RESISTING THE ECLIPSE OF *DIGNITATIS HUMANAE*

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ABSTRACT

Vatican II's announcement of the Catholic Church's acceptance of religious freedom in its Declaration on Religious Freedom (*Dignitatis Humanae*) ought to have ushered in a period of ecumenical agreement on the topic of religious disestablishment. Instead, forty years after this most controversial document was promulgated, we find that public, academic, and even ecclesial discussions of the role of religion in public life are confused and in fact deeply contentious. The problem, however, is not that *Dignitatis Humanae* was incoherent or naïve in its understanding of religious freedom, but that we have failed to grasp its nuanced and coherent manner of reconciling a robust religious freedom with a profound view of the political significance of religious beliefs. Careful attention to this Declaration provides a solid foundation for continuing political theology and a public presence of religion without infringing the important value of religious "disestablishment."

Few today would deny that religious beliefs have political implications. Abroad, we see efforts to make civil law conform to the religious laws of Islam as well as aggressively secularistic challenges to any public display of religious belief or devotion. There is a similar tension within the United States between, at one extreme, an increasing "antidisestablishment" attitude that wants civil government to endorse basic religious beliefs, and, at the other, a "separationism" that would remove all religious expression and influence from public life. In the midst of this confusion and controversy the Declaration on Religious Freedom (*Dignitatis Humanae*) by the Second Vatican Council is often treated—even by Catholics—as outmoded. Many acknowledge *Dignitatis Humanae*'s achievement in accepting the American situation of religious "disestablishment" but they presume that it does not touch on the more complicated issues raised by our current efforts in political theology. Others suggest that this document embodies a misguided acceptance of an indefensible secularism. Whether the Declaration is merely commonplace or fundamentally wrong, it seems that its moment has passed, that we do not look to *Dignitatis Humanae* to shed

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light on the complexities of the relationship between religion and politics in our time.[1]

At least in the United States, where the question of government establishment of a specific Church or ecclesial communion was settled long ago, our debates about religious freedom no longer focus on the limited question of official government privilege for a particular denomination or church. As John Courtney Murray noted on this topic, "the [Catholic] church is in the unfortunate position of coming late, with the great guns of her authority, to a war that has already been won . . . ."[2] Nonetheless we are at a virtual impasse in the debate between those who seek a wall of separation such that religious beliefs have no impact on political decisions and those who insist that government neutrality entails an untenable privatization of religion. Perhaps even more frequent and passionate are the disagreements over the role of religiously-based values in our legislation: the question of how far, if at all, we can separate our religious beliefs (or lack thereof) from the values that inspire us to enact certain laws and to oppose others? What can religious freedom mean if laws necessarily reflect some religious values and conflict with other such values?

The problem of religious freedom has been especially sharpened by the common argument, proffered by some political liberals as well as by opponents of this liberalism, that the government can maintain religious neutrality only by privatizing religion.[3] Critics such as Stanley Hauerwas and John Milbank maintain that religious "disestablishment" prohibits religious people from living the fullness of a faith that cannot properly be relegated to a part of their lives or left behind when they enter the public realm. Perhaps to counter precisely this separationism, Pope John Paul II emphasized that *Dignitatis Humanae* defends the freedom of the Church to work for the structuring of our socio-political institutions in accord with the truth of Christian faith.[4]

[1]My ideas and arguments in this article have benefited from the opportunity to share this research at an early stage with the College Theology Society's Religion and Society section at their 2004 annual meeting, and from further discussion with Professor Gerald P. McKenny and Ms. Anselma Dolcich-Ashley. Gratitude is also due to Ms. Dolcich-Ashley for her assistance with research for this article.

[2]John Courtney Murray, S.J., "The Matter of Religious Freedom," as quoted by Christopher J. Kauffman, "American Reactions to *Dignitatis Humanae*" in John T. Ford, C.S.C. ed., *Religious Liberty: Paul VI and Dignitatis Humanae* (Rome: Brescia, 1995), 79.

[3]See for example, Robert Audi, "The State, the Church, and the Citizen" in Paul J. Weithman, ed., *Religion and Contemporary Liberalism* (Notre Dame, IN: University of Notre Dame Press, 1997), 38-75; Stanley Hauerwas, "The Church and Liberal Democracy: The Moral Limits of a Secular Polity," in his *A Community of Character: Toward a Constructive Social Ethic* (Notre Dame, IN: University of Notre Dame Press, 1981), 72-86; and John Milbank, *Theology and Social Theory* (Cambridge, MA: Blackwell, 1990).

[4]See Hermínio Rico, S.J., *John Paul II and the Legacy of Dignitatis Humanae* (Washington, DC: Georgetown University Press, 2002), esp. 127.

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However, if *Dignitatis Humanae* merely affirms the freedom of the Church to proclaim the political significance of its doctrines, albeit without attempting to coerce faith, it is difficult to account for the fact that it was "the most controversial document of the whole Council."[5] After all, proclaiming that the Church has a role as teacher of socio-political values is no recent development, nor is the insistence that faith cannot be coerced. If, on the other hand, the Declaration indeed accepted disestablishment of religion, did it not (however unwittingly) endorse a disastrous removal of religion from public life?

Given the currently common presumption that religious disestablishment requires religious privatization, it is perhaps inevitable that some would conclude, as Hauerwas has, that *Dignitatis Humanae* is utterly incoherent. He acknowledges that the Declaration goes beyond mere non-coercion in its defense of the public right to religious freedom and so he concludes that at some points (influenced by progressives at Vatican II) it advocates a secularism that privatizes religion. However, at other points (where conservatives won concessions), Hauerwas reads the Declaration as affirming religious establishment as the appropriate expression of the true religion's socio-political role.[6] If Hauerwas is right, we should heave a sigh of relief that the document was never accorded infallible status, conclude that it is a misguided if well-intentioned exercise in muddleheaded thinking, and consign it to the dustbin of history.

I contend, however, that it is a mistake to reject *Dignitatis Humanae* as wrong, confused, or even passé. Though this Declaration does not seek to answer all possible questions on church-state relations, it proffers a coherent and nuanced understanding of the properly political role of religion in a free and democratic polity. *Dignitatis Humanae* not only avoids both the erroneous extremes of privatized religion and theocracy but does so by articulating an understanding of religious freedom with insights that are still lacking in our contemporary debates. Contrary to Murray's claim that the battle for religious freedom has long since been won, I maintain that the Declaration has developed the carefully designed armor desperately needed to protect religious freedom from current attacks.

To support my contention that *Dignitatis Humanae* provides an appropriate account of religious freedom in the service of a politically active faith in a free and pluralistic society, I will first review here the

[5]John Courtney Murray, S.J., "Introduction [to Religious Freedom]" in Walter Abbott, S.J., ed., *The Documents of Vatican II* (Piscataway, NJ: New Century, 1966), 673.

[6]Stanley Hauerwas, "Not Late Enough: The Divided Mind of *Dignitatis Humanae Personae*" in his *A Better Hope: Resources for a Church Confronting Capitalism, Democracy, and Postmodernity* (Grand Rapids, MI: Brazos, 2000), 109-116.

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basic argument of *Dignitatis Humanae* in order to clarify its achievements and its importance to our contemporary U.S. debates about religion in public life.[7] Secondly, with the help of Franklin I. Gamwell's recent work on religious freedom, I will defend the integrity of *Dignitatis Humanae*'s position against those, like Hauerwas, who maintain that it is incoherent. Finally, I will look at some problems in the understanding of religious freedom in the later years of the papacy of John Paul II, especially as these concern issues of official governmental endorsement of religious beliefs and the legislation of moral behavior, Vatican positions that are not fully consistent with *Dignitatis Humanae* and thereby confuse our reception of this document. To be sure, current debates reveal ambiguities in *Dignitatis Humanae* that call for further clarification, but they also show that this forty-year-old document still has much to offer our ongoing political and theological discussions of the role of religion in public life.

I. Dignitatis Humanae*'s Defense of Religious Freedom*

The Catholic tradition has long maintained that faith cannot be coerced, yet it has also held (and continues to hold) that Christianity has implications for all aspects of human existence, including the organization of society and even governmental policies. This consistent Catholic refusal of religious privatization should remind those of us too young to recall the controversy preceding *Dignitatis Humanae* that secularism is not a new problem, and that there were good reasons for religious freedom to pose such a difficult theological issue for the Second Vatican Council.[8] It may seem self-serving for ecclesial authorities to have insisted that error does not have the same rights as truth and to have upheld the idea of a Catholic Church in a Catholic state, with Protestants denied the freedom publicly to teach their "errors," even while Catholics demanded from Protestant states public freedom for

[7]Notwithstanding the importance of historical studies, I concur with Pietro Pavan that "the document is what it is, and it can only be understood by giving its words the meaning they have in common usage and in the context of the document itself" (Pietro Pavan, "Ecumenism and Vatican II's Declaration on Religious Freedom" in Walter J. Burghardt, S.J., ed., *Religious Freedom: 1965 & 1975* [New York: Paulist, 1976], 7-38 at 33).

[8]See for example John Courtney Murray's arguments against the secularism that privatizes religion while he nevertheless defends the proper secularity of civil government, thus acknowledging its limits with regard to religious truth, especially in his "Are There Two or One? The Question of Religious Freedom" in John Courtney Murray, S.J., *We Hold These Truths: Catholic Reflections on the American Proposition* (Kansas City: Sheed and Ward, 1960), 197-217; as well as his "The Declaration on Religious Freedom" in John Courtney Murray, S.J., *Bridging the Sacred and the Secular: Selected Writings* (Washington, DC: Georgetown University Press, 1994), 187-199.

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the proclamation of Catholic truth.[9] Nevertheless the tension between the affirmation of religious freedom and a commitment to the sociopolitical implications of religious beliefs was no less evident to Catholic thinkers then than it is now. The challenge for the Council Fathers at Vatican II and for the theologians addressing this issue before and during the Council was largely the same question with which we are grappling today: how can religious freedom be supported without separating public life from religion or freedom from truth?[10]

As most commentators on *Dignitatis Humanae* note, locating the right to religious freedom in the dignity of the person rather than in the beliefs that the person holds was a major step toward approaching the difficult issue of religious freedom in a new way.[11] The person is here understood as having the obligation to seek and to embrace the truth in freedom and as therefore having the right to the personal autonomy necessary to fulfill this duty. Rights are, of course, exercised in relation to other people, hence the right at stake is specifically defined as a double immunity from coercion. The human person has a valid claim against others "not to be forced to act in a manner contrary to . . . conscience," as well as a right not to be "restrained from acting in accordance with . . . conscience."[12] For John Courtney Murray, the latter right to freedom from government restraint is only adequately defended when the Declaration further clarifies in article three that the government in any case does not have the competence in discerning religious truth and error needed to repress the acts of those whose consciences are in error.

In thus proclaiming that all have the obligation and so the right to seek and to embrace the truth in freedom, *Dignitatis Humanae* clearly rejects the skepticism that considers religious or moral truth to be publicly irrelevant or even unknowable. We commonly hear that we must allow freedom in these matters because no one knows the truth with certainty. This moral and religious skepticism is sometimes maintained even to the point of divorcing the exercise of freedom entirely from the question of what (if any) truth it ought to serve, a position that John Paul II rightly criticized.[13] Given current trends to reassert religious

[9]See, for example, the early drafts on religious freedom rejected by Vatican II as described by Pietro Pavan, "Declaration on Religious Freedom" in Herbert Vorgrimler, ed., *Commentary on the Documents of Vatican II*, vol. IV (New York: Herder and Herder, 1969), 49-86 at 50.

[10]Rico has a good, brief discussion of this issue in *John Paul II*, 1-5.

[11]Enda McDonagh, *Freedom or Tolerance? The Declaration on Religious Freedom of Vatican Council II* (Albany: Magi, 1967), 38-42; John Courtney Murray's commentary on *Dignitatis Humanae* in Abbott, *Documents ,* 678, and Pavan, "Declaration," 63-65.

[12]*Dignitatis Humanae* [Declaration on Religious Freedom], art. 3.

[13]See especially John Paul II, *Veritatis Splendor* [On the Splendor of the Truth], 1993, esp. arts. 31 and 32.

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truth as socially indispensable, we need to understand that religious freedom in this conciliar document is endorsed not because freedom is separated from the truth but precisely because freedom is oriented to a truth "that cannot impose itself except by virtue of its own truth, as it makes its entrance into the mind at once quietly and with power."[14] Further, since the right is located in the person and not in the belief held or the act defended, it cannot be denied to those whose consciences are in error or who simply fail to seek the truth, even though there is no positive right to do wrong. As *Dignitatis Humanae* stipulates quite clearly, "the right to religious freedom has its foundation not in the subjective disposition of the person, but in his very nature. In consequence, the right to this immunity continues to exist even in those who do not live up to their obligation of seeking the truth and adhering to it and the exercise of this right is not to be impeded, provided that just public order be observed."[15]

This document does not then presume an opposition between positive and negative approaches to freedom as do many today. We find here instead the clear assertion that our positive freedom for God is exercised on the basis of a negative freedom, or immunity, from coercion, because this negative freedom allows us freely to embrace God's truth. The right to religious freedom is not divorced from the truth, as we saw above, but neither is it forfeited by those who fail to exercise this freedom in order to realize the truth. After all, if freedom is granted only to those who use it to realize its proper end and denied to those who do not, it follows that none can truly embrace the truth in freedom insofar as they know that they have no other option.

Since the right to immunity from coercion is thus grounded in the personal obligation to seek the truth in freedom, *Dignitatis Humanae* further clarifies that this right to religious freedom includes not only a narrowly defined freedom of religious cult but a more broadly construed right to be uncoerced in matters of conscience, a point that is particularly significant for current debates about morals legislation (discussed in more detail below). Our search for the truth is not limited to the truth about God and His Church, since the Declaration affirms "the quest for the values proper to the human spirit."[16] Hence, our freedom extends in principle to all the acts by which we seek to realize the good as we see it, even when these are not acts directly related to religious worship or to a recognized religious code of behavior. Although some have mistakenly argued that granting religious freedom to unbelievers goes beyond *Dignitatis Humanae*'s actual argument, both

[14]*Dignitatis Humanae,* art. 1.
[15]Ibid., art. 2.
[16]Ibid., art. 1.

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Murray and Pietro Pavan more accurately conclude that the Declaration grants atheists (who solve "the religious problem in a negative way") no less right to freedom from coercion of conscience than it provides for theists.[17]

Lest this freedom begin to sound like a prescription for anarchy, *Dignitatis Humanae* specifies that immunity from coercion is not and cannot be an absolute right, a freedom without limits. Since we live in society, it follows that "in the use of all freedoms the moral principle of personal and social responsibility is to be observed."[18] Civil governments have the obligation to defend society itself as well as the rights of its members by securing the public order, even at times restraining people from acting according to their conscience (and thus limiting religious freedom) in those circumstances where the exercise of one's freedom will violate the rights of others or threaten the public order. However sincerely convinced one might be that child sacrifice is commanded by God, for example, we cannot allow people to kill others, even in the name of religious freedom.

Dignitatis Humanae thus represents an important advancement beyond the earlier idea that whenever possible we should seek legally to establish the true religion in order that the common good may be based on a true morality. Without accepting either religious skepticism or religious privatization, the Declaration clearly affirms that religious freedom is a central human right, one that includes not merely freedom from coercion in matters of religious worship but also the rights freely to seek the truth, to proclaim that truth to others, and to act (within due limits) in accord with the values one perceives as true and good.[19] This document thus affirms, as John Paul II insisted, that the Church must be free (along with other groups) to teach publicly the relevance of its doctrines to the organization of society and to public polity. Those who maintain that religious freedom allows them to argue for legislation in accord with their religious beliefs will find support here. The Declaration also maintains, however, that the state has no proper role in preventing religious error (as the civil government may not "presume to direct or inhibit acts that are religious"[20]), and no one is to be denied

[17]See the discussion summary following Kauffman's "American Reactions," 90; Pavan "Declaration," 69; and Murray's commentary in Abbott, *Documents*, 678. Further support for Pavan and Murray can be found in the fact that *Gaudium et Spes* [Pastoral Constitution on the Church in the Modern World] art. 21 also explicitly repudiated any distinction in civil rights between believers and unbelievers. This document was issued on the same day as *Dignitatis Humanae*.

[18]*Dignitatis Humanae*, art. 7.

[19]For pre-Vatican II discussions of the importance of avoiding religious skepticism and the privatization of religion, see McDonagh, *Freedom*, as well as John Courtney Murray's work in *We Hold*.

[20]*Dignitatis Humanae*, art. 3.

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the right to full participation in public life because of one's religious beliefs. Those who insist that they have a right not to be forced to live according to the dictates of others' religious beliefs also find considerable support here.

II. The Coherence of Dignitatis Humanae's *Understanding of Religious Freedom*

A careful reading of *Dignitatis Humanae* reveals that the right to religious freedom is not merely affirmed alongside and in tension with the claim that religious doctrines have socio-political implications, as though the differing parties simply won concessions to their competing positions. The Declaration understands religious freedom as integrally related to and indeed as serving our obligation freely to seek the truth and the good to which our society as well as our individual lives must be directed.[21] Still, Hauerwas is not alone in considering this position to be incoherent. Can we indeed maintain without self-contradiction *both* that our polity ought to be directed to God *and* that the religious freedom of all members of the polity should be protected, as *Dignitatis Humanae* insists? If our laws are informed by a particular understanding of the good to which society is to be directed, is this not tantamount to endorsing a religion and thus coercing those who do not accept that religion's account of the good?

Franklin I. Gamwell's nearly twenty-year-old description of this quandary is surely no less applicable today:

> Some fear a secularized state, that is, a state which is independent of all religious convictions, and insist that disestablishment does not preclude a foundation of religious values in the Republic. Others fear a state that is religiously partial and insist that the "wall of separation" prescribes civil neutrality toward religion as such. . . . Contemporary religionists typically fail to show how their affirmation of a positive relation between religion and American politics is consistent with their denial of establishment, and contemporary separationists typically fail to show how their affirmation of disestablishment is consistent with their denial of secularism. Each side, then, has good reason to fear what it fears, and the public has good reason to be confused.[22]

[21]Hauerwas fails to grasp the Declaration's deep commitment to this basic connection between religious freedom and the search for the truth, as he rather surprisingly insists that the right to religious freedom in *Dignitatis Humanae* "is in no way governed by the duty to seek the true and the good." See Hauerwas, "Not Late Enough," 111.

[22]Franklin I. Gamwell, "Religion and Reason in American Politics" in Robin W. Lovin, ed., *Religion and American Public Life: Interpretations and Explorations* (New York: Paulist, 1986) 88-112, at 88-89.

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In *The Meaning of Religious Freedom*, Gamwell develops a detailed argument that intends to remedy our confusion by demonstrating that religious freedom (properly understood) is consistent with the fact that we cannot and should not separate our religious beliefs from our judgments about which laws to endorse or to oppose. The issue gains considerable clarity from Gamwell's broad definition of religion as (at least) an account of the ultimate good or goal of human life such that all valid human acts and purposes must be consistent with this ultimate goal.[23] For example, he observes that Christians believe that all of life is to be oriented to the love of God above all and of neighbor as oneself, and it follows from this that no act or purpose (including legal acts and governmental purposes) can be valid for Christians if it is not consistent with this love command. Since all laws implicitly affirm values, they will necessarily be consistent with (possibly more than one) answer to the comprehensive purpose of human life, but not with some other possible answers. Government is thus inextricably involved in implicitly endorsing some religion(s) and not others. Nevertheless, Gamwell maintains that it is not the business of the state explicitly to legislate or to endorse any account of the ultimate good, but only to legislate behavior. Religious freedom cannot mean that religious beliefs do not influence or are not implicated in legislation (as this would be impossible), but it does require that the state legislate only on matters of behavior necessary to public life while refraining from explicitly endorsing or teaching religious beliefs (whether those implicit in the state's laws or any other religious beliefs). In sum, Gamwell maintains that religious freedom requires that the religious question remain formally open and the citizenry be free to persuade each other to support legislation that is consistent with an alternative account of the ultimate good of humanity.[24]

Though *Dignitatis Humanae* does not provide the clear explanation of the co-existence of religious freedom and religiously-informed legislation that Gamwell has developed, the Declaration nevertheless affirms the major tenets of Gamwell's position. *Dignitatis Humanae*

[23]Religion is of course notoriously difficult to define. Nevertheless, Gamwell is right to give such a broad definition that any system of ultimate meaning would be included, so that the issue is not what is or is not a "religion," but rather the issue of legal protection afforded to all answers to the ultimately "religious" question of the final good of human life.

[24]In addition to the concise presentation of this argument in Gamwell's "Religion and Reason," see his *Meaning of Religious Freedom* (Albany: SUNY, 1995). A similarly insightful discussion of the inevitability of religious values in governmental legislation is provided by Ronald Thiemann, *Religion in Public Life: A Dilemma for Democracy* (Washington, DC: Georgetown University Press, 1996).

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shares Gamwell's contention that no person or religious body can justly be hindered from seeking to persuade others of the importance of religious doctrine for the organization of society. (Indeed, *Gaudium et Spes,* issued the same day as *Dignitatis Humanae,* discusses at length the implications of Christian faith for the political order. Both documents assume that the values we seek freely will be relevant to public life.) At the same time, the Declaration maintains that the state's proper concern is limited to matters of the common welfare, a limit that the state transgresses when it seeks directly to prohibit or to endorse religious acts. *Dignitatis Humanae* thus concurs with Gamwell's position on the following principles: 1) the laws of the state should be consistent with the religious truth as its people know it; and 2) the government has no proper role in directing the religious expressions of the people precisely because society should be directed to the true good realized in freedom. Hence, if Gamwell has successfully shown that these propositions can be maintained without contradiction, then Hauerwas's claim that *Dignitatis Humanae* is fundamentally incoherent is unfounded. Insofar as government neutrality on the religious question does not imply that laws may not reflect religious beliefs about the ultimate good of human life, it follows that religious disestablishment is consistent with a people's remaining free to allow religion to inform the whole of their lives.

This insistence on governmental neutrality includes for Gamwell not only neutrality about the various forms of Christianity but also (of course) a prohibition on the endorsement or establishment of any religious belief, however general or common that belief may be. I conclude similarly that any governmental establishment of even the most basic religious belief would contradict *Dignitatis Humanae*'s mandate that the civil government must ensure the equality of all citizens before the law such that there is no discrimination for reasons of religion.[25] Even a simple constitutional affirmation of God as the source of all true values would be a barrier to the equal participation in public debates of those who do not believe in God, insofar as their arguments for alternative values would be inconsistent with this country's Constitution. Such an established belief would further discriminate against dissenters by rendering them ineligible for those public offices that require a religious oath to uphold the Constitution, since dissenters could not coherently vow to uphold religious beliefs they are convinced are wrong. *Dignitatis Humanae*'s call for governments to "help create conditions favorable to the fostering of religious life" cannot, therefore, be properly interpreted as grounds for favoring some forms of religious life

[25]*Dignitatis Humanae*, art. 6.

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over others, or even for supporting theistic rather than non-theistic answers to the question of our ultimate purpose.[26]

Religious disestablishment and the socio-political importance of religious doctrine are not then mutually opposed ideas. We are too often presented with the false dilemma requiring that we choose either some form of religious establishment or a total, secularistic privatization of religion; we are told that governmental neutrality is impossible, as the government must be for or against God, for or against a religious basis of public life. This argument must be rejected as the false dilemma that it is, since neither logically nor practically is a civil government forced to choose between establishing religion and banishing it from public life. The restraint that prevents the government from endorsing an explicit answer to the religious question does not prevent non-governmental groups from defending their answer to that question in the public domain. The question of the ultimate human good must remain formally open to ongoing debate and revision, even while legislation regulates our common life in accord with some and not with other implicit answer(s) to this inherently religious question.

Perhaps it is at this point that we find a real self-contradiction in *Dignitatis Humanae*. If explicit governmental endorsement of any religious belief is a violation of the religious freedom of dissenters, what are we to make of the fact that *Dignitatis Humanae* does not rule out the possibility that a body politic might give legal recognition to a religion for reasons due to that society's "peculiar circumstances?"[27] We should first note that the Declaration neither endorses nor condemns such legal recognition, merely stating that if (hypothetically) such a situation exists, the state must nevertheless fulfill its obligation to ensure that there is no infringement of the religious freedom of its citizens.[28] Further, Enda McDonagh has argued that the Constitution of Ireland provides a legal recognition of the Catholic Church that is no more than a statement of the historical fact of the role Catholicism has played in that country; this legal recognition, McDonagh insists, is without juridical implications for or against the Catholic faith or Catholics in the government or the future development of that country.[29] If *Dignitatis Humanae* intends some such recognition of historical fact that in no way privileges explicit religious beliefs or a particular religious body,

[26]Ibid.

[27]Ibid.

[28]In his commentary notes on *Dignitatis Humanae*, John Courtney Murray argues that the paragraph on legal recognition was carefully worded to avoid taking a position on whether such legal recognition was potentially consistent with religious freedom (as some maintain) or never consistent with religious freedom (as others insisted). See Abbott, 685.

[29]McDonagh, *Freedom*, esp. 116-120.

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then such legal recognition may well be consistent with Gamwell's prohibition of the state's endorsing or teaching a particular answer to the question of the ultimate goal of human life. In any case, and however we interpret the legal recognition clause of *Dignitatis Humanae*, this legal recognition remains a hypothetical situation that is subordinate to the people's rights to religious freedom and to the full exercise of citizenship. This minor concession of refusing to condemn legal recognition may reveal an unresolved issue in the Declaration, but it does not provide evidence of a major contradiction in *Dignitatis Humanae*'s defense of religious freedom, nor does it force us to reject Gamwell's account as an explanation of the coherence of the Declaration's basic insights.

Having seen that religious freedom is inseparably intertwined with the authority of the state to enact legislation that reflects some ultimate value(s) and not others, we cannot end this discussion without a bit more attention to the special difficulties raised by morals legislation. As we have noted, *Dignitatis Humanae* stipulates that our right to be uncoerced in our efforts to realize the good as we see it is limited by the duty of government to protect the common welfare. Child sacrifice can be banned without fear of controversy, but what about polygamy or animal sacrifices? Many religions condemn as contrary to the common good such practices as divorce, artificial means of contraception, dancing, and the public appearance of unveiled women; if their adherents succeed in passing legislation against these behaviors, it is fairly safe to predict that those whose religions do not prohibit these actions will conclude that their freedom of religion has been infringed. To take another example, does our right to be uncoerced in matters of conscience preclude legislation against sodomy, which many in our society would define as part of their realization of a good life? As we become more aware that behavior and belief are inseparable, the most difficult challenges are posed by efforts at governmental regulation of actions that some believe must be prohibited and others claim are central to their realization in conscience of truly human values. Indeed, as Enda McDonagh noted over forty years ago, "to say that the problem of religious freedom today reduces to the problem of public morality is to exaggerate, but in some [s]tates only to a slight degree," since "religion connotes not merely a set of beliefs, but also a way of life, based on these beliefs."[30]

While it is true that *Dignitatis Humanae* does not attempt to provide us with a list of those cases in which the government's obligation to protect the public order trumps our personal rights to be uncoerced

[30]Ibid., 92. The essay from which this quote is drawn was first published in 1962.

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in our efforts to realize the good, the Declaration is not so vague on this matter as to leave us with no clue as to how to discern what abuses might limit religious freedom, as Hauerwas alleges.[31] As we have seen, *Dignitatis Humanae* insists on a presumption in favor of freedom in matters of conscience, so that governmental coercion in this realm is limited to what is necessary to defend the common welfare and to secure the public order. Those who seek legislation that will prevent others from acting according to their consciences must demonstrate not merely that the behavior in question is immoral but that it is seriously detrimental to the public order.

This question of the appropriate extent of morals legislation consistent with religious freedom, however, is further complicated by the fact that *Dignitatis Humanae* specifically includes "a proper guardianship of public morality" along with good order and true justice as the necessary components of the common welfare. A great deal depends on how we are to understand what is entailed in this public morality that the civic government properly enforces. If public morality is defined too broadly, there will be scarcely any space left for the right to be uncoerced in matters of conscience; yet, on the other hand, public morality should not be defined so narrowly that nothing is added that was not already included under the defense of good order and true justice.

Our understanding of the necessary limits of public morality may be clarified by a brief examination of three major, common sense definitions of the proper extent of morals legislation, all of which fail to leave sufficient room for "uncoerced conscience" to be a meaningful concept. The first approach I would like to consider is the view that the state should uphold the moral consensus of the majority of society. This position has the merit of providing a plausible definition: it is not unreasonable to define public morality as that morality held by most of the people. This is also an influential position, since it was maintained by Justice Antonin Scalia in a recent dissenting Supreme Court opinion.[32] Yet if we accept Scalia's definition, the right to be unhindered in acting according to one's conscience is reduced to the right to be unhindered when acting in ways that the majority of the population (as evident in the laws passed) agree is good. If this is the intended meaning, then the Declaration has set no real limit to the power of democratically elected governments with regard to morals legislation. In-

[31]Hauerwas, "Not Late Enough," 112.

[32]See Justice Scalia's dissenting opinion in *Lawrence v. Texas* 123 S. Ct. 2472 (2003) and the discussion of this case in Mary Doak, *Reclaiming Narrative for Public Theology* (Albany: SUNY, 2004), 60-62.

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stead, it simply confirms the common wisdom that the law in a democracy needs majority support.

An alternative, possibly more limited, approach to public morality has been proffered by Enda McDonagh. In his 1967 book, *Freedom or Tolerance,* he maintains that public morality is in principle identical to the natural law (the morality known through reason), though in fact morals legislation must take into account the extent to which the public has grasped the natural law as well as any practical difficulties in enforcement that may require us to tolerate what ought to be illegal.[33] This approach has the benefit of refusing to legislate anything not defensible on the grounds of reason (which Scalia's moral majority approach does not), but McDonagh's position is nevertheless also too broad to fit the freedom described in the Declaration. *Dignitatis Humanae* affirms that people have the duty and so the right to seek the truth in freedom, a truth that "cannot impose itself except by virtue of its own truth."[34] Surely then this right must include especially those human values that we can know through reason, whereas McDonagh's position would (at least theoretically) make acting on all such values a matter of legal coercion rather than freedom. This approach thus renders nonsensical the Declaration's explicit extension of religious freedom beyond matters of religious cult, including particularly those acts directed to realizing the good according to one's conscience.

George Weigel invokes (perhaps unintentionally) the broadest possible definition of public morality when he calls Catholics to seek legislation against behavior that they find detrimental to society, thus suggesting that the public morality which government should enforce includes all behavior that affects public life.[35] This may seem to be an appropriate and helpful limit, but we need only a cursory awareness of sociological studies to know that people's most personal decisions form patterns with considerable impact on the public. If all of our sins in some way affect the rest of society (as I believe they do), Weigel's approach would leave us with potentially no limits to civic legislation at all, and freedom from coercion would be utterly meaningless. I would further note that the Declaration is quite clear about the importance of true religion for society. If all behavior that affects society is a proper subject for legislation, then the entire right to religious freedom is undermined. We ought rather to take seriously Murray's astute observation, "when you have made your case against these influences as

[33]McDonagh, *Freedom,* 92-94.
[34]*Dignitatis Humanae*, art. 1.
[35]George Weigel, *Soul of the World: Notes on the Future of Public Catholicism* (Grand Rapids: Eerdmans, 1996), esp. 75.

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socially corruptive, you have only reached the threshold of the problem of social freedom. Many questions remain."[36]

If the state's appropriate guardianship of public morality is not, then, to be equated with the moral sense of the majority of the people, the morality known through reason, or the morality that affects society, what is it? I submit that an answer consistent with *Dignitatis Humanae*'s affirmation of a right freely to act according to the truth is that proffered by Murray, one of the architects of the Declaration: the public morality to be enforced by law is that minimal moral behavior necessary for a decently functioning society.[37] This is, to be sure, still a rather general and vague answer, though a degree of generality is not inappropriate in such a document, especially when dealing with matters that are as historically contingent as is public life. We are provided with further guidance in the principle that in matters of conscience, freedom is to be "respected as far as possible and not to be curtailed except when and insofar as necessary" to ensure that we live together "in good order and in true justice."[38] Morals legislation ought not then to aim for the prevention of whatever offends others or perhaps tempts them to depart from the true and the good lest the right to realize the truth in freedom become meaningless. Instead, a society must seek only that morals legislation necessary to defend the rights of all, basic justice, and the bounds of a decent common life.

Although *Dignitatis Humanae* has not provided us with a definitive determination of the minimal morality necessary for public life, it has clarified the appropriate grounds to be considered. We ought primarily to be concerned with whether the behavior in question violates others' rights or is so destructive of the public order that it threatens our capacity for a reasonably good common life. The specious but frequently used argument that those whose beliefs condemn an action must (on pain of self-contradiction) vote to make that action illegal should be retired. The argument with regard to morals legislation is not properly focused on whether reason or religion teaches that certain behavior is immoral, but rather whether the behavior in question sufficiently threatens our common public life that it must be constrained by the force of law.

Dignitatis Humanae cannot, of course, put an end to all the debates about religion and civic legislation. Still, it would be a major accomplishment even today, so many years after Vatican II, if we could recognize that religious freedom is preserved, not when a secularism pre-

[36]Murray, *We Hold*, 161.

[37]John Courtney Murray, S.J., "Should There Be a Law? The Question of Censorship" in *We Hold*, 155-174 at esp. 166.

[38]*Dignitatis Humanae* art. 7.

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vails that privatizes all religious beliefs, nor when people are free to vote to make their religious beliefs or moral codes the law of the land. Religious freedom is preserved instead when the body politic together seeks to legislate practices but not to endorse religious beliefs, and legislates only those issues of morality necessary to maintain the public order, paying special attention to the serious threat that must be present if the law in question will interfere with personal efforts to realize the good according to one's conscience.

III. Vatican Interventions in Issues of Church and State

In the later years of John Paul II's papacy, the Vatican took positions that have confused our reception of *Dignitatis Humanae* and have obscured the coherent position on religious freedom that the Declaration established. A brief discussion of two examples, John Paul II's intervention in the Constitution of the European Union and the Congregation for the Doctrine of the Faith's 1992 statement on gay rights legislation, will enable us to clarify the meaning of *Dignitatis Humanae* and demonstrate the ongoing relevance of the Declaration (when properly understood) for issues of religious freedom frequently debated today.

John Paul II's attempted interventions in the European Union's Constitution are in any case noteworthy, but perhaps especially so for Americans currently debating whether we are a "Christian nation" and for academics debating the secularity of liberal governments. John Paul's original request for an *invocatio Dei* in the Constitution, followed by his continuous lobbying for Constitutional recognition of the special role of Christianity and of the Christian Churches in Europe, may seem to be consistent with *Dignitatis Humanae*, even perhaps further developing the doctrine for issues of today that the Declaration did not address.[39] After all, the Declaration does not condemn legal recognition of religions and reminds us that "the traditional understanding of . . . society's duty to God" remains uncompromised by the defense of religious freedom.[40]

If the sought-after *invocatio Dei* were not merely a mention that some people believe in God but rather (as it seems) was to be a Constitutional assertion that God is the source of all proper social values, this *invocatio* would of course be an establishment of religious belief

[39]"EU Seeking a Divine Definition," *International Herald Tribune,* February 5, 2003; also, "John Paul II Resumes Call for Constitution to Recognize Christianity," *Zenit News Agency,* January 9, 2004, http://www.zenit.org/english/visualizza.phtml?sid=47130.

[40]*Dignitatis Humanae*, art. 1.

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far beyond *Dignitatis Humanae*'s allowance for recognition of an ecclesial body's special historico-cultural role. One might argue that the Declaration does not explicitly forbid such Constitutional establishment of religious belief, yet this is surely inconsistent with the limited role and competence of the state in *Dignitatis Humanae*. When the state privileges some beliefs or religious communities over others, the state is in effect claiming the competence to determine which religious beliefs are true and which are untrue. Further, I have argued here that a Constitutional establishment of belief in God cannot be harmonized with the explicit requirement that citizens not be discriminated against for religious reasons. All who are not monotheists would likely be unable to swear to uphold this Constitution and may be at a disadvantage in public debate insofar as they wish to argue for legislation based on a non-theistic account of the ultimate good of humanity.

Perhaps most clearly in conflict with *Dignitatis Humanae* is the fact that, even after John Paul II surrendered his quest for a Europe united by explicit belief in God, he did not back down from his more sustained and public argument that the Constitution must legally recognize Christianity. This insistence on the necessity of legal recognition continued even after the alleged unfairness of excluding Christianity from mention among the major European cultural influences was resolved by removing all references to specific cultural sources.[41] Although these other cultural factors were omitted, John Paul insisted that Christianity must still receive special recognition. While the Pope's position may again seem consistent with *Dignitatis Humanae*'s acknowledgment of peculiar circumstances that may lead to the recognition of a specific religion, it is important to note that John Paul was not arguing that Christianity may be recognized but that it *must* be so. Does this not, in effect, return us to the pre-Vatican II (thesis-hypothesis) position that when we are the majority population we must establish our religion whenever possible? To be sure, John Paul asked for Constitutional recognition of Christianity rather than specifically of the Catholic Church, but there is nothing in *Dignitatis Humanae* indicating that Christianity as a religion has specific rights that Catholicism or particular denominations of Christianity do not have.

John Paul's argument for legal recognition of Christianity in the European Union is no less troubling because it was consistently proffered on the grounds that Christianity and Christian values have been

[41]See especially John Paul II, "Homily for the Advent Mass for the Students of the Roman State Universities," Thursday, 11 December, 2003, http://www.vatican.va/holy_father/john_paul_ii/homilies/2003/documents/hf_jp-ii_hom_20031211_university-students_en.html

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and must continue to be the source of European unity.[42] Indeed, this rationale suggests that the purpose of Constitutional recognition of Christianity is then precisely to ensure that all legislation will be consistent with Christianity. I, too, share this desire that all laws would be in accord with Christian values, but I contend that religious freedom requires that all have an equal opportunity to make their case for the values that ought to govern public life. Religious freedom means nothing other than bare tolerance if we can write a Constitution so as to determine in advance that some religious ideals and values are publicly inadmissible. Again, Pope John Paul seems to have returned to the earlier teaching that preferred legal establishment (with tolerance of dissenters) whenever possible as the proper means of uniting society and directing it to its proper goal.

Our final discussion must now turn to a specific case involving the contentious question of the legislation of morality. *Dignitatis Humanae* and John Paul II agree that morality and religion are inseparable, since we direct our lives to God not only through beliefs and acts of worship but also through all of our attempts to realize the good and to conform our lives *in toto* to the ultimate truth for humanity. Indeed, this inseparability of religion and morality rooted in the search for the true and the good is why freedom of religion is incomplete without the right to be uncoerced in acting according to one's conscience, as *Dignitatis Humanae* maintains and I have repeatedly argued here. This unity of religion and morality also requires that any defense of religious freedom aptly grasp the limits of the state's role as guardian of public morality.

Unfortunately, the document of the Congregation for the Doctrine of the Faith, "Some Considerations Concerning the Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons" presents arguments in support of its position that continue to presume a role for state coercion of conscience, and thus it conflicts with the understanding of religious freedom in *Dignitatis Humanae*. When, for example, this CDF document asserts that rights to work and to housing may (and perhaps must) be "legitimately limited for objectively disordered external conduct" simply for the reason that the behavior is disordered, have we not returned to the extreme position that those in error forfeit their public rights? This is of course further compounded by the insistence that "there is no right to homosexuality," which re-

[42]John Paul II's Angelus at Castelgandolfo, 24 August 2003, http://www.vatican.va/holy_father/john_paul_ii/angelus/2003/documents/hf_jp-ii_ang_20030824_en.html; Apostolic Exhortation *Ecclesia in Europa,* 28 June 2003, http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_20030628_ecclesia-in-europa_en.html.

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moves the right from its proper place in the person's free search for truth and returns it to the mistaken location in the action taken or idea believed (such that there is no right to error).[43] The question, as *Dignitatis Humanae* recognized, was not whether there is a right to be or to do wrong, but rather whether there is a right to freedom from coercion of conscience. As we have seen, one of the major developments of the Declaration was to affirm that there is such a right that is not forfeit due to error or even negligence. To be sure, *Dignitatis Humanae* invests the civil government with the responsibility to limit this right when essential to maintain the public order (including the public morality), but the necessary argument grounding discrimination against homosexuals in the need to protect the common welfare is lacking in this document (and in too many of the arguments by the U.S. bishops who received it). If the government is allowed to overrule our right to be uncoerced in matters of conscience simply because the behavior involved is objectively wrong, there is no longer any such right to freedom of conscience, as I have argued above.

The CDF document is perhaps even more disturbing in that it moves rather directly from insisting that there is a just denial of housing and work to people who engage in homosexual acts to the further suggestion that it is also acceptable to discriminate against people with a homosexual orientation, on the too-easy assumption that only active homosexuals will proclaim their homosexual orientation and be known as such.[44] A forced silence on homosexual orientation would then be imposed, because those who acknowledge their orientation forfeit civil rights to work and to housing, regardless of whether or not they are in fact sexually active and whether or not there is evidence of this activity. What could remain of *Dignitatis Humanae*'s affirmation that even those in error maintain the right to express their views publicly and to be part of the social process of seeking the truth in open dialogue with others? This Congregation's document instead would have us conclude that those whose moral positions (however sincere) are objectively wrong simply do not have the right to proffer them publicly because the erroneous positions reveal and encourage others to an inclination to act wrongly.

It may seem that these particular cases of Constitutional recognition and gays' rights legislation are but limited examples, and in any case ones in which the problem is more with the argument than with the actual stance taken. Am I then overly alarmist in maintaining that they contribute to a diminishment of the commitment to religious free-

[43]Congregation for the Doctrine of the Faith, "Responding to Legislative Proposals on Discrimination Against Homosexuals," *Origins* 22 no. 10 (Aug. 6, 1992), nos. 12 & 13.
[44]Ibid., no. 14.

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dom affirmed by *Dignitatis Humanae*? To be sure, these positions were not supported by a very high level of papal authority. Nevertheless, the rationale offered in each case gives reason for concern: the arguments suggest that officers of state have the religious competence necessary to determine correct religious values and not merely to oversee the behavior that influences the public order. Further, when ecclesial arguments presume that religious freedom pertains only to those who use their freedom to realize the truth and not to those in error, the legacy of *Dignitatis Humanae* is threatened indeed.

IV. Conclusion

While I have argued here that religious freedom as described by *Dignitatis Humanae* is not consistent with invoking the power of the state to achieve legal endorsement and privileging of particular religious beliefs or communities, I wish to be clear that I am not advocating that secularism that removes all mention of God, Christianity, or anything religious from public life. As *Dignitatis Humanae* indicates, if we are to seek the truth in freedom, and to direct our society according to these truths, the public debate over the values that ought to govern our society must be free, vigorous, ongoing, and at times perhaps explicitly religious. The support for religious freedom in the Declaration is predicated not on religious beliefs' irrelevance to public life, but on recognizing that the state's authority and competence is limited to matters of the public order and does not extend to discerning the ultimate truth of human life better than its citizenry can. Religious freedom empowers communities of discourse in search of truth, but only to the extent that all positions, theistic and non-theistic, are proffered and defended by a country's people and social groups other than the civic government.[45] When we seek to avoid the difficulties of persuasion (and the very real risk of losing the argument) by invoking the power of the state to limit the conversation, we have exchanged the possibility of realizing the truth in freedom for a coerced compliance in which those who disagree are finally not equal citizens with those whose views are established by law.

While Hermínio Rico has expressed concern about John Paul II's one-sided emphasis on *Dignitatis Humanae*'s defense of the freedom of the Church from the state, David Hollenbach judges to the contrary that "fears of a new quest for hegemony" are unfounded.[46] Hollenbach

[45]David Hollenbach, S.J., "Freedom and Truth: Religious Liberty as Immunity and Empowerment" in J. Leon Hooper, S.J., and Todd David Whitmore, eds., *John Courtney Murray and the Growth of Tradition* (Kansas City: Sheed & Ward, 1996), 129-148 at 146.
[46]Ibid., 132-134.

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rightly cautions against knee-jerk reactions and asks that we read the Pope's corpus on the topic of religious freedom carefully and avoid drawing conclusions from silence. Yet the positions taken by the Vatican in the last years of John Paul's papacy do raise serious concerns. These concerns are not adequately allayed by Hollenbach's reminder that John Paul consistently advocated dialogue and maintained that "the Church's method is always that of respect for freedom."[47] What is at stake, after all, is precisely what is meant by the concept of freedom. Vatican political interventions (more recent than those addressed by Rico and Hollenbach) suggest an inclination to invoke the power of the state to limit the possibility of error. The Vatican has been increasingly willing to ask the state to coerce when possible those who would misuse their freedom, not only on the grounds that this coercion is necessary to maintain the public order but more disturbingly at times, it seems, simply because the behavior at stake is contrary to important Catholic ethical teachings and might incline more people to disagree with the Church.

There may indeed be good reason to be pessimistic about people's capacity to discern the truth in freedom, especially in those areas of the world where an increasingly powerful capitalist ethos has resulted in a culture of consumerism. Nevertheless, we need a Niebuhrian realism here in that our pessimism about the people must be balanced by pessimism about the state which is, after all, determined by these same people. If we are willing to grant the state a competence in deciding religious matters when we believe we can use that power for the good, we will have little grounds for complaint when that power is used against us.

Notwithstanding, then, the real difficulties we face in defending the truth in public life, I believe that our best option is still to trust in the power of a truth realized in freedom. Pope Paul VI, in my judgment, got it quite right when he declared:

> And what does this Church ask of you after close to two thousand years of experiences of all kinds in her relations with you, the powers of the earth? What does the Church ask of you today? She tells you in one of the major documents of the Council. She asks of you only liberty, the liberty to believe and to preach her faith, the freedom to love her God and serve Him, the freedom to live and to bring to men [sic] her message of life."[48]

[47]John Paul II, as quoted by Hollenbach, ibid., 134.

[48]Pope Paul VI, in his message to civic authorities on Dec. 8, 2005, as quoted in Abbott, *Documents*, 730. See also *Gaudium et Spes* art. 42 on the Church's desire to develop freely in a just society.

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