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After Gender the Destruction of Man? The Vatican's Nightmare Vision of the "Gender Agenda" for Law

Mary Anne Case*

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* Arnold I. Shure Professor of Law, University of Chicago Law School, and Director, Feminist Theory Project, University of Chicago Center for the Study of Gender and Sexuality. This Essay is a very small part of a much larger project on the Vatican and gender. Because I am still at an early stage of research on this broader project, the conclusions advanced herein are more than usually speculative and subject to correction. And, because this Essay is such a small part of the project, there are many important aspects of the subject it of necessity cannot fully explore or even begin to address or acknowledge due to space limitations. Portions of this Essay and of the broader project were presented, not only at Pace Law School's *After Gender?* Symposium, but as the University of Chicago Gender Studies 2010 Iris Young Distinguished Faculty Lecture, and at Lavender Law, the VII Convegno Internazionale Christine de Pizan in Bologna, Yale Law School's *Comparative Reproductive Rights* Workshop, the Center for Reproductive Rights *Global Scholar Incubator*, Princeton University's LAPA Program 2010 Anniversary Reunion, the AALS SOGI Section's *Perry and Beyond: Constitutionalization of Family*, the *Sexual Nationalisms* Conference at the University of Amsterdam, the ESF Research Conference on *Religion, Gender and Human Rights: Challenges for Multicultural and Democratic Societies*, the Feminism and Legal Theory Project's Twenty-fifth Anniversary Conference *Beyond the Boundaries of the Law* and its *Beyond Rights: Vulnerability and Justice* Workshop at Smith College, and the University of Chicago's Gender Studies Faculty Seminar and its Symposium: *Sexual Rights as Human Rights*. I am grateful to organizers and participants in these events, particularly Noa Ben Asher, Matthew Collibee, Bridget Crawford, Duncan Dormor, Peter Drucker, Liz Emens, Eric Fassin, Thelma Fenster, Martha Fineman, Taylor Flynn, Jaime Gher, Janet Halley, Diana Hortsch, Titia Loenen, Scott Long, Jamie Mayerfeld, Ali Miller, Shannon Minter, Aidan O'Neill, Rachel Rebouché, Earl Jeffrey Richards, Darren Rosenblum, Mindy Rosenman, Kim Lane Scheppele, Reva Siegel, Sara Silvestri, Judith Surkis, Andrea Tarnowski, Mieke Verloo, Charlotte Walker-Said, and Lori Walters; as well as to David Dunn Bauer, J. David Franks, Mary Anne Franks, Dan Mansueto, Linda McClain, Ali Miller, Charlotte-Walker-Said, and Winni Sullivan for comments on drafts; to Susanne Baer, Charles Donahue, Jean Bethke Elshtain, Paula Ettelbrick, Ben Finkelstein, Mary Anne Franks, Robby George, Dick Helmholtz, Laurie Hollander, Armin Keller, Katharina Krause, Pnina Lahav, Claire Le Ninan, Sara McDougall, Camille Robcis, Susan Ross, Julia Simon-Kerr, Bob Smith, Susan Stabile, Yofi Tirosh, David Tracy, and Jim Whitman for brainstorming

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For the last several decades, the English word "gender" has been anathema to the Vatican and those seeking to influence secular law and policy throughout the world on its behalf. A few recent examples may give some of the flavor and breadth of Vatican opposition to what it sees as a "gender agenda"[1] linking feminism and gay rights in a worldwide effort to redefine, not only secular laws governing the sexes, sexuality, and the family, but human nature itself.

In September 2011, eighty deputies from Nicolas Sarkozy's ruling UMP party seconded a call previously made by officials of the French Catholic Church for the immediate withdrawal of new French public high school textbooks in life sciences because the textbooks included discussion of "gender theory, or the idea that masculinity and femininity are socially constructed."[2] To back them up, the Pontifical Council for the Family rushed into print *Gender: La Controverse*,[3] an abbreviated and updated French paperback edition of essays most of which had previously appeared in its 2003 *Lexicon: Ambiguous and Debatable Terms Regarding Family Life and Ethical Questions*.[4] The more than nine hundred pages of the

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assistance; to Sr. Prudence Allen and Camille Robcis for sharing with me their unpublished drafts; to Shawn Kravich, Lyonette Louis-Jacques, Greg Nimmo, Margaret Schilt, Tara Tavernia, and Mishan Araujo Wroe for research assistance; and to the Williams Institute, the University of Chicago Law School's Arnold and Frieda Shure Fund, and the Kanter Family Foundation Initiative Fund for Research Support.

1. While the term "gender agenda" has been embraced by the United Nations itself, *see, e.g.*, *Global Gender Agenda and the United Nations*, UNITED NATIONS, http://www.un.org/ecosocdev/geninfo/women/gender.htm (last visited Dec. 14, 2011), I am here using the term as imagined, defined, and rejected by the Vatican and by religiously motivated conservatives under its influence. *See generally* DALE O'LEARY, THE GENDER AGENDA (1997) (describing from a Catholic perspective the process by which the Vatican and other religious participants opposed the feminist use of the term "gender" at the 1994 International Conference on Population and Development in Cairo and the 1995 Fourth World Conference on Women in Beijing).

2. Ruadhán Mac Cormaic, *French schoolbook ignites gender debate*, IRISH TIMES (Sept. 7, 2011), http://www.irishtimes.com/newspaper/world/2011/0907/1224303639424.html.

3. CONSEIL PONTIFICAL POUR LA FAMILLE, GENDER: LA CONTROVERSE (Tony Anatrella ed., 2011)

4. PONTIFICAL COUNCIL FOR THE FAMILY, LEXICON: AMBIGUOUS AND DEBATABLE TERMS REGARDING FAMILY LIFE AND ETHICAL QUESTIONS (Human Life International 2006). The original Italian version was published in 2003.

Pontifical Council's Lexicon contained no fewer than three separate subject headings on the term ("Gender,"[5] "An Ideology of Gender: Dangers and Scope,"[6] "New Definitions of Gender"[7]) as well as dire warnings about "gender" under a number of other subject headings such as "Verbal Engineering."[8]

In March 2011, in its official statement on the conclusions of the 55th session of the Commission on the Status of Women of the United Nations Economic and Social Council, the Vatican, in its capacity as permanent observer-state at the U.N., renewed objections to "a radical definition of 'gender,' which asserts that sexual identity can somehow be adapted indefinitely to suit new and different purposes[ ] . . . ."[9] The Vatican noted that it had been making similar objections since before the Beijing Fourth World Conference on Women in 1995. The Vatican warned, yet again, that "the international community should be aware that this agenda to re-define 'gender,' in turn, calls into question the very foundation of the human rights system."[10]

In July 2010, Monsignor Tony Anatrella, a French Lacanian psychoanalyst priest who, in addition to editing *Gender: La Controverse*, had played an active role as a public intellectual in French debates concerning same-sex marriage and gay parenting and as a Vatican spokesman in opposition to the ordination of gay men to the Catholic priesthood,[11] urged

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5. *Id.* at 399.

6. *Id.* at 465.

7. *Id.* at 625.

8. *Id.* at 934.

9. *Statement of the Holy See in Explanation of Position on the Agreed Conclusions*, THE PERMANENT OBSERVER MISSION OF THE HOLY SEE TO THE UNITED NATIONS, http://www.holyseemission.org/statements/statement.aspx?id=73 (last visited Dec. 14, 2011).

10. *Id.* For the objections raised by the Vatican to the use of the word "gender" in Beijing, see Report of the Fourth World Congress on Women, Beijing 4-15 September 1995 p. 162. U.N. Report on the Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, U.N. Docs. A/Conf.177/20 [hereinafter "Beijing Report"].

11. *See, e.g.*, Tony Anatrella, *Le couple face au concubinage et à l'homosexualitc; Ne pas brouiller les repères symboliques*, LE FIGARO, June 16, 1998 (arguing that for the law to recognize single-parent families, same-sex couples, heterosexual cohabitants, and blended families as equivalent to traditional married couples was symptomatic of social psychosis); Cindy

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the Catholic bishops of Africa, assembled for SECAM (the Symposium of Episcopal Conferences of Africa and Madagascar) to resist vigorously the imposition by Western NGOs, the U.N., and the E.U. of "gender theory," which he described as an "intellectual virus," which "like Marxism is contrary to human interests" but which also, in promoting "moral and anthropological deregulation," presented risks analogous to unfettered market capitalism.[12] Among the many evil consequences of an ideology of gender focused on the destruction of sex differences were, according to Anatrella, war between the sexes, the devaluation of motherhood, promotion of contraception and abortion, acceptance of homosexual partnerships and parentage, and the decline of marriage.[13]

In November 2008, German activist Gabriele Kuby warned in a Vatican publication that a resolution by the E.U. Parliament "to promote equality between women and men" by encouraging the elimination of "sexual stereotyped images" from advertising and the media threatened "to break the innermost core of the culture, namely the different identities of

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Wooden, *Vatican newspaper says homosexual men not suitable for priesthood*, CATHOLIC NEWS SERV., Nov. 29, 2005, at xxxi, *available at* http://www.catholicnews.com/data/stories/cns/0506787.htm (quoting Anatrella as saying a candidate for the priesthood must have "sufficient affective and sexual maturity coherent with his masculine sexual identity" and "affir[ming] the need for a priest to be heterosexual in order to see himself and for others to see him as the 'bridegroom of the church' and as a 'spiritual father' to those to whom he is ministering"). Anatrella remains to this day in the Vatican's good graces and an official spokesman, notwithstanding complaints of sex abuse filed against him in France by male patients with whom he allegedly had sex as part of sessions seeking to cure them of homosexuality. *See, e.g.*, Rocco Palmo, *Homosems, A Year On*, WHISPERS IN THE LOGGIA (Nov. 8, 2006, 11:18 PM), http://whispersintheloggia.blogspot.com/2006/11/homosems-year-on.html; Tony Anatrella, *L'idéologie du gender et la "santé reproductive"*, ZENIT (Nov. 23, 2011), http://www.zenit.org/article-29555?l=french (lecture given at the Vatican warning that "the ideology of gender and the notion of reproductive health" would "transform the meaning of relations between men and women, the meaning of sexuality and even the meaning of the family and procreation") (translated by author).

12. *See* John L. Allen, Jr., *Secularism, Africa and Characters in Rome*, NAT'L CATH. REP. (Aug. 20, 2010), http://ncronline.org/blogs/all-things-catholic/secularism-africa-and-characters-rome.

13. Tony Anatrella, Caritas in Veritate, La famille et la théorie du genre, Speech at SECAM (the Symposium of Episcopal Conferences of Africa and Madagascar) in Accra, Ghana (July 31, 2010).

men and women."[14] Kuby asked, "Why do women not see that their freedom to be wives and mothers is about to be mercilessly strangled? Why do men not understand that the raging battle of the sexes is seeking to take away their male power and identity?"[15] For Kuby, the resolution was a small part of the much bigger problem with gender mainstreaming, which she was disturbed to observe had been adopted by the E.U. and its member states as a universal guiding principle.[16]

In May 2004, before ascending to the papacy as Benedict XVI, Joseph Cardinal Ratzinger, then head of the Catholic Church's Congregation for the Doctrine of the Faith, explained in a Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World:

> Recent years have seen new approaches to women's issues. A first tendency is to emphasize strongly conditions of subordination . . . . A second tendency emerges in the wake of the first. In order to avoid the domination of one sex or the other, their differences tend to be denied, viewed as mere effects of historical and cultural conditioning. In this perspective, physical difference, termed sex, is minimized, while the purely cultural element, termed gender, is emphasized to the maximum and held to be primary. The obscuring of the difference or duality of the sexes has enormous consequences on a variety of levels. This theory of the human person, intended to promote prospects for equality of women through liberation from biological determinism, has in reality inspired ideologies which, for example, call into question the family, in its natural two-parent structure of mother and father, and make homosexuality and

14. Gabriele Kuby, *Gender Mainstreaming—The Secret Revolution*, VATICAN MAG., 6 (November 2008), http://www.lifesitenews.com/ldn/2008_docs/GenderMainstreaming.pdf.

15. *Id.*

16. *See id.* at 1.

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> heterosexuality virtually equivalent, in a new model of polymorphous sexuality.
>
> While the immediate roots of this second tendency are found in the context of reflection on women's roles, its deeper motivation must be sought in the human attempt to be freed from one's biological conditioning. According to this perspective, human nature in itself does not possess characteristics in an absolute manner: all persons can and ought to constitute themselves as they like, since they are free from every predetermination linked to their essential constitution.[17]

Several things are of note in the Vatican mobilization against what it terms "the gender agenda." First, very few interventions against "gender" are undertaken by the Catholic Church as a religious body attempting to influence the hearts and minds of believers. Rather, even when the addressees of warnings against "gender" are, for example, Catholic clergy, as in Ratzinger's 2004 "Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World" or in Anatrella's speech to the African bishops' conference, the emphasis is on the imperative to influence secular law and policy in line with the Vatican vision. In international and multinational settings, the Vatican acts first and foremost as a state actor, the Holy See; as such it can make common cause with other state actors, notably members of the Organization of the Islamic Conference who share some of the concerns it situates in relation to the term "gender."[18] Within Europe, by contrast, the Vatican can act as an insider,

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17. Letter from Cardinal Joseph Ratzinger, Prefect, Congregation for the Doctrine of the Faith, to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World (May 31, 2004), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html.

18. *See e.g.*, Doris E. Buss, *Robes, Relics and Rights: the Vatican and the Beijing Conference On Women*, 7 SOC. LEGAL STUD. 339, 343, 347 (1998) (describing cooperation between the Vatican and Islamic states at the Cairo and Beijing conferences).

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stressing the importance of its Christian contribution to European heritage and values. More broadly, acting both in its own name and through a multitude of individual and organizational actors, the Vatican can effectively position itself vis-à-vis the women and the nations of the Third World as one who understands and supports them by contrast with those feminists and sexual rights advocates it paints as focused on issues of interest only to a small minority and far removed from the real, material needs and the preferences of most poor women. Thus, for example, in presenting the "Holy See's Final Statement" at the 1995 Women's Conference in Beijing, Harvard Law Professor Mary Ann Glendon, head of the Vatican delegation, expressed regret at an "exaggerated individualism" and "the colonization of the broad and rich discourse of universal rights by an impoverished, libertarian rights dialect," saying, "[s]urely this international gathering could have done more for women and girls than to leave them alone with their rights!"[19] Perhaps the most interesting of all the Vatican's modalities of opposition to the "gender agenda" are its attempts to speak as what Ratzinger, in his 2004 letter, called "an expert in humanity [with] a perennial interest in whatever concerns men and women;"[20] it was in this capacity, disclaiming any peculiarly religious authority, but claiming expertise in philosophical anthropology and psychology, that Catholic figures such as Tony Anatrella sought to intervene in debates concerning the reform of French family law.

Second, the Vatican sees, and assumes its opponents also see, a tight connection between and among all the components it incorporates under the "gender agenda," such as the dismantling of sex roles, the acceptance of homosexuality, the recognition of a diversity of family forms and of sexual and gender expression, and access to the new reproductive technologies, condoms, other contraceptives, and abortion—in short, most of what goes under such diverse headings as women's sexual and reproductive rights, SOGI (sexual orientation and gender identity), family law reform, and the elimination of sex stereotyping. Unfortunately, as Ali Miller's

19. Beijing Report, *supra* note 10, at 159-62.
20. Ratzinger, *supra* note 17.

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contribution to this Symposium documents, the feminist and sexual rights advocates on the other side of the "gender agenda" from the Vatican too rarely make common cause or even seem to see the connections between the issues to which they are committed.[21] Miller describes the dominant tendency as "silo-ing"—whether these metaphorical silos are seen as hoarding grain in the form of funding or protecting missiles to be lobbed against the opposition, their downsides are that each silo (the SOGI silo, the reproductive rights silo, etc.) tightly encloses a set of issues and constituencies far from fruitful interaction with others and some constituencies are left without a well-filled and fortified silo of their own.

This leaves someone like me in a paradoxical position with respect to the Vatican's articulation of the "gender agenda." As a descriptive matter, the Vatican and I draw very similar connections between the various components of feminist, LGBT, sexual and reproductive rights, and family law reform—when we connect the dots we see a similar figure; the principal difference is the normative spin we each put on it, in that the Vatican's nightmares concerning gender are my dreams and vice versa. (I have noticed similar points of descriptive commonality and diametrically opposed normative spin when I have in the past compared my own vision on questions of sex, gender, and sexuality with that of Justice Scalia.[22]) Unfortunately, those who share more of my normative preferences when it comes to the laws and policies governing sex, gender, sexuality, and the family are all too rarely inclined to make the connections the Vatican and I see as inescapable. Perhaps part of the reason is that, unlike many other scholars and activists on my side of the "gender agenda," I am strongly inclined to resist the identitarian turn: I find much that is

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21. *See e.g.*, Ali Miller, *Fighting Over the Figure of Gender*, 31 PACE L. REV. 837, 840-41 (2011) (describing "two superficially distinct guises of gender territorialization in the U.N.," an "overt" "turf fight" and a "tension . . . discernible in a deafening silence" between "advocacy groups representing 'gender as identity/woman'" and "groups representing 'gender as gay or trans identity/male'").

22. *See e.g.*, Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination*
Law as a Quest for Perfect Proxies, 85 CORNELL L. REV. 1447, 1448 (2000) (discussing Scalia's dissent in the VMI case).

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appealing in what for the Vatican is a nightmare vision of "liberation from biological determinism" and from essentialized identity categories.[23] More importantly, I would like to see rights extended not on the basis of sex, gender, or orientation identity categories, but to all regardless of the identity categories they may identify with or be categorized into. My dream vision is of people being free and equal no matter who or what they are, not because of who or what they are.[24] Instead of reinforcing what Ali Miller calls the SOGI silo, I would like to see greater recognition by advocates for freedom of sexual and gender expression that not only gays and lesbians have a sexual orientation and not only those who identify as trans have a gender identity in need of protection. I would also still like to see:

> my side of debates on the meaning of gender in law—the side of the feminists, the gay rights advocates, the queer theorists—[ ] be clear about the relationship our most vehement and thoroughgoing opponents so clearly see between a commitment to traditional sex roles rooted in the subordination of women and opposition to equal rites and rights for gay and lesbian couples.[25]

Not only do many other advocates for components of the "gender agenda" tend to draw too few of the connections the Vatican does between and among their causes, they also tend

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23. Ratzinger, *supra* note 17.

24. Among the many works in which I have previously defended such a vision of liberation from rigid identity categories are Mary Anne Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) [hereinafter Case, *Disaggregating Gender*]; Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305 (1998); and Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1203-09 (2010).

25. Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, *supra* note 24, at 1209. In this earlier essay, I argued that "recognition of same-sex marriage and elimination of enforced sex roles are as inextricably intertwined as the duck is with the rabbit in the famous optical illusion." *Id.* at 1233.

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to misinterpret the Vatican itself as being almost exclusively obsessed with homosexuality and transsexuality (i.e. with the standard components of the SOGI silo) even when a careful reading of the Vatican's pronouncements makes clear much broader concerns about sex and gender are often at issue. Consider one dramatic recent example. When interested observers reported on the 2008 Christmas speech Pope Benedict XVI made to the members of the Roman Curia, the headlines tended to read along the lines of "Pope says saving heterosexuality like saving the rainforest."[26] What the Pope actually said was far more sweeping and more interesting.[27] According to the Pope, the Church

> has a responsibility towards creation, and must also publicly assert this responsibility. In so doing, she must not only defend earth, water and air as gifts of creation belonging to all. She must also protect man from self-destruction. What is needed is something like a human ecology, correctly understood.
>
> If the Church speaks of the nature of the human being as man and woman, and demands that this order of creation be respected, this is not some antiquated metaphysics. What is involved here is faith in the Creator and a readiness to listen to the "language" of creation.

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26. *See e.g.*, *Pope says saving heterosexuality like saving the rainforest*, REUTERS (Dec. 22, 2008, 1:18 IST), http://blogs.reuters.com/faithworld/2008/12/22/pope-says-saving-heterosexuality-like-saving-the-rainforest/; Foreign staff, *Pope: Saving world from homosexuality like saving rainforests*, TELEGRAPH (Dec. 22, 2008, 6:33 PM), http://www.telegraph.co.uk/news/worldnews/europe/italy/3902931/Pope-Saving-world-from-homosexuality-like-saving-rainforests.html.

27. Confirming this broader interpretation, "[a] Vatican spokesman said that the pope did not want to attack homosexuality or transsexualism per se, but 'was speaking more generally about gender theories.'" Jason Farrago, *Pope: Save Rainforest and Heterosexuality, Too: Benedict's Christmas Message Decries Erosion of 'Traditional' Gender Roles*, NEWSER (Dec. 23, 2008, 8:08 AM), http://www.newser.com/story/46091/pope-save-rainforest-and-heterosexuality-too.html ("Benedict's speech focused on the blurring of gender roles, which he said could lead to the 'self-destruction' of the human race.").

> To disregard this would be the self-destruction of man himself, and hence the destruction of God's own work.
>
> What is often expressed and understood by the term "gender" ultimately ends up being man's attempt at self-emancipation from creation and the Creator. Man wants to be his own master, and alone—always and exclusively—to determine everything that concerns him. Yet in this way he lives in opposition to the truth, in opposition to the Creator Spirit.
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> Rain forests deserve indeed to be protected, but no less so does man, as a creature having an innate "message" which does not contradict our freedom, but is instead its very premise.[28]

Taking seriously the notion of a "human ecology" put at risk by the "gender agenda" has a number of fascinating implications. First, it indicates that the Pope thinks of people like me—feminists and advocates for sexual rights—in much the same way as environmentalists think of logging companies: we are on the verge, if we are not stopped, of clear-cutting human nature the way loggers are the rainforest. This imagines a level of power and influence, not only on law but on lived human experience, that even the most hopeful supporters and severest critics of what Janet Halley calls "governance feminism"[29] have not hitherto ascribed to feminists or to SOGI activists. It also helps make sense of the Vatican's emphasis on shaping secular law: the Vatican is seeking the equivalent of

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28. Pope Benedict XVI, Address of His Holiness Benedict XVI to the Members of the Roman Curia for the Traditional Exchange of Christmas Greetings (Dec. 22, 2008), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/december/documents/hf_ben-xvi_spe_20081222_curia-romana_en.html.

29. See Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 340 (2006) (defining governance feminism as "the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power").

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an endangered species act for the traditional family.

Even more intriguing, it suggests that, in the Pope's view, just as it would be possible to destroy the rainforest, it would also be possible, though similarly inadvisable and contrary to the will of the Creator, for human beings to effect the "self-destruction of man himself" by destroying what the Vatican sees as "the nature of the human being as man and woman." In his dire warnings against the imminent risk of human self-destruction, the Pope sounds to me a bit like the Charlton Heston character in Planet of the Apes, crying "You Maniacs! You blew it up! Ah, damn you! God damn you all to hell!"[30]

It appears that the Pope's argument here echoes similar arguments made in twentieth century French family law reform debates by public intellectuals with Catholic connections, including once again Tony Anatrella, but also a host of other politicians and scholars who invoked, inter alia, Lacanian psychoanalytic theories and philosophical anthropology to argue that any move to eliminate traditional sex distinctions in French family law (for example, through recognition of same-sex couples, new reproductive technologies, gay and single parent adoptions) could, by disrupting the symbolic order, "bring about a generalized state of social chaos and psychic distress,"[31] in a worst case scenario turning society and all within it psychotic.

The Pope's arguments and those of other Vatican opponents of the "gender agenda" bear far less resemblance to arguments I am accustomed to hearing on this side of the Atlantic, even from public intellectuals with Catholic connections taking a similar stand against, for example, legal recognition of same-sex marriage. To be sure, Catholics such as Maggie Gallagher, head of the National Organization for Marriage, do warn of harms to the common good from the

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30. PLANET OF THE APES (APJAC Productions 1968). Perhaps one reason why this image springs to mind is that Charlton Heston's character, George Taylor, also laments, in tones reminiscent of the Vatican's concerns about sexual freedom's threat to a marriage culture, that on Earth there was "lots of love-making but no love. You see, that was the kind of world we'd made." *Id.*

31. *See* Camille Robcis, *French Sexual Politics from Human Rights to the Anthropological Function of the Law*, 33.1 FRENCH HIST. STUD. 129, 132 (2010).

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erosion of a marriage culture,[32] but they seem to stop well short of claiming we risk social psychosis, perhaps because psychoanalytic arguments have less traction in the United States today. When American Catholic new natural law theorists such as Robby George argue that two persons of the same-sex lack the "sexual complementarity" necessary for marriage, the emphasis is not on so much on the necessary complementarity of psychological components of masculinity and femininity so crucial to Vatican orthodoxy on sex and gender over the last third of a century, but on the "biological complementarity"[33] of sexual organs. George stresses that two men cannot produce a biological child together through a sex act that unites them in a potentially procreative "one-flesh union."[34]

One of the central reasons why those who seek from a conservative Catholic perspective to influence the law of family, sex, and gender in the United States, by contrast with participants in Vatican-led campaigns in other countries and in the international arena, focus far less on the need to reinforce the "difference or duality of the sexes"[35] may be that, for about as long as the Vatican has been inveighing in favor of sexual complementarity and against the dangers of a radical ideology of gender,[36] the constitutional order of the United States has

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32. *See, e.g.*, Maggie Gallagher, *The Stakes: Why We Need Marriage*, NAT'L REV. ONLINE (July 14, 2003), http://www.nationalreview.om/article/207483/stakes/maggie-gallagher.

33. *See, e.g.*, Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 258 (2011).

34. *See, e.g.*, Robert P. George, *What's Sex Got To Do With It? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 73 (2004). I am not suggesting that there is any inconsistency between the way that sexual complementarity is articulated by George and by the Vatican, only that there is a noteworthy difference in emphasis. In addition to the influence of American constitutional norms on sex equality discussed infra, another reason why George's discussions of natural law and the complementarity of the sexes sound different than those emanating from the Vatican may be that George's arguments have their roots in Anglo-American analytic philosophy, rather than in the continental tradition in which German and French Catholic thinkers like Ratzinger and Anatrella are rooted.

35. Ratzinger, *supra* note 17.

36. Despite heroic efforts by Catholic supporters of an ideology of complementarity to seek its roots in prior centuries, even they generally concede that the term only entered Catholic teaching in the mid-twentieth

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been committed to the elimination from the law of "fixed notions concerning the roles and abilities of males and females."[37] As I have previously argued, this places Supreme Court Justice Ruth Bader Ginsburg in an analogous position to Ratzinger as Pope[38]—each is "now able to put more authority behind a normative take on gender for which he [or she] had long been arguing.[39]

Since at least 1985, Ratzinger had thought it:

> necessary to get to the bottom of the demand that radical feminism draws from the widespread modern culture, namely the "trivialization" of sexual specificity that makes every role interchangeable between man and woman. . . . Detached from the bond with fecundity, sex no longer appears to be a determined characteristic, as a radical and pristine orientation of the person. Male? Female? They are questions that for some are now viewed as obsolete, senseless, if

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century, via the works of Dietrich von Hildebrand, a married Protestant convert to Catholicism. *See, e.g.*, Prudence Allen, *Man-Woman Complementarity: The Catholic Inspiration*, 9.3 LOGOS 87, 92 (2006) (discussing the development of ideas of complementarity in the work of Hildebrand and others).

37. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

38. I by no means intend to suggest that Ratzinger is the sole or even principal driving force behind Vatican concern about the "gender agenda" or architect of the Vatican's own opposing vision. Although I do think Ratzinger's influence on the current Catholic theological anthropology on matters of sex, gender, and sexuality tends to be underestimated, it is clear that the work of Pope John Paul II, both as the philosopher Karol Wojtyla and after ascending to the papacy, had a profound influence on the Vatican vision of thoroughgoing and deep-rooted sexual complementarity with psychological and spiritual as well as physiological dimensions. I focus on Ratzinger in this very short Essay for several reasons; among them, in addition to his influence on theological anthropology, are that as the current Pope he shapes the Catholic Church's current and future view of and response to the "gender agenda" and that he has long been and remains particularly interested in influencing secular law. Nor have I ever wished to "suggest that modern constitutional sex discrimination law sprang full grown from the head of Ruth Bader Ginsburg like Athena from the head of Zeus." Case, *supra* note 22 at 1451.

39. Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, *supra* note 24, at 1208.

> not racist. The answer of current conformism is foreseeable: "whether one is male or female has little interest for us, we are all simply humans." This in reality has grave consequences even if at first appears very beautiful and generous.[40]

Ginsburg, by contrast, had been arguing since the 1970s, inter alia as an advocate for the ACLU Women's Rights Project who briefed and argued many path-breaking constitutional sex discrimination cases, that:

> men and women should be given the same rights, obligations and work assignments in society . . . [and] that nobody should be forced into a predetermined role on account of sex, but each person should be given . . . possibilities to develop his or her personal talents.[41]

To instantiate this vision in American constitutional law, Ginsburg had to effect the overturning of centuries of "Precedent in Need of Re-evaluation," precedent that forced both men and women by law into rigidly defined sex roles, even though at times it claimed to be doing so "beautiful[ly] and

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40. JOSEPH CARDINAL RATZINGER & VITTORIO MESSORI, THE RATZINGER REPORT: AN EXCLUSIVE INTERVIEW ON THE STATE OF THE CHURCH 95 (1985).

41. Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 1 (1975) (quoting Olof Palme, Swedish Prime Minister, Address at the Women's National Democratic Club in Washington D.C. (June 8, 1970)). Ginsburg is, of course, also responsible for the fact that in U.S. law (and these days in many international and multi-national legal documents written in English) the words "sex" and "gender" have come to be used interchangeably. *See, e.g.*, Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 1 n.1 (1975). At first glance, at least linguistically, this use of the word "gender" interchangeably with "sex" may seem in sharp contrast to its use to distinguish "cultural or attitudinal characteristics" associated with the sexes from "physical characteristics" (i.e. to distinguish masculine and feminine from male and female). J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting); *see also* Case, *Disaggregating Gender*, *supra* note 24, at 11–18. But from the Vatican's perspective, there is the same reason to be concerned about both usages—each is associated with what the Vatican condemns as the "obscuring of the difference or duality of the sexes." Ratzinger, *supra* note 17.

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generous[ly]" for women's protection.[42] To the extent that in opposing the "gender agenda" Benedict XVI has put the authority of the Catholic Church behind the reinforcement of fixed-sex roles, I would argue that he too has overturned centuries of precedent. It seems to me,[43] as it does to Catholic theologian Susan A. Ross, that historically in Church teaching:

> gender roles have been more fluid, with the medieval period serving as a model for such variability. The struggle for women's rights in the last century has, in my judgment, resulted in a much more rigid attitude on the part of the Church to variability in gender roles.[44]

Perhaps it is too much to hope for, but were the Vatican to abandon its recent turn to a more rigid attitude with respect to gender roles, it too might come to agree that embracing those aspects of the "gender agenda" that entail the repudiation of "fixed notions concerning the roles and abilities of males and females" would lead, not to the destruction of man, but to the true fulfillment of human potential.

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42. For further discussion, see Case, *supra* note 22, at 1470.

43. For further discussion, see Mary Anne Case, *No Male or Female*, *in* TRANSCENDING THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 83 (Martha Fineman ed., 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1421399 (discussing "how the Church that brought me to sameness feminism at first repudiated sex equality and then turned to an embrace of difference").

44. Susan A. Ross, *The Bridegroom and the Bride: Theological Anthropology of John Paul II in its Relation to the Bible and Homosexuality*, *in* SEXUAL DIVERSITY AND CATHOLICISM: TOWARD THE DEVELOPMENT OF MORAL THEOLOGY 39, 54 (Patricia Beattie Jung & Joseph Andrew Coray eds., 2001).

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