BYU Law Review

Volume 47 | Issue 4 Article 5

Summer 6-1-2022

Separated at Baptism: What the Mortara Case Can Teach Us About the Rejection of Natural Justice by Integralists and Progressives

Francis J. Beckwith

Follow this and additional works at: https://digitalcommons.law.byu.edu/lawreview

 Part of the Law Commons

Recommended Citation

Francis J. Beckwith, *Separated at Baptism: What the Mortara Case Can Teach Us About the Rejection of Natural Justice by Integralists and Progressives*, 47 BYU L. Rev. 1099 (2022).
Available at: https://digitalcommons.law.byu.edu/lawreview/vol47/iss4/5

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Separated at Baptism:

What the Mortara Case Can Teach Us About the Rejection of Natural Justice by Integralists and Progressives

Francis J. Beckwith[*]

CONTENTS

INTRODUCTION

From the growing fondness among secular progressives for abandoning long-held understandings of academic freedom[1] and tolerance of dissent[2] to the flirtation with integralism among

* Professor of Philosophy & Church-State Studies, Affiliate Professor of Political Science, Resident Scholar in the Institute for Studies of Religion (ISR), and Associate Director of the Graduate Program in Philosophy, Baylor University. I would like to thank Dr. Dawn Eden Goldstein (Catholic University of America), Professor Kevin Vallier (Bowling Green State University), and Professor Edward Peters (Sacred Heart Major Seminary) for reading an earlier version of this manuscript and offering me valuable comments. A friendly nod to Professor Massimo Fagioli (Villanova University) for reading the same early manuscript and giving me an encouraging word. I am also grateful for helpful comments and suggestions offered by editors Brock Mason and Miranda Hatch. I, of course, take full responsibility for the article's shortcomings. Finally, a special thanks to the provost's office at Baylor University for awarding me a Fall 2021 research leave that allowed me to complete this article and begin working on another—both of which are parts of a larger project on the specialness of religious liberty.

1. *See, e.g.*, Eric Kaufmann, *Academic Freedom Is Withering: Surveys of Faculty Opinion Show the Growing Extent of Political Discrimination and Cancel Culture*, WALL ST. J. (Feb. 28, 2021, 12:06 PM), www.wsj.com/articles/academic-freedom-is-withering-11614531962.

2. *See, e.g.*, Francis J. Beckwith, *The Censorship of Lawrence Ferlinghetti and the Unbooking of Ryan T. Anderson*, PUBLIC DISCOURSE (Mar. 17, 2021), https://www.thepublicdiscourse.com/

religious conservatives,[3] there seems to be an increasing fascination with totalizing ideologies across the political spectrum in our public culture. Ideas that were rarely taken seriously in American society just a decade ago now seem not only to be in ascendancy but have become nearly sacrosanct among large swaths of the most influential segments of our population. It is now, for example, the norm for major corporations, government agencies, and academic institutions (both public and private) to require their employees, while undergoing their institutions' diversity training, to affirm without question disputed moral, political, anthropological, and philosophical views over which reasonable people have often disagreed.[4] To be sure, these institutions have always had rules about proper conduct in the workplace. But they virtually never tried to compel their employees to confess or assent to a list of contested philosophical doctrines.[5] It was assumed that on such

2021/03/74766/; Jessica Murphy, *Toronto Professor Jordan Peterson Takes on Gender-Neutral Pronouns*, BBC NEWS (Nov. 4, 2016), https://www.bbc.com/news/world-us-canada-37875695; Scott Berson, *Professor Sues After He Says He Was Punished for Calling Transgender Student "Sir,"* KAN. CTY. STAR (Nov. 13, 2018, 9:52 AM), https://www.kansascity.com/news/nation-world/national/article221585420.html.

3. For an overview and critique of Catholic integralism, see Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 SAN DIEGO L. REV. 1039 (2019).

4. Here I am thinking of the variety of perspectives on systemic racism, sexual morality, religious difference, and gender identity that are bound to arise in a free society in which our reliable though fallible sources of information, background beliefs, and plausibility structures often lead equally conscientious citizens to contrary conclusions. *See, e.g.*, Elliot Resnick, *The Man Who Refuses to Undergo Sensitivity Training: An Interview With Political Scientist Jeffrey Poelvoorde*, JEWISH PRESS (Sept. 2, 2020), https://www.jewishpress.com/indepth/interviews-and-profiles/the-man-who-refuses-to-undergo-sensitivity-training-an-interview-with-political-scientist-professor-jeffrey-poelvoorde/2020/09/02/.

5. Of course, exceptions include private faith-based institutions such as universities, churches, hospitals, and charitable organizations. Many of these institutions require their employees to be members of the group or at least to affirm its moral and theological precepts. But these exceptions, in a sense, prove the rule, for they exist as a consequence of like-minded citizens freely pooling their resources for the sake of a common goal informed by their religious traditions. This is why Title VII includes a religious exemption to its ordinary prohibition against religious discrimination in employment: "This subchapter shall not apply to an employer with respect . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e-1(a) (2018); *see also* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987); Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171 (2012).

matters, employees, like all human beings, owned their own cognitive lives.[6]

The idea that there is a sphere of solitude—a citadel of conscience, if you will—that is by its nature outside the jurisdiction of both state subjugation and private invasion has deep philosophical roots in our law and culture. It has not only served as the basis for our understanding of religious liberty;[7] it has shaped the way the Supreme Court has resisted governmental attempts to compel speech,[8] significantly curtail parental rights,[9] engage in viewpoint discrimination,[10] tie state benefits to religious

6. This, it seems to me, is the underlying philosophical assumption behind Title VII's prohibition of employment discrimination based on religion and its requirement that an employer must accommodate an employee's religious beliefs or practices if it does not cause the employer an undue hardship. 42 U.S.C. § 2000e(j). Although it does not have the force of law, the United States Equal Employment Opportunity Commission's (EEOC) explanation of the meaning of "religion" is consistent with this account:

> Religious beliefs include theistic beliefs as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns "ultimate ideas" about "life, purpose, and death."

EEOC, *Section 12: Religious Discrimination* (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (footnotes omitted); *see also* Equal Emp. Opportunity Comm'n v. Abercrombie & Fitch Stores, 135 S. Ct. 2028 (2015).

7. James Madison, *Memorial and Remonstrance Against Religious Assessments [ca. 20 June] 1785*, https://founders.archives.gov/documents/Madison/01-08-02-0163 (last visited Feb. 12, 2022) ("The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.").

8.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

W. Va. State Bd. of Educ. v. Barnette 319 U.S. 624, 642 (1943).

9. *See* Meyer v. Nebraska 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); Wisconsin v. Yoder 406 U.S. 205 (1972).

10.

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger v. Rectors and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (citations omitted).

conviction,[11] and interject the state into marital intimacy.[12] To be sure, no liberty is absolute, and for this reason there will always be disputes about the extent to which any liberty should be restricted when other goods are at stake.[13] But these disputes are typically always over the question of what is the most just way to balance these diverse goods, and not over whether any one of them *really* is a good that ought to be protected.

In this Article, we will consider the right of natural parents to direct the religious formation of their children. In U.S. Constitutional law, it has the status of a pre-political fundamental right that the government is obligated to recognize. As the Supreme Court noted in its three most consequential rulings on the matter:

> Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . *establish a home and bring up children, to worship God according to the dictates of his own conscience*, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[14]

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. *The child is not the mere creature of the State; those who nurture him and direct his destiny have the right*,

11. "[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." Sherbert v. Verner, 374 U.S. 398, 406 (1963); *see also*, Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981).

12.

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

13. Think, for example, of the requests by religious groups for injunctive relief from Covid-19 restrictions. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020); Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021); Tandon v. Newsom, 141 S. Ct. 1294 (2021).

14. *Meyer*, 262 U.S. at 399 (emphasis added).

> coupled with the high duty, to recognize and prepare him for additional obligations.[15]
>
> [T]he Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children.[16]

One could, of course, raise questions about the extent of this right, and conclude that whatever rights natural parents (and adoptive or foster parents, with the tacit or explicit consent of the natural parents) may have to direct their children's religious formation it does not include a right to sacrifice their children on the altar to Baal.[17] But that is a far cry from saying that natural parents have *no* natural right to religiously form their own offspring because natural parenthood carries with it no pre-political, moral, or normative weight that the state is obligated to recognize and enforce.[18] Because the latter leaves little room for any extra-governmental moral authority—no citadel of conscience that government ought to recognize—it entails that it is largely the state's rightful power to determine not only what constitutes the rights and obligations of parents, but also what children belong to what parents.

---

15. Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 535 (1925) (emphasis added).

16. Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

17. The Supreme Court famously said in Reynolds v. United States, 98 U.S. 145, 166 (1878):

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

18. This seems to be the logical implication of the case made by Courtney Megan Cahill in her article. *See* Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, 49 U. CAL. DAVIS L. REV. 183 (2017). She writes in her conclusion:

> At the very least, the marriage equality precedent stands for the proposition that the logic used to establish the family in the past . . . ought not, and likely cannot, stimulate radical legal reform of alternative reproduction — and particularly legal reform that enforces the state's normative paradigm of kinship, dampens individuals' procreative choice, and forces the thousands of individuals who rely on alternative reproduction as a vehicle of family formation to conform to the state's preferred vision of intimate and family life.

Id. at 250. What Cahill is saying is that once marriage is detached from traditional understandings of kinship—which Cahill believes is the logical entailment of Obergefell v. Hodges, 135 S. Ct. 2584 (2015)—it is unjust for the law to privilege natural kinship relations, since to do so implies that not all marital arrangements are equal.

In this Article, I want to explore how this kind of thinking gains effect in the works of two very different Catholic scholars, Fr. Romanus Cessario, O.P and Dr. Mary McAleese. I will explain how their views on parental rights, state power, and the rite of baptism can teach us about how the rejection of extra-governmental moral authority, what St. Thomas Aquinas called *natural justice*, provides fertile ground for illiberal policy prescriptions.[19]

In section I, I explain what I mean by natural justice as it pertains to parents, children, and religious formation. Here I rely on the writings of Thomas Aquinas (1225–1274), whose work in this area both summarizes and expands on the Catholic Church's most ancient teachings on the matter (even though the Church and its theologians, from time to time, have not lived up to those teachings).[20]

In section II, I will consider Fr. Cessario. In his defense of Pope Pius IX's abduction of Edgardo Mortara, he argues that the Catholic Church has the right to exercise by means of political power its obligations to educate and catechize baptized children of non-Catholic parents even if the children's parents wish otherwise.[21]

In section III, I will explain the views of Dr. McAleese. She argues that the Catholic Church does *not* have the right to exercise

19. I should note here that Aquinas, who lived at a time when virtually everyone in Europe was Christian, was not a defender of religious liberty as we understand it today, though he did believe that a community's common good *may be* impeded if a certain amount of toleration is not extended to compatriots he (and most everyone else) thought were deeply mistaken in their practices and beliefs. He writes:

> [T]hough unbelievers sin in their rites, they may be tolerated, either on account of some good that ensues therefrom, or because of some evil avoided. Thus from the fact that the Jews observe their rites, which, of old, foreshadowed the truth of the faith which we hold, there follows this good—that our very enemies bear witness to our faith, and that our faith is represented in a figure, so to speak. For this reason they are tolerated in the observance of their rites. On the other hand, the rites of other unbelievers, which are neither truthful nor profitable, are by no means to be tolerated, except perchance in order to avoid an evil, e.g. the scandal or disturbance that might ensue, or some hindrance to the salvation of those who if they were unmolested might gradually be converted to the faith. For this reason the Church, at times, has tolerated the rites even of heretics and pagans, when unbelievers were very numerous.

ST. THOMAS AQUINAS, SUMMA THEOLOGIAE II.II.11.3 (Fr. Laurence Shapcote, O.P., trans., John Mortensen & Enrique Alarcón, eds., 2012) (hereinafter ST).

20. Matthew A. Tapie summarizes this failure in his article, *Spiritualis Uterus: The Question of Forced Baptism and Thomas Aquinas's Defense of Jewish Parental Rights*, 35 BULL. MEDIEVAL CANON L. 289, 294 (2018).

21. Fr. Romanus Cessario, O.P., *Non Possumus*, FIRST THINGS (Feb. 2018), https://www.firstthings.com/article/2018/02/non-possumus.

its obligations to educate and catechize baptized children insofar as those obligations are contrary to the United Nations Convention on the Rights of the Child (UNCRC).[22]

At first glance it may appear that Fr. Cessario and Dr. McAleese are in disagreement. However, upon further inspection (or so I will argue), one discovers that their views share a foundational premise: they both maintain that considerations of natural justice may not trump whatever a legal or political authority declares is in the best religious interests of the child. For Fr. Cessario, that authority is the Papal States, and for Dr. McAleese, it is the United Nations. Conversely, each in their own way, believes that the state ought to enforce certain types of religious obligations. For Fr. Cessario, it is the obligation of parents to raise their baptized infant child as a Catholic because of the sacramental nature of the rite. On the other hand, for Dr. McAleese, it is the obligation of parents *not to* baptize their infant child in the Catholic Church because of the consensual requirement of religious belief.

Although my primary purpose is to explain how two seemingly contrary views—one integralist and the other progressive—share the same belief about state power in relation to parental rights and what that belief can teach us about natural justice, my secondary purpose is to show the incoherencies of both views.

I. AQUINAS ON PARENTS, CHILDREN, AND NATURAL JUSTICE

Although the term "natural justice" has a variety of meanings, in this Article I am using it as a shorthand for what is often called the natural law: those moral principles derived from the human goods to which we are ordered by nature and on which our moral judgments rest. Natural justice, in this sense, is pre-conventional, meaning that it is the philosophical basis, and not the deliverance, of the positive law.

22. Mary McAleese, Former President of Ireland, Lecture on the Future of Ireland: Human Rights and Children's Rights, 2019 Edmund Burke Lecture, Trinity College Dublin (Nov. 5, 2019), https://www.marymcaleese.com/the-edmund-burke-lecture; Mary McAleese, The Flaws in the Christening Contract: How the Human Rights of Children Now Require the Church to Separate the Theological (divine) From the Juridic (man-made) Consequences of Baptism, web conference, Faculty of Catholic Theology, Goethe University Frankfurt (June 5, 2020), https://www.marymcaleese.com/faculty-of-catholic-theology; MARY MCALEESE, CHILDREN'S RIGHTS AND OBLIGATIONS IN CANON LAW: THE CHRISTENING CONTRACT (2019); Mary McAleese, *The Catholic Church's Home Grown Existential Crisis*, *in* 5 YEARS TO SAVE THE IRISH CHURCH (2018).

In his presentation of the natural law in the *prima secundae partis* of the *Summa Theologiae*, Aquinas provides a brief account of what he calls the precepts of the natural law.[23] Because we are rational animals, and not creatures directed by mere instinct, we have intellects that apprehend those goods to which human beings are naturally ordered that our wills *ought to* choose. The first precept of the natural law is "that *good is to be done and pursued, and evil is to be avoided*." [24] This, Aquinas argues, follows from the first principle of practical reason, "that *good is that which all things seek after*."[25] He goes on to say that "all other precepts of the natural law are based upon" the first precept, and thus "whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided." [26]

Among these precepts are those that pertain to "sexual intercourse, education of offspring, and so forth."[27] Aquinas maintains that practical reason naturally apprehends the moral truth that parents have an obligation to advance the well-being of their children, including their education and religious practice. This follows, Aquinas explains elsewhere,[28] from the causal and protective roles that father and mother play in the origin and early development of their child. Just as our inclination to know tells us that we are ordered toward the good of knowledge and thus ignorance is to be avoided, our inclination toward the conjugal act tells us that it and its procreative end are good, that the authority and responsibility of parents are also good, and that any acts contrary to those goods ought to be avoided. As should be evident, Aquinas's understanding of inclination depends on a teleological view of the natural world, that the rightness or wrongness of human acts ought to be judged by the end to which the agent is ordered by nature. [29] So, for example, it would be morally wrong for parents to neglect their children's physical and mental health by allowing them to indulge without limit on Pepsi Cola, M&M's, and

23. ST, *supra* note 19, at I.II.94.2, *respondeo*.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at II.II.10.12.

29. For clarification on this point, see Francis J. Beckwith, *Catholicism, and the Natural Law: A Response to Four Misunderstandings*, 12 RELIGIONS 1 (2021).

online video games, or to enroll them into "[Mr.] Fagin's School of Pickpocketry" in lieu of ordinary public education.[30]

It is in the *Summa*'s *secunda secundae partis* in which Aquinas addresses in greater detail the authority and responsibility of parents when he answers the question, "Whether the children of Jews and other unbelievers ought to be baptized against their parents' will?"[31] Aquinas argues that the answer is "no." After presenting five objections, he writes in the *sed contra*:

> Injustice should be done to no man. Now it would be an injustice to Jews if their children were to be baptized against their will, since they would lose the rights of parental authority over their children as soon as these were Christians. Therefore these should not be baptized against their parents' will.[32]

Although it may seem that this implies that if a child is baptized *invitis parentibus* (against the wishes of the parents), the parents would lose their parental authority and that the Church may remove the child from his home (and thus affirm the position defended by Fr. Cessario), this would be a mistake. When Aquinas replies *sed contra* he is not necessarily affirming what he believes is the correct position.[33] He is oftentimes simply presenting a contrary point made by a respected authority with which he may or may not fully agree. As Matthew Tapie notes: "The *sed contra* can easily be mistaken for Aquinas's position because the *sed contra* typically represents something close to Aquinas's position (against baptism of children *invitis parentibus*)."[34] In the medieval dialectical style of the *Summa*, known as the *disputatio*, Aquinas begins with a question he wants to answer, presents several objections to what he thinks is the correct answer, asserts the *sed contra*, and then gives his answer in the *respondeo* followed by replies to each of the objections. It is in

30. HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS 240 (2010). It would also be wrong for the parents to sacrifice their children on the altar to Baal, as already noted in Introduction.

31. ST, *supra* note 19, at II.II.10.12. Aquinas also addresses the question in ST III.68.12.

32. ST, *supra* note 19, at II.II.10.12, *sed contra*.

33. As Frederick Christian Bauerschmidt asserts: "Sometimes it [the *sed contra*] is a simple quotation of an authority, while at other times it offers the sketch of an argument, but rarely more than a sketch. In a few cases it offers an argument that is no closer to Aquinas's final view than the objections." Tapie, *supra* note 20, at 309 n.87 (citing Frederick Christian Bauerschmidt, *Reading Summa Theoligiae*, *in* THE CAMBRIDGE COMPANIAN TO THE SUMMA THEOLOGIAE 11–12 (Phillip McCosker & Denys Turner eds., 2016).

34. Matthew Tapie, *The Mortara Affair and the Question of Thomas Aquinas's Teaching Against Forced Baptism*, 14 STUD. IN CHRISTIAN-JEWISH REL. 1, 17 (2019).

the *respondeo* and the replies, not the *sed contra*, where one finds Aquinas's definitive answer to the question.[35]

In the *respondeo* Aquinas points out that "it was never the custom of the Church to baptize the children of the Jews against the will of their parents,"[36] and gives us two reasons why. First, it poses a danger to the faith: "For children baptized before coming to the use of reason, afterwards when they come to perfect age, might easily be persuaded by their parents to renounce what they had unknowingly embraced; and this would be detrimental to the faith."[37] It is important to note here that Aquinas is assuming that the natural parents, and not prelates or Catholic families, are raising these children that had been baptized against the parents' wishes. In other words, it does not seem to occur to Aquinas, as it did to Pius IX in the Mortara case and numerous other prelates and scholars in church history,[38] that baptized children of non-Catholics should be forcibly removed from their non-Catholic parents and brought up by and as Catholics. Elsewhere in the *Summa*, when dealing with the faith of unbelieving parents whose children have been baptized (while not addressing the question of whether the unbelieving parents consented to the rite), Aquinas assumes that the unbelieving parents will be raising and caring for their baptized children:

> Nor is it a hindrance to their salvation if their parents be unbelievers, because, as Augustine says, writing to the same Boniface (Ep. xcviii), "little children are offered that they may receive grace in their souls, not so much from the hands of those that carry them (yet from these too, if they be good and faithful) as from the whole company of the saints and the faithful. . .." And the unbelief of their own parents, even if after Baptism these strive to infect them with the worship of demons, hurts not the children. For as Augustine says (Cont. duas Ep. Pelag. i) when once the child has been begotten by the will of others, he cannot subsequently be held by the bonds of another's sin so long as he consent not with his will . . .." But the faith of one, indeed of the whole Church, profits the child through the operation of the Holy

35. *Idˆ*

36. ST, *supra* note 19, at II.II.10.12, *respondeo*.

37. *Id.*

38. Tapie explains the twists and turns of this debate as well as Aquinas's rejection of the theologies of forced baptisms. *See* Tapie, *supra* note 20, at 294–327.

> Ghost, Who unites the Church together, and communicates the goods of one member to another.[39]

Aquinas does not suggest that the Church ought to take custody of such baptized children and find for them Catholic homes in which they may be properly catechized.

The second reason for the church's custom of not baptizing Jewish children is that it would be contrary to natural justice. It is on this point that Aquinas offers his natural law account of parental authority and responsibility. He writes:

> For a child is by nature part of its father: thus, at first, it is not distinct from its parents as to its body, so long as it is enfolded within its mother's womb; and later on after birth, and before it has the use of its free-will, it is enfolded in the care of its parents, which is like a spiritual womb, for so long as man has not the use of reason . . ..[S]o, according to the natural law, a son, before coming to the use of reason, is under his father's care. Hence it would be contrary to natural justice, if a child, before coming to the use of reason, were to be taken away from its parents' custody, or anything done to it against its parents' wish. As soon, however, as it begins to have the use of its free-will, it begins to belong to itself, and is able to look after itself, in matters concerning the Divine or the natural law, and then it should be induced, not by compulsion but by persuasion, to embrace the faith: it can then consent to the faith, and be baptized, even against its parents' wish; but not before it comes to the use of reason. [40]

Several points stand out in this passage. First, a child belongs to its parents as a matter of nature, a claim that Aquinas no doubt derives directly from the primary precepts of the natural law.[41] Second, parents have the right and responsibility to act on behalf of their pre-rational children, [42] which canon law designates as infants.[43]

39. ST, *supra* note 19, at III.68.9.ad2.

40. ST, *supra* note 19, at II.II.10.12, *respondeo*.

41. ST, *supra* note 19, at I.II.94.2, *respondeo*.

42. The age of reason is "[t]he name given to that period of human life at which persons are deemed to begin to be morally responsible. This, as a rule, happens at the age of seven, or thereabouts, though the use of reason requisite for moral discernment may come before, or may be delayed until notably after, that time." Joseph Delany, *Age of Reason*, THE CATHOLIC ENCYCLOPEDIA, http://www.newadvent.org/cathen/01209a.htm (last visited Feb. 11, 2022).

43. "A minor before the completion of the seventh year is called an infant and is considered not responsible for oneself (*non sui compos*). With the completion of the seventh

Given what Aquinas says in the articulation of his first reason—that baptism *invitis parentibus* poses a danger to the faith—this parental right and responsibility is not superseded by the Church if a child is in fact baptized against his or her parents' wishes. Third, after a child reaches the age of accountability he or she is no longer under the authority of his or her parents on spiritual matters. Such a child, if he or she desires, may choose to be baptized into the Catholic faith, even if it is contrary to the parents' wishes. But such a choice must be the result of a non-coerced exercise of free will. Although he does not say it in the aforementioned passage, it is important to note, as we will see below, that for Aquinas, civil and ecclesial authority must yield to the demands of natural justice.

II. FR. CESSARIO: INFANT BAPTISM, NATURAL JUSTICE, AND THE INTEGRALIST STATE[44]

In early 2018, the magazine FIRST THINGS caused quite a stir when it published Fr. Cessario's review of VITTORIO MESSORI, KIDNAPPED BY THE VATICAN?: THE UNPUBLISHED MEMOIRS OF EDGARDO MORTARA (2017).[45] Mortara was born in 1851 into a Jewish family in Bologna, which was at that time a city in the Papal States. In 1858, he was forcibly taken from his parents to be brought up in the Vatican after it was discovered by the authorities that he had been secretly baptized five years earlier by the family's domestic servant, Anna Morisi. Under canon law, child baptisms

year, however, a minor is presumed to have the use of reason." *The Canonical Condition of Physical Persons* Canon 97 § 2, CODE OF CANON LAW, https://www.vatican.va/archive/cod-iuris-canonici/cic_index_en.html (last visited Feb. 11, 2022) [hereinafter CAN.]. However, as Ed Peters noted to me in private correspondence, canon law does not see age seven as the sole bright line in regard to spiritual autonomy. See, for example, Canon 111 § 2: "Anyone to be baptized who has completed the fourteenth year of age can freely choose to be baptized in the Latin Church or in another ritual Church *sui iuris*; in that case, the person belongs to the Church which he or she has chosen."; *see also* CAN. 112 § 1 n. 3; CAN. 1478.

44. Four works were especially helpful to me in my analysis of Fr. Cessario's argument: Robert T. Miller, *The Mortara Case and the Limits of State Power:* First Things *Should Disavow Fr. Cessario's Defense of Pius IX in the Mortara Case*, PUBLIC DISCOURSE (Jan. 11, 2018), https://www.thepublicdiscourse.com/2018/01/20868/; Tapie, *The Mortara Affair*, *supra* note 34; Tapie, *Spiritualis Uterus*, *supra* note 20; and Sharon Stahl, The Mortara Affair, 1858: Reflections of the Struggle to Maintain the Temporal Power of the Papacy (1987) (Ph.D. dissertation, Saint Louis University) (ProQuest).

45. Cessario, *supra* note 21.

invitis parentibus are ordinarily illicit, though valid.[46] However, if Morisi was right about Mortara's imminent demise, then his baptism, under canon law, was both licit and valid, for canon law stipulates that "an infant of Catholic parents or even of non-Catholic parents is baptized licitly in danger of death even against the will of the parents."[47] Because the sacrament configures the baptized to Christ "by an indelible character, [and thus the baptized] are incorporated into the Church,"[48] little Edgardo, in the eyes of the Church, became Catholic the moment he was baptized. Canon law also teaches that parents of Catholic children have an obligation to raise them in the Catholic faith,[49] and that "[t]he duty and right of educating belongs in a special way to the Church, to which has been divinely entrusted the mission of assisting persons so that they are able to reach the fullness of the Christian life."[50]

Based on these premises, Fr. Cessario comes to Pio Nono's defense, arguing that Pius IX really had no choice. Given the nature of the Catholic sacramental worldview—that there are in fact supernatural effects, indelible marks, that follow from the reception of sacramental grace[51]—and that Mortara is entitled to a Catholic upbringing, which his parents refused to provide, Fr. Cessario asserts that the Papal States were justified under their civil law in kidnapping the young child, relocating him, and placing him under the guardianship of Pius IX.[52] (It should be noted, however, that it's not entirely clear whether the licitness of the baptism matters to Fr. Cessario's case, since an illicit though valid baptism would still leave the same indelible mark on the child's soul).

46. CAN. 868. I am citing the 1983 Code of Canon Law, which replaced the 1917 code. Because Fr. Cessario cites them in his defense of the Vatican, and because he argues that they reflect what was in church law at the time of the Mortara case, I rely on them here. The canon law applicable during the Mortara case is known as Decretal Law. *See* Ed Peters, *Master Page on the Ius Decretalium (1234-1918)*, CANONLAW.INFO (Oct. 24, 2018), http://canonlaw.info/masterpageIusDecret.htm.

47. CAN. 868 § 2.

48. CAN. 849.

49. CAN. 793 § 1.

50. CAN. 794 § 1.

51. Catholic theology teaches that three sacraments leave an indelible mark on the soul: baptism, confirmation, and holy orders. *See* CATECHISM OF THE CATHOLIC CHURCH 1285 (2nd ed. 2000); *see also* Nicholas Senz, *"The Indelible Mark:" Sacramental Character in Patristic and Scholastic Theology*, HOMILETIC & PASTORAL REV. (May 12, 2015), https://www.hprweb.com/2015/05/the-indelible-mark/.

52. Cessario, *supra* note 21.

But does it follow from the validity of the sacrament and the principles of canon law that the Papal States were *morally permitted* to abduct Mortara from his family and permanently keep him in custody at the Vatican? By not addressing the natural law grounding of parental authority and responsibility—the focus of St. Thomas's argument and the basis for the Church's teachings on the matter[53]—Fr. Cessario leaves this question unanswered. He relies exclusively on canon law and the civil law of the Papal Studies, as if they could never be contrary to natural justice: "Both the law of the Church and the laws of the Papal States stipulated that a person legitimately baptized receive a Catholic upbringing. . . . While the pontiff displayed his human feelings by making Edgardo his ward, Pio Nono nonetheless felt duty-bound to uphold the civil law. This law was not unreasonable, moreover." [54] For this reason, it leaves one to wonder the extent to which Fr. Cessario would think it permissible for the Church to cooperate with the state to achieve the Church's ends when the state is not under the authority of the Holy Father as it was in the Papal States.

Suppose, for example, a group of U.S. Catholic hospital chaplains, overly zealous about their faith, make a pact with each other to baptize, *invitis parentibus*, terminally ill newborns whenever possible, a tiny percentage of whom eventually recover. Under canon law, these baptisms are both licit and valid. But, given Fr. Cessario's understanding of the correct application of the Church's divinely entrusted mission, the local ordinaries (bishops) should instruct their dioceses' general counsels to petition the family courts to issue injunctions that order the parents of the surviving children either to raise them in the Catholic faith or to

53. *See* Pope Leo XIII, *Rerum Novarum* (May 15, 1891), http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html ("[I]nasmuch as the domestic household is antecedent, as well in idea as in fact, to the gathering of men into a community, the family must necessarily have rights and duties which are prior to those of the community, and founded more immediately in nature."); *see also* Pope Pius XI, *Mit Brennender Sorge* 31 (Mar. 14, 1937), http://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_14031937_mit-brennender-sorge.html ("Parents who are earnest and conscious of their educative duties, have a primary right to the education of the children God has given them in the spirit of their Faith, and according to its prescriptions. Laws and measures which in school questions fail to respect this freedom of the parents go against natural law, and are immoral. The Church, whose mission it is to preserve and explain the natural law, as it is divine in its origin, cannot but declare that the recent enrollment into schools organized without a semblance of freedom, is the result of unjust pressure, and is a violation of every common right.").

54. Cessario, *supra* note 21.

transfer custody to the bishop. If a secular court in the United States were to grant such an injunction, we would clearly see it as an infringement of the parents' rights and thus a violation of natural justice.[55] Aquinas makes this point in response to the objection that "[e]very man belongs more to God, from Whom he has his soul, than to his carnal father, from whom he has his body,"[56] writing: "[A] child, before it has the use of reason, is ordained to God, by a natural order, through the reason of its parents, under whose care it naturally lies, and it is according to their ordering that things pertaining to God are to be done in respect of the child."[57] In response to another objection—that *the government* may, without committing an injustice, force the baptism of Jewish children against their parents' wishes[58]—Aquinas writes that whatever civil obligations Christian monarchs may place on their Jewish subjects, *they cannot* "exclude the order of natural or Divine law."[59] Consequently, the fact that baptized Catholic children are entitled to a certain kind of spiritual formation and Catholic upbringing, and the fact that the Church has a responsibility to educate all its baptized members, *does not entail* that the civil government—even when that government happens to be the Holy See—may do anything in its power to achieve that end.

That the civil law cannot (and must not) in such cases be employed to achieve what every Catholic would see as important for the child's supernatural end is in line with Aquinas's point that the human law cannot repress every act of vice[60] or command "all the acts of every virtue."[61] Because a human law must participate in the natural law in order to be lawful,[62] and because canon law

55. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 536 (1925); Wisconsin v. Yoder, 406 U.S. 205, 229 (1972).

56. ST, *supra* note 19, at II.II.10.12.obj.4.

57. *Id.* at II.II.10.12.ad4.

58. *Id.* at II.II.10.12.obj.3.

59. *Id.* at II.II.10.12.ad3.

60. *Id.* at I.II.96.2.

61. ST, *supra* note 19, at I.II.96.3, *respondeo*.

62. Aquinas writes that if laws are just, "they have the power of binding in conscience, from the eternal law whence they are derived." ST, *supra* note 19, at I.II.96.4. His use of "eternal law" in this context is in reference to the natural law, as he notes earlier: "The natural law is a participation in us of the eternal law." *Id.* at I.II.96.2.a3.

and human law must answer to the natural law,[63] Pius IX's kidnapping of Mortara and the pontiff's refusal to return the young man to his parents, though permitted by the civil law of the Papal States, was, in the words of St. Augustine, justified by "no law at all"[64] (even if the baptism was both licit and valid under canon law).[65]

By ignoring the demands that natural justice places on the state (and by implication a state under the authority of the Church), and by focusing exclusively on the end to which he believes an integralist state is ordered (the salvation of souls), Fr. Cessario's political vision implies a totalizing view of state power.

III. DR. MCALEESE: INFANT BAPTISM, NATURAL JUSTICE, AND THE SECULAR PROGRESSIVE STATE

In 2018, Dr. McAleese, a former president of Ireland (1997–2011), was awarded a doctorate in canon law from the Pontifical Gregorian University in Rome. In her dissertation for that degree, she critically assesses the Church's understanding of infant baptism in canon law in light of the 1990 United Nations Convention on the Rights of the Child (UNCRC).[66] She has also presented variations of the same argument in a variety of venues,[67] including Trinity College Dublin, where in November 2019 she delivered the prestigious Edmund Burke Lecture.

63. "[I]t is evident and needs no restatement by the legislator that ecclesiastical authority cannot dispense from what Natural Law prohibits." Stephan Kuttner, *Natural Law and Canon Law*, 3 NAT. L. INST. PROC. 85, 112 (1950) (emphasis omitted). "[T]he principle of the hierarchy of laws requires that no provision of canon law may be contrary to divine or natural law. . . . Canon law must always be in accord with the immutable truths of divine and natural law." John J. Coughlin, *Canon Law*, 15, 20 (Notre Dame L. Sch., Notre Dame Legal Studies Paper No. 07-27, 2007).

64. ST, *supra* note 19, at I.II.96.4 (quoting St. Augustine, *De Libero Arbitrio* (*On Free Will*), i, 5).

65. It should be noted that Tapie takes the controversial position that the proper inference from Aquinas's teachings on baptisms is that *all child* baptisms *invitis parentibus* are illicit and invalid: "In so far as Aquinas's teaching is concerned, the baptism of Edgardo Mortara, or any child against the will of their parents, is not valid, lawful, or praiseworthy, but a dangerous innovation contrary to the custom of the Church and the natural law." Tapie, *Mortara Affair*, *supra* note 34, at 18. Although I am inclined to agree with Tapie, it would take us far afield to defend that position in this article.

66. Mary Patricia McAleese, Children's Rights and Obligations in Canon Law (2018) (Unpublished J.D.L. dissertation, Pontifical Gregorian University in Rome). It was subsequently published as a book by Brill in 2019: CHILDREN'S RIGHTS AND OBLIGATIONS IN CANON LAW.

67. *See supra* note 22.

According to Dr. McAleese, in canon law the rite of baptism has both spiritual and juridical components. The former has the effect of eliminating original sin, while the latter has the effect of imposing on the child "lifelong Church membership which can never be rescinded, becoming subject to Church laws from the age of seven on reaching the use of reason, and being deemed by Baptism to have made personal promises to fulfill the many onerous obligations canon law imposes on Church members."[68] This juridical component, argues Dr. McAleese,[69] is a clear violation of Article 14 of the UNCRC, noting that the Holy See "was one of the very first State Parties to sign up to the Convention."[70] Article 14 states:

> 1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
>
> 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.[71]

It would seem, at least at first glance, that there is nothing about Article 14 that is inconsistent with what Aquinas maintains are the parents' rights under natural justice to direct the religious beliefs and practices of their children. Thus, it would seem that the Catholic baptism of infants does not run afoul of Article 14. But Dr. McAleese thinks otherwise. She argues that because baptism's juridic component—which she attributes to "man-made canon law"[72]—is realized by promises "made by adults [parents and

68. Mary McAleese, *The Future of Ireland: Human Rights and Children's Rights*, EDMUND BURKE LECTURE 1, 9 (2019).

69. *Id.* at 9–10.

70. *Id.* at 6.

71. G.A. Res. 44/25, annex, art. XIV, Convention on the Rights of the Child (Sept. 2, 1990).

72. McAleese, *supra* note 68, at 9. She refers to it as "man-made" to indicate that the Church may change this juridic component of baptism without actually changing the

godparents] on the child's behalf and in circumstances where the child could not have been aware of the promises or their import,"[73] the rite does not "respect the right of the child to freedom of thought, conscience and religion" (in the words of Article 14.)[74] According to Dr. McAleese, the Holy See "has never considered the ethical, legal and moral implications of imposing lifelong membership of the Church and a body of obligations on a baby who is not in a position to weigh the implications."[75]

What are we to make of Dr. McAleese's argument?[76] First, the fact that the spiritual and juridic elements of baptism are distinguishable in our minds does not mean that they are ontologically distinct. Think, for example, of national citizenship. One can distinguish in one's mind between the act of becoming a citizen and the consequences of that citizenship (e.g., permanent residency status, eligibility for state retirement benefits, and so forth). But it does not follow that they are ontologically distinct, that one can actually be a citizen without the consequences of citizenship, just as three-sidedness cannot exist without triangularity even though we can distinguish the two in our minds.

Dr. McAleese is certainly correct that baptism (under the Catholic understanding) cleanses one of original sin, but it simultaneously incorporates one into the Body of Christ, the Church.[77] (If baptism makes one a Christian,[78] then *ipso facto* one is

sacrament. She writes elsewhere that the Church's official catechism fails "to differentiate between the indelible spiritual effects of Baptism, which operate by grace, and the juridical effects that impose mandatory Church enrolment." McAleese, *The Catholic Church's Home Grown Existential Crisis*, *supra* note 22.

73. McAleese, *supra* note 68, at 10

74. G.A. Res. 44/25, annex, *supra* note 71.

75. McAleese, *supra* note 68, at 11.

76. Special thanks to Ed Peters for two pieces that helped me to clarify some of the issues in the critique that follows. *See* Edward Peters, *The Formal Act of Defection*, CANONLAW.INFO (Apr. 28, 2006), http://www.canonlaw.info/canonlaw_discus.htm; *Some Correctives to Mary McAleese's Trinity College Remarks*, IN LIGHT OF THE LAW: A CANON LAWYER'S BLOG (Nov. 21, 2019), https://canonlawblog.wordpress.com/2019/11/21/some-correctives-to-mary-mcaleeses-trinity-college-remarks/.

77. "Baptism, the gateway to the sacraments and necessary for salvation by actual reception or at least by desire, is validly conferred only by a washing of true water with the proper form of words. Through baptism men and women are freed from sin, are reborn as children of God, and, configured to Christ by an indelible character, are incorporated into the Church." CAN. 849.

78. "Then he brought them outside and said, 'Sirs, what must I do to be saved?' They answered, 'Believe on the Lord Jesus, and you will be saved, you and your household.' They

a member of Christ's Body, an ancient Christian belief if there ever was one.[79]) For this reason, the Church can only answer "no" to Dr. McAleese's rhetorical question, "Could not [the baptized infants] become part of the body of Christ and have original sin expunged at Baptism without becoming enrolled as permanent members of the Catholic Church?" [80] But does that mean, as Dr. McAleese claims, that when children reach adulthood they may not separate themselves from the Catholic Church? It does not. For one may be excommunicated from the Church for any one of a variety of reasons, including schism, heresy, apostacy, or physically assaulting the pope.[81] But because of the nature of baptism—that it has a real ontological effect on the baptized—one can never become unbaptized and technically cease to be a son or daughter of the Church. Consequently, what is true of the first birth is true of the second birth as well. Just as one is not free to change one's biological parents, one is not free to change one's spiritual patrimony. On the other hand, just as one is free to never visit the home and never speak to one's biological progenitors again, one is free to never visit the home of one's baptismal progenitor and never enter it (or believe with it) again. Thus, it is a tad misleading for Dr. McAleese to say that "church law does not currently recognize any explicit right of a baptized Catholic to make a conscientious clean break from the Church."[82]

As someone who did indeed move out of his baptismal home as a teenager only to return over three decades later, I never felt constrained by the Church's teachings on baptism while I was separated from her, for the simple reason that I had, by my acts of schism and apostasy, rejected her authority to determine the nature of my relationship to Christ.[83] During that time I identified as a Protestant and never once, except toward the end of my journey,

spoke the word of the Lord to him and to all who were in his house. At the same hour of the night he took them and washed their wounds; then he and his entire family were baptized without delay." *Acts* 16:30–33 (The New Revised Standard Version).

79. "For in the one Spirit we were all baptized into one body—Jews or Greeks, slaves or free—and we were all made to drink of one Spirit." I *Cor*. 12:13 (NRSV).

80. McAleese, *The Catholic Church's Home Grown Existential Crisis*, *supra* note 22, at 83.

81. CAN. 1364–99.

82. McAleese, *The Catholic Church's Home Grown Existential Crisis*, *supra* note 22, at 87.

83. FRANCIS J. BECKWITH, RETURN TO ROME: CONFESSIONS OF AN EVANGELICAL CATHOLIC (2009); Francis J. Beckwith, *A Journey to Catholicism, in* JOURNEYS OF FAITH: EVANGELICALISM, EASTERN ORTHODOXY, CATHOLICISM, AND ANGLICANISM 81 (Robert L. Plummer ed., 2012).

thought myself to be under the authority of the Catholic Church.[84] But it was, I confess, a great blessing to know, when I was finally drawn back to the faith, that the Church was there to welcome me as a prodigal son who could have never in principle lost his spiritual patrimony. It is not clear why Dr. McAleese, who identifies as a Catholic, would want to disallow the baptized of that unassailable comfort, a good that the Church teaches these prodigals could never lose even while they are in schism with her.[85]

Second, Dr. McAleese is simply wrong in suggesting that the Holy See "has never considered the ethical, legal and moral implications" of its doctrine of baptism. Not only is the existence and development of canon law evidence of this reflection, but even the modest presentation of the sacrament in the *Catechism of the Catholic Church* reveals a deep and careful thinking on this topic that has been occurring from the earliest days of the Church.[86] (Aquinas, for example, in the *tertia pars* of the *Summa Theologiae*, devotes six questions [including 50 articles] to the sacrament of baptism.)[87]

But there is a deeper problem with Dr. McAleese's argument, one that has very little to do with whether she has correctly articulated the nuances of the development of Catholic doctrine. She assumes that because the Church has refused to embrace what some take to be the modern liberal view of the human person—[88] that *true human freedom* (THF) is the exercise of the individual will to choose what the person believes is the good unencumbered by inherited and/or unchosen traditions and forms of life—that the

84. As canon law states:

> "Heresy is the obstinate denial or obstinate doubt after the reception of baptism of some truth which is to be believed by divine and Catholic faith; apostasy is the total repudiation of the Christian faith; schism is the refusal of submission to the Supreme Pontiff or of communion with the members of the Church subject to him . . . Without prejudice to the prescript of can. 194, §1, n. 2, an apostate from the faith, a heretic, or a schismatic incurs a latae sententiae excommunication . . ."

CAN. 751, 1364 § 1.

85. "Incorporated into Christ by Baptism, the person baptized is configured to Christ. Baptism seals the Christian with the indelible spiritual mark (character) of his belonging to Christ. No sin can erase this mark, even if sin prevents Baptism from bearing the fruits of salvation. Given once for all, Baptism cannot be repeated." CATECHISM OF THE CATHOLIC CHURCH, 1272 (2nd ed., 2000) (note omitted).

86. *Id.* at 1213–84.

87. ST, *supra* note 19, at III.66–71.

88. I say what "some take to be the modern liberal view of the human person," since there are philosophers who identify as liberal who do not hold this view. *See, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); WILLIAM GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (1991).

Church's doctrine of baptism fails to measure up to the ethical, legal, and moral standards of the modern world that the Church on occasion has championed.[89] Her point is not without merit, since, as she correctly notes, the Church was a signatory of the UNCRC (albeit with some significant reservations).[90] But, as I have already noted above, it is not at all obvious that one must read the document as contrary to Aquinas's account of natural justice.

But why think that Dr. McAleese's interpretation of the convention's Article 14 is a sufficient reason for the Church to abandon its understanding of the sacrament of baptism? (Dr. McAleese does not actually say. She just assumes as normative her interpretation of international human rights law). And why should the Church suppose that the insights of the modern world—as Dr. McAleese understands them—offer a superior philosophical anthropology than its own traditions and theology? After all,

89. In defending her project, McAleese asks several questions, among which are the following:

> "[F]rom where derives the right of the Church to hold its members to obligations (which affect their freedom of conscience, opinion and belief), imposed on them when they were non-sentient and which they have not been given the opportunity to personally accept or reject when capable of doing so? Successive Church teachings assert that the Church's authority over its members derives from divine law but *in the light of modern understanding of individual human rights* are aspects of this view open to challenge?"

MCALEESE, *supra* note 22, at 36 (emphasis added).

90. McAleese writes:

> "On ratifying the UNCRC in 1990, the Holy See entered three reservations and an interpretative declaration . . . . The first two reservations concern universal Church teaching on family planning and parental rights in relation to named articles of the UNRC. The third reservation concerns only the Vatican City State and ensures the supremacy of canon law which is the primary source of that state's law. The interpretative declaration sets out the view of the Holy See that the Preamble to the Convention (which is a non-binding part of the Convention) protects the rights of the unborn."

Id. at 409–10. McAleese also notes:

> "The Holy See argues that its UNCRC treaty obligations of the Holy See (outside of the Vatican City State) extend only to using its global moral stature to encourage others to implement the Convention's principles. It maintains that the Convention needs a territory in which to be implemented and it has no territory except the Vatican City State. The Holy See also says that its right to religious freedom and to sovereign control over its internal jurisdiction as a religious entity places its teachings and canon law outside the mandate of the CRC. In the view of the Holy See the CRC has no authority to scrutinise the internal juridic domain of church teaching and canon law. The Holy See says this is how its UN treaty obligations have always been understood and that was what was understood when it ratified the UNRC."

Id. at 348–49.

modern liberal views of the person—some of which fall under Michael Sandel's neologism of the *unencumbered self*—are not without their own problems and puzzles.[91] As Sandel notes, it does not seem possible for flesh and blood human beings to seriously think that what is constitutive of their lives—those enduring loyalties and attachments to family, nation, faith, and tradition that they did not explicitly choose—somehow diminishes rather than informs how they ought to exercise their liberty.[92] Think of the millions of unsuspecting infants who every year are born into families that speak a language, live under a Constitution and body of laws, participate in formal education with a uniform curriculum, and engage in cultural practices they inherited from their predecessors, all of which provide order, purpose, and meaning so that the child may exercise her will freely and not capriciously once she reaches the age of reason. Are we to believe that the rights of these infants are violated because these attributes and practices—some indelible or nearly so—are foisted upon them without their explicit consent?

Dr. McAleese herself seems to tacitly, and thus ironically, accept this reality when she presents her interpretation of the international human rights conventions as normative for all the world's citizens, even though virtually none of those citizens has explicitly consented to the true human freedom (THF) that she believes these conventions teach. These citizens are born into and brought up in a world already configured with authoritative commissions, conventions, governments, constitutions, statutes, etc. which no

91. *See, e.g.*, Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81 (1984). My point in citing Sandel's work is not to champion it, but rather, to raise questions about Dr. McAleese's assumptions about freedom and human nature.

92. Writes Sandel:

> "To imagine a person incapable of constitutive attachments such as these is not to conceive an ideally free and rational agent, but to imagine a person wholly without character, without moral depth. For to have character is to know that I move in a history I neither summon nor command, which carries consequences nonetheless for my choices and conduct. It draws me closer to some and more distant from others; it makes some aims more appropriate, others less so. As a self-being, I am able to reflect on my history and in this sense to myself from it, but the distance is always precarious and provisional, point of reflection never finally secured outside the history itself. liberal ethic puts the self beyond the reach of its experience, deliberation and reflection. Denied the expansive self-understandings that could shape a common life, the liberal self is left to lurch between detachment on the one hand, and entanglement on the other. Such is the fate of the unencumbered self, and its liberating promise."

Id. at 90–91.

doubt, under Dr. McAleese's understanding, properly instruct these citizens as to what counts as THF. Take, for example, the Catholic adult whose parents live under a government that has placed in its laws Dr. McAleese's understanding of international human rights and thus prohibits Catholic baptisms. Imagine this adult now wishes that her parents had baptized her as an infant and inculcated in her the lessons of the faith that Dr. McAleese maintains are deleterious to THF. This adult was not, nor could ever be, a party to the original legislative agreement that banned her parents from asking the Church on her behalf to give her the sacrament. Yet that child, as with all children in Dr. McAleese's ideal state, must live under its rules, rules to which they did not explicitly consent.

Not surprisingly, when she discusses the Mortara case, Dr. McAleese does not describe it as a violation of natural justice, but rather, as the Church through its political power imposing itself on little Edgardo and his parents and inflicting on the latter deep emotional pain.[93] She writes: "The fundamental design flaw in the Church of the 19th century that Edgardo's story highlighted was the insistence in Church teaching that God had created the Church to be both the world's sole spiritual and temporal source of governance."[94] Although she admits that the rights of Edgardo's parents were violated,[95] she does not acknowledge those rights as

93. McAleese, *supra* note 22, at 77–79.

94. *Id.* at 79. It should be noted that McAleese seems to be misunderstanding the integralism embraced by the nineteenth century Church. It did not hold that the Church is "the source of temporal governance," but rather, that God has authorized two separate authorities—spiritual and temporal—the former of which should direct the latter on matters over which their jurisdictions overlap. Because human beings are ordered toward communion with God, the temporal government should be in the service of the spiritual government. How that gets cashed out in practice will depend largely on contingent circumstances. For more on this, *see* Thomas Pink, *In Defence of Catholic Integralism*, PUB. DISCOURSE (Aug. 12, 2018), https://www.thepublicdiscourse.com/2018/08/39362/; Edmund Waldstein, O.Cist., *Integralism and Gelasian Dyarchy*, THE JOSIAS (Mar. 3, 2015), https://thejosias.com/2016/03/03/integralism-and-gelasian-dyarchy/.

95. McAleese writes:

> Pius IX had become reputationally damaged internationally as a result of the Edgardo Mortara case in 1858 when he assumed a central role in the forced removal of a six year old Jewish child from his family. The Pope refused to return the boy to his family since he regarded the child as Christian, by virtue of an alleged and disputed secret baptism in infancy. The affair highlighted, among other things, the over-riding priority the Church attached to the salvation of souls and the extent to which that priority allowed it to disregard the rights of parents and child.

MCALEESE, *supra* note 22, at 57 (citation omitted).

grounded in natural justice, that the Mortaras have the right to inculcate in their child *their* religious faith and all the juridical obligations that go along with it (which includes, in Judaism, circumcision, a rite that most certainly left an indelible mark on their son).[96] And although she says contemporary international human rights instruments—such as the UNCRC—are grounded in the natural law,[97] the inferences she draws from those instruments seem to be inconsistent with the natural justice that grounds the rights of the Mortaras *as well as Catholic parents*. If she had brought that insight to the reader's attention, one could raise the following questions about her case against Catholic infant baptism: Why is it permissible (as Dr. McAleese argues) for the modern liberal state, with its assorted human rights instruments, to impose on Catholic parents an understanding of the sacramental life that forces them to cease baptizing their children until their Church officially detaches the juridical effects of baptism from its spiritual effects (which, as we have seen, is ontologically impossible)? If it was an injustice for the Papal States to kidnap little Edgardo unless his parents agreed to the condition to raise him Catholic, why is it not an injustice for the modern liberal state (as Dr. McAleese suggests) to tell Catholic parents they have a right to baptize their children only under the condition that their Church abandon its sacramental theology? If it is wrong, as Dr. McAleese claims, for the Catholic Church to teach, as it did in the nineteenth century, that it is "the world's sole spiritual and temporal source of governance,"[98] then why is it right, in the twenty-first century, for international human rights conventions and commissions to be posited as the sole source of what counts as legitimate spiritual

96. I am using the phrase "indelible mark" when referring to the effect of physical circumcision because Fr. Cessario uses the phrase "indelible mark" to refer to the effect of Catholic baptism. There is, of course, among Christians a long history of thinking of baptism as analogous to circumcision that goes back to the Apostle Paul:

> In him also you were circumcised with a spiritual circumcision, by putting off the body of the flesh in the circumcision of Christ; when you were buried with him in baptism, you were also raised with him through faith in the power of God, who raised him from the dead.

Col 2:11-12 (NRSV).

97. MCALEESE, *supra* note 22, at 1 ("These rights derive from the natural law and are based upon 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.'") (citation omitted); s*ee also id.*, at 37, 78, 96, 106, 463.

98. McAleese, *The Catholic Church's Home Grown Existential Crisis*, *supra* note 22, at 79.

practices?[99] It does not take much imagination to conclude from Dr. McAleese's reasoning that if the eradicating of unchosen Catholic baptisms is a matter of vindicating human rights, then it stands to reason that governments should legally proscribe Catholic infant baptisms in order to protect the victimized children from this terrible injustice.[100]

The main problem with Dr. McAleese's view is that it is practically indistinguishable from the one held by Fr. Cessario: both defend policies that offend natural justice on parallel grounds. For Fr. Cessario, because a child's right to salvation hangs in the balance, the State (under the direction of the Church) may separate that child from the religious direction of his parents until he reaches the age of reason. For Dr. McAleese, because a child's right to true human freedom (THF) hangs in the balance, the State (under the direction of the United Nations) may separate that child from the religious direction of his parents until he reaches the age of reason. You can say, then, that the views of Fr. Cessario and Dr. McAleese are twins separated at baptism.[101]

CONCLUSION

It is often difficult to see the shortcomings in one's own political views, especially when they are tightly tethered to one's deeply held religious or philosophical beliefs, while weaknesses in the views of one's adversaries always seem blindingly obvious. Think, for example, of the disputes over parental rights that became

99. Obviously, if international human rights instruments were to acknowledge their own principled limits by recognizing the authority of natural justice, then they could not be the sole source of what counts as legitimate human rights practices.

100. Dr. McAleese may suggest that my litany of questions is mischaracterizing her views, since, after all, she claims that in her book that "the rights of parents to guide and direct the faith life of their children (including having them baptized as babies) are not disputed though their extent and context is discussed." MCALEESE, *supra* note 22, at 9. But she provides no limiting principle as to why they aren't disputed. Is it because they *cannot be* disputed, given the parents' rights under natural justice? If so, then it is not clear what the big deal is about the juridical component of Catholic baptism, since guidance and direction in virtually all cases are far more effectual in shaping a child's will (and thus his freedom to make religious choices later in life) than is the undergoing of baptism.

101. A critic of this Article could raise the objection, "Why should one accept that there's such a thing as natural justice? Perhaps the only law that exists is positive law." That's certainly a good question, but not relevant to the project of this Article. My point is to simply show how the reasoning of both Fr. Cessario and Dr. McAleese—though seemingly worlds apart ideologically—is oddly parallel in so far as they both reject natural justice on a matter involving the right of parents to religiously form their minor children, and that this rejection of natural justice seems to be a condition amenable to a totalizing state.

central to the 2021 Virginia gubernatorial race. During a debate the Democratic candidate, Terry McAullife, made the remark, "I don't think parents should be telling schools what they should teach."[102] He was referring to the significant increase of parental involvement at school board meetings over elementary and secondary school curricula that the parents attributed to critical race theory, a controversial social philosophy of race that challenges conventional liberal understandings of justice, due process, and equality.[103] For political and religious conservatives, McAullife's remarks were a rhetorical salvo launched against the natural rights of parents long recognized by the Supreme Court.[104] For progressives, the parental reaction was a threat to public school safety and the proper development and implementation of curricula necessary to secure social justice.[105]

But the script flips when the issue changes. In 1999, Elián González, a five-year-old Cuban boy, was found floating on an inner-tube three miles off the coast of Ft. Lauderdale.[106] His mother, along with other refugees, died on their way from Cuba to Florida on a small boat. One of three survivors, Elián was placed in the custody of his Miami uncle, Lazaro Gonzalez. Elián's Cuban father, Juan Miguel González, who was divorced from Elián's mother, demanded that his son be returned to the communist country and placed in his custody. The conservative, anti-communist Cuban-American community in south Florida fought against the request. With sympathies toward that community, Republican Orrin Hatch (UT) opened U.S. Senate hearings on the matter by stating:

> As we ponder the best course of action for Elián, we simply cannot ignore the fact that this is not just a custody matter, but a case

102. Scott Clement, *McAuliffe's Quote on Schools Was a Clunker, but Polls Suggest Parental Backlash Didn't Swing the Election*, WASH. POST (Nov. 5, 2021, 1:19 PM), https://www.washingtonpost.com/politics/2021/11/05/mcauliffes-quote-schools-was-clunker-polls-suggest-parental-backlash-didnt-swing-election/.

103. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (3d ed. 2017)

104. *See* Philip Hamburger, *Is the Public School System Constitutional?*, WALL ST. J. (Oct. 22, 2021, 6:41 PM), https://www.wsj.com/articles/public-school-system-constitutional-private-mcauliffe-free-speech-11634928722.

105. *See* Letter to President Joe Biden from the National School Board Association (Sept. 29, 2021), https://www.documentcloud.org/documents/21094557-national-school-boards-association-letter-to-biden.

106. Jess Swanson and Angel Garcia, *Why the Elián Gonzalez Saga Resonates 20 Years Later*, VOX (Nov. 11, 2019, 10:11 AM), https://www.vox.com/the-highlight/2019/11/4/20938885/miami-cuba-elian-gonzalez-castro.

> where one of the options considered is returning this child to one of the last prison nations in the world, Fidel Castro's wretched communist dictatorship.[107]

On the other hand, Democrat Patrick Leahy (VT) appealed to an intuition grounded in natural justice: "I believe that the Elián Gonzalez issue has already been inappropriately politicized at the beginning of this Congress by members of this Congress, and that a six-year-old boy has been converted into a political symbol. *A young boy belongs with his parent, not with distant relatives*."[108]

Progressives, especially those hostile to conventional religious belief, have correctly viewed the Catholic Church's treatment of the Mortara family as an appalling injustice for which the Holy See should be ashamed. Yet many of these same progressives typically cannot see what is wrong with the involvement of compulsory education in the moral formation of children in ways that are contrary to parental wishes. On the other hand, religious conservatives who identify with the Catholic integralist movement are in the forefront of resisting progressive policies that in their judgment interfere with the rightful authority of parents and families,[109] even though some of these same integralists find it difficult to find anything wrong with Pius IX's abduction of Edgardo Mortara.[110] The lesson is clear: absent the explicit recognition of extra-governmental authority—something like

107. *Cuba's Oppressive Government and the Struggle for Justice*, H. Comm. on the Judiciary, 106th Cong. 2 (2000) (opening statement of Hon. Orrin G. Hatch, U.S. Sen.).

108. *Id.* (statement of Hon. Patrick J. Leahy, U.S. Sen.) (emphasis added).

109. In explaining why he embraces what he calls "common-good Constitutionalism," Catholic integralist Adrian Vermeule writes:

> These principles include respect for the authority of rule and of rulers; *respect for the hierarchies needed for society to function; solidarity within and among families*, social groups, and workers' unions, trade associations, and professions; appropriate subsidiarity, or respect for the legitimate roles of public bodies and associations at all levels of government and society; and a candid willingness to 'legislate morality' . . . . Unions, guilds and crafts, cities and localities, and other solidaristic associations will benefit from the presumptive favor of the law, *as will the traditional family*; in virtue of subsidiarity, *the aim of rule will be not to displace these associations, but to help them function well*.

Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ (emphasis added).

110. Adrian Vermeule, (@Vermeullarmine), TWITTER (Jan. 10, 2018, 6:07 AM), https://perma.cc/6RJY-WGWK ("Pius IX's actions were valid, so [the discussion] seems to be about whether to say so publicly.").

natural justice[111]—it becomes difficult to see what precisely is wrong with a totalizing ideology, especially if its advocates are convinced that God or the United Nations (or History) is on their side. As we have seen, an uncritical, exclusive, and scrupulous reliance on positive law—whether it's the civil law of the Papal States or international conventions and declarations—may nevertheless be employed in the service of what is unjust.

111. Or any other non-positive law. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW (rev. ed., 1969); RONALD DWORKIN, LAW'S EMPIRE (1986).