University of St. Thomas Law Journal

Volume 4
Issue 3 *Spring 2007*

Article 2

2007

# Analogy, Law and the Workplace: Complementarity, Conscience and the Common Good

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KEYNOTE ADDRESS

# ANALOGY, LAW AND THE WORKPLACE: COMPLEMENTARITY, CONSCIENCE AND THE COMMON GOOD

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Thank you for inviting me to participate in your symposium today; and I ask for the intercession of the Holy Family on our deliberations. Since my specialization is philosophy of the person and the subspeciality of the concept of woman in relation to man in the history of Western philosophy, I would like today to address three areas of concern about positive laws at the intersection of the family and the workplace. These areas are identified by the following themes: I. Analogy and Complementarity in Relation to Reality; II. Law and Conscience in Relation to Truth; and III. The Workplace in Relation to the Common Good. These three sections are bonded together by the principles that reality is the ground for truth, and truth is the foundation for the common good.

My remarks will draw particularly upon two philosophers who are representative of *existential personalism*, a twentieth-century development of realistic Thomism, namely, Mieczyslaw Albert Krapiec, O.P. and Karol Wojtyla (later Pope John Paul II). They had to defend their positions without a direct appeal to faith or religious authority because they taught philosophy at the Catholic University of Lublin, Poland (KUL) for over twenty

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years under communist rule. Thus, even though, as Catholic philosophers, their positions about positive law were in harmony with natural law and eternal law,[1] they had an autonomy which stands on its own in any cultural context, including our present North American context of secular humanism.

As a philosopher, I will simply lay before you some discrepancies between the real world of family members and laws, both as formulated and as applied to individual cases. I take all of the examples of discrepancies from experiences that either I have had, or someone I know directly has had, in the United States or Canada. The practical application of legal solutions to these discrepancies I leave in your hands as practicing attorneys and students of law.

As you most likely well know, Thomas Aquinas defined four essential characteristics of all law: 1) a law is an ordinance of reason; 2) ordered to the common good; 3) made by proper authority; and 4) promulgated.[2] In this presentation, I will use the word "law" in a very broad or inclusive sense to refer to positive law as inclusive of civil law, criminal law, regulations, ordinances, statutes, and rules when promulgated by the proper authority at the workplace, city, state, or federal level.

Martin Luther King, Jr., when considering segregation laws, followed Thomas Aquinas when he said that: "An unjust law is a human law that is not rooted in eternal law and natural law."[3] To the extent that a law fails in one of its four defining components, *to that extent* it loses the character of law and hence, it loses its legal authority. In other words, the authority of law in these cases is seldom full, but seldom empty either. Instead, there are degrees of obligation and, in turn, of its standing as law at all.[4] For example, the Institute for Marriage and Public Policy argued recently that some positive laws which falsely describe marriage are simply bad laws, as in: "Marriage in any important sense is not a creation of the State, not a mere creature of statute."[5]

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1. Thomas Aquinas distinguished among three basic different kinds of law: eternal law, natural law, and positive law in THOMAS AQUINAS, SUMMA THEOLOGIAE, *Part I of the Second Part*, q. 91 (Christian Classics 1948). At the same time as distinguishing the three kinds of law, Aquinas argued further that civil or positive law ought to be harmonious with natural law, which in turn should be harmonious with eternal law. See also RUSSELL HITTINGER, THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST-CHRISTIAN WORLD xxi–xxii, 1–91 (ISI Books 2003), for a detailed historical and contemporary analysis of different philosophical positions concerning what harmonious relation among these three kinds of law should mean.

2. AQUINAS, *supra* note 1, at q. 90.

3. Martin Luther King, Jr., Letter from a Birmingham Jail, *in* CHOICES: FRESHMEN SEMINARY 86, 90 (Carmen B. Schmersahl & Michael G. Collengerger eds., 2000).

4. For this clarification, I am very grateful to Christopher B. Gray, Concordia University, Montreal, Quebec, in private correspondence (Mar. 9, 2007).

5. INST. FOR AM. VALUES, *Executive Summary* to MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 4 (2000). The hundred authors signing this statement of principles include the following: Helen Alvaré, Dan Cere, Rev. John Coughlin, O.F.M., Jean Bethke Elshtain, Robert George, Mary Ann Glendon, Christopher Gray, and Robert Nagel. The document also indicates:

## I. Analogy and Complementarity in Relation to Reality

A universal or univocal law occurs when civil laws are formulated in such a way as to admit no exceptions. In other words, these laws ignore any differences among persons to whom they apply; instead they consider only the similiarities, which at times creates an artificial or "unreal" worldview. In the natural world, scientists articulate particular similarities and differences among things of the same kind with increasing exactness. Yet, in the natural world of living beings, univocal or universal claims often have some exceptions. Thus, they really abstract from the analogical structures of things to define what Aristotle correctly identified as what is always or usually the case in particular kinds of natural beings. In Aristotle's words: "[A]ll [natural] science is of that which is *always or for the most part.*"[6]

Many of our words signify real things in the real world, for example words in combination like human being, human person, or single words like woman, man, marriage or family. Several modern philosophers after Descartes argued that the direct object of words were ideas in the mind, rather than things in the world.[7] The difficulty with this view is that it vacillates between a universal claim about a thing, for example, a woman or the family, and an equivocal conclusion, that there is no such real thing that fills the claim. In other words, all it takes to destroy a *universal* claim about some kind of natural thing is to insert *one exception* as a counter-example. When this occurs, people usually argue that the counter-claim proves that the universal definition or description does not hold true, because there is no one common essential characteristic in all things of the same kind. In other words, persons who try to break open a universal law by introducing exceptions may conclude that for any definition of family there is at least one family which does not fall under this definition, and that, therefore, there is no such thing as a family *per se* or for any definition of woman there is at least one woman who does not fall under this definition, that, therefore, there is no such thing as woman *per se.* Families or gender become things that people can simply redefine according to an idea in the minds of those doing the defining.

If we want the positive law to be grounded in "the really real" and not simply in someone's or a particular culture's preferred univocal idea, then a

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> Family law as a discipline has increasingly tended to commit two serious errors with regard to marriage: (a) to reduce marriage to a creature of statute, a set of legal benefits created by the law, and (b) to imagine marriage as just one of many equally valid lifestyles. This model of marriage is based on demonstrably false and therefore destructive premises.

INST. FOR AM. VALUES, *supra.*

6. Aristotle, *Metaphysics, in* THE BASIC WORKS OF ARISTOTLE 689, 862 (Richard McKeon ed., Random House 1941) (emphasis added). *See also*, Aristotle, *Physics, in* THE BASIC WORKS OF ARISTOTLE, *supra*, at 213, 251.

7. *See* JOHN DEELY, FOUR AGES OF UNDERSTANDING: THE FIRST POSTMODERN SURVEY OF PHILOSOPHY FROM ANCIENT TIME TO THE TURN OF THE TWENTY-FIRST CENTURY (2001) (laying out an historical description of the relation of ideas to reality).

flexible model is necessary for claims about the nature of reality. There is a need for a model of laws that incorporates Aristotle's approach to natural beings which *"always or for the most part"* have common characteristics.[8]

I would like to propose a model based on M. A. Krapiec's philosophy of existential analogy in which exceptions can be absorbed without destroying the scientific and legal principle being articulated.[9] After providing a summary of the history of different theories of gender identity and their relation to different kinds of laws, I will offer for your consideration a preliminary description of this model based on existential analogies.

First, I offer a preliminary remark about my use of the words "sex" and "gender." I use the word "gender" to serve as a word-sign of the *integrated* woman or man, and not as distinct from the word "sex." The use of the expression "sex/gender" implies a dualism between biological nature and socialization at the heart of a person's identity. Since the word "gender" is derived from the root "gens" which includes reference to generation and biological sex, and since it more commonly refers also to socialization within a particular culture as a man or woman, it can better characterize the integral differentiation between man and woman, than does the word "sex."[10]

Second, in order to consider the family in the workplace, we have to admit that family always implies *human beings in relation to the worker*: parents, grandparents, spouse, siblings, children, grandchildren, and so on. These words describe real human beings, who have lived, are living, or may be on the way to living. Some kinds of human beings are mutually exclusive (for the most part), such as a man or a woman who are two separate ways of being a human being. Following from this, I will argue that a man and a woman are the prime analogates[11] for synergetic relations. Other

8. This model is in addition to necessarily univocal laws about intrinsically evil acts and intrinsically good and universal rights.

9. *See* MIECZYSLAW ALBERT KRAPIEC, O.P., *The Analogy of "Being" and "Cognition," in* METAPHYSICS: AN OUTLINE OF THE HISTORY OF BEING 447–485 (Theresa Sandok trans., Peter Lang Publishing, Inc. 1991).

10. *See* SISTER PRUDENCE ALLEN, R.S.M., THE CONCEPT OF WOMAN: THE EARLY HUMANIST REFORMATION, 1250–1500, at 15 (2002) [hereinafter ALLEN, THE EARLY HUMANIST REFORMATION] (further defending this position). For other discussions of the important difficulty with the split between sex and gender, and by authors who share the same concern but reach a different conclusion, see Jutta Burggraf, *Gender, in* LEXICON: AMBIGUOUS AND DEBATABLE TERMS REGARDING FAMILY LIFE AND ETHICAL QUESTIONS 399 (Alfonso Cardinal López Trujillo, ed., Human Life Int'l 2006); Oscar Alzamora Revoredo, *An Ideology of Gender: Dangers and Scope*, *supra*, at 465; Beatriz Vollmer de Coles, *New Definitions of Gender*, *supra*, at 625.

11. By "prime analogate" I mean that a man and a woman are analogous ways of being human persons (they have something similar—their human identity, and simultaneously something different: their gender); and when brought together into relation they can synergistically generate another human being. Other kinds of synergetic interactions among analogous persons, such as creative work in interdisciplinary collaboration among two academics in different fields, can be considered as secondary to the prime model.

kinds of human beings are not mutually exclusive (a son can also be simultaneously a father, or a mother a daughter).

Existential analogies (inter-ontic analogies[12] between two existing or real things) *hold in simultaneous tension* two different components: what is really common and what is really different. Theories of gender identity, a subclass within theories of existential analogies, also hold in simultaneous tension two different components: equal dignity (what is common) and significant differentiation of man and woman (what is different). Unfortunately, some are tempted to dissolve this simultaneous tension by rejecting or ignoring one or the other of the components held in the tension. When this happens, either what is common takes over, and we have a univocal claim allowing no exceptions about the real thing; or what is significantly different takes over, and we have an equivocal claim saying that there are so many exceptions that there is no common meaning to words describing the real thing.

Below, I include a chart summarizing the various theories of gender identity to demonstrate how this occurs in theories of gender relations. Further evidence in support of the claims in this brief summary is available in the volumes of *The Concept of Woman.*[13]

### *A. Gender Unity Laws*

Gender unity, more popularly known as unisex, laws in philosophical texts about the family and the workplace have a long history. Plato introduced them in his utopian dialogue, *The Republic*, and his later development of regulations for the utopian society, *Laws*. He argued that there were no philosophically significant differences between women and men, and that society should abolish family among the men and women rulers with the identity of their children kept hidden from them.[14] Alison Jaggar argued that any attempt to identify significant differences between women and men opens the door to discrimination against women.[15] The utopian author Shu-

12. Inter-ontic analogy is distinguished from infra-ontic analogy in several ways. Ontic refers to a kind of being. When a living being is compared with itself over time, i.e., a particular man with himself as a boy, this is called an "*infra*-ontic" analogy because there is something the same (the identity of the particular man), and simultaneously something different (how he is now and how he was as a boy). We can say that he is analogous with himself. When this man is compared analogously with another man, or with a woman, because this is a comparison of two different beings, it is called an "*inter*-ontic" analogy. The similarity comes from their human identity, but the simultaneous difference would be specified by some qualifier such as age, race, place in the space-time continuum, gender, and so forth.

13. SISTER PRUDENCE ALLEN, R.S.M., THE CONCEPT OF WOMAN: THE ARISTOTELIAN REVOLUTION, 750 B.C.–A.D. 1250 (1985) [hereinafter ALLEN, ARISTOTELIAN REVOLUTION]; ALLEN, THE EARLY HUMANIST REFORMATION, *supra* note 10.

14. *See* Plato, *Republic*, *in* THE COLLECTED DIALOGUES OF PLATO 688–720 (Edith Hamilton & Huntington Cairns eds., 1961); Plato, *Laws*, *in* THE COLLECTED DIALOGUES OF PLATO, *supra*, at 1331–1414. *See also* ALLEN, ARISTOTELIAN REVOLUTION, *supra* note 13, at 57.

15. Alison Jaggar, *On Sexual Equality*, 84 ETHICS 275, 277–278 (1974).

STRUCTURE OF THEORIES OF GENDER IDENTITY

| Theory | Equal dignity of man and woman | Significant differentiation of man and woman | Laws generally promulgated with this theory |
|---|---|---|---|
| **1. Gender Unity (unisex)** | Yes | No | Laws which assert that there are no distinctions between men and women |
| **2a. Traditional Gender Polarity** | No man *per se* superior to woman | Yes | Laws and legal practices which discriminate against women |
| **2b. Reverse Gender Polarity** | No woman *per se* superior to man | Yes | Laws and legal practices which discriminate against men |
| **3a. Fractional Gender Complementarity** | Yes | Yes complementary as parts and often hides devaluation of women | Laws which make a man and a woman in marriage equivalent to one moral person, and which often have a hidden gender polarity |
| **3b. Integral Gender Complementarity** | Yes | Yes complementary as wholes | Laws supporting marriage of one man and one woman, each as a whole person, and which (for the most part) lead to the synergetic inter-generational reality of a family as the first cell of the state |
| **4. Gender Neutrality** | Neutral | Neutral | Laws that are neutral with respect to gender identity |

lamith Firestone holds the most extreme philosophical presentation of the unisex position maintaining that women will be truly equal to men only when they no longer have to give birth, and all children will be born in laboratories: "Childbearing could be taken over by technology . . . ."[16] In this unisex approach we find univocal claims about the human being *per se*

16. SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION 238 (1970).

rejecting all differences between women and men in the workplace and in the family.

We see this unisex mentality also trying to keep away any real differences between a woman and a man, for example, when it suggests that pregnancy should be classified as a medical condition or disability, in the same category as ovarian or testicular cancer, in a workplace benefits scheme.[17] Another example of unisex presuppositions in positive law is the requirement that a Quebec medicare card must always remain in the birth name of the individual, unless she pays $400–$500 to legally change her name.[18] Thus, this approach harms the unity of a new family with young children when they are not able to have the same last name.[19]

Gender neutrality laws are distinguished from gender unity laws by the fact that they simply disregard gender. For example, all traffic laws concern a driver without any reference to whether or not the driver is male or female. The same is true for the vast majority of civil and criminal laws. These kinds of laws only affect discussions about the family in the workplace when, on the one hand, they seem to include all persons (male and female), but, on the other hand, they limit de facto the extension of the definition of person to one or the other gender.[20]

### *B. Traditional Gender Polarity Laws*

Traditional gender polarity laws also have a long history both in philosophy texts beginning with Aristotle and in positive laws. When the woman is considered naturally inferior to the man, it can foster marriage laws that make the woman akin to the property of a man, and that establish a severe separation of private and public places of work. Some variations of traditional polarity were found in seventeenth-century England, in which all property that a woman brought with her into her marriage or later inherited became the property of her husband.[21] Against this univocal devaluation of woman in marriage and limitation of her possibilities of work, Mary Astell vigorously complained. In *Some Reflections Upon Marriage* (1700), she describes a woman's loss of equality with man after marriage as being akin to her enslavement.[22] In 1851, John Stuart Mill, when he married the widow Harriet Taylor, formally protested against the marriage laws in England. He

17. "And when people complain that you can't tell the boys from the girls nowadays, the feminist response must be to point out that it should make no difference. As Florynce Kennedy demanded, 'Why do they want to know anyway? So that they can discriminate?'" Jaggar, *supra* note 15, at 291.

18. *CBC News Indepth: Name Changes, How to Change Your Name*, CBC NEWS ONLINE, July 26, 2006, http://www.cbc.ca/news/background/name-change/how-to.html.

19. Unless there is a tradition, as there is in Spanish and Portuguese speaking generations, in which the parents' separate names are the hyphenated names of their children.

20. *See, e.g.*, MOTHER WAS NOT A PERSON (Margaret Andersen ed., 1972).

21. *See* MARY ASTELL, SOME REFLECTIONS UPON MARRIAGE 20, 84 (4th ed. 1970).

22. *Id.* at 107.

declared: "I absolutely disclaim and repudiate all pretension to have acquired any *rights* by virtue of such marriage."[23]

Often when an author rejects a univocal form of the traditional polarity position, the author ends up with a unisex position instead. Consider, for example, Dorothy Sayers' essay *Are Women Human?* She rejects the traditional polarity position with respect to men's work and women's work, but she ends up with an individualism that moves closer to the unisex view. Against the argument that women are inferior because they always try to take men's jobs while men do not try to take women's jobs, Sayers answers: "Of course they [men] do not. They have done it already."[24] She lists the examples: spinning, dyeing, weaving, brewing, distilling, pickling, bottling, and then states, "[h]ere are the women's jobs—and what has become of them? They are all being handled by men. It is all very well to say that woman's place is the home—but modern civilisation has taken all the pleasant and profitable activity out of the home where the women looked after them, and handed them over to big industry, to be directed and organised by men at the head of large factories."[25]

Then, after tracing the history of women's work which had been taken over by men, Sayers concludes:

> If you wish to preserve a free democracy, you must base it—not on classes and categories, for this will land you in the totalitarian State, where no one may act or think except as the member of a category. You must base it upon the individual Tom, Dick and Harry, and the individual Jack and Jill—in fact, upon you and me.[26]

The underlying philosophical argument here is that if univocal claims about women or men are to be rejected, then it is better to have no significant claims about either one.

### C. *Reverse Gender Polarity*

Reverse gender polarity approaches to law have only recently begun to be "promulgated," even though the theory had its intellectual roots in the later Renaissance in such thinkers as Agrippa and Lucrezia Marinella.[27] The more recent claim that women are naturally superior to men, in part led Mary Daly to state that men could not speak at her lectures or in her classrooms, and later that they could not attend her lectures at Boston College.

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23. MICHAEL ST. JOHN PACKE, THE LIFE OF JOHN STUART MILL 348 (1954); *see also* Sister Prudence Allen, R.S.M., *Catholic Marriage and Feminism*, *in* THE CHURCH, MARRIAGE, AND THE FAMILY (Kenneth D. Whitehead ed., 2007).

24. DOROTHY L. SAYERS, ARE WOMEN HUMAN? 23 (1971).

25. *Id.* at 24.

26. *Id.* at 36.

27. *See* HENRY CORNELIUS AGRIPPA, ON THE SUPERIORITY OF WOMAN OVER MAN (New York, American News Company 1873); LUCREZIA MARINELLA, THE NOBILITY AND EXCELLENCE OF WOMEN, AND THE DEFECTS AND VICES OF MEN (1999).

Initially fired for contravening the university's laws for equal access of students to participate in classes, she counter-sued, and then settled out of court for an early retirement in 1999.[28] Daly's reverse polarity model, which makes universal claims about the inferiority of men, obviously does not accommodate the family in the workplace any more than did traditional polarity models, which excluded women from the workplace.[29]

### *D. Fractional Gender Complementarity*

Fractional gender complementarity is a model that flourished in the eighteenth and nineteenth centuries in a post-Cartesian world which had divided the unity of the human person through a dualism of mind and body. In fractional complementarity, a woman and a man are each thought to provide only a fraction of a single person. Rousseau says: "The relation [of husband and wife] produces a moral person of which woman is the eye and man the hand, but the two are so dependent upon one another that the man teaches the woman what to see, while she teaches him what to do."[30] Theodor von Hippel was a disciple of Kant, and as a lawyer, he tried to affirm woman's equality with man. His theory, however, remained within a model of fractional complementarity, concluding that "Man and woman together [in marriage] constitute a complete human being."[31] Fractional complementarity often hid a traditional polarity.[32] Once fractional complementarity slides into a devaluation of woman, the fundamental claim of equal dignity and worth is lost. This renders the classification of "complementarity" false.

The seventeenth- through the nineteenth-century Cartesian philosophies, which separated mind and body, were not able to hold the tension between the two simultaneous components of equal dignity and significant differentiation of man and woman because they failed to build a foundation

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28. *See Mary Daly Ends Suit, Agrees to Retire*, BOSTON C. CHRON., Feb. 15, 2001, http://www.bc.edu/bc_org/rvp/pubaf/chronicle/v9/f15/daly.html.

29. *See, e.g.*, MARY DALY, PURE LUST: ELEMENTAL FEMINIST PHILOSOPHY (1984); MARY DALY, GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM (1978).

30. JEAN-JACQUES ROUSSEAU, ÉMILE 340 (Barbara Foxley trans., J.M. Dent & Sons, Ltd. 1974). Mary Wollstonecraft offered a satirical critique of Rousseau's fractional complementarity in A VINDICATION OF THE RIGHTS OF WOMAN 88–89 (Carol H. Poston ed., W.W. Norton & Co. 1975). While a moral person, like a corporate person, is not the same as a natural person in general usage, Rousseau's philosophy seemed to imply that the married couple reaches moral decisions as one human being, rather than each one separately accountable for moral decisions.

31. THEODOR GOTTLIEB VON HIPPEL, ON IMPROVING THE STATUS OF WOMEN 167 (Timothy F. Sellner ed., trans., Wayne St. U. Press 1979).

32. Fractional complementarity can be symbolically represented as: 1/2 + 1/2 = 1, so that the woman represented 1/4 and the man 3/4; or 1/3 and 2/3 respectively. This was apparent in the discourses of Rousseau, and it also emerged in philosophers like Kant. *See* IMMANUEL KANT, OBSERVATIONS ON THE FEELING OF THE BEAUTIFUL AND SUBLIME 79 (John T. Goldthwait trans., U. Cal. Press 1960); HEGEL'S PHILOSOPHY OF RIGHT 102–103 (T.M. Knox trans., Clarendon Press 1958); Arthur Schopenhauer, *On Women*, *in* ESSAYS AND APHORISMS 80, 83 (Penguin Books 1970).

for integral gender complementarity. A solid ontological foundation for the real identities of woman and man as persons was lacking.[33]

### *E. Integral Gender Complementarity*

Integral gender complementarity is a contemporary theory of man-woman relation that is based upon understanding reality as ontologically analogical. This contemporary theory of complementarity had its roots in physics.[34] Theorists later applied the fundamental equality of the two complements, which overcame the hidden polarity of fractional complementarity, to man-woman complementarity in theology and philosophy.[35] An individual woman or an individual man, each as a unified, matter/form composite, living human being, reveals his or her obvious ontological structure. The twentieth-century renewal in Thomistic metaphysics provided an ontological foundation that overcomes the dualism of Descartes. Each woman or man has a central form which organizes increasingly complex levels of interior structures following laws identified by physics, chemistry, biology, psychology, and philosophy.[36]

When we consider the inter-relation of a man and a woman in marriage, we can turn to M. A. Krapiec, who provided the much needed metaphysical foundation for the demonstration of how reality is analogically structured: "Analogy is 'omnipresent' in the world of really existing beings. Their structure and pluralism 'forces' the analogy of cognition upon man [in the inclusive sense]; for the various names and the way they are used in expressions are also analogical."[37] Thus, one existing human being would

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33. *See* Sister Prudence Allen, *Rationality, Gender, and History*, 68 AM. CATH. PHIL. Q. 271, 276 (1994).

34. In 1922, Niels Bohr discovered the principle of the fundamental complementarity in the physical universe. In his explanation, he formulated that in order to understand light, one had to understand how, depending upon the environment in which it was measured, it would appear in the mutually exclusive ways as a wave or as a particle. *See* HENRY J. FOLSE, THE PHILOSOPHY OF NIELS BOHR: THE FRAMEWORK OF COMPLEMENTARITY (North-Holland Physics Pub. 1985); Sister Prudence Allen, R.S.M., *Fuller's Synergetics and Sex Complementarity*, 32 INT'L PHIL. Q. 3, 4 (1992).

35. John Paul II articulated the two essential components of this position (equal dignity and significant differentiation) in his audiences on *Genesis* in 1979, but previously had been working out these elements of his body theology as Karol Wojtyla. *See* JOHN PAUL II, THE THEOLOGY OF THE BODY 42 (Pauline Books & Media 1997); *see also* John Paul II, *Mulieris Dignitatem* ¶ 1 (1988), *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_15081988_mulieris-dignitatem_en.html. For a summary of these developments see Prudence Allen, *Integral Sex Complementarity and the Theology of Communion*, 17 COMMUNIO 523 (Winter 1990), and Prudence Allen, R.S.M., *Man-Woman Complementarity: The Catholic Inspiration*, 9 LOGOS 87 (Summer 2006).

36. *See* BERNARD LONERGAN, INSIGHT: A STUDY OF HUMAN UNDERSTANDING 519 (3d ed. 1970); *see also* Sr. Prudence Allen, R.S.M., *Metaphysics of Form, Matter, and Gender*, 12 LONERGAN WORKSHOP 25 (1996).

37. MIECZYSLAW ALBERT KRAPIEC, UNDERSTANDING PHILOSOPHY 518 (Hugh McDonald trans., 2007) (1991), *available at* http://www.hyoomik.com/lublin/understanding_philosophy.html #chapter5.

be analogous to another existing human being, one existing man analogous to another existing man, and one existing woman analogous to another existing woman.[38] Professor Krapiec identifies these *inter-ontic* analogies among separate existents of the same kind.[39]

A different kind of inter-ontic analogy occurs, for the most part, between a man and a woman who enter into a relationship of marriage. A woman/person and a man/person can choose how to act in relation to the other, and when they choose marriage they exemplify *the prime inter-ontic analogical beings among human beings*.[40] In this *ontologically based argument* in support of integral gender complementarity in marriage, the real man-woman relation demands that each man and each woman be considered as a whole being; and when they enter into a communion of persons, something *more* than 1+1=2 occurs. In fact, *nearly always or for the most part*, a woman plus a man in marriage leads to 3. A child is generated, and the family continues to be inter-generational. We can symbolically represent inter-gender complementarity by the mathematical signs of $1 + 1 \rightarrow 3$. Since there are no other combinations of relations that have this synergetic effect of inter-generational generation, the family based on the marriage of a woman and a man has a unique identity among all forms of existential analogies. It is the *prime model*, and the man and the woman in the relationship can be considered as prime analogates.

Let us recall again the difficulty with univocal definitions of real things such as human marriage. As Krapiec summarizes it, "Univocity occurs only in our human intellectual cognition. Reality itself is pluralistic. . . . In the process of creating univocal concepts, in a certain way I 'betray' reality and I 'steal' it from what interests me cognitively . . . ."[41] Yet, the rejection of a univocal claim by the insertion of exceptions as contrary to the universal leads to the opposite problem, or equivocal claims, which neglect what is common among real beings, and thus, they may become at times highly artificial or nominalistic.[42] Krapiec's model of existential analogies argues that reality itself—"the really real," if you permit—is structured analogically, and that the human being is able to understand

38. It is important to realize that Krapiec articulates a new theory of analogy, existential in its derivation. He is not speaking of simply analogical groups of things, like plants, animals, human beings, angels, etc. Nor is he speaking about analogical concepts in the mind, analogies abstracted from the world, or projected onto the world from an isolated Cartesian ego, Lockean consciousness, or Kantian postulated "idea" of a soul. For a helpful analysis of these views in modern philosophy see CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY (1989).

39. KRAPIEC, *supra* note 37, at 350.

40. This application of M.A. Krapiec's theory of analogy to gender identity is found in Prudence Allen, R.S.M., *A Woman and a Man as Prime Analogical Beings*, 76 AM. CATH. PHIL. Q. 465 (1992).

41. KRAPIEC, *supra* note 37.

42. MIECZYSLAW ALBERT KRAPIEC, O.P., *The Analogy of "Being" and "Cognition," in* METAPHYSICS: AN OUTLINE OF THE HISTORY OF BEING 447–485 (Theresa Sandok trans., 1991).

this structure of reality by simply taking a look around. Families are for the most part inter-generational: they have grandparents, parents, spouses, children, and grandchildren. Nearly all workers have some living family members.

The conclusions of the ontological argument by Krapiec can also be supported by an *historical argument* with application for positive laws with respect to the workplace. Consider the following words of Gerry Bradley:

> To the extent that the classical statement of liberal neutrality about marriage implies that monogamy or gender complementarity, for example, can be shown to be essential to marriage only by revelation or reliance upon religious authorities, the classic statement is simply wrong. Almost all human societies have come to understand marriage as the procreative union of man and woman, regardless of the religious beliefs circulating in those societies.[43]

In support of Bradley's claim one should note that the field of physics first identified the theory of complementarity as the principle which explains why light is measurable in two mutually exclusive ways, namely as a particle and as a wave.[44] Analogically we can say that the human being has two mutually exclusive ways of being in the world (always or for the most part) as a woman and as a man. That is why complementarity is a real way to describe their relation; a man and a woman are two complementary ways of being human persons.

*A sociological argument* for the same conclusion was put before Canadian legislators to defend the position that marriage should continue to be legally defined as between one man and one woman, because of the value of its *real intergenerational structure* for the state.[45] Helen Alvaré also affirms a similar sociological defense of restricting marriage to opposite sex couples in the United States where individuals make attempts to ignore its synergetic and care-oriented inter-generational dimension: "This argument [to fight the heterosexual foundation of marriage] is made to overcome

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43. GERARD V. BRADLEY, A STUDENT'S GUIDE TO THE STUDY OF LAW 86 (2006).

44. *See* FOLSE, *supra* note 34; *see also* R. BUCKMINSTER FULLER, CRITICAL PATH 369 (1st ed. 1981).

45. *See especially* KATHERINE K. YOUNG & PAUL NATHANSON, *The Future of an Experiment*, *in* DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT 41 (Daniel Cere & Douglas Farrow eds., 2004) [hereinafter DIVORCING MARRIAGE]; MARGARET SOMERVILLE, *What About the Children?*, *supra*, at 63; DOUGLAS FARROW, *Rights and Recognition*, *supra*, at 97; FARROW, *Facing Reality*, *supra*, at 155; *and* DANIEL CERE, *Conclusion*, *supra*, at 175. Even though this particular battle was lost in Canada, the arguments still remain as properly based on the real structure of the world, and they may be helpful to others engaged in analogous legal argumentation. Christopher B. Gray also notes that:

> While we lost that battle, it's not the war; . . . education can still achieve acquiescence to (1) the use of notwithstanding clause, with government acquiescence, and (2) the taking up again of the fourth question in that Reference case, which the court explicitly chose not to answer, that is, whether it is contrary to the Charter for the government to define an institution heterosexually.

INST. FOR AM. VALUES, *supra*, note 5.

states' claims that marriage is restricted to opposite-sex couples precisely because of the state's interest in children's well-being."[46]

A statement of principles articulated by the Institute of Marriage and Public Policy, following 2004 and 2005 Harvard Law School symposia on marriage (coordinated by Mary Ann Glendon), very closely follows the inter-gender complementarity model just articulated:

> Marriage and family law is fundamentally oriented towards creating and protecting the next generation. . . . The primary way that marriage protects children is by increasing the likelihood that a child will know and be known by, love and be loved by, his or her mother and father in a single family union. . . . Marriage is first and foremost a social institution. . . . No laws, and no set of lawyers, legislators, or judges, can summon a social institution like marriage into being merely by legal fiat. . . . Marriage is an irreplaceable social good. . . . A good society cares about the suffering of children. . . . [and] A major goal of marriage and family law should be supporting civil society's efforts to strengthen marriage, so that more children are raised by their own married mother and father in loving, lasting unions.[47]

To conclude this first section of the presentation: if we are reflecting today on how the workplace ought to be restructured to accommodate family life, then perhaps a robust model of integral gender complementarity would be useful for attorneys and judges. Consider the following situations:

1. Can a philosophy of the analogical structure of reality help to defend marriage as a relation between one man and one woman, potentially inter-generational, for the good of society as a whole?
2. Can a consideration of real differences between a woman and a man in the analogical structure of reality be helpful in formulating laws about pregnancy-leave that do not distort it into something akin to a disease?

## II. Law and Conscience in Relation to Truth

Can philosophy of the person and conscience help heal ruptures between conscience and truth in the practice of law? To begin, I will offer some practical examples from actual experiences of persons whom I know. They share the common characteristic of lying in order to gain an immediate goal which is often related to family responsibilities. In the first example, a father says he is sick when he is not, in order to take some time off work to care for his sick child because his office allows only maternal care leave. In the second example, a daughter, who is wrongfully accused of embezzling funds at her workplace agrees to plea bargain for a lesser, but

46. Helen Alvaré, *The Consistent Ethic of Life*, 2 U. St. Thomas L.J. 326, 337 (2005).

47. Coalition for Marriage, Family and Couples Education, Inst. for Am. Values, *supra* note 5, at 6–8.

*untrue charge* of intentional misappropriation of funds in order to put the legal fight behind her so that she can move to another state to take care of her elderly mother. In a third example, a woman driving near her workplace receives a traffic ticket after an accident caused by her failure to yield the right of way. In traffic court, she agrees to plead to a lesser, *untrue charge*, of "operating an unsafe vehicle," in order to receive a lower number of points on her license and a smaller fine for the purpose of helping her family finances. In the last two examples there would have been nothing wrong with pleading to a *lesser included charge*, but the difficulty is that the persons pleaded to *lesser false charges* because they thought it would help their family. Their false response of "guilty," when asked how they plead to the lesser, but false charge, has the real possibility of redounding back on the accused person by mistaking the meaning of responsibility for real guilt. It also redounds back on the legal system by making it seem "double-minded" and even ridiculous.[48]

In all of these examples, a person chose to not speak truthfully in order to do something he or she thought would be better for a family.[49] In each case, the persons lied in a public setting because of the way in which a positive law or legal process was commonly practiced. In the traffic case, the court provided the person with a written statement explaining that the judge might offer the lower charge even though it was not supported by any evidence. This seemed to imply that everyone accepted the charade. However, as newspaper reporting clearly demonstrates, a charge to which a person responds in court with "guilty" gets reported as if it were true in such words as "So and so pleaded guilty to the charges of . . . x, y, z."[50]

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48. In a different kind of example, a young man overcharged with a felony but admittedly guilty of a misdemeanor, and without available funds for making bail, pleaded guilty to the arguably false felony charge when the prosecutor refused to lower it in plea bargaining. He did this because waiting for a trial he would have spent at least six months in jail, whereas if convicted, because of serious prison overcrowding in that state, he would serve three months on a sentence of three years in prison. He plea bargained for a higher *untrue charge* of a felony, so that he could get in and out of jail or prison faster than if he waited in jail for the trial of the lesser charge. In other words, his desire to spend less time in captivity in the present moment led him to make a decision that could put him in jeopardy for future applications for work. Upon applying for work, he most likely would have to answer a questionnaire about whether he had ever been convicted of a felony, putting him in the position of either lying to secure a job or telling the truth and potentially losing the opportunity. He had no respect for the law and wanted to do anything he could to shorten his sentence.

49. *See* Alvaré, *supra* note 46, at 345 (emphasizing another important dimension of truth:

> One final but foundational indication that a legislative agenda for marriage and family stability could give the consistent ethic greater coherence and practical success is the fact that this agenda understands the two-fold nature of freedom: freedom as requiring both truth telling and solidarity with the vulnerable. As to truth telling, the marriage and family agenda regularly relies on the findings of experienced family researchers about what helps and what hurts couples and children.).

50. In some states "nolo contendere" pleas are accepted. In pleading 'no contest,' a person pleads guilty but does not really agree that he or she did it. I am grateful to Gerry Bradley for this clarification.

How can philosophical knowledge about the human person and the operation of conscience help attorneys to formulate or practice better law? One reason why so many people may be willing to compromise their conscience with respect to truth and positive law is that several modern philosophers have distorted what conscience really is and how it acts. These erroneous positions have misled people about how their conscience operates in determining a true good to be done or evil to be avoided in a particular situation. I will briefly summarize some of the key points of a more lengthy study on conscience.[51]

The correct view of conscience describes it as a faculty of the practical intellect, which can be exercised in judgment. The phrases practical intellect, practical reason, and practical judgment are often used interchangeably in this correct philosophical description about conscience. Thomas Aquinas specifies that conscience is a practical judgment about *the moral value* of an act that one has done, is doing now, or is thinking of doing in the future.[52] M.A. Krapiec wrote extensively on how the practical intellect uses analogy in relation to natural law.[53] He summarizes: "This act of knowledge, which continually suggests to the person: 'Do this,' 'Don't do that,' 'Do it this way or that way,' is an *act of the intellect in the practical sphere*, analogous to an act of the intellect in the theoretical order when it brings forth 'existential judgments.'"[54] He argued further that a person must engage his practical intellect to *evaluate his personal judgment of conscience* in relation to particular positive laws:

> Thus, every legal positive command cannot but pass through the "filter" of the human conscience, which always personally relates the person to the legal command. Otherwise, a person would not act as a person who is free and responsible for actions which he or she understands in the face of the law, but would act like a machine which is univocally directed "from the outside."[55]

Karol Wojtyla also described how conscience operates in a *concrete practical judgment* rather than in conformity to univocal claims imposed on a

51. Sr. Prudence Allen, R.S.M., *Where is Our Conscience? Aquinas and Modern and Contemporary Philosophers*, 44 INT'L PHIL. Q. 335, 335–372 (Sept. 2004). See also the discussion of Socrates and Thomas More, *id.* at 369.

52. AQUINAS, *supra* note 1, q. 79, a. 13.

53. M.A. KRAPIEC, O.P., *The Analogical Structure of Reality*, *in* PERSON AND NATURAL LAW 93–120 (Maria Szymanska trans., 1993); *The First Analogical Realizations of Natural Law*, *in* PERSON AND NATURAL LAW, *supra*, at 204–211.

54. M.A. KRAPIEC, I-MAN: AN INTRODUCTION TO PHILOSOPHICAL ANTHROPOLOGY 209 (Marie Lescoe et al. trans., 1983) (emphasis added).

55. KRAPIEC, *supra* note 53, at 230. For an excellent description of Krapiec's ontology and its relation to natural law see Christopher B. Gray, *Objectivity in Ontology and Practical Philosophy: Polish Philosophy of Natural Law at Lublin*, *in* 20TH CENTURY POLISH PHILOSOPHY (Sandra Lapointe ed., forthcoming 2007). While Gray and I do not always reach the same conclusions, we are both eager to have Lublin philosophy more available to the English-speaking philosophical and legal communities.

| **Structure of Theories about Operation of Conscience as Applied to Truth and Law Operation of Conscience** | **Definition of Conscience** | **Effect of Conscience in Workplace** | **Relation to Truth** | **Examples in Relation to Law** |
|---|---|---|---|---|
| **Practical intellect** | A particular judgment of a person's intellect about a good to be done or an evil to be avoided in the past, present, or future | Engaged and Dynamic | Identifies the true good and true evil in the moral quality of an act already done, being done, or to be done in the future | A person is free and responsible to filter through his or her judgment of conscience the moral quality of every act considered legal or illegal. |
| **Theoretical intellect** | Self-legislative reason that takes one's maxim about a proposed good and makes it universalizable | Locked-up tight in theoretical deduction | Mechanical or rational deduction about a univocal truth external to the person | All good laws are universal and categorical; they never allow exceptions. |
| **Imagination** | Calculation of the practical cash-value of an action about to be done and set at work in the stream of experience | Disengaged and calculating consequences to determine what is good or bad | Truth is something that happens to an idea. It makes itself true by the way it works. | If a law or plea bargain works then it is considered as pragmatically true, even though there is no evidence to support it. |
| **Emotions** | Identifying a feeling or moral sentiment about the pleasure or pain of something | Disengaged and doing what feels good and avoid what feels bad | Skeptical approach to truth with reason only able to rationalize emotions | If a law feels good then it must be good; if it feels bad, then it must be bad. |
| **Memory** | Experience of the super-ego or internalized authority from the past making a moral judgment in the present | Locked-up tight in repetition of the past | What others (my parents) have told me is true is true. | If something has always been legally regulated in a particular way, then it should always be done the same way. |
| **Will**<br>VERSION A<br>VERSION B | A dominating instinct or will to power<br>Conforming of private subjective conscience to laws of the state | Transferred into self-overcoming<br>Transferred into laws of the state or ideologies of social movements | I determine my own true and false, my good and evil.<br>Some group outside of me determines my objective true and false and good and bad | External laws have no application to me. My will and my laws are the same.<br>If the state promulgates a law then the individual conscience is transferred into the external law. |

person from outside: "[T]he function of conscience cannot be reduced to a mechanical deduction or application of norms whose truthfulness inheres in abstract formulas, formulas that in the case of established legal systems may be codified."[56] Wojtyla adds that conscience has both transitive effects that move outwards to shape the world, such as care for family members or relation to the workplace; and intransitive effects that turn back inward on the person who acts.[57] Through the intransitive effects of acting in accordance with conscience, a person either moves towards greater happiness, integration, and fulfillment through acts in union with a well-formed conscience or moves towards more vexation, disintegration, and lack of fulfillment, through acts not in accord with, or even against his or her conscience.[58] Thus, we can see why it would be important for attorneys to help formulate laws and aid legal processes that would respect and foster the integrity of their client's judgments of conscience.

The first erroneous philosophical view considers the conscience as conformed to the *theoretical reason (or theoretical intellect)* which offers universalized judgments about a particular act. Immanuel Kant represented this view when he argued that persons had a duty to conform their conscience (about a particular maxim for action) to a univocal law or categorical imperative.[59] Kant's approach reduces conscience to searching for a univocal and universalizable good, instead of discovering the analogical application of a discovered objective good. Thus, the conscience does not operate in a practical judgment as much as it remains locked-up in the theoretical claim. This results in the firm establishment of all laws as univocal and imposed by reason itself on all persons.[60] Edith Stein describes how a radical rejection of the overestimation of theoretical reason in Kant can lead to a neo-Kantian anti-intellectualism in contemporary culture.[61] An over-reaction in opposition to Kant may partly account for a contemporary overemphasis on the roles of feelings or the imagination in views about conscience.

A second erroneous view of the relation of conscience and truth is found in those who think that a person should calculate the good to be done by using the *imagination* to project the future "costs and benefits" of particular actions. The pragmatism of William James is representative of this ap-

56. KAROL WOJTYLA, THE ACTING PERSON 165 (Andrzej Potocki trans., 1979).

57. *Id.* at 161.

58. *Id.* at 172–73.

59. *See* IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 24 (Lewis White Beck trans., 1956). This reason must be self-legislative with respect to the moral law: "Reason determines the will in a practical law directly, not through an intervening feeling of pleasure or displeasure, even if this pleasure is taken in the law itself. Only because, as pure reason it can be practical is it possible for it to give law."

60. Christine Gudorf, *How Will I Recognize My Conscience When I Find It?*, PHIL. & THEOLOGY 64, 65–66 (Fall 1986) (offering a feminist critique against this Kantian approach).

61. EDITH STEIN, FINITE AND ETERNAL BEING: AN ATTEMPT AT AN ASCENT TO THE MEANING OF BEING 437 (Kurt Reinhardt trans., 2002); *see also id.* at 437 n.98.

proach.[62] He articulates further that: "That new idea . . . *makes itself true*, gets classified as true, by the way it works . . . ."[63] Unfortunately, advertisements and some other media-driven programs are based on this. If we say emphatically and repeatedly, you need this car, that political option, and so forth, it "seems" to be true. Under this approach, the operation of the conscience is disengaged in the present moment, when it should be operative. This is why plea-bargaining to something that is not true has come to be "the way that it is done" because "it seems to work."

A third erroneous view about conscience locates it in the *emotions*, particularly of pleasure and pain. David Hume promoted this view when he argued that "[m]orality, therefore, is more properly felt than judg'd of."[64] This approach prepares the way for the common claim that if something feels good then it must be good.[65] Hume also argued that the emotions use reason as an instrument, and that conscience is only moral sentiment or feeling. He remarked that: "Reason is wholly inactive and can never be the source of so active a principle as conscience, or a sense of morals."[66] Hume's identification of conscience with an emotion inevitably leads to the disappearance of conscience itself. Conscience becomes completely disengaged from the operations of the practical intellect in coming to moral decisions.[67]

A fourth erroneous modern theory about conscience argues that it is found in the memory. Sigmund Freud located the conscience in the superego or internalized memory of a child of its parents' (or some other authority person's) rules and regulations. If persons locate their conscience in the memory, they are likely to consider something to be good if they had been

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62. WILLIAM JAMES, *What Pragmatism Means*, *in* SELECTED PAPERS ON PHILOSOPHY 203 (1967) (arguing that "If you follow the pragmatic method . . . you must bring out of each word its practical cash-value, set it at work within the stream of your experience.").

63. *Id.* at 209 (emphasis added).

64. DAVID HUME, A TREATISE OF HUMAN NATURE 470 (L.A. Selby-Bigge ed., Clarendon Press 1965) (1888).

65. In law, the question of whether or not someone knew they were doing something wrong is often confused by the response that it seemed good to the person at the time of the act. We sometimes find this argument used to support the claim that since two same-sex partners feel that they want to be married, it would be good to allow them to marry. The argument from emotion simply disregards the fact that marriage between a man and a woman has been legally supported because it provides the inter-generational framework for the raising of children and care of the elderly that is helpful to the stability of the state. *See* DIVORCING MARRIAGE, *supra* note 45.

66. HUME, *supra* note 64.

67. *See, e.g.*, WOMEN'S CONSCIOUSNESS, WOMEN'S CONSCIENCE: A READER IN FEMINIST ETHICS (Barbara Hilkert Andolson et al. eds., 1985). The title and introductory sentence open the issue of conscience: "The last fifteen years have witnessed enormous changes in women's consciousness, but the accompanying changes in our ethical styles—changes in our consciences—have received little sustained attention." Surprisingly, this opening sentence appears to be the sole reference to the word "conscience" in the subsequent 300 page text!

told that it was good in the past or bad if they had been told it was bad. The conscience is locked-up tight in the repetition of the past.[68]

The fifth erroneous attitude locates the operation of the conscience in the *will*. Nietzsche asked: "What will he call this dominating instinct, supposing he feels the need to give it a name? The answer is beyond doubt: the sovereign man calls it his *conscience*."[69] Nietzsche redefines the good as the will to power of peoples or of individuals; and he relocates truth in the will to power. He transfers the operation of his conscience into his own will (to power) to determine the true and false, good and evil.

Another version of the erroneous location of the conscience in the *will* is articulated by Hegel, who argues that the person should conform his or her individual *subjective conscience* to the objective articulation of the universal ethical good stipulated by the state in its "laws and institutions of a social, cultural, and legal nature that inform the life of a people."[70] Two dangers of Hegel's approach await the individual citizen in his or her workplace: the lack of respect for the individual conscience[71] and the pull of the individual constantly towards the universal laws of the state or of an ideology to escape a perceived isolation.[72]

If a person thinks that his or her conscience is located in the will, the person may transfer his or her conscience into the laws of the state or some kind of external political movement. Robert Lifton described this transferring of conscience into the "prevailing opinion of others," as an example of "doubling" through which a person acts one way in his or her family and

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68. *See* 19 SIGMUND FREUD, *The Economic Problem of Masochism*, *in* THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 167 (James Strachey trans., 1961) (1924) (After arguing that all men have an Oedipus complex, derived from an inherited sense of guilt from the desire to kill their father, Freud asserts that "The super-ego—the conscience at work in the ego—may then become harsh, cruel and inexorable against the ego which is in its charge. Kant's Categorical Imperative is thus the direct heir of the Oedipus complex."). For Freud's discussion of conscience, see also 22 SIGMUND FREUD, *New Introductory Lectures*, *in* THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 61 (Alix Strachey trans., 4th prtg. 1973) (1933); and 21 SIGMUND FREUD, *Civilization and Its Discontents*, *in* THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 132 (James Strachey trans., 1961) (1930).

69. FRIEDRICH NIETZSCHE, *"Guilt," "Bad Conscience," and the Like*, *in* ON THE GENEALOGY OF MORALS AND ECCE HOMO 57, 60 (Walter Kaufmann ed., R.J. Hollingdale & Walter Kaufmann trans., Vintage Books 1969).

70. RICHARD L. SCHACHT, *Hegel on Freedom*, *in* HEGEL: A COLLECTION OF CRITICAL ESSAYS 289, 316 (Alasdair MacIntyre ed., 1st ed. 1972); *see also* GEORG FRIEDRICH HEGEL, HEGEL'S PHILOSOPHY OF RIGHT ¶ 128 (T. M. Knox trans., 1958).

71. HEGEL, *supra* note 70, at ¶ 91. Regarding the first danger Hegel states in *Philosophy of Right* that ". . . the state cannot give recognition to conscience in its private form as subjective knowing, any more than science can grant validity to subjective opinion, dogmatism, and the appeal to a subjective opinion."

72. G.W.F. HEGEL, THE PHENOMENOLOGY OF MIND 670 (J.B. Baillie trans., Harper & Row 1967). Concerning the second danger Hegel states: "When, therefore, any one says he acts towards others from a law and conscience of his own, he is saying, in point of fact, that he is abusing and wronging them."

neighborhood and a different way in the workplace.[73] Lifton's example comes from extensive interviews with Nazi doctors whose consciences were silent while working in the prison camps of World War II; in short, each doctor transferred his or her conscience into the Nazi ideology of the government.[74]

In American culture, this process occurs among those women who transfer their conscience about abortion into the feminist movement, calling abortion part of work benefits for "women's reproductive health."[75] A transfer of conscience into an external extreme form of economic capitalism can also occur in the workplace, when executives take home exorbitant salaries (with the attitude that this is the way it is done in business, or this is comparable to salaries of other executives), and at the same time, in response to financial difficulty, they may cut out all retirement benefits and common stock benefits for their workers' retirements. One can find a less extreme example of how families may be affected by the transferring of the conscience into an American business mentality in a recent Harvard-McGill research study of 177 countries for the Global Project on Working Families, which states that "At least 126 countries require employers to provide a mandatory day of rest each week. The U.S. does not guarantee workers this 24-hour break."[76]

To summarize the conclusions of this section on conscience, I would like to reiterate that the *non-erroneous view of conscience* considers it to be *a judgment of the practical intellect* about the moral quality of an act one has done, is presently doing, or is considering for the future. Our analysis of five erroneous views, namely placing conscience primarily in the theoretical intellect, imagination, emotions, memory, or will, has indicated difficulties that these erroneous views pose for laws and for people bound by them. This conclusion does not intend to suggest that the theoretical intellect, imagination, emotions, memory, or will have no value for the person who is trying to come to a good judgment of conscience. Each of these personal operations can work in harmony with the practical intellect. For example, the theoretical intellect can suggest basic principles to be considered in a particular case, the imagination can help a person consider how it would be for him or her to be the recipient of a particular action, uncomfortable emotions can be a red flag of uneasiness helping a person to think about what he

73. ROBERT JAY LIFTON, THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE 421–22 (2000).

74. *Id.*

75. *See* Gudorf, *supra* note 60, at 78.

76. *See* Jody Heymann, Alison Earle & Jeffrey Hayes, *The Work, Family, and Equity Index: How Does the United States Measure Up?*, 2007 INST. FOR HEALTH AND SOCIAL POLICY, MCGILL U. at 3. The study also traces duration of paid annual leave, leave for illness and family care among other factors. Examples of how this approach to conscience might affect someone in the workplace include an absolute demand that persons work on Sabbath days, when their conscience leads them to not work on those days.

or she is doing, the memory can help someone recall a suggestion about a kind of action by someone they respected in the past, and the will can help a person do something difficult when the practical intellect suggests it is the better thing to do. The person must engage his or her practical intellect to conclude that a particular act is the right one to do here and now, and that act is the wrong one to avoid doing, to stop doing, or to regret doing.

To conclude this brief second section of the presentation, let me ask two questions for attorneys to ponder the possible ways to foster in their clients a greater respect for conscience and truth:

1. In order to prevent the worker from having to lie in order to get days off, can paid time away from a workplace for a woman or a man for care of a sick relative be covered by laws that simply designate a set number of days off without stipulating whether they are for vacation, sick leave, care leave, or personal leave or specifically for care of a child, parent, grandparent, spouse, or a grandchild?
2. In a situation of plea bargaining, can an attorney support his or her client's conscience, respect for the truth and for the law, by seeking a lesser, included charge that is supported by the facts (in other words, that is truthful), rather than encouraging the client to plead guilty to a false, even if lesser, charge?[77]

## III. Workplace in Relation to the Common Good

Now that we have reflected on the need for laws to be both based in the analogical structure of reality and integrated with a person's practical judgment of conscience about the good to be done and the evil to be avoided, we will complete this presentation with a reflection on the philosophical understanding of the common good as applied to accommodating the family in the workplace.

Many examples that directly concern women with young children and the workplace, I expect, Joan Williams will address at this conference; they are well-documented in her articles and books.[78] One significant area of common concern that we both address is the need for legal support for fractional-time positions with fractional benefits. To give just one example, a couple, both full-time tenured philosophers at an Eastern university/seminary gave birth to their second child, a daughter with a chromosomal abnormality, Tetrasomy 18p. They decided to seek one full-time position, sharing

77. In response to a query about how an appeal to *synderesis* or conscience can work in a contemporary secular culture driven by a pragmatist's understanding of conscience, it was pointed out that attorneys can try to awaken the real operation of the conscience in one-on-one situations in which they lay out for their clients various options, explaining how each one is closer or farther from the truth of the real situations being discussed. Then the client must be left to freely come to a decision about the one that seems closest to the good for him or her in this particular situation.

78. *See* Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It (2000); Joan C. Williams, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 Harv. Women's L.J. 77 (2003).

it half-time, so that one could be home with their daughter while the other one was in the office. They were hired at another seminary, after a typical competitive interviewing process, and given a common office and half-time responsibilities (20 hours per week) in teaching and administrative work. Then, when they went for their meeting with human resources, the employer told them that one had to be full-time and the other part-time with no benefits. This was the way that the seminary had developed its benefits plan. They had to work out various ways to argue that they were doing philosophy another 10 hours at home to make up a minimum 30-hour schedule to be minimum full-time. Here the legal structure of the benefits plan was not flexible enough to accommodate the truth of their working situation.

A second example of another related area in which legal practices seemed to harm rather than help this same couple, occurred in the whole medical process, paid for by their previous employer during the pregnancy of the wife. She was 38 then, and her obstetrician asked her to make a blood draw to search for abnormalities. This led to an ultrasound, which led to further requests by the doctor for her to have an amniocentesis. At this point, the couple (which had made a well-informed decision not to have an amniocentesis because it could kill the child and because they would not under any circumstances abort the child), kept experiencing various physicians almost harassing them, *out of fear of subsequent lawsuits*. For the common good of Catholic families, Catholic workplaces could have Catholic physicians, who would simply inform, but not try to force their clients against their will, with spurious arguments (such as comparing a 1/300 chance that the amniocentesis would kill the child with a 1/20 chance that she has an abnormality), in order to convince them that it would be better to have the amniocentesis. The couple could make a well-informed decision, sign a release for the physician, and then focus on preparing for their child to be born.

In a third kind of example, employers or work supervisors can make excessive demands on a worker. For example, by Quebec law, a nurse working in a hospital must do a double-shift if the nurse for the following shift does not show up, regardless of the young children or spouse waiting for the nurse at home at the end of the regular shift.[79] Some employees demand overly frequent and sudden travel or frequent and sudden moves which uproot families and cause unacceptable tensions. The fear of losing a professional job can hold the member of a family hostage to these extreme demands of the workplace. These kinds of demands undermine the common good of the family.

79. From a personal example of a nurse working at St. Justin's Childrens' Hospital, Montreal, Quebec.

In a fourth example, the religious family of the Little Sisters of the Poor, which had been in the past able to encourage their residents to participate in basic cleaning activities as a way of participating in the good order of the home as well as for their own good of keeping active and contributing to the community, were restricted by labor union rules which stipulated that, even in their own homes for the poor, only certain paid workers should do all of the cleaning work.

To address these situations in which laws do not contribute well toward building the common good of a particular nexus of the workplace and family, I again offer a summary chart listing different philosophical approaches to the common good followed by a discussion of some essential philosophical elements and some distortions in relation to the common good:

THE COMMON GOOD (= INDIVIDUAL GOOD + GOOD OF GROUP) IN THE FAMILY, WORKPLACE, AND SOCIETY

| The Common Good | Good of Individual | Good of Group | Relation to Laws |
|---|---|---|---|
| **Realized** in regimes supporting the real true common good | **Yes** Good of the individual fosters the good of the group and of every individual within the group | **Yes** Good of the group fosters the good of each individual within the group | Laws developed by all those at whose good they are aimed. |
| Emphasizes general will or will of authority | **No** Individual good dominated by the group | **Yes** | General will or supreme authority promulgates laws that are opposed to the good of individuals in the group. |
| Emphasizes individual rights | **Yes** | **No** Group good dominated by the individual right | Individuals cause the promulgation of laws or application of laws that are opposed to the good of other individuals in the group and also to the good of the group as a whole. |

People often misunderstand the phrase "common good." The two essential components of the common good as applied to work and to the family are: the simultaneous holding of a common goal which the group shares and the active participation of each individual member of the group leading both to an enrichment of the community and to the development of the individual persons. It entails two components held together in tension, which leads to the tendency to push one or the other side of the tension out of the relation, in order to resolve the tension. Simply put, the common

good of any group involves the simultaneous good of each individual within the group and of the group as a whole.[80]

Turning once more to Lublin existential personalism, M.A. Krapiec summarizes this dynamic between the individual and the group with respect to the common good as follows:

> Further, it is only in such a conception of common good, which is the goal of the personal activity of every man [and woman], that we can posit the principle that the growth of an individual person is at the same time the growth of the common good of the whole society. For the enrichment of personal development cannot be achieved at anyone's cost, but it serves everyone. For this reason, the goal of the community is making possible the fullest realization of common good; i.e., the creation of the conditions for personal actualization to an unlimited degree.[81]

Karol Wojtyla augments this understanding of the internal dynamism of how individuals make decisions in relation to the common good. He describes different kinds of work situations:

> Thus for the laborers the common good may appear to be solely the completion of the excavation, and for the students the commitment to memory of the information contained in the lecture.
>
> These common goods, however, may also be considered as links in a teleological chain, in which case every one of them is seen as a means to attain another goal that now presents itself as the common good; thus the excavation dug out by the laborers will serve to lay the foundations for a future construction, and the attended lecture is but a link in a long and complex process of learning with examinations as a formal test of the knowledge acquired in that particular field.[82]

Wojtyla further qualifies this by arguing that it would be superficial simply to identify the common good with the shared external goal of the group. In his words: "It is impossible to define the common good without simultaneously taking into account the subjective moment, that is, the moment of acting in relation to the acting persons."[83] As he deepens his elaboration of this subjective meaning of the common good, Wojtyla contrasts temporary groups like the laborers or students mentioned above with, "for instance, a family, a national group, a religious community, or the citizens of a state. The axiology of these latter communities, which is expressed in the common good, is much deeper."[84] Wojtyla claims that,

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80. For the Thomistic and the French roots of this approach see JACQUES MARITAIN, THE PERSON AND THE COMMON GOOD (U. Notre Dame Press 1966) (1946).

81. KRAPIEC, *supra* note 53, at 256.

82. WOJTYLA, *supra* note 56, at 281.

83. *Id.*

84. *Id.* at 282–83.

> [E]ach of its members expects to be allowed to choose what others choose and because they choose, and that his [or her] choice will be his [or her] own good that serves the fulfillment of his [or her] own person. At the same time, owing to the same ability of participation, man [and woman] expects that in communities founded on the common good his [and her] own actions will serve the community and help to maintain and enrich it.[85]

With this introduction, we can turn now to some philosophies in which positive laws appear not to foster the common good. It could be argued that among philosophers *ignoring the good of the individual* follows a pattern previously suggested by Plato in the *Republic*. M.A. Krapiec observes that:

> Contemporary theoreticians of the state and of law who experienced fascism point to the characteristic traits of the system of government, connecting it with the servile forms of the ancient and Platonic ideal of the state. . . . [A] system of government that is based on Platonic models can be designated as the kind of government in which the human person is not the end but only the means of realizing the ends of government, and his value is only that of a means.[86]

The individual's participation, or the participation of a smaller unit in the society such as a family, may be ignored or crushed by the general will.[87]

Karol Wojtyla clarifies that any priority of the common good does not follow from the fact that the common good concerns a great number or the majority while the individual good concerns only individuals or a minority. It is not the numbers or even the generality in the quantitative sense but the *intrinsic character* that determines the proper nature of the common good.[88]

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85. *Id.* at 283 (emphasis omitted).

86. KRAPIEC, *supra* note 53, at 262.

87. A contemporary example of this could be seen in Quebec language laws, which forbid an English-speaking family with a small family business to have any signs relating to their business in English if they are visible outside the store. In addition, any signage in English visible inside the workplace itself must be in a smaller and less colorful type than its French counterpart. If we understand language and culture as a natural part of the flourishing of persons within a society, in this case the common good is not well fostered, because the general will of the group crushes the individual wills of members of linguistic minorities. In this case the positive law is too narrow for the common good to truly flourish. Christopher B. Gray updates this example:

> Signs in 'native' languages outside are another exemption [to Bill 101], to some extent; that is, those neither in French nor English have special provisions. Urdu and Bantu do, but English does not. Yes, it crushes individual wills; but perhaps more disastrously it obliterates the public institutions of the linguistic community—schools, hospitals, social services, and therewith the community whole, not just individuals. The effect of that points up how much individuals are sustained if not defined by their community. We're dying now.

Personal correspondence from Christopher B. Gray of Concordia University, Montreal, Quebec, to author (Mar. 9, 2007) (on file with author).

88. WOJTYLA, *supra* note 56, at 283.

The willing participation of each member of the group is essential for this intrinsic character of the common good to be well realized.

In the opposite kind of distortion, a law may support an individual or set of individuals' rights in such a way that the common good of the larger unit is not supported.[89] Following a pattern inspired by John Locke, John Stuart Mill, and others, the legal individual right of a woman to have an abortion has often rejected the will of others, including the father of the child, the woman's extended family, and her society. M.A. Krapiec summarizes this approach as: "liberal individualism [in which] . . . society as some kind of reality is a fiction; only people exist, of whom some have power and others do not. Individual people, in relation to each other, act in a definite and more or less free manner."[90]

Sometimes positive laws or their interpretation are too broad, and their consequences redound, or turn back, on the common good, and destroy it from within. For example, the *intended consequences* of a particular law may be originally desired by a specific group. The birth-control movement started by Margaret Sanger pressed to have laws passed which allow for the availability of birth control. This movement appeared to support individual women and their families, but turned out to be an effort to limit and even to destroy the families of persons of color. Rebecca Messall has carefully traced this movement in a meticulous study titled: *The Long Road of Eugenics: From Rockefeller to Roe v. Wade*.[91] Thus, while Sanger and others appealed to the rights of an individual woman to use artificial birth control and/or have an abortion for her perceived individual good, and for the perceived common good of her family and for her work, in fact, wealthy white men manipulated the individual woman and women who intentionally diminish the number and size of black families. Day Gardner, the leader of the Black Pro-Life movement, recently confirmed that: "The eugenic policies of the founder of Planned Parenthood, Margaret Sanger, appear to be alive and well and still directed at black women."[92]

An example of law redounding against the common good through *unintended consequences* is currently coming to light. In a very detailed demographic study of world-wide sex ratios at birth, divided by country and

89. *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 47–75 (1991).

90. KRAPIEC, *supra* note 54, at 263 (emphasis omitted). Krapiec includes Rousseau in this category, but I am more inclined to include him in the previous one. *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSE ON THE ORIGIN AND FOUNDATION OF INEQUALITY AMONG MANKIND 109 (Lester G. Crocker ed., 1967). "So long as a number of men in combination are considered as a single body, they have but one will . . . ."

91. *See* Rebecca Messall, *The Long Road of Eugenics: From Rockefeller to Roe v. Wade*, 30 HUMAN LIFE REV. 33, 33 (Fall 2004) ("At the domestic level, abortion has had a disparate effect on African-Americans . . . .").

92. *Racism, Eugenics Still Fuel Planned Parenthood Black Pro-Life Leader Charges*, CATHOLIC NEWS AGENCY, Mar. 1, 2007, http://www.catholicnewsagency.com/new.php?n=8762.

region, Nicholas Eberstadt has conclusively demonstrated that the international use of ultrasound on pregnant women has resulted in the destruction of a disproportionate number of female human beings.[93] In a well-documented account, Eberstadt describes country by country what he calls *The Global War Against Baby Girls*; and he concludes that "this [is a] portrait of a war that is apparently unfolding on practically every continent . . ."[94] The international laws which allow these tests, supposedly to verify the health of the mother and fetus, are targeting women in general and non-white women in particular, resulting in a significant number of abortions of female fetuses, and an even more disproportionate number of abortions of females from families of color.[95]

How can we evaluate whether or not laws truly support the common good? M.A. Krapiec reflects that:

> No community can exist against its own proper way of being and issue such laws which, in any way whatever, should seek to make impossible or hinder the attainment of common good, or to condition the attainment of this good with the help of rules-commands that, of their very nature, were not necessarily bound with [the] common good. All such norms or decrees can be recognized as being only pseudo-laws, which cannot in any way, bind in conscience, a human being who is ordained to the attainment of common good.[96]

Gerry Bradley offers the following criteria for evaluating whether law is truly oriented towards the common good:

> The most important way to evaluate positive law is by its success or failure in contributing to the genuine flourishing of those persons it governs. That is what law is *for*. . . .
>
> The positive law of political society is liable to the greatest injustice when it loses track of what the law is *for*, that it is to serve not only persons but also the communities that help them to flourish. Justice depends not only upon correctly identifying those individuals to whom justice is due. It also has much to do with how the law treats human communities—marriage, family, religious organizations and so on.[97]

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93. Nicholas Eberstadt, *The Global War Against Baby Girls: An Update*, THE CHURCH, MARRIAGE, AND THE FAMILY 341–62 (Kenneth D. Whitehead, ed., 2007).

94. *Id.* at 360.

95. *Id.* at 361. Eberstadt asks: "How will the global war against baby girls unfold in the years immediately ahead? At the dawn of the 21st century, sex preference for boys is prevalent in many parts of the world. Prenatal gender determination technologies are becoming increasingly accessible and inexpensive."

96. KRAPIEC, *supra* note 54, at 257.

97. BRADLEY, *supra* note 43, at 14–15.

Fortunately, positive law and the practice of jurisprudence are frequently self-corrective.[98]

To conclude this third section I would like once again to pose some questions for your consideration about how philosophy can help you come up with models for laws affecting the family in the workplace:

1. Can attorneys who help companies write laws for a business or benefits program encourage the introduction of flexible fractional time positions with fractional benefits, where economically feasible?
2. Can attorneys be continuously self-critical about their work in law so that at all times, they try to move it closer to the common good, based on love for truth, rooted in the analogical structure of the real world, and can they be alert to any ways in which laws redound back on the very people they were initially thought to help?

In sum, we have considered how philosophy builds up to the common good by beginning with an analogical theory about how law should be grounded in reality and conscience grounded in practical judgments about moral truth. There are many levels and kinds of laws, and many different human responses to law. Laws ought to help us to come to our good end. That is perhaps the reason why we love good laws and hate bad laws. For example, astronauts situated in the post-Einstein world of relativity theory surely love the laws of physics that enable them to return for a flight in space and enter into the earth's atmosphere at exactly the right angle without otherwise burning up! Can attorneys nudge positive laws and their application in particular cases a little closer to the real common good? If so, then they may be able to resound interiorly with words similar to the psalmist of Psalm 119, in response to divine law:

*Open my eyes, that I may behold*
*wondrous things out of thy law.*
*I am a sojourner on earth;*
*hide not thy commandments from me!*
*My soul is consumed with longing*
*for thy ordinances at all times.*[99]

98. Lynn Bartels, *Amendment 41 Stalls Scholarships: CU Foundation Awaiting Clarity on Gift-Ban Law*, ROCKY MOUNTAIN NEWS, Mar. 2, 2007, at 30. Over time, laws with too broad a sweep, which come back to haunt the very people they were hoping to help, usually are adjusted so that they can more perfectly help the common good. An example closer to home, which shows the delicate interaction of the family and the workplace, is found in Colorado's Amendment 41, recently passed by referendum. The amendment limits government workers and their families from receiving anything worth more than $50 in gift from lobbyists and governmental agencies. While its purpose was to keep elected government officials from receiving expensive gifts from lobbyists, it seems to have made it impossible for children of government workers, including firemen and policemen, from receiving scholarships. The law which was trying to keep corruption out of the workplace has redounded against the families of the workers it was designed to protect. Fortunately, clarifying legislation is being worked on at this very moment.

99. *Psalms* 119:18–20 (Revised Standard Version Catholic Edition).

*I will run in the way of thy commandments*
*when thou enlargest my understanding!*
*Teach me, O Lord, the way of thy statutes;*
*and I will keep it to the end.*
*Give me understanding, that I may keep thy law*
*and observe it with my whole heart.*
*Lead me in the path of thy commandments,*
*for I delight in it.*[100]

*Hot indignation seizes me because of the*
*wicked,*
*who forsake thy law.*
*Thy statutes have been my songs*
*in the house of my pilgrimage.*[101]

*Oh, how I love thy law!*
*It is my meditation all the day.*
*Thy commandment makes me wiser than my enemies*
*for it is ever with me.*[102] *I hate double-minded men,*
*but I love thy law.*[103]
*I hate and abhor falsehood,*
*but I love thy love.*[104]

Let us consider together how philosophy may be of service for those seeking to practice a law that we can all love.[105]

100. *Id.* at v. 32–35.
101. *Id.* at v. 53–54.
102. *Id.* at v. 97–98.
103. *Id.* at v. 113.
104. *Id.* at v. 163.
105. With gratitude for suggestions for this paper to Gerry Bradley, JD; Helen Alvaré, JD; Christopher B. Gray, PhD, BCL, LLB; Rebecca Messall, JD; Susan Selner-Wright, PhD; and Sr. Mary Timothea Elliott, SSD; Sr. Mary Judith O'Brien, RSM, JD, JCD; Sr. Mary Veronica Sabelli, JD, PhD; and Sr. Rita Rae Schneider, PhD.