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John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism

Gregory A. Kalscheur, S.J.¹

A September 2003 USA TODAY/CNN/Gallup Poll found that Americans are content to see “In God We Trust” on coins and a Bible on a teacher’s desk – but they object to priests and rabbis advising politicians on abortion or the death penalty.² Similar objections greeted the July 2003 Vatican statement opposing proposals to give legal recognition to same-sex unions. Senator John Kerry, for example, contended that the statement inappropriately “crossed the line” separating church and state in American politics.³

Reactions like these pose a significant challenge to a church whose social teaching includes a call for the recovery of “the basic elements of a vision of the relationship between civil law and moral law.”⁴ John Paul II issued that call in his 1995 encyclical *Evangelium Vitae*, in response to what he characterized as a trend to demand a legal justification for contemporary attacks on human life like abortion and euthanasia, “as if they were rights which the state, at least under certain conditions, must acknowledge as belonging to citizens.”⁵ In the face of this trend, the Pope advocates a jurisprudential vision which includes the “doctrine on the necessary conformity of civil law with moral law,” a doctrine “which is in continuity with the whole tradition of the church.”⁶ While this vision is “put forward by the church,” the Pope notes that it is “also part of the patrimony of the great juridical traditions of humanity.”⁷

Shortly after *Evangelium Vitae* appeared, moral theologian Richard McCormick, S.J. suggested that the encyclical’s discussion of the relationship of the moral law to the civil law would remain the most controversial part of the encyclical “after the dust settles.”⁸ In the U.S. context, the controversial aspect of this discussion stems, in large part, from the plurality of moral views that exist in American society regarding issues

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² See Larry Copeland, *Church-and-State Standoffs Spread over USA*, USA TODAY, Sept. 30, 2003, at A15.

³ David R. Guarino, *Kerry Raps Pope: Senator Fuming Over Gay Marriage Order*, BOSTON HERALD, Aug. 2, 2003, at 1. The document, *Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons*, was promulgated on July 31, 2003 by the Congregation for the Doctrine of the Faith. See 33 ORIGINS 177 (Aug. 14, 2003).

⁴ Pope John Paul II, *EVANGELIUM VITAE* ¶ 71 (1995) [hereinafter *EVANGELIUM VITAE*].

⁵ *Id.* at ¶ 68.

⁶ *Id.* at ¶ 72.

⁷ *Id.* at ¶ 71.

⁸ Richard A. McCormick, S.J., *The Gospel of Life*, 172 AMERICA 12 (April 29, 1995), quoted in Kevin P. Quinn, S.J., *Whose Virtue? Which Morality? The Limits of Law as a Teacher of Virtue – A Comment on Cathleen Kaveny*, in CHOOSING LIFE: A DIALOGUE ON EVANGELIUM VITAE 150 (K. Wildes & A. Mitchell eds., 1997). [hereinafter *CHOOSING LIFE*]

like abortion, physician-assisted suicide, embryonic stem-cell research, and the legal recognition of homosexual unions. Moreover, the often “muddled” understanding of the relationship that should exist between law and morality exacerbates the confusion stemming from the plurality of moral views.⁹ Given this social reality, it is difficult to articulate the precise shape and scope of the “necessary conformity” between civil law and moral law that the Pope desires to promote.

The Pope’s extensive jurisprudential reflections in *Evangelium Vitae* prompt the question I consider in this presentation: How should we understand the doctrine on the necessary conformity of civil law with moral law in a religiously pluralistic democratic society like that of the United States today? My objective is to articulate a vision of the relationship between moral values and civil law that is grounded in the tradition of the church’s social thought and that can allow the church to contribute credibly and effectively to public discourse regarding the law and public policy in our religiously pluralistic democratic society.

I will begin by outlining the understanding of the relationship between law and morality John Paul II articulates in *Evangelium Vitae*. I will then turn to the understanding of the differentiated relationship of law and morality developed in the work of theologian John Courtney Murray, S.J. It is appropriate to ground contemporary analysis of this issue in the pioneering work of Murray, since, in the words of Cardinal Bernardin, “[n]o single figure in American history has had greater impact on how Catholics conceive of the relationship between religion and politics.”¹⁰ Finally, supplementing Murray’s views with insights gleaned from a number of contemporary voices in Catholic social thought, I will suggest six axioms that ought to inform our vision of the appropriate relationship between religious values, the objective moral order, and civil law and public discourse in the context of twenty-first century American pluralism.

I. The Jurisprudence of *Evangelium Vitae*

The Pope’s jurisprudential reflections begin with a catalogue of tendencies that underlie contemporary claims to legal justification for attacks on human life like abortion and euthanasia. John Paul II believes these tendencies are rooted in the ethical relativism pervading much of contemporary culture.¹¹ The first of these tendencies is a claim he characterizes as “a proportionalist approach,” an approach of “sheer calculation.” According to this approach, the life of an unborn or seriously disabled person is only a relative good. This good must be balanced against other goods, and only the moral decision maker in a particular concrete situation can correctly evaluate the goods at stake. “[O]nly that person would be able to decide on the morality of his choice. The state,

⁹ See Quinn, *supra* note 8, at 152 (calling for “a more complete exposition of the muddled relation between law and morality,” and suggesting the social theory of John Courtney Murray as an appropriate starting point).

¹⁰ Joseph Cardinal Bernardin, *Religion and Politics: Stating the Principles and Sharpening the Issues* (Woodstock Forum Address – Georgetown University, Oct. 25, 1984), in *A MORAL VISION FOR AMERICA* 38 (John P. Langan, S.J., ed., 1998).

¹¹ See *EVANGELIUM VITAE*, *supra* note 4, ¶ 70.

therefore, in the interest of civil coexistence and social harmony, should respect this choice, even to the point of permitting abortion and euthanasia.”¹²

The second tendency the Pope identifies is the claim that the civil law cannot demand that citizens conform to moral standards higher than those acknowledged and shared by all citizens. “Hence the law should always express the opinion and will of the majority of citizens” and recognize in some cases the right to abortion and euthanasia.¹³

A third tendency is rooted in prudential and pragmatic concerns. It is claimed that – given popular support for abortion and euthanasia in certain circumstances – the legal prohibition and punishment of these practices would inevitably lead to an increase in unsafe illegal practices, would be unenforceable in practice and, as a result, would undermine the authority of all law.¹⁴

Finally, the Pope describes a viewpoint that might be characterized as a “complete autonomy” claim. This view maintains that, in a modern and pluralistic society, people should be allowed complete freedom to dispose of their own lives as well as the lives of the unborn. “[I]t is not the task of the law to choose between different moral opinions, and still less can the law claim to impose one particular opinion to the detriment of others.”¹⁵

The Pope believes that these views contribute to the contemporary assertion that the legal system of any society should be based only on what the majority considers moral and actually practices. Because many believe that an understanding of objective truth shared by all is unattainable, the norms governing social coexistence should be based simply on the will of the majority, whatever this may be. “Hence, every politician, in his or her activity, should clearly separate the realm of private conscience from that of public conduct.”¹⁶

This bifurcation in turn supports “what appear to be two diametrically opposed tendencies.”¹⁷ On the one hand, the state is not to adopt or impose any ethical position; instead, in the name of freedom of choice, the state’s only role is to “guarantee[] maximum space for the freedom of each individual, with the sole limitation of not infringing on the freedom and rights of any other citizen.”¹⁸

On the other hand, public officials, when exercising their duties, are to set aside their own moral convictions “in order to satisfy every demand of the citizens which is recognized and guaranteed by law”; the only moral criterion for the exercise of one’s official duties is what is laid down by the law itself.¹⁹ “Individual responsibility is thus

¹² *Id.* at ¶ 68.

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *Id.*

¹⁶ EVANGELIUM VITAE, *supra* note 4, ¶ 69.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

turned over to the civil law, with a renouncing of personal conscience, at least in the public sphere.”²⁰

The Pope strongly condemns the idolization of democracy that he sees flowing from these tendencies. Democracy’s moral value is not automatic, nor is the system of democracy a substitute for morality. Instead, the moral value of democracy depends on its conformity to the moral law – “its morality depends on the morality of the ends which it pursues and the means which it employs. . . . [T]he value of democracy stands or falls with the values which it embodies and promotes.”²¹ Certain values are fundamental and are not to be ignored by the democratic system: the dignity of every human person, respect for inviolable and inalienable human rights, and adoption of the common good as the end and criterion regulating political life.

These values are not rooted in shifting majority opinions, but in acknowledgement of the objective moral law. This objective moral law – the natural law written on the human heart – serves as the “obligatory point of reference for civil law itself.”²² Social peace built on some foundation other than the values of human dignity and solidarity “frequently proves to be illusory.”²³ The interests of the powerful operate to shape consensus, and democracy becomes an empty word. In order to avoid this fate, it is “urgently necessary” to “rediscover those essential and innate human and moral values which flow from the very truth of the human being and express and safeguard the dignity of the person.”²⁴ These values are not created, modified, or destroyed by individuals, majorities, or states. Instead, these values can only be acknowledged, respected, and promoted.²⁵

Moreover, this rediscovery of essential and innate human and moral values must include the recovery of the proper vision of the relationship between civil law and moral law. The Pope recognizes that “the purpose of the civil law is different and more limited in scope than that of the moral law.”²⁶ The civil law cannot take the place of conscience or dictate norms concerning matters outside its competence. The limited competence of the civil law “is that of ensuring the common good of people through the recognition and defense of their fundamental rights, and the promotion of peace and of public morality.”²⁷ Because the real purpose of the civil law is to guarantee an ordered social coexistence in true justice, “it must ensure that all members of society enjoy respect for certain fundamental rights which innately belong to the person, *rights which every positive law*

²⁰ *Id.*

²¹ EVANGELIUM VITAE, *supra* note 4, ¶ 70.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at ¶ 71.

²⁵ *See id.*

²⁶ EVANGELIUM VITAE, *supra* note 4, ¶ 71.

²⁷ *Id.* In support of this conception of the limited role of civil law, the Pope cites paragraph 7 of *Dignitatis Humanae*, Vatican II’s Declaration on Religious Liberty. The document can be found in VATICAN II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS 799-812 (Austin Flannery, O.P., ed., new rev. ed., 1998) For a discussion of the role played by John Courtney Murray’s thought in the drafting of *Dignitatis Humanae*, see JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 329-53 (1998).

*must recognize and guarantee.*²⁸ First among these rights is the inviolable right to life of every innocent human being.

Citing St. Thomas Aquinas, the Pope acknowledges that the public authority may sometimes choose *not* to use the law to stop a practice if its prohibition would cause more serious harm.²⁹ But, this limiting principle can *never* be invoked to legitimize as an individual legal *right* an offense against other persons caused by disregard of the fundamental right to life.³⁰ Thus:

[t]he legal toleration of abortion or of euthanasia can in no way claim to be based on respect for the conscience of others, precisely because society has the right and duty to protect itself against the abuses which can occur in the name of conscience and under the pretext of freedom.³¹

The legal toleration of abortion or euthanasia is, therefore, a violation of a fundamental human right, which runs directly contrary to the state's primary duty of safeguarding human rights. The Pope here relies on John XXIII's discussion of human rights in the encyclical *Pacem in Terris*. The common good is best safeguarded when personal rights and duties are guaranteed. The chief concern of civil authorities, therefore, must be to ensure that these rights are recognized, respected, coordinated, defended, and promoted. In fact,

'to safeguard the inviolable rights of the human person and to facilitate the performance of his duties is the principal duty of every public authority.' Thus any government which refused to recognize human rights or acted in violation of them would not only fail in its duty; its decrees would be wholly lacking in binding force.³²

The Pope next situates the doctrine of the necessary conformity of the civil law with the moral law within the tradition of the church. *Pacem in Terris* again provides the relevant precedent:

Authority is a postulate of the moral order and derives from God. Consequently, laws and decrees enacted in contravention of the moral order, and hence of the divine will, can

²⁸ EVANGELIUM VITAE, *supra* note 4, ¶ 71 (emphasis added).

²⁹ *See id.*, citing St. Thomas Aquinas, SUMMA THEOLOGIAE I-II, q. 96, a. 2. *See* ST. THOMAS AQUINAS, TREATISE IN LAW 92 (Regnery Gateway ed., 1979) ("The purpose of human law is to lead men to virtue, not suddenly but gradually. Wherefore it does not lay upon the multitude of imperfect men the burdens of those who are already virtuous, viz., that they should abstain from all evil. Otherwise these imperfect ones, being unable to bear such precepts, would break out into still greater evils"; if the precepts of a perfect life are poured into imperfect men, "the precepts are despised, and those men, from contempt, break out into evils worse still.").

³⁰ *See* EVANGELIUM VITAE, *supra* note 4, ¶ 71.

³¹ *See id.*, citing *Dignitatis Humanae* ¶ 7 ("[C]ivil society has the right to protect itself against possible abuses committed in the name of religious freedom" when those abuses threaten that part of the common good that is called "public order.").

³² *Id.* (quoting PACEM IN TERRIS ¶ 60-61 (the internal quotation is from Pius XII, radio message of Pentecost 1941 (June 1, 1941))).

have no binding force in conscience . . . ; indeed, the passing of such laws undermines the very nature of authority and results in shameful abuse.³³

Pacem in Terris here is relying on the authority of both Scripture and St. Thomas:

Since the right to command is required by the moral order and has its source in God, it follows that, if civil authorities pass laws or command anything opposed to the moral order and consequently contrary to the will of God, neither the laws made nor the authorization granted can be binding on the consciences of the citizens, since “God has more right to be obeyed than men.”³⁴

Human law has the true nature of law only in so far as it corresponds to right reason, and in this respect it is evident that it is derived from the eternal law. In so far as it falls short of right reason, a law is said to be a wicked [unjust] law; and so, lacking the true nature of law, it is rather a kind of violence.³⁵

John Paul II concludes his discussion of the church’s understanding of the doctrine of the conformity between the civil law and the moral law with another quote from Thomas, who himself was borrowing from Augustine: “[e]very law made by man can be called a law insofar as it derives from the natural law. But if it is somehow opposed to the natural law, then it is not really a law but rather a corruption of law.”³⁶

The Pope then applies this doctrine to laws authorizing and promoting abortion and euthanasia. Because such laws disregard the fundamental right to life – the source of all other rights – they are radically opposed both to the good of the individual and the common good, which it is the duty of the public authority to safeguard:

As such [these laws] are completely lacking in authentic juridical validity. Disregard for the right to life, precisely because it leads to the killing of the person whom society exists to serve, is what most directly conflicts with the possibility of achieving the common good. Consequently, a civil law authorizing abortion or euthanasia ceases by that very fact to be a true, morally binding civil law.³⁷

Abortion and euthanasia are, in fact, *crimes* that no human law can legitimize. Because these acts are intrinsically unjust, laws permitting abortion or euthanasia can neither be licitly obeyed nor supported or voted for. “[A] law which violates an innocent person’s natural right to life is unjust and, as such, is not valid as law.”³⁸ “There is no

³³ *Id.* ¶ 72 (quoting *PACEM IN TERRIS* ¶ 51).

³⁴ *Id.* (quoting *Acts* 5:29).

³⁵ *SUMMA THEOLOGIAE*, I-II, q. 93, a. 3, ad. 2. *Pacem in Terris* also cites Radio Message of Pius XII, Christmas Eve, 1944, *Acta Apostolica Sedis* XXXVII, 1945, pp. 5-23.

³⁶ *EVANGELIUM VITAE*, *supra* note 4, ¶ 72 (quoting *SUMMA THEOLOGIAE*, I-II, q. 95, a. 2, c). Thomas is here quoting Augustine, *De Libero Arbitrio* I, 5, 11 (“Non videtur esse lex, quae iusta non fuerit.”).

³⁷ See *EVANGELIUM VITAE*, *supra* note 4, ¶ 72.

³⁸ *Id.* at ¶ 90.

obligation in conscience to obey such laws; instead, there is a grave and clear obligation to oppose them by conscientious objection.”³⁹

A conscientious legislator *could*, however, vote in favor of a more restrictive abortion law, in place of a more permissive one already in force:

[W]hen it is not possible to overturn or completely abrogate a pro-abortion law, an elected official whose absolute personal opposition to procured abortion was well known could licitly support proposals aimed at limiting the harm done by such a law and at lessening its negative consequences at the level of general opinion and public morality. This does not in fact represent an illicit cooperation with an unjust law, but rather a legitimate and proper attempt to limit its evil aspects.⁴⁰

The task of the legislator thus “involves a complex and morally precarious balancing act.”⁴¹ Without falling into an illicit cooperation with evil, the Pope calls on civil leaders to “make courageous choices in support of life, especially through legislative measures.”⁴² Those who have a legislative or decision-making mandate, also have a responsibility “to answer to God, to his or her conscience and to the whole of society for choices which may be contrary to the common good.”⁴³ While the Pope recognizes that laws are not the only means available to protect life, “they do play a very important and sometimes decisive role in influencing patterns of thought and behavior.”⁴⁴

Legislators, therefore, have a two-fold task. In the face of the difficulties hindering an effective legal defense of life in pluralistic democracies, they must work to remove unjust laws that, “by disregarding the dignity of the human person, undermine the very fabric of society.”⁴⁵ At the same time, they must work to eliminate the underlying social causes of attacks on life, as they seek to do what is “realistically attainable” in pursuit of the “re-establishment of a just order” in defense of life.⁴⁶

The Pope reiterated his commitment to this vision of the relationship between the civil law and the moral law in a February 2000 address commemorating the fifth anniversary of *Evangelium Vitae*.⁴⁷ After noting that he considers this encyclical “central to the whole magisterium of [his] pontificate,” the Pope criticized the “type of defeatist mentality” that “claims that laws opposed to the right to life – those which legalize

³⁹ *Id.* at ¶ 73.

⁴⁰ *Id.* The Pope goes on in paragraph 74 to recall the general principles concerning cooperation in evil actions.

⁴¹ M. Cathleen Kaveny, *The Limits of Ordinary Virtue: The Limits of the Criminal Law in Implementing Evangelium Vitae*, in CHOOSING LIFE, *supra* note 7, at 133. [hereinafter *The Limits of Ordinary Virtue*].

⁴² *Id.* (quoting EVANGELIUM VITAE ¶ 90).

⁴³ *See id.* *supra* note 41, ¶ 90.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See* John Paul II, *Civil Law, Morality and the Right to Life, Address of Pope John Paul II at the Commemoration of the Fifth Anniversary of the Encyclical Evangelium Vitae (Feb. 14, 2000)*, in 45 THE POPE SPEAKS 271-73 (Sept.-Oct. 2000) [hereinafter *Civil Law*].

abortion, euthanasia, sterilization and methods of family planning opposed to life and the dignity of marriage – are inevitable and now almost a social necessity.”⁴⁸

In the face of this defeatist mentality, the Pope argues that the chapters of *Evangelium Vitae* addressing the relationship between the civil law and the moral law “deserve great attention because of the growing importance they are destined to have in the restoration of social life”:

Pastors, the faithful and people of goodwill, *especially if they are lawmakers*, are asked for a renewed and united commitment to change unjust laws that legitimize or tolerate such violence. No effort should be spared to eliminate legalized crime or at least to limit the damage caused by these laws⁴⁹

Returning to a theme he highlighted in *Evangelium Vitae* itself,⁵⁰ the Pope also recognizes that building a new culture of life requires affirmative pastoral and educational efforts, not simply legal prohibitions of activities opposed to the right to life. An authentic apostolate of life requires catechesis and conscience formation, as well as the provision of services that will enable anyone in trouble to find the necessary help.⁵¹ These activities *cannot* be separated from legal change:

The changing of laws *must be preceded and accompanied by the changing of mentalities and morals on a vast scale*, in an extensive and visible way. In this area the Church will spare no effort nor can she accept negligence or guilty silence.⁵²

Thus, the Pope makes an appeal to the whole church to become engaged in the apostolate of life: “to scientists and doctors, to teachers and families, as well as to those who work in the media, and especially to jurists and lawmakers.”⁵³

Summary of the Jurisprudential Vision of John Paul II

The Pope’s call for a recovery of the basic elements of a vision of the relationship between the civil law and the moral law is rooted in his sense that legal attacks on life flow from an ethical relativism pervading much of contemporary culture. This relativism leads to an idolization of democracy divorced from a conviction that the moral value of

⁴⁸ *Id.* at 271-72.

⁴⁹ *Id.* at 272-73 (emphasis added).

⁵⁰ See EVANGELIUM VITAE, *supra* note 4, ¶ 90:

[I]t is not enough to remove unjust laws. The underlying causes of attacks on life have to be eliminated, especially by ensuring proper support for families and motherhood. A family policy must be the basis and driving force of all social policies. For this reason there must be set in place social and political initiatives capable of guaranteeing conditions of true freedom of choice in matters of parenthood. It is also necessary to rethink labor, urban, residential and social service policies so as to harmonize working schedules with time available for the family, so that it becomes possible to take care of children and the elderly.

⁵¹ See *id.* ¶ 88.

⁵² John Paul II, *Civil Law*, *supra* note 47, at 273 (emphasis added).

⁵³ *Id.*

democracy depends on the morality of the ends it pursues and the means chosen to pursue those ends.

The objective moral law – the natural law written on every human heart – must serve as the obligatory point of reference for civil law itself. This objective moral law serves fundamentally to articulate essential values that flow from the very truth of human being and that express and safeguard the dignity of every human person. The civil law serves a limited purpose in relationship to this moral law – it ensures the common good through the recognition and defense of fundamental human rights and the promotion of ordered social existence in peace and true justice.

First among the fundamental human rights that positive civil law must recognize, respect, guarantee, and promote is the inviolable right to life of every innocent human being. The legal toleration of abortion or euthanasia is therefore an abdication of the state’s primary duty to safeguard human rights through law. Civil laws that contravene the moral order are unjust, conflict with the possibility of achieving the common good, lack the true nature of law, and have no binding force in conscience. Consequently, a civil law authorizing abortion or euthanasia ceases by that very fact to be a true, morally binding civil law.

Lawmakers have a duty in conscience to work to remove such unjust laws, or at the very least to strive to restrict such practices through less permissive laws than those currently in force. While doing whatever is reasonably attainable in pursuit of the re-establishment of a just order in defense of life, lawmakers must, at the same time, work to enact social policies that will help to eliminate the underlying causes of attacks on life.

Clearly, a number of significant and interrelated questions must be taken seriously by anyone seeking to heed the Pope’s call to recover the basic elements of a vision of the relationship between the moral law and the civil law in a religiously pluralistic society:

1. What can we reasonably expect the civil law to do in the absence of moral consensus in a pluralistic society?⁵⁴ Does law shape culture or does culture shape law?⁵⁵

⁵⁴ See McCormick, *supra* note 8, at 10-17. In the face of moral dissensus regarding the moral status of the fetus, for example, McCormick notes that “public policy will remain sharply contentious and the task of legislators correspondingly complex. Indeed a strong case can be made that the attempt to solve the . . . problem [of divergent evaluations of the status of the fetus] by legislation bypasses our duty to persuade, to change hearts and minds.” *Id.* at 13.

⁵⁵ See David Hollenbach, S.J., *The Gospel of Life and the Culture of Death: A Response to John Conley*, in CHOOSING LIFE, *supra* note 8, at 37-45. Hollenbach concludes that the law “must generally follow the cultural consensus rather than lead or form it.” He holds this view not out of skepticism or “sullen tolerance,” which he sees as deadly characteristics of our public philosophy and culture that he joins the Pope in criticizing. Instead, his conclusion flows from a “hope that the route of education and persuasion is more likely to improve the moral quality of our culture than is a premature reach for law, which remains coercive even when it intends to be educative.” Americans are likely to be suspicious of the intrusion of the coercive arm of the state into areas where they experience moral uncertainty. Such suspicion is not likely to result in conversion of the culture. *Id.* at 43-44. Cf. John Paul II, *Civil Law*, *supra* note 47, at 273 (stating that vast change in “mentalities and morals” must “precede[] and accompan[y]” legal change).

2. What sort of language can we use to articulate appropriately and effectively the demands of the moral law in a religiously pluralistic society?⁵⁶ Can we find some way to articulate the demands of the moral law in a way that can be understood across religious traditions?
3. Does the use of religious language or a theological foundation for the moral law constitute an improper attempt to smuggle theological beliefs into the civil law of a pluralistic society?⁵⁷
4. Does the use of legal coercion as a means to shape culture improperly infringe on the right to freedom of conscience? Does such a reliance on legal coercion fail to observe with sufficient care the distinction between the sphere of culture and the political/juridical sphere?⁵⁸
5. Would a more consistent adherence to Thomistic legal theory – focusing on law as a tool to educate for virtue – afford a more fruitful way approach to the law in the context of American pluralism than the rights-based approach of *Evangelium Vitae*? Would a more thoroughgoing Thomistic approach better allow us to draft laws that honor the moral claims made by the inviolability of the most vulnerable in society while also respecting the moral limitations of those who must respect those claims under difficult circumstances?⁵⁹

⁵⁶ See J. Bryan Hehir, *Get a (Culture of) Life: The Pope's Moral Vision*, 122 COMMONWEAL 8-9 (May 19, 1995). Hehir draws a contrast between John XXIII's philosophical treatment of human rights in *Pacem in Terris* (which provides much of the immediate foundation for John Paul II's discussion of the relationship between civil law and moral law) and John Paul II's use of biblical imagery and theological reflection in *Evangelium Vitae*: "Unlike John XXXIII's moral appeal to civil society . . . , John Paul calls upon all to enter into the rich symbolic discourse of the Scriptures to find direction for moral choice. There is a tension here between this vision and secular pluralistic culture which the encyclical never acknowledges." *Id.* at 13.

⁵⁷ See Leslie C. Griffin, *Evangelium Vitae: Abortion*, in CHOOSING LIFE, *supra* note 8, at 159-73. By relying primarily on a theological rationale rather than a natural law argument, Griffin reads *Evangelium Vitae* to be asking Catholic lawmakers and jurists "to inscribe their religious beliefs into the law of the United States." While the church may be entitled to impose its theological doctrine on the faithful, Griffin concludes that "theological doctrine should not be imposed on non-Catholics by the state and politicians, not even by Catholic politicians." *Id.* at 171.

⁵⁸ See Hollenbach, *supra* note 55, at 42-43 (arguing that *Evangelium Vitae* fails to address the question of the relationship between law's educative role in shaping culture and the right to freedom of conscience and fails to observe with sufficient care the distinction between the sphere of culture and the political/juridical sphere). "[T]he linkage between civil freedom and adherence to truth as a political/juridical question is quite different from the fulfillment of freedom through attainment of a full vision of the human good on the level of culture." *Id.* at 43.

⁵⁹ See Kaveny, *The Limits of Ordinary Virtue*, in CHOOSING LIFE, *supra* note 41, at 132-49. Kaveny summarizes her critique of the jurisprudence of *Evangelium Vitae* in this way: "The Pope's emphasis on rights language and exceptionless moral norms has hindered his ability to address the fundamental jurisprudential question raised in implementing the culture of life within a legal system: in drafting law, how do we honor the moral claims made by the inviolability of the most vulnerable members of the human community, even while recognizing the moral limitations of those who must respect those claims in very difficult situations?" *Id.* at 141.

II. The Moral Aspirations of the Law Are Minimal: John Courtney Murray on the Relationship of Law and Morality

Although answers to those questions are beyond the scope of my analysis in this presentation, I believe that the social theory of John Courtney Murray, S.J. may provide some assistance to legislators, jurists, and legal scholars attempting to negotiate the “complex and morally precarious balancing act”⁶⁰ involved in trying to maintain a proper relationship between the moral law and the civil law. Murray’s theory, “rooted in the ancient and medieval natural law tradition, but with a decidedly American slant,”⁶¹ calls us to keep in mind “the proper *distinction* between law and morality and between public and private morality.”⁶² The care with which Murray develops these distinctions makes his theory a promising foundation from which to explore the questions raised by the Pope’s call to recover the basic elements of a vision of the relationship between civil law and moral law in a religiously pluralistic society.

A. *The Experience of Religious Pluralism and the American Consensus*

The American experience of religious pluralism provides one of the key starting points for Murray’s theory. Murray defines pluralism as “the coexistence within the one political community of groups who hold divergent and incompatible views with regard to religious questions – those ultimate questions that concern the nature and destiny of man within a universe that stands under the reign of God.”⁶³ This sort of pluralism was “the native condition of American society,”⁶⁴ and it gave rise to a new project in social and political theory that Murray identifies as the American Proposition – the public consensus or the public philosophy of America.⁶⁵

This public consensus responds to the special difficulties that religious pluralism presents to a people desiring to achieve a real civil society. As an intellectual experience, religious pluralism can produce confusion and distrust, because, if each particular religious group speaks out of its own particularity, there is no common universe of discourse. Moreover, the different histories of the groups making up a religiously pluralistic society give rise to different styles of thought and interior life. Because pluralism is a reality that is not going to go away – “it is written into the script of history” – we need to find some way to contain the structure of conflict embedded in the confusion and distrust that can lie just beneath the surface of civic amity in a pluralistic society.⁶⁶

⁶⁰ *Id.* at 133.

⁶¹ Quinn, *Whose Virtue? Which Morality? The Limits of Law as a Teacher of Virtue*, in CHOOSING LIFE, *supra* note 8, at 152.

⁶² *Id.* (emphasis in original).

⁶³ JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 9 (1960) [hereinafter MURRAY, WE HOLD THESE TRUTHS].

⁶⁴ *Id.* at 10.

⁶⁵ *See id.* at 8.

⁶⁶ *See id.* at 27-35.

Murray contends that the path to a “more civilized structure of dialogue” can be found, and that it is to be located in the American consensus. The “consensus” is his way of talking about the “truths we hold in common”; truths rooted in “a natural law *that makes known to all of us* the structure of the moral universe in such wise that all of us are bound to it by a common obedience.”⁶⁷ This consensus facilitates the civil conversation that the fact of religious pluralism can hinder:

The consensus or public philosophy furnishes the basis of communication between the government and the people and among the people themselves. It furnishes a common universe of discourse in which public issues can be intelligently stated and intelligently argued.⁶⁸

Moreover, this consensus is political and constitutional. It embraces:

a whole constellation of principles bearing upon the origin and nature of society, the function of the state as the legal order of society, and the scope and limitations of government. “Free government” – perhaps this typically American shorthand phrase sums up the consensus. “A free people under a limited government” puts the matter more exactly. It is a phrase that would have satisfied the first Whig, St. Thomas Aquinas.⁶⁹

Leaving aside the question of whether or not St. Thomas would be comfortable sitting on the Whig side of the aisle, it is clear that Murray’s understanding of social and political theory is rooted in the Thomistic natural law tradition. He compiles, for example, a list of political principles that he contends emerge from natural law,⁷⁰ principles supported by the following set of ideas:

[T]he idea that government has a moral basis; that the universal moral law is the foundation of society; that the legal order of society – that is, the state – is subject to judgment by a law that is not statistical but inherent in the nature of man; that the eternal reason of God is the ultimate origin of all law; that this nation in all its aspects – as a society, a state, an ordered and free relationship between governors and governed – is under God.⁷¹

These are the ideas that constitute the consensus which “first fashioned the American people into a body politic and determined the structure of its fundamental law,” and, in Murray’s view, these founding principles of the American Republic coincide with “the principles that are structural to the Western Christian political tradition.”⁷²

⁶⁷ *Id.* at 51 (emphasis added).

⁶⁸ MURRAY, WE HOLD THESE TRUTHS, *supra* note 63, at 87.

⁶⁹ *Id.* at 43.

⁷⁰ *See infra* notes 76 & 77 and accompanying text.

⁷¹ MURRAY, WE HOLD THESE TRUTHS, *supra* note 63, at 53. Murray recognized that it was possible that “widespread dissent from these principles might develop”, and noted that, “[i]f that evil day should come,” the Catholic community would find itself as the guardian of the “ethical and political idiom” shared by “the Fathers of the Church and the Fathers of the American Republic.” *Id.*

⁷² *Id.* at 53-54.

B. *The Distinction Between State and Society*

The distinction Murray always maintains between state and society – a distinction that recognizes a limited role for the state within society – forms the crucial basis for his understanding of the proper relationship between law and morality. In the Introduction to *We Hold These Truths*, for example, Murray notes that a society becomes civil when it is formed by those “locked together in argument.” This argument ranges over three themes: public affairs, the affairs of the commonwealth, and the constitutional consensus. Public affairs are those matters for the advantage of the public “which call for public decision and action by government.” The commonwealth, by contrast, is a wider concept, and it concerns matters that, for the most part, fall beyond the limited scope of government:

These affairs are *not* to be settled by law, though law may in some degree be relevant to their settlement. They go *beyond the necessities of the public order* as such; they bear upon the quality of the common life.⁷³

The third theme of public argument, the constitutional consensus, is focused on the idea of law and the whole constellation of ideas that provide the foundation and structure of the legal order. Ideally,

[w]e hold in common a concept of the nature of law and its relationships to reason and will, to social fact and to political purpose. We understand the complex relationship between law and freedom. We have an idea of the relationship between the order of law and the order of morality. We also have an idea of the uses of force in support of the law. We have criteria of good law, norms of jurisprudence that judge the necessity of law and determine the limits of its usefulness. We have an idea of justice, which is at once the basis of law and its goal. We have an ideal of social equality and social unity and of the value of law for the achievement of both. We believe in the principle of consent, in terms of which the order of coercive law makes contact with the freedom of the public conscience. *We distinguish between the state and society, between the relatively narrow order of law as such and the wider order of the total public good.*⁷⁴

This distinction between state and society lies at the core of Murray’s vision of politics and law.⁷⁵ The distinction is clearly seen in the third of the four foundational political principles that Murray draws out of the natural law tradition.⁷⁶

1. The principle of the supremacy of law, and of law understood primarily in terms of reason, not will. This notion is connected to the idea of the ethical nature and function of the state, and the educative character of its laws as directive of man to “the virtuous life” and not simply protective of particular interests.

⁷³ *Id.* at 20 (emphasis added).

⁷⁴ *Id.* at 87-88 (emphasis added). *Cf. Dignitatis Humanae*, *supra* note 26, ¶ 6-7 (noting that the total common good of society is a broader concept than the sphere of public order that is the concern of law).

⁷⁵ See ROBERT W. MCELROY, *THE SEARCH FOR AN AMERICAN PUBLIC THEOLOGY: THE CONTRIBUTION OF JOHN COURTNEY MURRAY* 82 (1989).

⁷⁶ See MURRAY, *WE HOLD THESE TRUTHS*, *supra* note 63, at 315-16.

2. The principle that the source of political authority is in the community. While political society is natural and necessary for human flourishing, the precise form that the government takes in any given society is the product of reason and free choice.
3. The principle that “the authority of the ruler is limited; its scope is only political, and the whole of human life is not absorbed in the polis. The power of the ruler is limited, as it were, from above by the law of justice, from below by systems of private right, and from the sides by the public right of the Church.”⁷⁷
4. The principle of the contractual nature of the relations between ruler and ruled. Those who are ruled are not simply material to be organized by the coercive power of the ruler; they are rational human agents who agree to be ruled constitutionally, according to limits set by law.

The third political principle thus affirms that society is prior to the state and that the state is a subsection of the life of the wider society. It is this wider society, civil society as whole, which has the primary concern for the common good. Civil society is:

the “great society,” whose scope is as broad as civilization itself, of which civil society is at once the product and the vehicle. The term designates the total complex of organized human relationships on the temporal plane, which arise either by necessity of nature or by free choice of will, in view of the cooperative achievement of partial human goods by particular associations or institutions. The internal structure of civil society is based upon the principle of social pluralism, which asserts that there is a variety of distinct individual and social ends, either given in human nature or left to human freedom, which are to be achieved by cooperative association. Each of these ends is the root of a responsibility, and therefore of an original right and function. Hence there arises the principle of the subsidiary function as the first structural principle of society. But the whole society also has the function of preserving and developing itself as a whole. There is a good-of-the-whole, a common good, the social good, pluralist in structure but still somehow one.⁷⁸

Thus, for Murray the common good of society as a whole is not the concern of the government alone, but of all of society, including those mediating institutions that spring up as individuals join together to achieve distinct ends. Education, for example, is a component of the common good that is the responsibility not simply of the state alone, but of parents, churches, *and* the state.⁷⁹

⁷⁷ *Id.* at 315.

⁷⁸ John Courtney Murray, S.J., *The Problem of State Religion*, 12 THEOLOGICAL STUDIES 158 (1951), *quoted in* MCELROY, *supra* note 75, at 84.

⁷⁹ See John Courtney Murray, S.J., *Federal Aid to Church-Related Schools*, in BRIDGING THE SACRED AND THE SECULAR: SELECTED WRITINGS OF JOHN COURTNEY MURRAY, S.J. 49-50 (J. Leon Hooper, ed., 1994) [hereinafter Murray, *Federal Aid to Church-Related Schools*]. Cf. *Dignitatis Humanae*, *supra* note 27, ¶6 (stating that individual citizens, social groups, civil authorities, church and other religious communities each have a “particular duty to promote the common good.”).

Within this larger civil society, however, reason recognizes the need to have “a legitimate coercive power to serve the common good through the maintenance of public order.”⁸⁰ This is the necessary – but limited – function of the state acting through law:

The state is not the body politic, but that particular subsidiary functional organization of the body politic, whose special function regards the good of the whole. . . . [The state] is a set of institutions combined into a complex agency of social control and public service. It is a rational force employed by the body politic in the service of itself as a body. It is “the power” ordained by God, the author of nature, but deriving from the people. Its functions are not coextensive with the functions of society; they are limited by the fact that it is only one, although the highest subsidiary function of society. These limitations will vary according to the judgment, will, and capacities of the people, in whom reside primary responsibilities and original rights regarding the organization of their private, domestic, and civil (including economic) life. In accordance with the primary principle of the subsidiary function, the axiom obtains: “As much state as necessary, as much freedom as possible.”⁸¹

C. *The Jurisprudential Principle*

This axiom – “As much state as necessary, as much freedom as possible” – comes to be identified in Murray’s work as the jurisprudential principle. “[F]reedom under law is the basic rule of jurisprudence, which runs thus: ‘Let there be as much freedom, personal and social, as is possible, let there be only as much coercion and constraint, personal or social, as may be necessary for public order.’”⁸²

Murray initially sees this principle as an insight growing out of the Anglo-American political tradition.⁸³ Later, however, he contends that this principle – along with the limits that this principle places on the state’s power to act coercively through law – is rooted in human dignity itself.

Murray made explicit the connection between the jurisprudential principle and human dignity as part of an argument he developed after Vatican II in order to provide a more solid footing to the right to religious freedom affirmed in the Council’s Declaration

⁸⁰ MCELROY, *supra* note 75, at 84.

⁸¹ Murray, *The Problem of State Religion*, *supra* note 78, at 158; *see also* John Courtney Murray, S.J., *The Problem of Free Speech*, in BRIDGING THE SACRED AND THE SECULAR, *supra* note 79, at 65 (noting that the distinction between state and society reflects the distinction “between the voluntary and the coercive aspects of social existence”. “This distinction involve[s] a subordination of the state to society, and a concept of the state (meaning primarily the law, and government as the agent of law) as simply instrumental to the purposes of society, and indeed instrumental only to a severely limited number of these purposes.”).

⁸² John Courtney Murray, S.J., *The Problem of Religious Freedom*, 25 THEOLOGICAL STUDIES 521 (1964).

⁸³ *See* Murray, *Federal Aid to Church-Related Schools*, *supra* note 79, at 82 n.2. Hooper notes that this maxim was originally presented “as an outgrowth of an Anglo-American ‘great act of faith in the powers of the people to judge, direct, and correct’ the government. That is, the maxim emerged within a particular historical society.” *Id.* Murray later linked the maxim “immediately to a notion of the human person, prior to and formative of the government.” *Id.* *See also* J. LEON HOOPER, S.J., THE ETHICS OF DISCOURSE: THE SOCIAL PHILOSOPHY OF JOHN COURTNEY MURRAY 122 (1986).

on Religious Liberty, *Dignitatis Humanae*. At the outset of this argument, Murray notes that any discussion of the right to religious freedom involves an “inquiry into the foundations of the juridical relationships among human beings in civil society.”⁸⁴ This inquiry is constitutional; it deals with the duties and rights of the public power, and the nature, extent, and limits of the duties and rights of the public power.

Murray’s argument proceeds through five steps. It begins with an ontological first principle – the inherent dignity of the human person. “Every human person is endowed with a dignity that surpasses the rest of creatures because the human person is independent [in charge of himself, autonomous].”⁸⁵ Thus, the essence of human dignity is the demand that each person use and enjoy his freedom, his autonomy, by taking responsibility for himself and for his world. The human person is to be moved internally, “at the risk of his whole existence,” *not by external coercion*.⁸⁶ This is what it means to say that the human person is fashioned in the image of God.⁸⁷

A second principle, the social principle, flows from this first ontological principle. “[T]he human person is the subject, foundation, and the end of the entire social life.”⁸⁸ Murray notes that this principle establishes an “indissoluble connection between the moral and the juridical orders.”⁸⁹ This connection is:

the human person itself, really existing, in the presence of its God and Lord, in association with others in this historic world, but in such wise that it transcends by reason of its end both society and the whole world. The human person exists with others in society as a moral subject bound by duties toward the moral order and toward the historical order of salvation established by Jesus Christ. The human person exists with others in society as a moral-juridical subject furnished with rights that flow directly and altogether from human nature, never to be alienated from that nature. *The juridical order cannot be sundered from the moral order, any more than the human person can be halved.*⁹⁰

These two principles in turn give rise to the third step in the argument, the jurisprudential principle, which Murray here calls the principle of the free society.⁹¹ “This principle affirms that man in society must be accorded as much freedom as possible, and that that freedom is not to be restricted unless and insofar as necessary.” The state’s coercive power must be limited to what is necessary to preserve society’s very existence; it must be “necessary for preserving public order in its juridical, political and

⁸⁴ John Courtney Murray, S.J., *Arguments for the Human Right to Religious Freedom, in RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM* 231 (J. Leon Hooper ed., 1993) [hereinafter Murray, *Arguments for the Human Right to Religious Freedom*].

⁸⁵ *Id.* at 238.

⁸⁶ *See id.*

⁸⁷ *See id.* at 238.

⁸⁸ *Id.* Cf. Pius XII., *Nunt. radioph* 24 Dec. 1944, in *Acta Apostolica Sedis* 37 (1945) p. 12; Ioannes XXIII Litt. Enc. “*Pacem in Terris*,” in A.A.S. 55 (1963) p. 263; Dz.-S3968.

⁸⁹ *See Murray, Arguments for the Human Right to Religious Freedom, supra* note 84, at 238.

⁹⁰ *Id.*

⁹¹ *See id.*

moral aspects.”⁹² A fourth principle – the juridical principle – also flows from the first two. It holds that “all citizens enjoy juridical equality in society.”⁹³ This principle rests on the truth that all persons are peers in natural dignity and that every human being is equally the subject, foundation, and end of human society.”⁹⁴

These four principles lead to the fifth and final item in this progression: the first and principal concern of the public power for the common good is “the effective protection of the human person and its dignity.”⁹⁵ It is, therefore, the paramount duty of every public power to protect the inviolable human rights that are rooted in human dignity.⁹⁶ Murray concludes that these five principles constitute the relationship between the human person and the public juridical power. They provide us with “a kind of vision of the human person in society and of society itself, of the juridical ordering of society and the common good in its most fundamental dimensions, and finally of the duties of the public power toward persons and society.”⁹⁷ This vision is fundamentally oriented toward freedom:

The foundation of human society lies in the truth about the human person, or in its dignity, that is, in its demand for responsible freedom. That which in justice is preeminently owed to the person is freedom – as much freedom as possible – in order that society thus may be borne toward its goals, which are those of the human person itself, by the strength and energies of persons in society bound together with one another by love. Truth and justice, therefore, and love itself demand that the practice of freedom in society be kept vigorous, especially with respect to the goods belonging to the human spirit and so much more with respect to religion. Now this demand for freedom, following as it does from the objective truth of the person in society and from justice itself, naturally engenders the juridical relationship between the person and the public power. The public power is duty bound to acknowledge the truth about the person, to protect and advance the person, and to render justice toward the person.⁹⁸

Thus, the person must be given space for the exercise of responsible freedom “except where just demands of public order are proven to have the urgency of a higher force.”⁹⁹

D. The Just Demands of Public Order

How does Murray understand the precise scope of the just demands of public order? Murray characterizes public order or the public good as “that limited segment of the common good which is committed to the state to be protected and maintained by the coercive force that is available to the state – the force of law and of administrative or

⁹² *Id.* at 239.

⁹³ *Id.*

⁹⁴ Murray, *Arguments for the Human Right to Religious Freedom*, *supra* note 84, at 238.

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 241

⁹⁹ Murray, *Arguments for the Human Right to Religious Freedom*, *supra* note 84, at 241.

police action.”¹⁰⁰ As we have seen, society is understood as an area of freedom, while the state is understood as only one order within society – the order of public law and administration – the area in which “the public powers may legitimately apply their coercive powers.”¹⁰¹ On which occasions, then, may the coercive rational force of law appropriately be used to restrain the freedom of the human person?

Murray in “The Problem of Religious Freedom” identifies the public order as including three goods that can and must be achieved by the power proper to the state, “the power inherent in the coercive discipline of public law”:

The first of these is *public peace*, which is the highest political good. The second is *public morality*, as determined by *moral standards commonly accepted among the people*. The third is *justice*, which secures to people what is due them. And the first thing that is due to the people is their freedom, the due enjoyment of their personal and social rights.¹⁰²

Because freedom is the fundamental requirement of justice, the jurisprudential principle must govern the state’s use of force and fear to achieve its ends: “Let there be as much freedom, personal and social, as possible; let there be as much coercion and constraint, personal or social, as may be necessary for the public order.”¹⁰³

Murray addressed practical public issues on a limited number of occasions. His approach to two specific problems of public policy – censorship and contraception – provides us with a more precise understanding of his view of the scope of the public order, the nature and function of law, and the way in which both are tied to a proper understanding of the relationship of law and morality. Murray’s discussion of censorship, for example, shows the limits that he placed on pursuit of public morality as a component of public order.

¹⁰⁰ John Courtney Murray, S.J., *The Matter of Religious Freedom*, 112 AMERICA 40 (Jan. 9, 1965), quoted in MCELROY, *supra* note 75, at 86-87.

¹⁰¹ Murray, *The Problem of Religious Freedom*, *supra* note 82, at 520.

¹⁰² *Id.* at 521 (emphasis added). See also *Dignitatis Humanae*, *supra* note 27, ¶ 7 (defining public order using Murray’s categories) and Murray’s commentary on *Dignitatis Humanae* in THE DOCUMENTS OF VATICAN II 686 n.20 (Walter M. Abbott, S.J., ed., 1966) (“Public order . . . is constituted by these three values – juridical, political, moral. They are the basic elements in the common welfare, which is a wider concept than public order. And so necessary are these three values that the coercive force of government may be enlisted to protect and vindicate them. Together they furnish a reasonable juridical criterion for coercive restriction of freedom.”).

¹⁰³ Murray, *The Problem of Religious Freedom*, *supra* note 82, at 520. Robert McElroy describes five legitimate state objectives identified by Murray within the subsidiary common good that is the public order: (1) the Thomistic or juristic end (domestic tranquility understood as unity in political society achieved by law and stable social structures), (2) the Augustinian end (protection of the moral standards of the community; this end “gives substance to society because it supports all the procedures of law and the total edifice of tranquility that we call peace”), (3) the end of freedom (the empowerment to do what one ought and immunity from being constrained to do what one ought not to do), (4) the Christian end (government’s obligation to seek to attain a fullness of human welfare), and (5) the power end (government’s responsibility for the common defense of the nation from external enemies). See MCELROY, *supra* note 74, at 86 (citing John Courtney Murray, S.J., “Analysis for the Rockefeller Brothers’ Project,” John Courtney Murray Papers, at 28-29).

1. Censorship and the Possibility of the Law: Ground Rules for Public Policy Discourse in a Pluralistic Society

Murray devotes Chapter 7 of *We Hold These Truths* to the matter of censorship. He begins by noting that the American mind “has never been clear about the relation between morals and law. These two orders of reality are frequently confused, in either one of two ways.”¹⁰⁴

The first confusion stems from a failure to understand the difference in order between moral precepts and civil statutes. While there is truth in the medieval adage that “Whatever is right ought to be a law,” its truth does not lie in the notion that coercive statutes, backed up by state police power, should compel people to do whatever is right.¹⁰⁵ Instead, the adage means that *whatever is right ought to become a customary norm of life*; “the moral order ought to be reflected in the habitual order of everyday life and action.”¹⁰⁶ Moreover, while the reverse formulation of the medieval adage is also true, “Whatever is law (custom) ought to be right,” it does not mean that customs oblige simply because they exist. Instead, they are obligatory because of their rightness – their reflection of the moral order.¹⁰⁷ Thus, we need to be wary of those who shout, “There ought to be a law!”, without considering whether the matter of concern is the sort of good or evil “that the law can, or ought to, cope with.”¹⁰⁸

The second confusion flows from this failure to understand that *the law is not meant to deal with every sort of moral evil*. It finds expression in the notion that, “If what is moral ought by that fact to be legal, it follows that what is legal is by that fact also moral.”¹⁰⁹ This confusion reflects a sort of moral chaos that stems from “ignorance of the traditional rules of jurisprudence” – that “subtle discipline, at once a science and an art, that mediates between the imperatives of the moral order and the commands or prohibitions of the civil law.”¹¹⁰ This “subtle discipline”¹¹¹ reminds us that there is a difference between sin and crime, a distinction between private morality and public morality.

Moreover, “unless this distinction, like that between morality and law, is grasped, the result is a fiasco of all morality.”¹¹² The foolish position that all sins should be crimes devolves into the “knavish” position that those acts that are not crimes are not even

¹⁰⁴ MURRAY, *WE HOLD THESE TRUTHS*, *supra* note 63, at 154.

¹⁰⁵ *See id.* at 155.

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*

¹⁰⁸ *Id.*

¹⁰⁹ MURRAY, *WE HOLD THESE TRUTHS*, *supra* note 63, at 155.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

sins.¹¹³ “Upon [this] foolish disregard of the distinction between private and public morality there ensues a knavish denial that there is any such thing as public morality.”¹¹⁴

This distinction is rooted in the more fundamental distinctions between society and state and between the common good and public order. It is a basic principle of jurisprudence that “morals and law are differentiated in character, and not coextensive in their functions”; the civil law should not forbid everything that the moral law forbids or enjoin everything that the moral law commands.¹¹⁵ “The moral law governs the entire area of human conduct, personal and social; it extends even to motivations and interior acts.” The civil law, in contrast, “looks only to the public order of society; it touches only external acts, and regards only values that are formally social. For this reason the scope of the law is limited.”¹¹⁶ Moreover, because civil law ultimately operates through coercion, it can only have a *limited* effect on shaping internal moral character – “men can be coerced only to a minimal amount of moral action.”¹¹⁷ As a result, Murray concludes that “the moral aspirations of the law are minimal”:

Law seeks to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order. It does not look to what is morally desirable, or attempt to remove every moral taint from the atmosphere of society. It enforces only what is minimally acceptable, and in this sense socially necessary.¹¹⁸

If society wishes to elevate and maintain moral standards above this minimal level of social necessity, it must look to institutions other than the law. This contention highlights Murray’s view of the crucial role played by voluntary, mediating institutions – for example, the church, the family, the school – in working to build up the common good through efforts to raise the level of public morality.¹¹⁹ All of these institutions have a legitimate role to play with respect to issues of public morality; the field is not left to the state and the law alone. This, again, emphasizes the importance of Murray’s distinction between society and state. The state and the law have a necessary – but necessarily limited – role to play in civil society’s goal of establishing and maintaining the common good.

Thus, while law and morality are related, they are also differentiated. The premises of the law are ultimately found in the moral law – reason compels civil society to seek the common good and to recognize that the effort to secure some aspects of the common good may require the help of the state acting through the coercive force of law. Moreover, civil law invariably looks to the “moralization of society.”¹²⁰ The civil law concerns itself with public morality. But, given its mode of action, which is ultimately

¹¹³ *Id.*

¹¹⁴ MURRAY, WE HOLD THESE TRUTHS, *supra* note 63, at 156.

¹¹⁵ *Id.* at 163.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 164. *See also* MCELROY, *supra* note 75, at 88 (“Law, in Murray’s view, had to be rooted in morality. But its aims were not to generate a truly moral society; rather, [its aims] consisted of establishing a threshold of moral standards in society.”).

¹¹⁸ MURRAY, WE HOLD THESE TRUTHS, *supra* note 63, at 164.

¹¹⁹ *See id.*

¹²⁰ *Id.*

coercion, the law must not moralize excessively. If it does so, “it tends to defeat even its own modest aims, by bringing itself into contempt.”¹²¹

The law, therefore, may have to tolerate many evils that morality condemns.¹²² The civil law should *not* be made to prohibit a given moral evil *unless* that prohibition can be shown to be something *it is really possible for the law to address prudently*.¹²³ Murray here is drawing on the Thomistic notion that human law must be framed with a view to the level of virtue that it is actually possible to expect from the people who will be required to comply with the law. As Thomas explains:

[L]aws imposed on men should . . . be in keeping with their condition, for, . . . *law should be possible both according to nature, and according to the customs of the country*. Now possibility or faculty of action is due to an interior habit or disposition: since the same thing is not possible to one who has not a virtuous habit, as is possible to one who has. . . . [M]any things are permitted to children, which in an adult are punished by law or at any rate are open to blame. In like manner many things are permissible to men not perfect in virtue, which would be intolerable in a virtuous man.

Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft, and suchlike.¹²⁴

Murray suggests a series of questions that the legislator should consider in assessing the possibility of a proposed law:

1. Will the ban be obeyed, at least by the generality?
2. Is it enforceable against the disobedient?
3. Is it prudent to enforce this ban, given the possibility of harmful effects in other areas of social life?¹²⁵

¹²¹ *Id.*; see also EVANGELIUM VITAE *supra* note 4, (quoting SUMMA THEOLOGIAE, I-II, q. 96, a.2, ad. 2) (stating that legal precepts that expect too much virtue will be despised by imperfect men, who will hold law in contempt and break into greater evils). Cf. MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 134 (1991) (noting that “[t]he central problem . . . of the legal enterprise is the relation of love to power.’ If we are compassionate, and if we value community, we will be especially wary about relying on extreme coercion: The costs – extreme suffering and extreme resentment – are great and sometimes terrible.” (quoting JOHN NOONAN, PERSONS AND MASKS OF THE LAW xii (1976))).

¹²² See MURRAY, WE HOLD THESE TRUTHS, *supra* note 63, at 164 (“Therefore, the law, mindful of its nature, is required to be tolerant of many evils that morality condemns.”).

¹²³ See *id.*

¹²⁴ SUMMA THEOLOGIAE, I-II, q. 96, a.2, c. (emphasis added).

¹²⁵ Murray cautions that, given the complexity of society and the interlocking character of social freedoms, restrictions on freedom can have many social consequences that the lawmaker must consider in evaluating the prudence of a given law. Imposing a constraint on freedom in one area, in order to increase

4. Is the instrumentality of a coercive law a good means for the eradication of this or that social vice?
5. Since a means that usually fails is not a good means, what are the lessons of experience with this sort of ban? Moreover, in evaluating our experience, what is the prudent view of results – the long view or the short view?¹²⁶

If legislation is to be properly crafted, “[t]hese are the questions that jurisprudence must answer.”¹²⁷

In light of all these considerations, society should not expect very much moral improvement from the law – “the whole criminal code is only a minimal moral force.”¹²⁸ Moreover, our expectations must be particularly muted in the area of censorship and sexual morality. In a paradoxical (though understandable) fashion “the greater the social evil, the less effective against it is the instrument of coercive law.”¹²⁹ The limited effectiveness of legal coercion compelling obedience through fear of punishment as a vehicle toward real moral reform means that the law must be used with caution in a free society:

[A] human society is inhumanly ruled when it is ruled only, or mostly by fear. Good laws are obeyed by the generality because they are good laws; they merit and receive the consent of the community, *as valid legal expressions of the community’s own convictions* as to what is just or unjust, good or evil. *In the absence of this consent law either withers away or becomes tyrannical.*¹³⁰

Thus, for law to be effective as a moral guide, some level of consent as to the goodness of the law must be obtained. Moreover, Murray recognizes that this issue of popular consent supporting the coercive order of law becomes particularly acute in a religiously pluralistic society like our own.¹³¹ Religious differences lead to conflicting moral views; “certain asserted ‘rights’ clash with other ‘rights’ no less strongly asserted.” The resulting divergences are often “irreducible.”¹³²

freedom in another area, may have dangerous consequences damaging to the freedom of the community in a third area. Moreover, we cannot know with much clarity in advance what the multiple effects of a given law will be. “[U]nforeseen effects may follow, with the result that a regulation, in itself sensible, may in the end do more harm than good.” See MURRAY, WE HOLD THESE TRUTHS, *supra* note 63, at 160.

¹²⁶ *Id.*

¹²⁷ *Id.* at 164-65. The questions themselves are set out on p. 164. See also MCELROY, *supra* note 74, at 88-89 (noting that any effort to use the coercive power of law to enforce moral standards should keep in mind that “the more important forces that make for social order rise from the depths of the free human spirit – the forces of civic virtue, which give birth to a love of the common good, the forces of moral virtue, which instill a spirit of social justice and charity into all human associations, and above all the forces of religious faith” (quoting John Courtney Murray, S.J., *Leo XIII: Two Concepts of Government*, 14 THEOLOGICAL STUDIES 554-55 (1953))).

¹²⁸ MURRAY, WE HOLD THESE TRUTHS, *supra* note 63, at 165.

¹²⁹ *Id.*

¹³⁰ *Id.* (emphasis added).

¹³¹ *Id.*

¹³² *Id.*

To move past this impasse in pluralist societies, some sort of consensus must be developed in order to support the order of law to which all groups in the community are subject. Murray thus suggests a set of rules to govern the way in which different groups within pluralist society should act in trying to influence the structure of the legal order.¹³³ Murray frames these rules in the context of his case study of censorship, but, as rules designed to maintain social peace in a religiously pluralistic society, they would seem to apply to the efforts of religious groups to influence any issue of public policy.

Murray first notes that each group within the larger pluralist society is free to act as a censor for its own members.¹³⁴ No particular group, however, has the right to demand that the government impose a general censorship according to standards that are unique to one group.¹³⁵ At the same time, groups can work to elevate standards of public morality within the wider pluralist society, so long as they use “methods of persuasion and pacific argument.”¹³⁶ Finally, no group is to impose its own religious views through methods of force, coercion, or violence.¹³⁷

These rules are rooted in the “jurisprudential proposition that what is commonly imposed by law on all our citizens must be supported by general public opinion, by a *reasonable consensus* of the whole community.”¹³⁸ Thus, so long as groups use peaceful methods of reasoned argumentation – on grounds accessible to all, rather than standards unique to one group – those groups are free to try to influence public morality within civil society.

2. Contraception and the Distinction Between Public and Private Morality

Murray’s applied views on the relationship of law and morality can also be seen in his memo advising Cardinal Cushing of Boston regarding the appropriate response to legislative efforts to decriminalize the supplying of artificial contraception devices.¹³⁹ Murray makes two principal arguments, one focusing on the differentiated character of law and morality and the distinction between public and private morality, and the other rooted in the concept of religious freedom.¹⁴⁰

The first argument begins by noting that the civil law has a limited purpose: because it is the instrument of public order in society, its scope is limited issues of public morality.¹⁴¹ It is not the function of law to forbid all that is morally wrong and to compel

¹³³ MURRAY, WE HOLD THESE TRUTHS, *supra* note 63, at 165-66.

¹³⁴ *See id.* at 166.

¹³⁵ *See id.*

¹³⁶ *Id.*

¹³⁷ *See id.*

¹³⁸ MURRAY, WE HOLD THESE TRUTHS, *supra* note 63, at 166 (emphasis added).

¹³⁹ *See* John Courtney Murray, S.J., *Memo to Cardinal Cushing on Contraception Legislation*, in BRIDGING THE SACRED AND THE SECULAR, *supra* note 79, at 81-86 [hereinafter Murray, *Memo to Cardinal Cushing on Contraception Legislation*].

¹⁴⁰ *See id.*

¹⁴¹ *See id.* at 82.

all that is morally right. Matters of private morality are beyond the scope of the law and are left to private conscience. Of course, asserting the existence of a private morality begs the question of what criterion serves as the basis of the distinction between public and private morality.

Murray claims that an issue of public morality justifying a legal prohibition to safeguard the social order exists when society is threatened by a practice “that seriously undermines the foundations of society or gravely damages the moral life of the community as such.”¹⁴² Further, the law by its nature can only be concerned with fairly minimal standards of public morality.¹⁴³ While a minimum of public morality is a social necessity, people can only be coerced into the observance of minimal standards. Thus the coercive force of the law has a fairly limited scope. This is particularly true in a free society where the jurisprudential rule obtains: “As much freedom as possible; as much restriction and coercion as necessary.”¹⁴⁴

Moreover, in a democratic society, public judgment has a role to play in determining what aspects of public morality should be legally enforced. The people whose moral lives will be affected by the law have a right of judgment regarding the level of public virtue to be imposed on them by law.¹⁴⁵ Further, in the absence of “reasonable correspondence between the moral standards generally recognized by the conscience of the community and the legal statutes concerning public morality,” the laws will be unenforceable, ineffective, and resented as unduly restrictive restraints on freedom.¹⁴⁶

While the law may sometimes have a role in shaping the public conscience, Murray contends that the public educational value of the law in areas of sexual morality is quite limited.¹⁴⁷ Indeed, Murray notes that declaring public law and clarifying public conscience are two distinct problems; the public conscience may have to be clarified “in an atmosphere of reasonable and factual argument unclouded by passion or prejudice” *before* the law can be changed.¹⁴⁸

Murray then concludes that contraception is a matter of private morality. The practice is both widespread and sanctioned by many religious groups within the community.¹⁴⁹ “It is difficult to see how the state can forbid, as contrary to public morality, a practice that numerous religious leaders approve as morally right.”¹⁵⁰ Catholics may find the stance of these religious groups to be morally wrong, but “it [their stance] is decisive from the point of view of law and jurisprudence, for which the norm of ‘generally accepted standards’ is controlling.”¹⁵¹

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ Murray, *Memo to Cardinal Cushing on Contraception Legislation*, *supra* note 139, at 82.

¹⁴⁵ *See id.* at 82-3.

¹⁴⁶ *See id.* at 83.

¹⁴⁷ *See id.* at 83.

¹⁴⁸ MURRAY, WE HOLD THESE TRUTHS, *supra* note 63, at 153.

¹⁴⁹ *See* Murray, *Memo to Cardinal Cushing on Contraceptive Legislation*, *supra* note 139, at 83.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

While contraception may involve a number of public consequences (with respect to the birth rate, family morality, and “the rise of hedonism”), they do not seem susceptible to control by law.¹⁵² Moreover, efforts to impose legal control might cause other social evils, like contempt for the law and a growth in religious strife.¹⁵³ Thus decriminalization of the distribution of contraceptive devices is both permissible and advisable “on grounds of a valid and traditional theory of law and jurisprudence.”¹⁵⁴

Murray supports this conclusion with a secondary argument grounded in the concept of religious freedom. This concept creates a two-fold immunity from coercion:

First, a man may not be coercively constrained to act against his conscience. Second, a man may not be coercively restrained from acting according to his conscience, unless the action involves a civil offense – against public peace, against public morality, or against the rights of others.¹⁵⁵

Since the practice of contraception involves no such civil offense against public order, Murray concludes that restraint of the practice, which members of some religious denominations may find to be a practice dictated by their conscience, would seem to violate the principle of religious freedom.¹⁵⁶

Murray, thus, believes that legislation prohibiting the distribution of contraceptive devices is not appropriate (i.e., the civil law should not enforce the moral law with respect to this issue).¹⁵⁷ At the same time, he also believes it essential that the public know that this conclusion is rooted in principles of law, jurisprudence, and religious freedom.¹⁵⁸ Two points, accordingly, are to be made clear. First, contraception is morally wrong.¹⁵⁹ Second, a proper understanding of the difference between morality and law and between public and private morality, as well as the concept of religious freedom, should lead Catholics to “repudiate in principle a resort to the coercive instrument of the law to enforce upon the whole community moral standards that the community itself does not commonly accept.”¹⁶⁰

¹⁵² *See id.*

¹⁵³ *See id.*

¹⁵⁴ Murray, *Memo to Cardinal Cushing on Contraceptive Legislation*, *supra* note 139, at 83.

¹⁵⁵ *Id.* at 84.

¹⁵⁶ *See id.*

¹⁵⁷ *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ Murray later comes to question this judgment, without discussing it in great detail. *See* John Courtney Murray, S.J., *Toledo Talk*, in *BRIDGING THE SACRED AND THE SECULAR*, *supra* note 79, at 334, 336-37. Regardless of Murray’s ultimate conclusions regarding the morality of contraception, it is important to acknowledge that one can take a moral position against a practice without at the same time insisting that it be prohibited by the civil law.

¹⁶⁰ Murray, *Memo to Cardinal Cushing on Contraceptive Legislation*, *supra* note 139, at 85-86.

E. Murray's Contribution

Murray's social theory provides us with a well-developed articulation of the jurisprudential tradition, rooted in the Thomistic understanding of natural law, that John Paul II calls us to recover in *Evangelium Vitae*. Moreover, Murray's vision of the differentiated relationship between law and morality can be helpful in our efforts to formulate public policy responses to important moral issues in our pluralistic society. But can Murray's vision be squared with the Pope's understanding of the "necessary conformity" of the moral law and the civil law?

Both the Pope and Murray clearly agree on the dangers flowing from disconnecting law and morality.¹⁶¹ Indeed, they both express a fear of the idolization of democracy.¹⁶² In language strikingly similar to that used by John Paul II in *Evangelium Vitae*,¹⁶³ Murray warned that the idea of democracy was being corrupted. Instead of seeing democracy as the servant of humanity, it was now becoming an "idol. And we know that it is the fate of those who worship idols that they should be enslaved to what they worship. Democracy, once a political and social idea, now pretends to be a religion."¹⁶⁴ For Murray, democratic procedures must be seen as the means to – not the measure of – justice in law.¹⁶⁵ When the justice of law is measured simply by its conformity to the will of the majority, rather than conformity with natural or divine law, we have left behind true democracy and fallen into "totalitarian democracy."¹⁶⁶

Moreover, both Murray and John Paul II root their visions of the relationship between law and morality in the natural law tradition and frame their jurisprudential arguments in terms of reason and human dignity, using non-sectarian language that is accessible to all.¹⁶⁷ The theories of Murray and the Pope also recognize the crucial distinction between state and society, and both call for intermediate institutions to play an important role in raising the public moral standards of society.¹⁶⁸

¹⁶¹ See generally *EVANGELIUM VITAE*, *supra* note 4, ¶ 70; see also Murray, *Memo to Cardinal Cushing on Contraceptive Legislation*, *supra* note 139.

¹⁶² See generally *EVANGELIUM VITAE*, *supra* note 4, ¶ 70; see also MURRAY, *WE HOLD THESE TRUTHS*, *supra* note 63.

¹⁶³ See *EVANGELIUM VITAE*, *supra* note 4, ¶ 70 ("Democracy cannot be idolized to the point of making it a substitute for morality or a panacea for immorality. Fundamentally, democracy is a 'system' and as such is a means and not an end.").

¹⁶⁴ John Courtney Murray, S.J., *The School and Christian Freedom*, 48 *PROCEEDINGS OF THE NATIONAL CATHOLIC EDUCATIONAL ASSOCIATION* 63 (1951), *quoted in* MCELROY, *supra* note 74, at 105.

¹⁶⁵ See *id.*

¹⁶⁶ *Id.* at 107.

¹⁶⁷ See *id.*; see also *EVANGELIUM VITAE*, *supra* note 4, ¶ 90.

¹⁶⁸ See *EVANGELIUM VITAE*, *supra* note 4, ¶ 90:

If charity is to be realistic and effective, it demands that the Gospel of life be implemented also by means of certain forms of social activity and commitment in the political field as a way of defending and promoting the value of life in our ever more complex and pluralistic society. Individuals, families, groups and associations, all have a responsibility for shaping society and developing cultural, economic, political and legislative projects which, with respect for all and in keeping with democratic principles, will contribute to the building of a society in which the dignity of each person is recognized and protected and the lives of all are defended and enhanced.

Murray, however, seems to take a much more realistic view of what law can achieve with respect to improving morality and what sorts of policies can actually be enacted into law in a religiously pluralistic society.¹⁶⁹ The Pope does recognize that the state may sometimes choose *not* to use legal means to stop a practice if its legal prohibition would cause more serious harm.¹⁷⁰ Murray, however, has developed this Thomistic insight, in conjunction with his strong emphasis on the limited role of the state with respect to the common good, into a fairly sophisticated theory of the relationship of law and morality and the minimal aspirations we can have for the law with respect to morality.¹⁷¹

The jurisprudential principle (as much personal and social freedom as possible, only as much coercion as necessary to protect public order) and the recognition of pragmatic and prudential limitations on what the law can accomplish constitute the heart of Murray's framework for understanding the relationship between civil law and morality.¹⁷² There are tensions inherent in this framework. These tensions are rooted both in the desire to protect the freedom rooted in human dignity from any more coercion than is absolutely necessary and in the practicalities of what is *possible* through the law. Murray, therefore, sees the law as a tool of limited value when seeking to improve the moral standards of society. While finding much of the Pope's legal theory congenial, I suspect that Murray would be suspicious of the Pope's rhetorical insistence on the "necessary conformity" of the civil law and the moral law.

Murray would undoubtedly agree that the moral law always serves as a standard against which to critique the civil law. At the same time, Murray would recognize that in practice, especially in a pluralistic society, prudence might require the civil law to stop short of the moral law in some instances. While the civil law and the moral law always stand in a necessary relationship to one another, Murray's articulation of the church's tradition of jurisprudence would acknowledge that reason may sometimes dictate a degree of nonconformity between the two:

The goodness of human law is judged by a moral and theological norm; it is also to be judged by a juristic norm, the exigencies of the common good in determinate circumstances. Both norms together govern the application of principles in given situations of fact. . . . [T]he jurist is conscious of the limitations of his instrument. . . . Both the science and art of jurisprudence and also the statesman's craft rest on the differential character of law and morals, of legal experience and religious or moral experience, of political unity and religious unity. The jurist's work proceeds from the

¹⁶⁹ See Murray, *The School and Christian Freedom*, *supra* note 163.

¹⁷⁰ See EVANGELIUM VITAE, *supra* note 4, ¶ 71.

¹⁷¹ See *id.*

¹⁷² See Charles E. Curran, *Civil Law and Christian Morality: Abortion and the Churches*, in ABORTION: THE MORAL ISSUES 159 (E. Batchelor, ed., 1982) (Curran notes that "many Roman Catholics do not realize that the two fundamental changes concerning the dignity of conscience and the limited nature of constitutional government [reflected in *Dignitatis Humanae*] must affect and change the understanding of the nature and function of civil law."). *Id.* at 157. "[D]espite these developments, official Roman Catholic statements unfortunately continue to adopt the older understanding of the relationship between civil law and morality." (*citing* the 1974 Declaration on Procured Abortion as an example). *Id.* at 161.

axiom that the principles of religion or morality cannot be transgressed, but neither can they be immediately translated into civilized human law. There is an intermediate step, the inspection of circumstances and the consideration of . . . the public advantage to be found, or not found, in transforming a moral or religious principle into a compulsory rule for general enforcement upon society.¹⁷³

A proper understanding of the principles of law and jurisprudence – principles rooted in the tradition that the Pope urges us to recover – may require us at times “to repudiate in principle a resort to the coercive instrument of the law to enforce upon the whole community moral standards that the community itself does not commonly accept.”¹⁷⁴

III. A Constructive Proposal for Contemporary American Pluralism

Drawing on important themes in Murray’s work, I suggest that the following six axioms¹⁷⁵ might inform our vision of the proper relationship between religious values, the objective moral order, and civil law and public discourse in the context of contemporary American pluralism:

1. The distinctions between state and society and public and private morality must be respected.

The essential foundation for understanding the relationship between the moral law and the civil law is Murray’s distinction between state and society. Part of the moral law to which the civil law should conform is a moral limitation on the competence of the state and the civil law. Because society is distinct from the state, the state and the law that it enforces have a limited purpose with respect to promoting the common good of society.

Evangelium Vitae itself recognizes that the civil law has a limited competence – its goals extend only to ensuring the common good of the people through protection of fundamental rights and the promotion of peace and public morality.¹⁷⁶ Murray’s

¹⁷³ John Courtney Murray, S.J., *Leo XIII and Pius XII: Government and the Order of Religion*, in RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM 59-60 (Leon Hooper, S.J., ed., 1993).

¹⁷⁴ Murray, *Memo to Cardinal Cushing and Contraceptive Legislation*, *supra* note 139, at 85-86.

¹⁷⁵ By characterizing these six principles as “axioms,” I hope to suggest that they might serve a mediating role in helping us to move between the general doctrine of the necessary conformity of the civil law to the moral law and more specific conclusions regarding particular critiques of the civil law offered by the church. They are, in this sense, “middle axioms” – “moral principles of the type which address the ‘middle ground between general statements and detailed policies.’” THOMAS MASSARO, S.J., CHRISTIAN SOCIAL TEACHING AND UNITED STATES WELFARE REFORM 38 (1998) (*quoting* RONALD PRESTON, EXPLORATIONS IN THEOLOGY 9 (1981), *reprinted in* CHRISTIAN SOCIAL ETHICS: A READER 146 (John Atherton, ed., 1994)). Massaro explains that, “[b]ecause middle axioms are provisional formulations of Christian social principles, and need not invoke distinctively Christian theological beliefs in staking out ethical positions on worldly matters, they may serve as loci of overlapping agreement, holding potential to build bridges among social observers of diverse backgrounds.” *Id.* “Middle axioms are ethical principles which consist of specifications of more general statements of values . . . but which avoid recommending technical policy actions . . .” *Id.* at 209.

¹⁷⁶ See EVANGELIUM VITAE, *supra* note 4, ¶ 71 and *Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons*, *supra* note 3, ¶ 6 n.11.

contribution to this understanding of the civil law is implicit in the encyclical's citation of *Dignitatis Humanae*'s discussion of the scope of the notion of public order in support of its recognition of the limited competence of the civil law.¹⁷⁷

Murray himself suggested that *Dignitatis Humanae*'s distinction between state and society – between the political/juridical realm of the state where the law's coercion can appropriately be used to safeguard public order and the wider social realm where freedom should be respected – may be the “most significant” contribution of the document. “It is a statement of the basic principle of the ‘free society.’”¹⁷⁸ The foundational distinction between state and society, therefore, means that the doctrine of the necessary *conformity* of the moral law and civil law has at its heart a necessary *distinction* between the moral law and the civil law. The moral law includes all of morality, extending to issues both public and private. Yet the competence of the state and the civil law extends only to those issues of public morality that are part of the public order that it is the state's role to protect on behalf of the common good of all of society.

Murray's jurisprudential principle articulates this limitation on the competence of the civil law with more force and clarity than *Evangelium Vitae* brings to bear on this point. Because human freedom is an essential component of human dignity, legal coercion must be limited to those matters essential to the protection of public order: as much personal and social freedom as possible, only as much coercion as necessary to protect public order. Thus, it is not within the competence of the state to use the coercive instrument of the criminal law to deal with matters of private morality. Doctrinal language insisting on the *necessary conformity* between the moral law and the civil law tends to obscure this fundamental *limitation* on the legitimate scope of civil law.

2. The moral concerns that govern good lawmaking may sometimes demand that the civil law not be used to restrain every offense against public morality.

Even in the sphere of public morality, there may be important moral reasons for the civil law to refrain from enforcing some dimensions of the moral law. Again, *Evangelium Vitae* does acknowledge that the state may sometimes be forced to choose not to use the law to stop an offense against public morality if its prohibition would cause more serious harm.¹⁷⁹ Murray, however, offers a much more fully developed understanding of the prudential limits of the law as a coercive instrument, and he, consequently, holds fairly minimal moral aspirations for the law.

There is in fact a wide range of moral reasons the lawmaker might have for choosing *not* to act to constrain practices that may seem to violate objective standards of public morality. The work of both Cathleen Kaveny and Michael Perry, for example, suggests that coercive legislation may be inappropriate on a number of grounds: (1)

¹⁷⁷ See EVANGELIUM VITAE, *supra* note 4, ¶ 71 & n.93 (citing *Dignitatis Humanae* ¶ 7); Noonan, *supra* note 27 (discussing Murray's contribution to *Dignitatis Humanae*).

¹⁷⁸ See Murray's commentary on *Dignitatis Humanae* in THE DOCUMENTS OF VATICAN II, *supra* note 102, at 687 n.21.

¹⁷⁹ See EVANGELIUM VITAE, *supra* note 4, ¶ 71.

respect for those whose views may be justified – even if tragically wrong – by the state of ordinary virtue in the wider society; (2) recognition of the practical and moral limitations on the law’s ability to serve the common good; (3) acknowledgement of human moral fallibility; (4) openness to a range of ways of living that lead to human flourishing; (5) tolerance; (6) compassion; (7) fellowship within the community; (8) desire to minimize suffering and resentment; and (9) a desire not to subvert individual conscientiousness.¹⁸⁰

Thus, “[c]ommitment to ethical objectivity [should not] be confused with what is a very different matter, commitment to ethical or moral authoritarianism.”¹⁸¹ Indeed, if human dignity and the formation of virtue demand that actions proceed from free choices in accord with moral norms, legal coercion may tend both to lessen respect for human dignity and to retard the formation of virtue.¹⁸²

3. Any evaluation of the degree to which the civil law conforms to the moral law should consider the legal framework in its entirety. It is not sufficient simply to try to enact criminal prohibitions of offenses against public morality.

Murray, Kaveny, and Perry all identify powerful reasons that may counsel against legal prohibitions of an activity that violates the moral law in a society where the moral norms regarding that activity are contested. Moreover, the attention paid in Kaveny’s work to the Thomistic understanding of the law as a teacher of virtue provides something

¹⁸⁰ See M. Cathleen Kaveny, *Toward a Thomistic Perspective on Abortion and Law in Contemporary America*, 55 THE THOMIST 343, 377 (1991) [hereinafter *Toward a Thomistic Perspective*] (discussing the practical and moral limitations on criminal law’s ability to serve the common good). “We need to consider seriously the possibility that persons completely immured in or victimized by the individualistic, materialistic values of contemporary America might be justified although terribly wrong in their attitudes toward abortion.” *Id.* at 388. Given that criminal law must be framed for the average person – not the saint – elements of mercy, pardon, and excuse may counsel against invoking criminal sanctions for abortion. *Id.* at 379; see MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 132-35 (1991); see also Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Is Not Illegitimate in a Liberal Democracy*, 36 WAKE FOREST L. REV. 217, 223 (2001) (“One who believes that particular conduct is immoral may have good reasons not to want the law to ban the conduct.”); see also Kaveny, *The Limits of Ordinary Virtue*, in CHOOSING LIFE, *supra* note 41, at 144 (“Forging a pro-life jurisprudence for the United States requires that we take a sober, clear-eyed account of the level of virtue our society currently possesses, not only of the virtue we earnestly hope that it will one day manifest. Societal habits, no less than individual habits, can be developed and strengthened only step-by-step. We cannot erase the damage done over many years with one vote of the legislature.”).

¹⁸¹ MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 90 (1988) (quoting HILARY PUTNAM, REASON, TRUTH AND HISTORY 148 (1981)).

¹⁸² *Id.* at 134-35 (“A moral community that values individual conscientiousness or personal integrity – that believes that ultimately, after careful, informed deliberation, a person should choose on the basis of conscience – will be wary, therefore, about pursuing a political strategy of extreme coercion.”); see also Kaveny, *The Limits of Ordinary Virtue*, *supra* note 41, at 142 (stating that, because acts done solely under threat of coercion cannot count as virtuous, law, if it is to lead people to virtue, must engage in a two-step process: “1) it must accustom the less-than-virtuous to refrain from the physical, external acts prohibited by virtue and to perform the physical, external acts required by virtue; 2) at the same time and no less essentially, it must illuminate for its subjects the reasons why its strictures support the flourishing of all persons in community and thus stand in accordance with the dictates of practical reason. Only in this manner will the less-than-perfect subjects of a given legal framework have the tools they need to begin the long journey to virtue.”).

of a corrective to Murray's rather pessimistic conclusion regarding the moral aspirations of the law. While restraint and coercion have a limited role in education to virtue, law is more than a police officer working through restraint and coercion. Positive law always includes a pedagogical component, and the law as a whole must be considered when we are evaluating the degree to which the civil law conforms to the moral law.¹⁸³

For example, even while constitutional law severely restrains abortion restrictions, and even though criminal prohibitions of abortion might be morally inappropriate given the contemporary state of ordinary virtue in our society, other areas of the law can and must contribute to nurturing the virtues necessary to support a culture of life. While the moral aspirations of the criminal law may be minimal, *the legal system as a whole reflects a set of moral judgments*. Rather than simply looking to see whether or not offenses against public morality are prohibited by criminal law, the desire to ensure that the civil law not be divorced from the moral order demands that we pursue a further line of inquiry. What sort of society are we becoming through the entire range of legal policies we advocate and enact? Who are we becoming as a society when we regularly invoke the death penalty? What sort of a society do we become if we over-zealously restrict civil liberties in response to terrorism, or if our immigration law and border control policies undervalue the dignity of the lives of immigrants? Are we working to build a legal system as a whole that supports and promotes the virtues necessary to protect human dignity and sustain a culture of life? Such questions help us to see that the law as a whole can “function as a moral teacher, serving to inculcate and reinforce fundamental beliefs of the society which it orders.”¹⁸⁴

4. The church as a mediating institution has a crucial role to play in bringing moral and religious critique of law and public policy into public conversation. The primary context for this role is the realm of society and culture.

The fact that the civil law at a given point in time fails to embody the moral law in every respect does not mean that a commitment to the necessary conformity of the civil law and the moral law has been abandoned. The heart of that doctrine may lie in a conviction:

¹⁸³ See Kaveny, *The Limits of Ordinary Virtue*, *supra* note 41, at 144 (“[P]ositive law always includes a pedagogical component”; for example the Americans with Disabilities Act, the Civil Rights Act of 1964, the Family and Medical Leave Act all “intend not only to prohibit and require specific actions but to inculcate a moral vision of how we should live our common life together”). “The legal tools likely to provide the most help in reshaping [our] social structure are not the blunt-edged tools of the criminal code but the more subtle and flexible instruments of administrative and regulatory law.” *Id.* at 148; *see also* M. Cathleen Kaveny, *Law, Morality, and Common Ground*, 183 AMERICA 10 (Dec. 9, 2000) (“[C]riminal law is just a small sliver of the legal framework necessary to promote the common good. All the various components of that framework are infused with a normative vision.”).

¹⁸⁴ Kaveny, *Toward a Thomistic Perspective*, *supra* note 180, at 396; *see also* M. Cathleen Kaveny, *Assisted Suicide, the Supreme Court, and the Constitutive Function of the Law*, 27 HASTINGS CENTER REPORT 27, 29-30 (1997) (“[T]he ‘habit of regarding law as the instrument by which ‘we’ effectuate ‘our policies’ and get what ‘we’ want is wholly inadequate. It is the true nature of law to constitute a ‘we’ and to establish a conversation by which ‘we’ can determine what our ‘wants’ are and should be.”) (*quoting* J.B. WHITE, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 42 (1985)).

[T]he conviction that civil law and social policy must always be subject to ongoing moral analysis. Simply because a civil law is in place does not mean that it should be blindly supported. To encourage reflective, informed assessment of civil law and policy is to keep alive the capacity for moral criticism in society.¹⁸⁵

As a mediating institution within society, the church has a crucial role to play in keeping this capacity for moral criticism alive in society.

Building upon the work of Murray, J. Bryan Hehir and David Hollenbach, S.J. have articulated an understanding of the role of the church that is activist, but indirect, as it strives to function as a moral critic within society seeking to influence public policy through the formation of public opinion.¹⁸⁶ The legitimacy of such a role for the church and similar mediating institutions is recognized even by John Rawls in his discussion of religious discourse in the “background culture.”¹⁸⁷ Moreover, religious and moral critique of civil law and social policy within the institutions of society and culture helps to ensure that the law and democracy do not become idols to which we unthinkingly submit.¹⁸⁸

5. Moral and religious dialogue is a crucial component of any effort to maintain the connection between the moral order and the civil law.

Murray’s work reflects a deep concern that genuine dialogue and conversation be at the heart of common life in a pluralistic society.¹⁸⁹ Moral precepts should not in any

¹⁸⁵ Joseph Cardinal Bernardin, *Role of the Religious Leader in the Development of Public Policy, in A Moral Vision for America*, *supra* note 10, at 32.

¹⁸⁶ See J. Bryan Hehir, *Responsibilities and Temptations of Power: A Catholic View*, 8 J.L. & REL. 71, 73-78 (1988); see also J. Bryan Hehir, *Church-State and Church-World: The Ecclesiological Implications*, 41 PROCEEDINGS OF THE CATHOLIC THEOLOGICAL SOCIETY OF AMERICA 54, 58-65; see also David Hollenbach, S.J., *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877, 878 (1993) [hereinafter *Contexts of the Political Role of Religion*] (“Religious faiths and traditions have perhaps their most important influence on government, law, and policy-formation in an indirect way. The impact on politics understood as the sphere of government activity is mediated through its influence on the multiple communities and institutions of civil society and on the public self-understanding of a society called culture.”). Much of Hollenbach’s argument about the public role of religion in civil society is directed against the failure of liberal political philosophy to understand the state/society distinction. This distinction gives rise to a crucial public realm outside of the political sphere of the state. See *id.* at 882-88; see David Hollenbach, S.J., *Civil Society: Beyond the Public-Private Dichotomy*, 5 THE RESPONSIVE COMMUNITY 15 (Winter 1994-95) [hereinafter *Civil Society*]; see also John Rawls, *The Idea of Public Reason Revisited*, in THE LAW OF PEOPLES 134 n.15 (1999) John Rawls conceded that his “wide view of public reason,” with its recognition of the need for full and open discussion in the “background culture,” is political liberalism’s response to this critique. See *id.* (quoting Hollenbach, *Civil Society*).

¹⁸⁷ See Rawls, *supra* note 185, at 134 n.15.

¹⁸⁸ See *infra* notes 193-95 and accompanying text (discussing the danger of law becoming an idol).

¹⁸⁹ See, e.g., John Courtney Murray, S.J., *The Issue of Church and State at Vatican Council II*, 27 THEOLOGICAL STUDIES 580, 592 (1966) (“[R]eciprocity in the ecumenical dialogue is a matter of love and respect, not only for the other as a person, but also for the truth possessed by each, to be understood by both. An analogy is visible here. The civil community in its most profound meaning and manner of action is itself a form of dialogue. The dialogue does not disguise, but brings to light, differences of view. But in

crass way be imposed through the coercive power of the civil law simply because the political power exists to do so.¹⁹⁰ As Cathleen Kaveny has explained, such an approach would undermine an important aspect of the law’s pedagogical function. A disjunction between law and morality would continue to exist if the public discourse leading to the enactment of the law failed to help people understand *why* adopting the world-view underlying the law promotes the common good and leads to human flourishing.¹⁹¹

Thus, if law is to teach virtue – that is, if law is to do more than simply demand right conduct through coercion – the manner in which public discourse about the law is conducted is crucial. A proposed law’s moral rationale must be communicated in a way that people can accept and understand, and one’s dialogue partners must be treated with respect. Those striving to create greater conformity between the civil law and the moral law should, as the work of David Hollenbach suggests, engage different worldviews not from a position of unmovable dogmatic certitude, but in a spirit of intellectual solidarity that involves mutual listening and speaking. Such a strategy of positive engagement might encourage the development of a sense of community in the midst of pluralism:

[C]ommunities holding different visions of the good life can get somewhere if they are willing to risk conversation and argument about these visions. Injecting such hope back into the public life of the United States would be a signal achievement. Today, it seems not only desirable but necessary.

When the Church contributes its insights to public discourse “through a dialogue of mutual listening and speaking with others,” its contribution is “fully congruent with the life of a free society.”¹⁹²

As Michael Perry has explained, respect for the dignity of the other does not inevitably demand that we refrain from acting through the law if those to be restrained cannot be convinced that the law would promote their flourishing. Respect does, however, demand that we give those who disagree our best reasons for proposing a certain course of action *and* that we try to discern and communicate to others the reasons

order that it be a proper dialogue, it is essential that each should treat with the other on a footing of equality.”).

¹⁹⁰ See Kaveny, *Law, Morality, and Common Ground*, *supra* note 182, at 9 (“If lawmakers respect the fact that law is a teacher of virtue, they will not simply cram legislation down the throats of unwilling citizens, but will take pains to communicate its rationale in a way that the public can understand and accept.”)

¹⁹¹ Cf. Kaveny, *Toward a Thomistic Perspective*, *supra* note 180, at 381, 389 (“[I]t is a great disappointment that the pro-life movement has not yet supplied the imaginative vision which would alter the epistemic context that now renders a lenient attitude toward abortion all too plausible”). *Id.* at 389 (noting that the “consistent ethic of life” approach is the most promising move made toward this goal of a new imaginative vision by Roman Catholic ecclesiastical authorities). *See id.* at n.49.

¹⁹² Hollenbach, *Contexts of the Political*, *supra* note 186, at 891, 892, 895-96; *see also* Hollenbach, *Civil Society*, *supra* note 186, at 22 (“Many religious communities recognize that their traditions are dynamic and that their understandings of God are not identical with the reality of God. Such communities have in the past and can in the future engage in the religious equivalent of intellectual solidarity, often called ecumenical or interreligious dialogue.”). Vatican II’s Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes*, highlighted the dialogic character of the relationship that ought to exist between the church and the world. *See infra*, note 195 (quoting GAUDIUM ET SPES).

they might have for supporting a proposed law or policy. So long as our reasons offered in explanation do not themselves assert, imply, or assume the inferior humanity of those to whom the explanation is offered, there is no denial of respect.¹⁹³

Moreover, to prevent democracy and the law from becoming an idol, we might understand the law (both the moral law and the civil law), not simply as command or code, but as an invitation to dialogue. The law is not something beyond criticism that the state imposes, but rather is a practice that grows out of conversation with others. The conversation that the community conducts about its true identity (whether that community be the state or the church) undermines law's tendency to become an idol.

Thomas Shaffer, for example, argues that democratic idolatry (which is one of the primary targets of the Pope's jurisprudential critique in *Evangelium Vitae*) can in part be countered by understanding law not as command but as dialogue: "Although man made the (democratic) state, God makes the man. . . . God, who makes each person and gives him inalienable personal rights and a political authority he can exercise collectively, gives him as well a legal capacity that he exercises in conversation with others. Law is the conversation."¹⁹⁴ Law as conversation becomes a helpful corrective for the idolatry of statism, because "in conversation we are better able to remember that both the Cross and Buchenwald are symbols of what men can do to one another in the name of the law."¹⁹⁵

Shaffer also argues that the idea of law as conversation can be a helpful corrective to a form of idolatry within the tradition of natural law:

When natural law measures positive law, natural law is likely to take the form of positive law. How else are the two to be compared? This way of thinking leads toward codifications of natural law – statements of it in hornbook form. And, of course, hornbooks have authors; they have institutional authorities who promulgate and enforce them. And the institutional authority that stands behind these codifications of natural law can become a god. There are examples of this in Anglo-American common law of the Blackstone variety and in Roman Catholic moral theology.¹⁹⁶

This sort of idolatry may well be a risk to be aware of when considering how we are to understand any doctrine calling for necessary conformity between the moral law and the civil law. Are we imagining the moral law as a code that can be imposed on society without engaging in the dialogue that helps keep the law from turning into an idol?

¹⁹³ See Perry, *Why Political Reliance on Religiously Grounded Morality Is Not Illegitimate in a Liberal Democracy*, *supra* note 180, at 244-45; see also M. Cathleen Kaveny, *Religious Claims and the Dynamics of Argument*, 36 WAKE L. REV. 423, 431-34 (2001) (discussing mutual respect as a crucial norm for discourse in our pluralistic society).

¹⁹⁴ Thomas L. Shaffer, *Jurisprudence in the Light of the Hebraic Faith*, 1 J.L. ETH. & PUB. POL'Y 77, 87 (1984).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 88.

6. *Evangelium Vitae's* call for a necessary conformity of the civil law to the moral law can play a constructive role in public policy discourse so long as the claims of the moral law are presented in a way that is publicly accessible and intelligible.

Evangelium Vitae's insistence that the civil law reflect the demands of the moral law need not be rejected in liberal society as the inappropriate imposition of sectarian viewpoints or the use of a privatized religious language. Instead, it can be understood as a call to bring religious moral insights and arguments into public dialogue where those insights and arguments can be probed and questioned.¹⁹⁷ The religious voice must enter this dialogue as one that desires to learn as well as teach. Thus, as Cardinal Bernadin explained:

The substance of the consistent ethic [of life] yields a *style* of teaching it and witnessing to it. The style should be prophetic, but not sectarian. . . . [W]e should resist the sectarian tendency to retreat into a closed circle, convinced of our truth and the impossibility of sharing it with others. To be both prophetic and public, a countersign to much of the culture, but also a light and leaven for all of it, is the delicate balance to which we are called. The style should be persuasive, not preachy. We should use the model of *Gaudium et spes*, the Second Vatican Council's Pastoral Constitution on the Church in the Modern World: We should be convinced that we have much to learn from the world and much to teach it. We should be confident but collegial with others who seek similar goals but may differ on means and methods. A confident Church will speak its mind, seek as a community to live its convictions, but leave space for others to speak to us, help us to grow from their perspective, and to collaborate with them.¹⁹⁸

Cardinal Bernadin reminds us that *Gaudium et Spes* acknowledged the importance of dialogue between the church and the world, a dialogue in which the church is open to help from the world.¹⁹⁹ This dialogue, moreover, should aspire to an ideal of public

¹⁹⁷ See Perry, *Why Political Reliance Is Not Illegitimate*, *supra* note 179, at 230-31; see also Michael J. Perry, *Liberal Democracy and Religious Morality*, 48 DEPAUL L. REV. 1, 31 (1998) (“[A]ny religious community that would play a meaningful role in the politics of a religiously pluralistic democracy like the United States must honor the ideal of self-critical rationality.”)

¹⁹⁸ Joseph Cardinal Bernadin, *The Consistent Ethic of Life After Webster*, in A MORAL VISION FOR AMERICA, *supra* note 10, at 92. See also Michael J. Perry, UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY 69 (2003) [hereinafter UNDER GOD?] (*quoting* Cardinal Bernadin).

¹⁹⁹ See The Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes*, in VATICAN COUNCIL II: THE CONCILIAR AND POST-CONCILIAR DOCUMENTS, *supra* note 27, at 903-1001. In paragraph 40, for example, *Gaudium et Spes* explains that the dignity of the human person, the nature of the community of humankind, and the deep significance of human activity all “provide[] a basis for discussing the relationship between the Church and the world and the dialogue between them.” Given that the church “is convinced that there is a considerable and varied help that it can receive from the world in preparing the ground for the Gospel,” the Council “outline[d] some general principles for the proper fostering of mutual exchange” between the church and the world. Those principles include the insistence that, in this exchange, the church is called to listen, as well as speak: “Nowadays when things change so rapidly and thought patterns differ so widely, the Church needs to step up this exchange [between the Church and the different cultures of the world] by calling upon the help of people who are living in the world, who are expert in its organizations and its forms of training, and who understand its mentality, in the case of believers and nonbelievers alike. With the help of the Holy Spirit, it is the task of the whole people of God, particularly of its pastors and theologians, to listen to and distinguish the many voices of our times and to

accessibility and civil intelligibility. Michael Perry, for example, urges caution in the use of biblically grounded moral claims when no persuasive argument rooted in human experience supports the claim. Indeed, contemporary experience, evaluated in the light of the gospel, can serve as a helpmate in deciding what the Bible really teaches about the requirements of human well-being.²⁰⁰ Similarly, J. Bryan Hehir contends that, for civic intelligibility, religiously based values and arguments must, at some point, be rendered persuasive to the wider civil public.²⁰¹

For Perry and Hehir, commitment to this ideal of public accessibility and civil intelligibility has important theological foundations. Hehir characterizes this foundation as the complementarity of nature and grace.²⁰² Perry holds that moral-theological arguments grounded in human experience flow from a theological vision of God as Creator and of human nature as the good handiwork of that Creator.²⁰³ These theological foundations allow religious-moral claims about the requirements of human flourishing to be articulated in language intelligible beyond the bounds of the Christian community. There is no need for believers simply to assert that they possess, and are entitled to enforce, a moral truth that others may be unable to see. This insight must be part of any attempt to understand the doctrine of the necessary conformity of the moral law and the civil law in a pluralistic society.

The willingness to subject the civil law and public policy to moral critique within ecumenical political dialogue²⁰⁴ must constitute the heart of the doctrine of the necessary conformity of the moral law and the civil law in a pluralistic society. That doctrine can

interpret them in the light of the divine Word, in order that the revealed truth may be deeply penetrated, better understood, and more suitably presented.” *Id.* at ¶ 44.

²⁰⁰ See PERRY, UNDER GOD?, *supra* note 198, at 64-74.

²⁰¹ See Hehir, *Responsibilities and Temptations of Power: A Catholic View*, *supra* note 186, at 82-83 (stating that participation in public argument should be characterized by a set of virtues – technical competency, civil intelligibility, and public courtesy – and should avoid a set of corresponding vices – simplistic analysis, sectarian arguments, and misrepresentation of one’s contending partners); *cf.* Kaveny, *Religious Claims and the Dynamics of Argument*, *supra* note 193, at 430 (noting that participants in public policy dialogue should conform to three norms: 1) public accessibility, 2) mutual respect among citizens who differ about matters of public import, and 3) moral integrity in the way in which we hold and advance our own positions on such matters).

²⁰² See Hehir, *Responsibilities and Temptations of Power: A Catholic View*, *supra* note 186, at 77-78 (noting that the Catholic conception of the complementarity of nature and grace provides the theological foundation for the primacy of philosophy in articulating the church’s social teaching in an intelligible way outside the boundaries of the church). “[T]he natural law style of the church’s social ethic allows it to project and communicate a social vision that is consonant with revelation, but available as moral wisdom to society at large.” *Id.* at 77.

²⁰³ See PERRY, UNDER GOD?, *supra* note 198, at 72.

²⁰⁴ See PERRY, MORALITY, POLITICS, & LAW, *supra* note 181, at 103 (discussing Murray’s understanding of the relationship of Catholicism and democracy and the importance of “ecumenical public discussion”). “Those of us who believe that . . . talk – moral discourse – is a real possibility even in a highly pluralistic society like our own can try to create a politics focused, in part, on questions of human good – a deliberative transformative politics (as distinct from a politics that is merely manipulative and self-serving) – a politics in which questions of human good, of what way or ways of life human good consists in, are not marginalized or privatized but, instead, have a central, public place. Not only does ‘philosophy’ have priority over democracy’: without philosophy, in the sense of ecumenical public discussion about human good, democratic politics would be quite vacuous.” *Id.*

most fruitfully be understood as a call for critical moral reflection on contemporary standards of civil law, rather than as a dogmatic insistence on the imposition of Christian morality on a religiously pluralistic society.