



2018

## The Right to Religious Freedom - A Theological Comment

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### Recommended Citation

Haker, Hille. The Right to Religious Freedom - A Theological Comment. *Loyola University Chicago Law Journal*, 50, 1: 107-136, 2018. Retrieved from Loyola eCommons, Theology: Faculty Publications and Other Works,

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## The Right to Religious Freedom—A Theological Comment

*Hille Haker, PhD\**

*Religious freedom is too important a right to be politicized. Religions have an important role to play in the public sphere and are an indispensable voice in ethical conflicts of different kinds. Therefore, religions are necessarily political. But this does not mean that they should follow a political theology which claims that only those laws are valid that concord with the natural and, ultimately, divine law. I analyze the theological context of the religious freedom debate in the twentieth century, adding a theological-ethical analysis to the legal interpretations. I argue that the moral principle of dignity and the right to freedom is not only a legal right that creates privileges but a moral right that comes with responsibilities. Theologically speaking, the legally granted right to religious freedom must be interpreted in view of one's religious tradition, and Christianity, among several other religions, prioritizes those who are most discriminated against and morally injured in their societies. Christian ethics entails the responsibility to respect and protect the needs and rights of others. Its morality is not rooted in an objective order but in the gift of human freedom, which calls moral agents to respect the moral freedom and moral agency of others as one's own moral freedom.*

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#### INTRODUCTION

Every time I cross the border to the United States, I thank God I am a legal immigrant, white, and a citizen of the European Union and Germany, coming from a country and entering another where I expect my rights to be protected. The laws of the land may in part differ from the European ones, and even clash with some of my religious values and convictions. But since morality and positive laws never entirely coincide, the laws of a nation-state challenge me to reevaluate my convictions as much as I will challenge the rightness of some of the United States' laws.<sup>1</sup> Our identities entail multiple facets, mediated by the many social, cultural, religious, and political contexts that shape our lives. Everyone must navigate multiple identities in contexts of plural values and norms.<sup>2</sup>

At the turn of the century, philosophical and theological ethicists, together with political and social theorists, debated social and cultural transformations spurred by globalization and new transnational economic and cultural constellations, new technologies, the deregulation of the economic sector, and international treaties that shape international cooperation.<sup>3</sup> But international terrorism motivated new forms of war a few years into the new millennium, the collapse of the financial markets caused a global economic crisis, and the recent rise of populism resulted

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1. For example, the abolition of and stance against the death penalty is a precondition for membership in the European Union and regarded as a centerpiece of European values. *See, e.g., EU Strongly and Unequivocally Opposes Death Penalty*, EUROPEAN EXTERNAL ACTION SERV. (Oct. 10, 2017, 10:10 AM), [https://eeas.europa.eu/delegations/world-trade-organization-wto/33622/eu-strongly-and-unequivocally-opposes-death-penalty\\_en](https://eeas.europa.eu/delegations/world-trade-organization-wto/33622/eu-strongly-and-unequivocally-opposes-death-penalty_en).

2. *See generally* KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (2005).

3. *See* BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* 250–377 (1995) (discussing the debate over social, political, and legal changes arising from increasing globalization).

in a radically changed international political landscape. The wave of nationalism in Europe, Asia, and the United States has pushed transnational problems such as global hunger, global poverty, global migration, and climate change to the background; instead, more and more countries debate their national and cultural identity.<sup>4</sup> While my most fundamental religious conviction may be captured in Pope Francis's call to "care for our common home,"<sup>5</sup> this is not how the religious freedom debate is currently being shaped in the United States. In the following, I will contextualize the current religious freedom debate in three steps: first, I will explain the return of religion in the public sphere;<sup>6</sup> second, I will attend to the historical context of the religious freedom debate;<sup>7</sup> and third, I will address the politicization of religion, which includes my comments on Leslie Griffin's analyses of the current lawsuits in the United States.<sup>8</sup>

### I. RELIGION IN THE PUBLIC SPHERE

In modern societies, which are, by definition, pluralistic with respect to moral values and religions, any religion is granted religious freedom or liberty. In the public sphere, however, religious individuals or institutions must accept that they act as one voice among others, which raises the question of *lived religions* in societies that are shaped by the pluralism of values and forms of life. Some Christian groups in the United States, however, see their moral convictions under threat by a society that has moved in another direction than the proclaimed Christian ethics. Catholic bishops, following the papal teachings of John Paul II, which were widely rejected by many Catholic ethicists as a step behind the Vatican II Council,<sup>9</sup> refer to the authority of the Magisterium of the Catholic Church in moral questions. Furthermore, they hold that divine

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4. This is most evident in the European Union but also, for example, in India. *See generally* Akeel Bilgrami, *Reflections on Three Populisms*, 44 PHIL. & SOC. CRITICISM 453 (2018) (discussing the rise of populism in the United States, Great Britain, and India). For an international analysis of this recent transnational debate, see generally POPULISM IN EUROPE AND THE AMERICAS: THREAT OR CORRECTIVE FOR DEMOCRACY? (Cas Mudde & Cristóbal Rovira Kaltwasser eds., 2012).

5. *See generally* Pope Francis, *Laudato Si'*, On Care for Our Common Home (May 24, 2015), [http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco\\_20150524\\_encyclica-laudato-si.html](http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_encyclica-laudato-si.html) [hereinafter *Laudato Si'*].

6. *See infra* Part I.

7. *See infra* Part II.

8. *See infra* Part III; *see generally* Leslie C. Griffin, *Religious Freedom, Human Rights, and Peaceful Coexistence*, 50 LOY. U. CHI. L.J. 77 (2018).

9. *See generally* Pope John Paul II, *Veritatis Splendor* (Aug. 6, 1993), [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_06081993\\_veritatis-splendor\\_ge.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_ge.html).

truth is the ultimate authority that must guide any political order.<sup>10</sup> It echoes an understanding of theology that underlies the “political theology,” first coined in the legal writings of Carl Schmitt, who used theology as a metaphor for the quasi-theological legitimization of the secular state.<sup>11</sup> For Schmitt, the reference to the divine foundation of morality was a metaphor for an (unaccounted) normative authority of the state, pointing beyond the positive law.<sup>12</sup> Today, in contrast, a political-theological movement has reemerged *within* Christian groups who, at the same time, hold powerful positions in the government and/or courts: they strive to reinterpret the way that the separation of church and state is spelled out. The current court cases reveal the tensions that have always existed in this arrangement but today reemerge under the banner of religious freedom. Thus, the right to religious freedom may be interpreted either as one right among other rights, determining how religious *and* nonreligious groups are to navigate the different facets of their identities in the civil sphere, or as the *primary* right that comes with the moral authority to reject the legitimacy of certain laws for vast numbers of citizens, religious and nonreligious alike.

#### A. Religion in the Civil Sphere

Religion, we have learned from the discourse of “religion in the public sphere” of the last decades, is never merely a private affair.<sup>13</sup> But whatever religion’s role in the public may be, we need to be aware that the public discourses are dominated by those who have access to media and controlled by those who are visible and audible due to their financial, political, or social power. In this situation, the question is how civil societies can take on the political-ethical task of social integration. In a surprising acknowledgment of religion’s role in the public sphere, philosopher and social theorist Jürgen Habermas has raised this question since the early 2000s.<sup>14</sup> He takes religions’ critique of political liberalism seriously, namely that religions have been pushed too much into the private sphere, denying them their rightful public voice in the civil public

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10. See *infra* Part II.

11. See generally CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (George Schwab trans., MIT Press, 1985) (1922).

12. See *id.* at 36–52 (discussing divine morality and its connection to vast monarchical and executive power).

13. See generally JUDITH BUTLER ET AL., THE POWER OF RELIGION IN THE PUBLIC SPHERE (Eduardo Mendieta & Jonathan VanAntwerpen eds., 2011).

14. See, e.g., JÜRGEN HABERMAS, BETWEEN NATURALISM AND RELIGION: PHILOSOPHICAL ESSAYS 114–47 (Ciaran Cronin trans., Polity Press 2008) [hereinafter HABERMAS, BETWEEN NATURALISM AND RELIGION]; JÜRGEN HABERMAS ET AL., AN AWARENESS OF WHAT IS MISSING: FAITH AND REASON IN A POST-SECULAR AGE 15–23 (Ciaran Cronin trans., Polity Press 2010) [hereinafter HABERMAS, AN AWARENESS OF WHAT IS MISSING].

sphere. While Habermas is mostly interested in establishing a counter-force to the unaccounted for functional systems such as the financial markets, a new scientific “naturalism,” and private systems that may well increase social disintegration,<sup>15</sup> his turn to religion offers one possible account for the public role of religions. Regarding the formation of new ideas of social integration that must be transnational rather than national, he renders religious voices not only *acceptable* in the public sphere but *indispensable*; they may provide the sources to keep alive questions which otherwise may be buried under the weight of instrumental reason.<sup>16</sup> This means: rather than regarding religion’s assumed *idiosyncratic rationality* as a *threat* to a democratic state, Habermas argues that the public voice of Christianity is especially needed today, because Christianity claims a specific “awareness of what is missing.”<sup>17</sup> Explicitly taking up the New Political Theology of Johann Baptist Metz, Habermas agrees that theology may remind society of what may be lost “in the face of growing and disarming systemic strains on the social integration of our political communities.”<sup>18</sup>

And indeed, in his *New Political Theology*, deliberately juxtaposed to Carl Schmitt’s political theology, Metz insisted on the connection between Christian theology and political ethics.<sup>19</sup> Theology, he argued, must *resist* the refusal to attend to suffering, and *remember* the duty to stand in solidarity with those who suffer or, put differently, with those who are the victims of a social order that throws them into oblivion.<sup>20</sup> Religious freedom, turned positively, would then mean—at least in the case of the Christian religion—spelling out the practical and political responsibility, addressing anybody whose dignity and rights are violated. In contrast to this understanding of the public role *and* political ethics of theology, what we observe in the current debate on Christianity’s freedom of religion is an identity politics pursued by Christian groups, aimed at defending a privileged status of one particular religion.

In the civil sphere of public life, however, the reality of lived religions and nonreligious life forms requires tolerance as much as mutual respect among people who all share (or should share) the foundational value of

15. See generally HABERMAS, BETWEEN NATURALISM AND RELIGION, *supra* note 14.

16. HABERMAS, AN AWARENESS OF WHAT IS MISSING, *supra* note 14, at 15–23.

17. See Jürgen Habermas, “The Political”: *The Rational Meaning of a Questionable Inheritance of Political Theology*, in THE POWER OF RELIGION IN THE PUBLIC SPHERE, *supra* note 13, at 15–28 (discussing the legitimizing effect of religious discourse on political actions).

18. *Id.* at 23.

19. JOHANN BAPTIST METZ, ZUM BEGRIFF DER NEUEN POLITISCHEN THEOLOGIE 1967–1997 (1997) [hereinafter METZ, NEUE POLITISCHE THEOLOGIE]; see also JOHANN BAPTIST METZ, FAITH IN HISTORY AND SOCIETY: TOWARD A PRACTICAL FUNDAMENTAL THEOLOGY (J. Matthew Ashley trans., 2007) [hereinafter METZ, FAITH IN HISTORY].

20. METZ, NEUE POLITISCHE THEOLOGIE, *supra* note 19.

human dignity.<sup>21</sup> Tolerance is a core value of modern societies. Paradoxically, it is not “permissive” in one crucial respect: it does *not* allow the toleration of disrespect for the human rights of others. Moral conflicts, we know, normally arise in the *interpretation*: what exactly counts as a human rights violation is not always easy to discern. It requires the willingness to listen to all sides and the willingness to come up with prudent practical solutions. Public debates often reveal that the claim of rights turns out to be more complex at second sight. As recent court cases have shown, religious groups may consider their values and identities under attack by increasingly secular societies, by states that favor one religion over another, or by legal decisions that they claim infringe upon their right to religious freedom.<sup>22</sup> But others, too, see their values and identities under attack; they do not accept that the religious freedom right as such trumps the rights of others, or any other right. In the civil sphere, it is therefore crucial to frame the moral conflicts in such a way that those whose practices (or identities) are questioned are not disrespected for the way they live, what they believe, or for the dissent within their own religion. One could call this a second-order respect and tolerance principle, which applies, too, to the right to religious freedom. Once practiced, legal resolutions may be the exception rather than the rule. When conflicts cannot be resolved informally, however, courts must sometimes judge the scope and limits of religious expressions and practices protected under religious freedom. In the cases Leslie Griffin has presented, courts must also sometimes decide whether religious rights can in fact be violated *indirectly* by the freedom of others, or even by the laws of the land.<sup>23</sup>

France often serves as an example of how conflictual the civil sphere

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21. See *infra* Part II.

22. See generally Griffin, *supra* note 8, at 85–99. Also see the multiple statements regarding, *inter alia*, the understanding of marriage the United States Conference of Catholic Bishops has issued over the years. For example:

The redefinition of legal marriage to include any other type of relationship has serious consequences, especially for religious freedom. It changes every law involving marital status, requiring that other such relationships be treated as if they were the same as the marital relationship of a man and a woman. No person or community, including religious organizations and individuals of faith, should be forced to accept this redefinition. For many people, accepting a redefinition of marriage would be to act against their conscience and to deny their religious beliefs and moral convictions. Government should protect the rights of those with differing views of marriage to express their beliefs and convictions without fear of intimidation, marginalization or unwarranted charges that their values imply hostility, animosity, or hatred of others.

Letter from the U.S. Conference of Catholic Bishops to All in Positions of Public Service, The Defense of Marriage and the Right of Religious Freedom: Reaffirming a Shared Witness (Apr. 23, 2015), <http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/defense-of-marriage-and-right-of-religious-freedom-open-letter-2015.cfm>.

23. See Griffin, *supra* note 8, at 85–99.

can become when religion is concerned. The French Constitution, established with the so-called *Laïcité* clause in 1908, was twice renewed—in 1946 and 1958.<sup>24</sup> It guarantees the “free exercise of religious worship” within the constraints of public order.<sup>25</sup> At the same time, the 1905 French Law on Separation of the Churches and State excludes any state involvement in religious affairs; Article 2 describes a French republic that “does not recognize, pay, or subsidize any [form of] worship.”<sup>26</sup> The French majority society had been rather comfortable with this arrangement, shaped above all by French intellectuals who often declared indifference or hostility towards any religion. While over the years the Catholic Church especially succeeded in negotiating multiple exemptions to the non-subsidy clause so that many religious services are in fact paid for by the state, conflicts arose when the French Muslim communities claimed the equal right to more explicit visibility in the public sphere.<sup>27</sup> France, like other countries, faced deep conflicts among its citizens. With their visibility and claim to be part of the civil/public sphere, Muslims seemed to threaten what was promoted as the French identity; it therefore came as little surprise that France passed a law, the so-called *Loi-Stasi*, in 2004.<sup>28</sup> Over the last decade or more, however,

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24. 1958 CONST. art. 10 (Fr.) (“No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order.”).

25. Loi du 9 Décembre 1905 Concernant la Séparation des Eglises et de l’Etat, art. 1 (Fr.), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000508749&dateTexte=20181003> (“La République assure la liberté de conscience. Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l’intérêt de l’ordre public.”).

26. *Id.* art. 2.

27. See, e.g., Suzanne Daley & Alissa J. Rubin, *French Muslims Say Veil Bans Give Cover to Bias*, N.Y. TIMES (May 26, 2015), <https://www.nytimes.com/2015/05/27/world/europe/muslim-frenchwomen-struggle-with-discrimination-as-bans-on-veils-expand.html>; see also, e.g., *French Muslim Student in Media Storm Over Headscarf*, AL JAZEERA (May 23, 2018), <https://www.aljazeera.com/news/2018/05/french-muslim-student-media-storm-headscarf-180523073930597.html>.

28. The *Loi-Stasi* prohibits, for example, the public wearing of the hijab, which many regarded as a response to growing societal tensions. LOI n° 2004-228 du 15 Mars 2004 Encadrant, en Application du Principe de Laïcité, le Port de Signes ou de Tenues Manifestant une Appartenance Religieuse Dans les Écoles, Collèges et Lycées Publics (Fr.), <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000417977&dateTexte=&categorieLien=id>. Yet, in recent years, efforts have been made, in France and throughout Europe, to acknowledge the social transformations of the citizenry within the European Union. See EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR INTERNAL POLICIES OF THE UNION, ISLAM IN THE EUROPEAN UNION: WHAT’S AT STAKE IN THE FUTURE? iii (2007), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2007/369031/IPOL-CULT\\_ET\(2007\)369031\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2007/369031/IPOL-CULT_ET(2007)369031_EN.pdf) [hereinafter WHAT’S AT STAKE] (“Muslim presence in Europe is an uneven and unfinished process. It is an ongoing process in the manner of all social facts. The internal articulation of European Islam is unfinished, leaders are rare, the leadership class is in the process of being constituted, the populations are still in the process of taking full possession of (their rights in) European public space, with many still rendered fragile because of the difficulty and precariousness of their entry into the space of the labour market.”).



any effort to find prudent and practical solutions to civil conflicts have been attacked especially by right-leaning Christian groups, insisting on the European cultural identity that is rooted in Christianity.<sup>29</sup> While some argue that open Islamophobia is on the rise, the European Union's report cautions against overemphasizing the rift that ignores the multiple local resolutions—the specter of “Islamization” may well be a politically motivated *narrative* that may represent less social realities than creating a particular political narrative.<sup>30</sup>

Another public discourse concerns marriage equality, but in Europe, it played out differently in different countries. In France, in January 2013, hundreds of thousands of Catholics and other supporters of a so-called traditional family model demonstrated against sexual equality and the Marriage for All Act brought forward by French President Hollande.<sup>31</sup> In Germany, Spain, and Ireland, where similar laws were passed over the last decade, no mass demonstrations of these numbers took place, although Christian groups clearly raised their voices.<sup>32</sup> When these debates were lost, religious freedom arguments appeared like arguments of last resort against a so-called “culture of death” and immorality. Just as in Europe, in the United States conflicts of cultural changes are dominated by Christian conservatives and the Christian Right who claim that their identity is under attack by an increasingly secular society.<sup>33</sup> The

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29. For a thorough analysis of the debate on “European values” and the role of the Catholic Church in this debate of the 2000s, see CHRISTOF MANDRY, *EUROPA ALS WERTEGEMEINSCHAFT: EINE THEOLOGISCH-ETHISCHE STUDIE ZUM POLITISCHEN SELBSTVERSTÄNDNIS DER EUROPÄISCHEN UNION* (2009). For a discussion of Catholicism in France and its influence on the Christian right, see Emma Green, *Religious Leaders Condemn Family Separations—but Not Necessarily Trump*, ATLANTIC (June 19, 2018), <https://www.theatlantic.com/politics/archive/2018/06/why-religious-conservatives-are-calling-out-trump-on-family-separation-at-the-border/563060/>.

30. WHAT'S AT STAKE, *supra* note 28, at 29 (“[C]ontrary to what has been written in some places, we continue to believe that there is no widespread or virulent current of ‘Islamophobia’ in Europe. There is certainly no manifestation of deep-seated hostility toward Islam, no phobic hatred. There are reactions on the surface of society and situations that are sometimes translated by manifestations of hostility.”).

31. Steven Erlanger, *Gay Marriage is Protested in France*, N.Y. TIMES (May 26, 2013), <https://www.nytimes.com/2013/05/27/world/europe/thousands-march-in-france-against-gay-marriage.html>; see also LOI n° 2013-404 du 17 Mai 2013 Ouvrant le Mariage aux Couples de Personnes de Même Sexe (Fr.), <https://web.archive.org/web/20160115130840/http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027414540&dateTexte=&categorieLien=id> (text of Marriage for All Act).

32. See, e.g., *Germany Gay Marriage Approved by MPs in Snap Vote*, BBC (June 30, 2017), <https://www.bbc.com/news/world-europe-40441712>, *Spain approves gay marriage bill*, BBC (last updated Oct. 1, 2004, 14:11 GMT). The same holds true for the 2018 referendum on abortion in Ireland. *Irish Abortion Referendum: Ireland Overturms Abortion Ban*, BBC (May 26, 2018), <https://www.bbc.com/news/world-europe-44256152>.

33. See DAMON T. BERRY, *BLOOD AND FAITH: CHRISTIANITY IN AMERICAN WHITE NATIONALISM 1–5* (2017) (analyzing the history of the claim of the “threatened identity” as part of a Christian-nationalist political narrative in the United States). This is part of a broader narrative of

United States Catholic bishops have embraced this argument in certain ways, however, arguing strictly on moral, not cultural grounds.<sup>34</sup> Same-sex marriage, they bluntly state, is *against nature*: “a same-sex union contradicts the nature of marriage: It is not based on the natural complementarity of male and female; it cannot cooperate with God to create new life; and the natural purpose of sexual union cannot be achieved by a same-sex union.”<sup>35</sup>

*B. From the Civil Sphere to Political Decision-Making*

In democracies, public debates are channeled into formal political decisions. These must seek to integrate the insights into those policies that strive to do justice to all citizens. In the best possible way, legislators will weigh the different arguments as guides of their decisions and propose laws accordingly. How exactly the transformation of public discourse into governance and laws occurs is, however, complicated when interest groups—with different powers and different channels of influence—drive the political decisions, sometimes to the point of drafting laws. The gap between the ideal of a deliberative democracy and the reality of politics is not to be underestimated.<sup>36</sup> But at least procedures are available to pave the way to operationalize democratic decision-making. Ideally, these enable citizens to hold their politicians accountable. Yet, when the public space is “occupied” or reclaimed by citizens, there is no guarantee that the citizens will indeed have peaceful cohabitation in mind.<sup>37</sup> It is for this reason that the principle of tolerance and the equal protection of rights are so central in modern democracies.

Today—in the United States as in numerous countries in Europe—political groups are on the rise who create a narrative that is

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the nationalists who were not always aligned to Christian groups but increasingly did so over the course of the twentieth century. The main line of argument of these nationalist groups is that not only Christianity but also whiteness is threatened by an increasingly multicultural society. As Damon Berry has shown, this is a pattern that has been consistently used by white nationalism groups.

34. See *Between Man and Woman: Questions and Answers About Marriage and Same-Sex Unions*, U.S. CONF. OF CATH. BISHOPS No. 3 (Nov. 2003), <http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/questions-and-answers-about-marriage-and-same-sex-unions.cfm> (“The natural structure of human sexuality makes man and woman complementary partners for the transmission of human life. Only a union of male and female can express the sexual complementarity willed by God *for* marriage. The permanent and exclusive commitment of marriage is the necessary context for the expression of sexual love intended by God both to serve the transmission of human life and to build up the bond between husband and wife.”).

35. *Id.* at No. 4.

36. See generally Habermas, *supra* note 17.

37. See SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* 38–40 (2004) (discussing the “cosmopolitan right of hospitality” and its applicability to an influx of new members of a sovereign).

decidedly populist, calling for an explicit *Christian national politics*.<sup>38</sup> It is promoted together with the narrative of a threatened identity, calling for a security politics that renders exceptional security and surveillance measures and the accompanying law enforcement measures necessary.<sup>39</sup> The narrative of a *Christian national identity politics* is not always coherent with the moral positions Christians take, especially not in the field of social ethics. For example, the Catholic Church explicitly warns against violations of human dignity and rights of Muslims, Jews, immigrants, or refugees—yet, current United States politics steers exactly in this direction.<sup>40</sup> Religious freedom, the Catholic Church claims, *obliges* Christians to speak out against Islamophobia, xenophobia, and the overall criminalization of entire groups.<sup>41</sup> The opposite is the case. The treatment of undocumented migrants and the policy of family separation and detention of asylum seekers is condemned by the United States Conference of Catholic Bishops. But instead of centering the debate on religious freedom on *these* issues and calling Christians to civil disobedience, the Catholic Church uses the religious freedom argument primarily when so-called liberal values around sexuality, gender, and family norms are at stake.<sup>42</sup> Over time, these values—rather than advocacy for social integration and religious freedom of all religions—have come to dominate the religious freedom debates.

### C. *The Return of Political Theology*

While religious groups use their right to religious freedom to promote a particular morality, political groups use religion to promote *their* agenda of an American (Christian) identity. The conflation of these two movements results in a politicization of religion under the banner of a reinterpreted political theology. “God” serves as the “ultimate” authority regarding normative claims; “God” is invoked to legitimize wars; and

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38. These are, among others, *Fidesz* in Hungary, *PiS* (“Law and Justice”) in Poland, *AfD* (“Alternative for Germany”) in Germany, the *Lega Nord* in Italy, or the *Swedish Democrats*. All of these parties support a strictly Christian-nationalist agenda.

39. Take, as one example among many, Victor Orban’s continuing attacks on the refugee policies in the EU. Aiming at a “Christian democracy” or “illiberal democracy,” he was the first to close borders and build a fence during the 2015 refugee crisis. See Shaun Walker, *No Entry: Hungary’s Crackdown on Helping Refugees*, *GUARDIAN* (June 4, 2018), <https://www.theguardian.com/world/2018/jun/04/no-entry-hungarys-crackdown-on-helping-refugees>.

40. See generally Griffin, *supra* note 8.

41. See *id.* at 82–83 (citing JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 43* (1960)) (explaining that the church considers religious freedom to be individual, and Murray’s view that “the First Amendment is not ‘articles of faith’. . . Catholics support the First Amendment as ‘articles of peace.’”).

42. See *id.* at 98–103 (explaining the church’s arguments against same-sex marriage and how those translate into Supreme Court decisions).

“God” is invoked in the so-called culture “war” about the future of the American society: a “war” between a so-called “liberal” morality and a so-called “traditional” morality.<sup>43</sup> Sexuality, gender, and family norms are the key symbols in this “battle” and religious freedom is its strongest “weapon.” In reality, the majority of Catholics in the United States do not follow, for example, the sexual morality of their church regarding contraceptives, and Catholic women who tend to consider abortion morally wrong still terminate pregnancies in similar numbers as other groups.<sup>44</sup> Regarding the social values of United States citizens, acceptance of homosexuality is on the rise, and same-sex marriage was supported by almost two-thirds of United States citizens in 2017, up from one-third in the early 2000s.<sup>45</sup> This not only means that there is a gap between the convictions and actions of Christians, and a disconnect between Church leaders and Church members who believe the sexual and gender morality of the Church is simply wrong,<sup>46</sup> but also that the issues in the debate are more *symbolic* in a *narrative* of a “war” meant to create the “frontlines” in a battle that is more created discursively than backed by social facts.<sup>47</sup> It further means that in the debates, religious freedom becomes a political instrument. Religion is no longer upheld as one right among other rights, such as the right to nondiscrimination, aimed to guarantee the peaceful cohabitation of different societal groups; it is

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43. James Davison Hunter, *The Culture War and the Sacred/Secular Divide: The Problem of Pluralism and Weak Hegemony*, 76 SOC. RES. 1307, 1318–19 (2009).

44. According to the Guttmacher Institute Report from 2016, twenty-four percent of women who terminated a pregnancy in 2014 were Catholic. JENNA JERMAN ET AL., CHARACTERISTICS OF U.S. ABORTION PATIENTS IN 2014 AND CHANGES SINCE 2008, GUTTMACHER INST. (2016), [https://www.guttmacher.org/sites/default/files/report\\_pdf/characteristics-us-abortion-patients-2014.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf).

45. See *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.

46. For some thorough arguments on sexual social ethics, see Hille Haker, *A Critical Ethics of Responsibility in the Age of HIV/AIDS and Inter-religious Dialogue*, in NEGOTIATING BORDERS: THEOLOGICAL EXPLORATIONS IN THE GLOBAL ERA 225 (Patrick Gnanapragasam & Elisabeth Schüssler Fiorenza eds., 2008); HILLE HAKER, ETHIK DER GENETISCHEN FRÜHDIAGNOSTIK: SOZIALETHISCHE REFLEXIONEN ZUR VERANTWORTUNG AM BEGINN DES MENSCHLICHEN LEBENS (2002); Hille Haker, *Catholic Feminist Ethics Reconsidered: The Case of Sex Trafficking*, 43 J. RELIGIOUS ETHICS 218 (2015).

47. Hunter, *supra* note 43, at 1314. Hunter argues that the framing of discursive narratives does not necessarily reflect the lives of their supporters; instead the narratives create what Hunter calls “weak hegemonies” that are aimed at securing the cultural domination of one group over another:

It is this effort to establish a weak hegemony that explains why so many *cultural* issues have been contested *politically*—through litigation, lobbying, and electoral politics. When factions employ these tools, they use the instrumentalities of the state in order to secure the patronage of the state, its resources and, finally, its coercive power. Needless to say, all of these instrumentalities run roughshod over the actual far-ranging plurality of religious and cultural commitment, typically reducing them to crude simplifications, often based upon the narrow interests of activists.

*Id.*

utilized as a political *weapon*. At present, conservative Christian groups use their power to undermine and undercut major legal reforms that resulted from decades-long public debates that shifted convictions in religious and nonreligious groups alike.<sup>48</sup>

I agree with Habermas that religions could be models for the social integration of pluralistic societies—but this is not what we see today.<sup>49</sup> The reason that religious freedom may indeed serve as a tool to create a “weak hegemony,” as Hunter argues, is not only cultural.<sup>50</sup> As I will ultimately argue, the right to religious freedom itself requires a departure from this *political theology*, and not every group is willing to follow through.<sup>51</sup> In the next part, however, I will focus on my own tradition, Catholicism, and examine the relationship between ethics and politics, and more precisely, ethics and divine, natural and positive law within contemporary Catholic theology in the exemplary field of religious freedom.<sup>52</sup>

## II. RELIGIOUS FREEDOM AND THE ROLE OF THE CHURCH IN MODERN STATES

By the end of the nineteenth century, the Catholic Church had lost its claims on political power in most Western countries and focused on its internal ecclesial affairs, alongside the pastoral and moral guidance of its members. The medieval and early modern tradition of Catholic natural law created a coherence between the metaphysical divine law, the natural law of reason, and the positive law of the state. But it had been replaced by the natural rights theory and the social contract that is based on consent between free agents. This political-legal epistemology of the social contract departs explicitly from the connection to divine law—however, up to the enlightenment, it emphasizes the endowment of every human being with reason and freedom that is ultimately grounded in the theology of creation.<sup>53</sup> The neo-scholastic interpretation of the nineteenth century, however, narrowed it to a metaphysical, objective order that resulted in a

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48. *This Catholic Church Policy Has Been Harming Women for 50 Years*, TONIC (July 26, 2018, 2:16 PM), [https://tonic.vice.com/en\\_us/article/594yzb/catholic-church-ban-on-birth-control-humanae-vitae](https://tonic.vice.com/en_us/article/594yzb/catholic-church-ban-on-birth-control-humanae-vitae) (“In 1970, just two years after *Humanae Vitae*, two-thirds of Catholic women were using banned methods of birth control. By 1974, 83 percent of Catholics said they disagreed with *Humanae Vitae*. And, by 2008, 98 percent of Catholic women who’d had sex said they’d used a birth control method other than natural family planning, according to the National Survey of Family Growth.”).

49. See HABERMAS, AN AWARENESS OF WHAT IS MISSING, *supra* note 14 (noting that religions could be models for the social integration of pluralistic societies).

50. Hunter, *supra* note 43, at 1311.

51. See *infra* Part II (analyzing religious freedom and the role of the church in modern states).

52. *Id.*

53. For more information on this topic, see CONCILIUM: HUMAN NATURE AND NATURAL LAW, no. 3, 2010 [hereinafter HUMAN NATURE AND NATURAL LAW].

legalistic and authoritarian “ordo-theology.” What happened in the reductionist reading of the tradition of Christian theology was, first, that divine justice was narrowed to divine law, spelled out in normative commands. Then, these commands were codified into quasi-legal, ecclesial-moral norms.

With the separation of state and religion on its way in most Western countries, the church lacked the power of enforcement, unlike laws of a state, and hence personal moral formation (or, as many would say, moral disciplining) became a central task of the church. At the same time, however, popes commented on social issues: through their encyclical letters,<sup>54</sup> a new social ethics emerged in the late nineteenth century, complementing personal moral theology. Up to the Vatican II Council (Council), it was mostly based on an ecclesial understanding of a hierarchical church, in line with the patriarchal, antidemocratic, anti-liberal political theory of the *societas perfecta* that is promoted, up to today, by the so-called traditionalists of the Catholic Church.<sup>55</sup>

Even after the Council revised the Church’s stance towards modernity and began to embrace a human rights oriented reinterpretation of the natural law tradition, Catholic conscience formation was regarded mostly in juxtaposition to the secular “modern” culture that was criticized in its striving for a seemingly unrestricted individualized “autonomy.”<sup>56</sup> In his social teachings, Pope John Paul II often referred to the secular “culture of death,” which was repeated by Pope Benedict XVI and, though with a more anti-capitalist twist, also by Pope Francis.<sup>57</sup> Yet, although the neo-scholastic interpretation of the natural law is still reflected in major parts of the church’s moral theology, it also reflects a particular *political theology* that was never entirely overcome in the Catholic Social Teaching either. *Dignitatis Humanae* is one of the (many) documents of the Council that symbolize the change in the 1960s; it therefore matters to attend to the tensions within the document while not overlooking what it tried to achieve.

#### A. *Dignitatis Humanae*

*Dignitatis Humanae, On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious (DH)* accepts religious

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54. *Compendium of the Social Doctrine of the Catholic Church*, PONTIFICAL COUNCIL FOR JUST. & PEACE para. 8 (2004), [http://www.vatican.va/roman\\_curia/pontifical\\_councils/justpeace/documents/rc\\_pc\\_justpeace\\_doc\\_20060526\\_compendio-dott-soc\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html).

55. An important figure in this group, Cardinal Gerhard Ludwig Müller, became the Prefect of the Congregation of Faith in 2012, leaving the office in 2017.

56. See, e.g., Pope John Paul II, *Evangelium Vitae* (Mar. 25, 1995), [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html) [hereinafter *Evangelium Vitae*].

57. See, e.g., *Laudato Si'*, *supra* note 5.

pluralism as the context in which religious freedom is spelled out.<sup>58</sup> The overall goal is to ensure that people and groups, religious and nonreligious, can live together in peace, working for the common good.<sup>59</sup> This aim of peaceful cohabitation and cooperation for the common good coincides with the purpose of the secular state according to modern political theory.<sup>60</sup> It means that no church or religious group can claim to be, as Leslie Griffin states, “a valid legal or political ideal.”<sup>61</sup> *DH* does argue, however, that the state has a particular *duty* regarding religion: it must secure individuals’ freedom of religion and religious institutions’ freedom of religion.<sup>62</sup> It must not interfere with the church’s truth claims and/or individuals’ expressions of conscience.<sup>63</sup>

Furthermore, 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. However, government is not to act in an arbitrary fashion or in an unfair spirit of partisanship. Its action is to be controlled by juridical norms which are in conformity with the objective moral order. These norms arise out of the need for the effective safeguard of the rights of all citizens and for the peaceful settlement of conflicts of rights; the need for an adequate care of genuine public peace, which comes about when men live together in good order and in true justice; and finally, the need for a proper guardianship of public morality.<sup>64</sup>

At the Council, *DH*, drafted mostly by John Courtney Murray, was the result of modern political history since the French Revolution, in which different models of the church-state relationship had emerged in different countries. I argue that one must consider these different national constellations in order to understand the debate before and during the Vatican II Council. After all, just as Murray reflected upon the American arrangement, other participants, too, came to the deliberations with their own national experiences.<sup>65</sup> Given the dominance of European participants at the Council, it may be possible to discern several different

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58. Pope Paul VI, *Dignitatis Humanae*, Declaration on Religious Freedom para. 15 (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) [hereinafter *Dignitatis Humanae*].

59. *Id.*

60. See Griffin, *supra* note 8, at 84 (noting that “people of different faiths can find *political* common ground even while agreeing to disagree about *theology*,” and explaining that Americans believe it is not the state’s duty to make faith determinations).

61. *Id.*

62. *Dignitatis Humanae*, *supra* note 58, para. 6.

63. *Id.*

64. *Id.* para. 7.

65. See generally JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION (2005).

models that reflected political realities, from the identification of faith and state to the complete severance of any ties. Seen in its historical context, the adopted model of *DH* is indeed a major achievement. One model the church knew well was France's laicist or agnostic state that severs any positive tie between the state and religions.<sup>66</sup> Here, religious freedom is strictly a negative right; it was not a model the Council could have followed without putting its major public institutions in different societies, such as schools or hospitals, at risk.

Another, albeit extreme, alternative was pursued in Franco's Spain after the Civil War that ended the short time in which Spain followed France in severing its ties to the Church; Franco returned to the nineteenth century stance that privileged the Catholic Church; the fascist state was defined as a *Catholic nation*, and during the time of the Council, Franco's dictatorship was still in place (it ended only in 1975).<sup>67</sup> Siding with Franco, the Catholics tried to regain their lost influence: "In nationalist Spain, the story of clerical support for Franco during the war is well known. Behind the rhetoric of the 'great spiritual crusade,' the Spanish Catholic Church saw an opportunity for *rechristianizing* the nation that had appeared impossible . . ."<sup>68</sup> Pastor quotes from a Franco speech affirming that Spain was a Catholic nation: "When the nations have received from God the privilege of possessing a single faith, and when they all speak the language of the true religion, no concessions can be made to error."<sup>69</sup>

A third model was the Soviet Union's declared atheism. It was a reminder of the ever-possible control of the church by the state known up to today from the experience of the Catholic Church in China, and/or the persecution of the (predominant) Christian Orthodox Church and religious minorities in Russia.<sup>70</sup> This context certainly increased the urgency to come to a resolution at the Council.

The fourth model, the United States' secular state that guarantees religious freedom under the auspices of the separation of church and state,

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66. See *supra* note 28 and accompanying text.

67. It is no secret that the Spanish clergy mostly supported Franco's regime, and it might therefore have served as the model for the course of the church in the 1960s, especially because the situation was not much different in South America. However, it would have come with the price of an ongoing intrareligious conflict between different Christian groups in several societies, as well as interreligious conflicts. For the historical context of Spain's clergy under Franco, see Eugenia Relaño Pastor, *Spanish Catholic Church in Franco Regime: A Marriage of Convenience*, 20 *KIRCHLICHE ZEITGESCHICHTE* 275 (2007).

68. *Id.* at 279.

69. *Id.*

70. See *Revelations from the Russian Archives: Anti-Religious Campaigns*, LIBR. OF CONGRESS (Aug. 31, 2016), <https://www.loc.gov/exhibits/archives/anti.html> (explaining the reactions to the Soviet Union's declared atheism by the rest of the world).



while welcoming religion in the civil and public life, ultimately emerged as the model *DH* used as background. It guaranteed both negative and positive freedom, did not privilege one religion over another, and still left enough room for the church to flourish in the civil sphere. Remembering this landscape of church-state relations at the time of the Council, I am only interested in the underlying political theology, as defined in the section above.

*DH* spells out the natural law in terms of human dignity.<sup>71</sup> But the concept itself is ambiguous, shifting between the freedom of conscience, addressed mainly as protection against any coercion by laws, and dignity that is interpreted with the authority of the Church in discerning moral truths. The following quote is an example:

For the Church is, by the will of Christ, the teacher of the truth. It is her duty to give utterance to, and authoritatively to teach, that truth which is Christ Himself, and also to declare and confirm by her authority those principles of the moral order which have their origins in human nature itself.<sup>72</sup>

In other words, the Catholic Church argues that human dignity functions as the *metaphysical* presupposition of the secular state, thus providing the legislator with a criterion to discern whether a given law is in fact “in conformity with the objective moral order”—that is, coherent with dignity spelled out as the principle of natural law.<sup>73</sup> The ambiguity regarding the natural law tradition continues up to today; it therefore looms in the background of the understanding of the church-state relationship with respect to the right to religious freedom.

### *B. Natural Law and Human Rights*

Human dignity is the core principle of Catholic ethics, and its violation requires the solidarity of the Church. In an astonishing parallel, Pope John Paul II compared the Catholic solidarity with impoverished European workers in the nineteenth century with the protection of “another category of persons . . . being oppressed” in the twentieth century—namely, the human embryo.<sup>74</sup> This priority may explain why sexual morality became

71. *Dignitatis Humanae*, *supra* note 58, para. 1.

72. *Id.* para. 14.

73. *Id.* para. 7.

74. William Levada, *Instruction Dignitas Personae on Certain Bioethical Questions*, CONGREGATION FOR THE DOCTRINE OF FAITH para. 37 (2008), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20081208\\_dignitas-personae\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html) (quoting Letter from John Paul II to all the Bishops on *The Gospel of Life* (May 19, 1991)).

Just as a century ago it was the working classes which were oppressed in their fundamental rights, and the Church courageously came to their defense by proclaiming the sacrosanct rights of the worker as person, so now, when another category of persons is being oppressed in the fundamental right to life, the Church feels in duty bound to speak out with the same courage on behalf of those who have no voice. Hers is always

such an obsession of Catholic moral theology over the last fifty years, strictly shaped in relation to the sacrament of marriage.<sup>75</sup> Contraceptives, abortion, and human embryo protection dominated the moral debates throughout the papacies from Paul VI to Benedict XVI and continued even after the devastating scandal of sexual abuse finally became public knowledge in the early 2000s.<sup>76</sup> In all these cases, human dignity is at stake. For example, the 2008 Instruction by Pope Benedict, *Dignitas Personae*, affirms Pope John Paul II's approach to reproductive medicine, identifying human embryo protection as *the* twentieth century question of Catholic Social Teaching (CST).<sup>77</sup> This is certainly a striking statement, prioritizing human embryo protection over all the other global issues *also* addressed in CST, such as hunger, poverty, migration, or climate change. By the turn of the century, the questions of gender, homosexuality, and same-sex marriage were increasingly addressed by the Church, often under the headline of "gender ideology."<sup>78</sup> The United States Conference of Catholic Bishops seems to also follow this interpretation. For example, in its statement on marriage, it referred both to the Canon Law and to the Catechism of the Church but, quite tellingly, not to the human rights framework.<sup>79</sup>

And yet, despite the ongoing presence of neo-scholastic interpretations, the natural law doctrine has been considerably reinterpreted, bringing it much closer to the human rights framework than was the case in the Magisterium's twentieth century interpretation of moral theology.<sup>80</sup> This has been documented, most importantly, in the

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the evangelical cry in defense of the world's poor, those who are threatened and despised and whose human rights are violated.

*Id.*

75. See, e.g., *Love and Sexuality*, U.S. CONF. OF CATH. BISHOPS, <http://www.usccb.org/beliefs-and-teachings/what-we-believe/love-and-sexuality/index.cfm> (last visited Nov. 22, 2018) (explaining the "gift of sexual difference" between men and women and its implications in marriage).

76. See Hille Haker, *Catholic Sexual Ethics—a Necessary Revision: Theological Responses to the Sexual Abuse Scandal*, CONCILIUM: HUMAN TRAFFICKING, no. 3, 2011, at 128. Ironically, Thomas Aquinas—otherwise quoted as "the" doctor of Catholic moral theology—only mentions abortion in passing, and even when he does, he does not distinguish between intentional and unintentional loss of pregnancy. Cf. ROBERT PASNAU, *THOMAS AQUINAS ON HUMAN NATURE* (2002).

77. See Levada, *supra* note 74, paras. 2–3.

78. "Gender Theory"/"Gender Ideology"—*Select Teaching Resources*, U.S. CONF. OF CATH. BISHOPS (Feb. 1, 2017), <http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/upload/Gender-Ideology-Select-Teaching-Resources.pdf>.

79. For a comprehensive overview of the two main interpretation lines of natural law—the "metaphysical objectivistic" interpretation and the "deontological, critical or moderate" interpretation that is aligned to the human rights tradition, drawing on the natural law tradition in Spain and Portugal, see Antonio-Enrique Pérez Luño, *Natural Law Theory in Spain and Portugal*, 1 AGE HUM. RTS. J. 1, 12 (2013).

80. See *In Search of a Universal Ethic: A New Look at the Natural Law*, INT'L THEOLOGICAL

International Theological Commission's (Commission) 2009 document.<sup>81</sup> While this reinterpretation is a much welcome move, the tension between the "ethical" paradigm and the "metaphysical" natural law paradigm still is not entirely overcome. The Commission still refers to natural law as "objective law" that responds to the order of nature, which is seen in accordance with eternal law.<sup>82</sup> The only change is that this order is now interpreted in view of human rights.<sup>83</sup> Addressing the relationship between the (moral) natural law and the positive (legal) laws issued in secular societies, the "norms of natural justice [law],"<sup>84</sup> the Commission argues, are to be directly translated into positive law; when this is the case, they are not only legally, but also morally binding:

Positive law must strive to carry out the norm of natural justice [natural law]. It does this either by way of conclusions (natural justice forbids homicide, positive law prohibits abortion), or by way of determination (natural justice [natural law] prescribes that the guilty be punished, positive penal law determines the punishments to be applied in each category of crime.) Inasmuch as they truly derive from the norm of natural justice [natural law] and therefore from the eternal law, positive human laws are binding in conscience.<sup>85</sup>

Not surprisingly, however, the Commission still grapples with the potential clashes between positive law and natural law; after all, human history demonstrates that the two do not necessarily coincide. Therefore, the Commission cautions to identify both, insisting on the superiority of the natural law over the positive law:

*The norms of natural justice [natural law] are thus the measures of human relationships prior to the will of the legislator. They are given from the moment that human beings live in society. They express what is naturally just, prior to any legal formulation. The norms of natural justice [natural law] are expressed in a particular way in the subjective rights of the human person, such as the right to respect for one's own life, the right to the integrity of one's person, the right to religious liberty, the right to freedom of thought, the right to start a family and to educate one's children according to one's convictions, the right to associate with others, the right to participate in the life of the community, etc. These rights, to which contemporary thought attributes great importance, do not have their source in the fluctuating desires of*

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COMM'N para. 34 (2009), [http://www.vatican.va/roman\\_curia/congregations/cfaith/cti\\_documents/rc\\_con\\_cfaith\\_doc\\_20090520\\_legge-naturale\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20090520_legge-naturale_en.html) [hereinafter *In Search of a Universal Ethic*] (describing the evolution of the natural law doctrine's interpretations).

81. *See generally id.*

82. *Id.* para. 35.

83. *Id.* para. 5–6.

84. *Id.* para. 92. This is an adjusted translation to the term, *lex naturalis*, used in the 2009 document.

85. *Id.* para. 91.

individuals, but rather in the very structure of human beings and their humanizing relations. The rights of the human person emerge therefore from the order of justice [law] that must reign in relations among human beings. *To acknowledge these natural rights of man means to acknowledge the objective order of human relations based on the natural law.*<sup>86</sup>

In the opposite case, they are not binding. “If the law is not just, it is not even a law.”<sup>87</sup> With this statement, the question of who has the authority to interpret the moral conformity of laws with the natural law is put back on the table. But if the core principle of the natural law tradition, reinterpreted in line with human rights, is human dignity, it is crucial to overcome the ambiguity that accompanies this concept.

### C. Human Dignity and Political Ethics

Whether today it is possible to “save” the natural law tradition in its “moderate” version is contested.<sup>88</sup> Pope Francis certainly has shifted the emphasis of human dignity from sexual morality to the major global crises, even though he faces constant attacks by “traditionalists” who, like prominent bishops in Poland, Hungary, and the United States, unsurprisingly are close to the nationalist movements in their countries who reject core values underlying liberal democracies.<sup>89</sup> I argue, however, that even Pope Francis’s understanding of his central theological concept, mercy,<sup>90</sup> overlooks the tension between the metaphysical and the ethical interpretation of Catholic morality: it still does not succeed in shifting the political theology that is tied to the neo-scholastic natural law tradition to what Antonio-Enrique Pérez Luño

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86. *Id.* para. 92 (emphasis added).

87. *Id.* para. 91.

88. See generally HUMAN NATURE AND NATURAL LAW, *supra* note 53.

89. See, e.g., Mark Hosenball, *Steve Bannon Drafting Curriculum for Right-Wing Catholic Institute in Italy*, REUTERS (Sept. 14, 2018, 4:47 AM), <https://www.reuters.com/article/us-eu-politics-bannon-catholics/steve-bannon-drafting-curriculum-for-right-wing-catholic-institute-in-italy-idUSKCN1LU176> (discussing the connection between the Dignitatis Humanae Institute and Steve Bannon); Astrid Prange, *How the Catholic Church Ties in to Poland’s Judicial Reform*, DEUTSCHE WELLE (July 24, 2017), <https://www.dw.com/en/how-the-catholic-church-ties-in-to-polands-judicial-reform/a-39809383> (discussing the close ties between PiS and clergy in Poland). Hungary’s relation to the Catholic Church is more complicated, because Victor Orban has taken control over which churches can exist in Hungary while putting his political (and financial) support behind the Catholic Church. See *Church and State in Orbán’s Hungary*, HUNGARIAN SPECTRUM (Jan. 16, 2018), <http://hungarianspectrum.org/2018/01/16/church-and-state-in-orbans-hungary/>; see also Benjamin Novak, *Churches Get Another USD 30 Million in the Run-up to the General Election*, BUDAPEST BEACON (Feb. 15, 2018), <https://budapestbeacon.com/churches-gets-another-usd-30-million-run-general-election/>.

90. His approach owes much to Walter Kasper’s book on “Mercy” from 2013. See generally WALTER KASPER, *MERCY: THE ESSENCE OF THE GOSPEL AND THE KEY TO CHRISTIAN LIFE* (William Madges trans., Paulist Press 2014) (2013).

called its “deontological, critical, or moderate” interpretation.<sup>91</sup> Rather, Pope Francis shifts the focus to a *pastoral* interpretation of norms. The problem, however, is that he thereby evades clarifying the difficult relation between natural law, natural rights, and justice. As long as the concept of mercy is formulated in analogy to the “pardoning” power of a judge, applied to the ecclesial-legal framework of Canon Law that is otherwise untouched by such acts of (pastoral) mercy, the broader ethical concept of human dignity and justice is still concealed.<sup>92</sup> The pastoral solution that Pope Francis puts forward in several areas of conflict, such as divorce, homosexuality, or the use of contraceptives, still rests upon the authority of the pope, which can easily be revised in the future.<sup>93</sup> It does not shift the emphasis from the moral authority represented by the Magisterium to a political ethics that is centered on moral freedom and responsibility for justice.<sup>94</sup>

In the Hebrew bible, however, divine justice is not first and foremost a legal term; it is also not primarily linked to the concept of a “pardoning” mercy regarding the guilt of persons.<sup>95</sup> Instead, it is linked to compassion for suffering people, as Metz has posited against Walter Kasper, who argues that both concepts can be used interchangeably.<sup>96</sup> The Hebrew term that links justice and compassion is *rahamim*, meaning the feeling of the pain of those who are suffering in the “womb” (not the heart, as in the Latin term *miser cordia*), com-compassion or suffering with those who are morally harmed, socially marginalized, or oppressed.<sup>97</sup> Divine compassion is linked as well to the rectification of injustice as to the reassurance that for any fallible human being, including those who fail to live up to their moral freedom, new beginnings are always possible.<sup>98</sup>

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91. Put in context:

I have always found it appropriate to distinguish between an ontological, dogmatic or radical Natural Law, which defends a metaphysically objectivistic order from which absolute and extemporal values may be deduced; and a deontological, critical or moderate Natural Law, which does not deny legal character to unfair Positive Law, but establishes certain criteria in order to assess such a regulation and therefore set grounds for its criticism and substitution by a just system.

Pérez Luño, *supra* note 79, at 12.

92. See Hille Haker, *Compassion and Justice*, CONCILIUM: MERCY, no. 4, 2017, at 54 (critiquing this pastoral approach).

93. See generally Pope Francis, *Amoris Laetitia* (Mar. 19, 2016), [https://w2.vatican.va/content/dam/francesco/pdf/apost\\_exhortations/documents/papa-francesco\\_esortazione-ap\\_20160319\\_amoris-laetitia\\_en.pdf](https://w2.vatican.va/content/dam/francesco/pdf/apost_exhortations/documents/papa-francesco_esortazione-ap_20160319_amoris-laetitia_en.pdf) (discussing Pope Francis’s approach to conflict within the Catholic faith).

94. See generally IRIS MARION YOUNG, *RESPONSIBILITY FOR JUSTICE* (2011).

95. See Johann Baptist Metz, *Facing the World: A Theological and Biographical Inquiry*, 75 THEOLOGICAL STUD. 23, 27 (2014) (discussing divine justice centered around compassion).

96. *Id.*

97. See Haker, *supra* note 92, at 57 (defining the Hebrew term linking justice and compassion).

98. *Id.*; cf. PAUL RICEUR, *MEMORY, HISTORY, FORGETTING* (Kathleen Blamey & David

I belong to those who depart from the natural law tradition in order to emphasize this necessary shift of the ethics framework, opening the debate to a new understanding of human dignity that is defined by vulnerable agency, compassion and justice rather than by obedience, law and mercy.<sup>99</sup> In a nutshell, the concept of dignity points to the human condition of vulnerability *and* agency; both dimensions are captured in the moral concept of dignity. On the one hand, the human condition of vulnerability renders humans susceptible to suffering caused by illness or bad luck; as social beings, however, vulnerability also renders them susceptible to moral harm by others, in acts of disrespect, shame, humiliation, and the many forms of violence against their body and personal integrity; finally, human vulnerability is increased by social states of precariousness, distributed unequally between individuals and groups.

On the other hand, human beings are defined by their agency; they are “capable human beings,” as Paul Ricœur calls it, pointing to the potency of human beings to bring about changes through their actions, to be effective and affect others.<sup>100</sup> As social beings, we are addressed and respond to others in our communications and actions. Actions, this means, are already and necessarily reactions, responses to the other or others, rendering agents “entangled in stories” that others have begun to write for them.<sup>101</sup> Human beings always start in the middle of a story, not at the beginning. Human dignity is therefore not a metaphysical concept that relates to a metaphysical order but a moral concept that relates to our situated vulnerable agency in the “here” and “now.” It correlates the needs, desires, and rights of vulnerable human beings with their responsibilities as agents. It obliges agents to respond to others in ways that mitigate their ontological vulnerability (to diseases, age-related dependencies, etc.) that avoid moral harms, and that reduce the states of precariousness.

This short summary of a complex phenomenology of vulnerable agency explains why human dignity goes far beyond the autonomy as self-centered pursuit of happiness, but also, in Kant’s term, beyond

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Pellauer trans., Univ. of Chi. Press 2004) (explaining the link between divine compassion and the rectification of injustice).

99. Hille Haker, *Political Theologies in a Post-Christian World*, in T&T CLARK COMPANION TO POLITICAL THEOLOGY 950 (Rubén Rosario-Rodríguez ed., 2019); cf. also J. M. BERNSTEIN, *TORTURE AND DIGNITY: AN ESSAY ON MORAL INJURY* (2015).

100. See PAUL RICŒUR, *THE COURSE OF RECOGNITION* 89–99 (David Pellauer trans., Harvard Univ. Press 2005) (2004) (defining “capable human beings” as having the potency to bring about changes through their actions).

101. WILHELM SCHAPP, IN *GESCHICHTEN VERSTRICKT: ZUM SEIN VON MENSCH UND DING* (Meiner 1953).

autonomy as self-legislation.<sup>102</sup> Religions articulate and reflect the human condition as a moral condition in multiple narratives that spell out human dignity as God's gift and claim to respond to this call by responding to and caring for others. Theological dignity does not change the *concept* of dignity that is spelled out in different forms as narratives or philosophical analyses; it does, however, change the embeddedness in a particular tradition and ethics. Politically speaking, the goal of any state is to enable the peaceful cohabitation of those who live within its borders, and the *same* goal holds true for the international order. A theology that rests upon dignity and justice, understood as the effort to enable everybody to live a decent life, with and for others, in just institutions, requires standing with those whose dignity is violated, and for whom a decent life is made impossible by the decisions of those who do not see them, or do not see them as relevant to their own projects.

#### D. Laws and Justice Reconsidered

The Catholic Church regards some United States laws as unjustified in the name of "natural rights of man" which must necessarily "acknowledge the objective order of human relations based on the natural law."<sup>103</sup> Among these are the death penalty, the right to abortion, or the same-sex marriage law. It does not matter right now whether one agrees with these judgments—the question is whether the generalized reference to the "objective order of human relations" suffices as the ultimate criterion to claim exemptions from the law for the reason of religious freedom.<sup>104</sup> What would happen, for example, when another religion disagreed with democracy, or the right to education for girls with the same claim of an objective order? Heiner Bielefeldt, human rights scholar and former UN Rapporteur for Human Rights, warns that a *nondiscriminatory* protection of religious freedom—meaning the protection of *all* religions—is only possible in a secular state.<sup>105</sup> It must not be viewed in the abstract but viewed strictly in concrete conflicts.<sup>106</sup> This warning, I argue, must serve as a guide to the current treatment of the religious freedom rights in the United States, because it broadens the discussion to the protection and religious freedom rights of Judaism, Islam, and all other minority religions.

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102. See generally IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary Gregor & Jens Timmerman eds., Cambridge Univ. Press 2012) (1786) (discussing autonomy as self-legislation).

103. *In Search of a Universal Ethic*, *supra* note 80, para. 92.

104. *Id.*

105. See generally Heiner Bielefeldt, *Freedom of Religion or Belief—A Human Right Under Pressure*, 1 OXFORD J.L. & RELIGION 15 (2012).

106. Heiner Bielefeldt, *Bedrohtes Menschenrecht: Erfahrungen mit der Religionsfreiheit*, 60 HERDER KORRESPONDENZ 65, 65–69 (2006).

Political decisions are, as we know, based on compromises. It is the task of practical moral reasoning, often informing social conflicts in the civil sphere, and juridical reasoning, to provide judgment that allows for justified decisions, taking into consideration the circumstances and available options. Catholic ethics can turn to its own rich tradition of contextual practical reasoning. *Reason, remembrance, docility, caution, foresight*, or the regard for *circumstances* are called middle principles that enable moral judgments that are *prudent* for a reason:<sup>107</sup> they direct the concrete normative assessments in a given situation—sometimes as concrete as a baker’s concern who does not want to bake a wedding cake for a gay couple, because he cannot tolerate their (lawful) marriage that he claims he cannot support in any way. This view presupposes that the baker indeed supports the values the gay couple holds when he treats them as his customers. But this argument misunderstands that tolerance does not accept the other’s view; rather, it respects *others* in their right to marry, because it is legal, and tolerates their views as part of the plurality and differences of values and lifestyles. There will always be values one disagrees with; the question is whether one can *tolerate* them. The laws are meant to orient citizens in this navigation, to wit, demonstrating to them which values or practices they must tolerate.<sup>108</sup>

Ultimately, however, it is the state’s responsibility to guarantee that laws are enforced so that all citizens live under the rule of law. This must be guided by the duty to treat all citizens as equal before the law. *DH* explicitly affirms this as the duty of the state.

Finally, government is to see to it that equality of citizens before the law, which is itself an element of the common good, is never violated, whether openly or covertly, for religious reasons. Nor is there to be discrimination among citizens.<sup>109</sup>

The examples Leslie Griffin provides of the current interpretations of religious freedom, however, show equality is exactly what is at stake.<sup>110</sup> It is here that the church’s claim to be the teacher of the truth, obliged “to declare and confirm by her authority those principles of the moral order

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107. These are, according to Thomas Aquinas’s *Summa Theologiae II-II*, elements of prudence; they were later used in the casuistry of moral theology. See THOMAS AQUINAS, *SUMMA THEOLOGIAE: A CONCISE TRANSLATION* 376–82 (Timothy McDermott ed., 1991).

108. This is not to say that one may not still morally disagree with a law—that is the normal process in democracies. See generally *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018). On the basis of the baker’s argument, a doctor must be able to be exempted from performing an emergency surgery for religious reasons—and even though one wants to respect conscientious objections, these cannot redefine the rules or laws of the land.

109. *Dignitatis Humanae*, *supra* note 58, para. 6.

110. See generally Griffin, *supra* note 8 (detailing numerous interpretations of religious freedom which intersect with individual rights).



which have their origins in human nature itself,”<sup>111</sup> reaffirms the objectivist position, to wit, that the *church*, not the state, is the *arbiter* of moral conflicts. The church fosters this perception (a) by using the power of its public voice and self-describing as the voice of conscience, for example, calling for a “culture of life” in a culture that is a “culture of death,”<sup>112</sup> and (b) by expanding the already granted religious exemptions from the law to ever-more areas of social life.

In these debates, theologians serve a crucial role: *first*, they must critique the priorities in the debate on religious freedom. If today Islam is the target of multiple attacks, fostered and amplified by the United States administration’s rhetoric, policies, and shifts in laws, Christians are indeed obliged, in the name of the right to freedom of religion, to speak up and stand with all those groups and individuals under attack. *Second*, theologians must contribute to the concrete theological and ethical judgments brought forward in legal cases. The natural law tradition is right in claiming that human rights, including religious freedom rights, are indeed never entirely captured by legal rights; the philosophy of law and ethics are overlapping but not identical.<sup>113</sup> The legal perspective must be constantly correlated, and potentially critiqued, by the broader moral perspective that emphasizes human dignity, now understood as vulnerable agency, and justice, starting with those whose dignity is under attack and who are facing injustices. When the church’s judgments are considered wrong for ethical reasons (as I believe they are with respect to many questions of sexual and gender ethics), Christian ethicists must speak up—and the church must listen to them in the *forum internum*. *Third*, theologians must remind the church, in its role as an authority in conscience formation, that persons’ moral beliefs are protected *theologically*, to wit, as freedom of conscience, and must be formed in view of human dignity.<sup>114</sup> *Finally*, theologians must bring to light the underlying political theology of the “traditionalist” interpretation of

111. *Dignitatis Humanae*, *supra* note 58, para. 14.

112. See generally *Evangelium Vitae*, *supra* note 56 (discussing the “culture of life” throughout).

113. For a different view, see JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* (Meir Dan-Cohen ed., 2012).

114. It should be noted that the medieval natural law tradition, too, insists on the freedom of conscience, as does the Catechism of the Catholic Church—however, it treats it in the context of an “erring conscience,” referring to the objective moral order. *Dignitatis Humanae* explicitly states:

On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of conscience. In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in a manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious.

*Dignitatis Humanae*, *supra* note 58, para. 3.

natural law that threatens not only the equilibrium between the secular state and religions but also revises the hard-won reforms of the Vatican II Council.

### III. THE POLITICIZATION OF RELIGIOUS FREEDOM

Leslie Griffin offers a pointed analysis of the current conflicts of religious freedom rights.<sup>115</sup> As she has shown, the United States Supreme Court and multiple state laws go along with arguments presented largely by the Catholic Church and several Protestant denominations, which in my view question the foundations and principles of church-state relations. Under the headline of “religious exemptions,” Christian groups promote a broad noncompliance with some laws, and they thereby tolerate discrimination of people in the name of the protection of religious freedom.<sup>116</sup> Exempting a religion (or any group) from a law that *itself* guarantees equal rights—as is the case in equal marriage law, for example—contradicts the very purpose of the law. If this is the case, *this* undermines the United States Supreme Court’s very authority: at once standing with the groups protected by the law in the name of equality *and* with the group that argues this equality violates its rights is impossible. The criticized practices—use of contraceptives, reproductive rights, and right to marry—must be accessible and open to *all* citizens, independent of their religious convictions. The principle of equality does not allow for unequal access lest it create new injustices. But because religious organizations see a conflict between the positive law and morality, they question not only the moral rightness but in fact the legality of the laws: “If the law is not just, it is not even a law.”<sup>117</sup> This, however, only holds true if there is a direct line from divine law to natural law and to positive law. In effect, religious groups try to *enforce* their own “laws”—the *moral* norms—upon their members, broadening the scope of religious exemptions ever-more to employees, students, and even the staff of companies, as Griffin shows.<sup>118</sup> In addition to conflating moral norms that are bound by freedom of conscience with enforceable laws, no state can allow a religious group to decide what counts as a legitimate law. The place for dissent is the public sphere, not the courts. In fact, the statement “[i]f the law is not just, it is not even a law”<sup>119</sup> must correctly read “if a

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115. See Griffin, *supra* note 8, at 85–91 (discussing religious exemptions and religious conflicts with law).

116. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (affirming the ministerial exception to labor law that exempts religious organizations from following certain laws when hiring and terminating ministers). For a more in-depth discussion on this topic, see Griffin, *supra* note 8, at 85–91.

117. *In Search of a Universal Ethic*, *supra* note 80, para. 91.

118. See Griffin, *supra* note 8, at 85–91.

119. See *In Search of a Universal Ethic*, *supra* note 80, para. 91.

law violates the dignity and rights of human beings in their vulnerability and agency, it cannot be just.” In this case, the conscientious objection does not refer to an abstract moral order but to the concrete violation of dignity. To answer whether a law does indeed violate the dignity and rights of others, one needs to listen to those who are most affected by it and integrate the above-mentioned middle principles and reference points of practical reasoning.<sup>120</sup>

I certainly do not want to argue that laws are always just. I agree, for example, with the Catholic Church’s position on the death penalty.<sup>121</sup> Civil disobedience may, in extreme cases, be indeed an obligation—but groups, religious or not, normally acknowledge the *transgression* of a law, bearing the legal consequences. An overly broad interpretation of the exemption clause for religious groups within the legal framework, in contrast, is an attempt to have the cake and eat it too: resisting the law of the land with the blessing of the courts. Leslie Griffin points to the multiple exemptions that demonstrate how powerful the strategic invocation of the right to religious freedom has become.<sup>122</sup> When basic rights of others are concerned, the state and its courts must, however, be sensitive in their decisions, even when they require a case-by-case consideration.

The current wave of populist nationalism is intertwined with (white) Christian identity politics, however, and this wave reveals yet another complication: political offices seem to increasingly favor one particular religious tradition, namely the Christian tradition, while discriminating against another, namely Islam. In this case, the defense of a particular religious identity in the name of religious freedom rights is, as I said, echoed by a state-driven political theology. In this vein, Attorney General Jeff Sessions introduced a Religious Liberty Task Force in July 2018, claiming an emergency of religious liberty:

A dangerous movement, undetected by many, is now challenging and eroding our great tradition of religious freedom. There can be no doubt. This is no little matter. It must be confronted and defeated. This election, and much that has flowed from it, gives us a rare opportunity to arrest these trends. Such a reversal will not just be done with electoral victories, but by intellectual victories. We have gotten to the point where courts have held that morality cannot be a basis for law; where ministers are fearful to affirm, as they understand it, holy writ from the

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120. See *supra* note 107 and accompanying text.

121. See *Catechism of the Catholic Church*, pt. 3, para. 2267, [http://www.vatican.va/archive/ENG0015/\\_P7Z.HTM](http://www.vatican.va/archive/ENG0015/_P7Z.HTM) (describing the use of the death penalty as a last resort).

122. See generally Griffin, *supra* note 8 (outlining religious exemptions in labor laws for religious institutions, for businesses refusing services due to not wanting to ratify same-sex marriage, and corporate exemptions from providing contraceptives in their healthcare plans under the Affordable Care Act).

pulpit; and where one group can actively target religious groups by labeling them a “hate group” on the basis of their sincerely held religious beliefs. This President and this Department of Justice are determined to protect and even advance this magnificent heritage.<sup>123</sup>

According to the White House website, the Trump administration has promoted religious rights aggressively.<sup>124</sup> While the website does not state it, most of the measures take up the demands of Christian groups.<sup>125</sup>

#### CONCLUSION

Religious freedom is a precious right, securing the dignity of persons and the rights of religious groups to exercise their beliefs privately, in their religious communities, and publicly. Regarding its own moral teachings, the Catholic Church that I have primarily addressed in this essay must adhere to its own principle of human dignity and human freedom. When religious groups force their beliefs or practices upon citizens, employees, clients, or patients, even though these concern rights otherwise protected by state law, they easily misinterpret this most fundamental principle and misunderstand their role in the public sphere. Moral conflicts require practical moral reasoning, based on the respect of others and tolerance of other views. One of the greatest insights of the *religious* understanding of the concept of dignity is that God-given freedom is reflected in the conscience of the moral agent; conscience, not the authority of the Church, is the ultimate reference that a person must abide by. In the Christian understanding, freedom must be the freedom of the other, independent of whether the other is a moral friend or a moral stranger.<sup>126</sup> If the positive law of nation-states and justice always

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123. Jeff Sessions, Attorney Gen., U.S. Dep’t of Justice, Remarks at the Department of Justice’s Religious Liberty Summit (July 30, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-department-justice-s-religious-liberty-summit>.

124. *See generally* *President Trump Has Been a Champion for Religious Freedom*, WHITEHOUSE.GOV (Feb. 8, 2018), <https://www.whitehouse.gov/briefings-statements/president-trump-champion-religious-freedom/>.

125. *See id.* The examples of religious freedom rights refer entirely to the rights of Christian groups; for example, to be exempted from provisions of the Affordable Care Act or abortion rights. *See id.* They mention, for example, antisemitism and/or hate crimes against Muslims, but they do not indicate that the protection of these religions’ *positive* rights are a priority, too. *Id.* In his speech announcing the Religious Liberty Task Force, Attorney General Sessions repeatedly referenced religious liberty court cases. Sessions, *supra* note 123. He said, for example: “But in recent years, the cultural climate in this country—and in the West more generally—has become less hospitable to people of faith. Many Americans have felt that their freedom to practice their faith has been under attack.” *Id.* While not mentioning one religion in particular, the whole context—and the examples—clearly points to what religion and what tradition he has in mind: “In substance, he [President Trump] said he respected people of faith and he promised to protect them in the free exercise of their faith. He declared we would say ‘Merry Christmas’ again.” *Id.* Sessions announced Archbishop Kurtz who spoke after him, welcoming the close relationship between the Trump administration and the Catholic Church. *Id.*

126. *See* THOMAS PRÖPPER, THEOLOGISCHE ANTHROPOLOGIE (2011) (explaining how, in the

coincided, legal reforms would be unnecessary. The space to politically dissent to laws is the civil sphere; the source for moral dissent is, ultimately, the moral freedom of the moral agent.

When individuals are discriminated against in their dignity or freedom, the state must intervene—and secure their rights, whether religious or nonreligious. At times, the state *must* constrain or limit the freedom rights of a religious group “in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others,” as the European Convention of Human Rights, for example, states.<sup>127</sup> All this is in line with *DH*.<sup>128</sup>

With Heiner Bielefeldt, I argue that conflicts of human rights must be addressed only in view of concrete conflicts *between* human rights.<sup>129</sup> The argument that certain lawful practices are offenses to religious values is not sufficient to be exempted from legal requirements; in fact, many people are often offended by certain laws and still need to abide by them. In many cases, religious people (or religious organizations, or the Catholic Church) are not *directly* affected in the exercise of their religion by the lives or conduct of others; while in contrast, people on the other side—women, those who identify as homosexual, transgender, or gender nonconforming—are *directly* affected by the often discriminatory tone in the discussion of gender equality and certainly by the acts and practices of members of the religious communities who condemn their practices, as if these could be separated from the agents who practice them. It is not only the task of the state but also *morally* right to protect these groups, already vulnerable to discrimination, against disrespect, misrecognition, and humiliation. Because contexts matter, their vulnerability must take priority over the remote vulnerability, for example, of a baker who wishes his customers to disappear from his world of commerce.<sup>130</sup> It may well be possible that compromises can be found with respect to certain practices; after all, this is what prudent practical moral reasoning would call for. But conflicting parties may also deliberately escalate the conflict and use their arguments strategically. It is then up to the courts—the only authority in a polity that decides on legitimate and illegitimate (not

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Christian understanding, freedom is independent of morality); cf. JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* (MIT Press 1998) (1996) (discussing the same idea from a philosophical perspective).

127. See EUROPEAN CONVENTION ON HUMAN RIGHTS art. 9 (noting that the determination whether a limitation is necessary or legitimate is the responsibility of the courts).

128. See generally *Dignitatis Humanae*, *supra* note 58.

129. Bielefeldt, *supra* note 106, at 65–69.

130. The same attitude is reflected when members of Congress or the Trump administration are publicly shamed and denied services—for example, in restaurants. They should not be granted the freedom “not to serve” a customer because of their beliefs either. Civil peace does not rest upon agreement; it rests upon the respect and tolerance of others.

necessarily just or unjust) claims—to secure the peaceful cohabitation among groups with different values.

Let me use a spatial metaphor to make a final point: the public space is never empty; it is always already “occupied” and filled with many voices that compete in their narratives of “good” and “bad” visions of life, or “right” and “wrong” practices.<sup>131</sup> Religious freedom—as any freedom—is an endowment that comes with the price of moral responsibility. Christian ethics obliges Christians to attend exactly to those who are inaudible, invisible, “thrown away,” often into the darkest places in society, “hiding from humanity” as Martha Nussbaum aptly calls it.<sup>132</sup> Knowing and acknowledging this, whoever has the privilege of being granted in their polity the right to religious freedom—and all other human rights—is obliged in return to stand in solidarity with those whose human rights are denied and whose dignity is violated. Creating a space for *everyone* in the public sphere and claiming the rights for those who have no rights entails the duty to speak out for the rights of others, rather than securing one’s own position of power. This “preferential option” for the rights of others, which in reality is a *responsibility*, renders the call for exemptions regarding the service to others—be it health services, commerce, or anything else—utterly self-centered and defensive. It turns religious freedom into a *privilege* that must be defended against moral strangers or moral enemies whose capability to act morally is denied. If religious freedom is rescued both from such a self-centered reading *and* from its narrow legal interpretation, its ethical dimension, contrary to being a privilege, appears in plain sight: it is the moral freedom that will respond to those whose needs, desires, and rights remain otherwise unanswered, and the moral freedom to respect others in their vulnerability and agency, too.

Because the public space is never unoccupied, Christians must choose where they stand, and with whom they stand. The parables of the Gospels, often alluding to the spatial terms of the “margin” and the “center,” help to discern where to look and to whom to attend. Furthermore, as the most “cosmopolitan” Apostle, Paul, writes in his letter to the Galatians, Christian ethics is indeed an ethics of social integration, calling for the peaceful cohabitation of different groups.<sup>133</sup> For Christians, ultimately, identity is *not* what matters, nor *should* it matter: “There is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Christ Jesus.”<sup>134</sup> Rather than being an exclusive truth claim

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131. See BENHABIB, *supra* note 37 (explaining how the public space is never truly empty).

132. See generally MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* (2009).

133. *Galatians* 3:26–29.

134. *Id.* at 3:28.

of Christianity, this is a radically inclusive statement, not only claiming the *freedom* of Christians but their *liberation* from the concern with social status, gender, ethnicity, or even their religion. Here, I would argue, a whole new story of religious freedom was meant to begin, liberating the oneness in Jesus Christ to the oneness of the one human family.