

Introduction to Essays from “The Question of Religious Freedom: From John Courtney Murray, SJ and Vatican II to the Present”

The papers that follow were originally presented at a conference entitled “The Question of Religious Freedom: From John Courtney Murray, SJ and Vatican II to the Present,” which was held at Loyola University Chicago during Spring Semester 2018. Ambassador Miguel H. Díaz, the John Courtney Murray University Chair in Public Service at Loyola University Chicago, organized the conference, which gathered together several prominent contributors to the contemporary conversation about religious freedom from the worlds of law and religious studies. Professor Hille Haker, the Richard A. McCormick, SJ, Chair in Catholic Moral Theology, and the Department of Theology graciously agreed to join him as cosponsors of the conference.

In recent times, religious freedom has reemerged as a key issue within the United States and around the world. This development has occurred in the context of now long-running culture wars, which recently have taken on new political salience. The reemergence of religious freedom as a key issue has been contentious and controversial, especially insofar as religious freedom has been seen to stand in competition with other fundamental human rights, and supporters of religious freedom have sometimes been perceived to rely on the principle of religious freedom as a sword rather than a shield. In the spirit of engaging these difficult questions with a view towards advancing the common good, the papers collected in this issue of the *Loyola University Chicago Law Journal* address the subject of religious freedom as it relates to issues of social polarization, peaceful coexistence, nondiscrimination, and the other components of the common good.

Offering an introduction to these papers, Professor Miguel H. Díaz’s paper *An Unfinished Project: John Courtney Murray, Religious Freedom, and Unresolved Tensions in Contemporary American Society*, addresses the contribution that John Courtney Murray, SJ made to *Dignitatis Humanae*, the groundbreaking document on religious freedom that the Second Vatican Council issued in 1965. Murray, as is well known, was a leading Jesuit and public theologian who bridged contemporary Catholic faith with American democracy. Professor Díaz discusses Murray’s reasoned historical approach to what he termed the American consensus, highlights the place that individual conscience

occupies in Murray's thought, and concludes with some observations on currently unresolved questions relating to religious freedom in the United States. Professor Díaz highlights "the unfinished nature of [Murray's] project and the need to revisit the complexity of this fundamental constitutional right." He argues that in light of recent developments related to what Latin American theologians have termed the irruption of the poor into history, any effort to advance religious freedom and achieve an American consensus in the service of public order must be done mindful of the option for and the rights of marginalized persons and communities. Such an emphasis, Professor Díaz suggests, can deepen Roman Catholic commitment to the advancement of religious freedom consistent with the evolution that Murray brought about, taking the Church from the position that "error has no rights" to one that affirms that "only people—not ideas—have rights."

Two questions frame Professor Robin W. Lovin's paper *Religious Freedom and Public Argument: John Courtney Murray on "The American Proposition"*: Is it good? Is it politics? Building upon Murray's argument that any American consensus fails as a matter of fact, but has the chance to succeed as a matter of "need," Professor Lovin emphasizes the Augustinian idea that "all goods are ordered in relation to one another by the relation that all of them have to God, and the idea that over a lifetime of experience, people can develop a reasonable apprehension of what that order is." Professor Lovin, however, readily admits that the question of what is good is not sufficient to address the current polarizing conversations surrounding the protection of religious freedom. Public consensus and issues of politics and public policy must be equally addressed. On the one hand, Professor Lovin argues that, "Religious activists sometimes seem to avoid questions about the details of policy by grounding their claims in biblical images and language, so that it becomes more and more difficult to distinguish their political program from an altar call." On the other hand, Professor Lovin cautions: "In place of a theology that is overly political, we now have a politics that is quasi-theological. Party programs have taken on a kind of ideological rigidity that makes them invulnerable to criticism or refinement."

In *Prophesy, Public Theology, and Questions of Justice: Some Modest Reflections*, Professor Barry Sullivan argues that while Murray was undoubtedly an important contributor to the work of Vatican II and the development of American public theology, his contribution may at times be overstated, partly because the contributions of other important voices are minimized and partly because some erroneously view Catholicism in overly monolithic terms, thereby overlooking the rich historical diversity of Catholic thought concerning political freedom and democracy. Professor Sullivan also questions the lacuna that exists in Murray's

thought with respect to some of the most salient features of public life in the United States, especially the then-growing awareness of the immorality of racism and its fundamental inconsistency with principles of liberal democracy. Critiquing Murray's seminal work, *We Hold These Truths: Catholic Reflections of the American Proposition*, Professor Sullivan argues that, "racism continued to be a central feature of 'the American proposition.' For that reason, it is difficult today to read Murray's work without being struck by the virtual absence of any discussion of racial segregation, racial prejudice, or the practical exclusion of African Americans from meaningful participation in the political life of the country." Given this seemingly inexplicable omission, Professor Sullivan suggests that we need to be mindful of the possibility that "public theology may have more in common with politics than with prophesy." His paper invites a more inclusive reading of social injustice to sharpen moral judgments for the sake of fostering necessary and just legal change.

In *Religious Freedom, Human Rights, and Peaceful Coexistence*, Professor Leslie Griffin emphasizes the magnitude of John Courtney Murray's ecclesial achievement, namely, moving the Catholic Church from its core belief that "the separation of church and state is clearly wrong, an evil to be tolerated and changed whenever it can be," to an understanding of the relationship of church and state that is centered on "the freedom of the church, not the establishment of the church." Central to Murray's position was a recognition—subsequently endorsed by the Second Vatican Council—that "the right to religious freedom belongs to every human individual, not just to the individual church or just to Catholics." Professor Griffin also points out, however, that "many of Murray's successors, both Catholic and non-Catholic, in courts, legislatures, and voting booths, have instead remained overwhelmingly committed to their own religious truth instead of to everyone's religious rights." The upshot of these developments, Professor Griffin argues, is that "the state's actors have empowered church institutions while neglecting individuals"—a hypothesis that she tests by reviewing the law relevant to employment discrimination, access to contraceptives, and same-sex marriage. In each of these areas, religious leaders have aggressively taken positions that value the church's religious freedom over that of the individual. According to Professor Griffin, "[t]he law protects women's rights, reproductive rights, and gay and lesbian rights. It should be up to individuals, not their church's hierarchy, to decide whether to exercise those rights."

In *The Right to Religious Freedom—A Theological Comment*, Professor Hille Haker explains the return of religion into the public sphere, attends to the historical context of religious freedom debates, and

addresses the contemporary politicization of religion. Exploring the complexity that defending the right to religious freedom entails, Professor Haker cautions that what “counts as a human rights violation is not always easy to discern.” In addressing difficult and often polarizing questions in society, such as that of religious freedom, she invites us “to listen to all sides” and be willing “to come up with prudent practical solutions.” Professor Haker’s paper underscores that human dignity is “not a metaphysical concept that relates to a metaphysical order but a moral concept that relates to our situated vulnerable agency.” “One of the greatest insights of . . . the concept of dignity,” she points out, “is that God-given freedom is reflected in the conscience of the moral agent; conscience, not the authority of the Church, is the ultimate reference that a person must abide by.” Faithfulness to this tradition entails “[c]reating a space for *everyone* in the public sphere, and claiming the rights for those who have *no* rights entails the duty to speak out for the rights of others This ‘preferential option’ for the rights of others . . . in reality is a *responsibility*.”

In *Religious Freedom and the Common Good*, Professor Kathleen Brady notes that, in the context of ongoing culture wars, “few topics are more important to consider than the relationship between religious freedom and the common good.” In Professor Brady’s view, too little attention has been given to that important relationship. “In some cases, the problem has been a narrow focus on one’s own interests and neglect of competing considerations. More often, though, the problem has been partial understandings of what is, in fact, a complex and nuanced relationship.” For Professor Brady, “pursuing religious freedom with the common good in mind” means that believers must not focus only on protecting their own rights, but “must also consider the effects of their demands on others and the larger community.” By the same token, “those impacted by the protections religious believers seek must also consider the value of religious liberty.” For religious liberty to be pursued in light of the common good, Professor Brady argues, “[e]ach side must carefully consider what it really needs and not insist upon advantages that are not really necessary,” with each side being “willing to address what is most important to the other.” Professor Brady believes that “constitutional rules regarding the requirements and limits of religious accommodation should foster such compromises.” She also believes that the “considerable power” that religious conservatives wield in the Trump Administration provides an opportunity for religious leaders who “have followed the same well-worn paths focused on protecting their own rights” to refocus their efforts on the common good, “reaching out to others of good will to try to overcome some of our society’s deepest divisions.”

In *From Common Good to Convivencia: Religious Liberty and the Cake Wars*, Professor Carmen Nanko-Fernández examines the central relationship between theological and legal constructs related to religious freedom and inaccurate interpretations of religious texts and theological traditions that bear on legal arguments. Professor Nanko-Fernández's paper emphasizes that, "Theological discrepancies and biblical interpretations are not the concern of the courts, as the Supreme Court articulated in 1871 in *Watson v. Jones*." On the other hand, she notes that, "Attention to the theological details is necessary . . . on the part of our churches and religious entities who participate in these cases by filing amicus briefs and/or by adding to the rhetoric around highly charged neuralgic and contested issues like same-sex marriage." Professor Nanko-Fernández's paper invites a more just, comprehensive, and accurate consideration of religious freedom and religious traditions, one that avoids dichotomous treatments of sacred and secular subjects (e.g. LGBT persons as secular versus those who do not accept same-sex marriage as religious). In so doing, she questions whether we might be using the courts "to engage in ecumenical and interreligious debates that belong in another sector of the public square."

Finally, taking Section 16 of the Virginia Declaration of Rights as his fundamental text, Professor Thomas Berg argues in his essay, *Religious Freedom and Nondiscrimination*, that "nondiscrimination is a crucial component of religious freedom," but that "religious freedom is also a value independent of nondiscrimination, and the two sometimes come in conflict." Professor Berg begins by discussing the nondiscrimination principle. Among other things, Berg discusses the Supreme Court's willingness to inquire into the motivation of the Colorado Human Rights Commission in determining that the baker was the object of antireligious animus, while refusing to look into President Trump's antireligious motivation in *Trump v. Hawaii*. He argues that, "[i]t is unfair to accuse the Court's majority [in *Trump*] of rank hypocrisy," but "the *Trump* majority certainly failed in an important opportunity to give teeth to the basic constitutional principle against official religious bigotry." "To preserve religious freedom as a principle, not a tool, we must enforce it for all," Professor Berg argues. He then emphasizes that nondiscrimination does not exhaust the concept of religious freedom: "Equality is little comfort without a baseline guarantee of actual freedom; equality alone could mean equal suppression of all religions." Noting the tension between these two values, Professor Berg then suggests an approach aimed at protecting both sides. Applying that model to the facts of *Masterpiece Cakeshop*, Professor Berg concludes that the baker must win because "[t]he harm of regulation on the religious side is permanent loss of identity or permanent loss of occupation," which is "far greater

than the one-time dignitary harm on the couple's side.”

As all these papers make clear, the need for reasoned conversation in the area of religious freedom has never been greater. The authors' arguments, we hope, may promote greater clarity and literacy with respect to both legal and religious matters that affect the protection of religious freedom as a fundamental human right. Through ongoing conversation with diverse stakeholders, we hope that public consensus may emerge—a new American consensus, if you will—that responds to “the signs of the times” and addresses the need for just and well-informed legal decisions, carefully weighing the right of religious freedom with the concerns of particular persons, institutions, and the voices of those who defend equally fundamental human rights within our democratic society.

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