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Emergency Contraception, Catholic Hospitals, and Rape

Valerie Violi-Satkoske

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EMERGENCY CONTRACEPTION, CATHOLIC HOSPITALS, AND RAPE

A Dissertation

Submitted to the McNulty College and Graduate School

Duquesne University

In partial fulfillment of the requirements for
the degree of Doctor of Philosophy

By

Valerie Violi-Satkoske

December 2008

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Valerie Violi-Satkoske

2008

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Approved October 31, 2008

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ABSTRACT

EMERGENCY CONTRACEPTION, CATHOLIC HOSPITALS, AND RAPE

By

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December 2008

Dissertation supervised by Lisa S. Parker, Ph.D.

The Roman Catholic Church teaches that a woman is permitted to protect herself from becoming pregnant due to rape. However, scientific uncertainties with regard to emergency contraception's mechanisms of action and the inability to detect pregnancy prior to implantation have led many Catholic healthcare facilities to limit a rape victims access to emergency contraception (EC), due to what the Church construes to be EC's potentially abortifacient properties. While the science is uncertain, the withholding of EC by Catholic healthcare facilities treats the science as settled, true, or certain and may be experienced as oppressive by rape victims. The Catholic Church has historically acknowledged the difficulty of practical moral decision making in cases where there is an absence of logical certainty, and the provision of EC to rape victims is such a case. While most Catholics are not aware of the moral method of probabilism, it is a legitimate system of moral discernment within the Catholic tradition which asserts that an uncertain moral obligation cannot be imposed as though it were certain. This

paper argues that probabilism is a uniquely appropriate moral method with which to consider the problem of EC in Catholic healthcare facilities, because it is Catholic in origin and specifically addresses the problem of certainty and certitude in moral decision making. The use of probabilism would allow Catholic hospitals to make practical moral decisions about EC, despite a lack of demonstrative proof. Further, the use of probabilism would allow for the inclusion of EC among the morally permissible treatment options for rape victims, thereby enabling informed consent, promoting fair access to the standard of care, and fostering the compassionate care that is foundational to the mission of Catholic healthcare.

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Introduction

Emergency Contraception, Catholic Hospitals, and Rape

Sexual assault is a pervasive societal problem which is reported to affect the lives of over 300,000 women in the United States each year (CDC, 2004; Tjaden & Thoennes, 2000). The World Health Organization estimates that 12-25 % of women worldwide will be the victims of some form of sexual abuse within their lifetime (2000). From those reported sexual assaults that involve a rape, more than 32,000 resultant pregnancies will occur each year in the United States (Holmes et al., 1996, p. 322).

Sexual assault has traditionally been recognized as a particularly heinous crime (Giacopassi & Wilkinson, 1985, p. 367), which harms the victim physically, psychologically, emotionally and spiritually. Because of the pervasive and degrading nature of sexual assault, many sexual assault survivors develop post traumatic stress disorder, which can manifest itself as “intense fear, helplessness, or horror” (Reddington & Kreisel, 2005, p. 81). In addition to the potentially devastating effects suffered by rape victims, the trauma of rape has been found to have a negative psychological and

emotional impact upon the victim's loved ones, her community, and the society in which she lives (Swiss, 1993, p. 612).¹

When sexual assault includes unprotected sexual intercourse the fear of pregnancy can further traumatize the female victim. Aside from the difficulties inherent to unplanned pregnancy—e.g., physical discomfort, emotional distress, financial expense, life-style changes—a child conceived in rape could be a constant reminder of the most horrific experience in a woman's life. In his discussion of pregnancy resulting from rape, Anthony Lathrop states that it is difficult for the rape victim to separate the fetus and the resultant child from the rape, and that “loss and grief are identified as normative experiences of pregnancy exacerbated by rape” (1998, p. 28). In light of the severe and long-lasting trauma that may result from sexual assault, one may reasonably conclude that a victim of sexual assault would want to avoid becoming pregnant by her attacker. Thus pregnancy due to rape constitutes a potential harm to rape victims that is reflected in current clinical guidelines for the treatment of sexual assault victims which have been published by the American College of Obstetrics and Gynecology (ACOG, 2001), the American Medical Association (AMA, 2004), the American College of Emergency Physicians (ACEP, 2006), the American Academy of Family Physicians (Petter and Whitehill, 1998) and the Academy of Pediatric Medicine (AAP, 2001), all of which recommend the provision of emergency contraception (EC) as a standard of care.

¹ Consideration of ethical and legal issues peculiar to the medical care of minors, and specifically parental consent, and these issues as they arise in the reproductive context, is beyond the scope of this dissertation. Of note, although an overwhelming proportion of rape victims are female, it is estimated that one in twelve rape victims is male (Madigan & Gamble, 1991, p 9.) Additionally, as the focus of this project is on ethically appropriate response to potential pregnancy subsequent to rape, I refer exclusively to the experience of the female rape survivors of child-bearing age. However, this is in no way meant to marginalize the trauma experienced by male victims of sexual assault or by other women.

On the surface, there appears to be no cause for controversy surrounding the provision of emergency contraception, specifically an oral hormonal agent, to rape victims. Quite the contrary, it would appear to be not only morally permissible, but morally imperative to provide rape victims with the means to minimize the traumatic effects of sexual assault. Even the Catholic Church, which has traditionally rejected the use of contraception as sinful, permits the use of contraception by a rape victim to avoid pregnancy due to a sexual attack by an unjust aggressor (ERD, 2001, #36).

Nevertheless, the Catholic Church places restrictions on a rape victim's access to EC. If a woman tests positive for pregnancy, Catholic hospitals will not provide her with EC because of EC's potentially abortifacient effects and because 'contraception' is no longer possible. However, the Catholic Church teaches that human life begins at conception, and there is currently no testing available to detect the presence of a conceptus prior to its implantation in the uterus. Therefore, in an effort to determine the possibility of fertilization prior to implantation, many Catholic hospitals require ovulation testing to rule out the *possibility* of pregnancy. If there is any possibility that fertilization has occurred (i.e., the woman is in the fertile phase of her menstrual cycle) the woman will be treated as though she were pregnant: Catholic hospitals will not provide her with EC. In light of the uncertainty surrounding the provision of EC to rape victims in Catholic hospitals—a lack of both demonstrative proof of EC's mechanisms of action and a means of detecting fertilization prior to implantation—Catholic hospitals often conclude that it is not morally permissible to provide EC. I argue that it is morally permissible for Catholic healthcare facilities to provide EC information and treatment to

rape victims, and that the offer of EC can be made in a manner which is consistent with Catholic moral teaching.

The argument is pursued in two parts. Part I provides an analysis of relevant scientific, historical, and conceptual information. It describes the chemical mechanisms involved in the most commonly prescribed EC, analyzes definitions of pregnancy and rape, traces historical developments in U.S. law and within the Catholic Church regarding contraception, and analyzes institutional responses to rape. Part II builds upon this initial conceptual analysis to address theological and epistemological concerns. The second part engages with key theological concepts and doctrines—natural law theory, the notion of epistemological certitude, probabilism as an approach to moral reasoning—to address ethical and theological implications of rape treatment protocols in Catholic healthcare facilities. Drawing on mutually reinforcing lines of argument presented by such apparently disparate figures as theologians John Henry Newman and St. Augustine and philosophers Helen Longino and Michel Foucault, the argument pays particular attention to the problem of certainty and certitude in moral decision making and to the degree of empirical uncertainty that surrounds both the establishment of pregnancy (or lack thereof) in the aftermath of rape and the biochemical mechanisms of EC.

Part I: Rape, Pregnancy, and Property: Problems of Definition and Power

Chapter one presents medicoscientific background regarding EC. Plan B and the Yuzpe Method are the two most commonly prescribed emergency contraceptives in the United States. Despite a lack of evidence to suggest that either method of EC would disturb a preexisting pregnancy, or produce any teratogenic effects (Grimes et al., 2002,

p. 184-186), pregnancy is considered to be a contraindication for the use of either Yuzpe or Plan B (Wertheimer, 2000, ¶ 14). Nevertheless, how pregnancy is defined is at the center of the EC debate. This chapter considers the different definitions offered by the American College of Obstetrics and Gynecology and the Catholic Church. These different definitions of pregnancy leave approximately a two week period during which Catholic moral teaching would consider a woman to be pregnant, and the medical community may not. The balance of this project explores the epistemological and moral relevance of this difference, a source of substantial uncertainty regarding pregnancy and the possibility of its prevention, for policies governing the provision of EC in Catholic healthcare institutions. These policies, and the definition of pregnancy on which these policies rely, have morally salient implications for women who seek care following their rape.

Chapter two reviews the relevant historical evolution of contraception with particular attention to the Catholic Church's views and to U. S. law. In order to illuminate lines of reasoning and considerations relevant to this project's main ethical and theological arguments, a brief general history of contraception is provided, tracing back thousands of years to some of the earliest recorded attempts of human beings to control their fertility. This history shows that from the days of Hippocrates (460-377 B.C.), the intention of the user was a significant consideration in the prescribing of fertility-inhibiting drugs. To set the stage for examination of the current debate surrounding the moral permissibility of providing EC to rape victims, this chapter's presentation of the Catholic Church's views on contraception analyzes significant teaching and events in the Church's history, including St. Augustine's strict prohibition of contraception based upon

his physicalist notion that sexual intercourse was strictly reserved for procreation (Mahoney, 1987, p. 61), and Pope Paul VI's encyclical *Humanae Vitae* in 1968 (Mahoney, 1987, p. 266).

Similarly, particularly significant decisions in United States law concerning contraception and abortion are reviewed to provide a societal context within which to consider the significance of the U.S. Catholic bishop's position on the provision of EC to rape victims. While in 1873, the Comstock Law outlawed contraceptives as obscene materials, in the century that followed, the legal right to exercise control over one's fertility, without interference from the state, was increasingly recognized and reflected in decisions such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v Baird*, 405 U.S. 438 (1972).

Chapter three is dedicated to what may be termed “the epistemological power of naming,” a notion foreshadowed in the first chapter's discussion of different definitions of pregnancy. Here, the discussion focuses on who gets to define the terms of the EC debate, such as rape and pregnancy, and how those definitions affect the victims of sexual assault. Concepts that emerge within social practices reflect the relative power and worldview of those who explicitly define—or implicitly act according to a particular definition of—key concepts. There are important ideological concerns in formulating, embracing, or acting-in-accordance with any concept or definition; a definition that benefits one group may adversely affect or oppress another. For example, while many acts of rape result in physical injury, definitions of rape generally stress the sexual nature of the crime rather than the resultant physical harm. Susan Brownmiller asserts that in defining rape as a sexual act the victim (read: woman) is reduced to her sex parts (1975,

p. 378). Consequently, some have called for the desexualization and recharacterization of the crime of rape, arguing that the stress on the sexual aspect of rape, rather than the violent aspect of rape, acts to disempower the victim (Brownmiller, 1975, p. 378; Cahill, A., 2000, p. 43). Conversely, Ann Cahill suggests that “to desexualize the act of rape, to consider it legally only as any other assault, would be to obfuscate—not to weaken!—its role in the production of the sexual hierarchy through the inscription of individual bodies” (2000, p. 60).

The first three chapters serve a foundational role, designed to provide readers with historical background and vocabulary to enable them to more fully engage with the subsequent argument. For the same reason, chapter four employs the personal rape narrative of Nancy Venable Raine to provide a context in which to consider the trauma of rape. The chapter also details the protocols and procedures a rape victim can expect to encounter when she presents herself for medical treatment. Despite the ineliminable perspectival influences on the concept of rape that are discussed in chapter three, at the very least, it may be agreed that rape is “a highly traumatic crisis causing disruption for the victim physically, behaviorally, emotionally and interpersonally” (Reddington and Kreisel, 2005, p. 81).

Although not all rape victims experience severe physical injury, many suffer from Posttraumatic Stress Disorder (PTSD) with symptoms including “persistent reexperiencing of the assault” and “persistent avoidance of reminders of the rape,” whose relevance are obvious for considering EC and the desirability of avoiding pregnancy-by-rape (Reddington & Kreisel, 2005, p. 81).

The chapter also details how rape may significantly impair the victim's previous relationships and, her ability to form new relationships, as well as the role that religious faith can play in supporting and restoring rape victims. In general, how the victim's culture defines rape, the stability of her relationships prior to the rape, and the degree to which the rape affects the victim are all factors that contribute to the manner in which family, friends, and communities respond to the rape victim. Of substantial importance for this project's argument is the fact that a rape victim's spiritual beliefs and relationship with her faith community may be influenced by the sexual assault.

Many people turn to their spiritual and religious beliefs to provide comfort and support in times of crisis, and rape is no exception. Research indicates a significant positive correlation between sustained, or increased, spirituality and the perception of emotional healing (Kennedy et al., 1998, p. 325). The personal importance for rape victims of religious commitment and spiritual support in the aftermath of their rape is an important ingredient in the cultural backdrop against which to consider both the Catholic Church's position on EC and the argument presented in Part II for the permissibility of prescribing it within Catholic healthcare institutions.

Part II: The Problem of Uncertainty, Probabilism, and the Permissibility of Providing EC

Part II of this project looks within Catholic social teaching to discover support for providing emergency contraception to any rape victim who wishes to avoid becoming pregnant by her attacker. In order to formulate an argument which is consistent with Catholic social teaching, one must first understand how the Church derives moral norms.

An appreciation of the Church's teaching regarding the origin of moral knowledge, and the moral norms that are derived from that knowledge, is necessary to formulate an argument that is both coherent and respectful of Catholic moral teaching.

Thomistic natural law theory provides the framework for moral thought within the Catholic Church. In chapter five, a brief history of Catholic natural law is provided. It is followed by an examination of two different schools of thought within contemporary Catholic natural law theory. One group describes the natural law legalistically. Human beings are inclined toward the good, and they use their reason to identify those goods. As human nature is constant over time, moral norms derived from the good are thus static and unchanging over time. This school of thought, which is explored in light of the works of John Finnis, Germain Grisez, and Pope John Paul II, asserts that certain moral norms are exceptionless, or absolute, regardless of history or circumstance. In contrast to this position, is a natural law theory which more adequately considers the human person. History, society, culture, and science are recognized to affect personal circumstances and are considered when using reason to participate in and reflect upon, both individually and collectively, God's creation as God is creating it (Kelly, 2004, p. 88). This form of natural law recognizes potential for change and growth, it is not static, and it adopts an historical approach to the meaning of moral absolutes. The works of moral theologians Joseph Fuchs, Charles Curran, and Cristina Traina provide the foundation for the final section of chapter five.

Chapter six provides the heart of argument of this project. It is here that I provide an argument for the provision of EC by Catholic healthcare institutions to any woman who wishes to avoid becoming pregnant by her rapist. The first part of the argument

examines how one arrives at a level of confidence in propositions, information, or data such that one comes to accept those propositions as certain or true. The first two sections of this chapter focus on the works of Catholic moral theologian John Henry Newman and feminist scholar Helen Longino. Newman devoted much of his scholarship to the notion of certitude and how the mind moves from the conditional acceptance of probable propositions to the unconditional acceptance of propositions. Newman's work on the manner in which a convergence of probabilities (or evidence) can rise to the state of certitude provides a valuable framework in which to consider the many pieces of medicoscientific information that inform the Church's position on EC. Similarly, building on ideas presented in chapter three with regard to the role of power in conceptual matters (e.g., naming, defining concepts), Longino's work on the role of power and perspective in the creation of scientific knowledge and in the assumption of objectivity provides a context within which to consider the role the Catholic Church's subjective world view with regard to EC. Such consideration may reveal that this world view influences the magisterium's understanding of scientific data. Thus Longino's work provides a framework for considering both the Church's position on EC and the certitude upon which some of its moral norms are founded.

In the next section of chapter six my developing argument gains support from the work of St. Augustine and philosopher Michel Foucault. I employ their insights to explore how claims of certitude, or the presentation of information as true or objective, by those in power or authority may be experienced as oppressive by less powerful segments of society. Additionally, I discuss how claims of certitude or truth by those in

authority may stifle the process of transformative discourse (developed by Longino) or the process of approaching of certitude (articulated by Newman).

Finally, I argue that where there is moral uncertainty the use of probabilism as a method of moral decision making is licit according to Catholic theological traditions. While most Catholics are not aware of the moral method of probabilism, it is a legitimate system of moral discernment within the Catholic tradition which asserts that an uncertain moral obligation cannot be imposed as though it were certain. The Church has historically acknowledged the difficulty of practical moral decision making where there is an absence of logical certainty. Such is the situation with regard to providing EC to rape victims in Catholic hospitals. There is a lack of certainty about EC's mechanisms of action and some may understand that uncertainty as precluding the attainment of certitude. However, a lack of logical certainty does not preclude making sufficiently justifiable moral decisions which warrant certitude, or the acceptance of a conclusion as true. Therefore, I argue that despite the uncertainty that plagues the EC debate, practical moral decisions can be made, at both an institutional and individual level, and Catholic hospitals can and should provide EC to rape victims.

In the second part of chapter six I argue that concerns about justice arise from the use of the ovulation method to determine treatment option for rape victims. In the aftermath of rape, the use of the ovulation method suggests a zero tolerance policy with regard to standards of acceptable risk to fetal life. This stringent standard limits a rape victim's access to EC and is not applied similarly to other women of childbearing age who seek medical treatment in other contexts. I further argue that in being denied EC rape victims are not accorded the special consideration that they are due both as a matter

of justice and as a matter of the particular commitments of the Church under Ethical and Religious Directive (ERD) #3 which accords special consideration to those who are marginalized and who are the subject of previous injustice.

Chapter 1

The Biology of Emergency Contraception and Pregnancy: What is the Problem?

1.1 Introduction

The debate surrounding the moral permissibility of providing emergency contraception to rape victims focuses heavily upon two biological issues: what is the chemical mechanism that is caused by emergency contraception (EC), and how is pregnancy defined?. In general terms, “emergency contraception (EC) consists of hormones or mechanical devices used within 72 hours of sexual intercourse with the intent of preventing pregnancy (Kahlenborn, Stanford, & Larimore, 2002, p. 465).

The most commonly used and studied forms of EC have been oral contraceptives consisting of estrogen, progestin, or some combination of the two. In addition, intrauterine devices (IUDs), Danazol, and Mifepristone have been used as EC, and their efficacy studied (Kahlenborn et al., 2002). The IUD is a small T-shaped contraceptive device, made of either copper or plastic, which when placed in the uterus may inhibit ovulation and sperm capacitation. Randy Ellen Wertheimer states the copper IUD “inhibits fertilization through its toxic effects on the sperm and blocks implantation through the effects of the foreign body and trace mineral release on the changing

endometrium” (2000, ¶ 5). The plastic IUDs contain some type of hormonal agent, usually a form of progestin, which is released at a steady rate to thin the uterine lining and possibly inhibit sperm mobility and implantation of fertilized ova (Baylor College of Medicine, 2001). An IUD must be inserted by a health care professional and should not be used by women who may be at risk for sexually transmitted disease. Side effects generally include increased menstrual bleeding and cramping (Baylor College of Medicine, 2001). The IUD is over 99 percent effective and is thought to be a reasonable choice of emergency contraception if implanted within five days of intercourse (Wertheimer, 2000, ¶ 24).

Danazol is an antigonadotropin (antigonadotropin is a derivative of a synthetic testosterone) which is primarily used in the treatment of endometriosis. Danazol’s primary mechanism of action is inhibition of ovulation by delaying or suppressing a peak in luteinizing hormone (LH) (Wanner & Couchenour, 2002, ¶ 3). Although ovulation is suppressed, it is unclear whether Danazol alters the endometrial environment to inhibit implantation. Even though Danazol has been used as an emergency contraceptive, several studies in the 1980s challenged the efficacy of the drug as a postcoital contraceptive, therefore it is not commonly prescribed as such (Wanner & Couchenour, 2002, ¶ 3; Rodrigues, Grou, & Joly, 2001, p. 531).

Mifepristone, also referred to as RU 486, is an antiprogestin that can be used effectively as an EC, but is primarily marketed as an abortifacient. When Mifepristone is administered prior to ovulation, it interferes with folliculogenesis, thus inhibiting the LH surge and ovulation. When administered after ovulation, Mifepristone creates changes in the endometrium that limit the supply of progesterone and prevent implantation of

fertilized ova or further development of already implanted embryos (Wanner & Couchenour, 2002, ¶ 21). Although Mifepristone has fewer reported adverse side effects, such as nausea and vomiting, and is more effective as an emergency contraceptive than either the Yuzpe regimen or levonorgestrel only containing methods of EC, it is less often prescribed in the United States than other oral hormonal methods of EC. David Grimes and Elizabeth Raymond suggest this is because Mifepristone is cost prohibitive, produces a significant delay in menses, and carries the stigma of being an abortion pill (2002, p. 181).

The most frequently prescribed methods of oral hormonal contraceptives for the purposes of EC are the Yuzpe regimen and a progestin-only regimen containing levonorgestrel. The Yuzpe regimen is named after Canadian physician Albert A. Yuzpe, one of its creators. In 1977, Yuzpe, and his colleague W.J. Lancee, introduced a combination of estrogen and progestin birth control pills as a method of EC (Wertheimer, 2000, ¶ 8). As originally prescribed, the regimen consists of two doses of combined oral contraceptives, each dose containing 100 µg ethinyl estradiol and 0.5 mg levonorgestrel. The first dose should be taken within 72 hours of unprotected sexual intercourse, and the second dose is to be taken 12 hours after the first (Tressel & Raymond, 1999, p. 872).

The Yuzpe regimen is estimated to be 74% effective in preventing pregnancy when taken as prescribed within 72 hours of unprotected coitus (Wanner & Couchenour, 2002, ¶ 8; Grimes & Raymond, 2002, p. 182). The timeframe is particularly important, as some studies indicate that the effectiveness of the EC decreases with the increase in time between unprotected intercourse and the initiation of the regimen (Grimes & Raymond, 2002, p. 183). However, a study done by Isabel Rodrigues, Fabienne Grou,

and Jacques Joly found that the Yuzpe regimen still had a “favorable effectiveness rate” up to 120 hours postcoitus (2001, p. 537).

The precise mechanism of action for the Yuzpe regimen is unclear. Depending upon the timing of EC administration during a woman’s menstrual cycle, the mechanisms may vary. Melissa Sanders Wanner and Rachel Couchenour report, “Emergency contraception may prevent pregnancy by inhibiting ovulation, fertilization, gamete transport, or implantation” (2002, ¶ 4). Grimes and Raymond agree that it is difficult to determine the exact mechanism of action for most oral hormonal forms of EC, but they conclude that, based upon the efficacy of such regimens, inhibition of ovulation cannot be the sole mechanism of action (2002, p. 182). Although there is uncertainty as to how the Yuzpe regimen works, evidence suggests that inadvertently taking it while pregnant should pose no abortifacient or teratogenic threat to an already established (read: implanted) pregnancy (Grimes & Raymond, 2002, p. 182)

Common side effects associated with the use of the Yuzpe regimen are nausea, vomiting, and fatigue. Some physicians will prescribe antiemetics when prescribing the hormone therapy to avoid the patient vomiting some of the medication and potentially reducing efficacy. Others will simply prescribe additional doses of the EC, in the event that the patient vomits before absorption of the medication can be certain (Wertheimer, 2000, ¶ 11). The Yuzpe regimen must be prescribed by a physician. Any brand of birth control pills can be used or combined to supply the prescribed combination of estrogen and progestin necessary to provide effective EC. However, in 1998 the Food and Drug Administration (FDA) approved Preven, a prepackaged version of the Yuzpe regimen consisting of four pills / two doses of EC, a pregnancy test, and an information booklet.

The other product approved by the FDA expressly for use as an emergency contraceptive is Plan B. Plan B consists of two tablets, each containing .75 mg of levonorgestrel. Levonorgestrel is a progestin-only product, differing in composition from the Yuzpe regimen which consists of both estrogen and progestin (Wanner & Couchenour, 2002, ¶ 12). Although Plan B is the brand name of a levonorgestrel product used for EC, the name *Plan B* is often used generically to refer to all oral forms of EC. For the purposes of this paper, Plan B will only refer to the specific levonorgestrel product approved by the FDA.

Levonorgestrel, like the Yuzpe regimen, is to be taken within 72 hours of unprotected coitus, in two doses taken 12 hours apart, and declines in efficacy as the time increases between coitus and the initiation of the EC. Also, as with Yuzpe, the mechanisms of action for levonorgestrel are unclear, but thought to be consistent with those of Yuzpe. However, if taken properly, levonorgestrel is more effective than Yuzpe, preventing approximately 85% of anticipated pregnancies compared with Yuzpe's 74%. Nausea and vomiting are also reported at significantly lower rates with the use of levonorgestrel versus Yuzpe (Grimes, von Hertzen, Piaggio, & Van Look, 1998, p. 431). Probably the most significant difference between levonorgestrel and Yuzpe at this time is the FDA's 2006 approval of the levonorgestrel containing Plan B as an over-the-counter drug for women 18 years of age and older (FDA, 2006).

Clearly, if taken in a timely manner and as prescribed, or per the package directions in the case of Plan B, oral hormonal emergency contraception can act as a substantial barrier to unintended pregnancy. As will be discussed in chapter four, for victims of sexual assault the ability to prevent pregnancy due to rape is of the utmost

importance. Thus, one may question why EC may be withheld from rape victims when they present to Catholic hospitals for treatment. The answer to this question can be found in how one defines the beginning of pregnancy.

1.2 Pregnancy: Fertilization versus Implantation

Rachel Benson Gold states the medical experts, most notably the American College of Obstetrics and Gynecology (ACOG), are clear that pregnancy is established when “a fertilized egg is implanted in the lining of the woman’s uterus” (Gold, 2005, p. 7). Under this definition, any action intended to prevent pregnancy that occurs prior to the implantation of the fertilized ovum into the uterus, including actions which inhibit implantation, are considered to be contraceptive and not abortifacient. For the purposes of this project, abortion will be defined as the deliberate interruption of a pregnancy prior to the time of fetal viability (Miller-Keane, 1997, p. 3). Thus, how pregnancy is understood to begin will influence which mechanisms of EC are considered to be abortifacient.

Based upon ACOG’s definition of pregnancy, EC can be presented to a rape victim as an option to prevent, not terminate, a pregnancy which may result from a sexual assault. In fact, the offer of EC has been incorporated into the recommended clinical guidelines for the treatment of female sexual assault victims by numerous United States medical associations, including but not limited to ACOG, the American Medical Association (AMA, 2004), the American College of Emergency Physicians (ACEP, 2006), the American Academy of Family Physicians (Petter and Whitehill, 1998) and the American Academy of Pediatrics (AAP, 2001). The support of the above mentioned

medical associations thus promotes the offer of EC to rape victims as a medical standard of care.

The Catholic Church asserts that pregnancy begins at the moment of fertilization and that any action taken to expel the fertilized ovum, or prevent its successful implantation into the uterus is abortifacient, and as such, morally wrong. The National Conference of Catholic Bishops (NCCB) state this assertion very clearly in Ethical and Religious Directive (ERD) 45:

Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. (2001)

The Church recognizes the fertilized ovum as the beginning of a unique human life, and as such, affords it the same respect and dignity that is to be given to all human beings. The Sacred Congregation for the Doctrine of the Faith (CDF) states, “from the time that the ovum is fertilized, a life is begun which is neither that of the father nor of the mother, it is rather the life of a new human being with his own growth” (Declaration on Procured Abortion, 1974).

Additionally, Catholic teaching does not permit the use of any form of artificial birth control, including oral hormonal contraceptive agents (ERDs, 2001, p. 18), a point which will be explored at greater length in the next chapter. This fact, paired with the Catholic Church’s teaching that pregnancy (i.e. human life) begins at fertilization, may lead one to assume that a Catholic hospital would never be permitted to prescribe or dispense EC, but that assumption would be erroneous.

The Catholic Church acknowledges that sexual assault cannot be viewed within the same moral context as acts of consensual sex between adults. Peter J. Cataldo and Albert S. Moraczewski submit that suppression of the procreative aspect of coitus is permissible when the sex act was not entered into voluntarily. They state “the absence of the essential condition of freedom in a sexual assault makes the prevention of fertilization after the assault an act of self-defense rather than a contraceptive act (in the moral sense)” (Cataldo & Moraczewski, 2001, p. 11/13).

This sentiment is echoed in Ethical and Religious Directive 36, provided here in its entirety, and referred to frequently throughout this work.

Compassionate and understanding care should be given to a person who is the victim of sexual assault. Health care providers should cooperate with law enforcement officials, offer the person psychological and spiritual support and accurate medical information. A female who has been raped should be able to defend herself against a potential conception from the sexual assault. If, after appropriate testing, there is no evidence that conception has occurred already, she may be treated with medications that would prevent ovulation, sperm capacitation, or fertilization. It is not permissible, however, to initiate or to recommend treatments that have as their purpose or direct effect the removal, destruction, or interference with the implantation of a fertilized ovum. (2001)

So, it would appear that in the absence of a positive pregnancy test, Catholic hospitals are permitted to provide EC to rape victims. However, that interpretation of ERD 36 would be based upon an understanding of pregnancy which begins at implantation, and not fertilization. If one accepts that pregnancy begins at conception, then any method of EC which may interfere with implantation is potentially abortifacient. As has been discussed, the exact mechanisms of action of most forms of EC are unknown. However, most studies concede that there are probably multiple mechanisms of action, inhibition of implantation being amongst them. Therefore, if fertilization

hasn't occurred, a Catholic hospital may provide EC, and if fertilization has occurred, EC may not be provided, regardless of the situation.

The problem with basing sexual assault protocols upon testing for evidence of fertilization is that it doesn't exist. There is currently no reliable clinical testing available to determine if fertilization of the ovum occurred in the span of time between which the sexual assault victim was raped and the time she sought medical treatment (Miech, 2005, p. 689). There is data to support the existence of signaling by the embryo prior to implantation, known as early pregnancy factor (EPF), which alerts the maternal immune system to the existence of a viable fetus (Barnea, Choi, & Leavis, 2000, ¶ 5). Barnea et al. suggest that the maternal recognition of the EPF released from the embryo is evidence of pregnancy prior to implantation, but they also admit that testing methods for EPF are unreliable, that EPF is not specific to pregnancy, and that EPF can be found in non-pregnant tissue and regenerating organs (2000, ¶ 12).

The limits of pregnancy testing are also explored in an article in *The Journal of the American Medical Association (JAMA)* in which Allen Wilcox et al. conclude that “there is no practical way to identify conception before implantation of the blastocyst” (2001, p. 1759). Todd Ackerman asserts that “one reason physicians define pregnancy as beginning when a fertilized egg implants in the womb is because that's the earliest point at which a serum or urine β human chorionic gonadotropin assay can confirm the presence of an embryo” (2006, p. 154).

In light of the inability to detect pregnancy prior to implantation, a question arises as to what constitutes the appropriate testing referred to in ERD 36, and if a negative pregnancy test should be sufficient in order for a rape victim to be provided with EC at a

Catholic hospital. It is over this point that there appears to be a controversy, even amongst Catholic health care providers (Cataldo & Moraczewski, 2001, p. 11/1).

Although some Catholic hospitals will administer EC after a negative pregnancy test, many will not (Shea, 2004). Among the Catholic Hospitals that will not dispense EC based solely upon a negative pregnancy test, the collection of additional history and clinical test results may be gathered to determine at what point a woman is in her ovulatory cycle (Hamel, Panicola, Baron, & Sulmasy et al., 2002, ¶ 6).

If the woman is found to be ovulating, or at a point in her ovulatory/menstrual cycle in which conception is more probable, then EC is withheld to eliminate any chance that a recently fertilized ovum may be prevented from successfully implanting into the uterus. As the protocols for treating rape victims and dispensing emergency contraception are not consistent amongst Catholic hospitals,² the manner in which a victim's ovulatory status is determined, and the rigorousness with which an answer to that question is pursued, varies from facility to facility (Cataldo & Moraczewski, 2001, p. 11/1).

Some Catholic hospital may rely solely upon the history provided by the patient regarding her menstrual cycles to determine where she is in her ovulatory cycle. Other hospitals may combine a patient's menstrual cycle history with the results of several clinical tests to determine the patient's ovulatory status. Many Catholic hospitals have patterned their sexual assault protocols upon the Peoria Protocol (Hamel et al., 2002). The Peoria Protocol, actually titled *Saint Francis Medical Center Interim Protocol for Sexual Assault*, was created at St Francis Medical Center in Peoria, Illinois, in 1995. In

² The Bishops of individual diocese determine if, and to what degree, the Ethical and Religious Directives are followed.

an attempt to provide EC only when the effect can be the inhibition of ovulation and not interference with implantation, the Peoria Protocol uses multiple layers of patient history and clinical testing to determine if there is any chance that fertilization may have occurred due to the rape.

After a patient history is taken and a pregnancy test yields a negative result, the Peoria Protocol calls for an LH surge test. An LH surge test is a urine dip-stick test that measures the amount of luteinizing hormone in a woman's body to determine periods of greater fertility. In addition, a blood test is required to determine the amount of progesterone in a woman's system, as progesterone levels fluctuate according to a woman's ovulatory cycle. If all testing is negative, and the patient is determined to be in her preovulatory stage, then EC may be given to inhibit ovulation and subsequent pregnancy. Interestingly, the Peoria Protocol specifically states that the first dose of EC is to be given in the hospital, in order to assure that it is being used as a contraceptive and not taken home to be used later as an abortifacient (1995).

However, if the LH surge test is positive, or the blood test indicates that the woman is either ovulating or in her early post ovulatory phase, it is not permissible to give EC. In other words, the women who are at greatest risk for becoming pregnant secondary to sexual assault are not provided with EC. Ironically, the Protocol allows for the dispensing of EC in order to provide a psychological benefit to rape victims for whom the chances of becoming pregnant are highly unlikely (Hamel et al., 2002).

As is evident, the manner in which pregnancy is defined has a significant impact upon whether or not EC is seen solely as a contraceptive, or as a contraceptive with potentially abortifacient properties. However, even if main stream medicine accepted the

Catholic Church's definition of pregnancy as beginning at fertilization, this would probably create few, if any, additional ethical issues for most physicians. Pregnancy cannot be detected prior to implantation (Wilcox et al., 2001, p. 1759), and in the absence of that evidence EC would still be seen as contraceptive. Additionally, early term abortion is legal in the United States, and even physicians who identify themselves as being 'pro-life' tend to support abortion as an appropriate option to be offered to women who find themselves to be pregnant secondary to a sexual assault (Westfall, 1991). Thus, if the American medical community adopted the position that life begins at fertilization/conception, one can speculate that the only significant change in current treatment guidelines would be the disclosure of the possible abortifacient effects of EC.

Some charge that the American medical community has in fact changed its definition of pregnancy over the past several decades. Ralph Miech asserts that conception was universally and scientifically accepted as the beginning of pregnancy until the advent of oral contraceptives in the 1960s (2005, p. 688). Miech implies that the definition of pregnancy was changed because oral hormonal contraceptives are thought to impede implantation as well as ovulation, making them potentially abortifacient (2005, p. 690). As abortion was illegal at the time, Miech's implication is that the scientific community altered the definition in order to make the use of oral contraceptives both legally and morally permissible. Additionally, there still appears to be discrepancies within the medical field as to the definition of pregnancy. For example, Mosby's Medical, Nursing & Allied Health Dictionary defines pregnancy as beginning at fertilization (2005). The Miller-Keane Encyclopedia & Dictionary of Medicine, Nursing

& Allied Health similarly defines pregnancy as “the condition of having a developing fetus in the body, after union of an ovum and spermatozoon” (1997, p. 1300).

Further demonstrating the importance of how pregnancy is defined, Walter Larimore and Joseph Stanford claim that the potential postfertilization effects of oral contraception are not routinely disclosed to users, and they question whether this is due to inconsistencies in defining pregnancy. Of particular concern to Larimore and Stanford is the potential user who defines pregnancy as beginning at fertilization, and whose medical decision making may be significantly influenced by the knowledge that oral contraceptives can have postfertilization effects (2000, p. 690). Larimore and Stanford make an excellent point, just as definitions of pregnancy vary between the Catholic Church and most of the medical community, the definition of pregnancy a woman accepts may affect the amount of information she needs to make a fully informed consent.

Just like the medical community, the Catholic Church’s definition of pregnancy, or when human life begins, has changed over time. The Church has only recognized human life as beginning at conception since 1854, when Pope Pius IX claimed that the Virgin Mary had been without sin from the moment of conception (Schroedel, 2000, p 19). Theologians of that period interpreted Pope Pius IX’s statement as meaning that all fetuses had souls from the moment of conception, and should be treated as sacred from that moment forward (Schroedel, 2000, p. 19). Prior to that time, the church had always regarded abortion to be a sin, but it had vacillated on how sinful it was and how one was to be punished for participating in an abortion.

David Kelly explains that the early Catholic Church was greatly influenced by the work of Saint Thomas Aquinas, who believed that early embryonic life was just a collection of fluid that had not yet been organized to form a body or to accept a spiritual soul. Aquinas claimed that boys were ensouled 40 days after conception and girls received their souls 90 days after conception. Prior to the time of ensoulment, or animation as it is sometimes referred to, Aquinas did not view the fetus, let alone the embryo, as fully human (2004, p. 253).

Three hundred years later, in 1588, Pope Sixtus V ruled that abortion is murder at any stage of pregnancy, implying that human life is present from the moment of conception. A few years later, Pope Gregory XIV ruled that participation in an abortion is not always murder, and that punishments should be dispensed based upon the developmental stage of the fetus (Schroedel, 2000, p. 21). Pope Gregory's stance on abortion implies that the fetus becomes more human over time, otherwise every act of abortion would be murder. Most recently, at the celebration of the 2007 World Day of Peace Pope Benedict XVI denounced both abortion and embryonic stem cell experimentation as a refusal to accept, and respect the rights of, others. Thus, Pope Benedict XVI reinforced the Catholic social teaching that human life begins at conception.

Despite the official position of the Church regarding the definition of pregnancy, and the beginning of human life, there is much debate amongst Catholic thinkers as to whether life really begins at fertilization. Richard McCormick, Thomas Shannon, Allan Wolter and Charles Curran are amongst those that believe that human life does not begin at fertilization, but at implantation (McCormick, 1983, p. 124; Shannon & Wolter, 1990,

p. 625; Curran, 2006, p 75). Richard McCormick argues “I believe that there are significant phenomena in the preimplantation period that suggest a different evaluation of human life at this stage from that made of an established pregnancy...” and “I do not believe that nascent life makes the same demands for respect at this stage that it does later” (1983, p. 124).

Charles Curran claims “truly individual human life is not present before the fourteenth day after conception precisely because there seems to be no individuality present” (2006, p. 75). The lack of individuality referred to by Curran is often based upon the science of twinning. Twinning is the capability of the preembryo to divide into more than one being. A preembryo can divide from the earliest stages of cell development up through the formation of the primitive streak at approximately 14 days after fertilization (ACOG, 2004).

Supporters of the twinning theory reason that the organism that existed prior to the twinning could not have been a separate and distinct human being, but an organism which would eventually develop into two separate humans. ACOG states, “The human preembryo does not possess the biologic individuality necessary for a concrete potentiality to become a human person, even though it does possess a unique human genotype” (2004). Many look at this from not only a physicalist perspective, which is the focus of this chapter, but as an issue regarding ensoulment. If the fertilized egg is to be immediately ensouled, does that then mean that a soul splits in two at twinning, or are their two souls housed in one organism?

The lack of individuality in the preimplantation embryo can also be found in totipotent embryonic stem cells. During the first four days of development, the embryo is

a collection of undifferentiated, totipotent, cells which when placed in the proper environment can develop into a specific type of cell, or potentially an entirely separate human being (Koch-Hershenov, 2006, p. 139; ACOG, 2004). Just as with the concept of twinning, the fact that the totipotent cells of the blastocyst have the potential to become many other human beings challenges the notion of the embryo as a unique human individual, instead of a developing human entity with a unique genetic code. Thomas Shannon and Allan Wolter state, “while one can speak of genetic uniqueness, in that the fertilized egg has its own genetic code distinct from any other entity, we simply cannot speak of an individual until in fact the individual is present”(1990, p. 622).

Yet another developmental anomaly that leads some thinkers, including McCormick, to question the status of the preembryo as fully human is the development of hydatidiform moles. An hydatidiform mole is an abnormal pregnancy which results from a pathogenic preembryo developing into a mass of fleshy cysts in the uterus (Miller-Keane, 1997, p. 1012). In these cases, the fertilized ovum does not in fact develop into a human being even after implantation, and to assume that the mass of cells which produced the mole was human and ensouled prior to implantation seems illogical.

As a matter of fact, the chances that any fertilized egg will eventually develop into a human being are not very high. The high rate of spontaneous preembryo loss is sometimes referred to as wastage. There are thought to be multiple reasons that preembryos and many early detectable pregnancies end in spontaneous loss; developmental abnormalities after fertilization, errors in gametogenesis, and defects in the fertilization process are but a few of them. ACOG’s Committee on Ethics notes that, “whatever the reasons, natural reproduction occurs in such a way that more than one half

(some estimates range as high as 78%) of fertilizations do not result in live births” (2004, p. 96).

The purpose of this chapter is to provide an overview of emergency contraception, how it works and why Catholic hospitals don't consistently provide EC to rape victims. While the information presented does not represent an exhaustive discussion of the subject matter, it has hopefully equipped the reader with a sufficient background for the following discussion.

Chapter 2

History of Contraception in the Catholic Church and the U.S.

In order to provide fuller understanding of the laws and policies governing contraceptive use both in the United States and according to the Catholic Church, this chapter describes significant events that shaped their evolution. The first section of this chapter provides a brief general history of contraception, followed by a section which examines the development of Church doctrine regarding contraception. The final section of this chapter traces the development of contraceptive policy both in the United States and in the Catholic Church, starting in the early nineteenth century.

Although this is to be a history of contraception, historical attitudes toward abortion will also be discussed. Abortion and contraception have long been discussed in tandem by the Catholic Church, as certain metaphysical issues, such as the moral status of a fetus, influence the Church's position on both. Similarly, American law regarding contraception and abortion influence one another, as evidenced by the case of *Griswold v. Connecticut* which laid the groundwork for the ruling in *Roe v. Wade*. Thus while some consideration of abortion is necessary, an attempt is made to limit that discussion to only that information which is necessary to enhance an understanding of the arguments put forth later in this project.

2.1 A Brief History of Contraception

Throughout much of recorded time, there is evidence that human beings have attempted to control their fertility. Remarkably, the methods employed by the ancients were not so dissimilar to those used today. Coitus interruptus, the rhythm method, the ingestion of certain herbs and potions, various barrier methods, abortion, and infanticide were among the techniques used to prevent pregnancy or limit family size (Riddle, 1994, p. 3-11). Although some ancient methods of contraception, such as a woman holding her breath during male ejaculation, were obviously based upon misconceptions (Potts & Campbell, 2002, p. 1), many of the contraceptive routines used during the ancient and pre-modern periods were amazingly effective and scientifically sound, to the point that medical practitioners were able to differentiate between which methods would act as a contraceptive and which as an abortifacient (Riddle, 1997, p. 37). Norman St. John-Stevas supports the notion that ancient contraceptive methods may have been more scientifically sophisticated than they appear at first blush; “an Egyptian papyrus dated 4,000 years ago mentions a plug of crocodile’s dung used as a primitive type of diaphragm. Since this dung is now known to be alkaline and therefore to some extent spermicidal its use is not as bizarre as appears at first sight” (1971, p. 13).

The Greek physician Hippocrates (460-377 B.C.) was among the first to write medical treatises on the prescription of contraceptive remedies. Hippocrates very clearly delineated between treatments to prevent pregnancy and treatments to induce abortion. Perhaps one of the first to prescribe oral contraceptives, Hippocrates recommended that a woman drink water containing copper ore to prevent pregnancy for up to one year. Although Hippocrates did not explain how the mixture prevented pregnancy, it is

speculated that the mechanism of action is akin to that of the modern copper IUD, which is thought to alter the endometrial environment of the woman's womb, thus acting as a spermicide (Riddle, 1994, p. 74). Another Greek physician, Soranos of Ephesus (98-138 A.D.), also wrote extensively about fertility. Soranos determined that there is a period of time during a woman's menstrual cycle, a sterile period, in which she could have intercourse with little chance of becoming pregnant (St. John-Stevas, 1971, p. 13). Unfortunately, Soranos miscalculated when that sterile period occurred, but he nonetheless advanced the idea that female fertility is cyclical.

In the years prior to the advent of Christianity, contraception was both available and tolerated within the Roman Empire. However, as Christianity grew, contraception use became identified with loose sexual morals, and Roman society became less tolerant of contraceptive practices. In addition, with the fall of the Roman Empire and the beginning of the Dark Ages came a period of time in which medical research virtually ended. Thus, with Christianity's rejection of contraception and a lack of medical research, significant advances in contraception did not appear again until the sixteenth century (St. John-Stevas, 1971, p. 14).

In 1564, an Italian anatomist, Gabriele Fallopio, revealed through his writings that he took credit for the invention of a linen sheath, or condom, to be fitted over the penis to avoid contracting venereal diseases. However, it was not until the late 1800s, after Americans Charles Goodyear and Thomas Hancock invented vulcanized rubber, that the precursor to the modern day condom came into being (Potts & Campbell, 2002, p. 10).

In 1955, scientists George Pinkus and John Rock announced the invention of an ovulation-inhibiting oral contraceptive, which was arguably the biggest scientific

breakthrough in contraceptive history. Pinkus and Rock tested their product in Puerto Rico, and the first contraceptive pill, Enovid, became available in the United States in 1960 (Critchlow, 1999, p. 41). As was discussed in chapter one, it is a combination of the same type of birth control pills that were invented by Pinkus and Rock over 50 years ago that lies at the center of current controversy regarding emergency contraception.

2.2 Contraception and the Early Catholic Church

Christianity appears to have disapproved of contraception from its beginnings. In the Old Testament, God puts Onan to death for withdrawing during sexual intercourse and spilling his semen onto the ground rather than impregnating his sister-in-law, as his father had commanded:

Then Judah said to Onan, 'Lie with your brother's wife and fulfill your duty to her as a brother-in-law to produce offspring for your brother.' But Onan knew that the offspring would not be his; so whenever he lay with his brother's wife, he spilled his semen on the ground to keep from producing offspring for his brother. What he did was wicked in the Lord's sight; so he put him to death also. (Genesis 38: 8-10)

Although many modern scholars interpret God's anger at Onan as a response to his refusal to fulfill his obligation toward his dead brother, early Catholic scholars construed the meaning of Onan's story to be that coitus interruptus is prohibited by God, as it interferes with the procreative dimension of the conjugal act (Riddle, 1997, p. 92).

Although it may not be directly attributed to Onan, Catholic teaching still prohibits any form of contraception which interferes with the unitive and procreative purposes of sexual intercourse (ERD, 2001, #36).

Many of the positions that the Catholic Church currently holds on contraception are rooted in the works of late fourth and early fifth-century theologians. Among those

theologians is St. John Chrysostom, a doctor of the Greek Church and the Bishop of Constantinople, who preached that contraception was a form of murder. In a sermon delivered toward the end of the fourth century, Chrysostom claimed that contraception was worse than murder, because it does not take existing life but prevents the potential for life (St. John-Stevas, 1971, p. 66). Chrysostom himself admitted that it was difficult to find the appropriate words to express why he felt contraception use was intrinsically more evil than murder. He considered procreation to be a primary purpose of man, as God commanded humankind to “be fruitful and multiply” (Genesis 1:28); thus contraception would frustrate that purpose. Additionally, Chrysostom regarded the ability to procreate as a gift from God, and as such, the repeated rejection of that gift, through the use of contraception, was profoundly sinful (Collins, 2007; St. John-Stevas, 1971, p. 66). From a pragmatic perspective, the Church fathers of Chrysostom’s time were very concerned about lax sexual morals and emphasized the importance of procreation in order to stifle what they considered to be promiscuous sexual behavior. Thus Chrysostom’s position on contraception may have reflected a rejection of sexual mores deemed immoral (St. John-Stevas, 1971, p. 65).

Undoubtedly, the theologian that has had the greatest impact on Catholic moral teaching in regard to contraception is St. Augustine of Hippo (354-430 A.D.). Augustine recognized procreation as one of the good purposes of marriage (Kelly, 2004, p. 100). Yet he denounced engaging in sexual intercourse, even within marriage, when the sole purpose of the sex act was the sating of sexual desire. Augustine believed that the purpose of human existence is to love God and that people are diverted from this primary purpose when they seek to fulfill a sexual desire (Mahoney, 1987, p. 65). Ideally,

Augustine would have married couples procreate while gleaning no sexual pleasure, but admits that unintentionally experiencing pleasure during intercourse is a lesser sin than explicitly seeking it. He considers the sexual desire that may compel one to procreate to be harnessing an evil desire for a good end (Kelly, 2004, p. 100; Mahoney, 1987, p. 63).

Throughout his writings, Augustine appears to struggle with the necessity of igniting sexual desire, which he clearly thought should be suppressed, in order to fulfill the marital obligation to have children. John Mahoney (1987) addresses Augustine's struggle: "the paradox of procreation for sinful man is that such physical and significantly embarrassing disorder needs to be deliberately resorted to, with more or less success, if man is to fulfil (sic) his religious duty of procreation" (p. 66). However, if a married couple engages in sexual intercourse solely for sexual pleasure, they commit only a minor or venial sin, as long as the act remains open to the possibility of procreation. In contrast, engaging in sexual intercourse with the intention of satisfying lust but preventing pregnancy is a major or mortal sin. So for Augustine, all forms of contraception were considered to be sinful (St. John-Stevas, 1971, p. 67).

Augustine also reasoned that coitus without the intention of creating offspring reduces a wife to a prostitute (St. John-Stevas, 1971, p. 66). He considered women to be inferior to men, lacking in both physical strength and the ability to engage in intellectually stimulating conversation. Women were merely breeding grounds, and the only reason to marry a woman would be to propagate one's progeny (Mahoney, 1987, p. 67). Thus, to have sexual intercourse with one's wife purely for sexual satisfaction deprives her of her primary purpose and reduces her to a whore. As Augustine did not place much value on women, it appears that his concern for a woman's reputation had

more to do with how her reputation reflected upon her spouse, than upon the woman herself.

Augustine's attitude toward women gave credence to the negative characterizations of women often found within the Bible. Just as Eve tempted Adam with the apple causing humankind to bear the stain of Original Sin (Genesis 3:6), other women in the Bible were often portrayed as sexual temptresses who distracted men from their devotion to God and caused men to sin. Further, Augustine's teachings on sexual morality put women in a no-win situation in which use of contraception would make them grave sinners and whores, while leaving every act of sex open to procreation would impose huge physical, emotional, social and spiritual burdens upon them.

Ironically, Augustine struggled with his own sexual desire and had several lovers outside of marriage. He frequently wrote about his struggle and confessed his weakness for a woman's touch (Mahoney, 1987, p. 67). However, instead of appearing as a hypocrite who proposed moral standards he himself could not meet, his writings revealed a man who truly feared his sexual indulgences would draw him away from God. J. Joyce Schuld explores Augustine's tortured existence and likens it to a constant battle between bad desire/sexual desire and good desire/a yearning to be close to God. Schuld states:

It is the body in relation that concerns Augustine, and this takes one beyond the overpowering features of sexual lust to a more interactively engaging and meaningful distortion of desire. Carnal lust by itself is too bound to biology to convey the intimacy of betrayal. It focuses on organs and not on the adulterous spirit. What is more personally hurtful in an affair, an act of two lustful bodies coming together or an act of love that expresses devotion and loyalty to someone else?" (2003, p. 86)

Augustine's attitudes toward sexual desire, sexual acts, marriage, contraception, and women have greatly influenced Catholic moral thought and, as will be discussed

throughout this chapter, continue to provide the foundation for many of the Church's official positions on these subjects.

At the end of the sixth century, Pope Gregory I (540-604 A.D.) reinforced Augustine's teaching by adopting a doctrine on marital intercourse which explicitly denounced pleasure during intercourse as a venial sin and implied that intercourse without the intention of procreation would be a sin:

The married must be admonished to bear in mind that they are united in wedlock for the purpose of procreation, and when they abandon themselves to immoderate intercourse, they transfer the occasion of procreation to the service of pleasure. Let them realize that though they do not then pass beyond the bonds of wedlock, yet in wedlock they exceed its rights. Wherefore, it is necessary that they should efface by frequent prayer what they befoul in the fair form of intercourse by the admixture of pleasure. (Davis, 1978, p. 188-189)

In 1140 A.D., Gratian, a Benedictine monk, wrote his *Decretum*, a compilation of Canon law derived from the history and literature of the Church. Gratian's *Decretum* paid particular attention to the sacrament of marriage and expressly condemned the use of contraception (St. John-Stevan, 1971, p. 68). Gratian's work is noteworthy because it was eventually incorporated into the Church's canon law.

Following in the footsteps of Augustine, but also departing from his doctrine on several points, St. Thomas Aquinas (1227-1274) considered procreation to be the primary purpose of marriage, women, and sex. Aquinas further agreed with Augustine that sex for the sake of sexual pleasure is sinful, but Aquinas found no sin in enjoying sex which had procreation as its desired end (Cahill, L., 1996, p. 192). This is a notable departure from the teaching of Augustine, because it recognizes the enjoyment of sex between marriage partners as permissible—or at least not sinful. Aquinas also recognized the special loving union that can develop within a marriage and credits the sexual expression

of love as a means to deepen that love (Cahill, L., 1996, p. 192). Once again Aquinas departs from Augustine, as Augustine did not discuss marriage as a loving union, and he certainly would never have approved of mutually loving sex as a moral good. Aquinas's view of marriage is significant because it allows for sex as an expression of marital love and not exclusively as a procreative duty. Lisa Sowle Cahill explains:

Aquinas has achieved a link between sexual intimacy, even sexual pleasure, and the intense love of spouses; his definition of marriage as a sacramental vehicle of Christ's presence in the church is not achieved over against or apart from sexual love and sexual pleasure (1996, p. 193).

In linking the concept of sex as an expression of marital love and Aquinas' identification of marriage as a sacramental vehicle of Christ's presence, Cahill makes clear the significance of Aquinas' position. If sexual intimacy enhances marital love, then in doing so, it also enhances the presence of Christ in the Church. This position is in direct opposition to the teaching of Augustine, who saw all forms of sex as distractions from one's devotion to God.

2.3 U.S. Law, the Catholic Church, and Contraception

U. S. Law Regarding Reproduction Prior to the Twentieth Century

Prior to the 1830s, reproductive decision making was rarely discussed in American society (Schroedel, 2000, p. 23). Consequently, little is known about the availability and use of contraceptives before that time in the United States. Even the Catholic clergy in America rarely addressed the issue of contraception publicly, as contraception use did not appear to be common. When clergy did address it, the focus was on other areas of the world where fertility rates were declining, which the Church implied was a result of the use of family limiting methods. In contrast, American

birthrates remained consistent through the late 1800s, indicating that Americans were not using contraception (Tentler, 2004, p. 16). However, there is evidence to indicate that early term abortion, before quickening, was a fairly common method of family limitation practiced in the early 1800s (Tentler, 2004, p. 18; Schroedel, 2000, p. 26).

Contraception was difficult to obtain and afford, whereas numerous manuals contained home remedies to induce abortion. Furthermore, abortion prior to quickening had not been considered as a criminal act under American common law in the early nineteenth century (Schroedel, 2000, p. 26).

In *Commonwealth v. Bangs*³, the Massachusetts Supreme Judicial Court ruled that abortion prior to quickening was “beyond the scope of the law” (Mohr, 1978, p. 5). The courts had previously determined that after quickening a human fetus had achieved moral status as a potential human being, but the developing fetus was not equal in moral status to that of a human being after birth. However, they had not determined what moral value, if any, could be assigned to the fetus prior to quickening. Thus, the law chose not to address the issue of early term abortion. Other states adopted Massachusetts’s position on early term abortion, and few cases regarding early term abortions were heard in American courts until the latter half of the 1800s (Schroedel, 2000, p. 26; Mohr, 1978, p. 5-6).

Interestingly, just as early Catholic moral theologians, such as Augustine and Aquinas, who considered contraceptive use to be a greater sin than early abortion, many nineteenth-century Catholics, operating under the belief that an early pregnancy was just inert matter without a soul, used early abortion to limit their family size (Tentler, 2004, p. 18). Leslie Woodcock Tentler suggests that poorer women of that time period may have

³ *Commonwealth v. Bangs*, 9 Mass, Rep 387 (1812)

resorted to abortion because they lacked access to birth control, but even wealthier Catholic women may have been more apt to chose abortion rather than contraception, due to the “abortion-permissive climate” (2004, p. 18).

By the late 1800s, the United States saw a shift in public and legal positions on both contraception and early term abortion, as a means of controlling fertility. The Catholic Church initiated educational efforts to teach that human life and ensoulment are present from the moment of conception and that contraception and abortion are therefore not morally permissible (Tentler, 2004, p. 18). Meanwhile, several political groups began to push for the criminalization of abortion at any stage of pregnancy. Among those lobbying for such criminalization were doctors who wanted to make it illegal for anyone but a physician to perform abortions and feminists who wanted men to take responsibility for their sexual actions. Additionally, eugenicists were fearful that immigrants were going to out-produce white Anglo-Saxon Americans, since white Anglo-Saxons had the money and means to obtain abortions, while the poor immigrants did not (Schroedel, 2000, p. 28).

The political and social climate of the late nineteenth century made America susceptible to the moral mission of Anthony Comstock. Comstock was a United States Postal Inspector and the founder of the New York Society for the Suppression of Vice. Comstock and his antivice crusaders heavily lobbied Congress for tighter controls over public morality. In response, Congress in 1873 enacted a statute which prohibited the shipment, distribution, and advertisement of obscene materials by either private or public means. Specifically, the Comstock Act made it a crime to send through the mail

information or devices that could be used for contraception or abortion (Schroedel, 2000, p. 28; Tentler, 2004, p. 18; St. John-Stevas, 1971, p. 19; McCann, 1994, p. 23).

The Comstock Act, the Catholic Church's rejection of both contraception and abortion, and the antivice movement added to the shame that was already associated with attempts to control fertility by not only labeling it as immoral, but also making it illegal. Although enforcement of the Comstock Act varied considerably in different parts of the country, every state banned abortion by the early 1900s. This national ban gave rise to black markets for contraception and abortion procedures, and the United States birth rate began to plummet in the beginning of the twentieth century (Schroedel, 2000, p. 29; Tentler, 2004, p. 40).

At the turn of the century, Margaret Sanger, a nurse from New York, began to gain notoriety due to her controversial journal *The Woman Rebel* and her vocal pro-contraception stance. In 1914, Sanger coined the term 'birth control' and discussed the term in an issue of her journal. Federal officials prosecuted Sanger under the Comstock Law for distributing lewd and lascivious materials via the U.S. mail, and she fled the country to avoid prosecution (McCann, 1994, p. 24).

In 1916 Sanger returned to the United States, and, she along with her sister, opened the first birth control clinic in Brooklyn, New York. Sanger was once again arrested and jailed for distributing contraception. Despite her arrest and detainment, Sanger remained resolute, arguing that women should not have to suffer the burden of uncontrolled child-bearing (St. John-Stevas, 1971, p. 20). Carole R. McCann (1994) credits Margaret Sanger for not only bringing the subject of contraception into the center of public discourse, but also for framing the argument "from a feminist perspective of

reproductive rights and responsibilities” (p. 24). Sanger campaigned for the repeal of all laws which interfered with a physician’s ability to prescribe birth control for a patient, and in 1918 she had her first legal victory.

Sanger appealed her conviction for distributing birth control devices, but the New York Supreme Court upheld her conviction in *People v. Sanger*.⁴ She then appealed to the New York Court of Appeals, which interpreted the criminal laws more broadly than did the trial court. In particular, the appellate court allowed for the dispensing of birth control to married persons by a physician for therapeutic purposes (American Law Encyclopedia, Vol. 8). This decision constituted a victory for Sanger, because it assigned the gatekeeping role for contraceptives distribution to physicians rather than law makers.

The attention focused upon Sanger was not limited to that of politicians and law enforcement agents, as the Catholic Church was keenly interested in Sanger’s work. Although many Catholic clergy were concerned about the influence Sanger appeared to be accruing both socially and politically, Fr. John A. Ryan of Catholic University in Washington, D. C. was among the most outspoken opponents of Sanger’s mission (Tentler, 2004, p. 40). Ryan suspected that many American Catholics were succumbing to the temptation to use birth control, as was evidenced by the decreasing American birth rate, and he suspected that the flood of birth control information provided by Sanger and her colleagues had fueled that temptation.

Ryan called for birth control reform, and he championed his cause by marrying the issue to a call for increased social welfare programs. This was a particularly effective strategy, because many of the poorest Americans were new European immigrants, many

⁴ *People v. Sanger*, 179 App. Div. 939, 166 N.Y.S. 1107 (1917)

of whom were Catholic. Tentler explains Ryan's position: "A society that had made its peace with contraception, he believed, would not scruple to exploit the weak in the name of enlightened policy. Employers would be under no obligation to pay a living wage, nor would the state necessarily be willing to assist the dependent poor, especially if they had large families" (2004, p. 41). Even the liberal bishops of the era who supported a more lenient position regarding contraception found Ryan's argument appealing, despite its obviously conservative underpinnings, because it addressed the need for public support of poor and marginalized populations. In 1919, the American bishops released an omnibus pastoral letter, condemning the use of contraception as sinful, and urging clergy to undertake a more active role in disseminating information and providing education which opposed contraception use and which was consistent with Catholic social teaching (Tentler, 2004, p. 41-42).

In New York City, another member of the Catholic clergy was mounting a similarly aggressive campaign to combat the efforts of Sanger. In 1921, Sanger and her American Birth Control League were holding a conference in New York City when they were raided by the police, and Sanger was once again arrested. However, the charges were quickly dropped when it was discovered that the police action was secured by Archbishop Patrick Hayes (St. John-Stevas, 1971, p. 20; McCann, 1994, p. 212). Instead of having the chilling effect that the archbishop had hoped for, the police raid on Sanger's conference ultimately emboldened Sanger, who publically accused the Catholic Church of trying to silence her, and also cast the Church as an institution willing to resort to political manipulation to achieve its purposes (Galvin, 1998). This scenario seems to have set the stage for debates concerning contraception in the United States, and the

Catholic Church remained at the center of many of the controversial reproductive issues in U. S. history. However, from 1930 forward American law and Catholic social teaching regarding contraception have grown increasingly further apart.

In the face of declining birth rates throughout Europe and the United States, in 1930, Pope Pius XI wrote the encyclical letter entitled *Casti Connubii (On Christian Marriage)* (Kelly, 2004, p. 101; Critchlow, 1999, p. 116; Mahoney, 1987, p. 53). The papal encyclical was Augustinian in nature, insofar as the Pope condemned the practice of contraception (Mahoney, 1987, p. 53). Furthermore, the encyclical charged parish priests with the duty of educating the laity on the Church's position regarding contraception, thereby eliminating the excuse of ignorance as a reason for practicing birth control (Tentler, 2004, p. 74). However, *Casti Connubii* also exhibited a significant shift in the Church's perception of sexual relations as an expression of marital love.

David Kelly notes that Pope Pius XI departed from the teaching of Augustine, because he found that a marital act of sex which has a secondary purpose, such as mutual love, is permissible as long as the act is left open to the possibility of procreation (2004, p. 102). In other words, conjugal love was explicitly acknowledged as a good, an expression of marital love, for the first time. This was a huge departure from Augustine's rejection of sex as sinful when engaged in for any reason other than procreation. Kelly asserts that the Church's public acceptance of conjugal sex as a good weakened the foundational argument upon which the Church based its categorical rejection of contraception use (2004, p. 102).

As the Catholic Church sought to reinforce its condemnation of contraception use, the U. S. legal system was beginning to chip away at the foundation of the Comstock Act.

In 1930 case *Young Rubber Corp. v. C. I. Lee & Co.*, the U. S. Court of Appeals for the Second Circuit redefined obscenity, finding that it was “ located in the intent of contraceptive users and not in the devices themselves” (McCann, 1994, p. 215). This redefinition of what constituted obscene materials opened the door for distribution of contraception for therapeutic purposes, such as the control of menstrual cycle irregularity and painful ovulation, and made enforcement of the Comstock Law more difficult (Logie, 1987).

While U. S. law began to sort through the legal questions created by the Comstock Act, the Catholic Church continued to explore the role of conjugal love within the marital relationship. In 1951, Pope Pius XII gave a talk to a group of Italian midwives in which he said it is permissible to intentionally limit sexual intercourse to infertile periods in order to avoid serious hardship that might result from childbearing (St. John-Stevas, 1971, p. 89; Kelly, 2004, p. 102; Tentler, 2004, p. 179). The Pope reiterated the Church’s teaching that every act of sexual intercourse must be physically open to procreation, which would still prohibit the use of contraception, but he departed from the Augustinian teaching that the intention of every act of sexual intercourse must be procreation (St. John-Stevas, 1971, p. 89). The outgrowth of this statement was the use of the rhythm method, or natural family planning, as a morally permissible means of family planning among Catholics.

Fourteen years later, with *Griswold v. Connecticut*, U. S. law also experienced a significant shift with regard to contraception. Estelle Griswold was the executive director of the Planned Parenthood League of Connecticut in the early 1960s. State officials arrested Griswold and her medical director, Dr. C. Lee Buxton, in 1961 for violating a

Connecticut statute that prohibited both using contraceptives and assisting of another in using contraceptives. Griswold and Buxton were accused of the latter and found guilty (Menikoff, 2001, p. 20; Critchlow, 1999, p. 59).

Following unsuccessful appeals to both the Appellate Division of the Circuit Court and the Connecticut Supreme Court, Griswold and Buxton appealed to the United States Supreme Court, which granted review. In the landmark case of *Griswold v. Connecticut*, the Supreme Court overturned their convictions, basing its decision on a right to privacy emanating from various amendments to the federal constitution. Writing for the Court, Justice William O. Douglas framed the issue as a right to be free from government interference within a zone of personal privacy (Menikoff, 2001, p. 20). Justice Douglas reasoned that the Connecticut law prohibiting contraceptive use sought to regulate behaviors in the marital bedroom and not to deter the sale or distribution of contraception. To support his reasoning, Justice Douglas drew upon the privacy protections afforded by several constitutional amendments to construct a penumbral right to privacy and to strike down the Connecticut statute. Remarkably, the Court's decision drew very little public criticism, even from the Catholic Church (Menikoff, 2001, p. 20; Critchlow, 1999, p. 59). As Critchlow observes:

This, in itself, was not terribly surprising given the changes occurring within the general culture and the church. Still, the Court's reasoning reflected a new attitude toward the notion of 'privacy' that would have profound implications for future legal decisions, as well as for America's dichotomous sense of private-public separation. (1999, p. 59)

In the meantime, the Catholic Church was struggling with the emergence of oral contraception. Birth control pills presented a unique challenge to traditional Catholic teaching regarding contraception, based on the premise that each act of sexual intercourse

must be open to procreation (Critchlow, 1999, p. 115; St. John-Stevas, 1971, p. 91).

Thus, birth control methods that interfere with the completeness of the physical act, such as barrier methods or coitus interruptus, frustrate the purpose of the natural act and are prohibited. However, oral contraception offered protection from pregnancy without interfering with the conjugal act.

For the Catholic laity, in particular for women, the advent of the birth control pill provided an option by which a married people could limit family size without suffering the worry associated with the often unreliable rhythm method, or the guilt associated with the use of contraceptive methods which were not approved by the Church (Tentler, 2004, p.137). Tentler suggests “the anovulatory pill disassociated—at least for its consumer—the sexual act from the fact of contraception. Women ignorant of their sexual anatomy or afflicted by shame might especially appreciate this” (2004, p. 137). The desire among Catholics to limit family size in an effective and discreet manner, that appeared to be consistent with Catholic teaching, was reflected in the fact that by the 1970s oral contraceptives were the most commonly used form of birth control among Catholic married couples (Tentler, 2004, p. 137).

The advent of oral contraception was not heralded with equal enthusiasm by the Roman Catholic Church. There was much debate among Catholic moral theologians regarding whether birth control pills were a permissible means of family planning. Those who were interested in reform of the Church’s teaching on family planning argued that the use of oral contraceptives induces a prolonged sterile period in a woman, much like the sterile period in a woman’s natural menstrual cycle, and noted that engaging in intercourse during a woman’s sterile periods is an acceptable method of family limitation

under Catholic doctrine (Critchlow, 1999, p. 113-115). In 1963, Dr. John Rock, M.D., one of the creators of the birth control pill and a Catholic, published a book entitled, *The Time Has Come: A Catholic Doctor's Proposal to End the Battle over Birth Control*. In his book, Rock also supported the argument that the Vatican would find the use of birth control pills to be acceptable because oral contraception simply extends a woman's infertile period (Critchlow, 1999, p. 115). In addition, Rock argued that the female body naturally inhibits ovulation during pregnancy to protect the developing fetus, and that oral contraception similarly inhibits ovulation to benefit others, such as the woman or her other children (St. John-Stevas, 1971, p. 94). Although Rock's views were disputed by many in the hierarchy of the Catholic Church, and his theological reasoning was often faulty, Rock provided what Tentler describes as "a new mode of speaking—direct, pragmatic, alert to social problems" (2004, p. 211). Rock's direct speaking style and medical expertise appealed to many Catholics, and the content of his argument afforded them a reasonable alternative to the rhythm method (Critchlow, 1999, p. 115; St. John-Stevas, 1971, p. 94).

On the other side of the debate were moral theologians who believed that the use of oral contraception was a form of temporary sterilization. Sterilization strips the sex act of its procreative purpose, thus rendering it sinful. Two American theologians, Gibbons and Burch, condemned the use of birth control pills as gravely sinful, asserting that the pill was not only contraceptive, intended to prevent pregnancy in one particular instance, but sterilizing in nature, reducing conjugal love to a sexual act devoid of its true purpose. In a 1958 address to the Congress of Haematologist (sic), Pope Pius XII lent his support to the condemnation of oral contraception (St. John-Stevas, 1971, p. 92). Others opposed

to condoning the use of oral contraception argued that the use of sterilizing agents undermines the gift of human life, created in the image of God, by failing to perpetuate that gift. Some Catholic moralists feared that such a disregard for human life would lead to the eventual acceptance of other practices in which human life was not respected, such as abortion (Critchlow, 1999, p. 114). Others argued that the acceptance of such methods of birth control would lead to the breakdown of family, the exploitation of women for the purposes of sex, and promiscuous sexual behavior (Critchlow, 1999, p. 114).

Although there was debate about the permissibility of using birth control pill as a contraceptive, most Catholic moralists, including Pope Pius XII, recognized that there may be situations in which such hormonal agents may be used for therapeutic purposes, such as regulation of menses or alleviation of severe menstrual pain (St. John-Stevas, 1971, p. 92). Thus the prohibition against contraception use was not absolute, in the sense that Pope Pius XII recognized certain situations in which a woman's health and welfare would override the prohibition on contraception use. Additionally, and of direct significance to this project, a number of theologians acknowledged that it may be permissible for a woman to take oral contraception to avoid pregnancy from a probable rape (St. John-Stevas, 1971, p. 93; Ashley & O'Rourke, 2001, p. 137). According to Fr. Brian Johnstone, a Redemptorist priest, the Vatican gave permission in the 1960s for nuns working in the Belgian Congo to use oral contraceptives to avoid pregnancy as a consequence of possible rapes (Allen, 2001, p. 11).

This decision on the part of the Vatican is interesting on many levels. At first blush it appears to be a compassionate attempt to eliminate any chance that a nun who was raped in the Belgian Congo would have to suffer the physical and emotional pain of

carrying and potentially raising her rapist's child. Furthermore, it places the welfare of the nun's before the prohibition against the use of contraceptives. However, a similar permission was not granted for all nuns or all women to use oral contraception to protect themselves from pregnancy due to potential rapes. Significant ethical questions are raised by the Vatican's decision to limit such a protection only to nuns in a very specific circumstance. Are nuns deserving of greater protections than other women, and if so, upon what criteria were the women religious deemed to have greater moral worth than other women? Or, is being raped by a man from the Congo more morally repugnant than being raped by a man from some other part of the world, and if so, upon what criteria is that judged, and by whom? As was discussed in chapter one, the Church recognizes the right of a woman to protect herself from pregnancy due to an unjust aggressor. However, in this case that right does not appear to have been applied to all women equally.

In the midst of all of the controversy regarding sexual reproduction, over-population, and contraception, in 1963, Pope John XXIII established an international papal commission whose initial purpose was to investigate over-population. However, it quickly became obvious that marital sexuality and contraception were at the heart of the commission's discussions (Mahoney, 1997, p. 261). Later that year Pope John XXIII died, and the new pope, Pope Paul VI, expanded the commission by adding over a dozen high ranking clergy, thirty-four laypeople, and Cardinal Ottoviani as the commission president (Critchlow, 1999, p. 128).

Prior to the release of the papal commission's findings, John T. Noonan's book, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists*, was published in 1965. Noonan, a lawyer, judge, and scholar, expressed the

epistemological view that religious doctrine and moral teaching can only be fully appreciated when considered within the social and historical context in which they were originally developed. Therefore, his book provides an extremely thorough history of the development of the Catholic Church's doctrine on contraception. Noonan draws particular attention to the fact that the Church's doctrine on contraception has not been stagnant, but has evolved over time. In light of the transformative capacity of Church doctrine, Noonan refers to it as the "living law of the Church" (1965, p. 532). While Noonan states that the purpose of his book is to provide a history, and not to "prophesy" about future developments in Church doctrine, he also asserts that the keys to doctrinal change can be found within the history of a particular doctrine. Noonan suggests that "marking the circumstance in which the doctrine was composed, the controversies touching on it, the doctrinal elements now obsolete, and the factors favoring further growth, this study may provide ground for prophesy" (1965, p. 6). Thus, the publication of Noonan's book provided some hope that a change in the Catholic Church's doctrine regarding contraception was possible.

In 1966, Pope Paul VI announced that the commission had presented its findings to him and that he needed to consider them carefully before any of their recommendations could be considered binding (Mahoney, 1997, p. 265). The commission had produced a majority report which found that contraceptive use was not always sinful and selfish and that it may be engaged in for morally legitimate purposes by married couples, and thus that married couples should be allowed to search their own consciences to determine their intention in using contraception. In opposition to that position were four theologians who penned a minority report that favored retention of

traditional Church teaching (Mahoney, 1997, p. 266-267). Ironically, the authors of the minority report could not mount an argument based on traditional Church teaching on natural law. John Mahoney explains:

The four theologians of the minority group acknowledged they could not demonstrate the intrinsic evil of contraception on the basis of natural law and so rested their case on Authority and the fear of possible consequences of change both to Authority and to sexual morality. (1997, p. 266)

On July 25, 1968, Pope Paul VI issued his papal encyclical *Humanae Vitae*, ‘on the right ordering of propagating human offspring’ (Mahoney, 1997, p. 267). In *Humanae Vitae*, Pope Paul rejected the majority report, and reserved the final decision on the matter for himself. In a speech given approximately a week later, the Pope expressed the compassion and love he felt for married couples and described the spiritual suffering that he had endured while coming to a decision. However, in the end Pope Paul VI concluded that traditional Church teaching on contraception “must be upheld as following from the basic principles of the human and Christian doctrine of marriage and as part of God’s moral law” (Mahoney, 1997, p. 268).

Clergy and laypeople alike were shocked, frustrated and dismayed by the Pope’s rejection of the majority report (Mahoney, 1997, p. 271). In the United States a sexual revolution was underway and the societal environment had become more sexually permissive, yet married Catholics were still struggling for permission to use contraception. Tentler claims that “couples who favored a change in the teaching were understandably angered by such arguments, which seemed to reduce their own needs and experiences to the merest footnote in a not terribly persuasive brief” (2004, p. 209). The issuance of *Humanae Vitae* was so poorly received by the laity in the U.S. that the

Church saw a drop, from 65% of Catholics to 55%, in attendance at Sunday mass in the years immediately following the release of the encyclical (Curran, 2006, p. 53).

Similarly, the clergy felt betrayed on many levels by *Humanae Vitae*. Not only did *Humanae Vitae* ignore the findings of the papal commission, but it then charged the parish priest with the duty of reinforcing the encyclical's unpopular message in the community. Clergy struggled to help married couples incorporate the teaching of the encyclical into their intimate lives, a task which was particularly difficult in developing countries which suffered disproportionately from overpopulation and poverty (Mahoney, 1997, p. 273).

In a bold move, a group of Catholic theologians issued a statement which voiced their disagreement with *Humanae Vitae* and asserted that good Catholics could choose to dissent from the noninfallible teaching found within the encyclical (Curran, 2006, p. 50-51). Charles Curran, one of the most famous of the dissenting theologians, stated, "conscious of our duties and our limitations as Catholic theologians, we concluded that Catholics could responsibly decide to use birth control if it were necessary to preserve and foster the values and sacredness of their marriage" (2006, p. 52). Despite the furor that occurred within the Catholic Church in the wake of *Humanae Vitae*, the teaching remains unchanged, and contraception use is still considered to be a sinful act.

While the struggles within the Catholic Church regarding contraception may have seemed archaic to many American citizens in the 1960s, U. S. law also did not reflect the sexual revolution that was taking place in the country. In 1972, William Baird was arrested for distributing contraceptive foam to an unmarried young woman during a lecture on population control at Boston University (Menikoff, 2001, p. 27). Under

Massachusetts law at that time, it was unlawful for anyone other than a licensed physician or pharmacist to distribute contraceptives to anyone for the purpose of pregnancy prevention (Menikoff, 2001, p. 27). Baird was convicted and sentenced to jail. After a series of appeals, Baird's case was eventually heard by the United States Supreme Court. In *Eisenstadt v. Baird*,⁵ the Supreme Court ruled that under *Griswold v. Connecticut* the distribution of contraceptives to married individuals cannot be prohibited; thus it would be impermissible to ban distribution of contraception to single individuals. To treat married and single who were similarly situated differently would violate the Equal Protection Clause of the fourteenth amendment to the federal constitution. Additionally, the Court found that the state could not unduly burden one of two similarly situated groups based solely on non-marital status (Menikoff, 2001, p. 31).

Following the Court's decision in Baird, U. S. law now recognized the rights of all adults to use contraceptives to control their fertility. This recognition of reproductive rights and freedoms made the climate conducive for challenges to laws that banned abortions. In 1973, the U. S. Supreme Court accepted such a challenge and recognized the right of a woman to be free from government encroachment on her pregnancy decision making. In *Roe v. Wade*,⁶ the Court extended the zone of constitutional privacy recognized in *Griswold v. Connecticut* to women when determining whether to terminate a pregnancy (Menikoff, 2001, p. 59).

In several respects the *Roe v. Wade* decision is relevant to the debate regarding emergency contraception. The Court pointed out that the federal Constitution does not expressly address prenatal life, thus rights afforded to persons under the Constitution are

⁵ *Eisenstadt v. Baird*, Supreme Court of the United States, 405 U.S. 438 (1972)

⁶ *Roe v. Wade*, Supreme Court of the United States, 401 U.S. 113 (1973)

assumed to apply postnatally. However in the same decision, the justices recognized the fetus as potential human life with a moral value that warranted greater protection as it developed. Further, the Court acknowledged that the State had “a legitimate interest in protecting the potentiality of human life” (Menikoff, 2001, p. 61).

The Court’s analysis in *Roe* established a trimester framework which allowed a woman and her physician to make decisions regarding abortion procedures free from state interference, until the end of her first trimester. In the second trimester, the Court allowed for state regulation of abortion for purposes of maternal health. Based upon the science that was available at the time, the Court recognized the third trimester as the time period in which fetal viability outside the womb was possible, and therefore granted the state the ability to regulate and/or prohibit abortion after the end of the second trimester, except in cases where a mother’s life or health are in danger (PBS/Frontline, 2001). This ruling is significant because while it asserts that all fetal life has some degree of moral value, it also makes clear that fetal life has a lesser value than human life, since even advanced fetal life can be sacrificed to save the life of the mother.

The Court has since reaffirmed *Roe*, including the state’s interest in protecting developing human life. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁷ Planned Parenthood asserted that the state of Pennsylvania was violating the trimester framework set forth in *Roe v. Wade* by mandating that all pregnant women seeking abortion, even those in their first trimester, fulfill certain requirements prior to the procedure. In order to obtain an abortion, Pennsylvania law required a 24 hour waiting period, informed consent education, consent from a parent for minors, and spousal

⁷ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Supreme Court of the United States, 505 U.S. 833 (1992)

notification for married women. The Supreme Court struck down the spousal notification requirement, while upholding the remaining requirements as well as the central holding of *Roe v. Wade*. However, the Court did choose to abandon the trimester framework and instead use an undue burden standard, on the grounds that the trimester framework as undervaluing the state's interest in potential life (Menikoff, 2001, p. 72). Under the undue burden standard, the state can enact regulations which show concern and respect for fetal life, but those regulations must not place a significant obstacle in the path of a woman's right to obtain an abortion. However, Justice Sandra Day O'Connor wrote that technology makes fetal viability a floating point at which the state's interest becomes compelling (*Planned Parenthood v. Casey* 505 U. S. 833, secIII, A, 4). So, while the Court's ruling allowed for greater regulation of abortion during early fetal life, it also upheld viability as the point at which the state's interest in protecting fetal life became compelling to the point of competing with the right of a woman to seek an abortion.

More recently, the Supreme Court further blurred the balance between fetal and maternal rights in its 2007 majority opinion in *Gonzales v. Carhart*.⁸ In its ruling, the Court upheld a congressional ban on what was termed partial-birth abortion, specifically intact dilatation and extraction (D&E), regardless of fetal viability. An intact D&E attempts to partially deliver a significant portion of the fetal body or head intact, rather than dismembering it prior to extraction, with the intention of terminating the fetus outside of the womb rather than in utero. When it is used, this procedure is generally undertaken in the second trimester for reasons of maternal health. However, the original partial-ban abortion statute allowed for intact D&E only in cases where maternal life was threatened (Oransky, 2003, p. 1464). While the Supreme Court upheld the ban, they did

⁸ *Gonzales v. Carhart*, Supreme Court of the United States, 550 U.S. (2007)

leave the door open for the procedure to be considered in cases in which maternal health is significantly challenged.

Gonzales v. Carhart is relevant to the discussion of emergency contraception on several levels, some of which were addressed by Justice Ruth Bader Ginsburg in her dissenting opinion. Justice Ginsburg pointed out that the majority opinion uses language which is inconsistent with previous opinions and which reflects personal morality and the political influence of the antiabortion movement. For example, pre-viability fetuses are referred to as unborn children and babies, and physicians who perform abortions are referred to as abortion doctors. By using terms typically associated with human persons who are afforded full human rights and protections under the law, such as ‘child’ and ‘baby’, the Court further confuses the debate surrounding when a developing human fetus warrants rights equal to those of viable, born, human beings.

Ginsburg further asserts that the Court ignored the opinions of numerous medical experts who indicated that dismemberment of late second term fetuses can cause physical harm to the mother, making intact D&E a safer procedure for the preservation of maternal health. The Court essentially shifted its protection of the fetus from viability to birth, or partial-birth. Suddenly the physical location of the pre-viable fetus is more significant than its ability to survive beyond the womb. In cases of intact D&E, the State’s interest in fetal life trumps the protection of maternal health. The tone of Ginsburg’s dissenting opinion is one of caution. A corollary to the Court’s extended protection of fetal life to pre-viability in some cases is the chipping away at both a woman’s right to have a first or second trimester abortion without undue interference from the state and the way in which human life is defined and protected by the law. The

extent of legal protection afforded to fetal life is at the heart of the debate about emergency contraception; thus Supreme Court rulings which address issues pertaining to the rights of a human fetus are germane to those on both sides of the EC debate.

While few cases have actually been brought against healthcare providers who fail to provide EC to rape victims, they establish points pertinent to this project. Several important rulings came from *Brownfield v. Daniel Freeman Marina Hospital*.⁹ In 1989, Kathleen Brownfield brought suit against Daniel Freeman Marina Hospital, a Catholic hospital in California, for failing to provide her with information regarding EC. Brownfield presented to the emergency room at Daniel Freeman Hospital after being raped and requested information on the morning after pill. The hospital staff refused, feeling that it would not be permissible in a Catholic hospital (Skeeles, 2003, p. 1016). In *Brownfield*, the appellate court ruled, first, that information regarding EC should be given to rape victims in order for them to make a fully informed autonomous decision regarding treatment. Second, rape victims who are not given information can bring suit against the offending facility. And, of particular significance to this project, the court ruled that the morning after pill acts to prevent pregnancy and not to terminate pregnancy, thus Catholic healthcare facilities would not be immunized against prosecution under the state's abortion statute if they chose not to provide EC education to rape victims. While the court's ruling necessitates the provision of information and treatment, if it is chosen by the patient, the treatment requirement can be fulfilled by facilitating a transfer to a facility that will provide the EC. Ironically, courts and legislatures in the United States continue to struggle with an issue that California appears to have resolved almost two decades ago. According to a 2008 Guttmacher Institute

⁹ *Brownfield v. Daniel Freeman Marina Hospital*, California State Court of Appeals, B032109 (1989)

Report, only 15 states mandate hospital emergency rooms to provide emergency contraceptive—related services to sexual assault victims; Arkansas, California, Connecticut, Colorado, Illinois, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Texas, and Washington.

2.4 Conclusion

While human beings have been trying to control their fertility for thousands of years, significant debate regarding the morality of contraception use can be traced back to early Christianity. In the Old Testament, God commands man and woman to be fruitful and multiply (Genesis 1:28), placing attempts to limit fertility in direct conflict with a command from God. In the 4th and 5th centuries A.D., St. Augustine further complicated matters by asserting that the sole purpose of sexual intercourse is procreation and that engaging in sexual activity exclusively for physical pleasure is sinful, because it distracts man from his relationship with God. Therefore, any attempt to limit the procreative element of coitus was denounced as sinful. While contemporary Catholic teaching acknowledges sexual intimacy as part of a loving marital relationship, contraception is still considered to be sinful, as it does not leave every act of sexual intercourse open to procreation.

Early U.S. law, such as the Comstock Act of 1873, similarly attempted to prohibit the use of contraception. However, seminal cases such as *Griswold v. Connecticut* and *Eisenstadt v. Baird* carved out a zone of privacy in which consenting adults should be free from government interference. This zone of privacy was later extended in *Roe v.*

Wade to include a woman's right to choose to terminate her pregnancy, until the fetus reaches viability and presents a competing interest.

While U. S. law regarding contraception changed, the Catholic Churches position stood still. The issue of emergency contraception has once again put the Catholic Church and U. S. law at odds. The Church holds that EC is potentially abortifacient and can therefore not be given to women at certain times in their menstrual cycle, even if the woman has been the victim of a rape. Conversely, many states hold that EC is contraceptive and not abortifacient and should be made readily available to rape victims, as it is a recommended standard of care by numerous medical associations. Furthermore, as was discussed in *Brownfield v. Daniel Freeman Marina Hospital*, if a state accepts that EC is not abortifacient, then Catholic hospitals will not be protected under state statutes which generally protect Catholic health care facilities from legal action if they refuse to provide abortion services. Yet, only 15 states mandate that emergency rooms make information on, and access to EC available to sexual assault victims. Obviously, the stance of the Catholic Church continues to influence political and legal positions on reproductive health issues.

Chapter 3

The Power of Naming

Chapter one discussed the scientific information which is necessary to understand much of the debate that surrounds emergency contraception, and chapter two provided an historical, legal, and theological context within which to consider that controversy. In both chapters, discussion revolves around key concepts that have contested meaning. Eric Reitan describes contested concepts as vague terms with unclear boundaries of meaning. While the contested concept has certain paradigmatic cases that all would agree possess characteristics which clearly point to that concept, there also cases which resemble the paradigm cases, but do not necessarily contain the characteristics associated with the concept (2001, p. 45-48). Reitan asserts that 'rape' is such a concept, as what constitutes rape has been redefined over time and its borders expanded. As will be discussed within this chapter, rape was historically understood to be a violation of a man's property rights. The definition of rape was very clear and narrow: forced sexual intercourse upon a woman by a man not her husband. One man trespassed and damaged another man's property. In contrast, current conceptions of rape are vague and broad,

and have recently been expanded to include offenses of cyber or virtual rape, in which an individual's virtual persona is sexually violated (Dibbell, 1993).

Commonly used terms such as pregnancy, consensual, contraceptive, and rape become contested when different groups with different interests define them differently. As these terms are often used in conjunction with one another during discourse, a lack of clarity regarding the meaning of one term may lead to confusion surrounding the meaning of another. If pregnancy is defined as beginning at fertilization, for example, then any attempt to prevent the fertilized egg from implanting would be considered abortifacient. However, if pregnancy is defined as beginning with the implantation of the embryo into the uterus, then attempts to prevent implantation would be contraceptive and not abortifacient. Therefore, how pregnancy is understood affects how contraception is understood. Equally important to understanding contested concepts, such as pregnancy, is an awareness of who has defined the concept, and how that definition shifts power dynamics within any given group or between groups.

There are important ideological concerns in formulating any concept or definition, as a definition that benefits one group may adversely influence or oppress another. In light of the importance of many of the contested terms within this work, this chapter spends some time exploring how meaning is assigned to language and who is permitted to assign that meaning. Of course, to speak of "assigning meaning" gives the impression that this is an explicit, intentional, and deliberate act. While sometimes it may be, more often a meaning emerges in discourse and reflects the interests of those with the power to promulgate their conception. Those with a different understanding and relatively less power may have the nuances of their use of a term ignored, as the more powerful group's

use of the term becomes the dominant or mainstream meaning of the term, and understanding of the concept it names. Thus the dominant or more powerful group's understanding, or perspective, comes to be accepted as the meaning or definition. It comes to be 'naturalized' or taken as the way things naturally, actually are. Pregnancy becomes, and eventually just is, what those who dominate the relevant discourse consider it to be. Rape is what those in power recognize it to be. The linguistic and epistemological trick is the naturalization of the concepts and terms naming them. The ethical import is that such naturalization obscures both the process of naturalization itself and the interest that lead different groups to conceptualize things differently, to mean different things by their concepts, and to assigning different meaning to the terms. Thus this chapter pays particular attention to the ideas of power dynamics and group interests and to the influence language and meaning have upon societal and individual perceptions and self-perceptions.

The influence of language on self and social perceptions is especially striking in the context of rape. In the autumn of 1985, author Nancy Venable Raine was raped. Raine shares her rape experience in her book, *After Silence: Rape & My Journey Back*.

I understood my mistake. I had made a deal with the rapist and now I regretted it. From now on, everyone would assess that deal, starting with the police and the doctors and, moving further out, family and friends. What if he never intended to kill me? Why did I believe his threats? Why didn't I have the physical strength to break his hold in those first few minutes? Was there something about me that allowed me to cave in to his demands? Was I a despicable coward? Why had I given in to his hateful needs to spare a life I no longer recognized as my own? The wisdom of my deal vanished the moment other human beings encountered it. I understood it perfectly when it was just the rapist and me in the nightmare in which I was fragmenting and reassembling in new ways that seemed to have meaning. But now that recombination of being made no sense. Yet it could not be reversed. It had changed me cell by cell. It was my fault that I was alive. If I had fought harder, I would either be dead or be as I was before. Now I was neither. (Raine, 1998, p. 27)

It may seem incredible that the victim of a violent crime would express guilt, shame, and self-condemnation at having survived such an attack. Yet, “both behavioral, sometimes referred to as situational, and characterological self-blame are common in sexual assault survivors” (Reddington & Kreisel, 2005, p. 84). These responses raise the question: why would a rape survivor fear that society would judge her harshly for choosing to live, when survival is generally celebrated, and those who survive other devastating events are described as courageous, heroic, and brave. The answer involves the use of language and the construction of meaning.

Many assert that the negative thoughts and emotions experienced by rape victims are grounded in historical definitions, and societal perceptions, of rape. The manner in which an event is defined or labeled influences the cultural understanding of that event, while imposing the values of the definers at both a societal and individual level. Therefore, how rape is defined within a culture directly affects how blame is assigned to both victim and perpetrator.

This chapter discusses the power to name, label, and define. The concept of power, in particular relational power, is discussed while examining how power is obtained and how naming can secure and further the power of some, while subverting the power of others. Further, the long-term effects of naming are considered while examining the difficulty faced when attempting to alter the understanding of concepts, such as rape, which have been inculcated into a collective societal perception.

3.1 The Power to Name

Power itself can be conceived in many different ways. Power can be understood as the ability to control or produce an effect upon another. Such power can be given to an individual, such as a judge or legal guardian, or it may be a right, such as the parental right to control a minor child. Power can be thought of as an exertion of force, whether that force be physical, mental, or moral. Power can also be understood as a source of energy, such as solar power or hydroelectric power (<http://www.merriam-webster.com>). The discipline of physics defines power as the rate at which work is done, or the work/time ratio. Power can also refer to one of the nine angelic choirs in the heavenly hierarchy of angels (Farrell & Healy, 1952, p. 121). One can possess the power to create, as in music and art, or the power to produce, as with work-product or income. There is the power to decide for one's self, to be autonomous or self-governing. There is healing power, the power of prayer, and omnipotence, which is unlimited power.

Michel Foucault describes power not as something that can be given, or held, or maintained, such as land, title, or position, but rather as a fluid force which exists within relational dynamics and which can only be exercised through action (1982, p. 789). The flow of power is directed by the actions of those in the relationship. Foucault explains that "in itself the exercise of power is not violence; nor is it a consent which, implicitly is renewable. It is a total structure of action brought to bear upon possible actions" (1982, p. 789). Foucault proposes that power is intrinsic to relationality and is thus present in every relationship, regardless of the level of intimacy. He does not limit his concept of relationality to that between self and other, but also recognizes relational power dynamics in how one relates to oneself. Foucault asserts that the ever present power dynamics that

exist within peoples' multiplicity of relationships shape how they perceive themselves and others. Foucault explains:

Power applies itself to immediate everyday life which categorizes the individual, marks him by his own individuality, attaches to his own identity, imposes a law of truth on him which he must recognize in him. It is a form of power which makes individuals subjects. There are two meanings of the word 'subject': subject to someone else by control and dependence; and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes subject to. (1982, p.781)

Foucault's view of power as relational recognizes a potentially vicious cycle of power in which the individual is influenced by external relationships, which in turn influence internal relationships and self perceptions. How one perceives one's self in relation to self and others then affects how the individual interacts with others and society as a whole. Joyce Schuld describes Foucault's conception of power as an intricate web in which "power relationships interconnect one by one, spreading from locale to locale and from depth to depth, gradually interlacing in so many places and on so many different levels that they form an uninterrupted mesh "(2003, p.16).

Working from Foucault's model of relational power, it would appear that the exercise of power by an individual in a single relationship has the ability to ripple successively outward and inward, both spreading the effect of that exercise of power throughout society, while simultaneously reinforcing the effects of that power dynamic within the individual. Additionally, through the formation of social alliances power can be collectively exercised, thus effecting a greater redistribution of power within the societal power dynamic. Foucault used his concept of power to analyze societal and political trends, suggesting that tracing the historical roots of a power dynamic would also allow for the uncovering of motivations, strengths, and weakness in a particular

dynamic which may be useful if there is a desire for change in that dynamic (1982, p. 791). In Foucault's book, *Discipline and Punish*, for example, he explores the penal systems use of varying forms of punishment, how those changes evolved over time, and whom those changes benefited. For example, in 18th century Europe criminals were routinely tortured and killed in a public venue to demonstrate the power of the monarchy. However, upon recognizing the value of the human body as an economic resource, incarceration and forced labor, slave labor if you will, replaced the destruction of the human body in light of its value as an economic commodity (1995).

Using social constructionism to explore power dynamics within sexual relationships, Jacquelyn W. White, Barrie Bondurant, and Cheryl Brown Travis, advance a concept of relational power similar to that of Foucault. White et al. assert that knowledge and reality are socially constructed, rather than discovered, and that it is those perceptions of reality held by those in power that are labeled as true (2000, p. 14). Iris Young refers to this social phenomenon as cultural imperialism, and defines it as “the universalization of a dominant group's experience and culture, and its establishment as the norm” (1990, p. 59). Young suggests that those in the dominant groups have greater influence on dissemination and communication of information and can therefore share their experiences, values, and perceptions more widely than other groups. As the experiences of the dominant groups become accepted as societal norms, those with whom the dominant culture cannot identify—i.e., those with substantially different interests and perspective—are defined as the “Other.” Young concludes that “the dominant culture's stereotyped and inferiorized images of the group must be internalized by group members at least to the extent that they are forced to react to behaviors of others influenced by

those images” (1990, p. 59-60). Members of the group and of the dominant culture come to see the culture’s characterization of the group as natural. That the images, labels, and terms used are actually constructed and thus may be contested can be overlooked as the dominant group’s view comes to be accepted as the descriptive of the way things actually or naturally are. Young’s view thus adds a critique of power to the social constructionist view that thoughts, acts, and feelings emanate from interaction with the external world, and that knowledge of one’s self and others cannot be separated from social, political, and historical influences (White et al., 2000, p. 14).

White et al. contend that knowledge is communicated and received through language; therefore, those that have the power to influence and construct the meaning of language also construct knowledge and influence societal norms. Ludwig Wittgenstein claimed that language creates reality, and that a language only acquires meaning within a social context. For Wittgenstein, words are the signifiers that direct our attention to a concept. The concept is the signified, and while the concept does not have the same meaning for everyone who understands a particular language, there are enough similarities in individual understandings of a concept to render language useful in conveying concepts (Wittgenstein, 1958, p. 32). Wittgenstein also asserts that the meaning and judgment attached to language create social truth; “It is what human beings *say* (sic) that is true and false: they agree in the language they use” (1958, p. 88).

The power to attach meaning to words imposes the values and judgments of those with power on the marginalized, poor, and oppressed in a society. For example, if it is socially defined as unsafe for a woman to travel alone at night, and unsafe means physically dangerous, then it would be reasonable for an unescorted woman to give up

certain night time activities in exchange for her physical safety. However, 'unsafe' may also refer to potential danger to one's reputation or social standing. If women traveling alone at night are labeled as promiscuous, then women may avoid that behavior to safeguard their reputation. By labeling a behavior as unsafe, it not only implies that danger awaits those who engage in that behavior, but also places the responsibility back on the actor if her action results in some type of injury, because she did not heed the warning contained within the label 'unsafe'. Thus, women come to associate fear with unescorted nighttime travel, and the movement of a woman becomes constrained and dependent upon the availability of a man to escort her. Therefore, fathers, brothers, husbands, and partners would be able to control the nocturnal travels of the females in their lives by labeling such travels as unsafe. This example illustrates how the movement and material conditions of a group of people can be constrained and dominated by the meaning attached by the powerful to certain actions. The constrained group becomes self-constraining when the meaning is then accepted and internalized by the less-powerful group itself.

Frances B. Reddington and Betsy Wright Kreisel explore the role of language in the power relational dynamics of prison rape. Prison is a culture purposefully set apart from most societies. Therefore, within a system where prisoners have few rights, goods, and services available to them, a unique social structure is formed. Within the prison culture, physical force and sexual dominance are among the limited ways in which power and social dominance can be employed, secured, and maintained. However, power is exerted not only through physical dominance and violence, but also through labeling. Once prisoners have been physically dominated and raped, they are often labeled

'women' or 'bitches'. By labeling the subservient male with a term coded as female, the dominant prisoners reinforce the dominated male's position as physically and sexually subservient; moreover, this label becomes internalized and shapes the prisoner's self-conception. As the dominated male assumes the role of woman, often choosing the safety of belonging to, or becoming the property of, one inmate in order to avoid multiple rapes, he internalizes the role of woman and therefore becomes signified by the mark of the signifier that his society has forced upon him. Just as women were once treated as chattel and whose worth was defined by the men to whom they belonged, prison bitches are only safe to the degree that one dominant male finds them to have value. The effect of labeling on those who lack other resources to circumvent the effects of being labeled is thus especially pernicious (Reddington & Kreisel, 2005, p. 163-165)

The degree to which the internalization of a socially imposed label can alter an individual's self perceptions once again demonstrates the power that is exercised by attaching meaning to a name, definition, label, or signifier. Corrigan et al. examine the power dynamics involved in naming, or labeling, in their research on stigma (2003, p. 162). The phenomenon of stigma is explored on both a societal level as public stigma, and an individual level as internalized or self- stigma. Like Foucault, Corrigan et al. submit that the way in which the majority culture or general public define and assign attributes to certain classes of people, or individuals, eventually infiltrates their sense of self and often leads to an altered self-perception (2003, p. 165). When public stigma is particularly demeaning and disparaging, it can lead to a public rejection of the stigmatized group. In turn, the stigmatized may be so overwhelmed with the pressure of carrying their stigma that they may succumb to the label and incorporate it into their self-

concept. Or, if stigmatized, marginalized Others do reject the dominant conception of them and their experiences, they then experience what Young following W.E.B. DuBois terms “double consciousness”—“this sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity” (Young, I., 1990, p. 60; DuBois, 1969 [1903], p. 45). Defined as deviant because different from different, one’s perspective and experiences are simultaneously erased—i.e., rendered invisible in the terms one knows them as one’s own—and defined as deviant because different, which the dominant group fails to recognize as a perspective.

As Foucault suggests, dominant culture defines reality within and for a society in large part through language by defining or assigning meaning to terms, and by labeling people, their characteristics, and their actions. To understand whose interests are served by a particular meaning of a concept, one must examine the social and political climate during which a particular meaning became the norm and how those interests continue to be maintained by the use of the concept in a web of meaning (Reddington & Kreisel, 2005, p. 163). Therefore, the remainder of this chapter explores historical definitions of rape, paying particular attention to definition crafted in United States and within the Catholic Church. It also examines the influence of the feminist movement on the definition of rape, and how the movement’s efforts may have underestimated the degree to which the historically held beliefs of society regarding rape and female sexuality have permeated the hearts and minds of women.

3.2 Rape Definitions and Myths

Eric Reitan refers to rape as “an essentially contested concept” (2001, p. 43). The word rape generally has great emotive value. Labeling an act as rape marks it as particularly heinous, and has legal, moral, and normative implications. However, the reasons for which the act is thought to be heinous, and the particular acts which qualify as rape are often debated. A woman who is violently beaten and forced to submit to penetration of her vagina by her attacker’s penis is generally recognized as having been raped. However, if that same woman had too much to drink at a party and discovered that her date had sex with her while she was passed out, many would dispute her claim of rape. Issues of the woman’s character, lack of resistance, and ability to consent would be but a few of the issues considered when the courts, society, and even the woman herself decided whether she was actually the victim of a rape.

In order to understand how the concept rape has become so contested, one must examine its historical roots. In the United States, women had very little legal or social standing until the early 20th century (Dailey, 1986, p. 1255). Prior to that time, women were considered to be the property of men, whether that man was a father, a husband, or some other male relative. For this reason, early definitions of rape depicted the crime as a violation of a man’s property rights (Reitan, 2001, p. 43; Giacomassi & Wilkinson, 1985, p. 368; Daily, 1986, p. 1256). The victim of rape was the man, as his property was damaged and his family unit was compromised (Giacopassi & Wilkinson, 1985, p. 367). A man’s wife was for his use alone, and he did not want to share her, incur the cost or burden of raising children that were not biologically his, or endure questions regarding patrilineal blood lines or inheritance. Additionally, a daughter who was not a virgin

became unmarketable as a bride, and brought shame upon her father and her family (McGregor, 2005, p. 3). However, rape within marriage was not acknowledged, and was even an unintelligible concept, as a man could do as he wished with his property. Early United States rape laws sprang from English law and defined rape as “carnal knowledge [by a man not her husband] of a woman forcibly and against her will” (McGregor, 2005, p. 28).¹⁰

By virtue of being raped, a woman was thus rendered undesirable and unmarriageable to anyone other than her rapist. Those societal views made the environment ripe for such customs as bride capture, in which a man raped a woman with the intent of acquiring property—namely, the woman and whatever material goods she may bring by way of dowry or inheritance. As no other man would any longer want the rape victim, and her family would never be able to marry her off, it was deemed to be in everyone’s best interest if she married her rapist. Additionally, even if a man was prosecuted and found guilty of rape, his victim could choose to save herself from the shame of a spinster’s life, and her rapist from punishment, by marrying him. Thus, the rapist who chose his rape victim well had the potential to rise in both economic and social status (Dailey, 1986, p. 1257), while the victim became the object of family shame and public rejection, whose best option was to endure a lifetime of subservience and fidelity to the man who raped her.

The male dominated social structure denigrated women and protected men, shifting shame and blame away from the perpetrator and onto the victim. Despite the great strides that have been made to secure equal rights for women within the United

¹⁰ This definition is attributed to Sir William Blackstone’s *Commentaries on The Law of England 1765-1769*.

States, the effects of this historical patriarchal framework are still felt by women today. Reddington and Kreisel suggest that “the fear and shame experienced by rape victims stems from a long cultural and legal precedent that has enabled men to subjugate women without any concern for retribution” (2005, p. 11). This patriarchal holdover, if you will, is illustrated in the fact that it has only been within the last quarter century that most states have overturned their marital exemptions in their rape laws (Giacopassi & Wilkinson, 1985, p. 377).

Therefore, while rape was considered to be a serious crime against another man, even a capital crime, there were rarely negative repercussions for the rapist. Yet, there were negative outcomes. Unintended pregnancies, impure women, and ruined family reputations could result from a rape, but who was blamed? Ironically, it was often the victim. In the 19th century, married women who were raped endured the same labels and stigma as those women who had engaged in extramarital affairs (Kahn & Mathie, 2000, p. 378). Unlike women who were virgins prior to their rape, married women were often forced to share culpability for their attack. Therefore, married women were often executed with their attacker, unless their husbands interceded (Reddington & Kreisel, 2005, p. 12).

It has been suggested that, the labeling of the rape victim as blameworthy has developed out of a number of rape myths which were created and perpetuated by a male dominated society (Ruch, 1992, p. 634; Reddington & Kreisel, 2005, p. 14; Fortune, 2005, p. 29). Rape myths are “prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists” (Burt, 1980, p. 217). This definition conveys the basic concept of a rape myth, however it has been criticized for failing to recognize the persistent nature of

those beliefs over time, as well as failing to note that most rape myths portray the rape victim in a disproportionately negative light. While research regarding rape myths has generally been inconclusive or contradictory, studies do consistently show that a significant number of Americans believe one or more rape myths to be truth, and that men are more likely than women to believe the myth (Reddington & Kreisel, 2005, p. 14-15).

One of the most prevalent rape myths is that rape doesn't happen to nice girls (Ruch, 1992, p. 634; Reddington & Kreisel, 2005, p. 17; Savino & Turvey, 2005, p.20). Libby Ruch (1992) claims that the label of nice girl implies the woman is white and upper or middle class (p. 634), while John Savino and Brent Turvey assert that nice refers to women who do not behave in a certain manner.¹¹ For example, nice girls do not dress provocatively, have a history of promiscuous behavior, frequent seedy bars, or use intoxicating substances to excess (2005, p. 20). The implication is that bad girls do get raped, and that bad girls wear short skirts, drink excessively, and have a history of agreeing to sex, so they must deserve to be raped. Reitan suggests that a woman who has had multiple sexual partners may be viewed as "common property," thereby forfeiting her right to decide who has access to her body, her property (2001, p. 52).

Bad girls don't follow societal rules of conduct and must therefore accept any subsequent harm that befalls them as self-inflicted (Reddington & Kreisel, 2005, p. 17). This particular rape myth not only blames the victim for her attack, but simultaneously excuses the rapist for his behavior. If the victim deserved it, then she must have seduced

¹¹ Definitions created by the historically wealthy, white patriarchy served to oppress not only women, but people of color, the poor, homosexuals and other marginalized groups. While reference may be made to the oppression and labeling of these socially marginalized groups, in depth discussion of such important topics is beyond the scope of this paper.

the rapist who was just the unsuspecting perpetrator of societal justice. Unfortunately, the victim-blaming that results from such beliefs can still be found within the criminal justice system, the very system which should protect, and seek justice for, rape victims (Savino & Turvey, 2005, p. 20). Savino and Turvey imply that rape investigators are as susceptible to rape myths as anyone else, and that a rape perpetrated upon a prostitute, drug addict, or homeless woman may not be as thoroughly investigated as the rape of a married, middleclass, churchgoing kindergarten teacher. Additionally, they suggest that many serial rapists target these marginalized bad girl populations, in order to lessen their chances of being successfully prosecuted for their crimes (2005, p. 20). In labeling the victim as blameworthy, rape myths have forced women to bear the stigma and low social status that as a matter of just deserts should be reserved for wrong-doers and criminals.

Another rape myth that excuses the behavior of the attacker asserts that men cannot control their natural aggression and libidinal appetites, and are subsequently not culpable for raping in order to satisfy their natural desires (Fortune, 2005, p. xvii; Henderson, 1992, p. 131; Savino & Turvey, 2005, p. 13; Donat & White, 2000, p. 360; Travis and White, 2000, p. 303). Once again, this male-perpetuated myth creates a no-win situation for women. Since it is difficult, if not impossible to suppress the heterosexual male need to have sexual intercourse, women who do not desire sexual intercourse should avoid behaviors which have the potential to stimulate heterosexual male desire. Patricia Morokoff (2000) suggests that this myth turns women into sexual gatekeepers, and that rape is a result of women failing in their gatekeeping capacity. The rape victim must have engaged in some behavior that incited the perpetually sexually ready male, while simultaneously lowering the constant defense of her chastity

(p. 303). Lynn Henderson asserts that the only case in which the male would be considered culpable, according to this rape myth, is if the perpetrator was black and the victim was white (1992, p. 131).

A rape myth which has had a particularly pernicious effect upon rape law is the myth that you can't rape a woman who doesn't want to be raped (Jordan, 2004, p. 29). This myth is based on the assumption that the nature of intercourse would make it impossible for a penis to penetrate a vagina without submission or cooperation on the part of the woman. Based upon this assumption, a good woman could protect her chastity, thereby protecting the reputation of her husband and family, by combating her assailant with the utmost resistance (McGregor, 2005, p. 28). This standard of resistance found its way into United States rape laws with some states requiring the utmost resistance on the part of the victim in order for a sexual assault to be classified as rape. Anything less than a brutal struggle would be deemed consensual sex (Jordan, 2004, p. 29; McGregor, 2005, p. 29). Rape victims then had two options: either resist rape to the point of death, or submit and be accused of consenting out of desire and then lying about the rape (McGregor, 2005, p. 31). These well constructed rape myths reinforce the social perceptions of men as basically good, moral, and innocent and of women as either innocent Madonnas or guilty whores. Henderson refers to this phenomenon as "a 'cultural story' of male innocence and female guilt" (1992, p. 131).

Judeo-Christian tradition embraces a similar "cultural story" beginning with the parable of Adam and Eve. Eve disobeyed God and then used her feminine powers of seduction to lead Adam astray (Genesis, 3:6). Eve was blameworthy and manipulative, while Adam was simply a victim of his natural urges. The power structure of the

Catholic Church is indisputably patriarchal, and within it, the men define. The story of Adam and Eve, one of the earliest and best known Christian narratives, clearly embodies the belief that women are blameworthy and men are innocent. Perhaps if Adam and Eve were held equally responsible for their transgression in the Garden of Eden, rather than woman being portrayed as a threat to man's relationship with God, then man would not fear woman and feel the need to exert power and control over her.

Within the historical teachings of the Catholic Church, the only women who seem to escape being labeled as blameworthy are those who guarded either their virginity, or their fidelity to a spouse, at all costs. Marie Fortune suggests that the value the Church places on an intact hymen as a symbol of virginity reinforces the societal label of women as sexual commodities (2005, p. 147). A woman's value has historically been measured by her sexual purity. The objectification of the virginal woman is deeply ingrained in Catholic tradition, and the virginal woman has been held up as a model of female behavior for generations of Catholic women. The best examples of the Church's objectification of virginal women are found in the stories of the virgin martyrs.

St. Agnes was born of Patrician stock in Rome in 290 A.D. Agnes's family was amongst the early Christians, and Agnes had chosen to "consecrate her virginity to Christ" (Smith, 1906, p. 17). In other words, Agnes planned to save her virginity for her eternal bridegroom. However, the son of a Roman prefect took an interest in Agnes, who was said to be in her early teens, and he asked her to be his bride. Agnes refused, and was brought before the prefect. Despite threats of torture and death, Agnes would not acquiesce and agree to marry the prefect's son (Smith, 1906, p 17).

The prefect was furious and planned to have Agnes put to death, but it was illegal in Rome to execute a virgin. So, the prefect ordered that Agnes be dragged through the streets naked to a brothel, where she would be defiled, and then returned to the prefect to be burned at the stake. However, when Agnes was stripped naked, her hair mysteriously grew and covered her naked body. When men attempted to rape Agnes at the brothel, they were struck blind or dead. And, when the Roman guards attempted to burn Agnes at the stake, the kindling would not ignite. Finally, a soldier stabbed Agnes in the throat, and she is now the patron saint of rape victims (Smith, 1906, p. 17). It is somewhat ironic that the patron saint of rape victims was not only never raped, but died a virgin. For the rape survivor, Agnes provides a difficult example. Obviously, Agnes must have chosen the correct course of action, because she was beatified as a result. So, what does Agnes's example hold for women who choose life, instead of death, in the face of rape? It seems clear from Agnes's story that death is preferable to rape.

The story of the virgin martyr St. Agatha is similar to that of Agnes. St. Agatha lived in Sicily around 250 A.D. Like Agnes, Agatha was of a noble bloodline and was devoted to Christ. She too was sought after by a high ranking Roman official, the Roman Consul Quintianus, whom she rejected. As a consequence, she was sent to a brothel to be debased. Unfortunately for Agatha, this is where the similarities between her experience and Agnes's depart. Agatha was raped repeatedly, imprisoned, and tortured. Among the horrific tortures inflicted upon Agatha was the crushing and tearing off of her breasts. Saint Peter is then said to have appeared to Agatha shortly before her death, replacing the flesh of her breasts (Winstead, 1997, p. 29; Beckett, p. 1998, p. 40). Modern depictions of Agatha often show her covering her chest and holding a bowl with her breasts in it.

Interestingly, the virgin martyrs were all young, beautiful, and wealthy, reflecting the attributes the Catholic patriarchy found to be most desirable in a woman. St. Lucy, St. Dorothy, and St. Catherine of Alexandria were all described as physically attractive young noblewomen who would rather endure torture and death than relinquish their virginity. As Christ was their bridegroom, they subsequently became the property of the Church. Ironically, many of the hagiographers of these early martyrs admit that the narratives of these young saints are more legend than fact. Smith admits that the stories of the virgin martyrs have been “embellished, amplified, and romanticized,” and that there is very little documentation to support their stories. However, he asserts that their lack of foundation in verifiable fact does not mean that they fail to have instrumental value (Smith, 1906, p. 10).

While it may appear obvious that the stories of the early virgin martyrs are more fable than fact, they have left an indelible impression upon many Catholic women. As Raines questioned her decision to submit to her rapist, rather than risk her life, she reflected on the stories of the virgin martyrs. Raine states, “I instinctively ‘decided’ to live—unlike any number of female saints half-remembered from my childhood who chose death over the loss of their ‘virtue.’ I did make ‘a deal with the devil’” (1998, p. 222).

St. Maria Goretti is a contemporary saint, canonized in 1950, who is often compared to St. Agnes and St. Agatha. Maria was often held up as a Christian role model, exemplifying the feminine ideals of the Catholic Church. Kathleen Young claims that it was impossible to attend a parochial school in the 60 years prior to Vatican II without being told about Maria Goretti who “constituted the core curriculum in moral

theology for Catholic girls” (1989, p. 477). The central story of this curriculum is this: in 1902, a 12 year old Italian girl named Marie Goretti was attacked by a young man named Alessandro Serenelli. Serenelli was 19 or 20 years old, and known to Maria, but it is not clear whether he was a neighbor or the son of a family friend. Serenelli held Maria at knife point and threatened to kill her if she didn’t have sex with him. Maria refused, Serenelli stabbed her 14 times, and Maria died 24 hours later. There is some question as to whether Maria was raped after she was stabbed, as her clothes were torn off, but the general retelling of the story concludes that she died a virgin (Young, 1989, p. 475-476).

Maria’s attacker was immediately apprehended, tried for murder, and sentenced to 30 years in prison. However, Maria apparently appeared to Serenelli during his imprisonment and forgave him. The story of young Maria spread quickly, and thousands from the Italian countryside attended her funeral. She was the perfect role model for young women. Maria was innocent, spiritually fit, sexually pure, self-sacrificing, and forgiving. Maria not only secured her place in heaven by protecting her virginity, she also saved Serenelli’s soul through her forgiveness. These legends of the virgin martyrs continue to define and limit a woman’s worth by the status of her hymen. By keeping women, and the societies in which they live, focused upon maintaining sexual purity—a concept defined in material terms—these legends serve to keep women oppressed. Men define what makes a woman valuable, and then they try to take it from her—blaming her if she allows it.

Maria Goretti was canonized in fewer than 50 years (Young, 1989, p. 477). It has been suggested that that the Catholic Church purposely used Maria’s story to act as a moral corrective. In the wake of World War II, many American women were reluctant to

return to traditional female roles after working outside the home and acting as breadwinners. Additionally, military men from many nations engaged in behaviors while at war, such as rape, murder, and infidelity, for which they needed to seek forgiveness. Young (1989) asserts that “Maria Goretti, as a virgin martyr, became a useful reactionary symbol of patriarchal, religious, and family values” (p. 481).

Rape myths have helped to create, perpetuate, and maintain a socially accepted way in which men can continue to exert power over women. If a rape victim lives, she is a whore, and if she dies, she is a martyr. It is an untenable situation for women. Rape myths have been so well absorbed into the social value system that women who allege rape are often disbelieved in the absence of serious physical injury, and survivors such as Raine begin to question their own motivation when they chose to be raped rather than murdered. By keeping the definition of rape unclear, and continuing to ascribe a certain amount of truth to rape myths, society keeps the rape victim in a state of uncertainty. As long as the victim remains unsure of her culpability in her rape, she will also remain unable to assign blame elsewhere.

3.3 Rape and War

Rape can have instrumental value. Within this chapter rape has been discussed as a means to secure property, as in bride capture, and to obtain social dominance, as in the prison system. In both examples, rape is used to effect a shift in the social power dynamic. Such is the case when rape is used as an instrument of war. The social fabric of one’s enemy is torn as their women are defiled, their bloodlines polluted, their family units shattered, and their community morale destroyed.

The systematic rape of Muslim women by Serbian soldiers in Bosnia provides a shocking example of using rape as a weapon of war. Serbian soldiers raped Muslim women in an attempt to impregnate them, thereby diluting their bloodlines and advancing a form of genocide. Naoko Miyaji applies the term “forced rape” to this type of rape and defines it as “a rape, the intentional aim of which is to impregnate a woman so that the child she carries will be ethnically mixed” (2000, p. 137). When war is based upon an ethnic conflict, rape is often employed as a military tactic and encouraged by military authorities (Swiss & Giller, 1993, p. 613). Victims are forced to participate in the genocide of their own community, while expanding the enemy’s bloodlines by unwillingly serving as incubators for enemy offspring. During the Nazi regime, women who were raped by German men had to seek special permission for abortions. Similarly, Croatian and Muslim women who became pregnant subsequent to rape by Serbian forces were then denied access to abortions services by the dominating Serbs. The goal of the Serbs was not only the eradication of the Croatian and Muslim bloodlines, but the creation of a new ethnically “cleansed” race of Serb children (MacKinnon, 2006, p. 188).

Rape in war can also serve to humiliate or emasculate the soldiers and men of the occupied territory by rendering them incapable of protecting their women or their ethnic identity (MacKinnon, 2006, p. 177). Enemy troops often force the men of a community to watch as they rape and torture the women. Such displays of military, physical, and sexual dominance serve not only to disgrace the occupied men, but also to weaken community bonds. The safety of a community is challenged when its members can no longer protect themselves from such horrors. When faced with rape and torture, many families will flee in search of safety, thereby splintering the community (Swiss & Giller,

1993, p. 613). Additionally, there is frequently a social stigma attached to having been raped, and the victims are often ostracized and labeled as unclean. The children who are the products of wartime rape also face community rejection, leaving the rape victims and their children to survive, and to attempt to heal, without the aid of social or family support (Swiss & Giller, 1993, p. 614).

The use of rape as a war weapon reflects many of the historical views of women that have been discussed throughout this chapter. Women are seen as community property, in that the women of a community belong to the men. Women are the spoils of war, and the conquest of an adversary's woman not only humiliates him but sullies his woman and bastardizes his bloodline. Women are the victims of wartime rape, yet they fear rejection because their worth is contingent upon their sexual purity, their faithfulness in a committed relationship, or both. In the case of rape in combat, when pregnancy is the goal, pregnancy is used as a continued means of victimizing both the woman and her community.

Catherine MacKinnon (2006) expresses concern that by viewing rape through the lens of war, the individual woman victim is lost, once again, and the focus is placed upon rape as a crime against a group of people, a group of men. No one man is held responsible for a sexual assault upon any one woman. Rape becomes an unfortunate byproduct of war. Worse yet, in conflicts labeled as just wars or holy wars, rape, as an instrument of war, can appear to be justified in the quest for what is just, right, true, or holy (p. 184-185). Once again women are used as a means to an end and not recognized as having any value in and of themselves.

3.4 A Feminist Redefining of Rape

Rape is different from all other crimes, and it is one of the most insidious. It is the only crime of violence that masquerades as sex. Rape is the wolf lying in Grandmother's bed, wearing her nightgown. Like Little Red Riding Hood, we are aware that something is different about Grandmother but are fooled nevertheless by appearances. Rape is a death force that can disguise itself as the life force to which all human beings are inexorably drawn. Rapists are sexual impostors. Many benefit from the confusion created by their disguise, just as many victims suffer from the consequences of that confusion. (Raine, 1998, p. 225)

Foucault would agree that rape is a violent crime masquerading as sex. Foucault suggests that rape is an act of violence upon a body part and not a sexual act. "Sexuality," Foucault asserts, "can in no circumstances be the object of punishment" (1988, p. 200). He reasons that only by elevating the sexual body parts to a place of greater importance than other body parts can one justify punishing the crime of rape differently than other acts of violence. So, only by labeling violence done to the sex organs as more heinous than other forms of violence does it become so (1988, p. 200-202). Based on this line of reasoning, Foucault suggests that the crime of rape be desexualized and reclassified as a violent crime.

Susan Brownmiller, a radical feminist who wrote extensively on the politics of rape in the mid 1970s, also calls for the redefining of rape as a crime of violence, instead of a crime of sex. Brownmiller suggests that rape has never been punished because of its sexual nature. As was discussed earlier in this chapter, rape was historically viewed as a crime of theft, trespass, and destruction of a man's personal property. In some cases raping a woman could secure a man a wife, as well as position within her family, so it had instrumental value. Brownmiller proposes that rape is no longer a means of gaining property or wealth and is instead "a brief expression of physical power, a conscious

process of intimidation, a blunt, ugly sexual invasion with possible long lasting psychological effects on all women” (1976, p. 423).

While Brownmiller acknowledges the psychological trauma associated not only with sexual assault, but also with the persistent threat of sexual force, she laments that such injuries are difficult to display in a court of law. Physical injury done to the victim is easily displayed, and nonsexual violent crimes more easily prosecuted. Additionally, unlike other crimes, such as robbery, rape victims have traditionally been required to prove that they put up a significant amount of physical resistance in an attempt to avoid the rape (1976, p. 431). Robbery victims are advised not to struggle with their assailant in order to escape physical injury, and no one assumes that because they did not struggle, they wanted to be robbed. However, the motivation of a rape victim who does not struggle with her rapist is often questioned. As Raine mentioned earlier, she was made to feel as if she consented to being raped, because she chose to live.

Brownmiller therefore proposes a gender-free law to govern sexual assault, a redefining of the term which would recognize rape as an act of violence perpetrated by one person upon another person, rather than a sex act forced upon a woman by a man. She states:

A modern perception of sexual assault that views the crime strictly as an injury to the victim’s bodily integrity and not as an injury to the purity of chastity of man’s estate, must normalize the penalties for such an offense and bring them in line more realistically with the penalties for aggravated assault, the crime to which sexual assault is most closely related. (1976, p. 425)

Ironically, Brownmiller uses the removal of the gender label as a corrective, an attempt to quiet historical patriarchal definitions of rape and redefine the crime to reflect the experience of the predominantly female victims.

Brownmiller's work was very influential, and her recharacterization of rape as violence, and not sex, became widely accepted and incorporated into the societal understanding of rape (Palmer, 1988, p. 513). However, voices did emerge that disagreed with attempts to separate sex and rape. Craig Palmer disputes Brownmiller's claim that domination and power, not sex, are the motivation and goals of rape, suggesting that the claim is based upon "vague semantics and uncheckable claims" (1988, p. 515). Palmer points to research that indicates a significant reduction in recidivism among rapists who have been castrated as evidence that rape is predominantly a crime of sex and not violence. Additionally, he cites two studies which concluded that extensive violence is only used in a minority of rape cases, and that the vast majority of rapists resort to violence only in the face of significant resistance (1988, p. 520-521).¹² Palmer also takes issue with statements which appear on the back cover of Brownmiller's book, *Against Our Will*, which imply that rape is violence by men upon women and that because it is not sexually motivated, women of all ages and levels of attractiveness are equally at risk. Palmer claims that younger (read: more attractive), stronger females are disproportionately represented in the rape statistics, while older, more vulnerable women are rarely raped (1988, p. 524). Palmer concludes that often the goal of rape is in fact sex, and lower recidivism rates among castrated rapists, the relatively minimal use of physical violence in the commission of sexual assaults, and evidence which suggests that rapists seek out sexually attractive victims support that claim.

¹² The studies cited are: Harding, C. F. (1985). Sociobiological hypotheses about rape: A critical look at the data behind the hypotheses. In S. R. Sunday & E. Tobach (Eds.), *Violence against women: A critique of the sociobiology of rape* (pp. 23-58). New York: Gordian Press; Smithyman, S. D. (1978). The undetected rapist. Ph.D. Dissertation, Claremont Graduate School. University Microfilms International: Ann Arbor, MI.

Giacopassi and Wilkinson argue that separating rape from the label of sex crime actually makes it less reflective of the female experience. Rape is an emotionally charged event, and it is viewed as a serious offense by most Americans (1985, p. 373). Unlike simple assault, rape has traditionally been seen as a heinous crime, and convicted rapists were subject to severe punishment, even capital punishment in 16 states until the late 1970s (Giacopassi, 1985, p. 372). The legal response was to rape as a sex crime; but as Brownmiller noted, it was difficult to get rape convictions for many reasons, such as victim blaming, resistance requirements, and the contested meaning of consent. While classifying rape as a crime of violence may lead to a greater number of convictions, Giacopassi and Wilkinson assert that it “trivializes the offense of rape and devalues the victim” (1985, p. 367).

The perpetrators of violent crimes are punished based upon the degree of brutality inflicted upon the victim. Many of the rape reform statutes of the early 1970s replaced the word rape with terms such as sexual assault, and the offenses were broken down into various degrees depending on the level of force or intimidation used by the perpetrator. By breaking rape down into degrees, it makes it possible for one rape to be less serious than another rape, at least legally. This presents the question: do rape victims experience a rape as less serious if they were subject to lower levels of violence? Or is rape more than a violent crime? Classifying the severity of rape based upon the level of violence employed does not attend to the experience of the rape victim. It reduces her experience to the difference between being slapped and being shot. Giacopassi and Wilkinson cite several studies in which “attempted rape victims and completed rape victims did not

differ significantly in their immediate and long-term responses to the sexual assault” (1985, p. 378).

Additionally, in judging the seriousness of a rape based upon the degree of violence or injury, the newly defined crime of rape puts women back in danger. When rape was considered to be a sexually based offense, the seriousness of the crime was often judged by the degree to which the victim resisted her attacker. Therefore, a woman who presented with few physical injuries might be suspected of consenting to sex (Jordan, 2004, p. 29; McGregor, 2005, p. 29). By defining rape as a crime of violence, the victim is once again placed in an untenable situation. If she resists and places her physical well-being in jeopardy, her rape will be considered serious, and her attacker punished accordingly. However, if she chooses to protect her life and physical safety, and thus incurs little physical injury while being raped, her rape may be labeled as less serious. So, once again the victim can place herself in danger in order to be taken seriously, believed, and found blameless. Or, she can protect herself and be taken less seriously, have her judgment questioned, and perhaps be assigned blame. Carine Mardorossin suggests that by placing the focus on the victim’s physical attempts to defend herself, or on the lack thereof, attention is shifted away from the perpetrator, and responsibility for the outcome of the sexual attack is placed back on the woman (2002, p. 153).

Giacopassi and Wilkinson claim that “to define rape as a form of assault denigrates the victim by treating the victim as simply a physical entity rather than as a total person with mind and body who attributes special significance to a sexual attack” (1985, p. 378). Similarly, Mardorossin expresses concern that the redefining of rape

presupposes a homogeneous rape experience which exists in an “authentic vacuum” and fails to acknowledge that each victim’s experience is unique and is shaped by how she understands the world (2002, p. 157). In other words, you can tell a rape victim that her attack was violent and not sexual, but that may not match how she experiences her attack. To the victim it may feel very sexual, and by desexualizing the signifier, ‘rape,’ the victim could feel that her experience is rendered invalid.

The feminist efforts of the 1960s and 1970s brought much needed attention to the crime of rape and sought legal reform that would hold rapists accountable for their actions (Henderson, 1992, p. 78; Giacopassi and Wilkinson, 1985, p. 371). Antiquated legislation, such as statutes with the marital rape exemption, was amended in many states, and the definition of sexual assault was expanded to include sexual violations other than forced penetration of a woman’s vagina by the penis of a man who is not her husband. The American public was made aware of the prevalence of rape, the victim blaming endured by rape survivor, and the difficulty of convicting a rapists. All are indisputably positive steps forward for rape victims and women in general.

However, the campaign to completely desexualize rape, to define rape as a crime of violence and not a sexually based crime, was short sighted. While increasing the conviction rate among sexual predators is a laudable goal, the arguments of Brownmiller and her contemporaries did not consider that women may experience sexual violence to be much more traumatic than nonsexual violence. For many women the violation of the vagina is more important than broken ribs, a concussion, facial lacerations, or bruises. Intimacy is shared with sexual partners via the sexed body parts. New life grows in the womb and is delivered through the vaginal canal. Women nurse their children at their

breasts. These body parts are special, sacred, and appropriately shared only with those of the woman's own choosing. While many women may be able to intellectualize rape as violence, they may not be able to divorce themselves from the cultural, religious, and familial beliefs which they have been infused with for a lifetime. Raine did not choose to think about the virgin martyrs after she was raped, she just did. By limiting the concept of rape to violence, many victims may be left with an experience that doesn't match the definition of rape, and they may feel isolated, ashamed, or abnormal. Mardorossian asserts that "in trying to undo the distinction between psychic and social lives, however, they contribute to subordinating the effects of gender and social differences to the self's interiority" (2002, p. 761). In the beginning of this chapter, Raine referred to rape as "a crime of violence that masquerades as sex" (1998, p. 225). Yet she too cannot separate the violence from its sexual nature:

Rape devours erotic love, the communion of body and being, the mysterious affirmation of existence beyond power and all its metaphors, the channel into and out of the center of creation where words and body disappear into the void of pleasure, the all-encompassing journey of two as one, and one as many and all. (1998, p. 225)

The experience of rape victims is critical to the definition of rape. When the terms do not reflect her experience, the rape victim is forced into a position of double consciousness if she is to be conscious of her rape—and to communicate about her rape—at all. It is her experience, and attempts to define rape for the victim will undoubtedly ring unauthentic. By forcing the rape victim to use language that does not adequately reflect her lived experience, her rape may be rendered illegitimate or abnormal. This in turn may lead to a greater sense of isolation, shame, or marginalization, as she remains unable to access language which would allow her to share her experience beyond herself.

Chapter 4

The Trauma of Rape

I am thrashing in the air. There is a foul odor. My body is on fire from inside. My blood is rushing as if trying to escape. I hear only it. There is no air. It is all going out of me. Who is screaming? I do not know who is screaming. I cannot breathe.

Now I hear the words. These are the words I hear: Shut up shut the fuck up you bitch you dirty bitch you fucking cunt shut up do you hear me you fucking dirty bitch I'm going to kill you if you don't shut up you bitch I'm going to kill you.

Now I am sucking air into my lungs. I am prey, grasping for air.

Now I have a thought: So this is Death.

Now I have a feeling: Anything to live.

Now I feel something hard pressing against my back. I know what it is. It is a penis. (Raine, 1998, p. 9)

Chapter Four is about rape and is the last of the foundational pieces that compromise the first section of this work. While the earlier chapters provide the reader with scientific, historical, legal, theological, and philosophical background, this chapter focuses on the experience of the victim in the aftermath of rape. As the experience of being raped cannot be known a priori, this chapter relies on the narrative of a rape victim to keep the reader focused upon the victim's experience, as she describes it in her own words. The experience of victims is also explored through their interactions and relationships with others. In the wake of rape, many survivors interact with health care

workers, police, rape advocates, and clergy. How these initial relationships are experienced by the victim is critically important, as any additional perceived threat to bodily integrity or sense of self can add to feelings of vulnerability, victimization, and isolation occasioned by the rape. Additionally, rape can affect the victim's previously established relationships with intimate partners, family, friends, God, and self. As one generally relies on such relationships to provide support and comfort in times of physical, emotional, psychological, and spiritual trial, challenges to the victim's primary relationships can leave both the victim and those close to her feeling traumatized, fragile, and alone.

4.1 Rape Statistics

The World Health Organization (WHO) estimates that 12-25% of women worldwide will be the victims of some form of sexual abuse within their lifetime (2000). In the United States, sexual assault is a pervasive societal problem with over 300,000 reported sexual assaults each year (CDC, 2004; Tjaden & Thoennes, 2000, p. 15). Of those sexual assaults which involve a rape, an estimated 5% of the victims will become pregnant by their attacker, resulting in approximately 32,000 rape related pregnancies yearly in the United States (Holmes et al., 1996, p. 322; McFarlane, 2007, p. 130). In cases of intimate partner rape, the pregnancy rate is significantly higher, with 26% of victims reporting having conceived secondary to rape (McFarlane, 2007, p. 130). As disturbing as these numbers are, they woefully underrepresent the actual number of rapes, and consequently the number of pregnancies resulting from rape, due to significant underreporting (Reddington & Kreisel, 2005, p. 210; Savino & Turvey, 2005, p. 211). A

National Violence Against Women (NVAW) survey conducted in 2000 estimated that the actual number of rapes perpetrated against women each year is in excess of 800,000 (Tjaden & Thoennes, 2000, p. 15). Consequently, Reddington & Kreisel (2005) refer to rape as “the most underreported crime in the United States” (p. 10).

It is estimated that 60% of rapes and sexual assaults go unreported (Savino & Turvey, 2005, p. 211; Buchwald et al., 2005, p.6). In a research project done for the National Institute of Justice and the Centers for Disease Control (CDC), Patricia Tjaden and Nancy Thoennes estimated that 876, 000 rapes occur in the United States each year, and that one in six women will experience “attempted or completed forcible rape at some time in their life” (2000, p. 15). At increased risk for sexual victimization are women with a history of psychiatric problems, substance abuse, homelessness, or sexual abuse, with one half of those who reported being victims of sexual assault also reporting that the abuse occurred prior to the age of 18 (Sarkar & Sarkar, 2005, p. 408; Tjaden & Thoennes, 2000, p. 15). Ironically, many of the same factors that make a woman vulnerable to sexual assault can also be a result of sexual assault, thus making sexually abused women increasingly vulnerable to future abuse.

Women chose not to report sex crimes for a plethora of reasons, many of which have been discussed in earlier chapters. Victim blaming, shame, fear, and stigma are but a few of the reasons women chose not to subject themselves to the public scrutiny involved in reporting to law enforcement or seeking medical attention (Smith, M., 2004, p. 243; Reddington & Kreisel, 2005, p. 10; Fortune, 2005, p. 29). Reddington and Kreisel suggest that underreporting “can be attributed to the dehumanizing effect rape has on its victims” and that “most victims have no desire to tell anyone of their victimization

including researchers and law enforcement officials; therefore, sexual victimization rates are inordinately underrepresented” (2005, p. 10).

4.2 The Victim as a Crime Scene

For the victims of rape who choose to report to law enforcement, their encounter with the criminal justice system may be an additional source of stress, anxiety, and suffering (Savino & Turvey, 2005, p. 211). While many female rape victims report being satisfied and comforted by their interactions with police immediately following their assault, fully one third of victims were dissatisfied with their interaction with the police. Many victims did not feel that their suffering or their allegations of rape were taken seriously. They reported that the police were dismissive or judgmental, and demonstrated disbelief and a lack of empathy regarding the allegations made by the victim (Jordan, 2004, p. 78). In the absence of obvious physical trauma, such as bite marks, bruises, or lacerations, a victim’s allegations of rape are at times questioned, and the victim may find herself trying to convince law enforcement officers that she was the victim of a crime, and not a willing participant in a consensual sex act. Rape victims have reported being interrogated in a suspicious and accusatory manner which one would expect to be reserved for alleged perpetrators, rather than traumatized rape victims (Savino & Turvey, 2005, p. 211; Reddington & Kreisel, 2005, p. 256; Jordan, 2004, p. 4).

This unexpected adversarial relationship between police investigators and rape victims can often be attributed to an officer’s acceptance of rape myths. Police may question a victim’s credibility based on her sexual or social history, subscribing to the rape myth that good girls don’t get raped and bad girls get what they deserve. So, a rape

victim with a history of substance abuse or multiple sexual partners may find herself being treated more as a criminal than a victim. The belief that women invite sex, and then lie about a sexual assault, is one of the most persistent and harmful rape myths, and is reflected in law enforcement's tendency to question a woman's claim of rape while unquestioningly accepting and investigating claims regarding nonsexually based offenses, such as burglary. Believing the rape myth that all rape victims are hysterical, police investigators may also misinterpret a rape victim's flat affect or calm demeanor as an indication of false reporting or guilt, rather than a coping mechanism or shock (Reddington & Kreisel, 2005, p. 259; Wood, 2000, p. 8; Jordan, 2004, p. 56). The influence of rape myths upon police treatment of sexual assault victims is referred to as an "extra-legal factor" or "secondary assault" that leads to a "secondary victimization" of the rape victim (Reddington & Kreisel, 2005, p. 259; Martin & Powell, 1994, p.856). Members of the American mainstream majority culture are raised to believe that the police are good. They are trusted public servants who protect the good guys and arrest the bad guys. Furthermore, the police are community representatives and their behavior is a reflection upon how the community and the legal system view rape victims (Martin & Powell, 1994, p. 857). Negative interactions with the police may leave the victim feeling betrayed by the very people who were supposed to protect her. If the victim's initial contact with law enforcement does not inspire some level of trust, it may increase the woman's levels of anxiety and fear, and make the collection of physical evidence more difficult for the victim.

Even in the absence of extra-legal factors, with law enforcement officers that are compassionate and supportive, the victim may perceive the process of evidence collection

as a negative event, or retraumatization, as she is encouraged to relive the rape in order to obtain evidence (Savino & Turvey, 2005, p. 263). The rape victim's body is the crime scene. From the moment the police become involved in a rape case, the protection, preservation, documentation, and collection of physical evidence is their primary goal (Savino & Turvey, 2005, p. 65). If evidence is contaminated, missed, or mishandled in any way, it can impede the efforts of law enforcement to secure justice for the victim. However, the evidence collection process can be a particularly harrowing event for the rape victim. Raine (1998) describes her initial encounter with law enforcement and the realization that she herself was the crime scene:

I want water. My thirst is vicious. I am in the kitchen now. I turn on the facet at the kitchen sink. My mouth is full of dirt. 'Was there oral penetration?' the woman asks. 'Yes,' I say.
'No water,' the woman replies. 'You might wash away evidence.'
Her words are terrible. I want to wash my mouth out with fire.
What is in my mouth? Dirt is in my mouth. In my body. His dirt. (p. 22)

If police are contacted prior to seeking medical treatment, the collection of physical evidence begins with them. The victim is told not to shower, eat, drink, urinate, defecate, douche, or brush her teeth, all in an effort to preserve physical evidence. While the necessity to protect biological evidence is understandable and reasonable on its face, the inability to rid herself of the physical residue left behind by her attacker may be unbearable to the rape victim.

Additionally, the rape survivor is generally the only witness to the crime, so her accurate recounting and detailing of her rape is essential to the successful apprehension and prosecution of her rapist. However, there are understandable fears that may cause a victim to be reluctant to participate in a legal investigation. For example, recounting the rape can trigger flashbacks, forcing the victim to relive her attack. She may also feel

shame or embarrassment at the prospect of discussing body parts and sexual acts which are generally discussed only in the most private of settings, or perhaps the victim has never discussed such matters before. A woman may fear that those to whom she discloses will reject her, ridicule her, or be repulsed by her. Moreover, many attackers threaten to retaliate if the victim identifies him (Woods, 2000, p. 8; Olshaker, 2007, p. 29). Raine (1998) feared that she would be harshly judged for choosing to survive her rape, rather than fight to the death (p. 224). Not only do women fear that the process of reporting and evidence collection will exacerbate their trauma, rape victims have very little confidence that the legal system will bring their perpetrator to justice (Olshaker et al., 2007, p. 85). Therefore, a victim may question the wisdom of torturing herself in light of what she perceives as a slim chance at justice.

For victims who chose to file a police report, the bulk of the biological evidence collection is done at a healthcare facility. Ideally a healthcare professional who specializes in evidence collection and has been trained to be sensitive to the specific needs of sexual assault victims, such as a sexual assault nurse examiner (SANE) or a forensic medical examiner, will complete a physical exam and collect evidence. Unless the victim's injuries are life-threatening or necessitate immediate medical attention, the treatment of physical injuries is routinely postponed until the forensic examiner is able to photograph the victim's injuries and complete the collection of evidence (Savino & Turvey, 2005, p. 126; Reddington & Kreisel, 2005, p. 100). Therefore, in addition to the emotional and psychological trauma a rape survivor may be suffering in anticipation of a rape exam, she may then be asked to endure the examination without benefit of stitches for lacerations, or a cast for a broken bone, or ice for a swollen lip. In order to help the

victim endure this difficult process, and to provide an additional resources and support for victims, many healthcare facilities have made sexual assault advocates available to rape victims as part of their sexual assault treatment protocol (Olshaker et al., 2007, p. 31).

During a forensic rape exam, literally every inch of a woman's body is processed. Any visible injuries, including those to breasts, genitals, and buttocks are photographed. Having the most intimate parts of their bodies photographed can be a highly traumatic event for the victims. Modesty, privacy, and personal space are once again violated, and concerns are raised regarding the storage and keeping of their most personal images. Fingernails are scraped, the mouth, genitals, and anus are swabbed, pubic hair is combed, scalp and pubic hair is plucked, blood is drawn, a urine sample is requested, an internal gynecological exam is performed, and any other area of the victim's body where the rapist's blood, saliva, or semen may have been deposited is processed (Olshaker et al., 2007, p. 31; Savino & Turvey, 2005, p. 127).

Raine recalls the conflict between the physical and emotional pain she experienced during her forensic rape exam, and the intellectual knowledge that the collection of evidence could lead to the capture of her rapist:

I am not sure I can go through with it. There is evidence inside me. They need it. The pain of the instrument inside me will be worth it, I tell myself. If I hurt some more, they will catch him. When the speculum enters me, I bite my lip. When it opens inside me, I do not think it is worth it. (1998, p. 28).

In order to maximize the usefulness of physical evidence in sexual assault cases, the forensic rape exam should be conducted within 120 hours of the assault. There are several reasons why examination and treatment should not be delayed. Biological evidence can become lost, be washed away, or degrade over time, weakening its value in

the legal investigation of the victim's rape. From a clinical standpoint, timely medical treatment can reduce physical pain and potential complications due to physical injury, as well as provide prophylaxis for infection, sexually transmitted diseases, and unwanted pregnancy (Olshaker, 2007, p. 87). Additionally, the healthcare setting can serve as a link to rape crisis centers and counseling services, and provide education and information on follow-up care (Woods, 2000, p. 9).

While timeliness is important for evidence collection, rape victims are intensely traumatized in the period immediately following a rape. Rape victims often feel vulnerable, powerless, humiliated, fearful, and out of control (Reddington & Kreisel, 2005, p. 96). Timothy Woods suggests that victims of sexual assault need three things from those around them in the immediate aftermath of rape: "victims' (sic) need to feel safe", "victims' need to express their emotions", and "victims' need to know what comes next after their victimization" (2000, p. 2).

Raine writes of backing away from the police and emergency medical workers when they entered her home after her rape. She describes herself as "terrified" and "humiliated" because her shirt is torn open and her pants are unzipped exposing the fact that she isn't wearing any underwear, because her attacker took her underwear (p. 21). Raine (1998) also recounts the terror she felt at the prospect of being left alone in a hospital bathroom during her rape exam: "I beg the nurse to stand outside the bathroom. While I collect a urine sample, I keep asking her through the locked door if she is still there. 'Don't leave,' I say" (p. 27).

Due to the thoroughness with which the body of the rape victim is examined for evidence, she can easily feel exposed, vulnerable, and re-victimized. Her already

shattered sense of privacy and control is once again violated, and she may feel humiliated and ashamed as her naked body is poked, prodded, and photographed (Woods, 2000, p. 9). As is reflected in quotes by Raine, despite knowing why the rape exam was important and understanding that police and healthcare workers are there to help her, she was scared to death. She had been stripped of her sense of safety, and she was simultaneously frightened of others and afraid to be alone. Recognizing the potentially traumatizing effect of both legal and medical intervention for rape victims, most law enforcement and health care protocols for rape investigations and treatment include the use of specially trained sexual assault investigators, SANEs, forensic examiners, counselors, and victims' advocates to attempt to establish some trust with the victim and to provide a supportive and secure environment (Savino & Turvey, 2005, p. 124; Olshaker et al., 2007, p. 32). Despite these undoubtedly genuine efforts to make rape victims feel safer, particularly in a medical setting which is to be healing and therapeutic, it does not appear that first responders can provide what Woods asserts rape victims need most in the aftermath of rape—to feel safe.

The second major need of rape victims in the period immediately following the attack is to express their emotions (Woods, 2007, p. 3; Reddington & Kreisel, 2005, p. 99). It is important for victims to be able to express their emotions and tell their stories in an environment that is supportive and nonjudgmental. Fear of being stigmatized, blamed, or judged for her emotions, reactions, or demeanor may inhibit a victim's ability to share her story, and heighten feelings of isolation, shame, and vulnerability. Moreover, if a rape victim cannot safely share her story she may withdraw, internalizing negative thoughts and feelings, and lengthening her recovery period (Reddington & Kreisel, 2005,

p. 99; Ahrens et al., 2007, p. 39). So the rape myths that can cause law enforcement, the legal system, society, the victim's family, and the victim herself to suspect that the victim bears some level of blame or responsibility in her rape not only inhibits successful prosecution of rapists, but also inhibits the emotional and psychological healing of the victim.

In the aftermath of rape, a rape victim also needs to know what to expect next, especially during the legal investigation and forensic exam phase (Woods, 2007, p. 4; Reddington & Kreisel, 2005, p. 100; Sarkar & Sarkar, 2005, p. 416). A feeling of powerlessness is often reported by victims of rape, and being given information and support service to prepare themselves emotionally and physically for what to expect, allows them to participate more fully in their treatment. It also gives the victim an opportunity to establish new physical and emotional boundaries, as she chooses who will touch, photograph, or talk to her. By choosing whether or not to contact the police, participate in a rape exam, or avail herself of rape crisis services, the victim shapes her path to recovery. Information regarding follow-up care is also important to the victim, as she may not be aware of the many levels on which sexual assault put her at risk. For example, Raine reflected, "I hadn't considered venereal disease and pregnancy when I was bargaining for my life" (p. 29). Partnering with the victim in decision making and information sharing can help her to regain some sense of control, and perceived control over the recovery process has been found to be a factor that led to the reporting of positive life changes by rape victims shortly after their attack (Sarkar & Sarkar, 2005, p. 416).

4.3 Responses to Rape and Post-Traumatic Stress Disorder

The rape experience does not end when the assault is over, or the rape kit is finished, or the assailant is caught. The rape experience can vary from woman to woman, however there is general agreement within the literature that rape is highly traumatic, especially during the immediate post-assault phase, causing emotional, psychological, and behavioral disruption, with significant long-term effects (Reddington & Kreisel, 2005, p. 81; Sarkar & Sarkar, 2005, p. 407; Ullman, 2007, p. 23). Much of what has been written addressing the reactions to a rape experience, and the coping mechanisms women employ to weather such experiences, are based on observations of others and not on the victim's lived experience. Consequently, this project has relied on the first hand narrative of Nancy Venerable Raine, as she recounts her rape experience in her narrative, *After Silence, Rape and My Journey Back*.

The problem with discussing rape is that no one wants to talk about it. While rape is often described as an act of violence, there are many acts of violence of which people speak freely. Once again, a woman could discuss her mugging and subsequent beating, and most people would listen with a sympathetic ear. However, no one wants to hear the details of a rape. Something about rape is too terrible, too heinous to discuss. The crime is unspeakable. Raine describes a conversation she had with a woman who had read her essays recounting the rape experience. The women commented that Raine's work was "well-written" but when it came to the topic of rape she said "let's face it, no one want to hear about such terrible things" (1998, p. 119). This attitude towards rape may not only make a woman hesitant to discuss the life changing event, but also may cause her to feel

such fear and shame that she does not discuss the crime, leaving her alone to deal with the after effects of rape.

For reasons that are not entirely clear, rape is unlike any other crime, even other crimes of violence. Victims of sexual violence have higher rates of post traumatic stress syndrome, and slower rates of recovery, than victims of non-sexual abuse or violence (McFarlane, 2007, p. 129; Sarkar & Sarkar, 2005, p. 415). In the aftermath rape victims report suffering from a plethora of problems, including sleeplessness, fearfulness, nightmares, nausea, vomiting, restlessness, agitation, increased startle response, and numerous maladies, including suicidal ideation. Many rape victims experience acute stress disorder (ASD), which occurs after a person experiences a traumatic event which involves actual or threatened serious injury, death, or threat to physical integrity of self, and elicits intense fear, helplessness, or horror. Additional criteria of identifying ASD include that either during or after the traumatic event the person experience three or more of the following symptoms: emotional numbing or detachment, a reduction in awareness of one's surroundings, derealization, depersonalization, or dissociative amnesia. The trauma victim frequently reexperiences the trauma through dreams, thoughts, flashbacks, and illusion. The victim avoids stimuli which may trigger recollections of the event, and may show marked signs of anxiety or increased arousal, such as being easily startled, having difficulty sleeping, and being increasingly agitated. In order for the diagnosis of acute stress disorder to apply, the symptoms must last for a minimum of two days but no more than four weeks, and they must occur within four weeks of the precipitating event (DSM IV, 1994, p. 432).

When the symptoms of ASD persist beyond one month, the rape victim may be experiencing Posttraumatic Stress Disorder (PTSD). PTSD symptoms usually begin within three months of the trauma and may persist for anywhere from one month to years. The disturbances and symptoms of PTSD are similar to those of ASD, but are more disruptive and chronic in nature. PTSD causes “clinically significant distress or impairment in social, occupational, or other important areas of functioning” (DSM-IV, 1994, p. 429). Eighty percent of rape victims with PTSD report suffering sleep disorders with increasingly worsening nightmares, poor sleep quality, anxiety, depression, and an impaired quality of life which is unresponsive to psychotropic drugs (Sarkar & Sarkar, 2005, p. 414).

Rape trauma syndrome (RTS) is a form of posttraumatic stress disorder, and up to 94 percent of rape victim exhibit signs of RTS within the first week after their attack, and over half of those victims continue to display signs of RTS a year later (Smith, 2004, p. 172). In addition to the psychiatric symptoms those with PTSD generally report, rape victims with RTS also frequently report feelings of “guilt, degradation, dependency, vulnerability, hysteria, and embarrassment” (Smith, 2004, p. 172). RTS may also express itself through physical symptoms such as loss of appetite, vomiting, nausea, sleeplessness, muscular tension, genitor-urinary discomfort, and feelings of numbness (Smith, 2004, p. 172; Holmstrom & Burgess, 1975, p. 1288). For some rape victims, the trauma that follows in the aftermath of rape is overwhelming, and they turn to drug and alcohol abuse to sooth their psychological and physical discomfort. For others, suicide appears to be the only escape they can envision from the pain and trauma of rape. Rates of suicide and suicidal ideation are significantly higher in women who have experienced

rapes than in women who have experienced violence alone, with approximately 17-20 percent of rape victims attempting suicide. Unfortunately, a rape victim's risk for suicide is not limited to the posttraumatic and recovery phase after sexual assault, as women with histories of sexual assault have higher rates of suicide attempts over the course of their lifetime (McFarlane, 2007, p. 128; Sarkar & Sarkar, 2005, p. 414; Smith, 2004, p. 172).

Sexual assault survivors may manifest, in addition to ASD, PTSD, and RTS, less common symptoms, or a combination of reactions, to having been raped that do not fall under the heading of any one syndrome or disorder, yet have an equally devastating impact upon their life. In a seminal work by Lynda Lytle Holmstrom and Ann Wolbert Burgess (1975), rape victims were asked to describe their reactions to their attack, rather than having their reactions and coping mechanisms observed and recorded. What they found was that the experiences of rape victims do not fit neatly into any one category. For example, a woman may exhibit some symptoms of PTSD, but other symptoms may represent a reactivation or exacerbation of a previously diagnosed physical or psychological disorder such as irritable bowel syndrome, depression, or substance abuse (p. 1288). Under the diagnostic criteria for PTSD, such preexisting conditions are discounted, yet they are experienced no differently by the victim.

In the wake of rape many women also report sexual dysfunction. A decreased desire for sexual intimacy, diminished pleasure during sex, arousal dysfunction, and fear inhibit a woman's ability to give and receive physical pleasure and love through sexual intimacy. Decreased sexual functioning often continues for a year or more following the attack. Raine describes her first sexual encounter one year after she was raped:

No man had held me since the rape. The rapist had violated my most basic human need—my bodyright. By destroying my ability to control my own body,

he had made my body an object. I lost a sense of it as the boundary of self, the fundamental and most sacred of all borders. (1998, p. 163).

When a pregnancy results from a rape, the victim is at even greater risk for posttraumatic stress. In a study done by Judith McFarlane (2007), rape victims who reported resultant pregnancies had higher PTSD scores than victims who did not become pregnant. Victims who became pregnant also had higher rates of bacterial vaginosis, chlamydia, gonorrhea, vaginal bleeding, and rectal bleeding (p. 130). Women who find themselves pregnant after rape may struggle with whether or not to continue the pregnancy. If a woman chooses to terminate the pregnancy she may violate her personal or religious beliefs regarding abortion, adding to her feelings of guilt and heightening feelings of stress. Regardless of a previously held moral stand on abortion, the stress of the decision to abort and the associated medical procedures can compound the effects of posttraumatic stress by triggering memories of the attack (Smith, 2004, p. 154; Lathrop, 1998, p. 28). If a woman chooses to continue the pregnancy and raise the child, the woman may have difficulty separating the child from her attacker, particularly if the child resembles the rapist, which could impede the mother's ability to bond with the child and to properly parent (Smith, 2004, p. 154; Lathrop, 1998, p. 28). Adoption is yet another option, and the victim may derive an altruistic benefit by placing the baby in a home in which it can flourish free from any knowledge of the circumstances of his/her parentage. However, a woman could still bear the psychological scars of giving up a child which is genetically half hers and to whom she may have become emotionally attached during the course of her pregnancy. Additionally, a victim who delivers the child will bear the physical scars, stretch marks, c-section scars, thicker waist, as a daily reminder of her rape. If a woman chooses to bring her child to term, whether she gives it up for adoption

or not, she may also be forging a lifetime relationship with the rapist, as in some states a rapist can assert his parental rights by blocking the adoption or filing for visitation rights (Smith, 2004, p. 155). Rape induced pregnancy also places both the mother and the child at increased risk for potential negative health outcomes, such as lower birth weights and failure to thrive in the children and an above average number of complications, both during and after pregnancy, for the mother (McFarlane, 2007, p. 129).

For women who are victims of intimate partner violence the chances of becoming pregnant due to rape are much higher. McFarlane's study reported that 26% of intimate partner rape (IPR) results in pregnancy, and that a significant number of the victims reported multiple pregnancies due to IPR (2007, p. 129). Multiple pregnancies for a single victim of IPR suggest a history of sexual abuse, rather than a single episode. Holmes et al. found that over 40% of the rape related pregnancies in their study "resulted from multiple assaults rather than from a single attack and thus occurred in the setting of ongoing violence or abuse" (Holmes et al., 1996, p. 323). For these women pregnancy may be a way for a partner to control her: her sexual freedom is violated, her body invaded, she may become financially dependent upon him to care for her and the baby, or her career may be sacrificed as she is forced into the role of caregiver (Lathrop, 1998, p. 27). It also may be more difficult to entertain the options of abortion or adoption, if the abuser remains involved in the woman's life and is aware of the pregnancy. Furthermore, it may be emotionally and psychologically difficult to give up a child if the mother has already given birth to siblings fathered by the rapist. For victims of IPR, not only have they been raped and traumatized, but the bonds of trust within their intimate partner relationship have been shattered. Annette Baier describes victims of IPR as having "trust

increased vulnerability” and asserts “that what the victim can suffer is not just a grave harm, but the poisoning of a once-possible future of an erstwhile good” (1994, p.146). The victims of IPR can no longer trust their partners to protect them, and they are deprived of a partner whose love and support can be so important in the healing process of a rape survivor. Anthony Lathrop asserts that “loss and grief are normative experiences of pregnancy exacerbated by rape, especially when the rapist is intimately known and the rape is a violation of intimate roles” (1998, p. 28).

In addition to high rates of posttraumatic stress disorder experienced by rape victims, and the additional stress of potential pregnancy, victims of rape also appear to be at greater risk for future sexual assaults (Sarkar & Sarkar, 2004, p. 408). N. Sarkar and Rina Sarkar attribute the increased risk for reattack to the fact that many rape victims have preexisting conditions or life situations which place them at greater risk for sexual assault, such as poverty, addiction, mental illness, poor health, lack of education, and homelessness. Their social situation, coupled with the trauma of rape, render these women even more vulnerable to future sexual assaults (2004, p. 408, 415, 417). Additionally, many of society’s marginalized populations lack familial and social support systems which are so important in the healing process for a rape victim, thus further inhibiting their ability to recover from sexual assault. Sarkar & Sarkar assert that based on the data, “most women live a miserable life after experience (sic) sexual assault” (2004, p. 414).

The level of support that women discover within their relationships with others, and the quality of those relationships prior to the rape, appear to be a fairly accurate predictor of their ability to recover from rape, as well as the pace at which they recover.

Research suggests that previously strained relationships, and family units which have not recovered well from previous stressor, may not respond well to a rape crisis (White & Rollins, 1981, p. 105). Family members are often classified as secondary victims of rape and often have acute stress responses similar to those of the victim. The victim is in need of the family for support to recover, however family members may not have the coping skills to respond appropriately to the victim's need for support, as they struggle with their own traumatization. Thus, the stress of rape can leave a family vulnerable, traumatized, and unable to provide each other with much needed emotional support.

Among rape victims who are in committed relationships, the support of her partner or spouse is most important in her recovery from sexual assault (Reddington & Kreisel, 2005, p. 120). Women generally choose to disclose their rape to people whom they believe will be helpful and make them feel safe, secure, and supported. Victims usually share their experience with a lover or a spouse, before anyone else (Reddington & Kreisel, 2005, p. 117). Unfortunately, the victim's partner is a secondary victim to rape and often exhibits symptoms similar to the victims and may suffer from PTSD. The vast majority of the literature on partner reaction to rape is based upon the response of a male partner in a heterosexual relationship. (While one would assume that the significance of a partner's response to rape would be no different whether the partner is heterosexual or homosexual, there is a paucity of literature on the response of lesbian partners to the rape of a significant other. Therefore the discussion will be limited to the reaction of male partners in heterosexual relationships.) The partner's reaction can be triggered by guilt or shame at not having been able to protect the victim. Or, may be a result of previously held beliefs about rape or an acceptance of rape myths or cultural beliefs; this can also

lead to victim-blaming which may feel like a secondary assault to the victim. It may be a visceral or deep seated belief that his intimate relationship has been violated or sullied, his woman has been contaminated. The male partner may also believe that rape is more an act of sex than an act of violence, potentially causing sexual dysfunction or physically intimacy issues between the partners which would impede the healing process (Reddington & Kreisel, 2005, p. 117; White & Rollins, 1981, p. 104-105). Priscilla White and Judith Rollins (1981) assert that “although recent research supports the view of rape as a violent act, cultural definitions still center around the view of rape as a sexual act” (p. 104). While having and displaying these reactions may paint the male partner in a negative light, by reflecting outmoded patriarchal values and prejudices, and by evidencing an inability to fully respond to the victim in a way that would be most therapeutic to her, it is important to remember that the partner suffers too. Unfortunately, 60 to 80 percent of intimate partner relationships end in the wake of rape (Smith, 2004, p. 172). Additionally, this may leave women who are victims of intimate partner rape particularly vulnerable as the trust of their intimate relationship was violated by the attack and it strips her of a source of support afterward.

A victim may also rely heavily on her family of origin for support, and for women without a partner their family may be their primary source of support. Rape is a sudden and harsh intrusion into a family. Unlike other crises which develop over time and allow family to anticipate a response and seek support, rape is not something that is expected or that can be prepared for (White & Rollins, 1981, p. 105). Families that are able to place blame for the rape outside of the family unit, and not upon the victim or a family member, “will be less vulnerable to long-term negative consequences from the

disruptiveness created by rape” (White & Rollins, 1981, p. 104). Parents often blame themselves and feel as if they have failed the rape victim, because they were unable to protect her. Additionally, parents may experience frustration, loss, and grief over their inability to fix the situation (Smith, 2004, 172; Reddington & Kreisel, 2005, p. 121). Other families may blame the victim for her rape and the resultant trauma caused to the family. Families that believe certain rape myths, such as good girls don’t get raped, may question the victim’s precipitating behavior and her culpability in the rape (White & Rollins, 1981, p. 104). For the family which has never spoken openly, expressed their emotions, or comfortably discussed sexual matters, distraction or avoidance may surface as coping mechanism (Reddington & Kreisel, 2005, p. 121p. 106). Or, these families may instead compensate by being overly protective of the victim or by doting on her, rather than allowing her to tell her story and express her emotions, in a safe environment. The family may also feel ashamed and embarrassed that such a thing happened to their family, and the discomfort other people display when it is discussed may heighten this embarrassment, so the victim and the family may bear the burden themselves, never talking about or dealing with it. Such coping mechanism do not empower the victim but leave her alone and dependent (Reddington & Kreisel, 2005, p. 121). Anger is yet another coping mechanism as family members are resentful and angry over their shattered worldview and sense of safety. Their space has been invaded, they have been violated, their family member has been attacked, and everyone must shift and adjust to accommodate the horrific event. Most families try to keep their anger from the victim, but such anger often permeates the home and can create a toxic environment which is not conducive to healing (White & Rollins, p. 107; Reddington & Kreisel, 2005, p. 212).

The family may have been operating on the premise that the world is not entirely safe, but 'we' as a family unit are safe; however, rape shatters the entire family's sense of safety and invulnerability, making them all fearful and vulnerable.

Children may be confused regarding previous family roles. A victimized mother may be unable to appropriately care for her children and may not respond to situations in a familiar manner. Children may be able to sense or be exposed to marital stress between their parents, and they may no longer feel safe in their home environment. A mother suffering from PTSD could be suffering from depression, hyperstartle reflex, sleeplessness, and a whole host of other behaviors which are not conducive to providing a stable and secure home life.

Additional family adjustment issues arise when an unintended pregnancy occurs, as even under the best of circumstances pregnancy represents a significant life change. As pregnant rape victims experience higher levels of PTSD, the family unit may experience higher levels of stress and dysfunction. The male partner may reject the child, because it is not his, and other family members may resent the burden that another mouth to feed represents to a family unit. Also, both pregnancy and the child may act as powerful reminders of the rape rendering the mother less capable of not only forming an attachment to, but also providing adequate love and care for, the infant. The mother's inability to bond with and care for the child may in turn place pressure on those around her to tend to the needs of the baby (Lathrop, 1998, p. 31).

The victim's relationship to her religion, God, or source of spirituality is also affected by her rape. Marie Fortune asserts that some rape survivors feel abandoned by God, and she suggests several explanations for that sense of abandonment. For victims

whose families are unable to cope with their rapes and therefore provide support, the victim's feelings of isolation may lead her to believe that God has turned away from her, too. Fortune also suggests that for women who expect that God will protect them from suffering and pain, the rape itself may produce a profound sense of being abandoned by God. If a woman believes that God is omnipotent and omnipresent, then how could He allow such an atrocity to be perpetrated upon her? Some may perceive God's allowing them to be raped as a punishment for some real or imagined sin or wrongdoing, or as some sign of disfavor, and for these women in particular, this abandonment may cause a "crisis of faith." Fortune also posits that Christian women understand both God and his redeemer son to be male, and as males they must not be able to comprehend the suffering of a female rape victim, thus they do not respond to the victim's prayers and pleas (2005, p. 148-149).

Victims who did not believe in, or actively practice, any form of religion or spirituality prior to their attacks may benefit from new or renewed practice. Several studies have reported that woman who attended religious services or noted increased spirituality after rape trauma also reported decreased levels of depression and a slightly increased sense of well-being (Sarkar & Sarkar, 2005, p. 416; Kennedy et al., 1998, p. 325). Conversely, women who experience a crisis of faith following their sexual assault may simultaneously experience the loss of a valuable source of support and coping. According to James Kennedy et al., sexual assault victims who reported decreased spirituality after the attack also reported "significantly reduced well-being" (1998, p. 325). Based upon these finding and the significance of religion/spirituality in the recovery process, and upon the fact that a disproportionate number of victims are

marginalized by society and victims of multiple sexual assaults, it would not be unreasonable to consider that the refusal of the Catholic Church to allow for the dispensing of EC to all sexual assault victims who are not pregnant could very well be experienced by rape victims as an abandonment by God in a time of need.

4.4 Conclusion

The quotation that opened this chapter is graphic and shocking. The language is shocking. The image of the victim being choked from behind while her rapist called her horrific names was shocking. Raine's realization that she was about to be raped was also shocking. Yet, the reason for including the quotation here was not to shock, but to allow the reader to see through the eyes of the rape victim. While it is important to understand the prevalence of rape within our society and the manner in which rape victims are currently treated in U.S. hospitals, without the experience of a rape survivor attached to them, these facts omit important points of significance. Therefore the words of Nancy Venable Raine are woven throughout this chapter.

The information provided within the first three chapters, and the statistical information and clinical information provided within this chapter provide the reader with the background information which is necessary to appreciate the arguments that will be made throughout the remainder of this work. However, the focus of this chapter has been the victim. The intention was to continuously return the reader to the experience of the victim, in her own words, so as to focus upon the person at the center of the issue. The victim must be at the heart of the discussion, and her experience and suffering should not be set aside at any point in the discussion of emergency contraception for rape victims.

Chapter 5

Catholic Natural Law Theory

Part II of this work looks within Catholic social teaching to discover support for providing emergency contraception to any rape victim who wishes to avoid becoming pregnant by her attacker. In order to formulate an argument which is consistent with Catholic social teaching, one must first understand how the Church derives moral norms. An appreciation of the Church's teaching regarding the origin of moral knowledge, and the moral norms that are derived from that knowledge, is necessary to formulate an argument that is both coherent and respectful of Catholic moral teaching.

Thomistic natural law theory provides the framework for moral thought within the Catholic Church. In this chapter, a brief history on Catholic natural law is provided, and is followed by an examination of two different schools of thought within contemporary Catholic natural law. One group describes the natural law legalistically. Human beings are inclined toward the good, and they use their reason to identify those goods. As human nature is constant over time, moral norms derived from the good are thus static and unchanging over time. This school of thought, which is explored in light of the

works of John Finnis, Germain Grisez, and Pope John Paul II, asserts that certain moral norms are exceptionless, or absolute, regardless of history or circumstance. In contrast to this position, is a natural law theory which adequately considers the human person. History, society, culture, and science affect personal circumstances and are considered when using reason to participate in, and reflect upon, individually and collectively, God's creation as God is creating it (Kelly, 2004, p. 88). This form of natural law recognizes potential for change and growth, it is not static, and it adopts a historical approach to the meaning of moral absolutes. The works of moral theologians Joseph Fuchs, Charles Curran, and Cristina Traina provide the foundation for the final section of this chapter. However, it is Christina Traina's interpretation of Thomistic natural law theory, with its feminist underpinnings, that is relied upon to provide a moral framework within which to consider the argument put forth in the following chapter.

5.1 Natural Law Theory

Natural Law theory is recognized as the basis of much of Roman Catholic moral thought and teaching, however, it is not an exclusively Catholic, or Christian, theory. Jean Porter asserts that, by those who embrace it, "natural law is usually regarded as a universal morality, accessible to all rational persons whatever their particular metaphysical or religious commitments (if any), and therefore most appropriately studied through philosophical analysis" (Porter, 2005, p. 1).

Cicero is noted as the first author to offer a full account of natural law theory; however, much of Cicero's work appears to be based in the teaching of the Stoics. The Stoics taught that all human beings possess right reason or natural reason which is the

equivalent of natural or universal law. Interestingly, in a time when slavery was commonplace and women did not enjoy the same rights as men, the Stoics not only believed that all humans possess right reason, but that right reason imbued every human with inherent dignity and the genuine capacity for full human flourishing (Porter, 1999, p. 68; Schulman, 2008, p. 6). The Stoic conception of right reason as belonging to all of humankind is further reflected in their claim that all of mankind comprises one community “under one universal law of justice” (Porter, 1999, p. 68). However, the Stoics conceived of the natural order, or natural law, as something that rational human beings are a part of, and subject to, but not as something in which they participate as authors. For the Stoics, reason allows human beings to recognize the universal law of nature and obliges them to acquiesce to the natural order. Thus, the Stoic conception of natural law was that of a static set of universal norms which left very little room for free will. If the universe is immanently reasonable, and man is endowed with right reason, then one has only to follow one’s nature to act virtuously, or consistent with the universe. Porter claims that the Stoic precursor to contemporary natural law theory was an “injunction to live in accordance with nature, or with reason” which “could be understood as equivalent to willing acceptance of fate or providence” (Porter, 1999, p. 68).

Cicero’s interpretation of the natural law does not vary significantly from that of the Stoics. Cicero conceived of the natural law “as a law that is universal in scope, identically the same in all times and places, and unalterable, in such a way as not to admit of abolition, exceptions, or dispensations” (Porter, 2005, p. 2). However, while the Stoics considered nature to be a divine structure, or order, of which humans are a part, Cicero recognized a transcendent deity which created, and had dominion over, nature.

While Cicero is often cited as the first author of natural law, the Roman jurist Ulpian is often cited as the source of the physicalist thread that runs through Catholic natural law theory. Ulpian understood the natural law to be the law which is universal to all living creatures, as opposed to manmade or civil law. Like a maternal instinct to protect one's young, or the desire to mate, Ulpian purported that the "natural law was something instinctive, something static, something built into the physical nature of all animals, including people. There was nothing specifically rational about it" (Kelly, 2004, p. 89). Ulpian's appeal to the physical function and orientation of the body is reflected in Thomas Aquinas's natural law theory, particularly when he addresses moral issues pertaining to sexuality (Kelly, 2004, p. 89; Gula, 1989, p. 223). Ulpian's physicalist position divorces human reason from the physical body and moral norms. Richard Gula suggests that Ulpian's natural law theory ignores the whole person and develops moral obligations based on only one dimension of the human experience—reasons understanding of the reproductive organs—thus "moral obligations arise from what is already prescribed in the physical structures of being human apart from their relation to the totality of the person, which includes such aspects as reason, freedom, affections and relationships" (1989, p. 223). There are acts according to nature and acts against nature. Acts which are against nature are against natural law, and are thus always wrong, or intrinsically evil. There is no consideration of intention, the circumstance, or the individual person, just right acts and wrong acts (Kelly, 2004, p. 88).

Aristotle was among the first to draw a "distinction between natural and conventional justice" (Porter, 1999, p. 70). He recognized the natural law as universal and of the gods, while simultaneously acknowledging a person's ability to participate in

the natural law by choosing whether or not to pursue the good (virtue). By allowing for the participation of the human in natural law, Aristotle allowed for consideration of the human in moral decision making. Aristotle asserted that:

Among the gods, indeed, justice presumably never changes at all; but in our world, although there is such a thing as natural law, everything is subject to change; but stills some things are so by nature and what is not, but is legal and conventional, assuming that both alike are changeable. (Aristotle, 1976, p. 190)

Aristotle admits there may be situations in which a generally immoral action may be considered moral (lying to save a life), or that some principles generally considered to be universal may have to be abandoned, as an alternative moral action is sought. Aristotle claims “we may need to rely on some sort of “moral intuition,” or we may perhaps simply confess our incapacity to determine the moral issue” (Aristotle, 1976, p. 21).

5.2 Natural Law Theory in Catholicism

Discussion of natural law theory, within Catholic social teaching, generally revolves around the work of St. Thomas Aquinas. By the high Middle Ages there were two predominate strains of natural law theory: natural law according to reason and natural law according to nature (Kelly, 2004, p. 89; Gula, 1989, p. 223). While virtually every discussion of natural law refers to Aquinas, as with any theory, there are varying interpretations of his work. Aquinas’s natural law theory encompasses both natural law according to nature and natural law according to reason. According to Aquinas, the image of God is found in the intellectual nature of man, and that likeness to God enables us “to participate intellectually in God’s plan for us” (Traina, 1999, p. 59). Aquinas claimed that God infused in human nature the supernatural virtues, understanding, knowledge, wisdom, counsel, piety, fortitude, and fear, through the Holy Ghost, that

people might more easily identify right action, action toward God, and assist them in the ultimate goal of being with God eternally (Farrell & Healy, 1952, p. 256). Thus, Aquinas's natural law is teleological as it identifies eternal union with God as the end to be considered and sought when developing moral norms. Therefore, anything that is oriented toward God is good, hence Aquinas's First Principle: "good is to be sought and done, and evil is to be avoided" (Porter, 2005, (Summa, I-II 94.2), p. 249).

Aquinas also identifies happiness and human flourishing as goods to be pursued, and identifies these ends as desired for us by God. Curran explains that "human reason reflecting on the creation made by God can determine how God wants us to act or what constitutes our own flourishing and happiness. The plan of God and our flourishing and happiness are the same" (Curran, 2002, p. 25). This interpretation of Thomistic natural law paints God as a benevolent parental figure who, after providing human beings with the prerequisite knowledge, wants only their happiness and full flourishing. Moreover, God is not an oppressive parent. After providing human beings with the ability to discover His will for them, God allows human beings to form their own moral judgments and make their own mistakes. For Aquinas, actions are commanded because they are good; they are not good because they are commanded (Curran, 2002, p. 24). Humans are not programmed to mindlessly follow God's law, rather they use their reason to participate in, and reflect upon, God's creation in order to discover God's plan for them. Laws and "principles by themselves do not lead to action, much less generate norms for action, until they are engaged by desires promoting practical reflection and action" (Porter, 2005, p. 249)

However, many moral theologians claim that Aquinas's natural law theory also possesses a physicalist component which stands in contrast to Aquinas's natural law theory as a whole. Aquinas divides human inclination into three levels which are all mediated by human reason. The first level is a basic orientation toward the good which is "common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature; and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles" (ST, Q. 94, Art. 2). The second level of inclination is more specific and addresses inclinations shared by all animals, including humans. Aquinas uses the physical inclination toward sexual intercourse and the natural inclination to educate offspring as examples of inclinations shared by all animals and belonging to the natural law. The third level of inclination is specific to human beings and claims that the nature of human reason inclines humans toward the good; "thus man has a natural inclination to know the truth about God, and to live in society" (ST, Q. 94, Art, 2).

It is Aquinas's second level of human inclination that gives rise to the physicalist component of his natural law. Gula suggests that this "order of nature" strain of Aquinas's natural law "emphasizes human physical and biological nature in determining morality" (Gula, 1989, p. 226). The function and biology of the physical body gives rise to moral norms independent of human reason. Furthermore, according to Aquinas, as the order of nature comes straight from God, and reason comes from the human person, the order of nature takes priority over the order of reason (Gula, 1989, p. 227). Therefore, as our natural inclination is toward mating and procreation, and the physical purpose of the sex organs is procreation, then to interfere with that inclination or purpose is to go against

the natural, God-given, order. That which is against nature is against God, and that which is against God is evil. This interpretation of Aquinas's thought makes natural law static and unchanging, because it is God's law imprinted upon human nature. Reason is subordinated to biology. While Aquinas recognizes human beings as embodied, and honors the nature of those bodies, to base moral norms upon human physiology seems to stand in stark contrast to the rest of Aquinas's natural law according to reason.

Yet this static vision of Aquinas's natural law appears to be a misinterpretation, as it considers the human levels of inclination in isolation from one another and inhibits full human flourishing, especially in matters of sexuality. John Mahoney laments this physicalist interpretation of Aquinas:

On the whole it has been the fate of Aquinas's natural law teaching in moral theology that the logical appeal and coherence of his system has been stressed, while the provisionality and contingency of conclusions as they come closer to individual situations, features which he himself carefully built into his theory, have been either neglected or ignored. (Mahoney, 1987, p. 80)

Similarly, Traina claims that physicalist interpretations of Aquinas's natural law are "simply inaccurate" and that Aquinas did not intend for his discussion of the inclinations to produce a concrete set of moral norms. Rather, Traina claims that "Thomas repeatedly warns that in practice the inclinations and natural and sensitive appetites are inadequate guides for action" (Traina, 1999, p. 74). Therefore, both Gula and Traina support an interpretation of Thomistic natural law which can better be described as personalism than physicalism.

5.3 Natural Law According to Nature

In contrast to Gula and Traina, some natural law scholars interpret the natural law in a more physicalist manner which often fails to adequately consider the human person. Germain Grisez developed a theory of moral law, a new natural law theory, which he asserts is based upon the later works of Aquinas (Grisez, 1964, p. 60). Grisez suggests that the most important element of the new moral law is the idea of practical reason. Practical reason considers what is to be pursued, or what the goal is, and deliberates upon the range of possible actions which can be taken to attain that goal. Practical reason bases deliberation upon a set of principles which practical reason derives from human nature, which is naturally inclined toward right action (Grisez, 1964, p. 61). Grisez refers to practical reasoning as “ought thinking” and asserts that practical reason constructs a framework of morally acceptable actions from within (Grisez, 1964, p. 60). However, Grisez does not support the Thomistic notion that God imprints His will for human beings in their physical nature. Rather there is the inclination of the good which informs intelligent action. Instead, Grisez suggests that “God has made man able to govern his own life by his own intelligence just as God by His wisdom governs the universe as a whole” (Grisez, 1964, p. 63). Practical reason does not require an attainable goal, rather its objective requirement is the pursuit of some “intelligible good” (1964, p. 62). Thus Grisez’s first prescription of practical reason sounds much like Aquinas’s first principle: “Good should be pursued and that actions appropriate in that pursuit should be done, and also that actions which are not helpful in pursuit of the good or which interfere with it should be avoided” (Grisez, 1964, p. 62). Grisez asserts that people are able to identify basic human goods by allowing themselves be drawn to said goods by their natural

inclination towards them (Grisez, 1964, p. 200). For Grisez, basic goods, such as life and friendship, are irreducible; thus to act morally one may choose between the moral goods, but may never take an action that acts against a moral good. Grisez claims that “what the basic principles of practical reason exclude, in other words, is any action against one undertaken in order to maximize another. No one of these values is absolute, but none of them is so relative that it does not resist submergence” (Grisez, 1964, p. 69). As an example, Grisez offers that a married couple may not fully embrace their natural inclination toward the good of procreation, delaying or avoiding having children; however, they may never take a direct action against the good of procreation by using contraception (Grisez, 1964, p. 201)

Germain Grisez and John Finnis are among a group of philosophers often referred to as espousing the new natural law theory or as revisionist, and they are often credited with reigniting interest in natural law theory (Hall, 1994, p. 16; Porter, 2005, p. 37; Lisska, 1996, p. 39). Finnis, like Grisez, basically hold that actions are either oriented toward human goods, such as life and knowledge, or they are oriented against human goods. Human beings do not have innate knowledge of the good, but the good is recognized by the intellect when good is experienced (Porter, 2005, 9. 37; Hall, 1994, p. 17). Finnis asserts that the good is “self-evident,” and although it is not imprinted in the nature of the knower, it is discovered through experience. As an example, Finnis suggests that everyone recognizes the value of knowledge, the pursuit of truth or the correct answer, but recognition of that value only emerges once one seeks the answer to a question and realizes the advantage of obtaining the correct or true answer (Finnis, 1980, p. 65). Finnis assumes that human beings who engage in rational thought, sans

emotion, will recognize the same set of basic goods. This sort of human collective agreement about goods seems to be enough for Finnis to identify them as "objective" claims. Like Grisez, Finnis asserts that all moral actions must be oriented toward a basic good and that the basic goods are irreducible (Hall, 1994, p. 17). Because no one good has superior intrinsic value, Finnis suggests that when there are competing interests among the goods authority is needed to assist with coordination problems. For example the law assists in solving coordination problems as well as helping to secure the common good (Finnis, 1980, p. 53). However such coordination in no way implies relativism, as objective claims regarding basic goods necessary for flourishing do not invite relativistic considerations. Thus the basic goods give rise to a set of moral absolutes, as the basic goods do not fluctuate based upon the situation.

The position of Finnis and Grisez in regard to moral absolutes is consistent with that of the Catechism of the Catholic Church, while the teleology may differ. The Catechism of the Catholic Church defines Natural Law as “a participation in God’s wisdom and goodness by man formed in the image of his Creator. It expresses the dignity of the human person and forms the basis of his fundamental rights and duties” (Chapter Three, Article Three, # 1978). Throughout the third chapter of the catechism moral, natural, and civil law are described as sets of rules which prescribe actions which are oriented toward God and proscribe actions which turn away from God. While human participation in the Eternal Law is discussed, it is clear that the role of human reason is to discover a constant set of unchanging rules and not to reassess, challenge, or question previously discovered rules in light of change. We are not rational creatures whom God constantly challenges with new puzzles and urges to explore the moral implications of

those challenges. The catechism describes natural law as “immutable,” “universal,” and “permanent” (1956, 1958). This prescription to follow a fixed set of moral rules and norms is deontological in nature.

Finally Pope John Paul II could certainly be numbered among those who supported a natural law theory that recognized a moral order with moral absolutes. James Gaffney asserts that John Paul II’s rejection of teleologism, consequentialism, and proportionalism is based upon his understanding that these theories do not accept that some acts are always evil, regardless of their intent or consequence (Gaffney, In Curran and McCormick, 1998, p. 53). Gaffney states that “the crucial issue for the pope seems therefore to be the admission of at least the possibility of formulating negative moral norms that admit absolutely no exceptions” (Gaffney, 1998, p. 55). In an examination of John Paul’s documents Gregory Baum draws attention to John Paul’s inconsistency of thought in discussing some elements of the natural law. In several of John Paul’s encyclicals which address global capitalism, the Pope appears to reject the need for an authority, an authority which Finnis asserts is needed to settle issues of uncertain moral paths. The reason for the rejection is that John Paul supports social systems in which all members of the society are able to participate in responsible decision making for their institution or society (Baum, 1998, p. 242). John Paul II referred to this as the “subjectivity of peoples,” which according to Baum’s interpretation, asserts that “governments may serve or claim to serve the well-being of their societies, but from an ethical perspective they are just only if they recognize the ‘subjectivity’ of the people, their right to share responsibility in defining their culture and shaping their society” (Baum, 1998, p. 243). Yet, as head of the Catholic Church, John Paul II was the leader of

an organization that has a hierarchy of moral authorities who call for “docility” toward their teachings (Sullivan, 1983, p. 164). Moral theologian Francis Sullivan defines docility toward magisterial teaching as “a willingness to be taught” and “a willingness to prefer another’s judgment to one’s own when it is reasonable to do so” (1983, p. 164). Sullivan suggests that docility requires an openness toward “the official teaching, giving it a fair hearing, doing one’s best to appreciate the reason in its favour, so as to convince oneself of its truth, and thus facilitate one’s intellectual assent to it” (1983, p. 164). It is important to note that Sullivan also clearly states that if after attempting to assent to Church teaching one cannot “overcome any contrary opinion” and cannot accept the teaching as true one can follow one’s conscience (1983, p. 170). However, unlike John Paul’s call for the “subjectivity of the people” in regard to economic issues, there does not appear to be a similar call for the participation of the people in regard to moral matters concerning human sexuality. Rather, it appears that the emphasis is on docility and assent. In discerning between moral choices Finnis suggested that to treat something as authoritative is “to treat it as an exclusionary reason for action” (Aiyar, 2000, p. 467). I do not think that John Paul sought to be exclusionary in regard to moral matters, but I also don’t think that the magisterium encourage the input of the laity, and subjectivity of the people, with the same vigor with regard to issues of sexual morality as they do with regard to economic issues.

5.4 A Shift from Physicalism to Personalism

This section of the chapter departs from a physicalist interpretation of natural law theory to explore and embrace the works of natural law scholars who place the rational

person at the center of natural law. First there is Catholic moral theologian Joseph Fuchs, who early in his career embraced a more physicalist interpretation of the natural law that was consistent with the positions espoused by Grisez, Finnis, and Pope John Paul II. However, Fuchs's understanding of the natural law changed over time, and he began to espouse a natural law according to reason theory over a natural law according to nature theory. While it may appear that this section devotes an inordinate amount of attention to the work of Fuchs, his work so beautifully illustrates the transitions from physicalism to personalism that it serves not only as a segue between the chapter sections but lays the groundwork for the primary argument to be presented in chapter six.

The next author who is discussed is Charles Curran. While his position on natural law theory is consistent throughout his career, and his interpretation is representative of his overall views of moral theology, it is his loyal and respectful dissent from Church teaching that lends importance to this overall project and which I hope to emulate in my work. Finally, I will concentrate on the work of Christina Traina. Traina explores the natural law with a unique blend of feminism, dissent, and what appears to be a genuine attempt to work within the Catholic tradition. She rereads and reinterprets the Catholic natural law tradition through the eyes of a woman, and gives voice to those who have been excluded from sharing in moral knowledge and discussing moral norms. It is through Traina's work and the work of other feminist scholars, both Catholic and non-Catholic that I hope to show why appealing to a person centered interpretation of natural law theory is necessary if all Catholics are to have an equal opportunity to flourish.

5.5 The Conversion of Joseph Fuchs

Prior to what Mark Graham terms Joseph Fuchs's "conversion," Fuchs would have been in agreement with John Paul II's assertion that there are certain moral absolutes. While Fuchs asserted that moral norms were based upon human nature's inclination toward the good and that action should therefore be oriented toward the good to maximize the potential for human flourishing, when it came to sexual acts between married couples Fuchs adopted a physicalist stance. He reasoned that the purpose of the sexual organs is reproduction and that any sexual act not open to the possibility of reproduction is against nature and therefore evil. Fuchs asserted "that every act of intercourse must remain open to conception and any attempt to alter or impede one's natural fecundity through artificial means is always morally wrong" (Graham, 2002, p. 40). Fuchs concluded that the prohibition against contraception was therefore universal and immutable, as the physical purpose of the sex organs, as God created them, has not changed over time (Graham, 2002, p. 99).

However, Fuchs' understanding of the natural law and the possibility of moral absolutes changed over time. Fuchs's conversion began in the early 1960s while serving on the Pontifical Commission on Population, Family, and Birth. Fuchs was not a member of the original committee, which was commissioned by Pope John XXIII in early 1963 to prepare statements regarding the Church's position on birth control, as such issues would inevitably be raised during a conference on world population which was co-sponsored by the World Health Organization and the United Nations. Although the original commission produced a document which explained and supported the Church teaching that contraceptive use is immoral, the commission was not disbanded upon the

completion of their initial purpose. In June of 1963 John XXIII died, and Pope Paul VI was elected his successor. In a surprising turn of events, Paul VI expanded the papal commission, and Fuchs was appointed to the commission as one of the moral theologians. This appointment was not altogether surprising, because Fuchs was known to be in agreement with the Church's position on birth control and had written several books on sexuality which further supported that received teaching (Graham, 2002, p. 87-88).

During the first few meetings of the commission Fuchs remained consistent in his position that contraceptive use was immoral, but by the fourth meeting he was beginning to question that teaching. Members of the commission began to debate the irreformability of the Church's teaching on contraception. Those who asserted that the teaching is irreformable, Jesuits John Ford and Marcellinus Zalba for example, based their argument on the fact that Church teaching has remained consistent over time, which made it immutable regardless of time or circumstance. Those who opposed the irreformability of the teaching, such as Bernard Haring, suggested that infallibility is only found in Divine revelation and not in human interpretation of the natural law (Graham, 2002, p. 90). Fuchs shocked fellow committee members by asserting that the teaching was reformable, yet he simultaneously reported not having heard anything during the course of the commission meetings which he found compelling enough to challenge the Church's teaching. However, privately Fuchs was beginning to have doubts. Fuchs's doubts were such that he stopped teaching certain classes at the Gregorian University and requested that a manual that he had written on sexuality not be reprinted, as it supported a teaching on contraceptive use of which he was no longer certain.

The true change in Fuchs's position regarding the use of contraception by married couples and the natural law was a result of his interaction with Catholic married couples who were added to the papal commission. Fuchs was moved by the burden that was imposed upon Catholic couples who were trying to live their faith and abide by the rules of Church but suffered frustration, decreased intimacy, and alteration of a previously spontaneous expression of marital love due to the Church's prohibition of contraception. In light of his recognition of their life experience, he began to reevaluate his position on contraception. Fuchs felt so strongly about the issue of contraception for married couples that he was the primary author of the majority report which supported the permissibility of contraceptive use by married couples in situations where their consciences deemed it to be appropriate. That whole process forced Fuchs to rethink his position not only on contraceptive use, but also on the natural law. Whereas Fuchs had previously placed human nature at the foundation of natural law, Fuchs's writing began to reflect his growing belief that its foundation was instead right reason. Fuchs also asserted that natural law is interpreted by humans and that humans do not have knowledge of the future as God does, so they cannot create moral absolutes or immutable norms because they cannot foresee what changes may occur over time (Graham, 2002, p. 97). Further, Fuchs contradicted previously held positions by arguing that the non-infallible magisterium had no privileged ability to grasp natural law and that Church teaching may be mistaken and need to be reconsidered over time (Graham, 2002, p. 97). Also, in the Majority Rebuttal, written in response to the minority report, Fuchs asserted that the Church not only had the authority to, but had already taken steps toward, altering the previously accepted teaching concerning the use of contraception. As examples that

Church teaching based on natural law not only could be changed, but had been changed, Fuchs pointed to the addition of the unitive to the procreative as goals of conjugal love by Pope Pius XI in *Casti Conubii* and Pope Pius XII in his address to the midwives in which he stated that periodic abstinence for the purposes of regulating birth was morally acceptable.

Thus, over the course of his participation in the Pontifical Commission, Fuchs's position on the natural law shifted drastically. Fuchs initially held a more physicalist approach to natural law locating the source of moral knowledge within human nature created by God. Additionally, Fuchs generally did not subscribe to the notion of irreformable moral norms; nevertheless, he did recognize certain situations, in particular the use of contraception, as intrinsically evil because it was against nature. Because the physical nature of human beings, and their sex organs, has been consistent over time, and the sex organs function expressly for the purpose of reproduction, anything that interferes with the primary purpose of those organs is not only evil, but immutably absolutely evil. So initially Fuchs was not only physicalist, but also held that there are some exceptionless moral norms. However, after his involvement with the Pontifical Commission, he began to look toward human reason as the proximate source of moral knowledge and moral norms. Additionally, Fuchs's later works claim that natural law must be applied with due consideration of history and the situations which may affect a moral actor. Rather than envisioning natural law as a static set of rules based on mankind's immutable nature, Fuchs began to describe natural law as flexible and developing over time (Traina, 1999, p. 182). Traina asserts that Fuchs's position regarding moral norms shifted so far as to virtually eliminate the possibility of forming

any absolute or concrete moral norms “in advance or in abstraction from circumstance” (Traina, 1999, p. 182; Graham, 2002, p. 226). The only exceptionless moral norm Fuchs appears to recognize is the Thomistic principle to do good and avoid evil, and even that principle requires interpretation based upon definitions of good and evil. While Fuchs does not reject the possibility of exceptionless moral norms, he insists that morally wrong acts do not automatically imply evil actors, therefore the intention and circumstance of the actor must be considered in tandem with the act (Traina, 1999, p. 182). So Fuchs shifted his natural law theory from a nature-centered to a person-centered account.

5.6 Charles Curran and the Natural Law

Charles Curran is another moral theologian who places the rational human being at the center of his teaching on natural law theory. Like Fuchs, the Pontifical Commission on Population, Birth, and Family marked a turning point in Curran’s career. While Curran did not serve on the commission, his public dissent from the resultant teaching on contraception, which was found in the encyclical *Humanae Vitae*, led to Curran’s censure by the Vatican, and he was declared “unsuitable and ineligible” to teach Catholic theology. Additionally, the publicity that surrounded Curran’s reprimand afforded him a certain amount of infamy as the face of respectful and loyal dissent from Catholic Church teaching (Curran, 2006, p. 132).

Unlike Fuchs, Curran’s positions regarding the natural law, and his criticism of the Church’s physicalist interpretation of natural law theory, have remained consistent over time (Gula, 1989, p. 243). In the 1960s when Curran was teaching at Catholic University of America (CUA), his courses on moral theology often focused on the

Catholic interpretation of natural law theory and paid particular attention to how that interpretation has shaped Catholic social teaching in regard to matters of sexuality (Curran, 2006, p. 29). Catholic natural law “maintains that human reason reflecting on human nature is able to arrive at moral wisdom and knowledge” (Curran, 2006, p. 29). While Curran agrees that moral knowledge and truth are discoverable through human reason, he has numerous criticisms and concerns about the Church’s teaching on natural law (Curran, 2006, p. 30). In his book, *Loyal Dissent: Memoir of a Catholic Theologian*, Curran provides five specific criticisms of Catholic natural law. First Curran borrows from the work of Bernard Lonergan to criticize Catholic natural law for adopting a classicism approach as opposed to an historical consciousness / mindedness approach. Classicism “emphasizes the eternal, immutable, and unchanging” and asserts that human nature remains the same regardless of time or place. As such, the moral agent is unaffected by history or circumstances, and as all human beings share a common nature, all should reason similarly. Curran claims that classicism, in regard to Catholic natural law, employs a deductive methodology and that “Catholic natural law theory in general is characterized by a rigid and dogmatic self-certainty” (Curran, 2006, p. 30).

Curran supports a Catholic natural law theory that adopts an historical mindedness approach. Unlike classicism, historical mindedness sees the moral agent as rooted in a particular history and culture that influences their rational reflection while still sharing in a common experience of being rational human beings. Curran suggests that historical mindedness relies on an inductive methodology which seeks the best possible answer in a given situation rather than moral certainty (Curran, 2006, p. 30). Curran’s description of historical mindedness envisions a collaboration of human reason stretching

and growing toward the good, in contrast to classicism, which embraces conformity to a set of static moral rules, which do not invite exploration or challenge us to use our reason.

Curran asserts that Catholic natural law theory has an “inadequate” anthropology as Aquinas, influenced by Ulpian, understood human beings to share certain commonalities with all animals and to be rational beings. However, Aquinas asserts that human reason cannot interfere with that which is common to all animals. Curran offers the example that procreation and education of offspring is common to all animals and thus cannot be interfered with according to Catholic natural law theory, and suggests that “animal rather than human nature is normative”(Curran, 2006, p. 31). As a case in point, Curran criticizes that Church teaching has “absolutized” the biological, animal if you will, function of the sex act so that any interference with that act is morally wrong.

Curran also claims that “the natural law basis for Catholic sexual ethics rests on a faulty faculty analysis” (Curran, 2006, p. 31). The Church teaches that the God-given faculty, or purpose, of marital sexual intercourse is both unitive and procreative. As such, every sex act must open to both dimensions of its faculty. Curran argues that the totality of the acts should reflect the two-fold faculty of the act, and that every individual act need not. He claims that the faculty of the sexual act is for the good of the person and their relationships and should be not be absolutized, as doing so places the emphasis on the physical act itself and separates it from person and the moral context (Curran, 2006, p. 31).

Finally, Curran suggests that Catholic teaching on natural law evolved out of preexisting teaching and that Aquinas primarily organized previously accepted teaching in a logical and systematic manner. Curran’s assertion is that it is often through

communal discernment that we arrive at moral truth, and that the teaching on things such as contraception, probably reflected the discernment of entire community and not just Aquinas. The experience of the Christian community can be an important source of moral knowledge and should not be excluded from the Church's process of moral discernment.

Curran also expresses concern that the Catholic approach to natural law may produce an over-identification by the rational human with God. Curran suggests "if we accept that the divine is mediated in and through the human, there is nevertheless the risk that the human becomes too closely identified with the divine" (Curran, 2006, p. 194). Curran's concerns are specifically directed at the Church and the magisterium, who, he claims, have attributed divine qualities to certain moral teaching so that they may oblige absolutely, like divine law. Curran asserts that in the light of the eschatology of the Catholic Church, there must be a recognition that human beings cannot claim perfection in this world, as full communion with God will only come at the end of time. Therefore, caution should be exercised in declaring teaching to be immutable. Curran explains "nothing in this world can ever be totally identified with the divine or the reign of God. In light of the eschaton, all human reality, including the church, will always fall short and be imperfect"(Curran, 2006, p. 194). For Curran the Catholic tradition is not a static set of God-given rules, but a "living tradition" that should grow and change over time as human reason continues to reflect upon God's evolving creation (Curran, 2006, p. 196-197).

5.7 Feminist Theological Contribution to Natural Law Theory

Cristina Traina's work on the natural law reflects her roots in both religious and feminist scholarship. Reflecting the differing interpretations of natural law found thus far in this chapter, Traina acknowledges two major schools of thought amongst Thomistic scholars. One group of scholars describes the natural law as adherence to a set of rules or principles which prohibit acts which are not oriented toward the good, or human flourishing. The other camp, asserts that reducing Aquinas's work to a set of rules diminishes the virtue ethic which infuses his work and encourages the development of character and habits, rather than compliance with rules (Traina, 1999, p. 58). Traina suggests that it is not an either/or situation, that both are necessary, and that one must be considered in regard to the other.

Traina asserts that natural law thought should yield "basic moral boundaries" or "minimal human requirements," while simultaneously allowing the freedom to pursue full human flourishing (Traina, 1997, p. 373). Traina suggests that these minimum moral requirements are negative or proscriptive like many of the Ten Commandments, and prohibit certain actions in order that all human beings, including the moral agent, have an opportunity to flourish (Traina, 1997, p. 374). Additionally, while moral absolutes are generally regarded to be more consistent with a physicalist natural law than a personalist natural law—due to their static and impervious nature in the face of time, culture, or person—Traina does admit that there may be not only minimum moral requirements but also moral absolutes. Moral absolutes are actions that are always and forever wrong regardless of history or situation. They are generally based on the theory, ethical foundationalism, that there is "a single, objective, changeless, universal set of rules

governing moral actors” (Traina, 1997, p. 373). However, Traina’s vision of moral absolutes is not one of stagnant rules which do not adequately consider the human experience; rather, she describes moral absolutes as a protection for the oppressed and marginalized. Traina claims that “in Roman Catholic thought transgression of moral absolutes offend God gravely *because* they profoundly disrespect the basic dignity of others—especially less powerful others” (Traina, 1997, p. 389). Traina asserts that certain actions, such as oppression of women, rape, and gender discrimination are never acceptable, thus always wrong, according to feminist ethics, and concludes that even feminist ethics recognizes certain moral absolutes (Traina, 1997, p. 372).

However, unlike negative moral actions which are forbidden, she asserts that there is no equally compelling moral precept which obliges a moral agent to pursue virtue or to act in a praiseworthy manner (Traina, 1997, p. 374). Traina claims that, “although failure to attempt any positive precepts would raise questions about a person’s moral seriousness, failure to fulfill any particular one is not a mortal sin” (Traina, 1997, p. 374). Thus, Traina recognizes a need for basic moral boundaries, however she suggests that these rules are not enough. The rules should create a safe environment or level playing field in which to pursue goods, but only by considering the lived experience in moral norm formation and encouraging the pursuit of human goods with the same moral energy which negative moral norms are proscribed will we have full human flourishing. Thus, it is both/and and not an either/or, in regard to natural law, because everyone has a right to a relatively safe environment in which to pursue full human flourishing, even if they choose not to do so.

However, Traina also suggests that even basic moral boundaries do not oblige marginalized populations in the same manner that they do others. Those who lack social, political, and economic power may not have had their flourishing considered, or their voices heard, when basic moral boundaries were, and are, being established. Traina looks to feminism as a corrective framework and claims that feminism seeks the common good, and recognizes goods which are necessary for all humans to flourish. Additionally, feminism insists that there is a societal duty to make every effort to optimize the potential for each individual in that society to flourish: “the point of social justice is to bring *every human being*, in her social context and with her special needs, across the threshold at which all the basic, humane requirements of flourishing are met” (Traina, 1999, p. 45). The poor, disenfranchised, and women are among those in society who are not afforded an equal opportunity to human flourishing based upon moral norms established by those in power, or the dominant culture; therefore, certain moral norms do not oblige these marginalized populations in the same manner they obligate the dominant culture because they simultaneously privilege and reinforce the moral thought of the dominant culture while devaluing or discounting the moral thought of the marginalized. According to Traina, this privileging of one group’s moral thinking over another’s is contrary to both feminism and natural law because (a) moral discourse becomes exclusionary rather than inclusive, (b) it deprives women of the chance to develop their moral thinking, and (c) it detracts from the common good by limiting the intellectual and moral developments of society or humanity as a whole. As a remedy, Traina calls for “communal moral discernment” and asserts:

When male natural law thinkers have dictated moral norms rather than eliciting broad moral dialogue, they have impoverished their reasoning and even

misdirected their discussions by ignoring women's experiences of human being. For this reason the success of natural law *method* is best protected when there is a *procedure* for including the viewpoints of all, especially those who are normally underrepresented among the "wise." (Traina, 199, p. 300).

Traina claims that the natural law "properly employed" applies the standard for minimal human requirements "differently to victims of coercion and oppression, generating not patronizingly compassionate 'exceptions' to rules but genuine yet limited justifications for self-preserving courses of action" (Traina, 1997, p. 373).

An example, albeit an imperfect one, of an attempt on the part of the Catholic Church to "properly employ" the natural law is found in Pope Pius XII's speech to a group of Italian midwives in 1951. As was discussed in chapter two, Pius XII declared that there were times in a married couple's life when it would be permissible for them to avoid pregnancy. In his remarks, Pius XII recognized that family circumstances can justify delaying pregnancy and that parents have the moral right to determine how many and when they would have children. Additionally, Pius XII acknowledged "mutual love" as a marital good which can be expressed in the conjugal act, as long as that act remains open to procreation. Pius XII considered Church teaching in light of the experiences of married couples and their families, which David Kelly describes as "a significant change for the better in theological anthropology, in how we ought to understand the human person" (2004, p. 102). As the leader of the predominantly white, educated, all male body of the Catholic Church that formulated moral norms, Pius XII nevertheless reconsidered Church teaching when its effect upon marginalized populations was oppressive. This is not a perfect example of properly employed natural law, as Traina conceives it, because laypeople were not actually included in moral discourse. However,

the Pope listened to those affected by the Church's position on birth control and reconsidered Church teaching based upon their lived experience.

In order to identify moral norms properly, it is first important to identify the irreducible human goods that are necessary for all humans. Life itself, food, shelter, sexual fulfillment, knowledge, play, friendship, kinship, and spirituality are but a few of the human goods that have been identified as both irreducible and necessary to enable a people to fulfill their human potential or flourishing. While many scholars identify the same goods as necessary for human flourishing, Traina suggests it is in the ranking of these goods that one can determine where someone falls within the natural law debate. Traina points out that Grisez and Finnis, for example, rank physical life as first amongst human goods, reflecting their somewhat physicalist position in regard to natural law. Whereas, feminist philosopher Martha Nussbaum ranks social interaction and practical reason at the top on her list, and feminist theologian Lisa Sowle Cahill ranks kinship near the top of hers (Traina, 1999, p. 44).

There are informative parallels to be drawn between feminist Catholic theology and secular feminist ethics. Feminist scholar Rosemarie Tong, for example, suggests that men, and those with power tend to see moral norms as rights or rules based, whereas women and the disempowered tend to judge moral actions based upon how those actions affect all who will be touched by that action (Tong, 1989, p. 162). Regarding morality, Tong suggests that women are "consequentialists," while men are "non consequentialists" who follow a set of exceptionless rules. Men see themselves as autonomous moral actors with rights, whereas women tend to see themselves in relationship or community, thus they define moral goods and norms differently.

Additionally, because men and women define moral goods differently, it stands to reason that the genders also identify and address moral dilemmas in dissimilar manners. Carol Gilligan suggests that for men and members of dominant groups ethical dilemmas arise from disputes regarding rights which can be solved by deductive reasoning, whereas women tend to view moral dilemmas as arising from actions that threaten human relationships (Gilligan, 1982, p. 30-31). Gilligan asserts that women see the actors involved in a moral dilemma “not as opponents in a contest of rights but as members of a network of relationships on whose continuation they all depend” (Gilligan, 1982, p. 30). Gilligan’s work reframes the identification of moral norms in a framework of care and a network of relationships, rather than in the “logic of impartial justice” which has historically dominated moral thought. The dominant culture (read: wealthy, educated, white, men) and academia have valorized the moral norms they have identified rather than inviting all members of the moral community into the discourse to negotiate mutually recognized moral norms. Thus, historically held moral norms “systematically miss and devalue an alternative moral logic prevalent among women (and, as others have argued since, among African and African-American men and the poor in general)” (Traina, 1999, p. 143).

Interestingly, consistent with feminist thought, the Catholic tradition teaches that human beings are meant to live in relationship. People were not created to exist as individuals, but to live in relationship to God, self, and others, as is evidenced by God’s statement that “it is not good for man to be alone” (Genesis 2:18). Additionally, Lisa Cahill suggests that God is a triune God—Father/Mother, Son, and Holy Ghost—whose very nature is relational, thus human beings reflect the image of God in relationship

(Cahill, 2006, p. 207). This suggests that full human flourishing cannot be found absent relationship with others, that human beings find flourishing beyond the boundaries of their own autonomous moral agency, and that moral knowledge and moral norms must be considered in light of relational human experiences.

Unfortunately, traditionally interpreted Roman Catholic natural law does not appear to consider the human being in relationship with respect to issues of sexuality and has taken very static and physicalist positions on matters involving human sexuality and reproduction. Contraceptive use is deemed wrong because it interferes with the unitive and procreative purpose of the sex act. The physical purpose of the sex act is given privilege over the flourishing of the moral agents engaged in that act. In contrast, use of Gilligan's logic of care would yield moral norms more concerned with how contraceptive use would affect the users and their relationships. If a married couple has a few children and is struggling financially, then contraception may allow that couple to pursue the goods of sexual intimacy, love, and friendship, without risking the additional financial and emotional burden of unplanned pregnancies. Contraceptive use could actually improve their potential to flourish by allowing them to freely express their love for one another through sexual intimacy sans anxiety. In addition, if women perceive morality in relationship, then the ability to maintain a healthy relationship with her spouse and adequately care for her children may seem to be a morally superior choice to risking the anxiety of possible pregnancy or jeopardizing the physical component of her marriage. However, while this line of reasoning may be morally justified in the logic of care, it is not reflected in the moral norms of the Church. In order for a woman to follow her moral compass she may have to incur guilt or shame for breaking the rules of the Church. A

physicalist interpretation of the natural law may be inconsistent with how women perceive moral goods. Moreover, adherence to such a narrow conception of the natural law may actually impede full human flourishing for women and men who attempt to remain faithful to the Church's teaching on contraceptive use.

Traina argues that while there are many points of overlap in how the genders define moral goods, feminism insists that certain criteria must be met to ensure the flourishing of all people and that issues particularly important to the integral flourishing of women must be not only theoretically available to women but “communally promoted” (Traina, 1999, p. 45). Traina claims that women's flourishing can be promoted by positive rights, such as the right to control one's sexuality, procreative function, and women's health issues, as well as by negative rights such as “freedom from violence (physical, emotional, and political), in particular from all pressure or unwanted sexual contact; freedom from pressure to bear children; and freedom from oppression” (Traina, 1999, p.45). It seems fairly obvious that many of the goods integral to female flourishing that Traina identifies are goods that have been discerned through the lived and embodied experiences of women. At first blush, it would appear as if Thomistic natural law theory, with its emphasis on the alleged natural purpose of body parts over the lived experience of the embodied person, would be incompatible with the full flourishing of women. However, Traina asserts that Thomistic natural law properly employed not only acknowledges the human embodied experience, but recognizes the body as “the medium of sense of knowledge and of all recognizably human experience in the world” (Traina, 1999, p. 319).

Aquinas claimed that the natural law is discovered by using human reason to reflect upon human nature and human experience to discern right action. Like Traina, Pamela Hall claims that Aquinas recognized the human body as the conduit of human experience which should be considered when formulating moral norms, and that “knowledge of human nature and what conduces to the flourishing of human nature is discovered progressively over time and through a process of reasoning engaged with the material of experience” (Hall, 1994, p. 94). Human experience is mediated through the physical body, so it follows that embodied experiences inform moral knowledge. Traina suggests that Aquinas “builds his epistemology on sense knowledge” and that he repeatedly identifies temporal flourishing as a good to be pursued (Traina, 1999, p. 155). This interpretation of Thomistic natural law is consistent with much of feminist theory, which recognizes humans as not only embodied but gendered. Differently gendered bodies experience life differently and therefore may identify moral goods based upon experiences as mediated through their gendered bodies (Traina, 1999, p. 47). A body is gendered in virtue of being situated in a hierarchy of power or privilege. A male body in most societies is situated in such a way as to enjoy benefits or privileges simply in virtue of being male. These include being allowed or expected to take up more space than female bodies, to be stronger, and to be unencumbered by procreation. Similarly different privileges attach to white bodies (as opposed to those of color), able bodies, young bodies, bodies born into economic privilege, conventionally attractive bodies and so on. Unfortunately, the Catholic Church does not adhere to a properly applied interpretation of the natural law that recognizes both the gendered nature of bodies and the role of the body as a conduit of gendered experience that informs reason. Thus, the

Church subordinates women's embodied experiences to the physical purpose of their individual body parts, especially in matters of sexuality. Traina asserts that in failing to recognize the embodied experiences of women, "the Roman Catholic natural law tradition has systematically ignored women's accounts of their own embodiment and so has failed to consider its moral and epistemological significance" (Traina, 1999, p. 319).

This piece of Traina's argument is particularly compelling in regard to the analysis of rape and the morality of prescribing EC. Rape and pregnancy are embodied experiences. If one follows Traina's understanding of Thomistic natural law, women's gendered and embodied experiences of rape would need to be considered in order to discern moral norms concerning the treatment of the rape victim. However, that is not the case with Catholic social teaching. As was discussed in chapter one, the treatment guidelines regarding the dispensing of emergency contraception for rape victims in Catholic hospitals are based upon the physical workings of the body, and not upon the embodied experience of the victim. A woman is terrorized and violated, and her ovulatory cycle is considered to be of greater concern than her trauma. A rape victim is terrified of becoming pregnant by her attacker and does not think she can endure the physical experience of a forced pregnancy, yet the possibility that fertilization may have occurred takes precedence over the victim's experience within the healthcare institution.

The very physicalist approach of the Catholic Church in regard to the matter of emergency contraception for rape victims ignores their embodied experience and formulates moral norms in the absence of that experience. If one accepts the Church's belief that life begins at conception, and that every life is sacred from the moment of conception, then the Church is asking rape victims to sacrifice their own well being—to

set aside their own flourishing—in order to save the life of another. On its face this is not completely unreasonable, people do place themselves in harm's way to save others. Police, missionaries, military, and healthcare workers are among those who often put themselves at risk for the benefit of others. However, self sacrifice is generally voluntary, and there is usually a verifiable 'other' for whom one is sacrificing. In the case of having been raped, a quintessential instance of coercion, there is no such 'other'.

Traina suggests that God does not require us to make “unreasonable sacrifices.” In Aquinas's *Summa Theologica* he treats killing to protect one's life as permissible, as long as the intention is to preserve your own life and not kill the attacker (Traina, 1997, p. 378). In light of the horror that is associated with being raped, the absence of any physical proof that conception has occurred, and continuing debate surrounding EC's abortifacient potential, I submit that denying rape victims EC is requiring them to make an unreasonable sacrifice. Further, I contend that the Church's official teaching regarding the dispensing of EC to rape victims reflects what Curran describes as “the temptation in the Roman Catholic Church...to claim too much certitude with regard to its particular moral teachings” (Curran, 2006, p. 195). This claim is explored in chapter six, as is the utilization of probabilism as a method of moral discernment absent moral certitude.

Chapter 6

Probability and Power in the Face of Uncertainty: Prescribing EC in the Absence of Pregnancy

No observant person can deny that the temptation in the Roman Catholic Church has been to claim too much certitude with regard to its particular moral teachings.

(Curran, 2006, p. 195)

6.1 Introduction

The Catholic Church recognizes the right of a rape victim to “defend herself against a potential conception from the sexual assault” (ERD, 2001, #36). U. S. Catholic hospitals rely on the ERDs to provide “authoritative guidance on certain moral issues” (ERD, 2001, p. 2). Directive 36 specifically provides such guidance with regard to the treatment of sexual assault victims. The ERDs clearly state that healthcare workers may provide a rape victim with treatment to inhibit fertilization. However, it is equally clear that no treatment will be recommended or provided that has as its “purpose or direct effect the removal, destruction, or interference with the implantation of a fertilized ovum”

(ERD, 2001, #36). Directive 36 allows for the offer of EC after “appropriate testing” to ensure that “there is no evidence that conception has occurred” (ERD, 2001, p. 21). The phrase “appropriate testing” is vague; uncertainty about EC’s mechanisms of action, coupled with the inability to detect a pregnancy prior to implantation, have left many Catholic bishops, theologians, healthcare workers, and laypeople uncertain with regard to how much testing is “appropriate” before it is morally permissible to provide EC. Some Catholic hospitals provide EC to rape victims after a negative pregnancy test, suggesting that pregnancy testing alone satisfies the testing requirement of Directive 36. However, many Catholic hospitals employ the ovulation method or Peoria Protocol which requires ovulation testing as a means to determine—not conception—but the *possibility* of conception. If a woman is found to be in a fertile period of her menstrual cycle, and could possibly be pregnant with a preimplantation conceptus, then EC is neither discussed nor provided. Therefore a rape victim’s right to defend herself from a pregnancy due to her attack is overridden by concern about an uncertain risk to an unconfirmed conceptus. Use of the ovulation method suggests that the *possibility* of fetal life is privileged over, or of greater moral value than, the existing rape victim. Therefore, in this chapter I argue that, in the absence of a positive pregnancy test, Catholic hospitals should offer EC as a morally permissible treatment option to all rape victims of childbearing age.

This chapter’s argument is presented in two parts. The first part examines how one arrives at a level of confidence in propositions, information, or data such that one comes to accept those propositions as certain or true. The first two sections of Part I focus on the works of Catholic moral theologian John Henry Newman and feminist

scholar Helen Longino. Newman devoted much of his scholarship to the notion of certitude and to the way the mind moves from the conditional acceptance of probable propositions to the unconditional acceptance of propositions. Newman's work on the manner in which a convergence of probabilities (or evidence) can rise to the state of certitude provides a valuable framework in which to consider the many pieces of medicoscientific information that inform the Church's position on EC. Similarly, Longino's work on scientific knowledge and objectivity provides a context within which to evaluate how the Catholic Church's subjective world view may influence the magisterium's understanding of scientific data. Thus her work provides a framework for considering challenges to both the Church's position on EC and the certitude upon which some of its moral norms are founded. Specifically, I suggest that the Church's world view is such that it understands scientific data on EC—not the moral implications of the science, but the science itself—differently from medical and scientific authorities. This different, perspective-laden interpretation renders the data less credible, objective, and certain than they are alleged or assumed to be, which in turn renders moral obligations based upon those interpretations doubtful.

The third section of Part I employs the arguments of Augustine and Foucault to explore how claims of certitude, or the presentation of information as true or objective, by those in power may be experienced as oppressive by less powerful segments of society. Additionally, I discuss how claims of certitude or truth by those in authority may stifle the process of transformative discourse (Longino) or the approaching of certitude (Newman). In the final section of Part I, I argue that where there is moral uncertainty the use of probabilism as a method of moral decision-making is licit according to Catholic

theological traditions. While most Catholics are not aware of the moral method of probabilism, it is a legitimate system of moral discernment within the Catholic tradition which asserts that an uncertain moral obligation cannot be imposed as though it were certain. Daniel Maguire claims that the use of probabilism is permissible in the presence of doubtful moral obligations or “where a rigorous consensus breaks down and people begin to ask when they may in good conscience act on the liberal consenting view” (Maguire, 1983, ¶ 7). This section’s brief historical tracing of the development of probabilism within the Catholic Church provides the groundwork for the argument in favor of probabilism’s appropriateness as a moral method in cases of moral uncertainty like the uncertainty surrounding EC.

In Part II, I argue that justice issues arise from the use of the ovulation method to determine treatment options for rape victims. In the aftermath of rape, the use of the ovulation method suggests a zero tolerance policy with regard to standards of acceptable risk to fetal life. This stringent standard limits a rape victim’s access to EC and is not applied similarly to other women of childbearing age who seek medical treatment in other contexts (i.e., not following rape). Additionally, the burden of this disparate treatment is disproportionately shouldered by rape victims who have limited resources and may be unable to seek treatment elsewhere—including homeless, poor, or mentally ill women—those who are most in need of the Church’s support and compassion.

In the second section of Part II, I argue that dissent is not a legitimate moral option for the rape victim who seeks treatment, including EC, in a Catholic hospital. Genuine dissent is not a mere rejection of Church teaching, but the result of a process in which one develops a well-informed conscience before deciding the truth lies contrary to

Church teaching. Most rape victims are too traumatized by their rape for a process of conscience formation to be initiated. Additionally, the time available to the victim for conscience formation would be constrained by the biologically prescribed time period within which EC is effective. It is unrealistic to suggest that most women consider, or should consider, these issues regarding moral certitude and EC prior to their rape.

Additionally, dissent would not improve a victim's access to EC, as her decision not to accept Church teaching in no way obligates a Catholic hospital to provide her with EC.

Thus, I propose the recognition of probabilism as a valid moral method in circumstances where there is uncertainty and moral doubt, and argue that probabilism grounds a woman's right of access to EC in the absence of a positive pregnancy test.

At the end of this final section that rejects dissent as a viable option for rape victims seeking EC, I return to probabilism and submit that it is a uniquely appropriate moral method in which to consider the problem of EC in Catholic hospitals, because it is Catholic in origin and specifically addresses the problem of certainty and certitude in moral decision making. The Church has historically acknowledged the difficulty of practical moral decision making where there is logical uncertainty. Such is the situation with regard to providing EC to rape victims in Catholic hospitals. There is a lack of certainty, or logical proof, about EC's mechanisms of action, and some may understand that uncertainty as precluding the attainment of certitude. However, a lack of logical certainty does not preclude making sufficiently justifiable moral decisions which warrant certitude, or the acceptance of a conclusion as true. Within Roman Catholic tradition, probabilism is a moral method that supports such a position. Probabilism asserts that where there is uncertainty, or moral doubt, a sufficiently probable conclusion may guide

moral decision making. Thus, in this chapter I argue that Catholic hospitals can make practical decisions about EC, despite a lack of demonstrative proof, and that a sufficiently justifiable moral conclusion can lead to a sense of certitude. Additionally, recognition of probabilism at an organizational or institutional level allows both the victim and the Catholic facility to consider EC as a valid moral option.

Part I: Claiming Certitude and the Issues that Arise from such Claims

6.2 John Henry Newman

The “quest for certitude” is a major theme in the works of John Henry Newman (Lyons, 1978, p. 1). Newman defines certitude as “the perception of truth with the perception that it is a truth, or the consciousness of knowing, as in the phrase, ‘I know that I know’” (Lyons, 1978, p. 150). His philosophy asserts that certitude is not exclusively based upon science and formal logic and that there can be certitude in matters of religion and faith as well. Newman claims that appeals to personal reasoning (informal inference) can also lead to certitude and that this type of reasoning “functions through a congruence of arguments, interpreted as a whole and assimilated by the individual to justify the conclusion” (Magill, 1993, p. 145). Newman believed that one must consider both the human (natural) and the divine (supernatural) when seeking certitude, because God created humans and nature, and therefore the divine is present in nature and can be discovered through human (natural) reasoning.¹³ James Lyons claims Newman “considered Christianity or faith the perfection of nature and is thus like and unlike nature at once...the supernatural is the perfection of nature. Only in the soil of the

¹³ Lyons defines natural reasoning as “reasoning in the concrete from a convergence of probabilities which converge upon a single certitude” (1978, p. 151).

natural can the supernatural grow” (1978, p. 7). The link between the natural and the supernatural is important to Newman’s concept of certitude because, he claims, the process by which a person reaches assent or certitude in matters of natural truth is the same process by which that person will arrive at assent to “revealed” or supernatural truths (Lyons, 1978, p. 7). Thus in Newman’s philosophy, as in natural law theory, truth can be found in that which God creates and knowledge is discoverable through human reason and lived experience.

In order for Newman’s philosophy of certitude to be comprehensible one must first understand his distinction between inference and assent. “Inference is the conditional acceptance of a proposition, Assent is the unconditional; the object of Inference is the truth-like or a verisimilitude” (Newman, 1979 {1870}, p. 207). Furthermore, Newman delineates between certitude as “a mental state” and certainty as “a quality of propositions” (Lyons, 1978, p. 49). He conceives of certitude as something very personal because it is mediated through individual human reason and has “its deep roots in the concrete, realistic experiences of daily life” (Lyons, 1978, p. 14). By reason, Newman is not referring to some isolated cognitive function of a person or even to a particular integrated capacity (or capacities) of a person, but to the whole person, “the feelings, the imagination, the unconscious, the will...the complete, living responsible person” (Lyons, 1978, p. 13).¹⁴ Newman claims that we do not live solely in a world of our own ideas and creation and that the quest for certitude is the desire to “increase our knowledge of matters which do not depend upon ourselves for being what they are; they are beyond us” (Lyons, 1978, p. 68). Therefore to arrive at certitude human beings must

¹⁴ Newman defines the mind as “the total person which includes the emotions, imagination, intellect and the will” (Lyons, 1978, p. 151).

use their minds to observe and interpret the instances or facts of their lived experiences (Lyons, 1978, p. 11). Moreover, the search for truth or certitude within those facts “is a duty to one’s self and a duty toward God” (Lyons, 1978, p. 14). If a pattern or overlapping begins to appear within these “instances” and those overlapping instances appear to strengthen and support one another, then “out of a convergence of probabilities certitude can be obtained” (Lyons, 1978, p. 52). To illustrate this concept Newman likened the convergence of probabilities to the intertwining of the individual strands of a cable. Individually the strands are weak, but when they are twisted together they support one another to form one strong cable (Lyons, 1978, p. 52). This process of drawing strength from the interconnection does not imply that the individual strands are necessarily faulty, only that they gain strength when bound with others.

Newman asserts that a convergence of probabilities, or data, leads not only to a quantitative change but also to a qualitative change in what is perceived or known. Increasing the number of overlapping probabilities increases the degree of probability or conditional assent Newman describes this as a quantitative change. However, when a person perceives an increase in probability as certitude, this is a qualitative change. In the moment that a convergence of probabilities is no longer recognized as such, but is instead perceived as certitude (i.e., the mind is certain), Newman detects a qualitative change. Professor of religious studies M. Jamie Ferreira describes Newman’s concept of certitude as a “threshold” concept or an “all-or-nothing” concept that does not admit of degrees (1993, p. 134). Accompanying that qualitative change in mental state—the perception of certitude—the moral agent moves from inference to assent, from probability to certitude. Ferreira refers to the moment in which probability becomes

certitude as the ‘critical threshold’. To illustrate the qualitative change that takes place in the transformation from probability to certitude Ferreira likens it to explosives that heat gradually but do not explode gradually; but rather they reach a critical threshold and explode effecting a qualitative change (Ferreira, 1983, p. 134). For Newman, the ‘critical threshold’ at which a convergence of probabilities is transformed into certitude is the equivalent of a modern “aha” moment. In the absence of that transformative recognition of something as true, assent is only conditional. Where assent is only conditional, it would appear that other probable moral avenues may continue to be pursued in the quest for unconditional assent or certitude.

Of particular interest to this current project is the discourse between religion and science in the quest for certitude or truth. As if in anticipation of twentieth-century discussions in philosophy of science, Newman presents a dialectical vision of the sciences in which the sciences inform one another, and it is in dialogue that they collectively move closer to objective truth. He suggests that the absence of any one science, or deficiency in knowledge of one science, renders the apprehension less objective and less true. Newman does not excuse theology from this “interdependent circle of sciences,” or privilege theology within the dialectic, rather he claims that the discourse between the sciences is necessary to “complete, correct, and balance each other” (Livingston, 1993, p. 100). This is consistent with Newman’s cable image as the various sciences discover convergent probabilities which help them not only individually, but collectively and collaboratively discern truth, stretch toward objectivity, and obtain certitude.

However, as James C. Livingston points out, Newman appears to conceive of the intellectual function of theology and the moral function of theology as situated differently in relationship to the sciences. It is the intellectual function of theology that Newman places within the interdependent circle of the sciences, but he appears to consider the moral function of theology as set apart from the other sciences as he labels theology “the highest indeed, the widest” branch of knowledge. Newman seems to fear what Robert Veatch (1973) terms the generalization of expertise—namely that other disciplines may “exceed their proper bounds” and present their interpretation of theological data as objective truth (Livingston, 1993, p. 101). For example Newman asserts that an historian should only assess sacred text from a scientific perspective “leaving it to those whom it really concerns to compare it with Scripture” (Livingston, 1993, p. 104). Thus it appears that when it comes to the moral function of theology, or what Livingston refers as the “sphere of religion,” Newman gives theology a trump role in the dialectic which is not embraced elsewhere. Overall, Newman envisions the path to certitude as one of dialogue or communication. The individual sciences learn and grow in dialogue as they expose and discuss common and contradictory ideas. Similarly, it is every facet of the moral agent—intellectual, physical, emotional, and imagination—that interpret the instances of everyday life and inform assent.

6.3 Helen Longino and Objectivity

The dialogue between medical science and Christian faith has for its primary purpose the common good of all human persons. It presupposes that science and faith do not contradict each other. Both are grounded in respect for truth and freedom. (ERD, 2001, p. 7)

Despite what one might assume would be incommensurable world views, separated by time, gender, and social settings, feminist scholar Helen Longino and John Henry Newman propose similar philosophies regarding the pursuit of knowledge and (objective) truth. They both recognize the subjectivity of individual and social thought and provide surprisingly similar accounts of, how human beings interpret data to achieve knowledge, particularly how evidentiary value influences claims of certitude. Longino emphasizes the social and discourse-bound nature of the quest for knowledge and articulates levels of objectivity and certainty that may be obtained with regard to that knowledge. Like Newman, Longino asserts that in the quest for knowledge human beings use their capacity to reason to “determine the logical relations that exist among sets of propositions” (Longino, 1990, p. 38). Inferences, whether a hypothesis is accepted or rejected, are then made based upon an assessment of the “relative acceptability” of the evidence (Longino, 1990, p. 38).

Longino discusses how science is traditionally thought to be objective in different senses of ‘objective’ and at various levels. First, science is thought to be objective because science is thought to present an accurate view of the natural world as it exists in reality, i.e., how it exists apart from being perceived or interpreted by any subjectivity. Science is thus considered to be objective because its *content*, the object of its inquiry, is thought to be objective, to exist apart from human subjectivity.

On another level, science is traditionally thought to be objective in the sense of being free of subjectivity because its methods of inquiry are specifically designed to reduce or eliminate the opportunity for subjective influence upon the scientific inquiry by members of the scientific community (Longino, 1990, p. 62). Efforts to design methods

of scientific inquiry which are free of subjectivity (i.e., that are allegedly value-free) are thought to produce objective data; however, Longino points out that instead of being free of all value, this notion of objectivity is itself imbued with value. This notion of objectivity is considered *valuable* insofar as it contributes to the assumption of the reliability, and thus the instrumental usefulness, of that which is considered objective. Labeling data as 'objective' in this way means that it can be counted among reliable propositions that can lead to a higher level of certainty in particular theories. Moreover, as Longino argues, this notion of objectivity *incorporates particular values and priorities* (e.g., accessibility to multiple observers, replicability) at the expense of others (e.g., relevance in a specific case). Thus, Longino argues that just because data are collected through an empirical method does not necessarily make them objective in the sense of being value-free (1990, p. 75). Further, displaying her feminist commitments, Longino asserts that science is practiced in relationship, and that scientific knowledge is influenced in one manner or another by everyone involved in that scientific community. From the lab technician to the peer reviewer, everyone who comes into contact with the information leaves a unique imprint on it. In a comment that might be illustrated by Newman's cable image, Longino claims that "experimental data and hypotheses are transformed through the conflict and integration of a variety of points of view into what is ultimately accepted as scientific knowledge" (1990, p. 69).

Most importantly, recognition of the several faulty ways that science and scientific knowledge are traditionally considered to be objective does not lead Longino to rule out the idea of objectivity in science. Rather, she reconceptualizes 'objectivity' and claims that there are levels or degrees of objectivity just as there are degrees of

probability. Longino asserts that the interpretation of evidence or data is dependent upon the world view or “background beliefs” of the scientist (or group of scientists or scientific community), as is the decision to accept or reject an hypothesis (1990, p. 43). Thus different background beliefs can result in different hypotheses based upon the same data. Longino provides the following example: suppose that one man believes that Nick is the only person in the world with a hat which is an unusual shade of gray, and another man believes that James is the only man in the world who leaves his hat perched on the banister in a particular way. Upon entering the same house for a party one man notices a gray hat perched on the banister and believes that James is there, and the other man sees the hat and assumes that Nick is there. Both men interpret the observable data and based upon background beliefs come to different conclusions. Evidence is considered in relation to background beliefs and assumptions, and it is from the connection between evidence and background beliefs that assumptions with regard to evidential relationships flow (Longino, 1990, p. 43-44). Longino asserts that the presence of “background belief is an enabling condition of the reasoning process” (1990, p. 44). Taken literally, Longino is claiming that the reasoning process cannot occur absent the influence of background beliefs, so one might conclude that Longino does not believe that science can produce objective data. In fact, the opposite is true.

Longino argues that instead of contaminating the operation of science or reason, criticism from alternative world views is necessary to achieve the only type of objectivity that is conceptually and practically possible. It is through the *inclusion* of these multiple outside world views that the dominating effects of the world views of those doing the science are kept at bay and that subjective contamination is limited. It may seem

contradictory, that by including differing world views we reduce the influence of world views, but nevertheless we can see how the presence of—and awareness of—competing world views can actually reduce subjective contamination and increase the likelihood of arriving at objective understanding, knowledge, or truth. First, the presence of competing background beliefs may, in effect, serve to cancel out the influence of any particular set of background beliefs. Second, awareness of the presence and effect of background beliefs on the empirical methods of science—or more generally on the process of reasoning—necessitates a reticence to assent to a proposition as true (as with Newman’s unconditional assent). Aware of the operation of one’s world view on one’s interpretation of data, one must avoid the arrogance or easy comfort of holding one’s belief as true and impervious to challenge or reconsideration. Instead, recognizing the operation of world views on one’s own interpretation of data and on others’ interpretations, one is forced to recognize the tentative nature—the ultimately conditional nature—of even one’s most confident beliefs, the propositions to which one (currently) gives unconditional assent.

Thus, Longino suggests that objectivity must be conceptualized along a continuum with dialogic and monologic as the opposite poles (1990, p. 76). Along the continuum of inquiry higher degrees of objectivity will be associated with the degree to which “transformative” criticism is allowed. However, the status of ‘objective’ will not be accorded to data, their interpretation, or propositions based upon them, solely in virtue of permitting transformative discourse but also in virtue of how the scientific community responds to criticism and the degree to which it sustains critical dialogue. The degree to which the scientific community can achieve objectivity will therefore be dependent upon

the extent to which the community can create four conditions Longino finds essential if critical discourse is to reach a transformative dimension. The community must (1) develop recognized avenues of criticism such as journals, conferences, and peer review; (2) develop a shared set of standards such as a code of ethics; (3) foster community responsiveness to the degree that the community remains sensitive to criticism; and (4) promote equal sharing of intellectual authority (1990, p. 76). These four conditions invite critical dialogue and provide guidelines designed to eliminate unchecked power or influence from any individual or group within that community. In other words, to the extent that these conditions are created and these features of a scientific community flourish, one set of background beliefs—what some might term “prejudices”—will be held in check by the operation of other background beliefs. One person’s or group’s world view will be counterbalanced by the assertion of the world view of others. No single perspective can achieve and sustain hegemony.

These four conditions also encourage criticism as a path to increased sustained transformative discourse. It is transformative in that it seeks to expose various world views so that they may be considered, discussed, and perhaps amended. Most importantly, in the service of achieving or drawing ever closer to certainty, as Newman suggested, probabilities that overlap among the varying world views can be joined together to form more probable propositions. Using Longino’s criteria, science that would be deemed subjective or value-laden is no longer deemed bad science or excluded from consideration. Indeed completely value-free science is revealed as an illusion. Instead, the four conditions of a flourishing scientific community function to bring specific world views to light so that they, as well as the data interpreted in the light of

them, may be discussed in relation to other world views (and other interpreted data), and this integrated discussion leads to greater objectivity (Majeske, 1995, p. 11). As Rachel Ankeny Majeske points out, however, transformative discourse may not produce increased objectivity when members of a community share background beliefs. In such cases, “background assumptions are invisible,” and “objectivity is precluded by the lack of critical self-reflection” (Majeske, 1995, p. 11). Therefore, science—and more generally, the quest for knowledge—proceed best in the presence of diverse world views

6.4 Augustine and Foucault

Aspects of the writing of Augustine and Foucault on the quest for certitude extend the ideas discerned in the work of Newman and Longino. Both Augustine and Foucault consider the social consequences of claiming absolute certitude in a world comprised by human relationships, especially in light of the complicated social dynamics that exist within that web of relationship. Augustine and Foucault consider attempts to claim moral certitude to be acts of arrogance and express interest in “how prideful tendencies influence cultural patterns” (Schuld, 2003, p. 111). It is important to note that individuals or institutions which possess these “prideful tendencies” are not always aware of such tendencies or cannot recognize them within actions that they have deemed to be “noble endeavors” (Schuld, 2003, p. 111). Augustine and Foucault find this unconscious or unaware aspect of what Schuld terms the ‘lust for certitude’ to be particularly pernicious as those in power attempt to impose a moral order on a morally uncertain world. Claims to truth with regard to moral matters can be used to manipulate or dominate, and when absolutized, such claims can inhibit debate with regard to certainty and command

compliance with moral law presented as unquestionably right and true (Schuld, 2003, p. 111). In terms of Longino's account of progress toward objectivity and knowledge, then, such claims to truth stifle transformative discourse and impede such progress.

In the later years of his life Augustine began to question assertions that individuals are capable of discerning moral certitude through self-knowledge. Augustine claims that by locating moral certitude within the individual such a notion of certitude ignores the highly relational, contingent, fallible, and dependent nature of man (Schuld, 2003, p. 112). Augustine sees human beings as overreaching in their quest for certitude as only God possesses absolute truth, and he cautions that "knowledge will only be perfected after this life when we shall see face to face. Let us be of this mind: so as to know that the inclination to seek the truth is safer than the presumption which regards unknown things as known" (Augustine {McKenna}, 1963; Schuld, 2003, p. 114).

For Augustine, claiming moral certitude, and thus moral superiority, in this messy world amounts to ignoring the complicated evolving needs of others. Claims of certitude made by those in power may act to insulate them from possibly uncomfortable ethical dilemmas or challenges to previously held beliefs as they hold themselves apart from those who they deem immoral or morally deficient. While one's intent in clinging to moral certitude may be self-preservation and not social domination, the effect may still be to strip one of compassion for another's situation if recognition of the other's need challenges one's initial moral position and sense of moral certitude. Augustine believes, for example, that the Stoics' quest for certitude and perfection rendered them indifferent to others and that "in deadening the affections, they simultaneously deaden what Augustine asserts is life's fundamental power, namely, love" (Schuld, 2003, p. 115).

Similar to Augustine, Foucault contends that those who claim certitude present themselves as set apart, as the objective knowers of truth, and as such consider themselves to be unquestionable and untouchable, thereby making attacks on their power a sacrilege (Schuld, 2003, pp. 128-129). In areas where specific knowledge is necessary to engage in discourse, the power gap between the possessor of knowledge or certitude and the other grows larger and more oppressive with increases in the knower's level of expertise (Schuld, 2003, p. 130). In a discussion of hierarchical bureaucratic structures, Iris Young makes similar observations. She argues that those with the more specialized knowledge at the top of the hierarchy generally do not anticipate or encounter challenges to their certitude from those in subordinate positions and that this leaves the institutional structure open to dominance by not only the world view of the institution but that of the individual in power (Young, 1990, p. 78). Young, much like Longino, asserts that the assumption of objectivity is spurious—i.e., it is false that any expert with a particular level of knowledge would make the same decision in a similar situation is false; “in fact personal judgment inevitably enters many important decisions” (Young, 1990, p. 79). A particular level of expertise brought to bear upon a body of data does not automatically yield a specific objective interpretation, hence knowledge. Instead, Longino and Young would contend, the expert's world view, coupled with her expertise, operate in the process of interpretation to yield an interpretation. Only through subjecting such interpretations or conditional assent to transformative discourse can even expert judgment approach objective truth.

Veatch's notion of the problem of the generalization of expertise plays a role here as well. Those who have achieved credibility as, or who present themselves to be,

experts in one field are often perceived to have expertise, or to be reliable sources of information, with regard to matters outside of their area of expertise. So, information presented by authorities from an unrelated field may be afforded the same level of acceptance as that presented by authorities in the relevant field. Veatch identifies this phenomenon with regard to physicians overstepping, or being asked to exceed, their expertise in medicoscientific matters to pass judgment on matters of personal and public morality (Veatch, 1973, p. 30). In like manner, the magisterium often form moral norms based upon their understanding of medical and scientific matters. While the Church does not claim specific expertise in such empirical matters, the power and authority of the Church carries over and lends credibility to the magisteriums's interpretation or understandings of the medicoscientific "facts." There is a tendency on the part of the faithful to accept the claims of the bishops, as leaders of the Church, as accurate and authoritative, regardless of the bishops' level of expertise in a particular field. Fr. Francis Sullivan claims that for most Catholics it is "reasonable to accept the authority of the bishops when they declare something to be obligatory for our faith, because we believe that they share in the mandate which Christ gave to the apostles" (1983, p. 34).

Foucault recognizes the tendency of the laity to accept magisterial claims as certain and specifically cautions those "who wield ecclesial power" about attempts to act on behalf of, or in the best interest of, the laity without first engaging in the sort of transformational discourse that Longino recommends for those in the sciences. Foucault suggests that as part of a community those in authority must be open to both internal and external discourse and challenges. Similarly, Augustine believes that the Church must be a "self-emptying" community willing to listen to the needs of the marginalized and

reinvent itself based upon the discourse (Schuld, 2003, p. 130). Like Longino writing about objectivity, Foucault and Augustine suggest that “solidarity is not thereby lost but understood differently as one that allows diverse and sometimes clashing threads to make up a less monochromatic and therefore, it is hoped, richer and more dynamic ecclesiological weave” (Schuld, 2003, p. 130). Foucault claims that assertions of certitude can be particularly damaging when those over whom the assertions have power are the marginalized, dispossessed, and voiceless. However, as Schuld points out “clearing spaces where disqualified voices can be heard requires that the church risk itself” (2003, p. 130).

6.5 Probabilism and its Application to the Question of EC

Historically, there have been several methods of discerning morally defensible positions, or weighing moral options within the Catholic tradition that are quite similar to the paths that both Newman and Longino suggest be traveled to arrive at certitude or some degree of objectivity in empirical matters. Early Modern Catholicism recognized the possibility of moral doubt and moral theologians taught that it was sinful to act upon a doubtful conscience, “with the reasonable fear (but no certain knowledge) that the action might be prohibited” (Fleming, 2006, p. 4). In such cases it was thought that ignorance could not be legitimately claimed, as knowledge of one’s uncertainty suggests culpability in the commission of the sin, regardless of the agent’s doubt prior to the act’s commission. The prohibition against acting in morally uncertain situations created a dilemma with regard to moral decision making “especially when the limitations of human knowledge collided with the need for immediate action” (Fleming, 2006, p. 4).

In the sixteenth century several moral systems were suggested as a means of identifying morally permissible action based upon the strength of competing moral arguments. Theology professor Julia Fleming suggests that in the absence of moral certitude “Catholic ethics needed a way to give people confidence that they were acting responsibly, even if their choices might eventually prove to have been mistaken” (Fleming, 2006, p. 5). In other words these moral systems helped to determine right action in cases where moral obligation was doubtful. Probabilism, probabiliorism, aequiprobabilism, and tutorism were among the most prominent of these moral systems (Mahoney, 1987, pp. 136-137; Traina, 1999, p. 104; Jonsen & Toulmin, 1988, p. 164).

Before considering these moral systems, it is first important to define ‘probable’ as it will be used in the discussion. While common use of the term implies that a probable proposition is more likely than alternative propositions, this is not how ‘probable’ is used here. Instead I adopt Mahoney’s definition of ‘probable’ as something which is “proveable or arguable, something for which there is a good argument, or two or more good arguments, irrespective of the merits of any alternative” (Mahoney, 1987, p. 136).

According to the principles of tutorism, translatable as safer-ism, probability really does not factor into the discernment process. One subscribing to this method of moral discernment would follow the law with regard to moral matters. It does not matter whether it is canon law, civil law, or natural law, those who subscribe to the principles of tutorism take the ‘safer’ path by erring on the side of the law in matters concerning moral doubt (Mahoney, 1987, p. 137; Fleming, 2006, p. 5). In contrast to aequiprobabilism, only when the probabilities are evenly balanced between several

possible courses of action, meaning no one argument appears to be more probable or morally correct than any other, can one safely choose from among those actions without fear of choosing a morally inferior or sinful position (Mahoney, 1987, p. 137).

In the absence of equally probable moral choices, or the decision to align oneself with the law in cases of moral doubt, there are two other moral systems which could help moral agents decide how to act in the presence of uncertainty—probabiliorism and probabilism. Probabiliorism requires the agent to pick the most probable action. While it might seem appropriate that one would choose the most arguable position or the argument supported by the most authorities, this approach limits the ability of the agent to choose in favor of arguable, albeit less persuasive positions that may be more consistent with the agent's conscience. In contrast, probabilism allows the moral agent to follow a probable course of action; however it does not require that the most probable or stronger argument necessarily be chosen (Mahoney, 1987, pp. 135-137; Fleming, 2006, p. 5). Even though probabilism may appear to demand the least degree of evidence, probability, or certainty from among the moral systems of its time, I argue that it is the most appropriate moral system within which to consider my argument. The other moral systems, while perhaps appearing to be more rigorous, are actually more dependent upon appeals to allegedly objective external authority to determine the probability of the arguments in order that they may be weighed and balanced in light of one another. For reasons articulated above, such appeals to an "objective" authority are misguided; as Longino explains, such objectivity is illusory. This insight supports embrace of probabilism as an approach that may lead us to the only justifiable degree of moral confidence that may be achieved in circumstances in which, as Newman might describe,

a conclusion cannot be proven and analytical certainty cannot be attained. Consideration of a brief history of probabilism and the central tenets of the approach suggest its value for considering the question of making EC available to all nonpregnant rape victims who desire it.

Bartolomé de Medina, a Spanish Dominican and professor of theology at Salamanca, is credited with introducing the moral system of probabilism in 1577. Probabilism is based on the tenet that “a doubtful moral obligation may not be imposed as though it were certain” or put another way “where there is doubt, there is freedom” (Maguire, 1983, ¶ 8). Remarking on Aquinas’s *Summa Theologiae* Medina comments “it seems to me that, if an opinion is probable, it is licit to follow it, even though the opposite opinion is more probable” (Jonsen & Toulmin, 1988, p. 164; Mahoney, 1987, p. 136; Fleming, 2006, p. 5). However Medina’s conception of probabilism was not without limits; he explained that in order for an opinion to be probable (permissible to follow) it must be a good argument, and it must be supported by “wise men.” (Mahoney, 1987, p. 136; Jonsen & Toulmin, 1988, p. 167). Thus Catholics had a vehicle through which they could legitimately dissent from Church teaching in matters of morality. Probabilism freed those who thoughtfully struggled to make moral decisions to follow their conscience without fear of sinning even though they had reasoned well (Jonsen & Toulmin, p. 168). The climate must have been ripe for change because Medina’s assertion was quickly accepted although it represented a significant departure from the Church’s teaching at the time. The Jesuits were among the first to embrace the principles of probabilism, and Gabriel Vasquez (1551-1604) was the first Jesuit to champion probabilism as a credible system of moral deliberation. However, Vasquez separated the

intrinsic and extrinsic elements that Medina deemed necessary to render an opinion probable. Moral theologian Daniel Maguire explains:

Solid probability could come about in two ways: *intrinsically*, in a do-it-yourself fashion, when a person prayerfully discovered in his or her conscience “cogent,” nonfrivolous reasons for dissenting from the hierarchically supported view; or *extrinsically*, when “five or six” theologians of stature held the liberal dissenting view, even though all other Catholic theologians, including the pope, disagreed. (Maguire, 1983, ¶ 8).

Albert Jonsen and Stephen Toulmin claim that separating the intrinsic and extrinsic elements of probabilism, and making them either/or instead of both/and “led to a conceptual split that badly damaged the thesis” as probability could be achieved based upon numbers and power absent reason (1983, p. 167).

It is important to note that Medina’s approach was not initially envisioned as a means to ease the suffering of the individual conscience so much as a means for priest confessors to advise penitents in the confessional. Moral theology was a relatively new discipline in the sixteenth century, and priests were ill prepared to “judge” and “classify” sinful acts in a consistent and meaningful way. While casuistry was taught in many of the seminaries as a means of resolving crises of conscience, probabilism allowed the penitent to follow a probable opinion where moral doubt existed. Additionally, probabilism afforded confessors greater latitude in assessing the moral quality of a penitent’s actions and in assigning penance/obligations based upon that quality judgment. Even if the confessor did not personally agree with the penitent’s course of action, in the face of moral doubt, the confessor was not mandated to give a harsh or shame provoking penance if the penitent or another confessor provided a probable opinion to support the penitent’s action (Jonsen & Toulmin, 1988, p. 167). Fleming claims that Medina established the floor beneath which moral action should not fall or “the minimal

standards of moral rectitude” (Fleming, 2006, p. 5). And, while it was not Medina’s primary intent to propose probabilism as a moral method, probabilism was recognized as a way in which to “lighten the burden of conscience on the scrupulous and troubled” (Jonsen & Toulmin, 1988, p. 168).

The theory of probabilism flourished for almost a century after Medina introduced it as a framework for moral decision-making. Catholic universities, moral theologians, and seminary instructors were among those who embraced the theory and used it to consider all manner of moral questions. However, there were some situations in which the use of probabilism was prohibited. If a chosen course of action would violate the rights of another or put another or the actor in serious physical or spiritual danger, then probabilism could not be used to justify that action. For example, doctors were obliged to provide treatment based on the most probable opinion, as to follow a less probable opinion could put the physical health of their patients at risk (Jonsen & Toulmin, 1988, pp. 170-171). In the absence of such limiting conditions, probabilism was seen as an invitation to moralists to consider and challenge previously understood concepts of certitude, probability, and culpability (Fleming, 2007, p. 6; Jonsen & Toulmin, 1988, p. 164), and that invitation did not go unanswered. Some moralist attempted to use probabilism to “justify the most bizarre of moral opinions as ‘probable,’ or even to create a doubt where previously there was none,” thereby opening probabilism to criticism that it serves as a gateway to laxism (Mahoney, 1987, p. 138). In fact “one moralist became known as the lamb of God because he took away so many of the sins of the world, and another was given the doubtful title of ‘prince of laxists’”(Mahoney, 1987, p. 138). The strongest critics of both probabilism and laxism were the Jansenists.

The Jansenists espoused “extreme Augustinianism” which caused them to be particularly resistant to any accommodation made to the uncertainty of human knowledge; they leaned more toward the “system of tutorism and moral rigorism” (Mahoney, 1987, p. 139). The Jansenists and other critics of probabilism feared that embrace of probabilism would lead to a morally permissive society because the probabilist system would inevitably degrade its criteria to the point that any opinion that held even the most remote possibility of truth could be chosen over well thought out moral arguments agreed upon by notable moral scholars. Among the most famous opponents of the Jesuits and probabilism was the French mathematician turned theologian Blaise Pascal. Pascal was a rigorist, a scientist, and a Jansenist with little tolerance for uncertainty, disorder, and ambiguity. Pascal launched scathing written attacks on probabilism predicting not only a “slide toward moral skepticism” but also the loss of moral order “where all law falls before liberty” (Jonsen & Toulmin, 1988, p. 171).

In conjunction with Pascal’s public criticism, Pope Alexander VII put many of the Jesuit’s publications on morality on the *Index of Forbidden Books*. Challenges to probabilism also arose within the Jesuit order, probabilism’s greatest proponents, as the members split on the use of probabilism as a moral system. There was of particular concern with regard to laxity in the teaching of sexual morality, and many of the Jesuits began to voice concerns that probabilism might be identified as their formal method of moral decision-making when many of the Jesuits actually rejected probabilism in favor of probabiliorism. Due to internal disagreement among the Jesuits in regard to matters of sexual morality, and the external conflicts between the Jesuits and the Jansenists, laxism, rigorism, and probabilism all fell into disfavor by the end of the seventeenth century

(Jonsen & Toumlin, 1988, pp 170-175; Mahoney, 1987, pp. 135-143). Fleming claims that probabilism was the victim of religious rivalries, politics, and the desire on the part of the Vatican for a unified church (Fleming, 2006, p. 6). It was not until 1748 that the moral system of probabilism regained some acceptability when Italian moral theologian Alphonsus of Liguori developed his own moral system by distilling elements of both probabilism and probabiorism. Liguori concluded that “in principle a doubtful law does not oblige and one may follow a probable opinion, but...that a law is really doubtful only when the opinions for and against are evenly balanced” (Mahoney, 1987, p. 143).

While Liguori’s discussion of probabilism did not return the moral method to the level of acceptability it enjoyed when Medina originally introduced it, Liguori’s beatification in 1831 lent greater credibility to the moral system of probabilism. Additionally, in 1950 Pope Pius XII declared the teachings of Liguori to be “‘most thoroughly approved’ and a ‘safe norm’ throughout the Church” (Mahoney, 1987, p. 143).

6.6 Conclusion Part I: Probabilism and EC

Drawing on several threads in Catholic teaching and on insights from feminist philosophical thought, I argue that probabilism is an appropriate moral model which allows for legitimate moral decision making in the face of doubtful moral obligations. Similar in nature to probabilism, Newman’s theory of convergent probabilities provides the moral agent with a framework in which to consider evidence and justify a conclusion, even when that conclusion is beyond analytical certainty. In Newman’s theory, a convergence of probable propositions lend strength to one another until an argument becomes sufficiently strong to warrant assent or certitude. Like probabilism, Newman’s

theory can provide an avenue for decision making and action where uncertainty exists. Similarly, Longino recognizes uncertainty with regard to the level of objectivity that can be achieved in scientific knowledge. Longino proposes four criteria for critical discourse which seek to bring scientific data and hypothesis closer to objectivity, while still identifying traditional, absolute, value-free objectivity as illusory. In this regard Longino, like Newman and the theory of probabilism, provides an avenue to act in the absence of certainty.

It is unlikely that the Church's understanding and reporting of the science with regard to EC would be considered sufficiently objective according to Longino's criteria. As an epistemic community, a community of inquiring knowers, the U.S. bishops fall into the epistemic traps Majeske describes (Majeske, 1995, p. 11); the background assumptions informing their interpretations of data are rendered largely invisible, and their world view is not treated as one among many competing world views and thus achieves hegemony which is sustained. The U.S. bishops' world view not only colors how they understand the science but how they then present it to others and, in turn, how their understanding informs the resultant moral norms—i.e., their authoritative guidance with regard to the treatment of rape victims. Thus their position is supported by not only uncertain, but biased science. Yet, the bishops' assumed authority precludes the operation of transformative discourse and the operation of different world views to correct for that bias and reveal, or perhaps reduce, uncertainty. The Church admits to not being expert in the area of the sciences ("we cannot but deplore certain habits of mind, which are sometimes found too among Christians, which do not sufficiently attend to the rightful independence of science and which, from the arguments and controversies they

spark, lead many minds to conclude that faith and science are mutually opposed” [Gaudium et Spes, #36]) and yet overreaches to generalize its expertise to scientific matters, a phenomenon both Augustine and Foucault warn against. Augustine actually suggests that claims to certitude may be claims to knowledge that only God can have, sort of the ultimate overreaching in a quest for certitude.

In light of the layers of uncertainty that challenge knowledge of EC’s mechanisms, the absence of any evidence of fetal life, and the operation of subjectively construed science, I argue that probabilism should be adopted as the appropriate moral method by which to consider this morally ambiguous situation. Probabilism is a uniquely appropriate moral method in which to consider the problem of EC in Catholic hospitals, because it is Catholic in origin and specifically addresses the problem of certainty and certitude in moral decision making. Thus, I argue that Catholic hospitals can make practical moral decisions about EC, despite a lack of demonstrative proof. Additionally, in the absence of fetal life, the overriding moral obligation should be to provide compassionate care to the rape victim and include EC among her treatment options. Allowing a woman to protect herself from conception due to rape is most certainly an act of compassion, in addition to being consistent with medical standards of care and the doctrine of informed consent.

Part II: Probabilism in the Face of Injustice

6.7 A Matter of Justice

One of the guiding principles of the Catholic Church is that of justice. Justice is frequently discussed in terms of fairness or equal access to basic human rights, such as

access to food, shelter, basic healthcare, and education, and the freedom to practice one's religion. Intrinsic to most conceptions of justice is the formal principle of justice, often elaborated as a sense of fairness—the principle requires that “equals must be treated equally, and unequals must be treated unequally” (Beauchamp & Childress, 2009, p. 242). According to this principle, not only is there a duty to treat similarly situated people similarly, there is also a duty to recognize disparity in need between dissimilarly situated individuals and to account for that disparity when considering the rights and needs of others. This notion of treating unequals unequally is also reflected in the Church's preferential option for the poor and is addressed specifically in the ERD which states that “Catholic healthcare should distinguish itself by service to and advocacy for those people whose social condition puts them at the margins of our society and makes them particularly vulnerable to discrimination” (2001, #3). I argue in this section that the use of the “ovulation method” to determine whether a rape victim will be offered access to EC violates both tenets of the formal principle of justice. First, rape victims are treated differently from other women of childbearing age who are being treated with potentially abortifacient and/or teratogenic therapies. Second, the special needs of the rape victim, as a marginalized and vulnerable person, are not adequately considered and accounted for in their plan of care. Rape victims are not treated similarly to other patients in relevant ways, and at the same time the ways in which their rape does distinguish them from other patients are seemingly ignored.

ERD # 36 requires that a rape victim receive “appropriate testing” to determine if there is any possibility that the victim may be pregnant. The testing requirements are based upon the Church's well known belief that life begins at conception and that in

uncertain moral matter in which life may be at risk one must err on the side of life. Therefore, if the victim is already pregnant or ovulating, EC may not be provided. However, the ERDs do not address or demand that similarly rigorous testing methods be required in other healthcare situations in which potential fetal life may be harmed. For example, the U. S. Food and Drug Administration (FDA) formulated a drug classification system (Classes A, B, C, D, and X) specifically to increase the awareness among healthcare providers regarding which medications may or do have teratogenic effects. In Class D drugs there is evidence of fetal risk, and it is recommended that the benefits and burdens for women of childbearing age be weighed carefully prior to prescribing such drugs. Additionally, it is recommended that such therapies be prescribed in tandem with contraceptive counseling to avoid pregnancy while on the medication. Class X drugs are contraindicated in pregnant women, and both the manufacturers and the medical literature recommend that Class X drugs never be prescribed to woman of childbearing age unless a reliable form of contraception is also prescribed in order to protect against fetal defect (Schwarz et al., 2007, p. 370).

Unlike the specific policies that address the prescribing of EC to rape victims, the Church has not developed a formal policy, or directive, regarding the prescription of Class D and X drugs to women of childbearing age. While a menstrual history and pregnancy test are generally performed prior to prescribing Class D and Class X drugs, consistent with clinical standards of care, the ERDs have not attended to the risk to fetal life presented by their possible teratogenic and abortifacient effects (Sulmasy, 2006, p. 320). Additionally, there appears to be no formal policy statement by the U.S. Catholic bishops or any of the major U.S. Catholic healthcare associations which suggest that

female patients in Catholic healthcare institutions should submit to LH surge tests (after a negative pregnancy test) when they are prescribed potentially abortifacient or teratogenic drugs—except in the aftermath of a rape. Thus there is a double standard with regard to the medical treatment of rape victims. No justification for this different treatment of women who are relevantly similarly situated, i.e., who are of childbearing age and potentially pregnant, has been offered, and it is difficult to imagine what it could be.

One might surmise that the use of Class D and X drugs is exceedingly rare and that, therefore, the effort necessary to develop and promulgate such a formal policy may be unwarranted. In reality, the prescription of such drugs is both common and prevalent. In the U.S. each year, 11.7 million prescriptions for Class D and Class X drugs are given to women of reproductive age (Schwarz et.al., 2007, p. 370). Additionally, the drugs in these classes include antibiotics, psychiatric agents, anticonvulsants and other commonly prescribed medications. Statins, for example, are cholesterol lowering agents that are commonly prescribed to patients with high cholesterol. Statins have been found to have teratogenic effects in animal studies and should “theoretically” cause fetal toxicity due to the mechanism of action further it is suggested that “in women of child-bearing potential providers must exercise great caution in evaluating risks and benefits of statin therapy” (Buse, 2003, p. 171). Comparatively, even if every one of the 300, 000 women who report being sexually assaulted every year in the U.S. (CDC, 2006) took EC, the prescriptions would appear to constitute a risk to fetal life of much smaller numerical magnitude than do the 11.7 million women who take Class D and Class X drugs. This disparate treatment of different classes of women needing medical care raises the question of why the Church so strictly controls the dispensing of EC to rape victims when

EC poses no greater risk to fetal life than does the ingestion of Class D and Class X drugs, and probably presents a smaller risk in terms of the number of potential fetuses placed at risk.

In addition, there are medical treatments or testing that can prove harmful or potentially fatal to a developing fetus, yet Catholic healthcare institutional policies and procedures do not demand that women submit to both pregnancy and LH surge tests prior to these being prescribed. Any woman of child bearing age who has ever had an X-ray has probably been asked by the administering healthcare worker whether there is any possibility that she is pregnant. If the woman reports that there is not, the healthcare worker takes her at her word and takes the X-ray. The woman is neither required to submit to a pregnancy test nor asked for a recent history of her sexual activity, and then, absent evidence of pregnancy, pressed to undergo an LH surge test prior to performing the indicated diagnostic test. Daniel Sulmasy points out that potential harms to human life are often found within medicine. While many of the risks may be statistically small, like allergic reactions and secondary infections, medical treatments which that present some risk are generally not prohibited by the Church. The benefits are recognized to outweigh the potential risks (Sulmasy, 2006, p. 321).

In light of the evidence presented, it appears to be unjust to require a higher level of certainty with regard to pregnancy, or rather the absence of pregnancy, when prescribing EC than when prescribing other potentially teratogenic and abortifacient interventions. Scientific testing cannot detect a human pregnancy until the time of implantation. Attempts to determine the possibility of fertilization in the absence of sound scientific testing only creates a false sense of certainty. What is unacceptable is

that the burden of these inequitable attempts to know the currently unknowable is disproportionately shouldered by victims of sexual assault. Not only is the imposition of this greater burden unfair, a case of failing to treat relevantly similar cases similarly, but the burden is imposed in the aftermath of a previous injustice, a rape, the violation of a woman's bodily integrity and sense of security. The compounding or exacerbation of such injustice by the imposition of not only a burden, but an undue or unfair burden, is unwarranted, lacks both compassion and justice, and is wrong.

If the Church's quest for certainty in similar situations was pursued with equal vigor, at a minimum one could assert that the standard for certainty in moral matters involving either fetal life, or the possibility for fetal life, was being applied fairly. However, as these standards are not currently applied consistently in relevantly similar situations, I submit that the requirement of LH surge testing prior to the dispensing of EC to rape victims in Catholic hospitals should be reconsidered based upon the justice interests of the rape victims they serve.

On the other hand, in other respects rape victims should be treated as special and indeed dissimilar to other women of childbearing age due to the nature of the circumstances surrounding their need for healthcare—namely, the trauma they have experienced and the vulnerability that often results. These circumstances bring rape victims within the purview of the ERD cited above (2001, #3). To be marginalized is to be relegated to an unimportant or powerless position within a society or group. Rape victims are rendered at least temporarily powerless by their attackers, and as discussed in chapter four, they are often marginalized by society in the aftermath of their rape. To withhold EC from victims who have tested negative for pregnancy is not consistent with

the ERDs pledge for Catholic healthcare to “distinguish itself by service to and advocacy for those people whose social condition puts them at the margins of our society and makes them particularly vulnerable to discrimination” (ERD, 2001, #3). If the ovulation method is employed by a Catholic facility and a woman is found to be ovulating, the rape victim may need to pursue EC on her own, *if she is physically and emotionally capable of doing so, if she has money, if she has transportation, if she has support, if she has education and information to know to do so.* In the interim, the time between a positive LH surge test and seeking treatment elsewhere, the effectiveness of EC decreases while the opportunity for the victim to become pregnant increases. As was discussed in chapter four, to become pregnant due to a rape has a significant negative impact on most rape victims. Increased risk of suicide, depression, physical illness, and difficulty bonding with their child are among the pernicious effects often suffered by women who are impregnated by their rapists. These women are not like other women, they are peculiarly vulnerable, and in the face of such uncertainty about how EC works and the inability to verify another life with a competing interest, justice would seem to dictate that Catholic healthcare should err on the side of their living, vulnerable, victim and provide her with EC as a treatment option. Thus, to make ovulation testing a precondition to the prescribing of EC is unjust, as it fails to treat all women of childbearing age similarly when considering the use of potentially abortifacient and teratogenic treatments. Moreover, it is unjust because it fails to recognize the ways in which rape victims are distinctive and entitled to particularly compassionate care, and this injustice is particularly egregious in light of the Church’s pledge to care for the marginalized. Rape

victims constitute a marginalized and vulnerable group who warrant increased compassion, consideration, and care—not less.

6.8 Dissent and Informed Consent

Throughout this work, there have been numerous references made to Directive #36 of the ERDs. It is this Directive that Catholic healthcare relies upon to provide guidance with regard to the prescribing of EC to sexual assault victims. In this final section of Part II, I will explore the authority the ERDs carry and the possibility of dissent from the moral teaching contained in the ERDs. I argue that dissent is a false option to afford sexual assault victims with regard to the provision of EC. Instead, I suggest that probabilism should be recognized by the Church as a valid method of moral decision making in the face of moral uncertainty, that this recognition should be reflected in the ERDs, and that recognition of probabilism would obviate the need for rape victims desiring EC to exercise the arduous process of dissent. Obviously, the rape victims treated in Catholic hospitals are not exclusively Catholic, and it is not my intention to exclude them from this conversation. However, it is my hope that by grounding my argument within the Catholic tradition I will effect a change in policy and establish a standard of care that will benefit all sexual assault victims who are treated in Catholic health facilities—not exclusively Catholic victims.

The United States Conference of Catholic Bishops (USCCB) describes the teaching contained within the ERDs as “authoritative guidance on certain moral issues” (ERD, 2001, p. 2). The ERDs have been approved by the Vatican’s Congregation for the Doctrine of the Faith (CDF), whose charge it is to “to promote and safeguard the doctrine

on the faith and morals throughout the Catholic world”

(http://www.vatican.va/roman_curia/congregations/cfaith/). While authoritative, the USCCB clearly state that the ERDs are not irreformable as “the Directives will be reviewed periodically...in the light of authoritative church teaching, in order to address new insights from theological and medical research or new requirements of public policy” (ERD, 2001, p. 2). Within Catholic healthcare institutions, the ERDs are not only authoritative at an organizational level, shaping hospital policy, but at the level of the individual healthcare worker, dictating terms of employment: Catholic healthcare services must adopt these Directives as policy, require adherence to them within the institution as a condition for medical privileges and employment, and provide appropriate instruction regarding the Directives for administration, medical nursing staff, and other personnel. (ERD #5, p. 10).

Lending even greater authority to the ERDs is what Sullivan claims to be the tendency of the “reasonable” Catholic to accept the authority and guidance of the bishops and “to be disposed to accept their teaching authority even when it is not infallible” (1983, p. 34). Sullivan suggests that this trust in the bishops is based in belief that the bishops share in the mandate of Christ to the apostles “to bear witness to what he had revealed to them,” and in the belief that the bishops receive the special assistance of the Holy Spirit as a result of that mandate (1983, p. 34). Strong support for the authoritative nature of magisterial teaching is found in the Dogmatic Constitution of the Church, *Lumen gentium*, which states that the sacred Synod “teaches that by divine institution bishops have succeeded to the place of the apostles as shepherds of the Church, and that he who hears them, hears Christ, while he who rejects them, rejects Christ and Him who

sent Christ” (1964, 20). Thus, there is a tendency on the part of Catholics to accept the teaching of the bishops as true, or certain, even if the bishops do not claim certitude with regard to a particular teaching.

“Creeping infallibilism” is the term Ann Patrick uses to describe the tendency of the laity to accept magisterial teaching as certain; she claims that the devout are encouraged “to place their trust in the supposed certainty of human words rather than in the God who inspires them” (1997, p. 31). Joseph Boyle voices similar concerns when he suggests that Church teaching is all assumed to carry the same degree of certainty and authority, thus irreformable teaching becomes the norm and reformable the exception.

Boyle claims:

The presumption of the truth enjoyed by church teaching authority both must and does yield to solid arguments for the truth of another position. The prevailing theology is simply unable to say how the teaching authority of the church changes its mind about anything—or worse, it suggests that teaching becomes true in virtue of its being taught by the magisterium. (Boyle, 1995, p. 93)

The point to be emphasized here is that even when bishops do not expressly claim certainty with regard to moral matters, their teaching is often received as, or perceived to be, certain. Therefore, even teaching based upon layers of uncertainty may be received as irreformable unless bishops can find a means, such as probabilism, to provide moral guidance and permit the operation of personal conscience in admittedly uncertain moral circumstances.

However, the ERDs are not irreformable. One could argue that one can legitimately dissent from authoritative non-infallible teachings, in fact that one has duty to do so, if one believes that “the “form” of a given norm expresses the substance of moral truth inauthentically” (Traina, 1999, p. 223). One could further argue that a rape victim is free to pursue this moral avenue and can therefore dissent from the Church

teaching with regard to EC. This argument would appear to be consistent with my argument in favor of the use of probabilism, as probabilism is generally thought of as a vehicle through which to legitimately dissent from Church teaching.¹⁵ However, my advocacy for probabilism as a moral method is not intended to identify a legitimate vehicle of dissent, but to recognize as valid a method of moral decision making which allows one to discern a morally permissible position, from among other morally valid positions, where a doubtful moral obligation exists. In light of such a use of probabilism, dissent would not be necessitated. Additionally, I do not think legitimate dissent represents a valid or practical option for a rape victim presenting herself at a healthcare institution for emergent treatment, nor would it provide rape victims with any meaningful alternative moral actions.

Legitimate dissent from Catholic teaching is not something that one could realistically achieve in an emergency situation. According to Sullivan, dissenting from the moral teaching of the magisterium entails forming one's conscience in a way that conflicts with the judgment of the Church. In theory, legitimate dissent requires that dissenters have "carefully attended to the official teaching" of the Church, "but have really been unable to form their consciences according to it despite serious and sustained effort to do so" (Sullivan, 1983, p. 170). Unless a rape victim is Catholic/Christian and has painstakingly considered the issue of EC for sexual assault victims prior to her own attack, there is very little chance she could fully appreciate the complexity of the EC debate and deliberate on it to a degree that would rise to the level of true conscience formation during the immediate aftermath of rape. Additionally, there is some question

¹⁵ Daniel Maguire claims that probabilism has dissent from hierarchical church teaching (where there is a doubtful moral obligation) as its purpose (Maguire, 1983).

as to whether any trauma victim is capable of absorbing and appreciating any medical information much less capable of making a potentially life altering decision in the face of institutional (read: Church and Medical) condemnations of particular treatment options. Further, women must make this decision quickly, as time is literally of the essence. Finally, depending upon which Catholic hospital a woman is taken to and in which state she resides, there is a chance that she won't be given any information on EC, so conscience formation and dissent will be impossible.

The second point on which I reject dissent as a useful or legitimate moral avenue to pursue in this situation is the burden of public dissent. Many Catholics dissent from Church teaching, for example, many married Catholic couples dissent from the Church's teaching with regard to contraceptive use. Catholics who are gay or lesbian often dissent from the Church's teaching on homosexuality. However, their dissent is private. They do not have to take a public stand, endure the judgment of others, or potentially feel ostracized by their Church. For rape victims in Catholic healthcare facilities, the dissent becomes public. The extreme burden of a rape victim's subjecting herself to additional public scrutiny and risking additional rejection and censure should be obvious. Not only would a woman have to muster the moral courage to voice her dissent to the treatment team, her dissent may then be known to whomever transfers her to another facility (whether that be medical transport, family member, or a taxi driver). The privacy of her conscience and her medical decision making would be compromised by her transfer to another facility. Additionally, rape victims often experience feelings of powerlessness, and may be incapable of engaging in any type of conflict, especially with such socially recognizable authorities as the Church and medical personnel.

A third point of concern is the negative connotations that often attach to the act of dissent. Curran, a figure often linked with the act of dissent, admits that some of his colleagues consider 'dissent' to be a negative term often "associated with opposition and confrontation...rebellion and disloyalty" (Curran, 2007, p. 67). Dissenting from Church teaching may add to the feelings of shame and guilt often experienced by rape victims. Victims often engage in self-blame fearing that they did something to cause their attack or to insufficiently defend themselves. Others feel God has abandoned them, having ignored their pleas for help during their attack, or that God is punishing them for some real or imagined sin (Fortune, 2005, p. 148). In light of such fears and feelings it is difficult to believe that a rape victim would be able to take such a negatively perceived action as dissent from Church teaching (read: God) when she already fears she has offended God. Additionally, the Church can frequently be a valuable source of support for women in the aftermath of rape, and "dissenting" from or rejecting Church teaching may make them feel isolated from the Catholic Church and no longer able to legitimately access that source of support. The rape victim's situation is untenable. To follow Church teaching, and accept limited treatment, means risking pregnancy by her attacker, and to dissent, and seek treatment elsewhere, could be perceived as abandoning the church and acting immorally, which could lead to a lifetime of doubt and shame. Placing this type of burden on a rape victim whose intent is to protect herself from pregnancy, as is permitted by the Church, lacks compassion. The victim and her interests have been lost in the quest to protect the alleged interests of an unverifiable life, and the rape victim is placed in the untenable position of having to engage in an adversarial relationship with

her caregivers to protect her right to prevent the unverifiable life from ever being conceived.

Finally, in a very practical sense, dissent will not effectively change a rape victims treatment options. Her dissent in no way compels the Church to provide her with EC. While the dissent of many may cause the Church to reconsider previously held positions, dissent in itself does not provide a sexual assault victim with additional options. Dissent will not lead to her being fully informed of her treatment options, transported to the nearest healthcare facility, or provided with EC in a timely manner, nor will it pay for her EC. Perhaps even more ethically troubling, her dissent will not necessarily allow her to feel she has made a morally permissible decision, if she chooses to seek treatment in a facility that will provide her with EC without condition. Unless she possesses a very nuanced understanding of dissent, she may very well feel that to dissent is to disobey the Church and, in turn, to disobey God.

When the church provides authoritative guidance with regard to doubtful moral matters, that guidance does not readily admit to other morally permissible courses of action. As has been discussed, magisterial teaching is privileged in that it is presumed to be morally correct. Any teaching from the bishops is not only value-laden, but also marked by the power of their office. Its presumed correctness renders competing moral action incorrect or wrong. I suggest that this presumption renders the spirit of probabilism invalid, as competing morally probable acts are considered in light of the officially sanctioned moral path and automatically rendered them morally deficient. I suggest that only if probabilism is divorced from the notion of dissent, can the moral

method truly support the notion that a doubtful moral obligation cannot be imposed as certain.

The cardinal principle of probabilism is that “where there is doubt, there is freedom” (Maguire, 1983, ¶8). In the presence of moral uncertainty, a rape victim should be free to choose a morally probable course of action.¹⁶ A rape victim cannot benefit, and is potentially harmed, from a structure of moral decision making that requires her to publically reject a Catholic teaching in order to pursue her right to protect herself from pregnancy due to rape. Admittedly, not all Catholic hospitals rely on the “ovulation method” to fulfill the ambiguous requirements of Directive #36. However, in making no attempt to clarify the teaching, which I think underscores the degree of uncertainty that surrounds the EC issue, the USCCB allows individual bishops and Catholic health facilities to interpret the Directives in an inconsistent, and I submit unjust, manner which unduly burdens women who are already victimized.

The degree of uncertainty with regard to EC’s mechanisms of action has been discussed at length, and in light of that uncertainty, a doubtful moral obligation should attach to moral norms based upon that uncertain knowledge. With regard to this doubtful moral obligation the use of probabilism as a valid moral method to discern legitimate courses of moral action—not dissent—provides a rape victim with a just, compassionate, and less hegemonically value-laden framework within which to consider her moral options. Again, probabilism comes from within the Roman Catholic tradition and asserts that where there is uncertainty, or moral doubt, a sufficiently probable conclusion may guide moral decision making.

¹⁶ Refer to an earlier section of this chapter: in probabilism a solid moral probability exists when a “person prayerfully discovers in his or her conscience “cogent,” nonfrivolous reasons” or when ““five or six theologians of stature” hold the view (Maguire, 1983, ¶8).

Additionally, probabilism would not constrain Catholic healthcare services from presenting the Church's position on matters, but would also allow for the discussion of other solidly probable moral arguments for and against the dispensing of EC. While a victim's ability to make an autonomous decision, or an informed consent may still be somewhat compromised by the expression of an authoritative Church position, she will at least be provided the information necessary to enable a choice from among options presented as morally permissible options, rather than as needing to make a choice in favor of, or against, the Church's position.

Thus, probabilism enables informed consent. It allows for the consideration of EC as a treatment option, in the absence of pregnancy, as well as for discussion of all of its potential mechanisms of action, including its potentially abortifacient effects (as pregnancy and abortifacient are defined by the Church). All solidly probable moral arguments are considered, which satisfies the disclosure element of informed consent. Directive #36 is not violated, as pregnancy testing is still included and EC can be offered.

However, in the absence of a definitive manner in which to verify pregnancy prior to implantation, the ovulation method could only be offered for its intended purpose—to predict fertility by measuring levels of luteinizing hormone—which some women may want to employ. The ovulation method could no longer be required, as it cannot verify pregnancy, and thus is not effective in increasing probability, decreasing uncertainty, or leading to the certitude necessary to epistemically warrant and morally mandate such testing.

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