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## An Unfinished Project: John Courtney Murray, Religious Freedom, and Unresolved Tensions in Contemporary American Society

Miguel H. Diaz

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# An Unfinished Project: John Courtney Murray, Religious Freedom, and Unresolved Tensions in Contemporary American Society

Miguel H. Díaz, PhD\*

*Religious freedom has re-emerged as a controversial issue in the courts, in the Church, and in the public square in the United States. This essay examines the groundbreaking contribution that John Courtney Murray, SJ made to bring about a paradigm shift in Roman Catholic teaching on religious freedom. This shift can be traced to the Church’s transitioning from the view that “error has no rights” to only people—not ideas—have rights. The essay underscores Murray’s focus on human conscience and addresses tensions that have emerged in the United States between voices that affirm the right to religious freedom and those that affirm other fundamental human rights. The essay proposes the adoption of an integral ecology of human rights built upon an option for the legally and religiously marginalized.*

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## INTRODUCTION

The figure of John Courtney Murray, SJ (1904–1967) looms large in discussions of religious freedom and, in particular, when addressing the paradigm shift that occurred in Roman Catholicism after the 1965 release of *Dignitatis Humanae*.<sup>1</sup> This central document of the Second Vatican

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\* The John Courtney Murray University Chair in Public Service at Loyola University Chicago, Ambassador to Holy See, Ret.

1. Pope Paul VI, *Dignitatis Humanae*, Declaration on Religious Freedom (Dec. 7, 1965), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html).

Council changed the way the Church understood its relationship with a world characterized by an increasing religious and cultural pluralism.<sup>2</sup> As an American and as a Jesuit, Murray tapped into the complex and manifold tradition of natural law as a way to reflect upon the American consensus.<sup>3</sup> For Murray, the cornerstone of this consensus within American democracy was the moral vision that informed the thoughts of our nation's founders. Murray saw this moral vision as stemming from a religiously informed consciousness that affirmed the transcendent rights of human persons. But this consensus, Murray would argue, cannot be taken for granted. It is an unfinished project that requires ongoing reasoned conversations and constructive public dialogue for the sake of the survival of our democracy.

This American consensus, especially around issues related to the separation of Church from state, was decisive in Murray's efforts to precipitate change in the Catholic Church's understanding on religious freedom.<sup>4</sup> In spite of the opposition that Murray faced and having been even silenced by some Church authorities, *Dignitatis Humanae* witnessed the triumph of his relentless efforts to draw from the American model of separating Church and state and from the constitutional affirmation of inalienable human rights and freedoms.<sup>5</sup> In parsing the implications of

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2. Unless otherwise noted, due to my focus on John Courtney Murray's teaching on religious freedom, the term "Church" will be used exclusively in this article in reference to the Roman Catholic Church.

3. See JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 115–22, 249–300 (3d ed. 2005) (recognizing that even though natural law exists and is indestructible, it is not acknowledged, and thus there is no elaboration of public consensus based on it). It is worth citing what prominent Catholic moral theologian Charles E. Curran has noted with respect to "natural law." As Curran argues, "Natural Law remains a very ambiguous term." Oftentimes the term "natural" is distinguished from supernatural in a way that does not sufficiently opt for an integral and incarnational approach to the presence of God in human history. Moreover, while the concept of natural law is often used by Catholic thinkers in connection with Thomas Aquinas, the fact is that the term "nature had over twenty different meanings in Catholic thinking before Thomas Aquinas." Curran also points out that the term "law" is ambiguous because for most modern readers it carries an overly legalistic connotation, "whereas for Thomas law was an ordering of reason." To summarize Curran's arguments on natural law:

natural law is a deliberative ethic which arrives at decision not primarily by the application of laws, but by the deliberation of reason. . . . Natural law in the history of thought does not refer to a monolithic theory, but tends to be a more generic term which includes a number of different approaches to moral problems. There is no such thing as *the* natural law as a monolithic philosophical system with an agreed upon body of ethical content existing from the beginning of time.

See Charles E. Curran, *Natural Law in Moral Theology*, in *READINGS IN MORAL THEOLOGY* NO. 7: *NATURAL LAW AND THEOLOGY* 247, 253–54, (Charles E. Curran & Richard A. McCormick eds., 1991).

4. See generally MURRAY, *supra* note 3.

5. For a historical overview of the Roman Catholic Church's teaching on religious freedom and Murray's struggle, condemnation, and vindication, see BARRY HUDOCK, *STRUGGLE*,

the American consensus for the Church's teaching on religious freedom, Murray's most lasting contribution, and certainly most relevant argument for our time, is his affirmation of "the fundamental inviolability of human freedom and the supremacy of conscience, even an ill-informed conscience."<sup>6</sup>

Religious freedom has re-emerged as a key and highly controversial issue within our increasingly polarized society. Within a pluralistic and religiously diverse global reality, our American public consensus faces new challenges. In this sense, Murray's voice resonates with the signs of our times.<sup>7</sup> Today, defending religious freedom—this constitutional and most basic of human rights—demands that we consider anew questions of religious freedom, ever so mindful of the relationship this right carries with respect to other human rights. We must make sure that, under the banner of religious freedom, no one person or group of persons engages in unlawful discrimination.

Within America's democratic legislative system, proponents and opponents of various laws and policies continue to invoke the protections afforded to religious principles and beliefs, seeking the equilibrium Murray dubbed public order. Critically engaging the role of religion within the public square has never been a more necessary task. From cake-baking to cage-making, religion and the First Amendment are at the heart of national debates and legal cases that affect not only the right of religious expression for millions of documented and undocumented "Americans," but also issues of public peace, public morality, and justice.<sup>8</sup> As the weight of these issues carry them as far as the Supreme

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COMMENDATION, VINDICATION: JOHN COURTNEY MURRAY'S JOURNEY TOWARD VATICAN II (2015). See also John Coleman, *The Achievement of Religious Freedom*, 24 U.S. CATH. HISTORIAN 21, 21–32 (discussing the identities of the "principal opposing actors or contending parties who helped to make *Dignitatis* the most deeply contested document of Vatican II," the processes through which the document eventuated and how those processes effected what it ultimately said, and the reasons the document is frequently considered a part of Catholic *social* teaching); Joseph A. Komonchak, *The American Contribution to Dignitatis Humanae: The Role of John Courtney Murray, S.J.*, 24 U.S. CATH. HISTORIAN 1, 1–20 (explaining Murray's role in "the Catholic doctrine of religious freedom"); Pietro Pavan, *Declaration on Religious Freedom*, in 4 COMMENTARY ON THE DOCUMENTS OF VATICAN II 49–86 (Herbert Vorgrimler ed., Hilda Graef, W.J. O'Hara, & Ronald Walls trans., 1975) (explaining the schematic structure of the Constitution "De Ecclesia").

6. ROBERT MCCLORY, FAITHFUL DISSIDENTERS: STORIES OF MEN AND WOMEN WHO LOVED AND CHANGED THE CHURCH 12 (2000).

7. See John F. Quinn, *The Enduring Influence of We Hold These Truths*, 16 CATH. SOC. SCI. REV. 73, 73–84 (2011) (explaining the lasting effect of Murray's teachings).

8. Murray argued that the state is primarily responsible for public order, and he limited the goods that could be achieved by the power of the state to three: public peace, public morality (by which he understood commonly accepted moral standards), and justice. "The public order thus becomes the criterion which controls and justifies the intervention of the state in all matters including the area of religion." See CHARLES E. CURRAN, AMERICAN CATHOLIC SOCIAL ETHICS: TWENTIETH-CENTURY APPROACHES 197 (1982) (describing that a "principle in Murray's

Court, and as friends and foes of religion weaponize religious freedom within the public square, Murray's advice to Catholics is as relevant today as it was when he first offered it in 1960.<sup>9</sup> As he suggests, the importance of affirming religious freedom must be understood as a moral commitment to foster peace and public order within the pluralistic American democracy:

The American Catholic is on good ground when he refuses to make an ideological idol out of religious freedom and separation of church and state, when he refuses to "believe" in them as articles of faith. He takes the highest ground available in this matter of the relations between religion and government *when he asserts that his commitment to the religion clauses of the Constitution is a moral commitment to them as articles of peace in a pluralist society*.<sup>10</sup>

Murray's careful distinction between faith and politics and his invitation to Catholics to commit to hold the government responsible for maintaining public order and peace within our pluralistic American society carries many implications when considering the widespread social experience of polarization and cultural wars at this moment in American history. As a Roman Catholic, Murray reflected the Catholic analogical imagination's attempt to reject polarizing positions, especially seeking a *rapprochement* between Catholicism and American democracy, between faith and reason, between the body of Christ and body politic, and, ultimately, between believer and citizen.<sup>11</sup> As a Jesuit, he reflected a religious tradition steeped in the practice of discerning God's presence in ordinary daily living, embracing the goodness of the world, but also distinguishing through holy indifference, God from anyone or anything that dared to take the place of God.<sup>12</sup> Because of this, Murray called upon government not to interfere in religious matters, which laid outside its competency.<sup>13</sup>

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understanding of the constitutional government is the distinction between the common good and the public order").

9. See generally MURRAY, *supra* note 3.

10. *Id.* at 86 (emphasis added). See CURRAN, *supra* note 8, at 217 (describing religious liberty as a "social necessity" necessary for peace and civil accord in a "religiously pluralistic society").

11. See generally DAVID TRACY, *THE ANALOGICAL IMAGINATION: CHRISTIAN THEOLOGY AND THE CULTURE OF PLURALISM* (1981) (identifying the difference between analogical and other viewpoints of faith by examining the culture of pluralism and the main differences in Christian theological doctrines).

12. See collected essays by Michael J. Schuck, Mark Williams, Leon Hooper & Thomas Hughson, in *FINDING GOD IN ALL THINGS: CELEBRATING BERNARD LONERGAN, JOHN COURTNEY MURRAY, AND KARL RAHNER* 83–124 (Mark Bosco & David Stagaman eds., 2007) (discussing "the American stories Murray lived *within* as he conducted his research and writing" and suggesting their "bearing on Murray's scholarship, particularly his notions of freedom and truth").

13. *Id.*

In this Article, I will offer a brief overview of Murray's ideas connected to religious freedom and pose some questions regarding the ongoing realization of this unfinished project as new questions and challenges arise. First, I will briefly discuss Murray's arguments in relation to the American consensus, which he lamented no longer existed and was in need of renewal.<sup>14</sup> Murray's reasoned historical approach remains relevant as we seek public consensus in defending religious freedom while also equally upholding a plurality of other fundamental human rights. Second, I will summarize Murray's notion of religious freedom, highlighting the place that individual conscience exercises in his thought. Third, I will conclude with some observations on current unresolved questions within the United States related to religious freedom, underscoring the unfinished nature of this project and the need to revisit the complexity of this fundamental constitutional right. I will argue that in light of recent developments since the late 1960s in the Church, any effort to advance religious freedom and achieve consensus in the service of public order must address the option for and the rights of marginalized persons and communities.

Respect for the human dignity and conscience of oppressed and marginalized communities within the Church and society, coupled with defending religious freedom of all persons, is the litmus test to reject what Pope Francis has called "the globalization of human indifference" and the surest road toward an *integral ecology of human rights*.<sup>15</sup> Today, we must engage one another in order to reach a new American consensus, mindful of the fundamental value of religious freedom, but also aware of a growing global consciousness that has been birthed as a result of the irruption of various oppressed and marginalized subjects into history. In the spirit of Murray's groundbreaking efforts, we must honor and protect, against any form of religious or social external coercion, the individual and communal religious convictions of these subjects, their theological and reasoned approaches to individual and socio-political experiences, and their God-given dignity and constitutional rights.

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14. MURRAY, *supra* note 3, at 93–94.

15. One of the earliest uses of the term "globalization of human indifference" was in the homily Pope Francis gave in Lampedusa Island, comparable to our Ellis Island. The pope characterized the lack of justice and care for immigrants as reflecting this global indifference. See Pope Francis, Homily at "Arena" Sports Camp, Salina Quarter (July 8, 2013), [https://w2.vatican.va/content/francesco/en/homilies/2013/documents/papa-francesco\\_20130708\\_omelia-lampedusa.html](https://w2.vatican.va/content/francesco/en/homilies/2013/documents/papa-francesco_20130708_omelia-lampedusa.html) (asking "forgiveness for those who by their decisions on the global level have created situations that lead to" the tragic deaths of individuals attempting to circumvent the closed borders of neighboring countries).

## I. JOHN COURTNEY MURRAY AND THE AMERICAN CONSENSUS

In a series of essays grouped under “the American proposition,” Murray lays out his arguments regarding how to achieve unity within an American pluralistic society. Murray makes the case for constructing “a new act of intellectual affirmation, comparable to those which launched the American constitutional commonwealth, that will newly put us in possession of the public philosophy, the basic consensus that we need.”<sup>16</sup> In advocating for a recipe for this public consensus, Murray relies heavily on select basic principles of natural law: (1) human persons are intelligent creatures; (2) reality is intelligible; and (3) because reality can be rationally understood, human persons have an ethical obligation to act or abstain from action for the sake of the common good.<sup>17</sup>

Murray follows Thomas Aquinas who argued that “[s]ince a rational soul is the proper form of man, there is in every man a natural inclination to act according to reason; and this is to act according to virtue.”<sup>18</sup> Of course, Murray is aware that the use of reason in and of itself does not guarantee virtue.<sup>19</sup> Moreover, Murray is clear that while this capacity to reason and reach for good is part of the permanent structure in the human person, the human person is never an abstract and *ahistorical* essence.<sup>20</sup> Much scholarly debate surrounds Murray’s approach to natural law, especially the question of whether his methodology sufficiently and consistently incorporated historical consciousness into consideration.<sup>21</sup> Critics of Murray may see echoes of the Roman lawyer Ulpian in his interpretation of natural law and what at times seems to be a failure to

16. MURRAY, *supra* note 3, at 93.

17. *Id.* at 111–12.

18. *Id.* at 113. See ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Pt. I-II, q. 93, art. 3 (1485) (arguing “every law is derived from the eternal law”).

19. For instance, Murray argues that in wiser and more honest persons the dynamism to act according to reason and virtue “is more fully released and more purified.” MURRAY, *supra* note 3, at 119.

20. *Id.* at 114. See MIGUEL H. DÍAZ, ON BEING HUMAN: U.S. HISPANIC AND RAHNERIAN PERSPECTIVES 79–110 (2001) for a discussion on the dynamic, mutable, historical, and relational nature of human persons.

21. Leon Hooper has persuasively traced the shift that occurs in Murray’s understanding of natural law from an ahistorical perspective to one that takes history more seriously into account:

In [essay] 1945b, natural law is an a-historical, a-social, complete body of general truth statements. By [essay] 1950a, Murray recognized some movement in the tertiary principles of natural law. By his 1958a [essay], he called for a refounding of America’s constitutionalism on critical, not naïve, natural law premises, and in Chapters 3 and 4 he fully recognized the essentially social component of natural law affirmations.

Leon Hooper, *The Theological Sources of John Courtney Murray’s Ethics*, in JOHN COURTNEY MURRAY & THE GROWTH OF TRADITION 106, 118 (J. Leon Hooper & Todd David Whitmore eds., 1996).

fully integrate issues related to faith and issues related to public order.<sup>22</sup> Still, others have pointed to Murray's embrace of an approach that moves away from abstract natural law tradition, one that pays more attention to historical consciousness and the "exigences" of human persons.<sup>23</sup> Notwithstanding these varying traditions of interpretation to his thought, the fact remains that Murray comes to understand the American consensus as something that should not be simply taken for granted, but rather embraced as a historical project. As such, this consensus entails an ongoing process that needs to be actualized in accordance with the nature of human persons as both rational *and* as historical creatures.<sup>24</sup> The role of reason, exercised *within (and not outside)* historical contexts, remains indispensable to this process. Thus, Murray argues:

But history, as any history book shows, does change what I have called the human reality. It evokes situations that never happened before. It calls into being relationships that had not existed. It involves human life in an increasing multitude of institutions of all kinds, which proliferate in response to new human needs and desires, as well as in consequence of the creative possibilities that are inexhaustibly resident in human freedom. . . . In a word, it has been abundantly proved in history that the nature of man is a historical nature. "The nature of man is susceptible of change," St. Thomas repeatedly states. History continually changes the community of mankind and alters the modes of communication between man and man, as these take form "through external acts," as St. Thomas says. In this sense, the nature of man changes in history, for better or for worse; at the same time that the fundamental structure of human nature, and the essential destinies of the human person, remain untouched and intact.<sup>25</sup>

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22. Ulpian was a third-century Roman lawyer who, as some have argued, has left a lasting influence on natural law proponents, including Thomas Aquinas. Curran argues that

Ulpian's understanding of the natural law logically leads to disastrous consequences in anthropology. The distinction between two parts in humans—that which is common to humans and all the animals, and that which is proper to humans—results in a two-layer version of human beings. A top layer of rationality is merely added to an already constituted bottom layer of animality. The union between the two layers is merely extrinsic—the one lies on top of the other. The animal layer retains its own finalities and tendencies, independent of the demands of rationality. Thus the individual may not interfere in the animal processes and finalities. Note that the results of such an anthropology are most evident in the area of sexuality.

Curran, *supra* note 3, at 257.

23. See Todd David Whitmore, *Immunity or Empowerment?*, in JOHN COURTNEY MURRAY & THE GROWTH OF TRADITION, *supra* note 21, at 149, 150–51 ("From 1964 on, Murray attempts to ground religious freedom less on perduring factors of human nature—though the emphasis on such factors remains in the background—and more on what he calls the 'exigences' of the human person at the present stage of human history.")

24. MURRAY, *supra* note 3, at 87–122.

25. *Id.* at 114.



Later in this Article, I will return to this argument regarding the historical nature of human persons, the use of reason, and their relevance for addressing contemporary issues related to religious freedom. It suffices for now to underscore that this twofold nature of the human being as a rational and historical creature are essential ingredients upon which to build public consensus not as a matter of fact, but as Murray argued, as a matter of need for the sake of the public good.<sup>26</sup> Murray maintained that there was “need for a new moral act of purpose and a new act of intellectual affirmation, comparable to those which launched the American constitutional commonwealth, that will newly put us in possession of the public philosophy, the basic consensus that we need.”<sup>27</sup> As I will argue shortly, the polarization we are experiencing surrounding issues of religious freedom and discrimination call for reasoned approaches in service to peace and public order. Polarization reflects the failure to integrate human differences, including religious diversity. The ancient question of reconciling the one with the many is certainly a central question in Murray’s writings, and remains relevant today.

Murray correlates the constitutional affirmation of religious freedom with the need to keep peace in a society comprised of religious pluralism. He devotes much effort to commenting on the American motto, *e pluribus unum*—one out of many—and relating this motto to issues of religious diversity and public consensus. In so doing, he strongly advocates that “the public consensus, on which civil unity is ultimately based, must permit to the differing communities the full integrity of their own religious convictions.”<sup>28</sup> But one cannot emphasize enough that pluralism as Murray suggests, whether religiously or culturally engendered, is the precondition to realize unity. Indeed, unity is not to be equated with sameness, as is often the case in efforts to construct the common good. Unity that authentically builds the common good must be understood as the ability of any society to *subsist in* human differences. Echoing Christian theological arguments related to the very nature of God as one and triune (a God who subsists in interpersonal differences as Father, Son, and Spirit), Murray argues that we are made one American society through “subsisting amid multiple pluralisms.”<sup>29</sup> In this sense, oneness,

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26. *Id.* at 93–94.

27. *Id.* at 93.

28. *Id.* at 59. For Murray’s arguments concerning historical reasons for the constitutional basis of our American religious plurality as a basis for peace, see *id.* at 68–74.

29. *Id.* at 44; see Joseph A. Komonchak, *John Courtney Murray and the Redemption of History: Natural Law and Theology*, in JOHN COURTNEY MURRAY & THE GROWTH OF TRADITION, *supra* note 21, at 60, 63–65 (describing Murray’s specific appeal to Trinitarian theology in his effort to reject both liberal individualism and various forms of collectivism, like Bolshevism, Nazism, and Fascism). As a fruitful theological point of contact, the reader should note how Murray’s arguments

whether in relation to divine or human life, is not about creating sameness and melting away human differences. Nor does oneness precede or stand above pluralism. As the American motto, *e pluribus unum*, clearly suggests, pluralism is constitutive of unity. A plurality of views, arguments, and experiences, Murray would concur, is a necessary feature to the health of our American democracy. Pluralism is the *sine qua non* of reaching public consensus.

Consistent with his understanding of human persons as rational and historical creatures, Murray offers some reflections that describe the origin, nature, and purpose of the kind of consensus he envisions within this pluralistic American society.<sup>30</sup> Murray squarely places consensus as a historical process and not as a *fait accompli*. It is “doctrine—not, however, in the sense of Platonic dogma, but in the sense that the word carries when used by a lawyer or by a military strategist.”<sup>31</sup> It is not a finished product. Like Catholic doctrine itself, it is “not a finished, but a developing, body of doctrine” that does not contain everything there is to know at any given moment in history, but constantly incorporates new insights and experiences.<sup>32</sup> As such, consensus is subject to ongoing reexamination, criticism, and revision. At the same time, this consensus is not unguided. It draws from a shared wealth of insights, thoughts, wisdom, and experiences.<sup>33</sup>

While Murray affirms the relation between public consensus and public opinion, he cautions against equating the two. He characterizes public opinion as the “shorthand” phrase that expresses communally

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echo similar arguments that have been made in reconciling unity and diversity in the area of ecclesiology and with respect to the doctrine of God. For instance, in a now well-known piece, Cardinal Walter Kasper argued:

The one church of Jesus Christ exists in and from the local churches. It exists, therefore, in each local church; it is present there especially in the celebration of the Eucharist. It follows that there can be no local church in isolation, for its own sake, but only in communion with all other local churches.

Walter Kasper, *On the Church—A Friendly Reply to Cardinal Ratzinger*, AMERICA (Apr. 23, 2001), available at <https://web.archive.org/web/20050206035736/http://www.americamagazine.org/gettext.cfm?articleTypeID=1&textID=1569&issueID=333>. For similar arguments related to the doctrine of God, see JOHN D. ZIZIOULAS, BEING AS COMMUNION: STUDIES IN PERSONHOOD AND THE CHURCH 27–65 (1985).

30. In the arguments that follow regarding the origins, nature, and purpose of public consensus, I rely on and paraphrase MURRAY, *supra* note 3, at 102–09. Of particular interest is Murray’s critical conversation with and appropriation of ADOLF A. BERLE JR., POWER WITHOUT PROPERTY (1959). As such, Murray’s arguments on public consensus reflect Berle’s economic presuppositions. That said, it is clear that his arguments on how to reach public consensus carry wider implications, especially within our contemporary American context of polarization.

31. MURRAY, *supra* note 3, at 108.

32. *Id.* at 105.

33. *Id.*

reached decisions stemming from “unstated but very real premises.”<sup>34</sup> Consensus refers to the acceptance of these premises that have come into communal consciousness.<sup>35</sup> And the primary task of developing this consensus, the tribunal of accountability, belongs collectively to “university professors, the reasoned opinions of specialists, the statements of responsible journalists, and at times the solid pronouncements of respected politicians.”<sup>36</sup> Murray argues that, within our democracy, this public consensus is the “final arbiter” that acts as a checking mechanism against any abuse of power.<sup>37</sup> Public consensus can draw from “settled principles of law” but also “the capacity to criticize that law.”<sup>38</sup> Finally, Murray maintains that this public consensus is not an ideology but rather a living process of tapping into communal consciousness in light of remaining in close relation to concrete human experiences.<sup>39</sup>

To then summarize Murray’s dynamic concept of public consensus, first and foremost, consensus is the child of thoughtful human reasoning that emerges within history. It is a process that must be revisited repeatedly in light of new questions and new experiences. Consensus must be built and developed, tapping into the ordinary, common, and shared wisdom of “We the People” of these United States, and also upon the wisdom that can be derived from a wide range of experts on any given social challenge. Finally, consensus acts as a check and balance for our democracy against any abuse of power, especially against any effort that undermines the ongoing American project to build oneness out of a rich human pluralism. In the next section, I turn to Murray’s understanding of religious pluralism and specifically, the question of religious freedom. In the final section, I will revisit his understanding of public consensus and relate it to contemporary debates on religious freedom and nondiscrimination, especially taking up the subject of an integral ecology of human rights and the preferential option for the poor and marginalized subjects.

## II. JOHN COURTNEY MURRAY, RELIGIOUS FREEDOM, AND THE AMERICAN MODEL OF CHURCH AND STATE

The constitutional affirmation of America as the one nation that exists under God and subsists within the pluralism of religious traditions leaves

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34. *Id.*

35. *Id.* at 106.

36. *Id.*

37. *Id.*

38. *Id.* at 107.

39. *Id.* at 108.

a lasting mark in the Church's Vatican II teaching on religious freedom, *Dignitatis Humanae*. Murray's arguments on religious freedom can be traced to a series of articles published in the 1940s and 1950s in *Theological Studies*, a prominent theological American and Jesuit Journal.<sup>40</sup> His teaching on this matter can be summarized as follows: All human persons are equal in dignity before God because all are independent, responsible, and autonomous creatures; human persons are the foundations and end of social life; religious freedom can be restricted where public peace or justice are threatened; all persons are equal under the law; and all social institutions, including governments, have a primary responsibility to support human dignity and freedom.<sup>41</sup>

David Hollenbach, SJ argues that the claim that human persons act by their "own counsel and purpose, using and enjoying [their] freedom, moved, not by external coercion, but internally by the risk of [their] whole existence," places the responsibility of becoming, of actualization of humanity, and of ethical decision-making, directly upon the conscience of individuals.<sup>42</sup> No one—not God, government, or the Church—can substitute or undermine human responsibility.<sup>43</sup> But, governments and social institutions have a duty to protect human dignity, freedom, and conscience. Hollenbach draws attention to the relationship between moral and juridical orders, quoting Murray who argues, "the juridical order

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40. See, e.g., John Courtney Murray, *Current Theology: Freedom of Religion*, 6 THEOLOGICAL STUD. 85, 85–113 (1945) (commenting on the influence global events have on the freedom of religion); John Courtney Murray, *Freedom of Religion I: The Ethical Problem*, 6 THEOLOGICAL STUD. 229, 229–86 (1945) (describing the ethical problem presented by the freedom of religion and applicable historic and theoretical approaches to that problem); John Courtney Murray, *Current Theology: On Religious Freedom*, 10 THEOLOGICAL STUD. 409, 409–32 (1949) (responding to articles "dealing with the urgent contemporary problem of religious freedom and the relations between Church and state"); John Courtney Murray, *Leo XIII On Church and State: The General Structure of the Controversy*, 14 THEOLOGICAL STUD. 1, 1–30 (1953) [hereinafter *Leo XIII On Church and State*] (outlining the "Leonine" documents "relevant to the problem of Church and State"); John Courtney Murray, *Leo XIII: Separation of Church and State*, 14 THEOLOGICAL STUD. 145, 145–214 (1953) [hereinafter *Leo XIII: Separation of Church and State*] (describing how Pope Leo XIII understood the separation of Church and state as "both . . . an ideology and . . . a political and social program"); John Courtney Murray, *Leo XIII: Two Concepts of Government*, 14 THEOLOGICAL STUD. 551, 551–67 (1953) [hereinafter *Leo XIII: Two Concepts of Government*] (indicating two concepts of government—political and paternal—and their interaction with religion); John Courtney Murray, *The Problem of Religious Freedom*, 25 THEOLOGICAL STUD. 503, 503–75 (1964) [hereinafter *The Problem of Religious Freedom*] (realizing the "differences among political traditions and regimes, and the divergences in the historical experiences of the nations," and addressing "the more difficult problem of Christian communities in lands of non-Christian tradition and culture").

41. David Hollenbach, *Freedom and Truth: Religious Liberty as Immunity and Empowerment*, in JOHN COURTNEY MURRAY & THE GROWTH OF TRADITION, *supra* note 21, at 129, 142–43.

42. *Id.* at 141.

43. *Id.* at 142.

cannot be sundered from the moral order, any more than the human person can be halved.”<sup>44</sup> Thus, in dealing with the question of government and its obligation to respect human conscience, religious freedom, and human dignity, government cannot undermine the nature of persons as religious and as responsible selves. The “truth to which government is accountable is the truth of human dignity, the truth that in matters religious, as in all matters in which human beings’ very selves are determined.”<sup>45</sup> Human persons must enjoy immunity from eternal coercion, and governments can only interfere where public peace and justice are threatened.

Murray’s reflections on religious freedom also challenged the Roman Catholic claim of being the one true faith and sole possessor of the one religious truth. In this model, known as error has no right, truths in other religious traditions had little room to be recognized and no possibility of salvation outside this visible body (“*Extra Ecclesiam Nulla Salus*”).<sup>46</sup> Murray convinced the Church to move beyond this envisioned ideal, known as “Catholic Thesis,” which could never be realized in modern democratic states, and even beyond the more pragmatic approach of simply tolerating the status quo, known as the “Catholic Hypothesis.” Murray’s approach embraces the possibility of encountering truth, even religiously-constructed truths, within the “catholicity” of cultural and religious traditions and accepts religious pluralism as a matter of historical fact and value.<sup>47</sup> There is little doubt that Murray’s ideas brought about a cultural shift in official Roman Catholic teaching. The American separation of Church and state and, in particular, the First Amendment, propelled his inspiration.

Murray’s case for distinguishing Church from state, and state from society, followed Leo XIII’s distinguishing the temporal power of the state from the spiritual power of the Church, carried enormous implications for the Church’s understanding of the role of religion in the

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44. *Id.*

45. *Id.* at 143.

46. See generally FRANCIS A. SULLIVAN, SALVATION OUTSIDE THE CHURCH?: TRACING THE HISTORY OF THE CATHOLIC RESPONSE (Paulist Press 1992) (studying the history of Christian thought about the salvation of outsiders to determine whether the dogma that there is no truth outside the Church is a true Catholic dogma).

47. On the pre-Vatican II views that came to be known as the Catholic Thesis-Hypothesis on religious freedom, see *The Problem of Religious Freedom*, supra note 40. See also MCCLORY, supra note 6, at 7–8 (describing the “Catholic Thesis” as the rigid supposition “that the vast majority (if not all) of the citizens of the state were Catholic,” and the “Catholic Hypothesis” as the pragmatic position Church authorities took in response to the fall of Catholic monarchs, advocating Church authorities in the eighteenth and nineteenth centuries “tolerate non-Catholic states until such time as the Catholic population grew into the majority”).

public square within modern democracies.<sup>48</sup> The American model of freedom *from* religion, rather than freedom *of* religion offered a particular and unique way of relating God and Caesar. Rather than excluding the church and religion from contributing to society, the American model offered the Catholic Church and other religious traditions “immunity” from government while also allowing the possibility for religion to contribute constructively to the common good. At this point, it is worth recalling the distinction that Murray makes between state and society, noting its relation to public order and the common good:

The common good is the responsibility of all persons and institutions within society. It consists of the full range of conditions that facilitate human fulfillment. The state is responsible only for the public order, which consists of the conditions necessary for the mere coexistence of persons in society. . . . Murray enumerates three goods under the rubric of public order: public peace, public morality, and justice. Only when these are violated can the state justly intervene with its coercive powers.<sup>49</sup>

Even more revolutionary than his arguments surrounding the separation of Church from state, was Murray’s affirmation of human dignity and human conscience, undoubtedly also influenced by inalienable and constitutionally enshrined rights in the United States. As Murray’s commentators have noted, the increased historical emphasis in his writings led to greater attention to the “exigencies” of human persons, including, but not limited to, human conscience and dignity. This carries great contemporary relevance.<sup>50</sup> In arguing that individual persons have a God-given duty to freely exercise their consciences unencumbered by any form of *external coercion*, Murray not only challenged states to respect religious freedom and conscience, but indirectly, this focus on human conscience and religious freedom also challenges the Church to refrain from exercising any external coercion on its faithful citizens. More specifically, this focus on individual conscience challenges the Church to refrain from turning to the ministerial exception, an exception to nondiscrimination laws for religious institutions enshrined in United States law, as a way to justify external coercion.<sup>51</sup> One need read no

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48. See *Leo XIII On Church and State*, *supra* note 40, at 1–30 (arguing “the struggle is between ‘the church’ and ‘the sects,’” which are activist parties in search of political powers); *Leo XIII: Separation of Church and State*, *supra* note 40, at 145–214 (analyzing Leo XIII’s theory regarding the practice of “Church-State relationships amid the conditions created by the peculiar nineteenth-century plight of the so-called Catholic nations of Europe and Latin America”); *Leo XIII: Two Concepts of Government*, *supra* note 40, at 551–67 (understanding the political and paternal concepts of government and their roles influencing the modern democracy).

49. Whitmore, *supra* note 23, at 155.

50. *Id.* at 161–71.

51. The ministerial exception is an exception to discrimination laws for religious institutions

further than past the opening words of *Dignitatis Humanae* to witness the profound effect this historical shift to human conscience had on Church teaching and the value it still carries with respect to checking potential abuses that could come from the state, but also from religious institutions:

A sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man, and the demand is increasingly made that men should act on their own judgment, enjoying and making use of a responsible freedom, not driven by coercion but motivated by a sense of duty.<sup>52</sup>

### III. AN UNFINISHED PROJECT: RELIGIOUS FREEDOM, PUBLIC CONSENSUS, AND THE AFFIRMATION OF HUMAN CONSCIENCES TODAY

Embracing a profound realism and pluralism, Murray was convinced that context is decisive and that, as he said, “[i]f we are to interpret the world, as we must, even to itself, our first duty is to understand it, in detail, with full realism under abnegation of the easy generalities with which the world is ordinarily denounced.”<sup>53</sup> In considering and interpreting the details of the world in its historical circumstances, Murray’s methodology invites us to examine the various cultural and diverse contexts that must now be taken into account to interpret and further develop the Church’s teaching on religious freedom. From this perspective, the recent irruption into history of various marginalized persons, which has carried enormous impact in the field of religious studies and theology, must also impact the field of law, its interpretation, and its implementation. These persons, faithful citizens that participate and contribute to both Church and society, have often experienced marginalization, discrimination, and human rights violations on the basis of their race, gender, sexual orientation, physical ability, immigration status, and the like.<sup>54</sup> Their cry must be heard in order to justly interpret

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when they limit who may serve in positions within their place of worship. *See* *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (affirming the ministerial exception to discrimination laws).

52. Pope Paul VI, *Dignitatis Humanae*, *supra* note 1, at para. 1.

53. DONALD E. PELOTTE, JOHN COURTNEY MURRAY: THEOLOGIAN IN CONFLICT 17 (1976).

54. The role religion has played in various forms of human oppression within the American continent has been amply explored. *See, e.g.*, PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (2000); ROSEMARY RADFORD RUETHER, *SEXISM AND GOD-TALK: TOWARD A FEMINIST THEOLOGY* (1983); MARCELLA ALTHAUS-REID, *INDECENT THEOLOGY: THEOLOGICAL PERVERSIONS IN SEX, GENDER AND POLITICS* (2000); JAMES H. CONE, *THE CROSS AND THE LYNCHING TREE* (2011); UNCOMMON FAITHFULNESS: THE BLACK CATHOLIC EXPERIENCE (M. Shawn Copeland ed., 2009); NANCY L. EIESLAND, *THE DISABLED GOD: TOWARD A LIBERATORY THEOLOGY OF DISABILITY* (1994); JONATHAN Y. TAN, *ASIAN AMERICAN THEOLOGIES* (2008); *FROM THE HEART OF OUR PEOPLE: LATINO/A EXPLORATIONS IN CATHOLIC SYSTEMATIC THEOLOGY* (Orlando O. Espín & Miguel H. Díaz eds., 1999).

and implement the laws of our nation. This preferential *option for the legally and religiously marginalized*, if I may be allowed to coin this phrase, provides a new opportunity and a new public lens from which to build public consensus. Their views have often been unrepresented, underrepresented, or neglected in our courts.

Since the late 1960s, individual Christian churches, other religious bodies, and, most recently, the Catholic Church in the figure of Pope Francis, have made a more conscientious effort to protect the marginalized and oppressed and defend their individual conscience and human dignity.<sup>55</sup> Following this historical consciousness and embracing an integral ecology of human rights requires that we work to build bridges between advocates of religious freedom, on the one hand, and all other advocates of human rights on the other. This means that the entities of the state, the Church, and society, entities where voices of Catholics are often encountered, must work together for the benefit of all.

The Catholic axiom affirming subsidiarity still holds within this newly acquired historical option for the marginalized: “as much religious freedom as possible; only as much restriction as necessary to protect the public order.”<sup>56</sup> But an equally important, and sometimes neglected Catholic social teaching is also the principle of solidarity, especially solidarity with the “indecent,” the “lynched,” the “undocumented” of history—those who suffer marginalization.<sup>57</sup> In situations where tensions arise between Church authorities and the law and in matters concerning persons who experience marginalization within the Church and society, the Church would be well served to follow the example of Murray who argued that Pope Pius XII’s teaching “goes much further [than affirming religious diversity] when he flatly states that ‘in certain circumstances God does not give men any mandate . . . to impede or to repress what is erroneous and false.’ The First Amendment is simply the legal enunciation of this papal statement.”<sup>58</sup>

In this case, this mandate and the respect for religious freedom ought to apply *ad intra* with respect to the Church and its institutional exercise of religious freedom.

Society’s conscience related to fundamental human rights associated with marginalized communities continues to grow and expand. At the

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55. On liberating theologies and their emergence in response to the cry of the “poor,” where being “poor” means human oppression in various manifestations, see generally MIGUEL A. DE LA TORRE, *INTRODUCING LIBERATIVE THEOLOGIES* (2015).

56. See Hollenbach, *supra* note 41, at 143 (discussing this general principle in the context of religious liberty as empowerment).

57. On the principle of subsidiarity, see Gregorio Guitán, *Juan XXIII y la encíclica Pacem in terris: La relación entre bien común y subsidiaridad*, 46 *SCRIPTA THEOLOGICA* 381, 381–99 (2014).

58. MURRAY, *supra* note 3, at 73–74.



same time, polarization seems to grow between advocates of religious freedom and those favoring nondiscrimination laws. Because of this dichotomy, there is today a great urgency to bridge the two sides and to use the defense of religious freedom as an opportunity to defend other basic human rights. The dismissal of LGBTQ persons from religiously affiliated institutions, including Catholic institutions, and recent court rulings in this area offer examples of how religious freedom and nondiscrimination principles have not achieved just resolution in American society.<sup>59</sup> The Church is not a monolithic institution. Among other areas, there is great pluralism of religious experience and theological perspectives regarding the controversial debates surrounding human sexuality and reproductive rights.<sup>60</sup> But this religious and theological diversity, which concerns the individual consciences of millions of Americans, has yet to make its impact on court rulings.

Murray was able to see that the agent and bearer of political power was no longer the state, but now, that agency belonged to the citizen and Christian (*civis idem et Christianus*).<sup>61</sup> But citizen-Christians come in great varieties, belong to different Christian churches and political parties, and differ with respect to their communally, ecclesially, socially, and religiously informed consciences. Notwithstanding this pluralism, all of them, as well as those who identify with other religious traditions, no religious tradition, and even those who are not citizens, deserve equal

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59. See, e.g., *Collette v. Archdiocese of Chi.*, 200 F. Supp. 3d 730 (N.D. Ill. 2016) (ruling against a director of worship and music that claimed he was fired for intending to marry male partner); Duaa Eldeib, *Court Rules Against Gay Man Who Sued Catholic Church Over Firing*, CHI. TRIB. (June 8, 2017, 7:07 AM), <http://www.chicagotribune.com/news/local/breaking/ct-catholic-church-gay-employee-lawsuit-met-20170607-story.html> (dismissing claim of a man married to another man); *Demkovich v. St. Andrew the Apostle Par.*, No. 1:16-CV-11576, 2017 WL 4339817 (N.D. Ill. Sept. 29, 2017) (finding in favor of the Church on an employment discrimination claim based on sexual orientation). See also Joy P. Waltemath, *Ministerial Exception Nixes Married Gay Music Director's Discriminatory Discharge Claims*, EMP'T L. DAILY, <http://www.employmentlawdaily.com/index.php/news/ministerial-exception-nixes-married-gay-music-director-discriminatory-discharge-claims/> (last visited Oct. 30, 2018) (explaining the holding of *Demkovich*); *Thorson v. Billy Graham Evangelistic Ass'n*, 687 N.W.2d 652 (Minn. Ct. App. 2004) (affirming the dismissal of claim by a woman arguing she was terminated because she was a lesbian); *Doe v. Lutheran High Sch.*, 702 N.W.2d 322 (Minn. Ct. App. 2005) (affirming the dismissal of an employment discrimination claim of a pastor and teacher arguing his religious high school fired him after he disclosed he was gay); *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350 (Minn. Ct. App. 2004) (dismissing state human rights claims filed by a discharged bisexual music director).

60. See generally CHARLES E. CURRAN, *CATHOLIC MORAL THEOLOGY IN THE UNITED STATES: A HISTORY* (2008).

61. See Charles E. Curran, *The Role of the Laity in the Thought of John Courtney Murray*, in JOHN COURTNEY MURRAY & THE GROWTH OF TRADITION, *supra* note 21, at 241, 250, 253 (analyzing the state and human person as a dyarchy over the First Amendment and recognizing in the human person a spiritual power that stands above it).

protection under the law. State and religious institutions have an ethical obligation to respect the right of persons to assume responsibility for their self-actualization, guarding themselves against any form of external coercion. All citizens deserve the right to be protected against threats that undermine this God-given capacity to risk one's whole existence in the process of self-actualization and becoming a creature alive for the greater glory of God (*ad majorem Dei gloriam*).

The state must respect religious expressions and beliefs, and not just the freedom of worship. And the Church in turn needs to become ever more cognizant and respectful of the pluralism of its citizen-believers. While Murray would surely stand on the side of conscience, and yes, a conscience formed by the Church, our contemporary notions of Church are more complex, more historically informed, more dynamic, and more inclusive, moving beyond the institutional dimension.<sup>62</sup> Perhaps more than ever before, the people of God, exercising their *sensus fidelium*, have informed their consciences with respect to issues of religion and religious freedom.<sup>63</sup> Thus, within our historical context, it is not only the state that must be cautioned against interfering on matters of conscience, but, in some cases, religious institutions and their representatives must also be cautioned. Clearly, in defense of human dignity and conscience and against the abuse of religious freedom, the very document that Murray steered into official Church teaching, *Dignitatis Humanae*, affirms that society “has the right to defend itself against possible abuses committed on the pretext of freedom of religion. It is the special duty of government to provide this protection.”<sup>64</sup>

While the Church certainly has much to contribute and teach the world, particularly with respect to human dignity and fundamental human rights, the Church, which exists in society, can also learn much from society.<sup>65</sup> A number of Murray's followers might agree with me that all issues of discrimination, whether religious or cultural in nature, are matters of public order. They are also issues that the Church needs to persuasively

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62. See Avery Dulles's classic work, AVERY CARDINAL DULLES, *MODELS OF THE CHURCH* (2002) (deriving six major approaches from the writings of contemporary Protestant and Catholic ecclesiologies). See also ORLANDO O. ESPÍN, *IDOL & GRACE: ON TRADITIONING AND SUBVERSIVE HOPE* (2014) (proposing a theological approach that draws out the subversive approach of the gospels and the role of the marginalized in passing along the Christian message).

63. On the *sensus fidelium*, see ORLANDO O. ESPÍN, *Tradition and Popular Religion: An Understanding of the Sensus Fidelium*, in *THE FAITH OF THE PEOPLE: THEOLOGICAL REFLECTIONS ON POPULAR CATHOLICISM* 63 (1997).

64. Pope Paul VI, *Dignitatis Humanae*, *supra* note 1, para. 7.

65. On human dignity, see Pope Paul VI, *Gaudium et Spes*: Pastoral Constitution on the Church in the Modern World paras. 12–22 (Dec. 7, 1965), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html). On how the Church learns from the world, see *id.* at para. 44.

address within a pluralistic society. There is an urgent need for public consensus and just adjudication in legal processes concerning the defense of religious freedom, particularly where religious institutions are exempt from nondiscrimination laws that trump the exercise of individual conscience.

Murray appealed to natural law as a way to argue for the renewal of the American public consensus.<sup>66</sup> In the spirit of Murray, we need a new consensus that relies on an “ordering of reason,” as Thomas Aquinas would argue, but surely, a reasoning process deeply rooted in historical consciousness.<sup>67</sup> A public consensus on issues of religious freedom and nondiscrimination must be built and developed, tapping into the common and shared wisdom of various Christian communities, of those belonging to other faiths, or to no faith at all. All are equal heirs to this American experience of honoring pluralism and fostering unity out of diversity, *e pluribus unum*.<sup>68</sup> As Murray would envision, this public consensus should act as a check and balance within our democracy against any abuse of power—be it religious or secular in origin. And lastly, while an ordering of reason is essential in engaging a wide range of voices, perspectives, and opinions, *compassion* must be embraced as a way to temper polarizing and passionate conversations and agency on behalf of religious freedom and on behalf of other human rights.

Religious leaders and advocates of religious freedom have been and can continue to be a powerful force for good in society. They contribute to construct public consensus when they stand on the side of individual conscience and freedom and when they put into practice what the Church teaches with respect to human rights and dignity, regardless of the issue at hand. Singling out LGBTQ persons within Catholic institutions as the only employees whose lives must be scrutinized weakens the Church’s credibility as a voice of justice, a community of love and compassion, and a builder of public consensus.<sup>69</sup> As research evidences, “violations

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66. MURRAY, *supra* note 3.

67. See Curran, *supra* note 3, at 253 (describing Thomas Aquinas’s understanding of natural law as “ordered reason”).

68. Note that the argument Murray makes regarding the consideration of complex matters that impact the elaboration of the public consensus, which he argues lies primarily in the hands of the *studium* and wise (and not the institutional Church), while containing some value in terms of empowering the laity can also be understood as elitist. See Curran, *supra* note 61, at 255 (explaining Murray’s argument in more detail).

69. See Michael J. O’Loughlin, *Firing of L.G.B.T. Catholic Church Workers Raises Hard (and New) Questions*, AMERICA (Feb. 13, 2018), <https://www.americamagazine.org/politics-society/2018/02/13/firing-lgbt-catholic-church-workers-raises-hard-and-new-questions> (recognizing “at least 80 people have been fired from Catholic parishes, schools and other entities in cases related to sexual orientation over the past decade” and reporting on the consequential effects each instance has on the Church).

of religious freedom and agency both by governments and powerful social actors, tend to reinforce oppressive structures that marginalize, or prevent integration of, impoverished people, exploited women, migrants, ethnic and religious minorities and outcasts.”<sup>70</sup> But the Church can undermine this fundamental human right when it relies on the ministerial exception as a way for religious institutions to dismiss individual persons whose views run counter to its official religious teachings. Within an integral ecology of rights, all human rights must be protected.

We know from the recent and controversial ruling in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* that more conversations are needed in matters regarding faith and public order.<sup>71</sup> At present, courts lack the ability to consider the diversity of religious perspectives within the Church and society. Appeals to the ministerial exception need to be carefully thought out so as not to endanger the value of human conscience. Because legal precedent favors religious institutions and not individual religious persons, the court’s major rulings so far leave little room to honor the religious and dissenting views of individuals, their religious freedom, and their consciences. Change must occur if we are to embrace the option for the legally and religiously marginalized. This difficult and oftentimes polarizing subject must be navigated within the courts, especially when defending the religious freedom associated with religious institutions comes into conflict with defending other legally recognized human rights associated with marginalized voices and communities.

This dilemma requires well-reasoned and compassionate voices to address the following questions: Whose conscience prevails when tensions between religious and social values ensue? Is it the institutionalized conscience related to the religious body represented by its official leaders, the informed conscience of individuals shaped by religious and/or socio-political perspectives, or the conscience of democratically elected political bodies and its leaders charged with preserving the common good? Are the courts obliged by legal precedent to take the side of the religious freedom of the institution or does our legal system provide room to find ways to protect the religious freedom of individuals in the spirit of John Courtney Murray with respect to official

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70. See Allen D. Hertzke, *Religious Agency and the Integration of Marginalized People*, in *TOWARDS A PARTICIPATORY SOCIETY: NEW ROADS TO SOCIAL AND CULTURAL INTEGRATION* 499, 499–529 (Pierpaolo Donati ed., 2018) (commenting on the “massive repression of . . . empowering religious agency” and explaining how “religious discrimination serves as a major driver of marginalization in numerous societies”).

71. See generally *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

Roman Catholic teaching on religious freedom? How can the common good best be served when tensions between religion, state, or any group within society occur? And how can the constitutional rights of *all* human persons within a democracy be protected, even while balancing institutionally religious and individually religious held values?

In transitioning from “error has no rights” to only people—not ideas—have rights, Murray set into motion a religious ethos and teaching that has yet to be fully realized.<sup>72</sup> Perhaps the time has come to consider, without losing sight of the social and relational nature of human persons, when institutional religious rights need to be legally checked in favor of particular subjects to prevent the erosion of the very religious values and freedom of conscience that these institutions rightly engendered and defend within society. Faithful to American democracy, the courts must continue to rule in favor of upholding the Church’s religious self-expression. In turn, faithfulness to its teaching on religious freedom and conscience requires that the Church and state both deepen their understanding of our historical moment and expand support for all Christian citizens and all women and men of good will. In continuity with John Courtney Murray’s teaching on religious freedom, the Church and the courts might do well to work together to safeguard the freedom of individual conscience and thereby build public consensus around the defense of universal human dignity and human rights.

As significant as the Catholic Church’s teaching in *Dignitatis Humanae* was, this teaching remains an unfinished project. The Church’s teaching on religious freedom must necessarily continue to be updated as it engages in historically situated conversations related to human rights and dignity. If the Church—institutionally speaking from the level of international relations or locally speaking from the perspective of any given democracy like ours—is to be judged as a credible and valuable religious voice in the conversation about human rights issues, respected in its right to freely express its religious convictions as an institution, and an equal partner in the construction of the common good, it must be willing not only to share with the world its religious wisdom as an “expert humanity.” Its leaders must also be willing to receive and deepen this understanding of humanity by engaging the world and people’s concrete realities, whether these individuals come from the faithful or from the world that shapes the Church’s existence. Just like it embraced worldly and American wisdom in *Dignitatis Humanae*, the Church can continue

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72. MURRAY, *supra* note 3, at 73–74; see also MCCLORY, *supra* note 6, at 8 (analyzing the difference between the American and European approaches to “freedom of religion” and “separation of church and state”).

to dialogue with our particular cultural and American values so as to deepen its own religious consciousness and its advocacy on behalf of human rights and the dignity of all persons.<sup>73</sup>

As the United States ambassador to the Holy See, I witnessed the tensions that often emerged between religiously and socio-politically motivated values in efforts to defend basic human dignity, human rights, and religious freedom of various communities, especially for the tens of thousands of Christians and members of other minority groups that have been displaced from their lands as a result war and violence. The same appeal to religious freedom, human rights, and conscience that diplomats invoke at the international relations level applies at the level of national relations in efforts to defend underrepresented and marginalized communities. If Murray teaches us anything, it is that even men and women who disagree with the official teaching of the Church on any given issue can still love the Church enough to change its teaching for the sake of advancing the dignity of all.<sup>74</sup> Making space for difference, domestically and internationally, is a worthy civic cause and a God-given call to build public consensus around issues that concern the common good.<sup>75</sup>

A Christian's first duty is to seek and act upon God's liberating grace, whether that grace is found within the Church, within society, or, even more basically, within the wisdom of daily living offered through countless men and women who struggle on behalf of human rights and dignity. The end of the human being and its achievement, as Murray rightly argued, is transcendent and supernatural, but this achievement is truly *a human achievement*.<sup>76</sup> Quoting Aquinas, Murray argues, "Grace perfects nature, does not destroy it."<sup>77</sup> Indeed, because grace grows in history, Christ's body is "*a-building* here in time."<sup>78</sup>

Murray's words offer the Church a powerful reminder that defending human dignity with respect to any human person or community within our democracy is never an action contrary to the mission of the Church.

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73. Pope Paul VI, *Dignitatis Humanae*, *supra* note 1.

74. See MCCLORY, *supra* note 6, at 26 (comparing Murray with Galileo, recognizing "Galileo is very much in the tradition of other responsible dissenters: those who tried to open questions that appeared to have been settled long ago, who sought to do so without contradicting the foundations of religious faith, and who in the process made sacrifices").

75. See JONATHAN SACKS, THE DIGNITY OF DIFFERENCE: HOW TO AVOID THE CLASH OF CIVILIZATIONS 53 (2002) ("God, the creator of humanity, having made a covenant with all humanity, then turns to one people and commands it to be different *in order to teach humanity the dignity of difference*").

76. MURRAY, *supra* note 3, at 176–77.

77. *Id.* at 176.

78. *Id.* at 177 (emphasis added).

Understood from Christian and Thomistic theological perspectives, the social challenges we face are not simply concerns of the state but are also issues that concern faith and the development of doctrine. Building peace and public order is in full continuity with the ethical demands of building Christ's body. The business of the public square is the business of the Church. Our central task today is "to consider the question of religious freedom from a different perspective, to ask the questions about it in a different way and by taking into consideration different premises and new circumstances."<sup>79</sup> In so doing, we might remain faithful to Murray's methodology, allowing public consensus to build between advocates of religious freedom and advocates of nondiscrimination laws so as to advance an integral ecology of human rights.

Therefore, we pay tribute to Murray best not by repeating his answers—that would entail the four doctrinal fallacies of fixism, archaism, misplaced abstractness and anachronism—but by raising again his question: what are the exigences of human dignity—particularly regarding the religious dimension of the person—given present circumstances?<sup>80</sup>

#### CONCLUSION

When Father Vincent McCormick, who was acting upon orders from the Holy Office, delivered the blow to Murray that he was being silenced, Father McCormick said, "I suppose you may write poetry. Between harmless poetry and Church-State problems, what fields are taboo I don't know." As a way to maintain the link between the exercise of religious freedom and the exercise of human conscience and to draw attention to our historical moment and the preferential option for the poor and marginalized, I will end my reflections with a poem written by Reinaldo Arenas. Arenas was a Cuban exile in the United States who devoted much of his energy to writing "harmless" poems that equally challenged various faces of human oppression and lifted the consciousness of various marginalized persons and communities. He suffered from AIDS and died on December 7, 1990. In his poem entitled *Niño Viejo* (Old Child), he reminds us of the marginalized and forgotten child that lives in our midst whose fundamental human dignity deserves to be recognized. Upholding human conscience and dignity is truly the business of the laws in our land and the business of any religion, including the Roman Catholic Church:

I am that child with the round, dirty face  
 who on every corner bothers you with his  
 "can you spare a quarter?"

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79. HUDOCK, *supra* note 5, at 172.

80. Whitmore, *supra* note 23, at 171.

I am that child with the dirty face  
no doubt unwanted  
that from far away contemplates coaches  
where other children  
emit laughter and jump up and down considerably

I am that unlikeable child  
definitely unwanted  
with the round dirty face  
who before the giant street lights or  
under the grandames also illuminated  
or in front of the little girls that seem to levitate  
projects the insult of his dirty face

I am that angry and lonely child of always,  
that throws you the insult of that angry child of always  
and warns you:  
if hypocritically you pat me on the head  
I would take that opportunity to steal your wallet.

I am that child of always  
before the panorama of imminent terror,  
imminent leprosy, imminent fleas,  
of offenses and the imminent crime.  
I am that repulsive child that improvises a bed  
out of an old cardboard box and waits,  
certain that you will accompany me.<sup>81</sup>

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81. Reinaldo Arenas, *My Lover the Sea*, POEMHUNTER.COM, <https://www.poemhunter.com/poem/my-lover-the-sea-2/> (last visited Oct. 30, 2018).