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Religious Freedom, Morality and Law: John Courtney Murray Today

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A LITTLE OVER FIFTY YEARS AGO, in December 1960, a portrait of John Courtney Murray appeared on the cover of *Time* magazine. *Time*'s editors joined Murray with Reinhold Niebuhr and Karl Barth as one of the very few theologians with the public influence needed to appear on their cover.[1] Behind Murray's portrait was an enlarged reproduction of the title page of Robert Bellarmine's *De Controversiis*. Few *Time* readers likely noticed this linking of Murray with Bellarmine as thinkers engaged in significant theological controversy. There is little doubt, however, that Murray was deeply involved in some of the most important controversies in both Catholic and American life in the mid-twentieth century. Despite the controversies that initially greeted his work, Murray's ideas came to have major influence at the Second Vatican Council and were received into the ongoing tradition of Catholic thought on religious freedom in the post-Conciliar period. Over the past decade, however, another topic Murray addressed—the role of the Church in shaping the moral dimensions of political life—has become a focus of new controversy, especially in the United States. Whether and how Murray's thinking on political morality should guide the public ministry of the Church today thus calls for fresh examination.

[1] Murray appeared on the cover of *Time* on December 12, 1960, Reinhold Niebuhr on March 8, 1948, Karl Barth on April 20, 1962.

This essay, therefore, will address the ways Murray's thought has been and might continue to be influential in shaping church engagement in public life. It will do so in four steps. First, the controversy concerning and subsequent reception of Murray's thought on religious freedom will be sketched. Second, some of today's disputes concerning the way the leadership of the Catholic community is addressing the relation between civil law and morality will be noted. Third, an emergent challenge to the efforts by religious communities to address public life will be presented, namely the polarization of political life in the United States along religious lines. Fourth, it will be argued that a deeper appropriation and reception of Murray's approach to the relation of religious freedom, morality, and civil law could enhance the effectiveness of the Church's role in public life.

Murray's Thought on Religious Freedom: Its Reception at Vatican II and Since

The caption to Murray's picture on *Time*'s 1960 cover read "U.S. Catholics & the State." In the 1950s Murray had written innovatively on the way the Catholic Church should interact with the state (or, as he preferred to call it, the government). As a public intellectual Murray had also been deeply engaged in debates with Protestant and secular opinion-makers about the religious role of Catholicism in U.S. public life. Catholics had long been held in suspicion by these opinion-makers, who feared that the Catholic understanding of religious freedom was a threat to American democracy. This suspicion had become very clear to Murray when he sought to collaborate with them in the early 1940s to shape a plan of action that would help make post-World War II international relations more stable and peaceful. Such suspicion was vividly perceptible when the Catholic John F. Kennedy ran for president of the United States in 1960. In that year, Murray published *We Hold These Truths: Catholic Reflections on the American Proposition*, a book that argued that Protestant and secular shapers of U.S. culture should get over their fears that Catholicism was a threat to U.S. political institutions. The book eloquently suggested that the United States had much to learn from the long Catholic tradition. Though not directly addressed to Kennedy's campaign, Murray's thought provided much of the intellectual background for Kennedy's political breakthrough. This breakthrough occurred only after significant political disagreement and debate, symbolized by Kennedy needing to reassure the Protestant ministers who were members of the Greater Houston Ministerial Association that his faith did not threaten the well-being of the Republic. Kennedy's election broke through the barrier that had long excluded Catholics from full participation in U.S. political life. Murray's theological in-

novation on religious freedom was the intellectual analogy to Kennedy's political breakthrough. The convergence of Kennedy's election and the publication of Murray's *We Hold These Truths* was a key reason for Murray's appearance on *Time*'s cover in 1960.

Murray's work also addressed the internal reflection of the Catholic community on religious freedom. This line of thinking surely had greater personal cost for Murray because of the initial response of Church leadership to his thinking. In the end, however, Murray's theology helped bring about an extraordinary shift in the Catholic Church's stance toward religious freedom. Murray argued that attention to the historical contexts of the rejection of religious freedom by nineteenth century popes such as Pius IX and Leo XIII could enable the Church to affirm religious freedom in contexts that were different, such as those prevailing in mid-twentieth century democracies.[2] When Murray proposed this approach, his views were roundly rejected by his traditionalist theological adversaries. These adversaries saw his defense of religious freedom as encouraging a religious relativism (they called it "indifferentism") that would effectively deny the unique truth of the Catholic faith. Adopting such a critical stance, Murray's critic Francis Connell made the blunt charge that Murray's theological advocacy of a positive Catholic stand on religious freedom could not be "harmonized with revealed truth." [3]

Such opposition and resulting Vatican pressure led to Murray being effectively marginalized from the discussion of the topic. In 1958 it led his Jesuit superiors to tell him to remain silent on the topic of religious freedom until the climate in Rome had changed. That change came much more quickly than either they or he had a right to expect. Soon after John XXIII's election in that same year, the new pope announced his intent to convene an ecumenical council, which opened in 1962. Murray's arguments were fully vindicated by this Council, where he played a major role in drafting Vatican II's *Declaration on Religious Freedom*. Indeed Murray's thought was a major source of the doctrinal development that led Vatican II to declare that "the right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the

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[2] See Murray's five articles on Leo XIII, the first four published in *Theological Studies* in 1953 and 1954, the fifth (dealing with both Leo XIII and Pius XII) not published in Murray's lifetime, but now available in John Courtney Murray, *Religious Liberty: Catholic Struggles with Pluralism*, ed. J. Leon Hooper (Louisville, Kentucky: Westminster/John Knox Press, 1993), 49-125.

[3] Francis J. Connell, memorandum in the Connell Papers, in the Redemptorist Archives Baltimore Province, cited in Joseph A. Komonchak, "Catholic Principle and the American Experiment: The Silencing of John Courtney Murray," *U.S. Catholic Historian* 17, no. 1 (Winter, 1999), 28-44, at 31.

revealed word of God and by reason itself."[4] This conciliar proclamation stands in stark contrast with Connell's assessment that Murray's views could not be reconciled with the revealed truth of the gospel.

The continuing influence of Murray's thought on religious liberty, as mediated through Vatican II's *Declaration on Religious Freedom*, is evident in the recent teachings of both Pope John Paul II and Pope Benedict XVI. John Paul II called religious freedom the "heart of human rights," thus affirming its central place in the Church's larger social mission.[5] Such a papal statement would have been unthinkable before Murray made his contribution. Under John Paul II's leadership, the defense of religious freedom assumed a central place not only in the teaching but also in the practice of the Church. The late Samuel Huntington, a Harvard political scientist with much interest in the development of democracy in the modern era, argued that the Second Vatican Council, especially its affirmation of the right to religious liberty, transformed the Catholic Church during the pontificate of John Paul II into one of the leading human rights actors on the world stage. Catholicism played a key role in the move of a number of countries from authoritarianism to democracy in the latter third of the twentieth century: Portugal and Spain in the mid-1970s, multiple Latin American states in the late 1970s and early 1980s, the Philippines in the mid-1980s, Poland and Hungary in the late 1980s. Due to the influence of the Council, Huntington concluded, "roughly three-quarters of the countries that transited to democracy between 1974 and 1989 were Catholic."[6] Murray's thought was surely one of the key sources of this dramatic development.

Pope Benedict XVI has continued the strong emphasis on religious freedom as the leading edge of his advocacy of human rights. Benedict's approach to religious freedom has several distinct but related elements. First, in his January 1, 2011, message for the Church's World Day of Peace, Benedict placed religious freedom in a broadly international context, arguing that the protection of this freedom is a precondition for peace within and among nations. He sees religious

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[4] Vatican Council II, *Dignitatis humanae (Declaration on Religious Freedom),* no. 2, in *The Documents of Vatican II*, ed. Walter M. Abbott (New York: Guild Press/America Press/Association Press, 1966).

[5] John Paul II, "Respect for Human Rights: the Secret of True Peace," World Day of Peace Message, January 1, 1999, section title, at no. 5. http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_14121998_xxxii-world-day-for-peace_en.html.

[6] Samuel P. Huntington, "Religion and the Third Wave," *National Interest* 24 (Summer, 1991), 30. Huntington's argument about the sources of democratization is more fully developed in his *The Third Wave: Democratization in the Late Twentieth Century* (Norman, OK: University of Oklahoma Press, 1991).

persecution and acts of violence based on religion as serious threats to peace.

Second, Benedict is particularly concerned that the religious freedom of Christians is being restricted and even denied in a number of countries today. In the pope's assessment, "At present, Christians are the religious group which suffers most from persecution on account of its faith."[7] In his 2011 Address to the Diplomatic Corps at the Holy See, Benedict specifically mentioned limitations on the religious freedom of Christians in Arab and Muslim countries like Iraq, Egypt, the Arabian Peninsula, and the Middle East more generally, in African countries like Nigeria, and in Asian nations such as China and Pakistan.[8] The recent bombings of Christian churches in Egypt and Iraq are the most deadly signs of such persecution of Christians.

Third, concern with the religious freedom of Christians does not detract from Benedict's commitment to the religious freedom of all persons. He sees religious freedom as rooted in the fundamental dignity of the person, which Jewish and Christian scriptures affirm is grounded in the creation of every person in the image of God. At the same time, the pope argues that Scripture is in harmony with human experience and that, through the use of reason, human dignity "can be recognized by all."[9] Thus *all* persons have a right to this freedom and *all* have a duty to respect it. In Benedict's words, "Religious freedom is not the exclusive patrimony of believers, but of the whole family of the earth's peoples."[10]

Fourth, religious freedom means freedom to exercise one's belief in public, not only in private, with others in community and not only alone. Drawing on a "relational" or "communitarian" understanding of religious freedom, Benedict argues that secularist efforts to restrict religion to the private domain of an individual's faith are as serious a threat to religious freedom as is fundamentalist fanaticism.[11] Benedict XVI's stress on the importance of the public and communal dimensions of the exercise of religious freedom was also an explicit teaching of the Council. *Dignitatis humanae* had affirmed that free exercise of religion is not only a personal freedom but includes the freedom to seek to influence the institutions and policies that shape

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[7] Benedict XVI, World Day of Peace Message, January 1, 2011, no. 1. http://www.vatican.va/holy_father/benedict_xvi/messages/peace/documents/hf_ben-xvi_mes_20101208_xliv-world-day-peace_en.html.

[8] Benedict XVI, Address to Members of the Diplomatic Corps, January 10, 2011. http://www.vatican.va/holy_father/benedict_xvi/speeches/2011/january/documents/hf_ben-xvi_spe_20110110_diplomatic-corps_en.html

[9] Benedict XVI, World Day of Peace Message, January 1, 2011, no. 2.

[10] Benedict XVI, World Day of Peace Message, January 1, 2011, no. 5.

[11] Benedict XVI, World Day of Peace Message, January 1, 2011, nos. 6 and 8.

and govern public life. In the Council's words: "it comes within the meaning of religious freedom that religious communities should not be prohibited from freely undertaking to show the special value of their doctrine in what concerns the organization of society and the inspiration of the whole of human activity."[12] Commenting on this passage from the Council, Murray observed: "Implicitly rejected here is the outmoded notion that 'religion is a purely private affair' or that 'the Church belongs in the sacristy.'"[13]

Each of these points about religious freedom show the lasting impact of Vatican II's *Declaration on Religious Freedom* and of Murray's continuing influence through the *Declaration*. Murray's thinking on religious freedom has clearly been received into the Catholic tradition in its contemporary form and continues to help shape the development of this tradition.

Controversy concerning Civil Law and Morality

The fact that the Council and the Pope saw religious freedom as requiring respect for the Church's right to play an active role in public life shows, however, that Catholicism remains in some tension with more secular aspects of the freedom-affirming, liberal traditions of the modern West. Through Murray's influence the Church had learned much from these traditions. But Pope Benedict, like Murray himself, strongly resists efforts to exclude religious influence from public affairs, seeing such exclusion as an unacceptable secularism. For example, Benedict has often protested against Europe's recent unwillingness to acknowledge publically the Christian roots of its cultural life. The pope, also like Murray, objects to philosophies that regard skepticism about the possibility of attaining knowledge of truth in the religious sphere as a precondition for commitment to religious freedom. Thus the Catholic understanding of religious freedom shaped by Murray at the Council stands in sharp contrast to secularizing approaches to public life and privatizing interpretations of the place of religion. This approach has generated argument and even resistance today.

This resistance is particularly evident with regard to Pope Benedict's approach to the *moral* dimensions of the Church's exercise of its role in public life. In several recent teachings focused particularly on religious freedom, Benedict sees the public freedom of the Church being morally exercised in efforts to protect the right to life. He has also suggested that the Church has a right to call for the defense of

[12] Vatican Council II, *Dignitatis humanae (Declaration on Religious Freedom),* no. 4.
[13] Murray, comment on *Dignitatis humanae*, no. 4, in *The Documents of Vatican II*, 683, note 11.

the family founded on marriage between a man and a woman, thus rejecting same sex partnerships and gay marriage.[14] Needless to say, abortion and same sex relationships are among the most hotly disputed moral issues in Western society today. In the United States they have become particular flash points of moral-political controversy.

The United States Catholic Bishops have adopted particularly pointed public advocacy positions on the right to life (including opposition to abortion, euthanasia, and embryonic stem cell research) and on resistance to gay marriage and public acceptance of the legitimacy of same sex relationships. The Bishops' 2007 statement *Forming Consciences for Faithful Citizenship* was a formal instruction by the U.S. hierarchy covering the full range of the public dimensions of the Church's moral concerns. In this document, the U.S. bishops placed particular emphasis on abortion and euthanasia. The bishops teach that these actions are "intrinsically evil" and "always incompatible with love of God and neighbor." Thus they must "always be rejected and opposed and must never be supported or condoned."[15] In a similar way, echoing the affirmation by the Catechism of the Catholic Church that homosexual acts "are contrary to the natural law" and that "under no circumstances can they be approved," [16] the bishops oppose "same-sex unions or other distortions of marriage." [17]

It is notable that the U.S. bishops link their opposition to same sex relationships and gay marriage to the exercise of religious freedom. They state that human rights of all persons must be protected, but that this "should be done without sacrificing the bedrock of society that is marriage and the family and without violating the religious liberty of persons and institutions."[18] This linkage of opposition to gay relationships with religious freedom echoes recent controversies that have arisen about whether Catholic institutions can be civilly required to provide forms of family health care benefits that would benefit the partners of employees in same sex relationships, or whether Church agencies can be required to provide adoption ser-

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[14] See Benedict XVI, Address to Members of the Diplomatic Corps, 10 January, 2011, and Benedict XVI, World Day of Peace Message, January 1, 2011, no. 4.

[15] U.S. Conference of Catholic Bishops, *Forming Consciences for Faithful Citizenship*, 2007, no. 22. Online at: http://www.usccb.org/faithfulcitizenship/FCStatement.pdf.

[16] United States Conference of Catholic Bishops, 2009 Pastoral Letter, *Marriage: Love and Life in the Divine Plan,* p. 22. http://www.usccb.org/laity/loveandlife/Marriage FINAL.pdf. The reference to the Catechism of the Catholic Church is to its no. 2357, and *Forming Consciences for Faithful Citizenship,* no. 46.

[17] U.S. Conference of Catholic Bishops, *Forming Consciences for Faithful Citizenship,* no. 46.

[18] United States Conference of Catholic Bishops, *Marriage: Love and Life in the Divine Plan*, p. 26.

vices to gay couples. Though the bishops do not discuss the linkage between such policy matters and religious freedom in a developed way, that linkage is explored in a document called the Manhattan Declaration that has been supported by a number of Catholic, Orthodox and Evangelical church leaders. This document explicitly links opposition to abortion and gay marriage with protection of the religious freedom of Christians who advocate such positions.[19] It has been endorsed by a number of the leaders of the Bishops' Conference, including Archbishop Timothy Dolan. In addition, as current President of the Bishops' Conference, Archbishop Dolan has established the Conference's new Ad Hoc Committee on Religious Liberty to pursue these issues in an ongoing way.[20] As is well known, the bishops' positions on these matters have generated much argument and considerable resistance.

Argument and resistance to the way the U.S. bishops have been approaching their role in public life reached high intensity during the debate on the Affordable Health Care Act, passed by the U.S. Congress and signed into law by President Obama in March 2010. The U.S. bishops intervened vigorously in the legislative debate about this bill. The bishops have long supported affordable and universally available health care insurance for all Americans. However, in 2010 they opposed the legislation that would greatly expand the number of people covered by health insurance as "profoundly flawed."[21] This opposition was based on their conclusion that the bill could lead to funds paid by taxpayers being used to fund abortions. In reaching this conclusion, the bishops disagreed with the leadership of the Catholic Health Association and a significant group of leaders of women's religious communities, who argued that that the bill would not in fact fund abortions. The action by the bishops has led a number of commentators to conclude that resistance to abortion has come to overshadow their other social ethical concerns. It also raises questions about whether the bishops have rightly interpreted the relation between moral principles, such as the duty to protect human life, and civil law, such as a complex piece of legislation like the 2010 Health Care Bill. The questions about the abortion-related consequences of the legislation were not matters of moral principle; they

[19] The Manhattan Declaration was issued on November 20, 2009, and is available at: http://www.manhattandeclaration.org/home.aspx.

[20] See Archbishop Dolan's letter establishing this Ad Hoc Committee and other material related to the Committee's work at: http://usccb.org/issues-and-actions/religious-liberty/.

[21] Cardinal Francis George, OMI, President on the National Conference of Catholic Bishops, Statement on Universal Health Care, March 23, 2010. http://www.usccb.org/healthcare/cardinal-george-healthcare-statement.pdf.

were prudential judgments about the consequences that would follow if the legislation were passed. Whether the bishops possess the competence and authority to make such judgments about the complexity of public policy can be questioned.[22]

The bishops' strong opposition to the 2010 Health Care Bill was surely an exercise of the public dimension of their right to religious freedom. It raises the question, however, of how the exercise of right to religious freedom relates to other moral concerns such as the right of all persons to adequate health care. In addition, when religious freedom is exercised to advocate legislative policy designed to enforce certain moral standards, such as opposition to abortion, the question of the role of civil law in the enforcement of such moral norms comes to the fore. A similar question arises with regard to the opposition by church groups to legislation that would civilly recognize same-sex partnerships. The public discussions about policy on both abortion and homosexual partnership raise important questions about whether and how civil legislation is an appropriate means for the promotion of the moral norms taught by the Church's magisterium. The question of the relation of civil legislation to moral norms was treated with theological acumen by John Courtney Murray. Before addressing these aspects of Murray's thought, it will be useful to note the growing religio-political polarization in U.S. society today. This polarization is of great importance both for the ethical quality of public life and for the well-being of the Church itself. It shapes the context for a possible further reception of Murray's thought today.

Polarization as a Challenge to Public Religion in the U.S. Today

Murray's thought on the public exercise of religious freedom to influence legislation and on the appropriate relation between moral law and civil law remains relevant because public opinion on both issues has become highly polarized in the United States. Murray addressed a number of practical ethical issues with implications for public policy. Probably his most creative contribution was a retrieval

[22] Nevertheless, official representatives of the bishops have held that the bishops rightly make such detailed judgment on policy, maintaining that "providing guidance to Catholics on whether an action by government is moral or immoral, is first of all the task of the bishops, not of any other group or individual." See Cardinal Daniel DiNardo, Chairman of the United States Conference of Catholic Bishops Committee on Pro-Life Activities; Bishop William Murphy of Rockville Centre, New York, Chairman of the USCCB Committee on Domestic Justice, Peace and Human Development, and Bishop John Wester of Salt Lake City, chairman of the USCCB Committee on Immigration, "Setting the Record Straight," May 21, 2010. http://www.usccb.org/comm/archives/2010/10-104.shtml.

and restatement of the just war tradition in a way that addressed the threats of the Cold War and the nuclear age. This contribution had strong influence on the U.S. Catholic Bishops' 1983 pastoral letter on the ethics of nuclear weapons and strategy, *The Challenge of Peace*.[23] Murray also reformulated key elements in the Catholic tradition's approach to the relation between morality and civil law in ways that addressed the pluralism of moral convictions present in the United States of his day. In particular, he addressed several issues where moral convictions held within Catholic tradition were in considerable tension with the stance of non-Catholics, notably free speech, censorship, contraception and some other aspects of sexual morality.

Needless to say, this moral aspect of Murray's work was also marked by controversy. It remains highly relevant to analogous controversies today. Serious disputes about the relation between Catholicism and the public life of pluralist America continue today on both the religious and moral levels. These contemporary disagreements, however, take a notably different form than they did before Murray made his contribution. The chief difference, thanks to the appropriation of Murray's thinking at Vatican II, is that no Catholic thinker can address the role of religion in public life today without presupposing the existence of the right to religious freedom. How this right is to be interpreted, however, and how religious freedom affects the moral realm, remain highly disputed. Murray's thought continues to be a fertile resource for reflection on the contribution of Catholicism in the United States in the face of on-going disputes about the role of religion in public life.

The religious divisions in U.S. politics today take different forms from the suspicions that excluded Catholics from high office before the Kennedy presidency. Nevertheless, the role being played by the Catholic Church in American politics today remains a key element in current religio-political division. When another Catholic, John Kerry, ran for president in 2004, his election was not opposed by secular and Protestant leaders who feared his Catholicism as a threat to American freedoms. Rather, Kerry's most visible adversaries were several U.S. Catholic bishops who regarded the Senator's pro-choice stance on abortion as a betrayal of the value of human life that Catholics should be advocating in the political domain. Several bishops threatened to deny communion to Kerry, in effect suggesting that he was not a Catholic in good standing. Abortion, along with stem

[23] National Conference of Catholic Bishops, *The Challenge of Peace: God's Promise and Our Response* (Washington, D.C.: United States Catholic Conference, 1983). Murray's influence on this pastoral letter was mediated by the work of J. Bryan Hehir, a devoted follower on Murray who served as principal consultant to the bishops in the drafting of the letter.

cell research, euthanasia, and gay marriage, have come to be seen by the leadership of the U.S. Conference of Catholic Bishops today as moral matters on which no political compromise is possible. This stance has significant political implications.

The current trends in the interaction of religion with politics in the United States have been studied in depth in the important book by Robert D. Putnam and David E. Campbell, *American Grace: How Religion Divides and Unites Us.* Putnam and Campbell see two outcomes resulting from recent developments in the relation between religion and society in the United States that point to the continuing relevance of Murray's thought today.

First, largely because post-baby boomer generations are increasingly alienated from the approach taken by both Catholic and evangelical religious leaders to gay rights and abortion, younger Americans have become increasingly secularized. One survey indicates that many younger persons in the United States have come to view religion as "judgmental, homophobic, hypocritical, and too political."[24] In an extraordinary development, the percentage of young people who say they have "no religion" increased from 5% in the 1970s, 80s and 90s to 25% who describe themselves that way today. Those who respond "none" when asked what religious community they belong to are not necessarily atheists; many of them state that they continue to believe in God. But the data suggest that their divergence from the positions of religious leaders on homosexuality and somewhat less so on abortion are at least part of the explanation of their alienation from any religious community. Putnam and Campbell see this divergence as an important source of the reconfiguration of the relation of religion and society that has occurred in the United States in the first decade of the twenty first century.[25]

This departure from religious community and religious practice has been particularly marked among Catholics. The Pew Forum on Religion and Public Life's U.S. Religious Landscape Survey concluded that "Approximately one-third of the survey respondents who say they were raised Catholic no longer describe themselves as Catholic. This means that roughly 10% of all Americans are former Catholics."[26] Putnam and Campbell reach a conclusion that should be even

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[24] David Kinnemann and Gabe Lyons, *Unchristian: What A New Generation Really Thinks about Christianity—And Why It Matters* (Grand Rapids: Baker, 2007). Cited in Robert D. Putnam and David E. Campbell, *American Grace: How Religion Divides and Unites Us* (New York: Simon and Schuster, 2010), 121.

[25] Putnam and Campbell, *American Grace*, 130. See pp. 123-132 for their fuller discussion of this shift.

[26] Pew Forum on Religion and Public Life, *U.S. Religious Landscape Survey* (2008), "Summary of Key Findings." http://religions.pewforum.org/reports.

more disturbing for Catholic pastors. Their data imply that among non-immigrant Catholics today, 60 percent who were raised as Catholics "are no longer practicing Catholics, half of them having left the Church entirely and half remaining nominally Catholic, but rarely, if ever, taking part in the life of the Church."[27]

Second, there is a notable correlation between being actively engaged in a religious community and supporting the Republican Party, and a similar link between being not being active in any religious community and supporting the Democratic Party. Thus there is a growing religio-political polarization in the U.S. today. Putnam and Campbell's data suggest that the growing divide between religious Republicans and unchurched Democrats revolves primarily around the issues of abortion and homosexual relationships. The intensity of a person's religious engagement is significantly correlated with that person's stance on abortion or gay rights. Being religiously active is less linked with people's positions on other issues that have significant moral dimensions, such as income inequality or spending on foreign aid. [28] As the Republican Party has increasingly taken a pro-life, anti-gay marriage stance and Democrats have moved in the other direction, we have seen the emergence of the so-called "God-gap" in American political alignment. Those who are pro-life and pro-traditional marriage are likely to be both believers and Republican, while those who are pro-choice and pro-gay rights are increasingly secular and Democratic. Thus a coalition of more religiously active citizens in support of the Republican Party has emerged. Putnam and Campbell suggest that opposition to abortion and homosexuality are "the glue that holds the coalition together."[29]

Such religious-political alignment is, of course, nothing new. Throughout the first three-fourths of the twentieth century the Catholic population was closely linked to the Democratic Party. This was largely due to Democratic support for the labor unions and the social policies that aided many immigrant and working class Catholics to advance economically. The question that arises, however, is whether it is a good thing for the United States today that the divisions between religiously active and more secular people are increasingly linked with a growing political polarization between Republicans and Democrats. This question is particularly important because abortion and homosexuality appear to be overshadowing a large range of other public issues having moral importance. These include the avoidance of war, ending reliance on the death penalty, promotion of

[27] Putnam and Campbell, *American Grace*, 140-141.
[28] Putnam and Campbell, *American Grace*, 384-388.
[29] Putnam and Campbell, *American Grace*, 384.

greater economic justice through jobs and just wages, provision of affordable and accessible health care, overcoming racial and gender discrimination, alleviating global poverty, and promoting religious freedom and human rights globally.[30]

The alignment of active Catholics with the Republican Party's agenda thus raises the question of whether abortion and same sex relationships should play an overriding role in shaping where a faithful Christian should stand politically. Or should the broader range of other issues play determining roles as well? The U.S. Bishops' 2007 statement on political responsibility set the stage for the emergence of this "God gap" when they argued that abortion and homosexuality are intrinsically evil and thus must *always* be politically opposed, while other political issues such as the justification of war involve prudential judgments concerning concrete circumstances, leaving some room for consideration of the overall effect of decisions about policy. The U.S. Bishops' 2007 statement, perhaps unintentionally, has suggested to many of the most active and devout Catholics that a politician's or a party's stance on public policy regarding abortion or homosexual partnerships are litmus tests for how they should vote. This way of thinking was further encouraged when the U.S. Bishops Conference directly appealed to legislators to vote against the 2010 Affordable Health Care Act because they saw it as placing insufficient barriers to using funds raised through taxes to pay for abortions. As noted above, other Catholic organizations, such as the Catholic Health Association, argued that the bill would not lead to the funding of abortion. In the face of this disagreement, the stance of the Bishops Conference has been interpreted as suggesting that some moral judgments, such as the unacceptability of abortion or gay sex, have direct and immediate consequences in the legislative and legal domains. Other concerns, such as the threat to human dignity of a lack of health care or the harm inflicted by war, can be related to the policy domain only through a process of prudential reasoning.

Thus the question of how normative judgments about the moral status of actions like abortion relate to prudential judgments about the moral impact of complex pieces of legislation like the 2010 Health Care Bill assume considerable importance. This importance is heightened in the context of the growing political polarization in the United States, where religious-secular splits around the issues of abortion and gay relationships are increasingly pronounced. Mary Jo

[30] These and other issues are discussed as matters that should be of moral and religious concern to Catholics in U.S. Conference of Catholic Bishops, *Forming Consciences for Faithful Citizenship* (Washington, D.C.: U.S. Conference of Catholic Bishops, 2007).

Bane, professor and former Academic Dean of Harvard's Kennedy School of Government, has argued that this growing polarization in American politics today is making it increasingly difficult to agree upon or achieve common purposes in national life.[31] Since the Catholic moral tradition, as shaped by Thomas Aquinas and reshaped by Murray, sees the promotion of the common good as the principal purpose of law and politics, one can ask whether such polarization should not raise serious concerns among Catholics.[32] For this reason Bane, who is an active Catholic, expresses worries about the apparent contribution by religious leaders to the growing inability to work for common purposes and the common good in U.S. politics. Though religious leaders seem not to have direct impact on the political views of their church members through preaching or organizing, they do indirectly influence these views through the environment they create in congregations. Thus Bane is dismayed that religious leaders have become "complicit" in the political divisions that make the common good increasingly difficult to attain. Indeed Bane goes as far as to suggest that encouraging such polarization contributes to what may be a social form of "sin" in America today.[33]

Even if Putnam, Campbell, and Bane are only partly right about what is happening at the intersection of religion and politics in the United States today, the stakes are very high as we consider how people should exercise their religious freedom and express their religious convictions in public life. The religiously based activity of at least some Americans appears to be deepening the political divisions that make the pursuit of the common good increasingly difficult. It also seems that the activity of religious leaders, including the U.S. Catholic Bishops, is the occasion for a notable rise in the percentage of younger people who are alienated from active participation in religious life. It is true, of course, that neither the unity of society nor the percentage of the society who are religiously active should override all other values as the Church determines its pastoral agenda. There may well be some moral questions that have such high importance that pursuing them justifies pastoral actions that lead to social conflict and the departure of some from active involvement in the Church. For example, it could be argued that the abolition of slavery would not have been successful if some religious leaders had not been willing to cause conflict and risk losing some of their followers because of their uncompromising stands against it. A similar argu-

[31] Mary Jo Bane, "God and Country," *Democracy: A Journal of Ideas* 19 (Winter, 2011), 91. This essay by Bane is a review of Putnam and Campbell, *American Grace*.
[32] See Thomas Aquinas, *Summa theologiae*, I-II, q. 90, a. 2.
[33] Bane, "God and Country," 92.

ment could be made concerning the willingness to risk conflict and alienation of some churchgoers in the later civil rights struggle for racial equality. Fortunately, the issues of abortion and gay rights do not seem to threaten American political life with the armed civil conflict that occurred in the 1860s. Nevertheless, religio-political polarization can threaten efforts to work for the common good in less dramatic ways and the sharp decline in active participation in religious community by the younger generation is surely a genuine loss for the Church. Thus careful consideration of Church positions on public policies toward abortion and same-sex relationships is surely needed.

FULLER APPROPRIATION OF MURRAY ON FREEDOM, LAW, MORALITY

John Courtney Murray's reflections on the appropriate relation between civil law, moral norms, and religious convictions can help us think through how we should address these controversial matters today.

In the chapter in *We Hold These Truths* entitled "Should There Be a Law," Murray drew on the thought of St. Thomas Aquinas to present an overall framework for how morality should be related to human or civil law. [34] Murray argued, as did Aquinas, that civil law should be founded on moral values, but that civil law need not seek to abolish all immoral activities in society. De facto, such a goal is impossible to attain. The demands made by civil law should be compatible with the level of virtue that has been attained by most of the people the law regulates. It is very unlikely that the majority of people in a particular society will be fully virtuous. Civil law, therefore, should not try to coerce people to move beyond the level of virtue they have already attained. Efforts to coerce people to move dramatically beyond their existing level of virtue are likely to produce resistance, bringing civil law into disrepute and thus leading to an outcome that may be worse that pursuing most modest moral goals.

Murray observed that efforts to promote virtue in the sexual area through civil coercion are particularly unlikely to succeed. For this reason, governments influenced by the Catholic tradition have rarely sought to enforce the Church's sexual code in a rigorous way. A rather tolerant approach to a moral issue like prostitution has often been found in Catholic states. For example, Murray noted that in late sixteenth century papal Rome, under the rule of the otherwise quite

[34] Murray "Should There Be a Law? The Question of Censorship," in *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed and Ward, 1960), 155-74; see Thomas Aquinas, *Summa theologiae*, I-II, q. 96, a. 2 and 3.

strict Pope Sixtus V, 9,000 prostitutes practiced their trade among a population of 70,000. Needless to say, Murray strongly held prostitution to be morally unacceptable. He called it "debauchery." Nevertheless, like both Aquinas and Augustine before him, Murray maintained that an effort to abolish prostitution through the coercive police power of the state is not required by a Catholic understanding of the moral power of civil law.[35] Indeed such an effort could be counterproductive.

In a similar way, Murray argued in the mid-1960s that preventing the use of contraception by civil legislation is also unlikely to be successful. He recommended, therefore, that Cardinal Richard Cushing of Boston not oppose a change of law that would permit the sale of contraceptives in Massachusetts by reversing legislation linked with the Protestant-influenced Comstock laws of the 1870s. Here again Murray drew on Aquinas, distinguishing between public and private morality. Aquinas had argued that civil law has as its goal the promotion of *public* morality. This public morality is limited to the common good of the civil multitude. It does not extend to coercively promoting the full virtue of each citizen, including the virtues that govern behavior in private interactions such as friendships or personal relationships.[36] Murray acknowledged that the question of whether contraception was a matter of public or private morality was disputed among Catholics. He argued, however, that the case for holding it to be a matter of private morality was "sufficiently conclusive." [37] Since civil law should seek to use coercion only in matters of public and not private morality, Murray recommended to Cardinal Cushing that the Church not advocate for the continuation of the Massachusetts law that prevented the sale of contraceptives.

Murray further argued that the case for not seeking to prevent the use of contraception through the power of civil law was reinforced by the fact that many people not only rejected the argument that contraception was immoral but that some, including some religious leaders, held that it could be morally required as a means to responsible parenthood. Murray did not accept this argument in his mid-1960s memo to Cardinal Cushing, which presumed as a starting point the

[35] Murray, *We Hold These Truths*, 163. Augustine discussed the issue tolerating prostitution in his *De ordine* Book Two, 4, 12, and the limits of the moral reach of civil law in *De libero arbitrio*, Book One, V. I. Murray refers to the former passage in Augustine, Thomas Aquinas to the latter.
[36] Thomas Aquinas, *Summa theologiae*, I-II, q. 96, a. 3.
[37] Murray, "Memo to Cardinal Cushing on Contraception Legislation," in *Bridging the Sacred and the Secular,* 83.

Catholic teaching that birth control was morally objectionable.[38] Still he argued against seeking to translate the Catholic moral objection to contraception into a civilly enforced ban because many citizens, including many religious citizens and clergy, saw it as morally acceptable. In Murray's words:

> It is difficult to see how the state can forbid, as contrary to public morality, a practice that numerous religious leaders approve as morally right. The stand taken by these religious groups may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of law and jurisprudence, for which the norm of "generally accepted standards" is controlling.[39]

Respect for the religious convictions of those not sharing the official Catholic rejection of contraception thus led Murray to judge that civil law should not attempt to prevent all citizens from using contraceptives by preventing their distribution. Though the Church could teach its members that birth control is morally unacceptable, the role of civil law was limited in this domain.

Nevertheless Murray certainly did not maintain that the existence of moral disagreement on a particular matter of public policy should *always* lead to the rejection of the use of civil legislation on that matter. He noted that civil law can sometimes play an "educative" role that helps to shape the consciences of members of the public. The civil law can sometimes be "ahead" of the public consensus on the moral standards that should govern society.[40] He noted that this was the case on the matter of racial equality, where civil law was clearly in advance of public opinion in southern states when Murray wrote in the mid-1960s. He was ready to support the use of civil law to seek to reshape the values of those who were ready to accept racial inequality because fundamental standards of justice were at stake, and these standards are matters of public rather than private morality.

The central importance of justice in determining the proper reach of civil law also appears in Vatican II's *Declaration on Religious Freedom*, no doubt due to Murray's influence. As noted above, the right

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[38] Toward the very end of his life, however, Murray seems to have held that the traditional teaching could no longer be theologically sustained. I say "seems" because the text of the talk in which he was reported to have argued this, given in Toledo on May 5, 1967, is not in the Murray archives. However, J. Leon Hooper has studied the press reports on this talk with care and presented his best effort to reconstruct what Murray said. See "Appendix: Toledo Talk," in *Bridging the Sacred and the Secular*, 334-341, esp. 336-337.

[39] Murray, "Memo to Cardinal Cushing on Contraception Legislation," 83.

[40] Murray, "Memo to Cardinal Cushing on Contraception Legislation," 83.

to religious freedom not only requires the protection of private belief and practice, but also guarantees that persons and religious communities may seek to influence public affairs in accord with their religious conviction. Thus churches legitimately seek to influence legislation in ways that reflect their convictions about what makes a society a good society. This is an essential aspect of religious freedom, and as the Council put it, this freedom is to be "respected as far as possible, and curtailed only when and in so far as necessary."

This is directly relevant to how a society should frame civil laws regarding matters about which there is considerable moral and religious disagreement. Should the government use civil legislation and coercive regulation to prevent abortion and same sex relationships, and if so how should it do so? Or are these matters where the Church and other moral educators such as the family should seek to develop the kind of virtue in people that will lead them to do what is right in these domains without being compelled to do so by threat of police action? Both Murray and the Council's *Declaration* stated directly that the presupposition of how the government should respond to matters on which moral or religious disagreement exists is a presupposition in favor of freedom. As the Council put it, "the freedom of man is to be respected as far as possible, and curtailed only when and in so far as necessary."[41] In analyzing this text, which was clearly dear to his heart, Murray added that this means freedom should be limited only so far as necessary to preserve society's very existence.[42]

Both Murray and the Council went on to specify a set of criteria that should be used to determine when such a threat to society exists and when it does not, and thus when coercive limitation of freedom is legitimate and when it is not. They called these criteria the standards of "public order." [43] Public order, as Murray and Vatican II understand it, has three components: justice, which secures the rights of all citizens; public peace, which itself is grounded in justice; and those standards of public morality on which consensus exists in society.[44] Understood this way, public order is a moral concept. It is not, however, the rich reality of the full common good that citizens would be able to achieve in their lives together if they were entirely virtuous.

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[41] Vatican Council II, *Dignitatis humanae,* no. 7.

[42] Murray, "Arguments for the Human Right to Religious Freedom," in Murray, *Religious Liberty: Catholic Struggles with Pluralism*, 239. It is noteworthy that Thomas Aquinas uses the same standard: civil law should intervene coercively only in moral matters "without the prohibition of which human society could not be maintained" (*Summa theologiae*, I-II, q. 96, a. 2).

[43] Vatican Council II, *Dignitatis humanae*, no. 7.

[44] Murray, comment on *Dignitatis humanae*, no. 7, in *Documents of Vatican II*, 686, note 20.

Rather, it is a more minimal level of morality that includes the protection of the most basic prerequisites of social life. These prerequisites include protection of the levels of justice and peace that are required if a society that is civil is to exist at all. When such requirements of public order are endangered, the use of the coercive power of the state is justified.

Drawing on Murray's analysis, we can conclude that the question to be faced in addressing the matters of same sex relationships and abortion in the United States today is whether permissive stances toward them threaten social life, and thus whether the justice and public peace that sustain social life require that they be civilly prohibited. Clearly, some religious leaders, including the leadership of the U.S. Conference of Catholic Bishops, believe that abortion and same sex relationships do threaten the justice required in social life this way. They hold that homosexual relationships, especially civil recognition of same sex partnerships, are threats to the family bonds that hold society together, and that abortion is unjustified taking of innocent human life. Therefore the bishops argue against laws granting civil recognition to same sex partnerships and advocate for laws that will prevent or restrict the resort to abortion. They also stand against public policies that they see as providing financial or other support for abortion, as they argued the 2010 Affordable Health Care Act would do. Thus the U.S. bishops suggest that the standards of justice and public morality that Murray and the Council saw as setting appropriate limits to freedom can be invoked to support the use of coercive governmental power to limit same sex partnerships and prevent abortion.

As noted above, a significant number of U.S. citizens do not agree with the bishops on these issues. They do not see same sex relationships or all abortions as violations of the justice and public morality required to hold society together. Some of those who disagree with the position of the U.S. bishops do so on religious grounds. One could argue, of course, that those who disagree with the bishops are simply in error when they hold that homosexual partnerships based on mutual love and commitment can be morally justifiable, or when they conclude that in some tragic circumstances abortion could sadly be justified. This is not the place to engage in examination of the theological and natural law arguments on which the positions of Church teaching on homosexuality and abortion are based. The question that is urgent in the present context, and to which Murray's thought makes a valuable contribution, is whether it is appropriate to use coercive civil restraint when there is significant disagreement in society about the ethical values at stake in the domains of homosexual rela-

tionships and public policy on abortion. This is especially true when some of these disagreements are related to religious conviction.

As noted above, one might argue that the use of civil law on these matters of moral disagreement can be justified by appeal to the educational role of civil law. Indeed, civil law in a number of European countries does seek to discourage abortion in what could be seen as an educational way by setting conditions for its legality that are notably stricter than the standards legally in effect in the United States.[45] Similar civic education through statutes regarding divorce could also surely reinforce the social importance of marriage and family stability better than they do now in the United States. To appeal to the educational role of civil law as a basis for criminalizing behavior on which there is substantial moral and religious disagreement in society, however, moves dangerously close to affirming that those in moral error regarding homosexuality and abortion simply have no rights.

The position that "error has no rights" was the position of those who rejected Murray's argument for religious freedom.[46] They believed that because Murray was in favor of the civil right to religious freedom for all persons that he was saying, in effect, that persons were free from any obligation to seek and hold the truths about God, Christ, and the Church. Murray repeatedly had to make clear that his argument for religious freedom was not based on a relativistic stance toward religious truth that held that all religions are equally true or equally false. His argument had an entirely different basis. He justified religious freedom by arguing that it is not the role of the state or of government to reach decisions about religious truth and enforce such decisions about which religious beliefs are true and which are false. The government and its officials are simply "denied all competence" to make judgments regarding religious truth or error.[47] Murray's argument for religious freedom, therefore, was based on the limited power of the government to determine and enforce truth in the religious sphere.

This argument for limits on the power of government has implications for moral issues when there is significant pluralism in society. As noted above, government's coercive power does not extend to the full scope of the moral life, just as it does not extend to the regulation of religious truth. Attaining the fullness of the moral life, which en-

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[45] See Mary Ann Glendon, *Abortion and Divorce in Western Law: American Failures, European Challenges* (Cambridge, MA: Harvard University Press, 1987).

[46] For Murray's own exposition of the view of those who opposed him on this question, see Murray, "The Problem of Religious Freedom," in *Religious Liberty*, 130-137.

[47] Murray, *We Hold These Truths*, 66. The Council affirms this in *Dignitatis Humane*, no. 3

compasses the entire scope of the common good, is the responsibility of civil society, including the Church and the broader components of cultural life. As Murray put it, "there are circumstances in which human authority has neither mandate nor duty nor right to use its coercive power against error and evil."[48]

We are thus led to ask where Murray's line of reasoning leads on some key issues facing the Catholic community in the United States today. For example, can we establish that same sex unions have such negative effects on the stability of family life that they undercut the justice required for society to sustain its necessary unity? Can we clearly show that the 2010 Health Care Bill, in fact, supported abortion or that a strict ban on abortion is a requirement of justice? If so, we rightly argue that laws against same sex unions are called for by the standards of public morality, and that the U.S. bishops were right to urge members of Congress to vote against the 2010 Health Care Bill in the name of justice. But if we cannot clearly establish that homosexual relationships so threaten the continued unity of society by undermining the family bonds that are important to this unity, then we ought not maintain that coercive use of state power to prevent such relationships is called for or legitimate. Similarly, the appropriateness of the bishops' recommendation that members of Congress vote against the 2010 Health Care Bill depends on showing that the bill's support for abortion was so clear that it outweighed its contribution to justice by the provision of greater access to health care. If the standards of justice do not lead to these conclusions, this does *not* mean all same sex relationships and all abortions should be simply accepted. They could be civilly regulated to prevent abuses that are clearly unjust. In addition, the Church itself should work vigorously to improve the level of virtue among both its members and in society at large in ways that significantly improve the level of sexual morality in society and reduce the number of abortions. The Church, the family, educational bodies, and many other groups have formative moral influence in the broader culture, and resort to the coercive power of the state is not the only way to work for moral improvement.

It should be noted that suggesting that the government may not be the appropriate agent for pursuing the advancement of moral values in the domain of homosexuality and abortion is *not* an argument that homosexuality and abortion are morally insignificant or acceptable. Murray clearly maintained that attaining and holding to religious truth is of the highest importance. But he also maintained

[48] Murray, "Leo XIII and Pius XII: Government and the Order of Religion," in Murray, *Religious Liberty*, 106.

that it is not the role of the government to compel people to hold the right beliefs. Similarly, we could extrapolate from Murray's argument and suggest that when there is the kind of moral disagreement that we have in the United States today on committed and stable same sex relationships and on abortions that occur in situations of grave distress, it is not the role of government to resolve these disagreements through the use of its police power. Indeed, the use of coercive law in these areas is likely to be ineffective, may well have negative consequences such as increased social division, and could lead to a disrespect for the law that makes society less worthy overall.

Whether such negative effects flow from efforts to control homosexual activity and eliminate abortion by law calls for careful attention to what can be known about the consequences of such efforts. If Putnam's, Cassidy's and Bane's interpretations of what is happening at the intersection of religion and American public life are correct, the approaches of a number of religious leaders, including the U.S. Catholic Bishops, seem to be leading to social divisions that make the common good increasingly difficult to attain. Such divisions also seem to be making it more difficult to attain justice in addressing matters such as the reduction of poverty and unemployment. These strategies are also alienating a sizable segment of the younger generation of Americans from religious community. This loss of the young will itself make it more difficult in the future for the Church to influence the larger culture in light of moral values.

John Courtney Murray's work in the mid-twentieth century does not answer all questions concerning how we should relate religion, morality and the civil law in the second decade of the twenty first century. Murray did, however, lead the Church to a transformative discovery that human freedom is the essential link between human beings and the truth about God. He certainly understood that freedom might need to be limited in some social situations. But his great insight was what he called the principle of the "free society," which affirms that each human person "must be accorded as much freedom as possible, and that this freedom is not to be restricted unless and insofar as necessary." Through Murray's influence this principle was enshrined in the *Declaration on Religious Freedom* of Vatican II. In words that Murray himself surely wrote, the Council declared: "[T]he usages of society are to be the usages of freedom in their full range. These require that the freedom of the human person be respected as far as possible, and curtailed only when and insofar as necessary."[49]

[49] The sentence from Murray is from his "Arguments for the Human Right to Religious Freedom," in Murray, *Religious Liberty,* 239. The parallel sentence from the Council is from *Dignitatis humanae*, no. 7.

The question today is not whether the restriction of freedom is sometimes necessary to protect social unity, but whether some of the efforts by the Church to secure such restriction in the areas of sex and reproduction have themselves become threats to social unity and to common good. If this is the case, it suggests that a different approach to same sex relationships and the links between abortion and health care is called for.

As I have suggested elsewhere, it may be more fruitful for the Church to seek first to influence the moral values held in the larger culture, and only when a greater agreement has been reached on those values to seek to embody them in civil law.[50] Indeed, through the dialogue and public argument that is needed to shape cultural values it is at least imaginable that the Church will itself gain some new insights into the issues that cause so much controversy today. It was Murray who helped the Church to new and deeper insight on the matter of religious freedom, thus enabling the Church to become a stronger force for human rights, justice, and public morality. Perhaps a fuller reception and deeper appropriation of Murray's thought today can help the Church address the controversies of our time with greater effectiveness. M

[50] See my "Catholicism and American Political Culture: Confrontation, Accommodation, or Transformation," in *Inculturation of the Church in North America*, ed. T. Frank Kennedy (New York: Crossroad, 2006), 7-22, esp. 17-22.