

## SYMPOSIUM

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### ISLAM AND RELIGIOUS FREEDOM: THE EXPERIENCE OF RELIGIOUS MAJORITIES AND MINORITIES

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#### INTRODUCTION

One of the most interesting stories in the history of religious freedom is the journey of the Catholic Church, from being perhaps the most powerful institution on earth opposed to religious freedom in the eighteenth and into the nineteenth centuries, to being perhaps the most powerful institution on earth in defense of religious freedom from the middle of the twentieth century and into the early decades of the twenty-first century.<sup>1</sup> Whereas in most countries today there is a very high correlation between dominant religious majorities and a low degree of religious freedom, regardless of whether the religious majority is Orthodox Christian, Muslim, Buddhist, Jewish, or Hindu, there is a striking exception: in countries with large Catholic majorities, limitations on religious freedom—measured both in terms of legal restrictions and social hostilities—tend to be low or very low.<sup>2</sup>

In an article in the *Notre Dame Law Review* celebrating the fiftieth anniversary of *Dignitatis Humanae*, I documented this remarkable anomaly and suggested that this was due to the Catholic Church's journey toward finding within its own religious tradition the theological resources for identifying freedom of religion as a basic component of human dignity and thus a fundamental human right.<sup>3</sup> In a subsequent article, Andrea Pin (whose article *Is There a Place for Islam in the West?*

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<sup>1</sup> See Brett G. Scharffs, *Religious Majorities and Restrictions on Religion*, 91 NOTRE DAME L. REV. 1419, 1435 (2016).

<sup>2</sup> See *infra* Part II.

<sup>3</sup> See generally Scharffs, *supra* note 1, at 1435–41.

*Adjudicating the Muslim Headscarf in Europe and the United States*<sup>4</sup> is the catalyst for this Online Symposium) and I have further traced the development of this shift in Catholic thinking.<sup>5</sup>

An important factor in the emergence of religious freedom as a core doctrine of the Catholic Church was an increased appreciation within the Church of the experience of Catholics in countries, such as the United States, where Catholics are a minority rather than a majority of the population.<sup>6</sup> As John Courtney Murray and other American Catholic thinkers explained to their coreligionists, religious freedom was very good for the Catholic Church in a place such as the United States where, while the largest single denomination, Catholics represented only about a quarter of the population and were minorities in a country where Protestants were the majority.<sup>7</sup> The history of the Catholic experience in America—a journey from being a minority that suffered persecution and discrimination on account of religion to being an accepted and ordinary part of the country’s religious landscape—had a profound influence on Vatican thinking about religious freedom.<sup>8</sup>

Professor Andrea Pin’s article, *Is There a Place for Islam in the West? Adjudicating the Muslim Headscarf in Europe and the United States*, raises a related question. The article contrasts recent court cases involving Islamic headscarves in workplace settings, and notes that in the United States, the freedom to manifest one’s faith by wearing a headscarf has been generally protected, whereas in Europe in two recent cases the Court of Justice of the European Union declined to protect such religious manifestations.<sup>9</sup> The question raised is how the treatment of religious freedom claims made by Muslims in places where Islam is a minority religion may affect the trajectory of thinking about religious freedom in what is often called the “Muslim world”—countries where Islam is not just the majority, but also the overwhelmingly dominant religion.

The concern animating this contribution is that failing to protect the religious freedom rights of Muslims in places where Islam is a minority religion will make it more difficult for Islam, as the second largest of the world’s religions,<sup>10</sup> to embrace a vision of religious freedom in places where it is a majority.

There are, of course, good reasons for thinking that the journey of Islam from a religious institution that is powerfully opposed to religious freedom into one that is supportive of religious freedom will not follow the same road as that traveled by

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4 Andrea Pin, *Is There a Place for Islam in the West? Adjudicating the Muslim Headscarf in Europe and the United States*, 93 NOTRE DAME L. REV. ONLINE 35 (2017).

5 See Brett G. Scharffs & Andrea Pin, *Freedom for All: The Catholic Journey to Religious Freedom and its Global Legacy* (Sept. 9, 2017) (unpublished manuscript) (on file with Notre Dame Law Review Online). Some of the information in Parts II and III of this Essay are adapted from *Freedom for All*.

6 See *id.*

7 See *id.*

8 See *id.*

9 See generally Pin, *supra* note 4.

10 See PEW RESEARCH CTR., *THE GLOBAL RELIGIOUS LANDSCAPE: A REPORT ON THE SIZE AND DISTRIBUTION OF THE WORLD’S MAJOR RELIGIOUS GROUPS AS OF 2010* 9 (Dec. 2012) [hereinafter *THE GLOBAL RELIGIOUS LANDSCAPE*], <http://www.pewforum.org/files/2014/01/global-religion-full.pdf>.

the Catholic Church. For one thing, Islam is much more diffuse as an “institution” than the Catholic Church is, so even knowing who has the authority to speak on behalf of Islam is more difficult to ascertain, which has the greatest implications for Muslims themselves.<sup>11</sup>

Nevertheless, it seems likely that change in Islam will be affected both by outside and internal sources, as was the case for the Catholic Church and its journey to *Dignitatis Humanae*. However, one thing the Catholic experience suggests is that meaningful and profound change does not simply come from outside pressures; it comes from authentic and sincere evaluation and interpretation by insiders of a religious tradition of that tradition itself. Thus, if Islam is going to come to embrace religious freedom as an important value, this will be the result, significantly if not primarily, of Muslims interpreting their own sacred texts, histories, traditions, and legal systems.

Is such a journey possible or likely?

### I. SETTING THE STAGE

Despite the long history of religious freedom as a human right, laws throughout the world vary widely in protecting freedom of religion and belief. Restrictions on religious freedom are a global problem whose ramifications can cause social unrest throughout the world, perhaps especially in Muslim countries. One of the key tenets of Islam is proselytism, and so within Islam conversion to the religion is unambiguously encouraged.<sup>12</sup> Nevertheless, in some countries where the majority of people are Muslim, conversion from Islam to another religion is strictly forbidden.<sup>13</sup> However, while several Muslim-majority countries have enacted laws greatly favoring Muslim citizens to the detriment of non-Muslim citizens, other Muslim-majority countries do not regulate worship.<sup>14</sup>

The heterogeneity of positions regarding religious freedom in Muslim countries may be attributed to a wide variety of factors such as the existence of different branches of Islam<sup>15</sup> and the absence of stable recognized religious hierarchies within Islam.<sup>16</sup> Some Muslims may quote the Quran to show Islam’s support for religious freedom, saying, “[t]here shall be no compulsion in [acceptance of] the religion,”<sup>17</sup> and, “Say, O disbelievers. I do not worship what you worship.

<sup>11</sup> See *infra* Part I.

<sup>12</sup> See QURAN, sura An-Nahl 16:125 (“Invite to the way of your Lord with wisdom and good instruction . . .”).

<sup>13</sup> See Angelina E. Theodorou, *Which Countries Still Outlaw Apostasy and Blasphemy?*, PEW RES. CTR. (July 29, 2016), <http://www.pewresearch.org/fact-tank/2016/07/29/which-countries-still-outlaw-apostasy-and-blasphemy/>.

<sup>14</sup> See PEW RES. CTR., MANY COUNTRIES FAVOR SPECIFIC RELIGIONS, OFFICIALLY OR UNOFFICIALLY (Oct. 3, 2017), <http://assets.pewresearch.org/wp-content/uploads/sites/11/2017/09/29162847/FULL-REPORT-FOR-WEB.pdf>.

<sup>15</sup> See Amber Pariona, *The Major Branches of Islam*, WORLD ATLAS (Apr. 25, 2017), <https://www.worldatlas.com/articles/the-major-branches-of-islam.html> (describing and distinguishing five branches of Islam).

<sup>16</sup> See Dr. Hatem al-Haj, *Religious Hierarchy in Islam*, ASSEMBLY OF MUSLIM JURISTS OF AM. (Aug. 6, 2006), <http://www.amjaonline.org/fatwa-1670/info>.

<sup>17</sup> QURAN, sura Al-Baqarah 2:256 (second alteration in original).

Nor are you worshipers of what I worship. . . . For you is your religion, and for me is my religion.”<sup>18</sup> But others quote from the Prophet al-Bukhari—“the Prophet said, ‘If somebody (a Muslim) discards his religion, kill him’”—<sup>19</sup>—to justify suppression of religious freedom. Consequently, despite the fact that some Muslims are strong advocates of religious freedom, Muslim-majority countries are usually more restrictive in matters of religious freedom than the rest of the world.<sup>20</sup>

To understand the prospects for religious freedom within Islamic thinking, it is helpful to get a better sense of the current state of affairs.

## II. RELIGIOUS MAJORITIES AND RESTRICTIONS ON RELIGIOUS FREEDOM: THE CATHOLIC ANOMALY

In April 2017, the Pew Research Forum reported that 40% of the world’s countries (based on 2015 data) had high or very high overall restrictions on religious freedom, an increase from 34% in 2014, with 60% having moderate or low restrictions on religious freedom.<sup>21</sup> Because the countries with high or very high restrictions include some with very large populations, such as India and China, these countries include nearly four out of every five people (79%) in the world. Only 21% of the world’s population live in countries with moderate or low restrictions on religious freedom, a decrease from 26% in 2014.<sup>22</sup>

A large majority of the countries with high or very high legal or social restrictions on religion are places where the largest religious group represents either a supermajority (which here is calculated as being over 70%) or at least a majority (over 50%).<sup>23</sup>

### A. *Legal Restrictions on Religious Freedom*

There is a high correlation between countries with high or very high legal restrictions on religious freedom and countries where the dominant religious majority group represents a supermajority of more than 70% of the population of

18 QURAN, sura Al-Kafirun 109:1–6.

19 MUHAMMAD AL-BUKHARI, SAHIH AL-BUKHARI vol. 4, bk. 52, no. 260.

20 See Scharffs, *supra* note 1, at 1423, 1425.

21 PEW RESEARCH CTR., GLOBAL RESTRICTIONS ON RELIGION RISE MODESTLY IN 2015, REVERSING DOWNWARD TREND 4 (Apr. 11, 2017) [hereinafter GLOBAL RESTRICTIONS ON RELIGION RISE], <http://assets.pewresearch.org/wp-content/uploads/sites/11/2017/04/24102207/Pew-Research-Center-Religious-Restrictions-2017-FULL-REPORT.pdf>.

22 *Id.* at 14. The percentage for high and very high restrictions are taken from page 14 of this report. *Id.* at 14. The percentages for moderate and low restrictions are not specifically mentioned in the report but are simply what remains. As the percentage for high and very high restrictions increased by 5% from 2014 to 2015 (74% to 79%), the percentage for moderate and low restrictions on religious freedom has subsequently decreased by 5%. See *id.* at 14–15.

23 See THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 45–50 (providing religious composition of various countries). For an overview of the sources of Pew’s demographic data, see GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, at 38–41. Primary sources “include reports from U.S. government agencies, several independent, nongovernmental organizations and a variety of European and United Nations bodies.” *Id.* at 38–39.

that country.<sup>24</sup> In the April 2017 Pew Report, there were twenty-three countries with very high and twenty-seven countries with high government/legal restrictions on religious freedom.<sup>25</sup> Eighteen of the twenty-three countries with very high legal restrictions have a dominant religious group of over 70%.<sup>26</sup> Many of these countries have a Muslim supermajority, but there is also one country with an Orthodox Christian supermajority (Russia).<sup>27</sup> Of the remaining five countries with very high legal restrictions, the dominant religious group represents more than half of the population in two: Eritrea and Malaysia.<sup>28</sup>

Twenty-three of the twenty-seven countries with high legal restrictions have a dominant religious group of 70% of the population or higher.<sup>29</sup> This list is again dominated by countries with a Muslim supermajority, but there is also a smattering of countries with Christian, Hindu, Jewish, or Buddhist supermajorities.<sup>30</sup> Of the remaining four countries with high legal restrictions, the dominant religious group represents more than 60% of the population in three of them.<sup>31</sup>

These correlations are striking. Of the fifty countries with high or very high legal restrictions, forty-one have a dominant religious group of 70% or more of the population, and five of the remaining nine have a dominant religious group of 60% or more of the population.<sup>32</sup> In all, forty-six of fifty countries with high or very high legal restrictions have a dominant religious group representing more than 60% of

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24 GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. A at 50 (listing countries with high and very high government restrictions on religion).

25 *See id.*

26 *Id.* at 15, app. A at 50; THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 45–50 (providing the religious composition of various countries).

27 GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, at 15, app. A at 50 (listing countries with very high government restrictions on religion); THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 45–50 (providing the religious composition of various countries). Note that the data for Russia from this report were “[e]stimates based on [the] 2004 Generations and Gender Survey, adjusted to account for underrepresented religious and projected to 2010.” *Id.* at 78. More recent estimates are that between 42.5% and 68% of Russian are Orthodox Christians, with several other Christian denominations at less than 5% each. *See, e.g.*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, RUSSIA 2014 INTERNATIONAL RELIGIOUS FREEDOM REPORT 2 (2014), <http://www.state.gov/documents/organization/238638.pdf> (reporting various studies and surveys).

28 GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, at 15, app. A at 50; THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 46, 48 (providing the religious composition of China, Eritrea, and Malaysia). China’s dominant religious group is technically unaffiliated with 52.2% of the population. *Id.* at 46.

29 GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. A at 50 (outlining countries with high legal restrictions); THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 45–50 (providing the religious composition of different countries)

30 *See id.*

31 *See* GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. A at 50 (listing Qatar, Laos, France, and Cuba as four of the twenty-seven countries with high government restrictions); THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 46–47, 49 (providing that the dominant religion accounts for more than 60% of the population in Qatar, Laos, and France).

32 GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. A at 50 (listing countries with very high and high government restrictions on religion).

the population.<sup>33</sup> Only four countries with high or very high restrictions (Cuba, China, Singapore, and Vietnam) are countries where the dominant religious group is less than 60% of the population.<sup>34</sup>

### B. Social Hostilities Involving Religion

A similar pattern is evident in countries with very high or high social hostilities involving religion and the existence of a majority religious group. According to the 2017 Pew Report, there are eleven countries with very high social hostilities involving religion, and forty-two countries with high social hostilities.<sup>35</sup> There is significant, but not absolute, overlap between countries with high or very high legal restrictions and countries with high or very high social hostilities.<sup>36</sup>

Ten of the eleven countries with very high social hostilities have a dominant religious group representing 70% or more of the population.<sup>37</sup> As we might expect, this includes a number of Muslim-majority countries, but also countries with a Hindu majority (India), a Jewish majority (Israel), and an Orthodox Christian majority (Russia).<sup>38</sup> Of the countries with very high social hostilities, only Nigeria does not have a majority religious group of over 50%, and that country is almost evenly divided between a Muslim-dominated northern half of the country and a Christian-dominated southern half of the country, with the overall population of the country almost evenly divided between Christians and Muslims.<sup>39</sup>

<sup>33</sup> *See id.*

<sup>34</sup> *See* GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. A at 50; THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 46, 49–50. Note that the Pew data for Cuba, placing the “Mixed Christian” total for the country at 59.2%, is an “estimate[] based on [the] 2010 World Religion Database.” *Id.* at 46, 72. Other sources, however, give a higher total. The Roman Catholic Church, for example, estimates that 60% to 70% of the population of Cuba is Catholic (though admittedly the number actually attending mass is much lower, perhaps as low as 4% to 5% of nominal Catholics). *See* Geoff Thale, *Comunidades de Fe en Cuba: Primera Parte de la Serie de Fondo de WOLA Sobre la Religión en Cuba*, WOLA (Mar. 26, 2012), [http://www.wola.org/es/comentario/comunidades\\_de\\_fe\\_en\\_cuba\\_primera\\_parte\\_de\\_la\\_serie\\_de\\_fondo\\_de\\_wola\\_sobre\\_la\\_religion\\_en](http://www.wola.org/es/comentario/comunidades_de_fe_en_cuba_primera_parte_de_la_serie_de_fondo_de_wola_sobre_la_religion_en). However, “[t]here is no independent, authoritative source on the overall size or composition of religious groups” in this Communist-controlled country. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, CUBA 2014 INTERNATIONAL RELIGIOUS FREEDOM REPORT 1 (2014), <http://www.state.gov/documents/organization/238748.pdf> (providing data on Cuba).

<sup>35</sup> GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. B at 53 (listing countries with high and very high social hostilities).

<sup>36</sup> *See id.* app. A at 50, app. B at 53.

<sup>37</sup> *Id.* app. B at 53 (listing countries with very high social hostilities); THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 45–50 (providing the religious composition of different countries).

<sup>38</sup> *Id.*

<sup>39</sup> GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. B at 53 (listing Nigeria as a country with very high social hostilities); THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 48 (providing the religious composition of Nigeria). The 2012 Pew Report (citing 2010 data) reported that Nigeria was almost evenly divided between Christians (49.3%) and Muslims (48.8%). *See id.* According to the U.S. State Department Report for 2014, “[m]ost observers estimate approximately 50 percent of the population is Muslim and 50 percent Christian.” BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, NIGERIA 2014 INTERNATIONAL

There is also a very strong correlation between high social hostilities and countries where the dominant religious group is a majority or supermajority. Thirty-three of the forty-two countries with high social hostilities have a dominant religious group with 70% or more of the population.<sup>40</sup> Of the remaining nine countries with high social hostilities involving religion, all have a dominant religious group with 50% or more of the population.<sup>41</sup>

These correlations once again are striking. Of the fifty-three countries with high or very high social hostilities, forty-three have a dominant religious group of 70% or more of the population, and eight of the remaining ten have a dominant religious group of 60% or more of the population.<sup>42</sup> In all, fifty-one of fifty-three countries with high or very high social hostilities relating to religion have a dominant religious group representing more than 60% of the population.<sup>43</sup> Only two countries (Nigeria and Bosnia and Herzegovina) with high or very high social hostilities have a dominant religious group that is less than 60% of the population.<sup>44</sup>

These statistics incline toward the conclusion that where there is a large religious majority or supermajority this will almost always correlate with high or very high legal and social restrictions on religion. But this is not the case, for there is an important exception: the Catholic Church. Countries where the dominant religious group is Catholic are noteworthy for their low legal restrictions as well as low social hostilities regarding religion.<sup>45</sup>

### C. *The Catholic Anomaly*

Of the countries included in the Pew research, there are thirty-two countries where Catholics represent a supermajority of 70% or more of the population.<sup>46</sup> In none of these thirty-two countries are there high or very high legal restrictions on

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RELIGIOUS FREEDOM REPORT 2 (2014), <http://www.state.gov/documents/organization/238460.pdf>.

40 GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. B at 53 (listing the countries with high social hostilities); THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 45-50 (providing the religious composition of different countries).

41 GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. B at 53; THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 45-49. The religious balance in Bosnia and Herzegovina is approximately 52% Christian and 45% Muslim. *Id.* at 45.

42 See GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. B at 53; THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 45-49.

43 See GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. B at 53; THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 45-49.

44 See *supra* notes 37-39 and accompanying text.

45 See GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. B at 53; THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 45-49.

46 PEW RESEARCH CTR., TABLE: CHRISTIAN POPULATION AS PERCENTAGES OF TOTAL POPULATION BY COUNTRY (Dec. 19, 2011) [hereinafter CHRISTIAN POPULATION TABLE], <http://www.pewforum.org/2011/12/19/table-christian-population-as-percentages-of-total-population-by-country/> (providing the Christian composition of different countries' populations). The Pew studies, using "censuses, surveys and official population registers," are based on self-identification of believers. THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 7. They do "not attempt to measure the degree to which members of these groups actively practice their faiths or how religious they are." *Id.* at 15.

religious freedom.<sup>47</sup> Thirteen (Argentina, Austria, Burundi, Equatorial Guinea, Italy, Mexico, Monaco, Panama, Peru, Poland, Slovakia, Spain, and Venezuela) of the thirty-two countries with a Catholic supermajority have moderate legal restrictions, and the remaining nineteen have low legal restrictions.<sup>48</sup> Thus, while eighteen of the twenty-three countries with very high legal restrictions on religion have a dominant religious group with 70% or more of the population,<sup>49</sup> none of those countries has a Catholic supermajority or Catholic majority. And while twenty-three of the twenty-seven countries with high legal restrictions have a dominant religious group of 70% or more,<sup>50</sup> none of those countries has a Catholic supermajority, and only two (Cuba and France) have a Catholic majority.<sup>51</sup>

The Catholic attitude toward minorities is not confined to the legal realm. Of the thirty-two countries where Catholics represent more than 70% of the population, none are countries where social hostilities involving religion are very high, and in only four (Italy, Mexico, Slovakia, and the Philippines) are social hostilities high.<sup>52</sup> Social hostilities are moderate in eight and low in twenty of the thirty-two countries with a Catholic supermajority.<sup>53</sup> Therefore, in the thirty-two countries with a Catholic supermajority, there are zero with very high social hostilities and only four with high social hostilities.

Thus, while ten of the eleven countries with very high social hostilities toward religion have a dominant religious group representing 70% or more of the population,<sup>54</sup> none of those countries has a Catholic supermajority. And while thirty-three out of forty-two countries with high social hostilities toward religion have a dominant religious group with 70% or more of the population, only four of those thirty-three countries (Italy, Mexico, Slovakia, and the Philippines) have a Catholic supermajority.<sup>55</sup> And while the remaining nine countries with high social restrictions on religion have a dominant religious group representing between 50% and 70% of the population, only one of those countries (France) has a Catholic majority.<sup>56</sup>

This data suggests two interim conclusions. The first, which draws from the statistics showing that religious majorities tend to oppress religious minorities either

47 See GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. A at 50; CHRISTIAN POPULATION TABLE, *supra* note 46.

48 See CHRISTIAN POPULATION TABLE, *supra* note 46; GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. A at 50–51 (rating countries' legal restrictions on religion).

49 See *supra* note 26 and accompanying text.

50 See *supra* note 29 and accompanying text.

51 See CHRISTIAN POPULATION TABLE, *supra* note 46; GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. A at 50.

52 See CHRISTIAN POPULATION TABLE, *supra* note 46; GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. B at 53.

53 See CHRISTIAN POPULATION TABLE, *supra* note 46; GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. B at 53 AT

54 See *supra* note 37 and accompanying text.

55 See *supra* notes 42 and 48 and accompanying text.

56 See CHRISTIAN POPULATION TABLE, *supra* note 46 (providing that the Catholic composition of France is 60.4%); GLOBAL RESTRICTIONS ON RELIGION RISE, *supra* note 21, app. B at 53; THE GLOBAL RELIGIOUS LANDSCAPE, *supra* note 10, at 45–49; see also *supra* notes 32 and 44 and accompanying text.



or both through legislation and societal restrictions, is that religion itself may be an important category of limitation on religious freedom. A second interim conclusion, which draws from the quite exceptional data concerning Catholic majority countries' attitudes toward minorities, is that it may be within religious traditions themselves that we will find the most effective resources for defending religious freedom.

### III. THE CATHOLIC CHURCH'S VIEWS OF RELIGIOUS FREEDOM IN THE PRE-VATICAN II ERA

The Catholic Church as an institution has not always protected religious freedom for all; it has taken a long journey toward embracing the ideal of religious freedom regardless of faith.<sup>57</sup> The Catholic Church's historical trajectory shows that religions can change and may come to embrace religious freedom in a way that positively affects everybody, by reflecting upon their own doctrine.

Catholicism came to protect religious freedom late in modernity. The topic of religious freedom had been widely known to the Catholic Church, as the Christian faith was persecuted from its very beginning.<sup>58</sup> But the Catholic doctrine had developed to the extent that, writing in 1791 at the time of the French Revolution, Pope Pius VI viewed religious freedom as an assault on the Catholic Church, calling it a "monstrous right" and an "imaginary dream[]." <sup>59</sup>

The sharp critique of religious freedom was continued by Pope Gregory XVI's 1832 encyclical *Mirari Vos*, which denounced religious freedom as leading to "indifferentism" toward truth, stating, "[t]his shameful font of indifferentism gives rise to that absurd and erroneous proposition which claims that *liberty of conscience* must be maintained for everyone."<sup>60</sup> For Pope Gregory XVI, religious liberty led to the false conclusion that one religion is as good as any other.<sup>61</sup>

A little over a decade later, in 1844, Pope Gregory XVI denounced Bible societies that translated and distributed the Bible in vernacular languages, warning about "indifference to religion propagated by the sect members under the name of religious liberty."<sup>62</sup> He warned that if "complete liberty of conscience, as they call it, spreads among the Italian people, political liberty will result of its own accord."<sup>63</sup>

In 1864, Pope Pius IX issued his *Syllabus Errorum* (Syllabus of Errors),<sup>64</sup> which included denunciations of indifferentism, communism, Bible societies, and

<sup>57</sup> See Scharffs, *supra* note 1, at 1435–41.

<sup>58</sup> See generally Everett Ferguson, *Persecution in the Early Church: Did You Know?*, IX CHRISTIAN HISTORY (1990), <http://www.christianitytoday.com/history/issues/issue-27/persecution-in-early-church-did-you-know.html> (providing an overview of the persecution of the Christian faith in the first three hundred years of the Church).

<sup>59</sup> Pius VI, Encyclical Letter *Quod Aliquantum*, in RECUEIL DES ALLOCUTIONS CONSISTORIALES 53–55 (Adrien Le Clere ed., 1865).

<sup>60</sup> Gregory XVI, Encyclical Letter *Mirari Vos* ¶ 14 (Aug. 15, 1832), <http://www.papalencyclicals.net/greg16/g16mirar.htm>.

<sup>61</sup> See *id.* ¶ 13.

<sup>62</sup> Gregory XVI, Encyclical Letter *Inter Praecipuas* ¶ 14 (May 8, 1844), <http://www.papalencyclicals.net/greg16/g16inter.htm>.

<sup>63</sup> *Id.*

<sup>64</sup> Pius IX, Papal Document *Syllabus Errorum* (Dec. 8, 1864), <http://www.papalencyclicals.net/pius09/p9syll.htm>.

modern liberalism. Pope Pius IX declared it an error that, “in some Catholic countries, that persons coming to reside therein shall enjoy the public exercise of their own peculiar worship.”<sup>65</sup> Also an error was that the Pope ought to reconcile himself “and come to terms with progress, liberalism and modern civilization.”<sup>66</sup>

In 1885, it was the turn of Pope Leo XIII. With his encyclical *Immortale Dei: On the Christian Constitution of States*,<sup>67</sup> Leo drew on previous papal pronouncements, advocated for a special place for the Catholic Church’s teaching in state laws, and repudiated religious freedom. He stated that “it [was] not lawful for the State, any more than for the individual, either to disregard all religious duties or to hold in equal favour different kinds of religion.”<sup>68</sup> More generally, he also argued that “unrestrained freedom of thinking and of openly making known one’s thoughts [was] not inherent in the rights of citizens, and [was] by no means to be reckoned worthy of favour and support.”<sup>69</sup>

In 1892, Pope Leo XIII also warned Catholics not to fraternize with Freemasons, namely “those who hide under the mask of universal tolerance, respect for all religions, and the craving to reconcile the maxims of the Gospel with those of the revolution.”<sup>70</sup> In 1900, he reiterated this theme by declaring, “[t]he world has heard enough of the so-called ‘rights of man.’ Let it hear something of the rights of God.”<sup>71</sup>

#### IV. U.S. ANTI-CATHOLICISM AND THE MOVEMENT TOWARD A CATHOLIC DEFENSE OF RELIGIOUS FREEDOM

Meanwhile, during much of the nineteenth and early twentieth century, Catholics suffered discrimination and even persecution in the United States.<sup>72</sup> Some of the first major anti-Catholic outbursts occurred in the Northeast of the United States from the 1830s to the 1850s, leading to the burning of Catholic property and the killing of Catholics.<sup>73</sup> Much of the violence and the anti-Catholic sentiments were fed by claims that Catholics were destroying the culture of the United States.

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65 *Id.* ¶ 78.

66 *Id.* ¶ 80.

67 Leo XIII, Encyclical Letter *Immortale Dei* (Nov. 1, 1885), [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_01111885\\_immortale-dei.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei.html).

68 *Id.* ¶ 35.

69 *Id.*

70 Leo XIII, Encyclical Letter *Custodi Di Quella Fede* ¶ 15 (Dec. 8, 1892), [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_08121892\\_custodi-di-quella-fede.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_08121892_custodi-di-quella-fede.html).

71 Leo XIII, Encyclical Letter *Tametsi Futura Prospicientibus* ¶ 13 (Nov. 1, 1900), [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_01111900\\_tametsi-futura-prospicientibus.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_01111900_tametsi-futura-prospicientibus.html).

72 See Kenneth C. Davis, *America’s True History of Religious Tolerance*, SMITHSONIAN MAG., Oct. 2010, <http://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/>.

73 See *id.*

Irish Catholic immigrants were blamed for spreading violence and drunkenness.<sup>74</sup> Prominent Protestant leaders attacked the Catholic Church as theologically unsound and an enemy of republican values.<sup>75</sup> The Catholic Church's official silence on the subject of slavery also garnered the enmity of Northern Protestants toward Catholics.<sup>76</sup>

In the 1920s, anti-Catholicism was widespread in the United States.<sup>77</sup> The Ku Klux Klan considered Catholicism to be incompatible with democracy and that parochial schools encouraged a separatism that kept Catholics from being loyal Americans.<sup>78</sup> With the rapid growth of the second Ku Klux Klan, anti-Catholic rhetoric intensified.<sup>79</sup> On August 11, 1921, Father James E. Coyle was killed on his rectory porch in Birmingham, Alabama, by a Southern Methodist minister, Rev. Edwin R. Stephenson.<sup>80</sup> The murder occurred just hours after Coyle had performed a wedding between Stephenson's daughter, Ruth, and Pedro Gussman, a Puerto Rican immigrant.<sup>81</sup> Several months before the wedding, Ruth had enraged her father by converting to Roman Catholicism.<sup>82</sup> Stephenson was defended by Hugo Black, a future Justice of the Supreme Court.<sup>83</sup> In Alabama, Hugo Black was elected to the U.S. Senate in 1926 after building a political base partially through his delivery of 148 speeches at local Klan meetings, where his focus was the denunciation of Catholicism.<sup>84</sup>

The Jesuit theologian John Courtney Murray became cognizant of that anti-Catholic fear.<sup>85</sup> He realized the existence of understandable mistrust of motives that many Americans had about the quickly growing American Catholic community.<sup>86</sup> Therefore, Murray began to develop a view based on the American view of a separation of church and state.<sup>87</sup> He developed the view of a religion-state

74 Maureen Fielder, *Profiling American Muslims is Bigotry, Plain and Simple*, NAT'L CATH. REP. (July 1, 2016), <https://www.ncronline.org/blogs/ncr-today/profiling-american-muslims-bigotry-plain-and-simple>.

75 See W. JASON WALLACE, *CATHOLICS, SLAVEHOLDERS, AND THE DILEMMA OF AMERICAN EVANGELICALISM, 1835–1860* 1–3 (2010).

76 See CHARLES E. CURRAN, *THE SOCIAL MISSION OF THE U.S. CATHOLIC CHURCH: A THEOLOGICAL PERSPECTIVE* 3–4 (2011).

77 See Josh Zeitz, *When America Hated Catholics*, POLITICO MAG. (Sept. 23, 2015), <http://www.politico.com/magazine/story/2015/09/when-america-hated-catholics-213177>.

78 See Lynn Dumenil, *The Tribal Twenties: 'Assimilated' Catholics' Response to Anti-Catholicism in the 1920s*, 11 J. AM. ETHNIC HIST. 1, 21–49 (1991).

79 See Zeitz, *supra* note 77.

80 Sharon Davies, *Tragedy in Birmingham*, COLUMBIA MAG., March 2010, at 31.

81 *Id.*

82 See William H. Pryor, Jr., *The Murder of Father James Coyle, the Prosecution of Edwin Stephenson, and the True Calling of Lawyers*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401, 403 (2006).

83 Davies, *supra* note 80.

84 See ROGER A. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 87, 104 (1997).

85 See Michael Tortolani, *John Courtney Murray and the American Catholic Experience*, ACTON INST. FOR THE STUDY OF RELIGION AND LIBERTY (1993), <https://archive.li/jBSkA>.

86 See *id.*

87 See Joslyn Ogden, *Religious Liberty, Vatican II, and John Courtney Murray*, in INSTITUTIONS IN CRISIS: CASE STUDIES IN ETHICS 6–7 (Kenan Inst. for Ethics at Duke Univ., 2009), <https://kenan.ethics.duke.edu/wp-content/uploads/2012/07/Case-Study-Vatican-II.pdf>.

framework where a government limited by laws protects the liberty of all religious communities equally, while the church pursues its aims by exercising its influence in society without relying on government intervention to enforce the church's status.<sup>88</sup> Consequently, by the 1950s,

Murray had written innovatively on the way the Catholic Church should interact with the state (or, as he preferred to call it, the government). As a public intellectual Murray had also been deeply engaged in debates with Protestant and secular opinion-makers about the religious role of Catholicism in U.S. public life. Catholics had long been held in suspicion by these opinion-makers, who feared that the Catholic understanding of religious freedom was a threat to American democracy.<sup>89</sup>

Furthermore, Murray's work

also addressed the internal reflection of the Catholic community on religious freedom. This line of thinking surely had greater personal cost for Murray because of the initial response of Church leadership to his thinking. In the end, however, Murray's theology helped bring about an extraordinary shift in the Catholic Church's stance toward religious freedom. Murray argued that attention to the historical contexts of the rejection of religious freedom by nineteenth century popes such as Pius IX and Leo XIII could enable the Church to affirm religious freedom in contexts that were different, such as those prevailing in mid-twentieth century democracies.<sup>90</sup>

He helped the Church Fathers develop an understanding of freedom that did not contradict the Catholic Church's claim to carry the truth.<sup>91</sup> He was also able to provide a historical perspective on the development of the Catholic doctrine of religious freedom that avoided frictions between the bold affirmations of *Dignitatis Humanae* and the nineteenth century's quite different approach to the topic.<sup>92</sup>

## V. VATICAN II

On December 7, 1965, His Holiness Pope Paul VI promulgated *Dignitatis Humanae: On the Right of the Person and of Communities to Social Civil Freedom in Matters Religious*.<sup>93</sup> The declaration begins by noting that:

A sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man, and the demand is increasingly made that men should act on their own judgment, enjoying and

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88 *See id.*

89 David Hollenbach, S.J., *Religious Freedom, Morality and Law: John Courtney Murray Today*, 1 J. MORAL THEOLOGY 69, 70 (2012).

90 *Id.* at 71.

91 *See id.*

92 *See id.*

93 *See generally* SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON RELIGIOUS FREEDOM: DIGNITATIS HUMANAЕ: ON THE RIGHT OF THE PERSON AND OF COMMUNITIES TO SOCIAL AND CIVIL FREEDOM IN MATTERS RELIGIOUS PROMULGATED BY HIS HOLINESS POPE PAUL VI (Dec. 7, 1965) [hereinafter DIGNITATIS HUMANAЕ].

making use of a responsible freedom, not driven by coercion but motivated by a sense of duty.<sup>94</sup>

The Second Vatican Ecumenical Council (“the Council”) declared the demand for freedom of religion to be “greatly in accord with truth and justice.”<sup>95</sup> The declaration self-consciously searched “into the sacred tradition and doctrine of the Church—the treasury out of which the Church continually brings forth new things that are in harmony with the things that are old.”<sup>96</sup> Thus, the declaration sought to find within the Catholic tradition and doctrine, the doctrines and resources that support the idea of freedom of religion.<sup>97</sup> The Council noted that “all men are bound to seek the truth, especially in what concerns God and His Church, and to embrace the truth they come to know, and to hold fast to it.”<sup>98</sup> But such obligations fall to human conscience.<sup>99</sup> “The truth cannot impose itself except by virtue of its own truth, as it makes its entrance into the mind at once quietly and with power.”<sup>100</sup> Religious freedom, in turn, demands that men be permitted “to fulfill their duty to worship God . . . with immunity from coercion in civil society.”<sup>101</sup> Thus, the doctrine of religious freedom does not undermine “traditional Catholic doctrine on the moral duty of men and societies toward the true religion and toward the one Church of Christ.”<sup>102</sup>

Vatican II recognized that the truth exists in harmony with religious freedom.<sup>103</sup> Therefore,

[r]eligious freedom does not imply indifferentism, but rather creates a sphere of personal responsibility wherein human beings can pursue the truth free from physical and psychological coercion. *Dignitatis Humanae* is designed both to appeal to public reason and to be rooted in the doctrinal understandings of true Catholic faith. The understanding of human dignity becomes the wellspring from which this powerful defense of religious freedom emerges.<sup>104</sup>

The Second Vatican Council signaled the culmination of a dramatic change in the Catholic Church’s perception of religious freedom.<sup>105</sup> The right to religious freedom is now viewed by the Catholic Church “as having ‘its foundation in the dignity of the person.’”<sup>106</sup> Furthermore, Catholics now view the doctrine of religious freedom as being rooted in divine revelation and as a Christian duty to respect it more conscientiously.<sup>107</sup> This “[d]ivine revelation ‘gives evidence of the respect which Christ showed toward the freedom with which man is to fulfill his duty of

94 *Id.* ¶ 1.

95 *Id.*

96 *Id.*

97 *See id.*

98 *Id.*

99 *See id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *See Scharffs, supra* note 1, at 1440.

104 *Id.*

105 *See id.*

106 *Id.* (quoting *DIGNITATIS HUMANAЕ, supra* note 93, ¶ 9).

107 *Id.*

belief in the word of God and it gives us lessons in the spirit which disciples of . . . [Christ] ought to adopt and continually follow.”<sup>108</sup> Vatican II underlined the fact that “[r]eligious freedom is not just compatible with Catholic doctrine; it is a tenet of Catholic doctrine.”<sup>109</sup>

There are many factors that played a part in the Catholic Church’s journey to Vatican II and its doctrinal embrace of freedom of religion as a basic component of human dignity and as a fundamental human right. Some of these influences came from outside the Church, while others came from within. Internal influences were numerous and included the rise of personalism within the Catholic Church, the influence of high-profile converts to Catholicism such as John Henry Newman, and the Papal encyclical *Immortale Dei*.<sup>110</sup> These influences have been described in some detail by Brett Scharffs and Andrea Pin in a forthcoming article, *Freedom for All: The Catholic Journey to Religious Freedom and its Global Legacy*.<sup>111</sup>

The influence I would like to emphasize here was that of American Catholics’ experiences with religious persecution, and the emphasis on the American constitutional experience of separation of religion and the state. As religious freedom of Catholics was protected under the U.S. Constitution,<sup>112</sup> a new model of church-state relations became not only plausible but it reflected certain advantages.

Some prominent thinkers played an active role in inspiring the drafting of *Dignitatis Humanae*. Among them stands out John Courtney Murray, an American Jesuit priest who was able to articulate a defense of religious freedom with his works and advised the Church Fathers during its elaboration.<sup>113</sup>

Murray gave a twofold contribution: on one hand, he provided the Church Fathers with an understanding of freedom that did not contradict the Catholic Church’s claim to carry the truth; on the other hand, he was able to articulate a narrative of the historical development of the Catholic doctrine of religious freedom that avoided frictions between the bold affirmations of *Dignitatis Humanae* and the nineteenth century’s quite different approach to the topic.

In 1965, while the declaration was in the process, Murray published *The Problem of Religious Freedom*,<sup>114</sup> a short book that looked at the idea of religious freedom from a historical as well as theoretical perspective.

Historically, Murray did not hide that the Church’s experience of religious freedom in the world was multifarious; “perhaps chiefly in Spain, the institution [was] alien; the very notion connote[d] a hated *Liberalismo*, pernicious both to the Church and to a cherished national religious unity.”<sup>115</sup> But the Church could not simply ignore its missionary role and the diaspora of Catholics in non-Catholic countries.<sup>116</sup> More precisely, Murray emphasized that religious freedom had been “an integral part of the Catholic experience in the United States” from which Vatican

108 *Id.* (quoting *DIGNITATIS HUMANAЕ*, *supra* note 93, ¶ 9).

109 *Id.*

110 *See* Scharffs & Pin, *supra* note 4 (manuscript at 12–14).

111 *See generally id.*

112 U.S. CONST. amend I.

113 SILVIA SCATENA, *LA FATICA DELLA LIBERTÀ* 376 (2003).

114 JOHN COURTNEY MURRAY, S.J., *THE PROBLEM OF RELIGIOUS FREEDOM* (1965).

115 *Id.* at 3.

116 *See id.* at 33.

II had to take inspiration.<sup>117</sup> The illuminating examples of the “American Constitution (1789) and its Bill of Rights (1791)” had shifted the legal paradigm of church and state relations from a “political and legal support of the exclusive rights of truth” to a question of “religious freedom—personal, ecclesial, associational, practical.”<sup>118</sup>

These historical considerations spurred Murray’s theoretical efforts. He proceeded to distinguish between the juridical, the theological, and the ethical problem of religious freedom.<sup>119</sup> He addressed these three layers from two different perspectives, which he saw as mutually alternative.

On one side stood what he called the First View.<sup>120</sup> This view considered the three layers jointly: the only correct exercise of freedom of conscience consisted in adhering to truth; an erring conscience could only be tolerated by public powers; and in fact, Pope Leo XIII and Pope Pius XII both spoke of tolerance.<sup>121</sup> On the legal plane, this meant that “[t]he erroneous conscience ha[d] no right to external social freedom. That is, it ha[d] no right to public expression or manifestation of its beliefs in worship, witness, or teaching. In particular, it ha[d] no right publicly to propagate or disseminate its belief.”<sup>122</sup> Only the true religion had the right to be established as it was divinely founded and ordained.<sup>123</sup>

In Murray’s eyes, this doctrine was not set in stone. It could be massaged—as it had been, since Pope Leo XIII and the Popes who came after him did not explicitly endorse the view that public power can legitimately “enforce outward conformity with the official faith.”<sup>124</sup>

With what he called the Second View, Murray built up an intellectual alternative from which the Church Fathers later drew. He considered freedom in general “as a political end, along with justice[,]”<sup>125</sup> within which religious freedom enjoyed a special place.<sup>126</sup> And yet, religious freedom was strictly “a juridical or constitutional concept,”<sup>127</sup> which through the ages had made its way into national constitutions.<sup>128</sup> It was “an affair of the social and civil order; it [was] an immunity that attache[d] to the human person within society, and it ha[d] its guarantee in civil law.”<sup>129</sup> The Second View “reject[ed] the opinion that public care of religion necessarily mean[t], per se and in principle, a political and legal care for the exclusive rights of truth and a consequent care to exterminate religious error.”<sup>130</sup> The new intellectual framework that Murray proposed for the political and

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117 *See id.* at 3.

118 *Id.* at 51.

119 *Id.* at 6.

120 *See id.* at 7–17.

121 *See id.*

122 *Id.* at 9.

123 *Id.* at 10.

124 *Id.* at 16.

125 *Id.* at 82.

126 *See id.* at 18–19.

127 *Id.* at 20.

128 *See id.* at 22–23.

129 *Id.* at 23.

130 *Id.* at 32.

constitutional spectrum did not justify an inferior treatment for non-Catholic religions.

The Second View's ramifications were particularly important for the Catholic Church's legal status and fostered an equalitarian treatment of religions on the State side. The Church did not "demand, per se and in principle, a status of legal privilege for herself. The Church demand[ed], in principle and in all situations, religious freedom for herself and religious freedom for all men."<sup>131</sup>

John Courtney Murray made another crucial distinction, which would bear consequences on Vatican II's reflections. It drew theoretical and practical lines between state and society.<sup>132</sup> The state was not an omnipotent agent, which was in full control of the society itself: the state's domain was to be found within society, not to be identified with itself.<sup>133</sup>

Drawing the line between state and society laid down the foundation for a crucial distinction, namely between public order and the common good.<sup>134</sup> In Murray's view, the state was not supposed to take care of the common good, but only of a part of it, which went under the name of public order.<sup>135</sup> The common good included "all the social goods, spiritual and moral as well as material," and its pursuit "devolve[d] upon society as a whole."<sup>136</sup> Public order, in turn, was "a narrower concept."<sup>137</sup>

According to Murray, human societies needed to allow the free exercise of the freedom of conscience. "[A] true metaphysic of the human person[.]" according to his thinking, considered "human existence [as] essentially social-historical existence."<sup>138</sup> It was not "permitted to introduce a dichotomy into man, to separate his personal-interior existence and his social-historical existence."<sup>139</sup> In other words, freedom of conscience was not just a business for individuals, but a necessary component of social life.

The statement that a person's life could not be dichotomized into an interior existence and an exterior one was particularly significant, and went hand-in-hand with the idea of the state as only protecting public order instead of fostering the common good broadly conceived. By denying the "separation of the personal-moral and the social-juridical orders"<sup>140</sup> and narrowing down the state's power to preserve the public order, Murray posited that the state could not simply stay out of a person's conscience: it also had "no power to coerce the social expression of the religious conscience."<sup>141</sup>

All things considered, for John Courtney Murray, "the state . . . [was] competent to do only one thing in respect of religion, that [was], to recognize,

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131 *Id.*

132 *See id.* at 28–29.

133 *See id.* at 29.

134 *See id.* at 29–30.

135 *See id.*

136 *Id.* at 29.

137 *Id.*

138 *Id.* at 38.

139 *Id.*

140 *Id.*

141 *Id.* at 39.



guarantee, protect, and promote the religious freedom of the people.”<sup>142</sup> The public power was “not the judge of the truth or falsity of the norms whereby conscience is formed.”<sup>143</sup> The protection of conscience did not end within the internal forum of the human soul; no religious truth could receive the state’s blessing.<sup>144</sup> Religious freedom had to be acknowledged as “a human freedom in the external forum of society.”<sup>145</sup>

## VI. ISLAM

The Catholic paradigm shift in matters of religious freedom is a noteworthy example of how religious persecution and the experience of a religious minority with the constitutional principle of religious freedom may lead a major religious group to reevaluate its approach to religious freedom. One may hope that religious groups such as Muslims will follow the Catholic example and become defenders of religious freedom. As previously mentioned, the Catholic Church as an institution has not always been an advocate of religious freedom for all.<sup>146</sup> *Dignitatis Humanae* shows that religions can change, and do so and come to embrace religion in a way that positively affects everybody, by reflecting on their own doctrine.<sup>147</sup>

The paradigm shift of the Catholic Church in regards to religious freedom was partially caused by the experiences of persecution of Catholics in America, as well as the experience of having their religious freedom recognized and protected.<sup>148</sup> As religious persecution of Muslim groups are on the rise in several places in the world, such as Myanmar,<sup>149</sup> we may ask whether Muslims will reconsider their approach to religious freedom in the same way that the Catholic Church has become a strong advocate of religious freedom.

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142 *Id.* at 41.

143 *Id.* at 79.

144 *See id.*

145 *Id.* at 80.

146 *See supra* Part III.

147 *See supra* Part V.

148 *See supra* Part IV.

149 *See, e.g.*, Abigail Hauslohner, *Discrimination Against Muslims is Increasing in U.S.*, *Pew Study Finds*, WASH. POST (July 26, 2017), [https://www.washingtonpost.com/national/discrimination-against-muslims-is-increasing-in-us-pew-study-finds/2017/07/25/dfa52756-717a-11e7-9eac-d56bd5568db8\\_story.html?utm\\_term=.4e0b311e1cd2](https://www.washingtonpost.com/national/discrimination-against-muslims-is-increasing-in-us-pew-study-finds/2017/07/25/dfa52756-717a-11e7-9eac-d56bd5568db8_story.html?utm_term=.4e0b311e1cd2); Panu Wongcha-um, *All Muslims in Burma Facing Growing Persecution Amid ‘Massacre’ of Rohingyas*, *Rights Groups Say*, INDEP. (Sept. 5, 2017), <http://www.independent.co.uk/news/world/asia/burma-rohingya-muslim-persecution-massacre-rights-groups-aung-san-su-kyi-a7929881.html>.

### A. *The Muslim Experience in France*

#### 1. The French Ban on Face-Covering Veils

Recent developments in French law show an intent to restrict Muslim religious freedom.<sup>150</sup> For example, “[o]n March 15, 2004, France passed Law No. 2004-228, which provides that in public elementary schools, junior high schools and high schools, students are prohibited from wearing signs or clothing through which they exhibit conspicuously a religious affiliation.”<sup>151</sup>

“On its face, this law affects all religions equally. In practice, however, this law has most severely impacted Muslim students because it prohibits Muslim schoolgirls from wearing headscarves to school.”<sup>152</sup> A few months after passage of the law, the *Conseil d’Etat* (the French Supreme Court on Administrative Matters) upheld its constitutionality.<sup>153</sup> It found that, “although it infringed on the ‘freedom of thought, conscience, and religion,’ the restriction ‘was proportionate to the general interest pursued’—the respect of secularism in public schools.”<sup>154</sup>

Five years later, addressing both houses of French Parliament in a historic Versailles venue, French President Nicolas Sarkozy denounced the burqa as a sign of subjugation and of debasement that is not welcome on the French territory.<sup>155</sup> In 2010, the Law No. 2004-228 was broadened by the passage of the Law No. 2010-1192, which “banned the burqa and other full-face veils in all public places.”<sup>156</sup> “Both the French Assembly and the French Senate overwhelmingly passed the ban, which was ultimately approved by the Constitutional Council, France’s top legal authority, on October 7, 2010. The law went into effect on April 11, 2011.”<sup>157</sup> It imposes two types of punishment for the violation of the law against face-covering veils: (1) a fine of 150 euros (approximately \$190 USD) or a citizenship course for a woman who wears a burka in public, and (2) one year in prison and a fine of approximately 30,000 euros (about \$37,000 USD) for anyone who compels a woman to do so.<sup>158</sup>

When Law No. 2010-1192 passed, it was challenged in the European Court of Human Rights (ECtHR). In the highly controversial decision *S.A.S. v. France*, the ECtHR upheld the ban.<sup>159</sup> The court focused on whether the law interfered with the

150 See Jessica Fourneter, Note, *France: Banning Legal Pluralism by Passing a Law*, 29 HASTINGS INT’L & COMP. L. REV. 233, 235–36 (2006).

151 Jennifer Heider, *Unveiling the Truth Behind the French Burqa Ban: The Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights*, 22 IND. INT’L & COMP. L. REV. 93, 94–95 (2012) (citations and quotations omitted).

152 *Id.* at 95.

153 *Id.*

154 *Id.* (quoting Nicole Atwill, *France—Implementation of Law Prohibiting Religious Clothing in Public Schools*, 12 WORLD L. BULL. 1, 16 (2004)), <http://www.fas.org/sgp/othergov/wlb/200412.pdf>.

155 *Id.* at 95–96.

156 *Id.* at 96.

157 *Id.* (footnotes omitted).

158 *Id.* at 96–97.

159 *S.A.S. v. France*, App. No. 43835/11 (Eur. Ct. H.R. 2014).

rights of the applicant to privacy, freedom of religion, and freedom of expression.<sup>160</sup> The court confirmed the existence of such a restriction.<sup>161</sup> But this restriction of the rights is required by law, so the question was whether it corresponded to a legitimate aim and if the restriction was proportionate to that goal.<sup>162</sup> Thus, the court examined the necessity of the measure.<sup>163</sup>

The ECtHR upheld the law but not on grounds of public order.<sup>164</sup> The French government failed to demonstrate that the face veil caused a general threat against public safety.<sup>165</sup> However, the court found that the impugned ban could be regarded as justified in its principle solely in so far as it sought to guarantee the conditions of “living together.”<sup>166</sup> Consequently, the court concluded that the ban imposed can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of “living together” as an element of the “protection of the rights and freedoms of others.”<sup>167</sup> This has been criticized as an expansion of the legitimate bases for limitations on freedom of religion and belief beyond the grounds for limitation enumerated in the European Convention on Human Rights.<sup>168</sup>

## 2. The French Supreme Administrative Court’s Denial of Mabchour’s Citizenship

The ban on face-covering veils in the context of citizenship and immigration policies creates further questions.<sup>169</sup> “On June 27, 2008, the French Supreme Administrative Court denied citizenship to Mabchour on the basis of her alleged submission to her husband and her lack of integration to French society.”<sup>170</sup> However, the woman speaks French fluently and had been living in France with her French husband since 2000.<sup>171</sup> The woman in question appealed to the Council of State.<sup>172</sup> Rejecting her appeal, the council invoked her imperfect integration into French society because she had adopted a “radical” practice of her religion that was

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160 EQUAL RIGHTS TRUST, CASE SUMMARY: S.A.S v FRANCE 4 (Jul. 1 2014), <http://www.equalrightstrust.org/ertdocumentbank/Court%20Watch%20-%20SAS%20v%20France.pdf>.

161 *Id.*

162 *Id.* at 4–5.

163 *Id.* at 5.

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.*

168 See, e.g., Eva Brems, *S.A.S. v. France as a Problematic Precedent*, STRASBOURG OBSERVERS (July 9, 2014), <https://strasbourgoobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/> (explaining that the condition of “living together” “is certainly not recognized as a legal right in France or elsewhere”); Hakeem Yusuf, *S.A.S. v France: Supporting “Living Together” or Forced Assimilation?*, 3 INT’L HUM. RTS. L. REV. 277 (2014) (discussing how the concept of “living together,” which is not mentioned in the European Convention on Human Rights, was adopted by the court to legalize repression of minorities).

169 See Yael Barbibay, Note, *Citizenship Privilege or the Right to Religious Freedom: The Blackmailing of France’s Islamic Women*, 18 CARDOZO J. INT’L & COMP. L. 159, 161 (2010).

170 *Id.* at 164.

171 *Id.* at 164–65.

172 *Id.* at 165.

incompatible with an essential value of the French community: the principle of the equality of sexes.<sup>173</sup>

The judgment did not make any explicit reference to the issue of clothing.<sup>174</sup> However, the fact that the plaintiff wore the burqa had been mentioned in a submission of the Council of State.<sup>175</sup> In the submission, an independent female magistrate stated that the woman had come to the interview with the government authorities fully covered in a robe from the Arabic peninsula and had refused to bare her face even in front of female officers for purposes of identification.<sup>176</sup>

“While it is undisputed that, pursuant to Article 21–4 of the French Civil Code, it is within the jurisdiction of the French authorities to deny citizenship based on lack of assimilation, this decision mark[ed] a significant evolution in French citizenship law . . . .”<sup>177</sup> It was the first time that French authorities had officially characterized the unnamed “radical practice of a religion as incompatible with French society.”<sup>178</sup>

By holding that Mabchour’s radical practice of her religion is incompatible with the essential values of the French community, the Conseil d’Etat’s ruling legitimize[d] the prejudiced assessments by the French authorities as to whether applicants’ practice of Islam and its social corollaries conflict with French values and amount to a lack of assimilation.<sup>179</sup>

#### *B. The Decisions of the European Court of Justice*

The recent cases of *Achbita v. G4S Secure Solutions*<sup>180</sup> and *Bouagnaoui v. Micropole SA*<sup>181</sup> further developed the caselaw on the protection of religious manifestations by Muslims in Europe. Both *Achbita* and *Bouagnaoui* dealt with the application of the antidiscrimination provision in European Directive 2000/78<sup>182</sup> regarding religious expression in the workplace. In both cases a female Muslim employee was fired because of her decision to wear a religious headscarf—*Achbita* in violation of her employer’s written policies<sup>183</sup> and *Bouagnaoui* because of customer preferences not to work with somebody wearing a religious headscarf.<sup>184</sup> In *Achbita*, the court held that the termination was not direct discrimination because the policy prohibited the expression of all political, philosophical, and religious signs (not just the wearing of religious headscarves), but that it may have amounted to

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173 *Id.*

174 *Id.*

175 *Id.* at 166.

176 *Id.*

177 *Id.* at 165–66 (citations omitted).

178 *Id.* at 166.

179 *Id.* (citations and quotations omitted).

180 Case C-157/15, *Achbita v. G4S Secure Sols. NV*, 2017 EUR-Lex CELEX LEXIS 0157 (Mar. 14, 2017).

181 Case C-188/15, *Bouagnaoui v. Micropole SA*, 2017 EUR-Lex CELEX LEXIS 0188 (Mar. 14, 2017).

182 See Council Directive 2000/78/EC of 27 Nov. 2000, 2000 O.J. (L 303/16) (establishing “a general framework for equal treatment in employment and education” in the European Union).

183 *Achbita*, 2017 EUR-Lex at ¶¶ 13–16.

184 *Bouagnaoui, SA*, 2017 EUR-Lex at ¶ 14.

indirect discrimination if the neutral policy resulted in “a particular religion or belief being put at a particular disadvantage.”<sup>185</sup> In *Bouagnaoui*, the court found for the Muslim woman and held that satisfying customer preferences “cannot be considered a genuine and determining occupational requirement.”<sup>186</sup>

#### CONCLUSION

I have argued that the experience with religious freedom by a religious minority can affect how coreligionists view religious freedom in a place where that religion is a majority. The primary example I’ve cited is the experience of Catholics in America, which became an important factor in the emergence of the Catholic commitment to religious freedom that was manifested in Vatican II. The experience of Muslims in countries where they are a minority, especially in Europe, does not bode well for the prospect of European Muslims becoming a force for advocating the benefits of religious freedom that will be persuasive to their coreligionists in places where Muslims represent a majority. The experience of Muslims in America may provide a more hopeful prospect, but the story here, too, is mixed at best.

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185 *Achbita*, 2017 EUR-Lex at ¶ 45.

186 *Bouagnaoui*, SA, 2017 EUR-Lex at ¶ 41.