

## RELIGIOUS FREEDOM VERSUS SEXUAL EXPRESSION: A GUIDE

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### ABSTRACT

Claimed rights to sexual expression unlinked to the creation of children are among the strongest challenges facing the free exercise of religion in the United States today. Such rights gained importance by means of a series of Supreme Court opinions associating consensual sexual expression unlinked to children with human dignity and even personal identity. These were accompanied by legal and cultural movements, led by more privileged Americans, diminishing children's rights in favor of adults', in the context of sex, marriage, and parenting. Laws and regulations protecting and promoting sexual expression detached from children are powerfully affecting religious institutions that operate health care, educational, and social services available to all Americans; the Catholic Church is a particularly prominent supplier of all of these services. Respecting the Catholic Church, it is possible but quite difficult to maintain respect for its free exercise of religion in the current environment, potentially by highlighting its measurable contributions to the common good. It might also be useful to show the close link between Catholic teachings on sex and marriage and the entire Catholic cosmology, such that coercing Catholics to behave otherwise is tantamount to coercing them to practice a different faith.

**KEYWORDS:** free exercise, religion, sexual expression, nondiscrimination

### INTRODUCTION

Over the last several years, it has become impossible to ignore a series of pointed conflicts between two asserted rights, each described by their proponents as “human rights”: the free exercise of religion and the right to sexual expression under particular conditions.

The two most prominent claims for sexual expression both concern a right to perform consensual sexual acts unlinked from the creation of children. Both include demands for active support or recognition by others. But the claims are also different. One pertains to relations between an opposite-sex pair, attended by highly accessible contraception and legal abortion. The other pertains to sexual relations between a same-sex pair, accompanied by marriage recognition from the state, and mandatory cooperation from various private parties whose roles or businesses intersect with same-sex couples.

The laws and regulations mediating the clash are several. They include marriage recognition laws and health-care laws, as well as nondiscrimination laws affecting employment, housing, commercial businesses, government contracting, and health care. These laws may require religious actors to provide contraception or abortion insurance to employees, or insurance benefits equally to all those the state recognizes as “spouses,” whether same sexed or opposite sexed. They might require religious health-care providers or religious entities contracting with the state to furnish access

to contraception or sterilization or abortion, or to recognize their employees' same-sex marriages. They might take the form of the denial of licenses to charitable services that refuse to recognize same-sex marriage in their policies or services. Religious citizens working for the government (such as license clerks) might be required to cooperate with same-sex marriage. The law might also require venues owned by religious entities or businesses run by religious citizens to cooperate with housing, or celebrating the wedding of, a same-sex couple.

The clashes have a bitter character, both for religious believers and for those championing the sexual expression described above. For the former, this might be due to the coercive quality of the laws, which often compel believers affirmatively to violate their religion, under threat of large fines or even the loss of their businesses.

Furthermore, proponents are asserting rights grounded in the supreme law, the federal Constitution. Religious believers also suffer with the sense that some judges are imposing their own political and moral opinions upon them, under the rubric of "interpreting the Constitution," in decisions handed down with razor-thin majorities. Additionally, religious opponents of various sexual expression claims are frequently accused of operating largely on the basis of hateful animus against women or lesbian, gay, bisexual, or transgender (LGBT) citizens—a serious charge. Finally, the federal government has recently been arguing that government (not the believer) possesses the right to decide whether or not a state action burdens a citizen's religious exercise.<sup>1</sup> This confirms a sense of powerlessness among religious citizens.

Hurt is also deeply felt for those seeking rights respecting consensual or state-sanctioned sexual expression unlinked to children. On the part of a person who identifies as LGBT, another's refusal to recognize a state-recognized marriage is often interpreted as a rejection of his or her entire person, and an affront to dignity, equality, and social respectability.

On the part of a woman who wants to use contraception or emergency contraception in the context of consensual sexual intercourse with a man—and who believes in abortion as a second level measure—she might regard any refusal to provide it as an unjustified intrusion into her private decision making about her body, and her deeply personal choices respecting sex and parenting. She might understand the refusal as a part of a larger (and historical) pattern of men exercising authority over women's lives, concerning a domain in which women regularly assume the lion's share of the work or even suffering: pregnancy, labor, child care, abortion, and post-abortion distress. Furthermore, behind refusals to provide poor women access to government-subsidized abortions, some women see only a callous disregard for poor women's opportunities to finish school or obtain adequate employment.

How did this conflict arise between sexual expression and the free exercise of religion? And how might free exercise be preserved, in a manner that promotes sexual expression values both sides could esteem, even if it does not obtain religious cooperation with sexual expression claims religions reject? For reasons of length and significance, this essay treats these questions insofar as they affect one of the most prominent US religious actors caught in the conflict today, the Roman Catholic Church. My analysis proceeds as follows:

In part one, "The Rise of the Clash," I describe how certain forms of sexual expression achieved constitutional status and came to be identified with nothing less than a human being's "identity." I also treat briefly the dynamic whereby the value of sexual expression increased and the value of children decreased, thus diminishing the power of the "children's rights" argument relative to the power of the "adult identity" argument.

1 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2777–78 (2014).

In this section, I also briefly discuss the process by which Catholic individuals and institutions became frequent actors in arenas increasingly subject to laws and regulations concerning sexual expression detached from children.

In part two, “Religious Freedom, Inconvenient Truths, and Prophecy,” I consider how it might be possible to maintain respect for the free exercise of religion in the current environment. Because sexual expression claims provoke emotional reactions, are gaining political and cultural ground, and command support particularly among the economically and educationally privileged, this is a difficult—but not impossible—enterprise. For example, I suggest highlighting Catholicism’s contribution to the common good on the subjects of sex, parenting, and marriage. I also suggest finding the language to show how, for Catholics, sex and marriage are closely tied with an entire cosmology or world view, such that coercing Catholics to facilitate opposing practices is tantamount to coercing them to abandon their own religion and to practice another.

## THE RISE OF THE CLASH

### *Sexual Expression as a Human Right, or as Synonymous with Human Identity*

In the United States, before approximately the 1970s, the state took an interest in maintaining the links between sex, marriage, and children via laws restraining even consensual sexual expression; these included laws banning fornication, cohabitation, and adultery. These laws were enforced quite unevenly, if at all, while at the same time, judges did not hesitate to affirm the legitimacy of the state interests underlying them.<sup>2</sup>

Beginning in 1965, however, the US Supreme Court—according to its authority to ensure that state laws do not violate federal constitutional guarantees—crafted a new framework within which to consider claims respecting sexual expression: the right of privacy. At other times, the Court evaluated sexual expression claims under the framework of Equal Protection. In the 1965 *Griswold v. Connecticut* opinion, the Court held that the Constitution contains rights pertaining to sex not found in the text of the Constitution, but rather in the “penumbras and emanations” of various constitutional guarantees, necessary for assuring “ordered liberty,” and continuity with our national history.<sup>3</sup> It thereby discovered a “right of privacy” entitling a married couple to purchase and use contraception. The private nature of the marital relationship and the private locus of the marital bedroom were featured aspects of this privacy right.

In the course of *Griswold*, and later similar cases evaluating claims respecting sexual expression disconnected from children, the Supreme Court engaged in a discussion of the relationship between the claimed right before it, and human flourishing or freedom as a majority of the Court imagined it. This ongoing discussion in the Supreme Court opinions plays an important role in the eventual strength of certain sexual expression rights—a strength sufficient to challenge even a textual constitutional right to the free exercise of religion. Beginning that conversation, the *Griswold* majority wrote:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the

2 See Traci Shallbetter Stratton, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASHINGTON LAW REVIEW 767, 769 (1998); *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring).

3 *Griswold*, 381 U.S. at 484 (majority opinion).

degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>4</sup>

Seven years later, in *Eisenstadt v. Baird*,<sup>5</sup> the Court extended *Griswold*'s right of privacy to the right of *individuals* to use contraception without state interference. In *Eisenstadt*, the Court located this right more precisely within the 14th amendment's substantive Due Process guarantee. Wrote the Court,

Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>6</sup>

The *Eisenstadt* Court gave the right of privacy a different foundation than did *Griswold*. They grounded it not upon the interests of married couples or the privacy of the marital bedroom, but in the right of *individuals* to make *decisions* about very important matters touching their sexual lives (that is, "matters so fundamentally affecting a person")—matters such as whether or not to have a child—free from "unwarranted governmental intrusion." On its face the language granting constitutional status to decisions about matters "fundamentally affecting a person," could have far broader purchase. Many, many decisions can be said to fundamentally affect a person. Yet the Supreme Court has refused to extend the right of privacy to cover a right to kill oneself or to seek assistance with suicide; and lower federal courts have refused to extend it to polygamy.<sup>7</sup> And while the right of privacy has been interpreted to include the right to remain employed while pregnant or childrearing,<sup>8</sup> it is more frequently applied to protect acts connected with *not* bearing children, rather than acts directed to bearing them. For example all states that have considered the question, have refused to extend the right of privacy to protect a woman's desire to implant embryos created via assisted reproductive technologies, against the wishes of the objecting genetic father;<sup>9</sup> and arguments on behalf of granting marriage recognition to same sex pairs, rely heavily upon the right of privacy.<sup>10</sup>

*Eisenstadt* was also the beginning of the Supreme Court's explicitly referring to decision making about sex and childbearing as part of individuals' formation of identity. The *Eisenstadt* Court articulated this link when it wrote that decisions about sex and parenting were matters "fundamentally affecting a person" in his or her "intellectual and emotional makeup."<sup>11</sup>

One year after *Eisenstadt*, in *Roe v. Wade*<sup>12</sup> and *Doe v. Bolton*,<sup>13</sup> the Court extended the right of privacy to include the right to obtain a legal abortion. The Court permitted states to regulate or

4 *Id.* at 486.

5 405 U.S. 438 (1972).

6 *Id.* at 453.

7 *E.g.*, *Potter v. Murray City*, 760 F.2d 1065, 1066 (10th Cir. 1985); *Vacco v. Quill*, 521 U.S. 793, 797 (1997); *Washington v. Glucksberg*, 521 U.S. 702, 706 (1997).

8 *E.g.*, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 634 (1974).

9 See Darra L. Hoffman, *Momma's Baby, Daddy's Maybe*, 35 WILLIAM & MARY LAW REVIEW 461 (2009).

10 See, *e.g.*, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

11 405 U.S. at 453.

12 410 U.S. 113 (1973).

13 410 U.S. 179 (1973).

even proscribe abortion during the last trimester of pregnancy, except where the mother's life or "health" was at stake. The Court's definition of health, however, effectively permitted legal abortion during the entire course of pregnancy.<sup>14</sup> The portion of *Roe* describing the outcomes of refusing to recognize a right of abortion might be understood to tie a right to abortion to a woman's identity formation; the Court linked a woman's ability to "terminate her pregnancy" with her maintaining happiness, psychological health, social status, and financial position.<sup>15</sup>

The 1992 decision, *Planned Parenthood v. Casey*<sup>16</sup> made a decisive leap toward linking abortion with identity formation. The *Casey* Court wrote that abortion is a "response to the consequence of unplanned activity or to the failure of conventional birth control."<sup>17</sup> In the Court's view, in order to protect women's access to the "unplanned activity"—sexual intercourse—and also to protect their right of identity formation, women had to be able to avoid motherhood via access to legal abortion. Wrote the Court: for "two decades of economic and social developments," women have "organized intimate relationships and made choices that *define their views of themselves and their places in society*, in reliance on the availability of abortion in the event that contraception should fail."<sup>18</sup> Specifying further what it meant by the link between legal abortion and women's self-identity, the Court added: "The *ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.*"<sup>19</sup> Linking abortion rights even more robustly with self-definition, the Court wrote,

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the [f]ourteenth [a]mendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the [s]tate.<sup>20</sup>

To deny an abortion right, said *Casey*, was tantamount to the State "insist[ing] . . . upon its own vision of the woman's role"; with abortion, the very "destiny of the woman" was at stake and it "must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."<sup>21</sup> After citing the line of cases concerning rights to contraception, the Court wrote that both its contraception and abortion decisions are about a woman's very "liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it."<sup>22</sup> While *Casey*'s soaring language is certainly subject to varying interpretations, at the very least it can be said that it firmly linked women's ability to avoid child-rearing following sexual intercourse, with her interest in forming her personal identity.

Eleven years later, the Court again strongly affirmed the link between consensual sexual expression without the possibility of children, to the rights of identity formation, dignity, and personhood. In

<sup>14</sup> "[M]edical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

<sup>15</sup> 410 U.S. at 153.

<sup>16</sup> 505 U.S. 833 (1992).

<sup>17</sup> *Id.* at 856.

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> *Id.* (emphasis added).

<sup>20</sup> *Id.* at 851 (emphasis added).

<sup>21</sup> *Id.* at 852.

<sup>22</sup> *Id.* at 852–53.

*Lawrence v. Texas*,<sup>23</sup> the Court struck down Texas' criminal ban on homosexual sodomy, saying that, "individual decisions . . . concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause."<sup>24</sup> Citing *Casey*, the Court reasoned that this was because these sexual acts are a core aspect of a person's "defin[ing] one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>25</sup>

While the *Lawrence* majority specifically disclaimed in its opinion any intention to decide the constitutionality of same-sex marriage,<sup>26</sup> its language connecting consensual sex acts with a person's "defin[ing] [his or her] existence, [] meaning, universe, and the mystery of human life"<sup>27</sup> became a vital part of the chain of reasoning that later state and federal court cases used in order to conclude that same-sex marriage is or might be a federal constitutional privacy right.<sup>28</sup>

The *United States v. Windsor*<sup>29</sup> decision illustrates this. In striking down section three of the Defense of Marriage Act (DOMA)<sup>30</sup> the *Windsor* Court (albeit in *dicta* following its statement that marriage recognition is really a state law matter), federally defined marriage recognition as a state's "acknowledging . . . the intimate relationship between two people."<sup>31</sup> The majority opinion was also replete with language opining that giving marriage recognition to intimate pairs is a crucial aspect of acknowledging their "dignity" and their "personhood."<sup>32</sup>

Reasoning from this definition of marriage—and from the linkage between marriage recognition and personhood and identity—*Windsor* opined that forbidding marriage recognition to any sexually and emotionally intimate same-sex couple who desire it (as did DOMA, section three) can only be evidence of animus against LGBT persons. Animus is *de jure* irrational and therefore an unacceptable basis for law.<sup>33</sup>

There is one further line of reasoning that has led to the current practice of equating sexual expression (without children) and personal identity: the notion introduced by the *Lawrence* Court that disapproval of any consensual sexual act is equivalent to disapproval of the people who undertake it. Writing for the Court, Justice Kennedy stated: "When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination."<sup>34</sup> Justice Kennedy's opinion for the majority in *Windsor* stated the same connection: conduct equals identity, and denying identity denies personhood. The opinion accomplished this when it held that the DOMA's refusal to recognize same sex marriages—which he said were constituted by emotional and sexual feelings and *conduct*—could only flow from a "bare desire to harm" *people*.

The *Christian Legal Society* ["CLS"] *v. Martinez* decision,<sup>35</sup> citing *Lawrence*, did likewise. The CLS—unlike any prior student group at the University of California (Hastings College of

23 539 U.S. 558 (2003).

24 *Id.* at 577 (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

25 *Id.* at 574 (citing *Casey*, 505 U.S. at 851).

26 *Id.* at 578.

27 *Id.* at 574.

28 See Helen Alvaré, *Same-Sex Marriage and the "Reconceiving" of Children*, 64 CASE WESTERN RESERVE LAW REVIEW 829, 833 (2014).

29 133 S. Ct. 2675 (2013).

30 1 U.S.C. § 7 (2012).

31 133 S. Ct. at 2692.

32 *Id.* at 2681.

33 *Id.* at 2693.

34 539 U.S. at 575 (emphasis added).

35 561 U.S. 661 (2010).

Law)—was denied official recognition on the grounds that it would not allow into its leadership, people who rejected its core beliefs. While the CLS admitted “all comers” into membership, it denied leadership roles to those who violated Christian sexual teachings *and* who refused to feel repentance for them. The CLS contended that it was not excluding individuals from leadership in its law school chapter *because of sexual orientation* (an exclusion that would have violated university policy) but rather “on the basis of a conjunction of (immoral sexual) *conduct* as evaluated by Christian beliefs—(gay or straight) and the *belief* that the conduct is not wrong.”<sup>36</sup> The Supreme Court refused to draw the line between conduct and identity, however, saying, “Our decisions have declined to distinguish between status [sexual orientation identity] and conduct in this context,” citing *Lawrence*.<sup>37</sup>

There is one final aspect of the development of the law linking sexual expression with a person’s identity that plays an important role in the current clash between sexual expression rights and free exercise. It is the link between sexual expression and race or sex (male or female), as identity markers. This link is important given the strength of constitutional abhorrence of laws disadvantaging citizens on racial and sexual grounds. Laws discriminating on racial grounds attract the highest level of constitutional scrutiny; racially discriminatory behavior is roundly condemned and readily legislatively banned. Laws discriminating on the grounds of sex are also roundly condemned, even if they provoke only an intermediate rather than heightened level of constitutional scrutiny. Plaintiffs seeking recognition of same-sex marriage constantly reference the Supreme Court’s decision striking down a law in *Loving v. Virginia*, which banned the intermarriage of black and white Americans; they directly and regularly analogize race to sexual identity.<sup>38</sup>

Similarly, sex discrimination law has played a role in developing the link between sexual expression and personal identity. Judges identify mothering as the practical and political factor by which women as a sex are marginalized; but contraception and abortion can prevent mothering. This obviously played an important role in the *Casey* decision wherein the Court reasoned that women depend upon abortion to avoid “role” limitations and thereby achieve social and economic status. A similar argument appears regularly in the federal government’s briefs defending the “contraceptive mandate,” the US Department of Health and Human Services (HHS) regulation mandating employers to provide insurance coverage of birth control and emergency contraceptives as “preventive health care” for women, without a co-pay.<sup>39</sup> Again and again in its federal court brief, HHS argues plainly that women’s social and economic equality directly depends upon free contraception and emergency contraception.<sup>40</sup>

While Supreme Court decisions are an important aspect of US culture, there are, of course, many other factors promoting the linkage between sexual expression, personal identity, and human rights. These cannot be adequately treated in one article, but ought to be noted. Speaking quite generally, they include, first, a heightened role for the importance that sexual intercourse plays respecting human happiness. See, for example, the ideas promulgated by Sigmund Freud and his disciple Wilhelm Reich, who coined the phrase “the sexual revolution.” Reich wrote in 1936: “Sexuality . . . is *the* productive vital energy. The core of life’s happiness is sexual happiness.”<sup>41</sup> There is also the

36 *Id.* at 689.

37 *Id.*

38 388 U.S. 1 (1967).

39 Brief for the Petitioners at 3, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

40 *Id.* at 15.

41 WILHELM REICH, *DIE SEXUELLE REVOLUTION* 18–19, 22 (Theodore P. Wolfe, trans., 15th ed., 1999).

work of Alfred Kinsey linking sexual behavior to human happiness in a foundational way.<sup>42</sup> Second, there is the literature assuring women that sex, free of the risk of pregnancy, would greatly increase women's and couples' happiness. The works of Margaret Sanger, Simone de Beauvoir and Betty Friedan are particularly important here. Margaret Sanger, for example, wrote that marriage with birth control would make a husband for his wife "a veritable god—worthy of her profoundest worship . . . . Through sex mankind may attain the great spiritual illumination which will transform the world, which will light up the holy path to an earthly paradise."<sup>43</sup> Betty Friedan's *The Feminine Mystique*<sup>44</sup> and Simone de Beauvoir's *The Second Sex*<sup>45</sup> predicted similar transformations of male/female relations.

Third and finally, there is the matter of the reduced valuation of children. This is much too large a subject to explore here fully, but several factors might be highlighted. This appraisal is related to the rise of the notion that children are an opportunity cost to women, relative to the increasingly valued rewards of work outside the home. It is exacerbated by the continued unwillingness of both public and private leaders to establish schemes whereby women can fulfill (with anything approaching equanimity) their interests and responsibilities both at home and at work. It is also undoubtedly related to the disappearing role of the home as a place of "production" (wherein children played a role) versus consumption. Finally, as more and more children are born outside of marriage in the last 50 years, and become, with their mothers, the most likely candidates for social welfare assistance in the United States, there is a rising tendency to view children as "costs." This underlies the messaging of the leading abortion and contraception promoters to the effect that cheap or free contraception and abortion achieve high cost savings compared to live births.<sup>46</sup>

The dynamic whereby children diminished in value while sexual activity as identity forming increased in value, complemented and encouraged public policies supporting sexual expression without children. It is easy to see how this would eventually conflict with Catholic teachings and practices. The latter strongly affirm the good of sexual relations for the happiness and union of the married couple, but also remember and value at all times, the unique power of sexual relations to bring new human life into being.<sup>47</sup> Because the Catholic Church—by theological inclination and practical activity—is also so present in the world in the form of charitable services, employment, education, and health care—there was bound to arise a conflict between Catholic activity and public policies. It is to this we now turn.

42 ALFRED KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); ALFRED KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953). Kinsey's influence continues to be felt, despite robust criticism of his methods and his conclusions. See, e.g., Alan Branch, *Alfred Kinsey: A Brief Summary and Critique*, CANON & CULTURE (May 21, 2014), <http://www.canonandculture.com/alfred-kinsey-a-brief-summary-and-critique/>; Geoffrey Gorer, *A Statistical Study of Sex, Review of Sexual Behavior in the Human Male*, by Alfred C. Kinsey, Wardell B. Pomeroy, and Clyde E. Martin, NEW YORK HERALD TRIBUNE, Feb. 1, 1948, at 4.

43 MARGARET SANGER, *HAPPINESS IN MARRIAGE* 121, 126, 271 (1940).

44 BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 86 (1963).

45 SIMONE DE BEAUVOIR, *THE SECOND SEX* 724–31 (H. M. Parshley ed. & trans., 1952).

46 See, e.g., *In Brief: Fact Sheet: Publicly Funded Family Planning Services in the United States*, GUTTMACHER INSTITUTE (Oct. 2014), [http://www.guttmacher.org/pubs/fb\\_contraceptive\\_serv.html](http://www.guttmacher.org/pubs/fb_contraceptive_serv.html) ("In other words, in 2010, every \$1.00 invested in publicly funded family planning services saved \$7.09 in Medicaid and other public expenditures that otherwise would have been needed.")

47 CATHOLIC CHURCH, *CATECHISM OF THE CATHOLIC CHURCH* ¶¶ 2360–63 (Libreria Editrice Vaticana 1994).



### *Rising Religious Activity Meets Rising Government Regulation*

The rise of sexual expression without childbearing as a legal value was brought to bear upon the Catholic Church in the United States. How that happened is a story of the rise of Catholic participation in activities and entities regulated by laws that became increasingly inclined to insist upon the value of sexual expression free of children.

#### The Growth of Catholic Institutions

The formation of social welfare organizations might be said to be a part of “Catholic DNA.” Such enterprises arise in every country Catholics populate around the world. Since their arrival in the United States, Catholics have founded and nurtured thousands of educational, health-care, and social-service organizations for the poor, the orphaned, the immigrant, and the disabled, to highlight just a few.

For example, between 1884 and 1915, the number of Catholic hospitals in the United States tripled from 200 to almost 600.<sup>48</sup> By 1936, the 675 nation’s Catholic hospitals represented 13.8 percent of all hospitals in the United States.<sup>49</sup> The number of Catholic hospitals reached a peak of 800 in 1965, but it is still significant today at 549, serving 88.8 million Americans.<sup>50</sup>

Catholic education has also grown rapidly in the United States since the early twentieth century. By the mid-1960s, there were 13,000 Catholic K-12 school systems enrolling more than 5 million children—approximately 12 percent of all US students.<sup>51</sup> Today, there are 1.4 million children in 5,400 Catholic elementary schools, and 583,000 in 1200 Catholic high schools.<sup>52</sup> There are also approximately 200 Catholic universities in the United States.<sup>53</sup>

Regarding Catholic Charities—the umbrella name for hundreds of local Catholic charitable organizations present in every state in the Union—today they provide services annually for approximately 10 million Americans.<sup>54</sup> Considering just a few types of those services: by 2011, Catholic Charities agencies were serving nearly 35,000 adoption clients annually.<sup>55</sup> There are 113 Catholic residential homes for children annually assisting 20,894 young people.<sup>56</sup>

Services to migrants and refugees are among the most common services the Catholic Church provides in the United States. The church serves about 30 percent of the 50 to 75,000 refugees

48 *Our History*, CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, <http://www.chausa.org/about/about/our-history> (last visited April 11, 2015).

49 U.S. CENSUS BUREAU, 2 RELIGIOUS BODIES 1936, at 1533 (1936).

50 *Frequently Requested Church Statistics*, CENTER FOR APPLIED RESEARCH IN THE APOSTOLATE, <http://cara.georgetown.edu/CARAServices/requestedchurchstats.html> (last visited April 11, 2015).

51 Andy Smarick, *Can Catholic Schools Be Saved?*, NATIONAL AFFAIRS, Spring 2011, at 113–30, available at <http://www.nationalaffairs.com/publications/detail/can-catholic-schools-be-saved>.

52 *Frequently Requested Church Statistics*, *supra* note 50.

53 *Catholic Colleges and Universities in the United States*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/higher-education/catholic-colleges-and-universities-in-the-united-states.cfm> (last visited April 11, 2015).

54 Catholic Charities, USA, Fiscal Year 2014 Form 990, Questions 4a–4c, <http://www.scribd.com/doc/261483129/Fy2014-Form-990-Ccusa>.

55 Sarah Torre & Ryan Anderson, *Adoption, Foster Care, and Conscience Protection*, THE HERITAGE FOUNDATION (Jan. 15, 2014), [http://www.heritage.org/research/reports/2014/01/adoption-foster-care-and-conscience-protection#\\_ftn15](http://www.heritage.org/research/reports/2014/01/adoption-foster-care-and-conscience-protection#_ftn15).

56 *Catholic Healthcare and Social Services*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (2014), <http://www.usccb.org/about/media-relations/statistics/health-care-social-service.cfm>

who enter the United States each year, offering processing and resettlement services, as well as services for unaccompanied children and victims of human trafficking.<sup>57</sup>

Finally, respecting Catholic participation in the commercial life of the United States, it is worth noting that the Catholic population in the United States has grown 75 percent over the last 40 years and represents approximately 25 percent of the total population.<sup>58</sup> Catholics are therefore likely to be well represented in all social sectors affected by laws regulating employers, health care, marriage recognition, and commercial services—the areas of the law most affected by lawmaking supporting sexual expression without children.

During the same time that Catholic involvement across many sectors has remained large or has grown, there has occurred a growth in laws and agency regulations both affecting many of these sectors and incorporating standards regarding sexual expression. These laws and regulation proceed under the appealing banners of nondiscrimination, freedom, dignity, and equality, thus casting an immediate shadow upon efforts to obtain exemptions from them.

Earlier laws in this period, like the Civil Rights Act of 1964, did not cover sexual expression as a protected category, but rather forbade discrimination on the grounds of race, color, religion, national origin, and sex, with respect to providing public accommodations, public facilities and education, and federally assisted programs.<sup>59</sup> The 1968 Fair Housing Act forbade discrimination respecting sale or rental of housing, on the basis of race, color, religion, sex, familial status, or national origin.<sup>60</sup> There, “familial status” referred to the presence or absence of minor children.<sup>61</sup>

While these were federal laws, they reached private and local activity via federal powers over interstate commerce and over federal spending. They applied, therefore, to various Catholic charitable projects receiving substantial federal grants. As reported on USASpending.gov, the United States Conference of Catholic Bishops’ (USCCB) Migration and Refugee Services, for example, recently has received grants ranging from several hundred thousand dollars, to twenty three million dollars, several times per year, for programs providing resettlement, legal assistance, health care, and even marriage strengthening.<sup>62</sup> Catholic Charities USA with 70,000 employees assisting nearly 10 million Americans annually,<sup>63</sup> received federal grants between 2008 and 2010 annually totaling at least 440 to 550 million dollars.<sup>64</sup>

57 See Migration and Refugee Services, *Those We Serve*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, <http://usccb.org/about/migration-and-refugee-services/those-we-serve.cfm>.

58 Center for Applied Research in the Apostolate, *Pies, Damned Pies and Statistics: Is the Catholic Population Growing?*, NINETEEN SIXTY-FOUR (Mar. 10, 2008, 11:10 AM), <http://nineteensixty-four.blogspot.com/2010/11/pies-damned-pies-and-statistics-is.html>.

59 Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

60 Fair Housing Act of 1968, Pub. L. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601-19, 3631 (2013)).

61 U.S. Department of Housing and Urban Development, *Fair Housing: It's Your Right*, HUD.GOV, [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/FHLaws/yourrights](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/yourrights) (last visited April 11, 2015).

62 Data is available by searching USASpending.gov. A report on grants to both USCCB and Catholic Charities USA for 2003-2014 was compiled by the author and is on file with the journal. See also *Federal Government Grants to Support USCCB MRS Programs and Services*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/about/migration-and-refugee-services/federal-government-grants-to-support-usccb-mrs-programs-and-services.cfm> (last visited April 11, 2015).

63 *About Us*, CATHOLIC CHARITIES USA, <http://catholiccharitiesusa.org/about-us/> (last visited April 11, 2015).

64 Tom Gallagher, *Following the Money from the White House*, NATIONAL CATHOLIC REPORTER, March 22, 2012, available at <http://ncronline.org/blogs/ncr-today/following-money-white-house>.

The protection of sexual expression separated from children has more recently become a condition of federal and state partnerships with private entities, including religious entities; at the same time, governments have become less inclined to account for the conscientious objections of potential religious grantees. For example, although prior to 2011, the USCCB was a federal grantee in connection with protecting victims of trafficking and violence, in 2011 HHS issued a regulation expressing a preference for grantees providing access to contraception and abortion. The USCCB thereby lost its contracts, which were given instead to groups that government evaluators deemed less competent or even “noncompetitive” as compared with the superior ratings given the USCCB.<sup>65</sup> In 2014, President Obama issued an executive order adding “sexual orientation” and “gender identity” to existing categories of protected nondiscrimination (race, color, religion, sex, national origin) with respect to certain federal contractors and subcontractors.<sup>66</sup> By its terms this order did not affect religious organizations receiving grants (versus contracts) from the government (though these groups might well be protected under the terms of a prior memo from the federal government), but it also failed to include a religious exemption protecting religious contractors.<sup>67</sup>

Some states, cities, and other local governments, had earlier extended the reach of nondiscrimination laws in their own jurisdictions by enacting statutes containing the protected categories of “sexual orientation” and “gender identity.” They also sometimes added categories like “marital status,” which could protect not only single persons but also cohabitants and same-sex couples. Landowners who did not wish to rent their property to cohabiting couples, therefore, were sometimes forced to choose between abandoning their conscience and going out of business.<sup>68</sup>

Judges also participated in extending the reach of nondiscrimination guarantees by interpreting protected categories so as to cover situations or persons not likely contemplated by the law’s drafters. For example, the category of “disability” was interpreted to cover discrimination against a person who self-identified as gay, because the source of the discrimination might be the belief that gay people have AIDS.<sup>69</sup> Likewise, a refusal to insure for birth control or sterilization (see the Equal Employment Opportunity Commission decision re Catholic College<sup>70</sup>) was labeled “sex discrimination” because women disproportionately buy birth control, even though the policy denied coverage to both men and women. Finally, several courts have concluded that a refusal to recognize same-sex marriage is a form of “sex discrimination”—because marriage recognition depends upon the sex of the second spouse—although the ban on marrying a person of the same sex might also be understood to be based upon a notion of marriage as opposite sexed, and therefore apply equally to both men and women.<sup>71</sup>

Health care and related insurance law also brought the government’s sexual expression values to bear upon Catholic entities. The clashes are generally of three kinds: the first are rules setting an acceptable standard of health care for women, applicable to a facility in some way under the

65 ADMINISTRATION FOR CHILDREN & FAMILIES, DEPARTMENT OF HEALTH AND HUMAN SERVICES, NATIONAL HUMAN TRAFFICKING VICTIM ASSISTANCE PROGRAM 6 (2011), available at [http://www.acf.hhs.gov/grants/open/foa/view/HHS-2011-ACF-ORR-ZV-0148\\_0.htm](http://www.acf.hhs.gov/grants/open/foa/view/HHS-2011-ACF-ORR-ZV-0148_0.htm).

66 Exec. Order No. 13672, 79 Fed. Reg. 42971 (2014).

67 Ruth Moon, *New Executive Orders on LGBT Discrimination Don't Exempt Religious Orgs*, CHRISTIANITY TODAY (July 2014), <http://www.christianitytoday.com/ct/2014/july-web-only/obama-executive-orders-sexual-orientation-discrimination.html>.

68 See, e.g., Swanner v. Anchorage Equal Rights Commission, 874 P.2d 274 (Alaska 1994).

69 See, e.g., Baxter v. City of Belleville, 720 F. Supp. 720, 728 (S.D. Ill. 1989).

70 Letter from Reuben Daniels, Jr., District Director, Equal Employment Opportunity Commission, to Belmont Abbey College (July 30, 2009).

71 See, e.g., State of Missouri v. Florida, No. 1422-CC09027, 2014 WL 5654040 (Mo. Cir. Ct. Nov. 5, 2014).

control of federal or state regulators. This has occurred, for example, in connection with laws mandating provision of “morning after contraception” for rape victims, without making an exception for religious hospitals who need first to determine if the drug might be acting as an abortifacient (versus a contraceptive) in a particular woman.<sup>72</sup>

The second are requirements for coverage of particular services in health insurance policies under the control of federal or state regulators. The most prominent example is the 2012 HHS mandate requiring certain employers (including many religious institutions), to insure employees and their children for contraceptives and emergency contraceptives without any co-pay.<sup>73</sup> There is also a new state agency mandate in California requiring health insurance companies to “remove discriminatory coverage exclusions” from their policies, to wit: they must remove exclusions for “elective” or “medically necessary” abortions, among others.<sup>74</sup>

The third clash follows state recognition of marriage (and previously “civil unions”) for same-sex couples. This change has brought governments and Catholic individuals and institutions into conflict in ways that cut across all the categories of laws noted above. For example, Catholic employers who provide insurance to employees’ families can be required to extend coverage to persons that their religion forbids them from recognizing as a “spouse.” Under antidiscrimination provisions (respecting marital status or sexual orientation), there might arise conflicts regarding housing, the availability of commercial services associated with weddings,<sup>75</sup> and the willingness of religious clerks and judges to participate in marriage ceremonies. Officials have refused to license social services like adoption agencies, which will not cooperate with a new understanding of marriage.

Catholic institutions’ employment decisions might also be affected by same-sex marriage recognition. While Catholic schools, for example, would employ an LGBT individual, a school is likely to enforce respecting an employee who is a spouse in a state-recognized same-sex marriage, the same contract provisions applied to divorced and remarried spouses, or to employees living in a known cohabitation: adherence to Catholic teachings on marriage. A refusal to recognize religious free exercise respecting marriage, therefore, would interfere with Catholic institutions’ choice of employees.

As the language of human rights has become more and more attached to sexual expression disconnected from children, it becomes harder for observers to find a way to preserve room for religious freedom. By its nature, the assertion of “human rights” will tend to shut down nuanced conversation. More than a few scholars and leaders have noted a general “creep” of the language of “human rights,” especially beyond what world leaders affirmed since 1948 in the still-revered Universal Declaration of Human Rights. This has been the subject of a noted book by Professor

72 See, e.g., ARKANSAS CODE ANNOTATED, I § 20-13-1403 (West 2009); CONNECTICUT GENERAL STATUTES § 19a-112e (2009).

73 See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147).

74 Letter from Michelle Rouillard, Director, California Department of Managed Health Care, to Mark Morgan, California President, Anthem Blue Cross (Aug. 22, 2014) (on file with author).

75 See, e.g., George Rede, *Sweet Cakes by Melissa Discriminated against Lesbian Couple*, *Oregon Hearings Officer Rules*, OREGONIAN, Feb. 2, 2015, available at [http://www.oregonlive.com/business/index.ssf/2015/02/sweet\\_cakes\\_by\\_melissa\\_discrim.html](http://www.oregonlive.com/business/index.ssf/2015/02/sweet_cakes_by_melissa_discrim.html) (reporting on baker fined for refusing to provide wedding cake for two lesbian women); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), cert. denied 134 S. Ct. 1787 (2014) (holding that photographer’s refusal to attend and photograph same-sex wedding ceremony was unlawful discrimination based on sexual orientation).

Mary Ann Glendon,<sup>76</sup> and was also raised in the document prepared for the recent Synod on the Family convened by Pope Francis: “Generally speaking, the notion of ‘human rights’ is also seen as highly subjective and a call for a person to self-determination, a process which is no longer grounded in the idea of the natural law.”<sup>77</sup>

How might this intersection between a rising number of government regulations favoring sexual expression without childbearing and Catholic religious freedom be moderated?

### RELIGIOUS FREEDOM, INCONVENIENT TRUTHS, AND PROPHECY

It is not difficult to make an attractive case for preserving religious freedom in the United States. Certain broad themes are appealing on their face, particularly within US culture. Religious citizens might, for example, speak of the natural centrality of the human freedom to seek ultimate meaning in life and to order one’s life in integrity with this. It is also not difficult to point out that if people are discouraged from seeking and living according to the ultimate meaning they discover, it is inevitable that some worldly source will assume the authority to supply final truths. Practically speaking, this authority will only too easily be assumed by the reigning government or the most privileged segments of society. These possibilities might be intrinsically disturbing to many people—or even felt to be contrary to the American experiment.

While religious freedom has its natural appeal, however, there remains a difference of opinion regarding whether it should survive a contest with sexual expression. Some citizens and lawmakers will perceive as *prima facie* problematic any demand for religious freedom in the context of laws affecting long-oppressed groups, even if those laws might fairly be described as valorizing sexual expression disconnected from children, more than recognizing the dignity of members of oppressed groups. Yet others will reject the underlying premises of sexual expression claims: that human beings *are* their sexual inclinations, and/or that it is wise to efface the weight of sex and the good of children.

In the presence of such uncertainty about the calculus between sexual expression and religious freedom—and because the case for sexual expression is intensifying legally and culturally today—something more is needed. I propose a case for religious freedom that is tied to an open and credible conversation about sexual expression. What follows is such an argument, in two parts. First, it claims that the Roman Catholic position on sexual expression is so intrinsic an aspect of Catholic cosmology—so vital a part of the central Catholic commitment—that forcing Catholics to cooperate with laws supporting sexual expression separated entirely from procreation, would work a tremendous hardship upon the practice of the Catholic faith. The Catholic stance on sexual expression is also an intrinsically positive argument, without *ad hominem* elements, and with positive fruit.

Second, it treats the possibility that there are beneficial social functions of preserving Catholic witness on sexual expression, and that even traditional supporters of sexual expression without children can recognize these. This section also suggests that it is unlikely that the first point alone would suffice to secure religious freedom; conversation about the second is likely required.

76 MARY ANN GLENDON, RIGHTS TALK (1991).

77 SYNOD OF BISHOPS, INSTRUMENTUM LABORIS ¶ 23 (2014).

### *Sex, Marriage and the Catholic Cosmology*

There is strong connection between Catholic teachings on sexual expression and Catholic identity overall. This is because Catholics' beliefs and practices about sex, marriage, and parenting are inextricably tied to their understanding of nothing less than the identity of God, God's relationship with his people, and the meaning of human life as love, according to the model of Jesus Christ. This is regularly invisible in discussions about Catholic opposition to legal recognition of same-sex marriage, or cooperation with contraception and abortion mandates.<sup>78</sup> Compared to the deep well of Catholic theology treating each of these teachings, each is treated quite briefly below.

#### Marriage as Glimpse of the Person of God

Catholics believe that marriage is intended to offer a glimpse of God's self as Trinity—Father, Son, and Holy Spirit—wherein three persons are united in an interpenetrating unity of endless love, and the Father and the Son send forth the Holy Spirit. This is reflected in the marital union of the man and the woman, and the fact that this union is the unique locus of new human life. In the words of the highest doctrinal body of the universal Catholic Church, the Congregation for the Doctrine of the Faith (CDF), the “complementarity of the sexes . . . reflects the inner unity of the Creator.”<sup>79</sup> The CDF has also opined that “the image and likeness’ of God constitutes the immutable *basis of all Christian anthropology*.”<sup>80</sup> By “Christian anthropology” the church means a Christian's understanding of the human person in light of God, that is, humans' origins, divine likeness, structure, purpose, destiny, and relations with God and with other persons. This is true of all persons in human history, not just those who understood themselves to be Christian.

Catholics, then, are called to live in loving communion, like God. John Paul II's Apostolic Letter on Women (*Mulieris Dignitatem*) teaches that marriage is the first and fundamental dimension of this call.<sup>81</sup> His *The Role of the Christian Family in the Modern World* (*Familiaris Consortio*), explains this further. There he writes that men's and women's complementarity “on all levels,” the “body . . . character . . . heart . . . intelligence and will . . . soul”<sup>82</sup> result in their forming a “communion . . . rooted in the natural bonds of flesh and blood,”<sup>83</sup> which communion images the Trinitarian God.<sup>84</sup>

God's creative power is also “imaged” in the man and the woman together. The Catechism states that “the union of male and female imitates God's fecundity.”<sup>85</sup> Children are the “living testimony of the full, reciprocal self-giving of the spouses.”<sup>86</sup>

78 See *Genesis* 19:5–8; *Leviticus* 18:22–23; *Leviticus* 20:13; 1 *Timothy*. 1:9–10; *Romans* 1:26–27.

79 CONGREGATION FOR THE DOCTRINE OF THE FAITH, LETTER TO THE BISHOPS OF THE CATHOLIC CHURCH ON THE PASTORAL CARE OF HOMOSEXUAL PERSONS ¶ 6 (1986).

80 CONGREGATION FOR THE DOCTRINE OF THE FAITH, ON THE COLLABORATION OF MEN AND WOMEN, IN THE CHURCH AND IN THE WORLD 5 (2004) (citing JOHN PAUL II, APOSTOLIC LETTER MULIERIS DIGNITATEM [On the Dignity of Women] ¶6 (August 15, 1988)).

81 JOHN PAUL II, MULIERIS DIGNITATEM [On the Dignity of Women] ¶ 7 (1988).

82 JOHN PAUL II, FAMILIARIS CONSORTIO [On the Role of the Christian Family in the Modern World] ¶ 19 (1981).

83 *Id.* at ¶ 21.

84 *Id.* at ¶ 19. (“But in the Lord Christ God takes up this human need . . . leading it to perfection through the sacrament of matrimony: the Holy Spirit who is poured out in the sacramental celebration offers Christian couples the gift of a new communion of love that is the living and real image of that unique unity which makes of the Church the indivisible Mystical Body of the Lord Jesus.”).

85 CATECHISM, *supra* note 47, at ¶ 2335.

86 FAMILIARIS CONSORTIO, *supra* note 82, at ¶ 28.

A second aspect of this first doctrinal point—about human marriage imaging the person of God—is Catholic teaching about how human marriage images in particular the identity and message of Jesus Christ, the Son of God, in his act of his handing himself over for the other. In his first encyclical letter, *Deus Caritas Est* (God is Love), Pope Benedict XVI speaks of the “pierced side of Christ” as the place “from [which] . . . our definition of love must begin. In this contemplation the Christian discovers the path along which his life and love must move.”<sup>87</sup> Jesus’s “act of self-oblation” “realize[s] the ‘imagery of marriage between God and Israel’ in a way previously inconceivable.”<sup>88</sup> Now “marriage” also images union with God in the form of sharing in Jesus’ mode of self-gift.<sup>89</sup> Expounding upon this, in his *Letter to Families*, Pope John Paul II wrote that “the *most important dimension* of the civilization of love,” the “radical” understanding of the human person, who, like Jesus, “‘finds himself’ by making a sincere gift of self.”<sup>90</sup> Human consent to complete and indissoluble human communion in marriage is therefore “based on a foundation” that, if removed, “would make incomprehensible the very work of salvation.”<sup>91</sup> In *Love and Responsibility*, citing the Gospel of Matthew (“He who would save his soul shall lose it; and he would lose his soul for my sake shall find it again” (*Matthew* 10:39)) John Paul II wrote further that spouses’ “surrender to one another in the one-flesh sexual union, is a form of imitation of the love of Christ: losing oneself to find oneself.”<sup>92</sup>

#### Marriage as Humanity’s Glimpse of God’s Relationship with Human Beings

The Catholic Church also teaches that marriage is an irreplaceable way of understanding how God loves us and we are to love God.

The Catechism and an apostolic exhortation of John Paul II, *Familiaris Consortio*, hold marriage to be indispensable for understanding the way in which God loves his people. The Catechism states that opposite-sex marriage “becomes an image of the absolute and unfailing love with which God loves man,”<sup>93</sup> the “image and sign of the covenant which unites God and His people.”<sup>94</sup> Both point to the marital analogies and language that feature prominently in both the Old Testament descriptions of the covenant between God and Israel, and in New Testament passages about God and the church. God’s relationship with Israel is captured in the language of fidelity, adultery, love, and betrayal.<sup>95</sup> In the New Testament, reflecting on the unity of man and woman at the moment of the world’s creation, the Apostle Paul exclaims, “this mystery is a profound one, and I am saying that it refers to Christ and the Church” (*Ephesians* 5:32). The very last book of the New Testament, the Book of Revelation, refers often to the “bride” of God, the “new Jerusalem,” (3:12; 21:2, 9–10) and the “marriage” of the Lamb (19:7), referring to the relationship between God and his people.

87 POPE BENEDICT XVI, *DEUS CARITAS EST* [God is Love] ¶ 12 (2005).

88 *Id.* at ¶ 13.

89 *Id.*

90 JOHN PAUL II, *GRATISSIMAM SANE* [LETTER TO FAMILIES] ¶ 14 (1994).

91 *Id.* at ¶ 3.

92 KAROL WOJTYLA, *LOVE AND RESPONSIBILITY* 97 (1960).

93 CATECHISM, *supra* note 47, at ¶ 1604.

94 *FAMILIARIS CONSORTIO*, *supra* note 82, at ¶ 12.

95 CATECHISM, *supra* note 47 at ¶¶ 1611–12.

## Marriage, as Instructions for How to Love One Another

Catholic teaching also states that marriage is the template for the command that human beings love one another. The CDF wrote in 1986 that “[men and women’s] capacity to love a person other than themselves—a reflection and image of God who is Love, an indication of the meaning and purpose of human life *not just in marriage, but in all human interactions* . . . is disclosed in the spousal character of the body, in which the masculinity or femininity of the person is expressed.”<sup>96</sup> In 2004, the CDF continued: “The human dimension of sexuality is inseparable from the theological dimension. The human creature, in its unity of soul and body, is characterized therefore, from the very beginning, by the relationship with the other-beyond-the-self.”<sup>97</sup> Benedict XVI’s first encyclical, *Deus Caritas Est* (God is Love) articulates in definitive language the relationship between the meaning of marriage and the norm of love: “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.”<sup>98</sup> In other words, Catholics understand sexual difference, and sexual complementarity, as pointing toward the meaning and purpose of life itself. This meaning is to love one another. Phrased differently, sexually differentiated, complementary marriage is not only a sign of human persons’ essentially relational nature, but the norm of all relationships, which is love. Marriage is simply the “primordial” expression,<sup>99</sup> the symbolically and physically and temporally complete (such as “one-flesh,” and “until death do us part”) expression, and the most evidently fruitful expression, of the norm of love. It embodies the “ethos” that must characterize the life of Christians.<sup>100</sup>

## Communicable? Persuasive?

Catholics have not communicated the above teachings about marriage in a way that is sufficiently visible or accessible to lawmakers or the public. It would be difficult to do so. Still, because of its ancient pedigree and recent affirmation, this set of teachings might have greater purchase in a courtroom where judges considering a free exercise claim are scrutinizing the clarity and sincerity of Catholic teachings about marriage—either under the Constitution or the Religious Freedom Restoration Act.<sup>101</sup> Yet even if it is spoken in a way that is more accessible and theologically intact, it is still difficult to imagine that it could alone make a significant impression on the conflict between sexual expression and religious freedom as this conflict is playing out in legislatures and the public square. Supporters of sexual expression do not sense that they currently need to dialogue with religious believers. In the telling words of same-sex marriage activist and Obama administration official Chai Feldblum, “The most pressing question for LGBT people probably is not ‘How can

96 ON THE COLLABORATION OF MEN AND WOMEN, *supra* note 80, at ¶ 8.

97 *Id.*

98 DEUS CARITAS EST, *supra* note 82, at 11.

99 John Paul II, General Audience of Oct. 20, 1982, available at <http://www.ewtn.com/library/papaldoc/jp2tb98.htm> (“Marriage was also a part of this integral heritage—as can be deduced from the Letter to the Ephesians 5:21–33—marriage, that is, as a primordial sacrament instituted from the beginning and linked with the sacrament of creation in its globality. The sacramentality of marriage is not merely a *model and figure* of the sacrament of the Church (of Christ and of the Church). It also constitutes an *essential part* of the new heritage, that of the sacrament of redemption, with which the Church is endowed in Christ.”).

100 *Id.*

101 Pub. L. No. 103–141, 107 Stat. 1488 (1993) (codified in scattered sections of 5 and 42 U.S.C.).



we be sure that we are adequately considering and taking into account the beliefs of those who believe we are immoral and sinful?”<sup>102</sup>

This is not to deny that non-Catholic citizens and legislators could grasp what the Catholic Church teaches about the relationship between marriage and learning how better to love God and one another. Modern psychology and sociology increasingly appreciate the links between sexual restraint, marriage, marital parenting, and the development of virtues conducive to selfless love and sustaining commitments. On the other hand, it is also true that Catholics do not effectively discuss these links creatively or often outside of Catholic enclaves.<sup>103</sup> Furthermore, the social understanding of marriage is so diluted that even if Catholic teaching was better stated, its propositions about the widespread consequences of adopting one or another meaning of marriage might fall on deaf ears. Observers of no-fault divorce, cohabitation, nonmarital parenting, assisted reproduction, and now same-sex marriage cannot be blamed for thinking of marriage today as representing something other than permanent, unconditional love, open to new life.

It is also true that supporters of sexual expression are not likely to support free exercise strictly on the grounds that a particular religion's belief about marriage is “core.” Yet they might also reflect on the fact that there is nothing “disqualifying” from a human rights perspective about the marriage beliefs upon which Catholics seek to order their lives. These beliefs hold up the goods of permanent, self-sacrificial, and loving relations, ordered to unity, harmony, and the service of new life. These are human values all can admire. They are intrinsically positive.

Closely related, when Catholic teaching speaks disapprovingly about sexual practices that do not share in the unique goods of the male-female marriage union, it takes tremendous care to speak positively about the persons involved with these practices, whether, for example, these are single mothers or individuals who identify as lesbian, gay, bisexual, or transgender.

Finally—and the subject of the next section—when the above-described Catholic teachings are applied to realities in the world, their “good fruits” are apparent. It is likely, in fact, that in order to make a better case for preserving the free exercise of religion in the presence of rights to sexual expression without children, any argument about the good of free exercise *in se*, should be paired with a factual consideration of what the particular religious tradition brings to the table on matters of mutual concern—here sexual expression. The following discussion treats that question.

### *Inconvenient Truths: Beneficial Social Functions of the Catholic Witness on Sexual Expression*

The Catholic Church has contributed an ethical voice to public discourse about sexual expression, bringing information to the table and taking positions preserving values and rights for vulnerable people, which rights and values are honored often in theory, but less often in fact.

102 Chai Feldblum, *Moral Conflict and Conflicting Liberties*, in *SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 26 (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Fretwell Wilson, eds., 2008).

103 There are more than a few books accessed largely by Catholics, treating such subjects, *see, e.g.*, ERIKA BACHIOCHI, *WOMEN, SEX AND THE CHURCH* (2011); HELEN M. ALVARÉ, *BREAKING THROUGH: CATHOLIC WOMEN SPEAK FOR THEMSELVES* (2012), but very little discussion of the religious centrality of marriage in widely-publicly available sources. *But cf.* Michael Paulson, *As Vatican Revisits Divorce, Many Catholics Long for Acceptance*, *NEW YORK TIMES*, Jan. 24, 2015, available at <http://www.nytimes.com/2015/01/25/us/as-vatican-revisits-divorce-many-catholics-long-for-acceptance.html> (“Ms. Alvaré, who is a former spokeswoman for the American bishops, said the indissolubility of marriage is a Catholic essential, ‘a key to the entire Roman Catholic cosmology—our understanding of the world, God, our relationship with him and our relationship to one another.’”).

To summarize these contributions, first, the Catholic Church has spoken often about the consequences—especially for women, for children, and for the poor—of “forgetting” that sex has an indelibly procreative character, and therefore a remarkable and unique significance even when it is not intentionally directed to procreation. There is a reason, in other words, why rape is more searing than other physical assaults, and why elevated levels of depression plague men and women after “casual” sexual relations.<sup>104</sup> Religious and nonreligious citizens alike can see that the sexual union between the man and the woman is where the creator “put” all new life and the making of human society itself, when it could have been otherwise. On its face, ignoring this deep natural reality seems likely to risk harm—to trivialize sex, to reduce it to a matter of gaining pleasure by means of another. Indeed history has borne this out.

Campaigns promoting same-sex marriage, and campaigns promoting abortion and contraception as the soul of women’s equality, “disappear” the significance of the link between sex and procreation. So do arguments trivializing the symbolism of premarital sex or cohabitation. On the one hand, all are becoming more commonplace facts of modern life; on the other hand, they do—always in the case of same-sex marriage and abortion, and sometimes for the rest—separate a child from the personal, emotional, and other resources children need and want from the mothers and fathers who conceived them.

Women also suffer when the procreative character of sex is ignored.<sup>105</sup> When widespread contraception and abortion technologically divorced children from sex, psychologists, economists, and sociologists reported women’s “immiseration.” To wit: a “marketplace” where sex is “cheap” (because disconnected from children) does not improve outcomes for women, but rather pressures them into more casual sexual relationships devoid regularly even of the possibility for marriage. It has therefore led to more nonmarital and unintended births and more abortions, outcomes all of which are borne disproportionately by women—emotionally, spiritually, and financially.<sup>106</sup>

The Catholic Church has spoken a great deal about the effects of these developments on women and children. Children’s coming into this world without the stable love and care of the adults who bore them has consequences that last their lifetimes.<sup>107</sup> These are documented too frequently to count. The Catholic Church adds to this its understanding of the Creator’s plan to provide every person in the world others to care for him or her as their “nearest neighbor”; children are the neighbor who came into the world via an act intended to show profound love and unity between the child’s parents. Their parents’ responsibilities toward them are particularly weighty. This “scheme” is understandable by all at a natural level, and by some at a supernatural level as well. Highlighting it is a contribution to public reflection about what is owed to children.

104 Melinda M. Bersamin et al., *Risky Business: Is There an Association between Casual Sex and Mental Health among Emerging Adults?* 51 *JOURNAL OF SEX RESEARCH* 43 (2014), available at <http://www.tandfonline.com/doi/pdf/10.1080/00224499.2013.772088>.

105 See generally, Helen M. Alvaré, *No Compelling Interest: The Birth Control Mandate and Religious Freedom*, 58 *VILLANOVA LAW REVIEW* 379 (2013).

106 George Akerlof, Janet L. Yellen, and Michael L. Katz, *An Analysis of Out-of-Wedlock Childbearing*, 2 *QUARTERLY JOURNAL OF ECONOMICS* 277 (1996); The Austin Institute, *The Economics of Sex*, YOUTUBE (Feb. 14, 2014), <https://www.youtube.com/watch?v=cO1ifNaNABY>.

107 Raj Chetty, et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States* (June 2014), available at [http://obs.rc.fas.harvard.edu/chetty/mobility\\_geo.pdf](http://obs.rc.fas.harvard.edu/chetty/mobility_geo.pdf) (family stability is an important correlate of upward mobility); Kristin A. Moore, et al., *Marriage from a Child’s Perspective: How Does Family Structure Affect Children and What Can We Do about It?*, *CHILD TRENDS RESEARCH BRIEF* (June 2002), <http://www.childtrends.org/wp-content/uploads/2013/03/MarriageRB602.pdf> (“An extensive body of research tells us that children do best when they grow up with both biological parents in a low-conflict marriage.”).

The Catholic Church has spoken also about the effects upon the poor of forgetting that sex is where human society is born. Poor women are the primary victim group held up by governments and interest groups endorsing easily accessible, cheap, or free contraception and abortion. But this group—constituted today disproportionately by African Americans and Hispanic Americans—is both the leading recipient of such services *and* the worst off among all groups of women respecting rates of unintended pregnancy, non-marriage, divorce, cohabitation, abortion, and single parenting. Further, in recent decades poor women have been the “beneficiaries” of more than a few government campaigns to “incentivize” chemically potent and physically invasive long-acting birth control—drugs and devices with both worrisome side effects and high rates of success in preventing births.<sup>108</sup> Even some of the leading supporters of programs providing such long-acting birth control to poor women acknowledge that the recipients might view such programs as suffused with racial and socioeconomic biases.<sup>109</sup>

Of course there are many factors causing the impoverishing of women and children and the concentration of poverty among minorities; but it is also true that stripping sex of its full power, via contraception and abortion campaigns marketed as essential to (especially poor) women’s empowerment, are important factors.

Second, in a similar vein, the Catholic Church has decried the physical, psychological and spiritual effects of over-sexualizing young girls, and it has criticized certain sex education, abortion, and contraception programs on this ground. These programs regularly suggest that the only important problems resulting from teen sex include pregnancy and disease. They strenuously attempt to isolate the sex from its link to procreation, and they ignore the hazards of thereby reducing girls to objects, as distinguished from human beings made to give and receive the gift of love.<sup>110</sup> But today, the American Psychological Association has weighed in with a strong denunciation of all means of sexualizing young women<sup>111</sup> in terms that recall Catholic concerns over objectifying female bodies, oppressing women generally, and harming children.

Third, the Catholic Church has for many years, spoken publicly about the medical side effects of birth control and the advantages of hormone-free natural family planning. The risks especially of hormonal birth control are recently gaining heightened public attention following a series of high-profile lawsuits brought on behalf of women suffering serious injuries or even death from various contraceptive drugs or devices.<sup>112</sup> There is also a growing literature about the effects of birth control on mate selection<sup>113</sup> and AIDS transmission.<sup>114</sup> The side effects of birth control are the subject of a popular book by an author who regularly reminds the reader that she is both pro-choice and

108 Jeanne L. Vance, Note, *Womb for Rent: Norplant and the Undoing of Poor Women*, 21 HASTINGS CONSTITUTIONAL LAW QUARTERLY 827, 833 (1994).

109 Jenny Higgins, *Celebration Meets Caution, LARC’s Boons, Potential Busts, and the Benefits of a Reproductive Justice Approach*, 89 CONTRACEPTION 237 (2014).

110 See Helen M. Alvaré, *Beyond the Sex-Ed Wars: Addressing Disadvantaged Single Mothers’ Search for Community*, 44 AKRON LAW REVIEW 167 (2011).

111 AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE TASK FORCE ON THE SEXUALIZATION OF GIRLS (2007), available at [www.apa.org/pi/wpo/sexualization.html](http://www.apa.org/pi/wpo/sexualization.html).

112 Sabrina Sadiquiqi, *Merck to Pay 100 Million in NuvaRing Lawsuit*, HUFFINGTON POST (Feb. 7, 2014), [http://www.huffingtonpost.com/2014/02/07/nuvaring-settlement\\_n\\_4746201.html](http://www.huffingtonpost.com/2014/02/07/nuvaring-settlement_n_4746201.html) (noting that Bayer pharmaceuticals paid over 1.6 billion dollars to settle lawsuits concerning a form of the birth control pill).

113 Melinda Wenner, *Birth Control Pills Affect Women’s Taste in Men*, SCIENTIFIC AMERICAN (Nov. 26, 2008), <http://www.scientificamerican.com/article/birth-control-pills-affect-womens-taste/>.

114 Renee Heffron et al., *Use of Hormonal Contraceptives and Risk of HIV-1 Transmission: A Prospective Cohort Study*, 12 LANCET 19 (2012).

non-Catholic. Holly Grigg Spall's *Sweetening the Pill*<sup>115</sup> excoriates birth-control manufacturers for their products' effects upon women's bodies, minds, and souls, and it implores non-Catholics to take up the cause the Catholic Church has highlighted for so many years. Obviously, birth control is used without physical side effects by many women; for a not insignificant number, however, it poses a variety of problems noted by Catholic sources and regularly ignored or downplayed by the government and by pharmaceutical manufacturers.

Fourth, while the Catholic Church has witnessed steadily to the negative effects of forgetting that sex is linked to adult relationship formation and procreation, it has likewise affirmed the good results of living in accord with the natural realities about human sexuality—realities the church teaches are also evidence of God's divine plan for human happiness and freedom. Data consistently shows that individuals and couples who live in accordance with the natural power of sex to bond adults and to make new life, report happier and more stable marriages and a higher sense of well-being overall.<sup>116</sup>

Fifth, while others have been reluctant to put people before politics where family policy is concerned, the Catholic Church has continually pursued the question about what human beings require to flourish in the family context, outside the constraint of political categories. It has insisted steadily that the state and private individuals owe the family support both for their family roles and for the underlying economic and educational opportunities that allow people to flourish as individuals and within stable family groups. Recently, even sources formerly resistant to bringing marriage and family policy into the arena of essential social welfare policies have begun to see the wisdom of this pairing.<sup>117</sup>

## CONCLUSION

Leading state actors and social institutions—media, educational, entertainment—disproportionately support valorizing sexual expression unlinked to children. With its large institutional presence and its large citizen population affected by various mandates and nondiscrimination guarantees, the Catholic Church in the United States is engaged in a vigorous set of legal contests and public debates about the wisdom of “forgetting” the procreative powers of sex. It has continued to articulate more than a few inconvenient truths: children's persistent and immense needs; the risks of contraception borne by women, children, and the poor; the racial and socioeconomic messages of state population policies; the harms of sexualizing children; and how much we owe to one another by virtue of both our human nature and the natural and supernatural demands of equality and freedom.

The Catholic Church's views on these matters are supported in principle by many thoughtful people of good will across political and religious divides. They have proved prophetic in light of emerging data about the conditions for the flourishing especially of families, children, women, and the poor. These arguments also advance individual and community reflection about the social or even divine meanings of global human realities like a two-sexed humanity, a procreative, one-

115 HOLLY GRIGG-SPALL, *SWEETENING THE PILL* (2013).

116 Dean M. Busby et al., *Compatibility or Restraint? The Effects of Sexual Timing on Marriage Relationships*, 24 *JOURNAL OF FAMILY PSYCHOLOGY* 766 (2011); Sharon Sassler et al., *The Tempo of Sexual Activity and Later Relationship Quality*, 74 *JOURNAL OF MARRIAGE AND FAMILY* 708 (2012).

117 Thomas B. Edsall, *What Makes People Poor?*, *NEW YORK TIMES* (Sept. 2, 2014), [http://www.nytimes.com/2014/09/03/opinion/what-makes-people-poor.html?\\_r=0](http://www.nytimes.com/2014/09/03/opinion/what-makes-people-poor.html?_r=0).

flesh union, and the human flourishing that steady family ties support. Still, they are unpopular with many state actors and leading social voices, who continue to champion sexual expression removed from procreation.

In the context of the clash between religious freedom and sexual expression, the church should pair its arguments for legal and statutory free exercise rights with better-articulated arguments about how its views on sexual expression promote the well-being particularly of the most vulnerable members of our society. Proponents of sexual expression unlinked to children should acknowledge the human costs of the division they are pursuing, and welcome dialogue partners legally capacitated to remind listeners, that a great deal of the “weight” of sex derives from its procreative character.

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