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8. Religious Liberty and Gender and Sexual Orientation Nondiscrimination Legislation

A Critical Analysis of the Catholic Perspective

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Abstract

Following the legalization of same-sex marriage by the U.S. Supreme Court, the next major struggle for equality rights for members of the LGBT community is the Employment Non-Discrimination Act (ENDA). The United States Conference of Catholic Bishops asserts that ENDA threatens religious liberty. Its position on religious liberty has evolved from seeking to protect the inward practice within a religious institution to protecting also the outward practice of a religious institution that serves diverse national populations. It has also been extended to embrace protecting public and private corporations and individual employers who have moral objections to specific types of sexual behavior and to moving beyond an exemption from a *just* law based on religious freedom to advocating the block or repeal of an *unjust* nondiscrimination law. We defend ENDA legislation and critique the USCCB position on its misperception of reductive secularism, lack of nuance in its understanding of the relationship between the common good and public order, failure to justify its claim that

ENDA is an unjust law, and ignoring the authority of a well-informed conscience. We conclude that the USCCB is advocating unjust discrimination in its attempt to block or repeal ENDA legislation.

Keywords: religious liberty, Employment Non-Discrimination Act (ENDA), LGBT, sexual orientation; gender identity; United States Conference of Catholic Bishops

Introduction

On June 26, 2015, the United States Supreme Court ruled same-sex marriage to be legal throughout the nation. That ruling, establishing the civil right of homosexual couples to marry, was a monumental legislative event. Leading up to it, a number of individual states had passed same-sex marriage legislation that both reflected and shaped public opinion in favor of equality before the law for same-sex marriage. A similar development is taking place regarding anti-discrimination laws based on sexual orientation and gender. Many states have passed nondiscrimination laws. A 2016 poll by the Public Religion Research Institute reveals overwhelming support for such laws among the general (71%) and Catholic (73%) populations. Nevertheless, there is a clear and deepening resistance to such laws from religious groups who are morally opposed to homosexual and transgendered people, who believe that such legislation is a violation of their religious freedom, or who fear that there may not be a religious exemption from it for religious institutions. The Catholic Church has been one outspoken opponent of such nondiscrimination legislation; both the United States Conference of Catholic Bishops (USCCB) and the Nebraska Catholic Conference (NCC) have challenged it.

In April 2015, the NCC sent a communication to all parents who have children enrolled in Catholic grade schools throughout Nebraska regarding proposed Nebraska Legislative Bill 586 (LB 586) on the prohibition of discrimination based on sexual orientation and gender identity. The communication said in part:

Your immediate action is needed to stop a bill in our State Legislature that would jeopardize the mission of Catholic schools. LB 586 would make “sexual orientation” and “gender identity” protected classifications under Nebraska’s employment laws. All persons have inherent human dignity and must be treated with respect. But LB 586 would require employers, including Catholic schools, to engage in employment practices that would *affirm sexual behavior contrary to Church teaching*. Schools would also have to affirm employees who deny that their gender was determined by the Creator as either male or female and who choose another gender as a matter of personal choice. For example, LB 586 *would prevent a Catholic school from reprimanding a transgender male coach who insists on using the girls’ shower and restroom facilities*, or from renewing the contract of a teacher of human sexuality who announces to students that she is marrying her lesbian partner. There is no religious exemption for the Church, and a proposed amendment is deceptive and does not provide protection to religious institutions (emphasis added).

Following the United States Conference of Catholic Bishops (USCCB), the NCC extends its concerns with nondiscrimination legislation to private and government businesses on the basis that such legislation promotes immoral sexual behavior.

LB 586 would apply to all employers with 15 or more employees, and all contractors/subcontractors of state and local government. Through their personnel management and policies, *these employers would have to affirm sexual behavior and relationships that contradict the moral teachings of many religions*, and the destructive concept that one's nature as male or female is a social identity that one can choose and change at will. *Employers would also be required to allow employees to promote and advocate for such lifestyles and fluid gender identities within and outside the workplace*, regardless of whether such advocacy would be detrimental to the workplace's mission or operations (Schleppenbach; emphasis added).

Aside from a brief acknowledgment of Catholic teaching on human dignity ("All persons have inherent human dignity and must be treated with respect") this Catholic rhetoric and fear-mongering has taken the claims of religious freedom to an entirely new level. In the wake of the Supreme Court's ruling on same-sex marriage, the next legal and religious debate regarding LGBT persons seems to be focusing on non-discrimination legislation.¹ This legislation applies to cases that received widespread media attention where private businesses refused to provide goods and services to gays and lesbians. In New Mexico, a wedding photographer refused to photograph a lesbian couple's wedding; in Colorado, a baker refused to bake a gay couple's wedding cake. Nondiscrimination legislation in employment, housing, and public accommodations – the Employment Non-Discrimination Act (ENDA) – has been widely introduced. The USCCB argues that ENDA threatens religious liberty.

The foundational question surrounding religious freedom and nondiscrimination legislation is how to balance one individual's right to practice religion freely with the civil rights of others when the two rights come into conflict. The claims for religious freedom and religious exemptions to discriminate, as the USCCB and NCC statements make plain, have evolved from seeking to protect the *ad intra* or inward practice within a religious institution to protecting also the *ad extra* or outward practice of a religious institution that serves diverse national populations, as do Catholic hospitals and schools. They have been extended to embrace protecting public and private corporations and individual employers who have moral objections to specific types of sexual behavior and to moving beyond an exemption from a *just* law based on religious freedom to advocating the blocking or repeal of an *unjust* nondiscrimination law. How did we get to this point? We first present a brief history of religious freedom and nondiscrimination legislation in the U.S. and then critically analyze the USCCB's assertions defending religious freedom, opposition to ENDA legislation, and suggest a strategy for moving forward in the currently polarized and toxic religious, political, moral, and legal context.

¹ NCC (2016) states: "There may also be a continued push for bills expanding homosexual rights, especially following the U.S. Supreme Court's ruling last summer legalizing same-sex 'marriage.' One of the bills carried over from 2015 is LB 586."

Historical Overview

There is a growing and perhaps inevitable legal and moral tension in the U. S. between nondiscrimination laws and the right to religious freedom. Thomas Jefferson famously stated that “a wall of separation exists between Church and State,” but, as we have become a more pluralistic, diverse country ethnically, culturally, and religiously, that wall has been dismantled and the growing debate on the interrelationship between the two constitutional clauses of the first amendment has served as a jack-hammer for this dismantling. The Free Exercise clause states that “Congress shall make no law . . . prohibiting the free exercise . . . of [religion].” The Establishment clause states that “Congress shall make no law respecting an establishment of religion.” On the one hand, some religious groups argue that nondiscrimination legislation, such as that protecting homosexual orientation and gender identity, violates their religious freedom if they are morally opposed to homosexuality and transgendered people. They claim that their moral doctrines require discrimination to protect their religious freedom. The *Catechism of the Catholic Church* asserts, “Every sign of *unjust* discrimination in [homosexuals] regard should be avoided” (2358, emphasis added), implying that there is just discrimination against homosexuals. The bishops assert that discrimination is just and moral in the case of homosexual coaches, teachers, military personnel, and applicants to foster or adopt children (see *Congregation for the Doctrine of the Faith*: 11). In contrast, those who defend nondiscrimination laws argue that granting religious exemptions from nondiscrimination legislation violates the establishment of religion clause by favoring one religious group over another which conforms to the nondiscrimination law (Wessels: 1202). With the growing number and diversity of religious groups and the expansion of government into religious domains – consider the recent clash between the Catholic Church and the Affordable Care Act’s (ACA) so-called “contraceptive mandate” – the courts have struggled to negotiate the interrelationship between the Free Exercise and Establishment clauses and the values, norms, and laws they try to uphold.

To resolve the tension between the two clauses, Shelley Wessels argues for a distinction between the inward and outward practices of religious institutions. On the one hand, “a religious interest should be absolutely protected against discrimination claims when the religious group advocates the religious interest in the context of its activity as a religious community ‘turned inward’” (1204). The Catholic Church, for example, may ordain only men, legally a form of gender discrimination, for the Free Exercise Clause protects it because it is operating internally within its own domain. A religious group, however, “should be required to adhere to antidiscrimination provisions . . . when it functions as a community ‘turned outward,’ toward the world” (1204). A Catholic university or hospital that serves culturally and religiously diverse populations with equally diverse faculty, staff, and administrators cannot discriminate against a homosexual employee because it serves “the world” external to itself.

This inward-outward distinction is useful, but it leaves ambiguous the line of demarcation between what constitutes inward and outward with respect to a religious institution and the world outside it. What is unique about the NCC argument, and is becoming more prevalent among religious institutions and individuals, especially in the wake of the Supreme Court’s ruling legalizing same-sex marriage, is that the claims of religious

liberty are extending the inward and outward distinctions beyond religious institutions to non-religious institutions and from institutions to individuals. This is clearly evident in the case of Kim Davis, a county clerk in Kentucky, who refused to issue marriage licenses to same-sex couples on the basis of religious objections. The NCC asserts, then, that LB 586 “would apply to all employers with 15 or more employees, and all contractors/subcontractors of state and local government” as well as individual “for-profit employers who have religious or conscience objections” (*Southern Nebraska Register*). We address the expansion of nondiscrimination exemptions to non-religious institutions and individuals and the attempts by religious organizations to prevent or repeal nondiscrimination legislation under the umbrella of religious freedom.

Two important pieces of legislation to negotiate the interrelationship between religious freedom and nondiscrimination legislation are the Religious Freedom Restoration Act (RFRA) and ENDA. The RFRA is a federal law overwhelmingly passed by Congress in 1993 to protect the right to religious belief and the right to practice religion. This legislation was passed as a response to the U.S. Supreme Court’s ruling in *Employment Division v. Smith*, a decision that the State could deny unemployment benefits to a Native American who was fired for using peyote as part of a religious ritual. Many saw this ruling as an extension too far of “the compelling interest test” whereby, if the State can establish a compelling interest to interfere with Free Exercise claims, it has the right to do so. Congress’ RFRA was meant to narrow “the compelling interest test” and reestablish the principles defending religious freedom. In 1997, the U.S. Supreme Court ruled that the RFRA was unconstitutional as applied to particular states; individual states would have to formulate their own versions of RFRA legislation.

Currently, twenty states have RFRA legislation and eleven other states interpret their constitutions to reflect the RFRA standard (*Politics and Religion*). Nebraska is not one of those states. Shortly after the Supreme Court ruling, Congress attempted to formulate comparable federal legislation by other means. Partisan gridlock, however, killed the bill. How did congress shift so radically from virtually unanimous agreement on RFRA legislation to partisan gridlock in five short years? According to Law Professor Douglas Laycock, “the biggest problem for religious freedom in our time is deep disagreements over sexual morality” (2014: 846). This insight is borne out in very public cases such as the ongoing court battles between the USCCB and the ACA on the so-called contraceptive mandate, Indiana’s version of RFRA and concerns over discrimination against members of the LGBT community by private corporations, and the U.S. Supreme Court’s ruling in the case of *Burwell v. Hobby Lobby Stores, Inc.* that allows “closely-held” private corporations a religious exemption from providing contraception in its insurance plan on religious grounds. The Hobby Lobby case entails a landmark decision since it extended RFRA legislation beyond religious institutions to private, for-profit corporations. Although “no one has ever won an exemption from a discrimination law under a RFRA standard” (*Politics and Religion*), there is concern that, with the Hobby Lobby decision, RFRA has been rewritten for the “corporatization of religious liberty” (Schwartzman, Schragger, and Tebbe) and will serve as jurisprudential precedent for exemptions from nondiscrimination, especially on issues revolving around sexual orientation and gender identity.

Hobby Lobby's victory is applauded by the USCCB and provides support for its critique of ENDA, the second piece of legislation we consider. ENDA was passed by the Senate in 2013 by a vote of 64 to 32. It includes gay, lesbian, bisexual, and transgender classifications in federal non-discrimination law, which already protects classes based on race, religion, sex, and national origin. ENDA "prohibits covered entities, employers, employment agencies, labor organizations, or joint labor-management committees, from engaging in employment discrimination on the basis of an individual's actual or perceived sexual orientation or gender identity" (113th Congress). The House never brought the measure to a vote and an attempt to introduce ENDA-type legislation as an amendment into defense legislation failed. President Obama did sign an executive order that bars federal contractors from anti-LGBT discrimination in the workplace. However, this legislation does not extend beyond federal contracts and it is left up to individual states to propose and pass ENDA-type legislation. In 2012, 31 states and Washington D.C. had passed an ENDA-type law or administrative policy (Hunt). The USCCB judges that RFRA "works" because it protects religious freedom (USCCB 2015) and ENDA violates RFRA since it "provides no religious liberty protection of any kind for any stakeholder" (USCCB 2013b). In the next sections, we explain and critically analyze the USCCB's defense of RFRA and rejection of ENDA-type legislation.²

USCCB on Religious Freedom

In April 2012, the USCCB issued a statement on religious liberty, *Our First, Most Cherished Liberty* (hereafter cited as *Statement*) that argues in alarmist language that freedoms in the United States are "threatened" and that "religious liberty is under attack." There are four claims in the text that have a bearing on the USCCB's and NCC's stance against sexual orientation and gender nondiscrimination legislation: reductive secularism, the common good, just and unjust laws, and conscience claims. We state these assertions, draw out their implications for this legislation, and critically evaluate them.

Reductive Secularism, Relativism, and the Culture Wars

Although secularism receives but a brief mention in the *Statement*, concerns over it are the basis for both its claims about how religious freedom is under attack and its resistance to ENDA-type legislation. The USCCB encourages lay people to be educated and engaged in the public debate on religious freedom to confront "the dominant culture" and to have "the courage to counter a *reductive secularism* which would delegitimize the Church's participation in public debate about *the issues* which are determining the future of American society" (USCCB 2012, emphasis added). Benjamin Wiker argues that reductive secularism has clear parallels with Popes John Paul II's and Benedict XVI's concerns with a "dictatorship of relativism." Secularism's end is "the removal of Christianity from culture;" relativism serves as a means to this end by denying universal ethical truth and "affirm[ing] all views as equally good; all ways of living as equally admirable; all thoughts as equally true" (Wiker). A central concern of the USCCB is with reductive secularism that manifests itself as relativism and violates not only religious freedom but the truths of natural law. "The issues" that are at the

² Several commentators on the USCCB's document, *Our First, Most Cherished Liberty*, make the point that it makes assertions or claims rather than presents arguments (see, for instance, Kaveny; Laycock 2012).

heart of this violation and are “determining the future of American society” are largely sexual ethical issues. These issues are of greatest concern for the USCCB and reflect culture wars that are polarizing the U.S. and which the USCCB and NCC are fomenting with various statements against ENDA legislation. We consider relativism and the cultural wars in turn.

1. The Magisterium on Relativism

Throughout their pontificates, Popes John Paul II and Benedict XVI raised concerns about relativism, which denies the existence of objective, universal truth and fundamentally threatens the human search for truth. In his homily at the opening of the 2005 papal conclave, Cardinal Joseph Ratzinger spoke of the “dictatorship of relativism” that “does not recognize anything as definitive and whose ultimate standard consists solely of one’s own ego and desires” (Ratzinger). In this section, we are specifically concerned with moral relativism, which denies the existence of universal, objective, valid-for-all-circumstances moral truth. Such truth is necessary, the Catholic magisterium argues, as the foundation for absolute norms that assert that certain acts, such as contraceptive and homosexual acts, are intrinsically evil and can never be morally justified regardless of intent or circumstance, and that a just and good society must adhere to these norms to protect the common good. Concern about relativism is certainly warranted in the twenty-first century, but the magisterium fails to discern the difference between genuine *relativism*, which rejects all objective ethical truth, and *perspectivism*, which accepts objective ethical truth but argues that human grasp of it is always partial, but reliable, and in need of further clarification. It also fails to discern legitimate theological pluralism, which the International Theological Commission’s “Theology Today” (2011) advances as an essential criterion of Catholic theology. Neither moral nor theological pluralism is to be equated with the relativism just described. Neither are religious, social, legal, or cultural disagreements about the content of sexual norms necessarily a manifestation of the relativism the USCCB asserts is a threat to religious freedom and the stability of society.

2. Culture Wars

Culture wars in the U.S. have defined and solidified the dividing lines between Church and State on many ethical issues. They have also empowered religious organizations to extend their reach into the State by moving beyond claims for exemptions to laws on the basis of religious freedom to advocating for the repeal or blocking of laws that, from their perspective, morally threaten the good of individuals and society (see Schmidt). Laycock argues that questions driving the culture wars have become more complex recently and the principal reason for this is “deep disagreements over sexual morality” reflected in the sexual revolution (2014: 839). He specifies: “On abortion, contraception, gay rights and same-sex marriage, conservative religious leaders condemn as grave evils what many other Americans view as fundamental human rights” (2014: 839, 866). These disagreements are evident not only between religious leaders and non-religious citizens, but also between religious leaders and their coreligionist citizens, including Catholic citizens. Sociological studies indicate a substantial and growing disconnect between what the Catholic faithful believe on sexual ethical issues and official Catholic teaching on those issues. A 2015 Pew survey indicates that fewer than half the Catholics surveyed believe that homosexual acts, remarriage without an annulment, cohabitation, and contraception are sins. Some 76% of Catholics believed that

the Church should allow birth control, 61% believed that it should allow cohabiting couples to receive communion, 62% believed that it should allow couples remarried without an annulment to receive communion, and 46% believed that it should allow same-sex marriage. What are we to make of these statistics? What relation do they have to official Church teaching and to accusations of relativism and secular reductionism against those who disagree with those teachings?

The first thing to note is that, as a representative survey of the Catholic population, the Pew survey makes an important contribution to our knowledge of Catholic opinion on sexual ethical issues in the U.S. Second, what is often labeled as “culture wars” and a manifestation of relativism may more accurately be ascribed to different perspectives on how to define human dignity and what norms facilitate or frustrate attaining that dignity. Third, the data of the Pew survey challenge claims to relativism by giving us insight into the *sensus fidei*, that “spiritual instinct that enables the believer to judge spontaneously whether a particular teaching or practice is or is not in conformity with the Gospel and with apostolic faith” (International Theological Commission 2014). It has become common for some magisterial officials to dismiss the data from surveys as sociological and not theological facts. That is obviously true as a description of the data, but it is obviously false if it means there is no *correlation* between the sociological and theological facts. The data in the Pew survey correlate to the sense of faith of the faithful, and that sense of faith of the faithful, in turn, correlates to the more universal sense of faith of the communion Church. The data indicate pluralism in Catholic beliefs on sexual issues. To present official Catholic teaching on sexual ethical issues as if it were the only morally legitimate perspective, to use that perception to claim violations of religious liberty if and when legislation interacts with those teachings, and to discount those perspectives that disagree with Catholic teaching as manifestations of relativism discounts the rich diversity of the Catholic tradition and the sense of faith of the faithful.

As the culture wars intensify and leaders of religious institutions, including Catholic bishops, attempt to assert their authority and to legislate their vision as normative under the guise of religious liberty, more people react by resisting sexual norms taught by these institutions. This strategy often creates a hostile environment among religious and non-religious people alike towards religious institutions and claims of religious freedom. Laycock argues that this strategy may end up having an impact on religious freedom in the United States similar to that experienced in France after the French Revolution, namely, a narrowing of the view of religious liberty (2014: 863ff.; 2011).

Though France and the U.S. have very similar legislative language on religious liberty – free exercise of religion, no establishment of religion, and separation of Church and State (Laycock 2014: 863) – France has laws restrictively interpreting religious freedom and the U.S. has laws interpreting it expansively. Laycock traces the origins of these differences back to the French and American revolutions. In France, the Catholic Church was a critic of the revolution. The revolution demanded the separation of Church and State and the Church was staunchly opposed to both this separation and to the liberties for people for whom the revolutionaries fought. The Church’s resistance is clear in Pius IX’s *Syllabus of Errors*, for example, which condemned the idea of religious freedom as “insanity” (77). In the American revolution, the churches were staunch supporters of the revolution since there was not a

dominant religion or ancient regime that would be dethroned in the aftermath of the revolution. In the U.S., religion and liberty were seen as natural allies; in France, they were seen as natural enemies. This history, Laycock points out, has shaped the different attitudes towards religious liberty up to the present in France and up to the sexual revolution in the United States.

It can be argued that the sexual revolution and the Church's response to it have transformed majority public opinion on religious liberty in the U.S. Majority support for a broad interpretation of religious liberty in the aftermath of the American revolution now risks shifting to a majority support for a narrow interpretation of religious liberty reflected in the aftermath of the French Revolution. It is somewhat disingenuous that the USCCB's *Statement* cites as an historical example of religious liberty, Baltimore's Archbishop James Gibbons' visit to Rome in 1887, where "he defended the American heritage of religious liberty" and claimed that "in the genial atmosphere of liberty [the Church] blossoms like a rose" (2012). In citing this example, the USCCB overlooks two points. First, "Rome's response was to anathematize Gibbons' embrace of his country's approach to religious liberty as heretical" (Silk) by reaffirming Pius IX's condemnation of the proposition: "In the present day it is no longer expedient that the Catholic religion should be held as the only religion of the State, to the exclusion of all other forms of worship" (Pius IX: 77). It was not until the Second Vatican Council's *Decree on Religious Freedom* in 1965 (*Dignitatis Humanae*) that Pius' teaching was repudiated and replaced by the straightforward teaching that "the human person has a right to religious freedom" (2). Second, and more to the point, Gibbons' optimism on the United States' novel approach to religious liberty that allows the Church to blossom like a rose has, due in large part to the Catholic Church's own resistance to the sexual revolution and personal rights, come under deep suspicion as it moves to extend its authority beyond its inward functioning to legislate its sexual morality for the broader, external, non-Catholic population. Not only does the Church oppose the content of the sexual revolution in its norms prohibiting homosexuality, contraception, and cohabitation, for example, but it also opposes the common-good principle of the sexual revolution, the human right to individual liberty. "For tens of millions of Americans," Laycock notes, "conservative churches have made themselves the enemy of liberty" (2014: 866).

3. Politics and Religion

The USCCB (2012) asserts that religious liberty is a cherished American value to be protected at all costs, but David Hollenbach and Thomas Shannon point out that the idea of religious liberty they invoke has profound political implications. Two points are significant. First, post-Baby-Boomer generations are alienated from conservative religious leaders' positions on many sexual ethical issues, and Millennials are increasingly alienated and secularized (Putnam and Campbell). Pew Research documents that a growing number of Millennials (35%) are either religiously unaffiliated or their religion is "nothing in particular" (Lipka). This is a substantial increase compared to the 13% non-affiliation of Baby Boomers in the late 1970s and 20% of Generation Xers in the late 1990s (Pew Research Center 2010). In addition, ex-Catholics make up the third largest religious group in the United States (Reese), and one of the reasons many of them cite for leaving the Catholic Church is its rigid, absolutist stance on sexual ethical issues (Roberts).

Second, there is a documented and growing correlation between membership in a religious institution, political party affiliation, and stances on sexual and religious freedom issues. Republicans tend to oppose abortion³ and same-sex marriage; Democrats tend to be pro-choice and support same-sex marriage. This political, legal, and moral polarization has profound implications on the religious-liberty perspective of the two parties. Among Democrats, the religiously unaffiliated group has grown from 19% in 2007 to 28% in 2014; among Republicans, it has grown from 10% in 2007 to 14% in 2014 (Audi). While the number of Democrats who are religiously unaffiliated is twice the number of Republicans, the number of religiously affiliated Democrats and Republicans remains high. On sexual and religious liberty issues, the statistics are striking. A Marist Poll in March 2015 posed the following question: “Do you strongly support, support, oppose, or strongly oppose allowing first amendment religious-liberty protection or exemption for faith based organizations and individuals even when it conflicts with government laws?” (Catholic News Agency). Responses showed that 46% of Democrats “strongly support” (13%) or “support” (33%) and 64% of Republicans “strongly support” (23%) or “support” (41%) such allowance. In addition, 44% of Democrats “strongly oppose” (11%) or “oppose” (33%) and 32% of Republicans “strongly oppose” (10%) or “oppose” (22%) it. These numbers indicate a consistent pattern, roughly a third less support among Democrats for allowing first-amendment religious liberty exemption for faith based institutions and individuals, in comparison to Republican support of such exemptions.

When the question shifts from faith-based institutions to private corporations, the support for exemptions drops considerably among both Democrats and Republicans.⁴ Though studies on the correlation between party affiliation and religious-liberty exemptions for corporations are limited, one study of women by Hart Research Associates revealed the following response to the question: “Should *corporations* be allowed to exempt themselves from the requirement of covering prescription birth control in their health plans if they object to birth control on religious grounds?” The responses show that 79% of Democrats and 50% of Republicans do not approve of such exemption. The research data indicate a consistent divide between Democrats and Republicans on moral sexual issues and claims to religious liberty. Laycock notes that “Republicans have accused the Obama administration of waging a war on religion – of being the most anti-religious administration in history” (2012). Though such an assertion is unfounded, the political polarization on religious liberty is evident, though the support for an exemption for religious freedom, not the divide itself, shrinks considerably among both Democrat and Republican women when the exemption shifts from faith-based organizations to for-profit corporations. The identification of political parties with diametrically opposed positions on specific sexual issues and the principle of religious liberty are fueling the cultural and political wars and undermining the voice of the Catholic Church on religious, moral, and political matters. It is this divide, we

³ We intentionally avoid the common aphorism “pro-life,” since this usually is equated with anti-abortion. However, we advocate Cardinal Bernardine’s “consistent ethic of life,” where pro-life extends well beyond abortion to issues such as capital punishment, just wage, access to healthcare and education, anti-euthanasia, etc.

⁴ The USCCB (2014) filed *Amicus Curiae* briefs to the U.S. Supreme Court in two religious freedom cases filed by for-profit corporations.

suggest, that risks both undermining religious-liberty exemption claims and the maintenance of peace, a common-good value that must be balanced and prioritized against other values that the common good seeks to protect in the public realm. To those risks we now turn.

The Common Good

The USCCB *Statement* proclaims, with regard to religious liberty, “What is at stake is whether America will continue to have a free, creative, and robust civil society – or whether the state alone will determine who gets to contribute to the common good, and how they get to do it” (2012). This statement, of course, requires that we define the common good, the role and function of the Church in relation to the common good, and whether and how ENDA legislation threatens the common good. First, Pope John XXIII described the common good as “the sum total of conditions of social living, whereby persons are enabled more fully and readily to achieve their own perfection.” This perfection is normally identified with human dignity, integral human development, human flourishing, human well-being, or some similar cognate. According to the common good, human dignity is a foundational and universal value. What facilitates human dignity is good and to be supported; what frustrates human dignity is evil and to be opposed.

There are at least two fundamental challenges with defining and realizing the common good. First, though we can posit human dignity as a universal value, it can be defined from different perspectives with different normative implications. The Catholic Church magisterially defines sexual human dignity in relation to heterosexual marriage and reproductive-type sexual acts within marriage. Many Catholic moralists define it in relation to *just and loving* heterosexual, homosexual, or bisexual relationships and acts, and both reproductive- and non-reproductive-type sexual acts within those relationships are deemed moral in general (see Salzman and Lawler; Farley). These are two fundamentally different perspectives on sexual human dignity with fundamentally different normative conclusions. There is anthropological and normative pluralism within the Church on human sexuality, which has implications for defining and realizing the common good.

The second challenge is, given pluralism inside and outside the Church, how to realize the common good in the public realm. What is the Church’s proper role for engaging with the public realm to promote its vision of the common good? On the one hand, the USCCB emphasizes that every person’s human rights must be protected. On the other hand, 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” (2009). Clearly, ENDA legislation presents a conflict of values between protecting human rights and protecting religious freedom, marriage, and family as these are defined by the bishops. Hollenbach and Shannon succinctly state the challenge this conflict poses: “When and how is civil legislation an appropriate means for the promotion of the moral norms taught by the Church’s magisterium?”

In response, they argue that there needs to be a shift in focus that reevaluates the Church’s role and function in defining and realizing the common good, and how this definition and realization should impact the Church’s involvement in the political realm. First, the Catholic Church considers the primary purpose of law and politics to be the promotion of the common good. While the common good is a foundational and absolute

principle in the Catholic tradition, realizing it in a pluralistic, democratic society is a complex endeavor, and navigating the normative and legal implications of the common good can, and often does, provoke conflict. The recent and ongoing debate between the USCCB and the Obama administration's Affordable Care Act highlights this conflict. On the one hand, the common good demands universal health care as a fundamental human right, which the ACA seeks to protect. On the other hand, the Church teaches absolute norms against contraception, abortifacients, sterilization, and direct abortion. Both universal health care and these sexual norms are Catholic teaching, but they come into conflict in the ACA legislation. Which should take priority as the higher value, universal health care or preventing access to contraceptives, abortifacients, sterilization, and abortion that *might* be used in a health insurance plan? Similarly, which is a higher value, respecting human dignity and ensuring nondiscrimination based on sexual orientation and gender identity or attempting to legislate against decisions with respect to sexual actions individuals *might* engage in that the Church deems immoral?

The Catholic moral tradition recognizes possible legal, normative, and value conflicts and proposes a way to settle them (Aquinas, *Summa Theologica*, II-II, 10, 11). It emphasizes that civil law should be grounded on moral values, but “it also stresses that civil law need not seek to abolish all immoral activities in society” (Hollenbach and Shannon). The arguments to justify such a stance stem back to Thomas Aquinas and were more recently advocated by John Courtney Murray. The goal of civil law, we argue, is to promote *public* morality, but there is a debate whether the concerns of the Church on homosexuality and gender are public or private morality. If they are private morality, the Church can teach not only unjust discrimination based on homosexual orientation and gender identity but can also support laws that prevent discrimination on the basis of homosexual orientation and gender identity. If they are public morality, it needs to balance its moral teachings on human sexuality with teachings on nondiscrimination, and realize the impact of pluralism on definitions of public morality and how those definitions evolve and change. The U.S. Supreme Court's decision to legalize same-sex marriage in every state is a good example of this evolution and change. What was once considered public morality and was legislated against in laws prohibiting sodomy is now considered private morality. What was once illegal, same-sex marriage, is now legal. With these shifts in the legal and social definition of morally and legally acceptable relationships in a democratic society, there needs to be a corresponding shift in the perception of religious freedom in relation to this evolution. The recent tradition in the Church recognizes this evolution.

When there are moral or religious disagreements, the *Declaration on Religious Freedom* decrees governments should favor religious freedom. “In matters religious, no one is to be forced to act in a manner contrary to his own beliefs. Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, *within due limits*” (Vatican II 1965: 2, emphasis added). These due limits are correlated with public order and *Dignitatis humanae* offers three guidelines: justice or rendering each person his or her due; public peace, which demands the avoidance of the kind of polarization we find in the culture wars on sexual issues; and standards of public morality on which consensus exists in society (7). As we have seen, standards of public morality on homosexuality and gender identity have changed radically in the U.S. in the last

twenty years. This change has created much more social acceptance of homosexual and gender-identity related issues, but it has also created greater polarization between conservative religious institutions and society, thereby threatening public peace. Catholic bishops need to engage in ongoing discernment to prioritize the values at stake. Are permissive nondiscrimination laws with respect to homosexual orientation and gender identity in the public work place a grave threat to social life and the common good and, if they are, do they need to be repealed or prevented? The bishops' stance on ENDA legislation and just and unjust laws provides their response to this question.

The USCCB on ENDA

Until now, we have been focusing on religious freedom and its interrelationship with relativism, polarization, and the common good. In this section, we shift to just and unjust laws in terms of ENDA and Catholic teaching on homosexual orientation and gender identity. This shift highlights the collision between expanded religious liberty claims and ENDA legislation.

Just and Unjust Law

With the so-called ACA contraceptive mandate and ENDA legislation, the USCCB has shifted its religious liberty claims from religious exemptions from a just law on the basis of conscience to prevention or repeal of an unjust law. The bishops explain: "It is essential to understand the distinction between conscientious objection and an unjust law. Conscientious objection permits some relief to those who object to a just law for reasons of conscience. . . . An unjust law is 'no law at all.' It cannot be obeyed, and therefore one does not seek relief from it, but rather its repeal" (USCCB 2012). According to the USCCB and NCC, ENDA legislation is an unjust law and should be prevented or repealed. The justification for this claim is an inadequate treatment of sexual orientation and gender identity.

1. USCCB on ENDA and "Problems" with Sexual Orientation

The USCCB raises four problems with ENDA's treatment of sexual orientation. We present and critically analyze each problem in turn.

Perhaps the most striking and controversial problem the USCCB raises is its critique of ENDA's definition of sexual orientation and the problems the definition poses. First, ENDA fails to distinguish between "sexual inclination" and "sexual conduct" and, since it has not made this distinction, "courts have construed a term such as 'homosexuality' to protect both same-sex attraction and same-sex sexual conduct" (USCCB 2013b). Catholic teaching distinguishes between homosexual acts, which it judges to be intrinsically immoral, and homosexual inclination, which it judges to be objectively disordered but not immoral. Since ENDA makes no distinction between sexual inclination and sexual conduct, and it *might* happen that homosexuals will be sexually active, it is just and moral to discriminate against them, the bishops argue, since "all sexual acts outside of the marriage of one man and one woman are morally wrong and do not serve the good of the person or society" (USCCB 2013b). According to the NCC, LB 586 should not be passed, since "employers would also be required to allow employees to promote and advocate for such lifestyles . . . within and outside the workplace, regardless of whether such advocacy would be detrimental to the workplace's mission or operations" (Schleppenbach). On this basis, all employers,

religious and non-religious, for-profit and non-profit, can exercise their religious freedom and claim an exemption from the law or, when ENDA does not distinguish between homosexual acts and orientation, prevent or repeal ENDA legislation. The USCCB distinction between inclination and act, a central distinction in Catholic moral doctrine, reflects a reductionist anthropology for homosexuals, which is inconsistently applied when compared to heterosexuals. The reductionist anthropology attempts to separate a fundamental identity characteristic of a person from the actions that manifest that characteristic. Judith Butler's work on feminism and identity, which "suggests that identity has a performative aspect, such that one's identity will be formed in part through one's acts" (Yoshino: 871; see Butler), is relevant here. Kenji Yoshino argues similarly that "homosexual self-identification and homosexual conduct are sufficiently central to gay identity that burdening such acts is tantamount to burdening gay status" (778). The fact that the USCCB does not raise the same concerns about heterosexual inclination and immoral heterosexual acts inside or outside of marriage reveals its bias and its inconsistency.

This inconsistency becomes clearer when looking more closely at Catholic sexual teaching. That teaching asserts that all sexual acts outside heterosexual marriage and all artificially-contraceptive sexual acts inside marriage are morally evil. A religious exemption from sexual orientation and gender identity nondiscrimination law, in part, is based on the concern that the failure to distinguish between act and orientation would force employers to promote immoral sexual activity. However, the USCCB does not argue the point that since heterosexual couples can also engage in immoral sexual activity, there should be a religious exemption to discriminate against heterosexuals on the basis of immoral sexual conduct. A married couple engaging in oral, anal, or artificially-contraceptive sex, conceiving using artificial reproductive technology, and an unmarried heterosexual couple engaging in any of these activities are all engaging in immoral sexual activity in the eyes of the Catholic Church. Since such acts are immoral, do they also "not serve the good of the person or society" as homosexual acts do not?

The USCCB asserts that "heterosexual conduct outside of marriage and, a fortiori, homosexual conduct has no claim to any special protection by the state" (USCCB 2013a). Since there is no distinction between homosexual inclination and conduct in ENDA legislation, and this failure is a basis for the USCCB's rejection of the legislation, all homosexual people, sexually active or not, are subject to "not unjust discrimination." The same does not apply to heterosexual inclination and conduct. Surely such a general rejection of ENDA promotes unjust discrimination against the many celibate homosexuals. By rejecting legislation in its current form, the USCCB is violating the common good, by violating the protection of individual human dignity on the basis of a generalization that all homosexuals *might* engage in immoral sexual activity. But this position implicitly supports unjust discrimination against celibate homosexuals on the basis of ENDA legislation in its current formulation. The immoral means, unjust discrimination, does not justify what the bishops proclaim as a moral end, namely, "homosexual conduct has no claim to any special protection by the state."

The USCCB's anthropological inconsistency and the norms that flow from it create a basis for discrimination against homosexuals who *might* engage in immoral sexual activity but do not create a similar basis for discrimination against heterosexuals who *might* also engage in

immoral sexual activity. The focus of the argument is not on the failure to distinguish between homosexual orientation and homosexual acts that is the given basis of the resistance to ENDA legislation. If that were the basis, the USCCB would also be promoting legislation to allow “not unjust discrimination” against heterosexuals, married or unmarried, who *might* engage in immoral sexual behavior. The focus is really on homosexual orientation. Yet the Church’s position implies that if ENDA made the distinction between homosexual acts and homosexual inclination, it could support ENDA legislation. This does not seem to be the case.

One might respond that the Catholic Church resists allowing not only homosexual couples but also cohabiting heterosexual couples and singles to adopt children at Catholic-run adoption agencies. There are two responses to this reply. First, in this case, the Church has a narrow definition of a religious exemption for religious institutions. It is calling for an exemption from a *just* law that allows adoption to take place in relational contexts outside of what the Church deems morally acceptable. In the case of ENDA legislation, it is claiming the prevention or repeal of an *unjust* law (see below). Second, the focus on arguing against singles being allowed to adopt seems to be on the relational importance of a two-parent household to raise children. The direct concern with the Church in this case seems to be familial and relational stability, not sexual immorality. In the case of adoption by homosexual couples or non-married heterosexual couples, the concern may certainly be with immoral sexual behavior and its influence on children. However, the Church has only extended this concern about sexual activity and grounds for just discrimination in employment to people with a homosexual and not a heterosexual inclination, though both *might* engage in immoral conduct that threatens the common good.

A more fundamental response to the USCCB’s concern with homosexual activity challenges the claim that homosexual acts are, by definition, intrinsically immoral and destructive of human dignity. Although the Church has been consistent in its teaching that homosexual acts are intrinsically immoral, the majority of lay Catholics do not accept that teaching. The same is true, but with a much higher percentage, for contraception. The fact that the majority of Catholic faithful do not accept Catholic teaching on the immorality of contraception or homosexual activity is not a moral argument, for morality is not determined by majority consensus. However, the burden of proof is on the Church to make a compelling argument to convince Catholics that its teachings are true. The Church should not ask the state to enforce a teaching against homosexual activity that it cannot convince the majority of its own members to accept (Hollenbach and Shannon). The burden of proof is on the Church to demonstrate that homosexual acts are destructive of human dignity and cannot serve “the good of the person or society,” and so far it has not offered a compelling argument for that assertion. An unproven assertion should not be advanced or allowed as the basis for an abuse of religious freedom aimed at preventing or repealing ENDA and imposing the Church’s morally questionable doctrine on the broader society (see more fully, Salzman and Lawler: 214-35).

The second problem with ENDA’s definition of “sexual orientation,” according to the USCCB, is that it “has no exception for those cases where it is neither unjust nor inappropriate to consider a job applicant’s or an employee’s sexual inclination” (2013b). In a footnote, the USCCB refers to a document of the Congregation for the Doctrine of the

Faith (CDF), which notes that such discrimination is not unjust in employment of coaches and teachers, or in the recruitment of military personnel, or when placing children in foster care or adoption (11). With respect to homosexual couples adopting or fostering children, the CDF asserts, "As experience has shown, the absence of sexual complementarity in [homosexual] unions creates obstacles in the normal development of children who would be placed in the care of such persons. . . . Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children" (7). It provides no scientific evidence, here or elsewhere, to substantiate its claim that homosexual union is an obstacle to the normal development of children. There is, however, abundant evidence to the contrary.

While acknowledging that research on gay and lesbian parents is still evolving, especially with respect to gay fathers, Charlotte Patterson summarizes the evidence available from 20 years of studies: "There is no evidence to suggest that lesbians and gay men are unfit to be parents or that psychosocial [including sexual] development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents. *Not a single study* has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents" (see also Mattingly and Bozick). In her overview of the research, Joan Laird goes further to suggest that the scientific data indicate that homosexual parents are somewhat more nurturing and tolerant than heterosexual parents, and their children are, in turn, more tolerant and empathetic (316-17). This preponderance of evidence led the American Psychological Association (APA) and the Child Welfare League of America (CWLA) to approve and disseminate important resolutions. In 2004, the APA declared that since "lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children . . . [and since] research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish," the APA opposes any discrimination based on sexual orientation. In 1994, the CWLA's policy statement recommends that "gay/lesbian adoptive applicants should be assessed the same as any other adoptive applicant. It should be recognized that sexual orientation and the capacity to nurture a child are separate issues." It further recommends that factual information about gays and lesbians should be provided "to dispel common myths about gays and lesbians" (Sullivan: 41). It is not the sexual orientation of gay and lesbian parents that produce negative outcomes in their children but the social discrimination towards them generated by myths propagated against them. Both the USCCB and the NCC continue to propagate these myths by publishing irresponsible statements. The Second Vatican Council praises the advances of the social sciences that bring the human community "improved self-knowledge" (1966: 5) and Pope John Paul II teaches that "the Church values sociological and statistical research when it proves helpful in understanding the historical context in which pastoral action has to be developed and when it leads to a better understanding of the truth" (1981: 5). The present question, namely, the effect of homosexual parents on their children, is a classic case in which the social sciences have clearly led to a better understanding of the truth.

2. USCCB on ENDA and “Problems” with Gender Identity

The bishops argue that ENDA uses law to support a misperception of gender as “nothing more than a social construct or psychosocial reality that can be chosen at variance from one’s biological sex” (USCCB 2013b). According to Catholic views on gender, humans are born with female or male gender designed to serve the complementarity of the spouses in a sexual relationship between a man and a woman in a monogamous marriage. Reducing gender to a social construct or psychological reality would allow for a continuum between the physical sex of a person and the perceived psychological and/or social perception of gender that would, in turn, allow for gender transformation that violates the gender identity assigned by God.

The distinction between biological sex (male/female) and socially conditioned gender (masculine/feminine) is frequently absent in magisterial discussions of gender (Ross: 56, n. 5). One also finds gender stereotypes in magisterial documents where femaleness is defined primarily in terms of motherhood, receptivity, and nurturing, and maleness is defined primarily in terms of fatherhood, initiation, and activity (John Paul II 1981: n. 23; 1995: n. 9; 1988). This ontological claim of gendered psychological traits does not recognize the culturally conditioned nature of gender, and does not adequately reflect the complexity of the human person and her or his relationships. Within individuals and relationships, psycho-affective, social, and spiritual traits are not “natural” to one gender but may be found in either gender, may vary within a specific relationship, and may express themselves differently depending on the relational context (Traina: 280-82). Some males, for instance, are as and more nurturing than some females and some females are as and more dominant and analytical than some males. In some relationships there may be two dominant people or two nurturing people. Do we want to claim that in these relationships these two people cannot complement each other? The “masculinity” and “femininity” of the non-biological elements are conditioned and defined by culture (Graham) and are not “essential” components of male and female human nature mysteriously creating a “unity of the two.” The Church’s view of gender as a biological given ignores the complexity of the human person, gender, and identity.

The bishops also argue that ENDA’s definition of gender identity “would adversely affect the privacy and associational rights of others” (USCCB 2013b). The NCC adopted this position in its concern with LB 586, it “*would prevent a Catholic school from reprimanding a transgender male coach who insists on using the girls’ shower and restroom facilities*” (2015, emphasis added). The main difference between the NCC citation and the USCCB backgrounder is that, whereas the former focuses this concern on Catholic schools, the latter extends it to “the workplace” in general. This position, we suggest, is a good example of Catholic fear-mongering. It is interesting to note that the NCC cites the following as an “argument” against ENDA legislation for Nebraska: “The proponents of LB 586 have been unable to produce empirically reliable evidence of widespread employment discrimination in Nebraska against homosexuals, bisexuals, or individuals with respect to ‘gender identity’” (Schleppenbach). We have two responses to this assertion.

First, if empirically reliable evidence is a basis for helping to make a compelling argument, and we believe it is, then there is no reliable evidence of transgendered male

coaches or teachers who insist on using female facilities of any kind. There is, however, ample evidence of workplace discrimination on the basis of sexual orientation and gender identity in Nebraska (see Williams Institute) and throughout the nation (Sears and Mallory). Second, Nebraska's law includes the categories of gender and sexual orientation as bases for hate crimes and increases the penalties for such crimes (Sears, Hunter, and Mallory). The famous case in Nebraska, made into a movie, "Boys Don't Cry," detailed the brutal murder in 1993 of Brandon Teena, a transsexual biological female.⁵ The multiplicity of lawsuits charging discrimination in housing and employment on the basis of sexual orientation and sexual identity, of hate crimes rooted in the same, and legislation that recognizes these crimes, disproves the NCC claim that, since proponents of ENDA legislation cannot produce empirical evidence of "widespread" employment discrimination based on sexual orientation and gender identity, LB 586 is driven "by the desire to invoke the government's authority to coerce employers who object to certain sexual behavior or ideological agendas to affirm and accommodate them" (Schleppenbach).

3. The USCCB on ENDA: From Exemption from a Just Law to Prevention or Repeal of an Unjust Law

The USCCB (2013a) opposes ENDA legislation, either through a religious exemption from or prevention or repeal of the law, on the basis of problems with its definition of sexual orientation. These include lack of a distinction between homosexual orientation and homosexual acts, failure to provide exemption on the basis of the sexual orientation of an employee, problems with ENDA's definition of gender identity which it reduces to a social construct, failure to respect legitimate privacy expectations in the workplace, and its restriction of the right to exercise conscience on gender issues. It cites religious liberty and freedom of conscience to argue for exemption, prevention, or repeal. Laycock (2012) notes that "reliance on a distinction between just laws that violate the tenets of a particular faith, for which the solution is an exemption, and unjust laws for which the only solution is repeal" is the most problematic aspect of the bishops' *Statement* on religious liberty. Seeking an exemption, prevention, or repeal under the auspices of religious liberty is to confuse the argument about the moral issues and the argument about religious liberty.

The USCCB cites Pope Benedict in its *Statement's* defense of religious liberty. "Many of you," Benedict stated, "have pointed out that concerted efforts have been made to deny the right of conscientious objection on the part of Catholic individuals and institutions with regard to *cooperation in intrinsically evil practices*" (USCCB 2012, emphasis added). Among those intrinsically evil practices are homosexual acts, contraception, premarital sex, and artificial reproductive technologies. However, Hollenbach and Shannon note, "Catholic moral tradition has long stressed that civil law should be founded on moral values but need not seek to abolish all immoral activities in society." The bishops are free to assert that government and secular agencies should exclude homosexuals from employment and from becoming foster or adoptive parents. That, however, is a moral argument seeking to regulate life in the public society (Laycock 2012). Should such a moral argument be codified in legislation? It is one thing to claim an exemption for a religious institution from a just law on

⁵ More recently, an Omaha man was charged with a hate crime for punching a transgender woman (Cole).

the basis of conscientious objection to the moral contents of the law, it is quite another to seek repeal or prevention of a law based on that objection. The bishops have not made this distinction in their resistance to ENDA legislation and seek to make Catholic moral imperatives on sexuality nationally legal imperatives. They claim that ENDA laws and the ACA contraceptive mandate are “unjust laws” because they promote immoral sexual conduct and immoral regulation of fertility, respectively. They note that it is essential to understand the distinction between conscientious objection and an unjust law. Conscientious objection applies to a just law and seeks a religious exemption from that law. “An unjust law is ‘no law at all.’ It cannot be obeyed, and therefore one does not seek relief from it, but rather its repeal” (USCCB 2012). Laycock notes correctly that “the difference between exemption and repeal is the difference between seeking religious liberty for Catholic institutions and seeking to impose Catholic moral teaching on the nation” (2012).

In their *Statement*, borrowing Martin Luther King’s phrase, the bishops want to be the “conscience of the state.” They seek to extend Catholic moral teaching beyond a religious exemption from a just law to prevent or repeal, on the basis of that teaching, what they view as an unjust law. Although the Catholic Church teaches that same-sex relationships, abortion, and contraception are morally wrong, a majority of Americans consider them basic human rights. As William Galston correctly notes, “the bishops make no effort to understand why their antagonists think that justice requires what the Catholic hierarchy thinks it forbids.” To claim a religious exemption from a just law is one thing; to claim repeal or prevention of an unjust law is quite another and raises the ethical and legal bar quite high. The bishops have every right to teach a moral position and to seek to protect religious institutions from participating in what they perceive as immoral activity, but they do not have a right to seek to impose their moral teachings legislatively in a pluralistic society. To do so is akin to proselytizing and can be a violation of a well-informed conscience.

Conscience and its Role in RFRA and ENDA Legislation

Already in the thirteenth century, Thomas Aquinas established the authority and inviolability of conscience. “Anyone upon whom the ecclesiastical authorities, in ignorance of the true facts, impose a demand that offends against his clear conscience should perish in excommunication rather than violate his conscience” (*In IV Sent.*, 38, 2, 4). He goes further and insists that the dictate of even a mistaken conscience must be followed and that to act against such a dictate is immoral and sinful (*Summa Theologica*, I-II, 19, 5). Seven hundred years after Aquinas, *Gaudium et spes* issued a clarion cry with respect to conscience. “Conscience is the most secret core and sanctuary of a man. There he is alone with God whose voice echoes in his depth. In a wonderful manner conscience reveals that law which is fulfilled by love of God and neighbor” (Vatican II 1965b: 16). *Dignitatis Humanae* went further to assert the inviolability of conscience. “In all his activity a man is bound to follow his conscience faithfully, in order that he may come to God for whom he was created. It follows that he is not to be forced to act contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious” (Vatican II 1965a: 3).

Several points are evident from the statements in *Gaudium et spes* and *Dignitatis humanae* on the nature and inviolability of conscience. First, conscience is sacred; it is a gift from God

(Vatican II 1965b: 16). Second, it is an intrinsic faculty of the human person (Vatican II 1965b: 16). Third, following one's conscience on moral and religious matters facilitates human dignity; violating one's conscience on moral and religious matters frustrates human dignity (Vatican II 1965b: 16; 1965a: 3). Fourth, no one is ever to be forced to act against her or his conscience; such force is a fundamental violation of conscience and of human dignity (Vatican II 1965a: 3). Fifth, the authority granted to conscience presumes that one's conscience is well-informed (Vatican II 1965b: 16). Though there is consensus on many aspects of the nature of conscience and its inviolability in *Gaudium et spes* and *Dignitatis humanae*, debate continues over the nature of conscience and its inviolability in relation to religious freedom and civil legislation.

While the freedom, authority, and inviolability of personal conscience are all affirmed in Catholic tradition, in the public realm all of them must be assessed against the competing rights and responsibilities of others – in particular, the responsibility to promote the common good in a pluralistic society. In their statements, the bishops seem to be unaware of any competing rights and responsibilities and present their religious freedom as an absolute. In the final part of the *Statement*, the authors issue an invitation to fellow bishops to “be bold, clear, and insistent in warning against threats to the rights of our people. Let us attempt to be the ‘conscience of the state . . .’” (USCCB: 2012). As Cathleen Kaveny correctly points out, and as we have seen, however, “Vatican II’s *Declaration on Religious Freedom* recognizes that there are ‘due limits’ on the exercise of religious freedom, including the need to promote a ‘just public order,’ and preserve the ‘equality of the citizens before the law’” (78). This equality of citizens before the law in a democratic, pluralistic society, in which one person’s or institution’s exercise of conscience and religious liberty can come up against another person’s or institution’s exercise of conscience and religious liberty raises serious questions of conscience.

Douglas NeJaime and Reva Siegel refer to these conscience questions as “conscience wars” and they are manifested in “complicity-based conscience claims.” These are “faith claims about how to live in community with others who do not share the claimant’s beliefs, and whose lawful conduct the person of faith believes to be sinful” (2519). Such claims, often identified as religious freedom claims, differ fundamentally from the RFRA free exercise cases in form and social logic. First, in free exercise cases, claims by religious minorities are advanced seeking exemptions from legal stipulations not anticipated by lawmakers when they formulated a law. Accommodating these claims is commonly supported in the broader social context. Complicity-based conscience claims, however, differ in form. “Because the claims concern the conduct of citizens outside the faith community, accommodating the claims can harm those whose conduct the claimants view as sinful” (2520). They also differ in social logic. Rather than protecting the right to practice one’s religion through an exemption from a just law, complicity-based conscience claims seek to “mobilize the faithful against laws that depart from [their] traditional sexual morality” in order to prevent third parties from sinning (2520). When such mobilization prevents or repeals laws protecting rights in a pluralistic society, rights flowing, for example, from homosexual orientation and gender identity, “some citizens are singled out to bear significant costs on another’s religious exercise” (2521). These costs may be both material, in terms of, for example, same-sex employment benefits, or dignitary, in terms of “not unjust

discrimination.” It is one thing to follow one’s conscience on religious and moral matters; it is quite another to force one’s conscience on religious and moral matters legislatively onto others who disagree about them. Such enforcing may be a violation of conscience for, and can cause extensive material and dignitary harm to, the other.

The bishops have taken it upon themselves to become the “conscience of the state” in sexual matters, seeking to impose Catholic sexual ethics on the broader society and moving beyond a mere exemption from a just law to advocating for prevention or repeal of what they perceive as an unjust law on the basis of their judgment that the law violates their moral code. What is most striking about the bishops’ strategy in claims to religious liberty is the absolute nature of those claims, the use of their freedom of conscience to justify those claims, and the total ignoring of the equal claims of others who disagree with them. “If we are not free in our conscience and our practice of religion, all other freedoms are fragile. If citizens are not free in their own consciences, how can they be free in relation to others, or to the state?” (USCCB 2012). The problem here, however, is clear: when my conscience conflicts with the consciences of others and I seek to impose my claims of conscience legislatively, the consciences of others will be violated. Kaveny notes correctly that the bishops provide no indication that such claims “must be assessed in a framework of competing rights and duties [and, we add, consciences], particularly the duty to promote the common good” (78).

Rights-claims and conscience-claims must always take into consideration relational responsibilities. Complicity-based conscience claims attempt to impose one person’s or one institution’s conscience on another person’s or institution’s conscience under the umbrella of religious freedom and the maintenance of the moral integrity of individuals or institutions to avoid complicity in sin. It is one thing to make such a claim on undisputed moral issues such as race and segregation, where there is virtually unanimous social agreement that they are fundamental violations of the common good. It is quite another to make the claim on disputed sexual ethical issues where the majority of the people in the society, including good Catholics with well-informed consciences, disagree with the Catholic Church’s sexual teachings.

Conclusion

In light of the foregoing, we make the following recommendations to the USCCB and the NCC on religious freedom and ENDA legislation. First, *ad intra*, within their Catholic activity, bishops have every right to seek religious exemption from legislation that violates doctrinal teaching. However, the consciences of the faithful or *sensus fidei* must be taken into consideration when discerning doctrinal teaching *in se* and in its relationship to legislation. Second, *ad extra*, in the democratic society outside the Catholic Church, the limits it sets *ad intra* on the conduct of its own adherents as a matter of faith and conscience are not to be legislatively imposed on the faith and consciences of others in the greater democratic society. Third, Catholic bishops ought to have a strategy for defending the right to religious freedom. In a pluralist society, however, that strategy should be measured according to *Dignitatis humanae*’s “due limits.” It should combine honest public argument, sensitive pastoral leadership, and the political savvy to know where in a pluralist society a combative line should be drawn. Pastorally and importantly, before the broader society, we suggest, it

should adopt Pope John Paul II's recommended "dialogue of charity" (1995: 17, 51, 60) rather than a confrontational, combative approach. Fourth, and finally, the bishops should be ashamed of themselves for citing in their *Statement* Martin Luther King, the genuine and undisputed "conscience of the state" for civil rights, to trample on the equal civil rights of homosexual, bisexual, and transgender citizens.

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