way of triumph over broken love. For each person, and in particular for intimate heterosexual pairs, that way requires "finding oneself by losing oneself." ⁷

For the sake of brevity, this Article will call the foregoing the "communion and mutual service model" of intimate, heterosexual relationships. In addition to Pope John Paul II and Pope Benedict XVI, there are other religious and legal scholars who have endorsed one or more elements of this model - whether drawing upon religious sources or images, ⁸ or upon the discipline of ethics. ⁹ Their contributions will be discussed below in Part II.

[*169] The development of the communion and mutual service model coincided historically with unprecedented legal changes in laws and practices in the United States, which reduced barriers to cohabitation, out-of-wedlock childbearing, divorce, and same-sex marriage. Theoretical legal and cultural reflections upon these developments often concluded with calls for sweeping change, both in the private sphere of intimate heterosexual relationships and in the public laws and policies affecting them. Often reacting to past or ongoing situations of oppression, discrimination, or even violence against women, several of these proposals evidenced deep suspicion of men and their capacity for loving relationships. They neglected discussing men's equality or dignity and sometimes despaired of securing men's assistance as a spouse or a parent. Other proposals sought to secure a strict equality of functional outcomes both within and outside of heterosexual relationships. Together, this Article will call the proposals introduced in this paragraph the "suspicion model" of intimate heterosexual relations. This model includes varying proposals, but they all tend toward suspicion regarding males' capacity for good behavior in such relations.

Family law in the United States is currently grappling with questions that engage the anthropological issues raised by both the suspicion and the communion and mutual service models. These questions include, inter alia, whether to valorize and promote marriage as compared with other intimate unions such as same-sex unions or cohabitation, whether to continue to devote public funds to encouraging nonresidential fathers' involvement with their children, whether and how to devote public resources to stabilizing marriage, and whether to reform divorce laws in order to slow down or even discourage divorce. The appeal of one or the other of these models could play an important role in providing answers to all these questions.

More dramatically, John Paul II and Benedict XVI claim that in some sense, humanity's successful understanding of the meaning of human life is at stake in the contest between these two models. This is because both popes contend that love is the very meaning of life and that, for the vast majority of people, love is learned, understood, communicated, and spread - or not - within the context of an intimate heterosexual relationship. It is not at all difficult to conclude that **[*170]** society at large is affected in myriad practical ways by whether or not men and women successfully negotiate the terrain of intimate heterosexual relationships. At the very least, children's well-being is at stake.

⁷ Cf. *Mulieris Dignitatem*, supra note 2, P 7 ("Man ... cannot fully find himself except through a sincere gift of self." (internal quotation marks omitted) (quoting Second Vatican Council, *Gaudium et Spes* [Pastoral Constitution on the Church in the Modern World] P 24 (1965), reprinted in *The Sixteen Documents of Vatican II* 513, 536 (Nat'l Catholic Welfare Conference trans., 1967))).

⁸ See, e.g., Margaret F. Brinig, *From Contract to Covenant: Beyond the Law and Economics of the Family* (2000); Don Browning et al., *From Culture Wars to Common Ground* (2d ed. 2000).

⁹ See, e.g., Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (2006).

While this paper concludes that the communion and mutual service model better accounts for and enables good heterosexual relationships, it will not overlook the salutary cautions, messages, or prescriptions offered by the suspicion model. Ultimately, however, this paper concludes that the communion and mutual service model can not only accommodate but can even illuminate the legitimate concerns of the suspicion model while holding onto a model of intimate heterosexual relationships that invites a more desirable, fruitful collaboration or communion between men and women.

This paper will therefore proceed as follows. Part I sets forth the elements of the communion and mutual service model as gathered from the leading, relevant documents of Pope John Paul II and Pope Benedict XVI. Part II describes and compares some of the existing models of intimate heterosexual relationships that share one or more elements of the communion and mutual service model, as proposed by scholars in law and religion. Part III sets forth the suspicion model. Part IV considers how the communion and mutual service model might correct and illuminate the suspicion model and offers general support for particular directions in the law affecting intimate heterosexual relationships.

I. Man and Woman in Communion and Mutual Service

This section will describe an anthropology of human persons in the context of their inclinations to form intimate heterosexual relationships. John Paul II and Benedict XVI have developed this anthropology in large part from the Genesis accounts of the creation of the human person, the Fall, and its aftermath. This Article's description of this model is very brief compared to the primary sources from which it draws, but it contains all of the elements necessary for a fruitful comparison with the suspicion model.

According to Pope John Paul II, the "basis of Christian anthropology" is God's act of creating every human being in his image and likeness, an act that reveals man and woman to themselves.¹⁰ John Paul II writes that "both man and woman are [*171] human beings to an equal degree" precisely because each is made in God's image.¹¹ Thus, the basis for equality of man and woman comes from an outside source. It is unchangeable. It is not about appearances, functions, strengths or weaknesses, but simply about our coequal humanity.

Like God, man and woman are rational and free.¹² Also like God, we are made for relationship and communion. This is based upon God's existing as three persons in one God in an eternal communion of love. John Paul II writes that this "social" nature of the human person is, in fact, a "prelude to the definitive self-revelation of the Triune God: a living unity in the communion of the Father, Son and Holy Spirit."¹³ It is also grounded in a reading of the Genesis creation account, in which God concludes after the creation of man that "it is not good that the man should be alone."¹⁴ Both creation accounts in Genesis understand the human being as a "unity of the two," as existing always in relation to another human person.¹⁵

Within this model, what is the purpose of sexual differences? John Paul II and Benedict XVI conclude that they exist to enable communion. In the second creation account, immediately after creating Eve to be Adam's "helper,"¹⁶ God directs that a man shall "leave[] his father and his mother and cleave[] to his wife, and they [shall] become one flesh."¹⁷ When Adam sees the woman, he recognizes her immediately as "bone of my bones and flesh of my

¹⁰ *Mulieris Dignitatem*, supra note 2, P 6 (emphasis omitted); see also Genesis 1:26-27.

¹¹ *Mulieris Dignitatem*, supra note 2, P 6.

¹² This poses an interesting challenge to some modern notions of rationality that would exclude women's propensity for thinking and problem solving in a personal, relational manner. See generally Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* ix-xxvii (2d ed. 1993).

¹³ *Mulieris Dignitatem*, supra note 2, P 7.

¹⁴ Genesis 2:18 (Revised Standard, Catholic Edition) (internal quotation marks omitted).

¹⁵ See *id.* 1:26-28, 2:18-35; see also *Mulieris Dignitatem*, supra note 2, P 7.

¹⁶ Genesis 2:18 (Revised Standard, Catholic Edition) (internal quotation marks omitted).

flesh,"¹⁸ a "somatic homogeneity."¹⁹ In other words, talk of heterosexual union, including physical union, follows immediately upon the creation of Eve. As Pope Benedict XVI wrote previously in *On the Collaboration of Men and Women*, one should not be distracted from the reality of Eve's equality-with-differences by the language of "helper" used in Genesis to describe Eve. To modern ears, it may appear to connote someone lesser in rank. But Benedict [*172] XVI writes that "the Hebrew word ezer which is translated as 'helpmate' indicates the assistance which only a person can render to another. It carries no implication of inferiority or exploitation if we remember that God too is at times called ezer with regard to human beings (cf. Ex. 18:4; Ps. 10:14)."²⁰

It is important to note the role played by the physical complementarity of Adam and Eve in the Genesis creation accounts. In his summary of this aspect in *John Paul II's Theology of the Body*, theologian Michael Waldstein writes that "to be a person is to stand in a relation of gift"²¹ and that each human person "lives as a body that offers a rich natural expression for the gift of self in spousal love."²² John Paul II opines that, while our bodies are not all we are, they manifest our person; they alone are "capable of making visible what is invisible."²³ It is in seeing one another's body that Adam and Eve understand that each is human, but also different from one another. Their differences sharpen their self-understanding.²⁴ These differences are in fact indispensable elements of man and woman understanding themselves and one another. Furthermore, their bodies indicate communion and complementarity, but not identity.²⁵ John Paul II calls this the "nuptial" understanding of the body: that the male and female are different and made not only with but for one another.²⁶ John Paul II concludes further that the man and the woman find themselves through a sincere gift of self to the other.²⁷

Males and females, by means of their bodies, speak a "language" the body did not author.²⁸ The language the body speaks is "union," but, as John Paul II states, "by no means" in a reductively biological way.²⁹ Rather, it concerns the "innermost being of the human person as such."³⁰ In fact, he claims the language of their bodies is truly "human" only if it is part of

[*173]

the love by which a man and a woman commit themselves totally to one another until death. The total physical self-giving [and becoming "one flesh"] would be a lie if it were not the sign and fruit of a total personal self-giving, in

¹⁷ See *id.* 2:24.

¹⁸ *Id.* 2:23 (internal quotation marks omitted).

¹⁹ *Theology of the Body*, *supra* note 1, at 44.

²⁰ *On the Collaboration of Men and Women*, *supra* note 5, P 6 n.5 (emphasis added).

²¹ Michael Waldstein, *Introduction to Pope John Paul II, Man and Woman He Created Them: A Theology of the Body* 1, 95 (Michael Waldstein trans., 2006).

²² *Id.*

²³ *Theology of the Body*, *supra* note 1, at 76.

²⁴ *Id.* at 61-62.

²⁵ *Id.* at 48.

²⁶ *Id.* at 58-63, 70.

²⁷ *Id.* at 70-72.

²⁸ *Id.* at 359 (internal quotations omitted).

²⁹ See Pope John Paul II, *Familiaris Consortio* [Apostolic Exhortation on the Role of the Christian Family in the Modern World] PP 11, 32 (1981).

³⁰ *Id.* P 11.

which the whole person, including the temporal dimension, is present: if the person were to withhold something or reserve the possibility of deciding otherwise in the future, by this very fact he or she would not be giving totally.³¹

Still, this overcoming of the human being's original solitude is inextricably tied up with sex: "the two shall become one flesh."³² This enables the "surpassing of the limit of man's solitude that is inherent in the constitution of his body."³³

John Paul II comments that this reading of the story of the creation of the man and the woman indicates that they are called "to exist mutually "one for the other."³⁴ In his Letter to Women, he calls this "a help which is not one-sided but mutual."³⁵ Man and woman are to be "gifts" to one another. This is the fundamental meaning of the "help" spoken of in Genesis 2:18-25.³⁶ John Paul II says it is always a matter of a "'help' on the part of both, and at the same time a mutual "help."³⁷ Marriage is the "first and, in a sense, the fundamental dimension of this call" to communion.³⁸ Eve's very being - equal, but different - is a donation to Adam.³⁹ Like him, she is not an object, but a subject; her gift to the man is free. She is the "master of her own mystery."⁴⁰ The gift, the mutual service between man and woman, therefore operates first at the level of the person, not at the functional or utilitarian level.⁴¹

An important feature of the communion and mutual service model is its treatment of the break between man and woman - original sin - and its hereditary character. Pope John Paul II [***174**] approaches this by contrasting Adam and Eve's responses to one another's bodies before and after their disobedience. Prior to the Fall, they looked upon one another naked and were "not ashamed."⁴² After the Fall, they see one another differently, feeling compelled to cover their sexual differences with fig leaves.⁴³ It became difficult for them to see one another's bodies as beautiful, as signs of their mutual gift to one another, and they began to see one another in parts. This first disruption in creation, therefore, pertains to the relationship between the male and the female. The physical aspects of the relation remain, but the contrast with their "naked but not ashamed" state is clear. Now there is a covering of their differences, a fear, a lack of trust.⁴⁴ Their sexuality seems to be an obstacle in the personal relationship, the very opposite of its original purposes of creating society, communion, and one-flesh union.⁴⁵

³¹ See id. PP 11, 32 (emphasis added).

³² Cf. Genesis 2:24.

³³ Theology of the Body, supra note 1, at 50.

³⁴ *Mulieris Dignitatem*, supra note 2, P 7.

³⁵ Letter to Women, supra note 3, P 7 (emphasis omitted).

³⁶ "I will make him a helper fit for him." Genesis 2:18 (Revised Standard, Catholic Edition) (emphasis added) (internal quotation marks omitted).

³⁷ *Mulieris Dignitatem*, supra note 2, P 7.

³⁸ On the Collaboration of Men and Women, supra note 5, P 6. The single and clerical vocations are other dimensions of the call.

³⁹ Theology of the Body, supra note 1, at 70-71.

⁴⁰ Id. at 372.

⁴¹ See id. at 88-89.

⁴² Genesis 2:25 (Revised Standard, Catholic Edition); Theology of the Body, supra note 1, at 72-74.

⁴³ Genesis 3:7; Theology of the Body, supra note 1, at 111-14.

⁴⁴ Theology of the Body, supra note 1, at 119.

⁴⁵ Id. at 117-25.

Following their disobedience, God subjects man and woman to the world. Their "subjection" pertains to their bodies, as did their dominion over the earth. ⁴⁶ Man will now earn his daily bread by "the sweat of [his] face." ⁴⁷ The woman will "in pain ... bring forth children." ⁴⁸ Each is also subjected to their own bodily impulses. In St. Paul's later summary of the effects of Adam and Eve's original sin, he utters the famous line, "I see in my members another law at war with the law of my mind" ⁴⁹ Benedict XVI has called this the "empirical aspect" of original sin, its tangible reality: "[A] contradiction exists in our being. On the one hand every person knows that he must do good and intimately wants to do it. Yet at the same time he also feels the other impulse to do the contrary" ⁵⁰

Furthermore, it appears that Adam and Eve's disobedience has "his and her" consequences. While both sexes suffer a loss of understanding that the body is a place of communion, ⁵¹ his body becomes the place for domination, and hers for a form of desire, **[*175]** which appears to be a kind of manipulation of his attraction in order to obtain what she desires. ⁵² "In pain you shall bring forth children, yet your desire shall be for your husband, and he shall rule over you." ⁵³ John Paul II notes that this is the first time the word "husband" is used in Genesis; it acts as a sign of the broken communion of equality. ⁵⁴ The male and the female will still experience mutual attraction, will still be called to communion, but will fail to satisfy their aspiration for a real communion of persons even in the union of their bodies. After the Fall, they are inclined to live not for one another, but over one another, precisely on the basis of their bodies and sex, and they become threatened by the insatiability of that union. ⁵⁵ John Paul II writes that another way to understand the new order of the male-female relationship is with the language of lust, seeing the other human being as an object to satisfy a longing. ⁵⁶ Lust directs personal desires to satisfy the body, at the cost of a true communion of persons. Woman has rather an "insatiable desire for a different union," and man for domination over her. ⁵⁷

In addition to affecting each of them somewhat differently, though interconnectedly, the Fall also imbalanced that "fundamental equality which the man and the woman possess in the "unity of the two," the equality that is absolutely necessary for true "communio personarum." ⁵⁸ Interestingly, John Paul II acknowledges that "this threat is more serious for the woman, since domination takes the place of "being a sincere gift' and therefore living "for' the other: "he shall rule over you." ⁵⁹ This is true even as males' domination erodes their own dignity as well. ⁶⁰

⁴⁶ See Genesis 1:28, 2:15, 3:16-19.

⁴⁷ Id. 3:19 (Revised Standard, Catholic Edition) (internal quotation marks omitted).

⁴⁸ Id. 3:16.

⁴⁹ Romans 7:23 (Revised Standard, Catholic Edition).

⁵⁰ Pope Benedict XVI, General Audience at the Vatican (Dec. 3, 2008), in *Nothing Triumphs over Christ's Light*, L'Osservatore Romano (English ed.), Dec. 10, 2008, at 16.

⁵¹ *Theology of the Body*, supra note 1, at 116-18.

⁵² Id. at 123.

⁵³ Genesis 3:16 (Revised Standard, Catholic Edition) (internal quotation marks omitted).

⁵⁴ *Theology of the Body*, supra note 1, at 120.

⁵⁵ Id. at 121.

⁵⁶ Id. at 117-19, 122-23.

⁵⁷ Id. at 123.

⁵⁸ *Mulieris Dignitatem*, supra note 2, P 10 (internal quotation marks omitted).

⁵⁹ Id.

⁶⁰ Id.

John Paul II and Benedict XVI also reflect upon women's reaction to males' domination. Women are rightfully opposed to it. ⁶¹ At the same time, John Paul II writes, women, like men, should not forget that the only fulfillment available to the human person lies in retaining both the "originality" of their sexual identity along with an **[*176]** orientation to communion. ⁶² This contrasts with views that emphasize androgyny or conflict. ⁶³ At the same time, by no means should the woman ever countenance violence.

Finally, there is the question of whether the reality of sin and evil in human life means that humans can no longer make a decisive, stable commitment to the good. Benedict XVI described such a stance as one in which "evil is equally primal with the good," and as such, "evil is invincible." ⁶⁴ On the contrary, the body's value as a sign - as a reminder of the possibility for full communion - has not been completely obscured by the effects of original sin, "but only habitually threatened." ⁶⁵ John Paul II summarized it memorably: "The heart has become a battlefield between love and lust." ⁶⁶ As for the relationship between the man and the woman, sincere giving is threatened when each is tempted to see the other as an object, and personal relations can become reductively associated with the body and sex, instead of being understood as a complete gift of the persons. ⁶⁷

In other words, heterosexual communion remains possible. This is because God is the sole principle of creation. ⁶⁸ Evil is "not equally primal" but rather originates in a "created" and "abused" liberty. ⁶⁹ God is stronger than evil. ⁷⁰ Thus, there is always hope; man is "healed de facto" by Christ's death and resurrection, ⁷¹ a reality which, of course, he must accept or decline by free will. In the end then, the human heart is "above all the object of a call and not of an accusation." ⁷² This applies fully to the relationship between the man and the woman. Marriage both echoes and strengthens their union. ⁷³ This is part of the sacramental character of marriage in the Catholic Church. ⁷⁴ At the same time, it is crucial that both men and women retain a **[*177]** "consciousness" that sinfulness is easily associated with heterosexual relationships, in order to aspire realistically to virtue in this area. ⁷⁵

II. A Shared Vision? A Review of Some Extant Proposals for Conceiving Intimate Heterosexual Relationships

Several scholars have already engaged some of the anthropological questions taken up by the communion and mutual service model. Margaret F. Brinig ⁷⁶ and Katherine Shaw Spaht, ⁷⁷ for example, have proposed a

⁶¹ Id.

⁶² Id. P 11.

⁶³ On the Collaboration of Men and Women, supra note 5, P 2.

⁶⁴ Pope Benedict XVI, supra note 50.

⁶⁵ Theology of the Body, supra note 1, at 126.

⁶⁶ Id.

⁶⁷ Id. at 126-27 (internal quotes omitted).

⁶⁸ Cf. Genesis 1:1.

⁶⁹ Pope Benedict XVI, supra note 50.

⁷⁰ Id.

⁷¹ Id.

⁷² Theology of the Body, supra note 1, at 176-77.

⁷³ Id. at 347, 350.

⁷⁴ Id. at 349.

⁷⁵ Id. at 176-77.

⁷⁶ See generally Brinig, supra note 8.

"covenant" model of marriage. Linda C. McClain speaks of "equal partnership,"⁷⁸ and Don Browning of "equal regard."⁷⁹ This Part briefly describes each of these approaches, insofar as they address matters such as the purpose of sexual differences, the mode of relationship between the man and the woman, the disorder characterizing heterosexual relations, and possible responses to any disorder. Similar to Part I, Part II can only provide an outline and not a full treatment of the leading points made by authors who have written at length about intimate heterosexual relationships.

First, we consider Margaret Brinig's and Katherine Shaw Spaht's proposals to envision marital, heterosexual relationships as covenants. These proposals touch upon the issue of the mode of relationship between the man and the woman. A "covenant relationship" is built upon the mutual promise of commitment between a man and a woman in advance of marriage. It also includes behavior to support commitment during marriage. In *From Contract to Covenant: Beyond the Law and Economics of the Family*, Brinig writes that she is not intending "covenant" exclusively in the religious sense, but also in the sense of agreements "stemming ... from the values of the family members" and accompanied by "solemn vows."⁸⁰ Still, Brinig notes that parties to a covenant recognize a "third party" [*178] in the relationship, helping to seal the commitment; this is sometimes the state, or God, or both.⁸¹

Brinig and Spaht's proposals variously emphasize couples' free will to make marital commitments, their preparation for doing so (via required premarital education), and the solemnity accompanying their mutual promises. Unconditional love is another feature of covenantal relationships, including erotic love between the adults.⁸² The covenant contains promises and evidence not only of the spouses' "mutual commitment to one another" and to permanence, but also to the "preservation and protection of the family itself," the common good.⁸³ Brinig observes that conceiving of marriages as covenants helps to explain why family members will tend to contribute without counting the cost.⁸⁴ Even when there is tension during a marriage, a covenantal commitment helps to sustain it. Even at the breaking or dissolution of the family, the covenantal quality of the members' relationships and the practical effects of having lived as family in a covenantal mindset can help individual family members continue to care about the others' welfare.⁸⁵

Spaht, one of the creators of "covenant marriage laws," writes about several additional aspects of covenant relationships.⁸⁶ She discusses the need for couples to undergo preparation for making such commitments.⁸⁷ She also considers the content of covenantal unions, as specified by state covenant marriage laws.⁸⁸ For example, such laws might require couples to memorialize their promises in a Declaration of Intent signed by the man and the woman prior to the marriage.⁸⁹ The husband and wife promise each other fidelity, support, mutual assistance, and

⁷⁷ See generally Katherine Shaw Spaht, *Covenant Marriage: An Achievable Legal Response to the Inherent Nature of Marriage and Its Various Goods*, [4 Ave Maria L. Rev. 467 \(2006\)](#).

⁷⁸ McClain, *supra* note 9, at 151-54.

⁷⁹ Browning et al., *supra* note 8, at 124.

⁸⁰ Brinig, *supra* note 8, at 1.

⁸¹ *Id.* at 6-7, 182.

⁸² *Id.* at 14, 83-84.

⁸³ See *id.* at 1.

⁸⁴ *Id.* at 109.

⁸⁵ See *id.* at 185-87.

⁸⁶ See generally Spaht, *supra* note 77.

⁸⁷ *Id.* at 482-83, 493.

⁸⁸ *Id.* at 482-89.

⁸⁹ *Id.* at 469, 483.

a variety of other behaviors strongly reflecting "notions of mutual giving and sacrificial love."⁹⁰ The couple further agrees to seek help if they are experiencing difficulties, as well as to restricted grounds for divorce (as compared with [*179] "standard" marriages).⁹¹ The solemn nature of a covenant marriage permeates the entire process for obtaining one, and even for ending one.⁹²

The covenant model for the most part addresses a couple's capacity to make and keep a free-will commitment to one another. It suggests that help in keeping commitments might come from the third-party presence in the relationship - God or the state or both - as well as from a shared commitment to their children, but it does not specify the particulars of such help. The covenant model indicates that adults can find happiness from commitment and habituation to one another and to their children, even in the midst of or following family conflict.

As compared with the communion and mutual service model, the covenant approach does not share the idea that help comes from a truth or call embedded within the human person disposing the person to a permanent, loving union. It also does not consider what role the body and other sex differences might play in seeking (courtship) or living out (marriage) a committed heterosexual relationship. It thus leaves room for more investigation regarding how a couple's sexual and other interactions during courtship or after marriage "speak" about commitment or not. The covenant approach further does not speak about any intrinsic rupture in male-female relationship or how this specifically might be repaired. On the subject of maintaining the bond in the face of difficulties, however, the covenant model quite helpfully highlights the necessary role of free will in maintaining heterosexual commitments. It also points out the deep and long-lasting influence that a "commitment to commitment" can have, even considering inevitable conflicts. This is especially true if law and culture will recognize and encourage that commitment and render the breaking of commitments more difficult.

Linda C. McClain, in her *The Place of Families: Fostering Capacity, Equality and Responsibility*, addresses the equality of the sexes, the nature of their mutual service to one another, and the possibilities for overcoming disorders in the relationships between men and women. She proposes an "equal partnership couple" model that has some elements in common - and some at odds - with the communion and mutual service model. Like the communion and mutual service model, McClain's contains an unequivocal commitment [*180] to sex equality as a foundation for good-quality heterosexual relationships.⁹³ Unlike the former model, however, McClain's is not based upon a religious belief in coequal creation in the image of God. Also unlike the former model, she does not celebrate sex differences or characterize them as pointing to communion between the sexes. In fact, she is wary of sex-difference talk, concerned that efforts to exhort men to become better husbands and fathers on the basis of particular, identified male traits or on the basis of theories about "taming men with marriage" will inevitably encourage unacceptable patriarchal behavior.⁹⁴ She correctly cautions that sex differences have been employed to justify self-sacrifice by women and men's domination over wives and families, and to encourage the kind of gender specialization that ultimately disadvantages women in the market.⁹⁵ She prefers the language of equality, or a "humanist" approach versus a gendered approach to understanding men's and women's behavior and responsibilities in heterosexual relationships.⁹⁶ This means equality of outcomes - inside the marriage and in society - regarding who performs care-work, a goal which will require redistributive work both by governmental and by private institutions.⁹⁷ She thinks that it might be necessary to "keep[] track of who does what," given women's historical tendency to do more at home.⁹⁸

⁹⁰ Id. at 483-85.

⁹¹ Id. at 482-83, 485.

⁹² Id.

⁹³ McClain, *supra* note 9, at 151-54.

⁹⁴ Id. at 134-37.

⁹⁵ Id. at 147-49.

⁹⁶ See id. at 108.

⁹⁷ See id. at 87-88, 111-13.

McClain's insistence that men perform care-work, too, is based upon an outlook she shares with the communion and mutual service model - namely, the view that we are all made for loving service. She writes that "care ... fosters all persons' capacities," not just women's.⁹⁹ It is not perfectly clear what source informs her conclusion, but few would likely dispute it.

As compared with the communion and mutual service model, McClain's equal partnership model puts a far greater weight on the role and salutary power of sex equality. The two models agree about the fact of sex equality, yet McClain makes it the centerpiece of hers, whereas the communion and mutual service model highly values sex differences and associated gifts. In McClain's model, sex differences are not permitted to play an important role in either respecting the [*181] strength of the heterosexual union or explaining role preferences.¹⁰⁰ In fact, biological differences and reciprocity play no role in her model. On the contrary, by defending androgyny and endorsing same-sex marriages, McClain makes it clear that physical sexuality does not have a normative role to play regarding the acceptance or conduct of intimate relationships.¹⁰¹

From the perspective of the communion and mutual service model, therefore, McClain's most welcome contributions are her affirmation of a relationship between equality and healthy heterosexual relationships, her statements about the necessary role of care-work in the life of every human person, male or female, and her cautions about problematic cultural and religious messages, which can undervalue care-work while assigning women disproportionate responsibility for it.

A final model of intimate heterosexual relationships and the one bearing the closest relationship with the communion and mutual service model is Don Browning's "equal regard" model. It begins, as does the communion and mutual service model, with an assertion about the equality of the male and the female. It holds that this requires according equal but not identical privileges and responsibilities to men and women in both public and private realms.¹⁰² Browning agrees with the communion and service model that the strongest basis for this claim of equality is the spouse's "equal status in the eyes of God."¹⁰³

Browning defines "equal regard" to mean that the husband and wife "regard or respect the other as a self or person just as one regards oneself as a self or person."¹⁰⁴ Each "takes the other's self-fulfillment as seriously as [one's] own,"¹⁰⁵ and each "wills the good for the other as earnestly as one does for oneself."¹⁰⁶

While Browning does not use the language of communion, he does understand equal regard to subsist within the couple's mutual [*182] behavior. He says that equal regard is "something that people create together," a "felt unity of thought and emotion," and a possible aspect of their one-flesh union, interpreted as "intersubjective dialogue that

⁹⁸ See *id.* at 154.

⁹⁹ *Id.* at 108.

¹⁰⁰ She does make the point, however, that women appear to value mutuality over self-sacrifice in marriage, as distinguished from men. *Id.* at 153.

¹⁰¹ See *id.* at 148-49, 155-57.

¹⁰² See Don Browning, *Critical Familism, Civil Society, and the Law*, [32 Hofstra L. Rev. 313, 313 \(2003\)](#) [hereinafter Browning, *Critical Familism*]; Don S. Browning, Linda McClain's *The Place of Families and Contemporary Family Law: A Critique From Critical Familism*, [56 Emory L.J. 1383, 1387 \(2007\)](#).

¹⁰³ Browning et al., *supra* note 8, at 281.

¹⁰⁴ *Id.* at 275 (emphasis omitted).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (emphasis omitted).

enacts love as equal regard." ¹⁰⁷ He distinguishes this from a unilateral decision or commitment by one person to another. ¹⁰⁸

As for the couple's behavior or mutual service, Browning proposes on the part of each spouse "strong efforts to actualize the welfare of the other ... as well as any offspring of their union." ¹⁰⁹ He also proposes that sacrifice is a symmetrical obligation for both husband and wife. ¹¹⁰ Regarding the asymmetrical language of St. Paul's teaching in Ephesians, ¹¹¹ Browning considers this a historical failure of the early Church to overcome the androcentrism of its time and argues that "the wife can be an equal, transformative, Christic figure to husband and children and do so in the sense of leading as well as following." ¹¹²

Browning is careful to state that the primary mode of equal regard is not self-sacrifice and that sacrifice is not an end in itself. Sacrifice is rather sometimes necessary to maintain mutuality, while the primary "task" of equal regard is the building of a relationship in which the other is taken as seriously as oneself. ¹¹³ Browning is well aware of some feminists' fears about even referencing sacrifice, but he points out how other feminists understand its Christian reformulation to involve a rejection of domination and an embracing of servanthood. Christian sacrifice, in other words, can be "disconnected from [its] customary association with masculinity" and proposed as the way for both men and women. ¹¹⁴

Regarding disorders within the male-female relationship and the possibilities for overcoming them, Browning's account, like the communion and mutual service model, proposes "his and her" manifestations - what he calls the "male problematic" and the "female problematic." The former is men's tendency to leave their families, and the latter is women's tendency to reject male help and to **[*183]** raise their children alone, even at great cost to themselves. ¹¹⁵ It is unclear how closely he ties these to original sin. On the one hand, he says these problematics are not "sinful as such," while, on the other hand, he claims that they "become involved in sin" the more that they contrast with "historically emergent ideals of committed" spousal love, which "Judaism and Christianity have associated with the unfolding will of God." ¹¹⁶ Here, he seems to point to the role of the body as he comments that these problematics highlight the need for further study of eros as an element of Christian love. ¹¹⁷

Browning's model, like the communion and mutual service model, does not give the last word to the disorder in heterosexual relations. He points instead to what he calls a "genius" of Christianity: its ability both to "point toward perfection but admit that sin leads us to fall short." ¹¹⁸ Christianity is replete with teachings about forgiveness and grace. Without these, he predicts, it is too easy to fall into either "permissiveness" or "condemnation." ¹¹⁹ The equal regard model points both husbands and wives to identification with Christ's sacrifice on the Cross as a

¹⁰⁷ Id. at 276 (emphasis omitted).

¹⁰⁸ Id.

¹⁰⁹ Browning, *Critical Familism*, supra note 102, at 321.

¹¹⁰ Browning et al., supra note 8, at 160.

¹¹¹ Ephesians 5:22, 25 (Revised Standard, Catholic Edition) ("Wives, be subject to your husbands Husbands, love your wives").

¹¹² Browning et al., supra note 8, at 147.

¹¹³ See id. at 283-84.

¹¹⁴ Id. at 283.

¹¹⁵ Id. at 106 (emphasis omitted).

¹¹⁶ Id.

¹¹⁷ See id.

¹¹⁸ Id. at 272.

¹¹⁹ Id. at 272-73. The latter tendency is surely present in the suspicion model. See *infra* Part III.

possible path away from conflict and dissolution. ¹²⁰ Browning also points to God's grace as engendering in the man and the woman an "additional capacity for sacrificial self-giving," and at this point he concludes that this element makes the equal regard model "distinctively Christian." ¹²¹

The equal regard model shares a great deal with the communion and mutual service model. Both ground male-female equality upon a trait which cannot be altered by time or circumstances: equal status as bearers of God's image. Browning does not dwell upon sex differences or their orientation to communion, although he does describe the relationship between loving a spouse and children as "images of God" and how one comes analogically to "extend[] kin altruism" to wider and wider circles of humanity. ¹²² Understanding sex differences and heterosexual union as a representation of human beings' relationship with God is discussed, but this is not made an **[*184]** important feature of the equal regard model. ¹²³ The nature of the service mutually rendered in both models is similar; it is an affirmative obligation to put the other party first. Sacrifice is not the only mode, although it clearly figures in maintaining mutuality. John Paul II speaks more of sex differences and their associated "gifts" or "genius" in the context of service; the differences themselves might be said to be partially constitutive of the service, helping each to understand his or her identity with and difference from the other.

A communion and mutual service model also gives a great deal more attention than the equal regard model to the meaning and "language" of the human body as an inescapable player in forming relationships, rendering service, and of course, demonstrating the disorder between men and women. Browning does say that eros must figure into analyses of heterosexual unions and conflicts, but does not pursue this far. ¹²⁴

Both models recognize inborn problems in men and women respecting essential elements of heterosexual union. The former model calls it "original sin" and identifies "his and her" manifestations. Browning names "his and her" problems but is circumspect about identifying the male or female problematic with sin per se, although he does state that it seems to be increasingly clear that these tendencies conflict with God's plan for the human race. ¹²⁵

Finally, both models are sanguine regarding the possibilities for redemption within the intimate heterosexual relationship: it is the way of sacrifice, of self-emptying for the purpose of restoring communion, according to the model offered by Jesus Christ. This model is for women as well as for men. The communion and mutual service model, however, given its attention to embodied persons, would also include as part of the way of redemption a willingness to "read" the "language of the body" and a rejection of both androgyny and denunciations of the opposite sex.

III. The Suspicion Model

The "suspicion model" of intimate heterosexual relationships might fairly be characterized as largely "post-communion-and-service." It cherishes sexual union by heterosexual and homosexual **[*185]** pairs as a right, but it is skeptical or even dismissive regarding possibilities for healthy, long-term heterosexual unions. The most well-known proponent of the suspicion model is Martha Albertson Fineman, but others have also taken up several of her themes. ¹²⁶

¹²⁰ See Browning et al., *supra* note 8, at 287.

¹²¹ *Id.* at 285 (emphasis omitted).

¹²² See *id.* at 303.

¹²³ See *id.* at 121-24.

¹²⁴ *Id.* at 106-09, 178.

¹²⁵ See *id.* at 106.

¹²⁶ See, e.g., Cynthia Grant Bowman, Social Science and Legal Policy: The Case of Heterosexual Cohabitation, 9 *J.L. & Fam. Stud.* 1 (2007); Vivian E. Hamilton, Family Structure, Children and Law, [24 Wash. U. J.L. & Pol'y 9 \(2007\)](#) [hereinafter Hamilton, Family Structure, Children and Law]; Vivian Hamilton, Mistaking Marriage for Social Policy, [11 Va. J. Soc. Pol'y & L. 307 \(2004\)](#) [hereinafter Hamilton, Mistaking Marriage for Social Policy].

This model begins not with the intrinsic equality of men and women, but with the vulnerability of women and children. ¹²⁷ Fineman refers, for example, to human beings' constant susceptibility to "destructive external forces and internal disintegration." ¹²⁸ The lone mother is her paradigm vulnerable subject. Cynthia Grant Bowman would include female cohabitants and their children in this category. ¹²⁹ They are vulnerable "as a result" of intimate relationships - particularly if they have become economically interdependent with a man or have given birth to a child. ¹³⁰ As for men, while Fineman would include homosexual men among the vulnerable, ¹³¹ heterosexual men are regularly suspected or accused of patriarchy ¹³² and violence. ¹³³

With disorder and patriarchy as the "foundation" of the suspicion model, it is hardly surprising that its proponents focus only on those claimed sex differences which contribute to conflict: his violence and reluctance to contribute to support, and her propensity to do a disproportionate amount of childcare and domestic labor. There is no warrant with such a beginning for considering aspects of stable coupling, or the similarities and differences between men and women, or the discernable purposes or orientations of these traits. Instead, just the opposite tack is taken. Fineman claims that stable **[*186]** male-female couples must no longer be seen as the norm because too many individuals reject the traditional family form. ¹³⁴ She charges all heterosexual two-parent family forms with patriarchy ¹³⁵ and asserts that her work is "intended to challenge the patriarchal norm of the male-defined and male-headed family with heterosexual union at its core." ¹³⁶ She contends that even "reforms have simply reinforced old values, adapting patriarchal objectives and structures of control to contemporary circumstances." ¹³⁷

Professors Fineman, Bowman, and Vivian Hamilton propose that the way forward in a society where women and men repudiate the marital norm is a reorientation of law and policy away from stable, intimate heterosexual partnerships toward relieving the economic needs of women and children. Evidence about the good of stable heterosexual unions for adults and for children is either ignored or dismissed as insufficient or inconclusive. ¹³⁸ Evidence about males' and females' historically and globally constant inclination to marry - an inclination still present today even among those least likely to marry ¹³⁹ - is ignored or employed as a rationale to direct benefits toward nonmarital intimate partnerships on the grounds that these might encourage marriage. ¹⁴⁰ Rather, on the

¹²⁷ See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, [20 *Yale J.L. & Feminism* 1, 2 \(2008\)](#). Fineman explicitly recognizes the "inherent radical potential" of a notion of intrinsic equality of rights among all human beings, but focuses instead upon the state's responsibility for guaranteeing equality of outcomes. *Id.* at 2, 4, 6.

¹²⁸ *Id.* at 11-12.

¹²⁹ See Bowman, *supra* note 126, at 36-38.

¹³⁰ See *id.* at 43.

¹³¹ See Fineman, *supra* note 127, at 22-23.

¹³² See Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* 174 (1991).

¹³³ Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* 21, 88, 162 (2004).

¹³⁴ Martha Albertson Fineman, *Why Marriage?*, [9 *Va. J. Soc. Pol'y & L.* 239, 246 \(2001\)](#).

¹³⁵ See Fineman, *supra* note 132, at 174.

¹³⁶ *Id.* at 12.

¹³⁷ *Id.* at 174.

¹³⁸ See, e.g., Hamilton, *Family Structure, Children and Law*, *supra* note 126, at 13-21.

¹³⁹ See, e.g., Kay S. Hymowitz, *Marriage and Caste in America* 95-96 (2006); Daniel T. Lichter & Zhenchao Qian, *Serial Cohabitation: Implications for Marriage, Divorce, and Public Policy* 4-5 (Feb. 20, 2007) (unpublished paper), http://www.pstc.brown.edu/nmu/Brown%20paper_DLichter.pdf.

¹⁴⁰ See Bowman, *supra* note 126, at 43.

basis of just several decades' trends, Fineman concludes that there is nothing "natural" about the marriage-type union. ¹⁴¹ It is merely the "legally contrived institution of the "official" family." ¹⁴²

Given the description of the suspicion model thus far, it is no surprise that it does not include positive attention to any service or sacrificial behavior between men and women. "Her" service - her propensity to invest herself in more childcare and domestic work - **[*187]** while valorized as a social contribution, ¹⁴³ is also treated as the very source of her vulnerability. ¹⁴⁴ "His" is not discussed.

In this context, where there is no "norm" of a heterosexual relationship, there is no basis for speaking of any disorder affecting the norm. Disorder is rather what constitutes heterosexual exchanges ab initio, or at least in the main. Does it have his-and-her characteristics? Perhaps the suspicion model means to characterize women's propensity to become pregnant while unmarried and then to perform undervalued and excess care-work as such a fault. But this is undercut by two additional points. First, the suspicion model also identifies these practices as productive and as contributing to the welfare of children and society. ¹⁴⁵ Second, in her brief reference to possible "failure of personal responsibility" on the part of those "left behind" (mostly women in Fineman's analysis), Fineman suggests only the possibility that "the system" gave "impermissible advantages" to more powerful individuals or groups and renders the vulnerable at least less responsible in her view. ¹⁴⁶ As for men's "fault" - in addition to their oft-mentioned propensity for violence - they are charged with being domineering and patriarchal. ¹⁴⁷

With no heterosexual relational norm on the scene, the suspicion model pays little attention to the possibilities for "redeeming" bad relationships. Fineman has suggested that it is either possible in theory, but not pursued in fact, ¹⁴⁸ or not worth trying. ¹⁴⁹ Hamilton's minimization of the goods of marriage and Bowman's proposal to steer legal benefits to cohabitation are also forms of dismissing the possibility for redeeming committed intimate heterosexual relations, although both suggest quixotically that steering more financial benefits to uncommitted relations might bring about more commitment. ¹⁵⁰

[*188] A final aspect of the suspicion model is its unwillingness to integrate the biophysical aspects of sexual difference into its analysis. It does not take any lessons from or even explore mental, emotional, or physical differences between the sexes. It does attend to physical domestic violence regularly and draw conclusions therefrom. It also alludes to women's propensity to provide physical care to children, but offers no analysis of its possible significance in a heterosexual dyad. It worries about, rather than reflects upon, the need for two sexes for procreation. ¹⁵¹ Rather, physical intimacy is characterized simply as a constitutional right. ¹⁵² It might even be a

¹⁴¹ Fineman, *supra* note 134, at 245-46.

¹⁴² Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, [81 Va. L. Rev. 2181, 2187 \(1995\)](#).

¹⁴³ Fineman, *supra* note 133, at 188-95.

¹⁴⁴ See Bowman, *supra* note 126, at 43.

¹⁴⁵ Fineman, *supra* note 133, at 188-204.

¹⁴⁶ Fineman, *supra* note 127, at 18; see also Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* 156-57 (1995).

¹⁴⁷ See Fineman, *supra* note 133, at 21, 88, 152, 162 (discussing men's tendency toward violence); Fineman, *supra* note 132, at 174 (discussing men's tendency toward patriarchy).

¹⁴⁸ Fineman, *supra* note 146, at 204 (referring to a discourse about fathers assuming responsibility as "more imaginary than real" when it "resists adopting a primarily punitive and retaliatory attitude toward women").

¹⁴⁹ Fineman has proposed that we "forgo attempts to coax men into caretaking." Fineman, *supra* note 133, at 202-03.

¹⁵⁰ See Bowman, *supra* note 126, at 43; Hamilton, *Mistaking Marriage for Social Policy*, *supra* note 126, at 369-70.

¹⁵¹ Fineman sees the biological-connection argument as leading to sexist notions about ownership and rights. Fineman, *supra* note 146, at 201-08.

useful tool for poor women, according to Bowman. She sees a poor woman's decision to cohabit to increase support as a "rational use" of cohabitation.¹⁵³ Setting aside completely the good of encouraging natural parents to nurture their children, Hamilton even opines that the state's choice to encourage the commitment of heterosexual couples in particular "is anything but logical."¹⁵⁴

In sum, the suspicion model mistrusts analyses of heterosexuality that take physical or other sex differences into account. At the same time, it highlights the dangers of biological reductionism and heterosexual violence.

IV. Which Way Forward for Women and Men? Comparing and Contrasting the Suspicion Model with the Communion and Mutual Service Model

There are good reasons to be attracted by the suspicion model of intimate heterosexual relations. There is the historical record of men's inclination to dominate women, both within the family and in legal, social, political, and other institutions. This has been accompanied by a devaluation not only of women's work inside and outside the home, but also of their persons, including their very capacity for rationality.¹⁵⁵ There is the prevalence of violence perpetrated by men **[*189]** upon women with whom they were intimate.¹⁵⁶ There is also what Browning calls the "male problematic" and its economic, social, and psychological consequences for women and children.¹⁵⁷ There is the need to do something now for disadvantaged children, a cause taken up with sympathy and enthusiasm by proponents of the suspicion model. Marriage-promotion and fatherhood-involvement programs, even if they work well, will not produce results sufficiently quickly to help many children presently in distress. Finally, there is the fact that women perform a great deal more care-work for children than men perform. Even today, with high numbers of women in the paid workforce, women on average are still performing more housework and childcare than men.¹⁵⁸ In many countries this means that women are simply working harder than men while netting less overall income and virtually no social welfare benefits in recognition of their domestic labor.¹⁵⁹

Yet the shortcomings of the suspicion model are also readily apparent. It sidesteps the question of the essential equality of men and women. This is more dangerous than is first apparent, for, as both the Catholic thinkers and Professor Don Browning have observed, human beings come to believe in the complete equality of people they do not know - including people very different from them - by first accepting the equality of persons they know within their own family.¹⁶⁰ In this context, the suspicion model's distrust and disparaging of men is more than troubling. Furthermore, the suspicion model's disregard of sexual differences and their role within heterosexual relationships

¹⁵² See Hamilton, *Family Structure, Children and Law*, supra note 126, at 26; Hamilton, *Mistaking Marriage for Social Policy*, supra note 126, at 347.

¹⁵³ Bowman, supra note 126, at 15.

¹⁵⁴ Hamilton, *Family Structure, Children and Law*, supra note 126, at 26.

¹⁵⁵ It has been written by more than one author that women's unpaid "labor within the home" leads directly to unequal pay for work outside the home. This is called the logic of the low value of female labor. See Carmel Shalev, *Birth Power: The Case for Surrogacy* 163 (1989); Susan Moller Okin, *Justice, Gender, and the Family* 138-45 (1989).

¹⁵⁶ See, e.g., Violence Policy Center, *When Men Murder Women: An Analysis of 2006 Homicide Data 3* (2008) (indicating that sixty percent of female homicide victims who knew their offenders were the wife or an intimate acquaintance (ex-wife or girlfriend) of the offender).

¹⁵⁷ See Browning et al., supra note 8, at 106, 110, 149.

¹⁵⁸ U.N. Div. for the Advancement of Women, *The Equal Sharing of Responsibilities Between Women and Men, Including Care-Giving in the Context of HIV/AIDS 5* tbl.1, U.N. Doc EGM/ESOR/2008/BP.1 (Oct. 3, 2008) (prepared by Mary Daly), available at <http://www.un.org/womenwatch/daw/egm/equalssharing/EGM-ESOR-2008-BP1%20Mary%20paper.pdf>.

¹⁵⁹ In the United States, for example, Social Security benefits do not accrue for the domestic and child-care work women perform in the home.

¹⁶⁰ See Browning et al., supra note 8, at 302-03; Pontifical Council for the Family, *Family, Marriage and "De Facto" Unions* PP 19, 22 (2000), in 30 *Origins* 473, 480 (2001).

easily leads to a view of the body as a tool, with no integral relationship to the person. In this view, sexual identity is completely constructed, whether by society, the individual, or both. Human beings cannot rely on the body for "clues" as to desirable ways of living as male or female. To the extent suffering **[*190]** results from one or another choice, they cannot look to sexual identity for assistance. The fact that the costs and burdens of pregnancy are borne by women's bodies alone and that women are "present"¹⁶¹ more often with their children need not have any effect upon choices about heterosexual intimacy.

The suspicion model also leaves poor and minority women with no realistic hope of closing the gap between their aspirations for permanent heterosexual union and their current situation. It also leaves such women with no realistic hope of closing the gap between themselves and more privileged women, who enjoy more marriages, more stable marriages, more father involvement, and fewer out-of-wedlock births. While there is no doubt that private and public assistance, especially toward better educational and job opportunities, can help and ought to be forthcoming, it is unrealistic to hold that money can completely replace the role played by love and companionship in bringing about good emotional, economic, and other practical outcomes in a heterosexual relationship or in a family. Money does not completely replace a father's involvement and marital commitment when the good at stake is the well-being of children.¹⁶² It will not replace adults' longing for real love and constant support, either.

To the extent it makes "service" a suspect term, the suspicion model potentially performs a disservice beyond the confines of heterosexual relationships. Whether people subscribe specifically to Erik Erikson's theories of moral development¹⁶³ or simply have the benefit of lived experience, there is wide agreement that a life devoted to self-service is not a "good" life. But if proponents of the suspicion model insist that service mostly wreaks havoc in women's lives, then its credentials are more than compromised. It is true that the suspicion model also valorizes mothering, which necessarily involves care-work, but the model gives the lion's share of attention to the costs and burdens of mothering. In the words of historian Elizabeth Fox-Genovese, if women feel that they have been "punitively held accountable for the practice of the virtues of service and sacrifice," **[*191]** then they will propose "beginning with their liberation from service to and sacrifice for others."¹⁶⁴ Men, too, would not likely be persuaded that activities portrayed as the source of distress for women are intrinsically good in themselves and should attract male participation.

Due to its treatment of equality, service, men, and the poor, the suspicion model is not adequate for the needs of individuals, families, or society today. The communion and mutual service model, on the other hand, can attend to the worries well articulated by the former model without doing violence to human beings' demonstrated needs in the context of intimate heterosexual relationships. John Paul II, for example, has already acknowledged and denounced the historical record of oppression against women and apologized on behalf of the Church for any role the Church played in it.¹⁶⁵ As to the need to value human work - not based on the sex of the person performing it, but based

¹⁶¹ Fineman, *supra* note 146, at 205 (internal quotation marks omitted) (referring to mothers as "the 'present' parent - the parent providing for the child, taking on the inevitable dependencies in our society").

¹⁶² See Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent* 3-4 (1994).

¹⁶³ See, e.g., Erik Erikson, *The Golden Rule in the Light of New Insight*, in *The Erik Erikson Reader* 445 (Robert Coles ed., 2000).

¹⁶⁴ Elizabeth Fox-Genovese, *Parents and Children*, in *Women and the Future of the Family* 37, 43-44 (James W. Skillen & Michelle N. Voll eds., 2000).

¹⁶⁵ *Letter to Women*, *supra* note 3, P 3.

Women's dignity has often been unacknowledged and their prerogatives misrepresented; they have often been relegated to the margins of society and even reduced to servitude. This has prevented women from truly being themselves and it has resulted in a spiritual impoverishment of humanity. Certainly it is no easy task to assign the blame for this, considering the many kinds of cultural conditioning which down the centuries have shaped ways of thinking and acting. And if objective blame, especially in particular historical contexts, has belonged to not just a few members of the Church, for this I am truly sorry.

Id.

on its being performed by a human being - John Paul II's *Laborem Exercens* has spoken emphatically.¹⁶⁶ In its role as a Permanent Observer at the United Nations, the Holy See has been a vocal proponent of providing social welfare benefits in recognition of the value of childcare and domestic work on the same basis as other work.¹⁶⁷ As for men's tendencies for violence and to neglect women [*192] and children, this too has received sustained attention from the Holy See internationally, and from national bishops' conferences as well.¹⁶⁸ Without the use of language about stereotypical sex-roles for men or women, the Holy See's delegations to the United Nations have called upon men to take up their human responsibilities as parents and upon governments to step in when families are suffering.¹⁶⁹

In addition to taking account of the worries posed by the suspicion model, the communion and mutual service model brings additional and timely resources to the table. These, taken together, add needed elements of realism, compassion for the poor, and fairness to a discussion of the modern situation of intimate heterosexual relationships. The model furthermore adopts a notion of the meaning of the "service" or "gift" exchanged between men and women, a notion that fundamentally tries to reorient the dialogue between the sexes toward a positive outcome.

Realism is fostered by the communion and mutual service model via its insistence that men and women will continue to be inclined to intimate unions and the mutual care of children conceived therein. It [*193] is contrary to historical and current experience to think that women should confine their hopes and expectations to babies, a contract with a man, and generous state benefits. It is, further, realistic to understand that the human body and sex differences play a role both in forming healthy unions and disordered ones. Findings, for example, that women are more likely than men to experience depression following uncommitted sexual intercourse¹⁷⁰ and are more likely to

¹⁶⁶ Pope John Paul II, *Laborem Exercens* [Encyclical Letter on the Ninetieth Anniversary of *Rerum Novarum*] P 6 (1981) ("The primary basis of the value of work is man himself, who is its subject.").

¹⁶⁷ See, e.g., Mary Ann Glendon, Head of the Delegation of the Holy See, Statement to the Fourth World Conference on Women P 2 (Sept. 5, 1995), available at <http://www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950905214652.txt>.

The fear of reinforcing certain stereotypes concerning the roles of women, should not prevent this Conference from clearly addressing the special challenges and the real-life needs and values of those millions of women who dedicate themselves to motherhood and family responsibilities, either on a fulltime basis or who reconcile them with other activities of a social and economic nature. Our societies offer far too little tangible recognition or concrete assistance to those women who are struggling to do a decent job of raising children in economically trying circumstances... .

The Holy See, at this Conference, ... stresses the importance of finding new ways of recognizing the economic and social value of women's unremunerated work, in the family, in the production and conservation of food and in a wide range of socially productive work within the community. Women must be guaranteed measures of economic and social security which reflect their equal dignity, their equal rights to ownership of property and access to credit and resources.

Id.

¹⁶⁸ See id. P 4.

The Conference has, however, rendered a great service by casting a spotlight on violence towards women and girls, violence which may be physical, sexual, psychological or moral. Much more needs to be done in all our societies to identify the range and the causes of violence against women. The extent of sexual violence in the industrialized nations, as it becomes more evident, comes often as a shock to their populations... .

All such forms of violence against women should be condemned and social policies to eliminate the causes of such violence should be given priority consideration.

Id.; see also U.S. Conference of Catholic Bishops, *When I Call for Help: A Pastoral Response to Domestic Violence Against Women* (10th anniv. ed. 2002), available at <http://www.usccb.org/laity/help.shtml> (giving pastoral guidance in regard to domestic violence against women).

¹⁶⁹ E.g., Glendon, *supra* note 167, P 2 ("Promoting women's exercise of all their talents and rights without undermining their roles within the family will require calling not only husbands and fathers to their family responsibilities, but governments to their social duties.").

express and hope for reciprocal commitment in an intimate union¹⁷¹ are likely related to women's roles in pregnancy and childbirth. Frank acknowledgement of such differences could help women prevent difficulties for themselves and are not to be ignored in the name of repudiating sex differences. This would demonstrate authentic compassion for women.

Compassion for the poor is also a feature of the communion and mutual service model, especially insofar as it refuses to relegate this group to relationships that are less true to human aspirations and inclinations. The suspicion model would settle for relationships such as cohabitation - if the man's income were right - or a contract for benefits from the man to the woman and child. The communion and mutual service model - with its insistence on the radical equality of every human person and its claim about every human person's call to loving communion - would not. Nor would it lead particularly lower socioeconomic classes to equate committed with uncommitted sexual unions. Nor, as some fear, would it simply insist that the poor "keep warm and well fed," while offering nothing for their physical needs.¹⁷² Proponents recognize the need for social assistance when families cannot provide for themselves. They are also actively and robustly engaged in the provision of private benefits to such families.

The notion of "service" articulated within the communion and mutual service model is really an ontological claim that by their very persons, including their differences, the man and the woman are "gifts" to one another. By this claim, the model points toward a general framework for resolving the differences and divisions that often accompany relationships between men and women. It also eschews the framework of utility or function, which easily obscures the truth about the fundamental equality of the sexes. Rather, John [*194] Paul II and Benedict XVI posit that sex differences are fundamentally constitutive of this service. First, this is because each sex is enabled to understand better his or her identity by comparison with the other. Second, each is helped to avoid a life of mere "sterile" and "baneful" encounters with the self¹⁷³ in favor rather of a life in which each can surpass his or her solitude, including via the one-flesh union with another. Third, the particular "otherness" of the opposite sex invites opportunities for realizing the meaning of life and their own dignity: definitive mutual giving. Fourth, Christ himself is characterized as the model servant, insofar as he put every human person before even his own life.¹⁷⁴ Such a characterization of "service" does not lay differing or unfair burdens upon one sex or the other. It does not assign stereotypical or limiting sex-roles to the woman. It rather lays a floor beneath which sex-differences talk may not descend - namely, the good of communion - and a goal toward which it should aspire: the fully realized dignity of every human person.

A final advantage of the communion and mutual service model is its account of the disorder afflicting the male-female relationship. Its description of this affliction squares well with the historical and modern situations of men and women: domination on the part of the man and temporary self-abnegation on the part of the woman in order to establish a relationship. Its account also comprehends the seriousness of the disorder. Many, many lives are afflicted, and in myriad aspects: economic, medical, psychological, and emotional. But the communion and mutual service model's recognition of original sin does not lead to abandoning hopes for men or for marriage. It recognizes the size of the threats to human beings' relationships, particularly marriage, but does not despair of such relationships.

If the communion and mutual service model of intimate heterosexual unions was accepted, it would have implications for several legal questions on the table at the state and federal levels today. The model would strongly support efforts to assist young women and men to understand the dignity of their entire persons - body, mind, and soul - and the significance of their identities as male or female. It would support education about the elements of healthy heterosexual relationships, including discussions about the need for harmony and communion - not conflict,

¹⁷⁰ See Ann M. Meier, *Adolescents' First Sex and Subsequent Mental Health*, 112 *Am. J. Soc.* 1811 (2007).

¹⁷¹ See Bowman, *supra* note 126, at 37 (summarizing relevant studies).

¹⁷² Cf. James 2:14-17.

¹⁷³ On the Collaboration of Men and Women, *supra* note 5, P 6.

¹⁷⁴ See Luke 10:29-37; John 13:1-17; Philippians 2:5-8.

not androgyny - as the [*195] guiding principle of such relationships. Empirical data that helps to unpack the "language of the body" would also be an element of this education. The communion and mutual service model would further support continuing efforts to promote marriage as the crucial social institution harmonizing men's, women's, children's, and society's needs and goals. Legal reforms helping to prevent marital dissolutions would be an important component of this effort. The communion and mutual service model would not support elevating uncommitted heterosexual unions or unions devoid of the possibility of full physical communion to the same level as marriage in the eyes of the law or society. Finally, it would encourage continued legal and cultural attention to encouraging nonresidential fathers to become better involved with their children directly and as co-parents.

Conclusion

John Paul II and Benedict XVI have invited those puzzling over the relationships between men and women to look at "all the possible factors involved in the experience of reality."¹⁷⁵ Benedict XVI highlights how, in particular, people ought to agree that there are things to "know" which cannot be captured by empirics,¹⁷⁶ and that many of life's most important decisions are made without full explication by empirical models.¹⁷⁷ The decision to love a person of the opposite sex is one of life's most important decisions. While empirical data can testify to its benefits, its full measure can only be grasped when it is understood in the context of the relationship to the meaning of all of life, presently and - for those so convinced - in the eternal future.

AVE MARIA LAW REVIEW

Copyright (c) 2009 Ave Maria Law Review

Ave Maria Law Review

End of Document

¹⁷⁵ Lorence Albacete, *God at the Ritz: Attraction to Infinity* 58 (2002).

¹⁷⁶ See James V. Schall, *The Regensburg Lecture* 114 (2007); Pope Benedict XVI, *Faith, Reason and the University: Memories and Reflections*, Address at the University of Regensburg (Sept. 12, 2006), reprinted in Schall, *supra*, at 130, 144-45.

¹⁷⁷ Albacete, *supra* note 175, at 6.