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THE TORTUOUS COURSE OF RELIGIOUS FREEDOM

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Abstract

This Essay, written for a conference at Notre Dame on Dignitatis Humanae, considers new challenges to and issues for religious freedom that have arisen recently in a world significantly changed from that of the 1960s, when the Declaration was first issued.

Introduction

Religious freedom is an ideal, understood in terms of what proponents take to be vital, timeless truths. Religious freedom is also a messy, ad hoc compromise worked out under conditions of prevalent error and potential oppression.

Thus, a religious believer presumably would wish that all of humanity would come to embrace the saving truth. If the believer is a Christian, she might fervently pray that "every knee should bow, . . . and every tongue confess that Jesus Christ is Lord."[1] But even someone who has no idea what the saving truth is might still wish that, if there is such a truth, everyone might come to know and accept it. If all of us converged on a single blessed truth, though, religious freedom would lose its importance: we might or might not *have* it, but we wouldn't really *need* it. Or at least we wouldn't need to talk about it, argue about it, fight for it, develop legal protections for it.

We worry about religious freedom when and because people do *not* agree: they believe different and seemingly incompatible things. Some of these incompatible beliefs may be true; many (and perhaps all) of them are, it seems, less than the pure truth. And disagreement—and especially disa-

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1 *Philippians* 2:10–11.

greement resulting from and reflecting the fact of widespread error—falls far short of being an ideal state of affairs.

Those are the conditions under which religious freedom becomes relevant. Religious freedom seeks to make room to believe and live by higher truth in a world containing, and very likely dominated by, lower falsehoods; and it seeks to appeal to people who do not agree about what the truth is. As a result, religious freedom has—and probably always has had, and always will have—both a universalist but also a compromised, ad hoc, faintly grubby feel about it. That humans have intrinsic dignity, and that saving faith must be voluntary and genuine: these majestic propositions may perhaps be true in all times and places. But what mundane legal doctrine should declare, or how courts or legislatures should act: these are matters that may vary with the context. They may depend on, among other things, what sorts of errors happen to prevail and what sorts of injustices happen to threaten, and hence on what sorts of adjustments or compromises are needed to try to make room for truth to be believed, proclaimed, and lived.

Dignitatis Humanae[2] reflects both the universalist and the local or contingent quality of religious freedom. Much of the Declaration has a categorical or universalist tone to it. When the Declaration asserts that people are "bound to adhere to the truth . . . and to order their whole lives in accord with the demands of truth,"[3]or when it declares that "[t]he act of faith is of its very nature a free act,"[4] the Declaration seems to be asserting propositions that would presumably be as valid a thousand years ago or a thousand years hence as they were in 1965. But the Declaration also conveys a sense of trying to be in accordance with opinions or developments of its own period.

Thus, the very first sentence in the document observes that "[a] sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man."[5] Later, the Declaration observes that "men of the present day want to be able freely to profess their religion in private and in public," and it goes on to reference the acceptance of religious freedom in "international documents," including, presumably, the Universal Declaration of Human Rights.[6] In these respects, the Declaration has a sense of trying to be in tune with the times. And it gently acknowledges that its emphatic endorsement of religious freedom reflects a change—or perhaps a development, at least in articulation—from church teachings or at least practices in earlier times. "In the life of the People of God, as it has made its pilgrim way through the vicissitudes of human history," the Declaration quietly confesses, "there has at times appeared a way of acting that was hardly in accord with the spirit of the Gospel or even opposed

2 Paul VI, Declaration *Dignitatis Humanae* (Dec. 7, 1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

3 *Id.* para. 2.

4 *Id.* para. 10.

5 *Id.* para. 1.

6 *Id.* para. 15.

to it."[7] Although no elaboration is given, readers may perceive an allusion to the medieval inquisitions, or perhaps—I'm not sure—to the nineteenth-century Syllabus of Errors. But then the document immediately returns to the universal. "Nevertheless, the doctrine of the Church that no one is to be coerced into faith has always stood firm."[8]

On the whole, *Dignitatis Humanae* seems to me to have done a laudable job of adjusting the universal to the contingencies of the mid-twentieth century world. I speak lightly as an outsider, though; others, especially Catholics, will have more intensely formed views.[9]

In at least one important respect, though, the world has changed in the past half-century—and not, I am afraid, for the better. Thus, the Declaration perceived among the "signs of the times"[10] a tendency towards greater unity. "Men of different cultures and religions are being brought together in closer relationships."[11] Whether or not that perception was correct in 1965, it seems inapt today, at least in this country. On the contrary, the dominant perception today is of growing and increasingly acrimonious polarization among people of different religiosities (or of none). This polarization is often described as the "culture wars," and it sucks more and more of the previously moderate or complacent into its vicious vortex—including Justices of the Supreme Court.[12] What I view as the Court's tragically misguided and divisive same-sex marriage decisions—not only *Obergefell v. Hodges*[13] but also *United States v. Windsor*[14]—and the reactions thereto are just one vivid bit of evidence of such divisiveness.

This polarization has serious potential consequences for religious freedom. At least in the United States, one side of the culture wars is associated with "religion"; the other side is typically viewed as mainly "secular." This is a crude and simplistic description, to be sure, and I want to try to amend it later in this Essay. But for the moment we might acknowledge that despite its crudity, the description obliquely conveys a good deal of truth. For example, in the Proposition 8 case, District Judge Vaughn Walker cited data indicating that an overwhelming majority of California voters who attend church weekly (eighty-four percent) had cast their ballots *for* the proposition, while a virtually identical proportion of citizens who never attend church (eighty-three percent) had voted *against* it.[15] On same-sex marriage, therefore, the hot-

7 *Id.* para. 12.

8 *Id.*

9 For trenchant but deeply divergent Catholic analyses, compare DOUGLAS FARROW, DESIRING A BETTER COUNTRY 63–77 (2015) (positive evaluation), with Patrick McKinley Brennan, *The Liberty of the Church: Source, Scope, and Scandal*, 21 J. CONTEMP. LEGAL ISSUES 165 (2013) (much more critical evaluation).

10 *Dignitatis Humanae*, *supra* note 2, para. 15.

11 *Id.*

12 For explanation, see generally Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675 (2014).

13 135 S. Ct. 2584 (2015).

14 133 S. Ct. 2675 (2013).

15 Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 952 (N.D. Cal. 2010).

button issue of recent years, active traditional religiosity seems to have marked a cultural and political divide of Grand Canyon proportions.

But if religion comes to mark such a divide, then it seems utterly predictable that the consensus that once existed in favor of religious freedom—the unity observed in *Dignitatis Humanae*—would disappear. And that is what has happened. Douglas Laycock observes that in the past, when nearly everyone was a religious believer of one kind or another, religious freedom could be seen as "a sort of mutual non-aggression pact" that was beneficial to all.[16] Today, by contrast, "[m]uch of the nonbelieving minority sees religious liberty as a protection only for believers. On that view, a universal natural right morphs into a special interest demand."[17] As a consequence, Laycock explains, "[f]or the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion *in principle*—suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized."[18]

This is a general description of our situation today, and of the challenge that faces proponents of religious freedom. But I want to be a bit more specific. So in the remainder of this talk, I want to discuss three more specific challenges or problems that should occupy proponents of religious freedom today.

I. The Problem of Free Exercise Exemptions

For much of American history, a central strategy—arguably *the* central strategy—for protecting religious freedom has made use of what we might call the exemptions approach. The idea is to create exemptions or exceptions from general laws for people for whom compliance would constitute a violation of their religion. These exemptions or exceptions have not been categorical; usually they have been qualified by some kind of balancing test, applied either in formulating the exemption or on a case-by-case basis *under* the exemption. Probably the best known examples have been draft exemptions: people who are religiously opposed to warfare—Quakers would be the classic example—have often been excused from military service, though they might be required to perform some sort of alternative community service instead.

It is sometimes suggested that the exemptions strategy was a creation of the Warren Court era, beginning with the well-known case of *Sherbert v. Verner*.[19] But I think the admirable casebook of which our keynote speaker, John Garvey, is a coauthor, amply demonstrates that this suggestion is mistaken. From the Founding period onward, advocates and courts have consid-

16 Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 422 (2011).

17 *Id.* (footnote omitted).

18 *Id.* at 407.

19 374 U.S. 398 (1963).

ered and sometimes approved exemptions for religious dissenters.[20] To be sure, whether and in what circumstances religious objectors should be exempted have always been contested questions. But support for such exemptions goes back to the beginnings of the American republic. And of course a presumptive requirement of exemptions was officially adopted in constitutional doctrine from the 1960s through 1990, and then in statutes such as the Religious Freedom Restoration Act.[21]

Recently, however, opposition to exemptions has stiffened. Some of the opposition may reflect simple rejection of the idea of religious freedom, at least as a special constitutional right.[22] But I think that even people (like myself) who favor religious freedom and support the idea of exemptions probably need to acknowledge that the exemptions strategy has become problematic as a principal device for protecting religious freedom. This is so for two main reasons.

One reason is the increasing polarization I mentioned a moment ago. As cultural divisions widen, the people who find themselves at odds with legal requirements are not limited to outlier groups like the Amish, or Quakers, or devout Native Americans—small groups that can usually be accommodated without great cost—but instead include more numerous and mainstream groups like serious Catholics, Evangelicals, Mormons, and devout Jews. Today the clash between law and religious conscience occurs not at the margins of society but rather at its core. And this shift makes exemptions less feasible as a strategy for dealing with diversity. It is one thing to excuse a few isolated folks from complying with a law; it is quite another to exempt, say, scores of employers responsible for thousands of employees.

The second reason why the exemptions strategy has become problematic is, to put it simply, the growth of government. As government has expanded the scope of its ambitions and activities, and as legal requirements and regulations accordingly proliferate, the occasions of conflict between law and religion multiply. To illustrate: in past generations, the contentious issue of late—namely, the conflict between some employers' religious convictions and a "contraceptive mandate"—was not presented. The conflict did not arise because it was not considered the federal government's business in the first place to tell employers they have to include contraceptive coverage in their benefits packages.

For myself, therefore, although I continue to support the idea of free exercise exemptions as a provisional measure, I also have serious doubts about the long-term efficacy of this strategy. And I believe that proponents of religious freedom need to be thinking about possible alternatives. That is

20 *See* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 139–98 (3d ed. 2011).

21 *Id.* at 160–210.

22 For a forceful presentation of this criticism, see *Why Law Professor Douglas Laycock Supports Same-Sex Marriage and Indiana's Religious Freedom Law*, RELIGION & POLITICS (Apr. 1, 2015), http://religionandpolitics.org/2015/04/01/why-law-professor-douglas-laycock-supports-same-sex-marriage-and-indianas-religious-freedom-law/.

a challenge, though, because it is not obvious what the viable alternatives might be.

II. The Coercively Inclusive Community

One response to this challenge would suggest that rather than exempt religious objectors, we ought more generally to downsize government: my colleague Maimon Schwarzschild has made this point forcefully and in derogation of the exemptions strategy.[23] Whatever the merits of this idea, though, its prospects do not look bright. On the contrary, the downsizing strategy runs into a different obstacle, which we might describe as the "progressive" project to create (coercively) a thicker and more inclusive community.

This project is starkly on display in some recent work of Robin West. In one essay, West criticizes the Supreme Court's decisions in *Hobby Lobby*[24] and the *Hosanna-Tabor*[25] ministerial exception case on the grounds that these decisions create rights to "exit" the "social contract," thereby undermining "our civic society" with its commitments to "inclusiveness, participation, and integration"[26] and to "equality, community, and democracy."[27] West's criticisms are part of a broader effort to distinguish between "exit rights," which she sees as subversive of community,[28] and "rights to enter," or to participate fully in "our civil society." In West's taxonomy, even rights to contraception and abortion can be characterized as "exit rights," but these particular rights are in her view justified.[29] The main targets of her criticism, it seems, are rights to own guns (recognized in *District of Columbia v. Heller*[30]), parental rights to homeschool one's children (tracing back to *Pierce v. Society of Sisters*[31]), and the church autonomy and free exercise rights upheld in *Hosanna-Tabor* and *Hobby Lobby*.

West's articles are significant, I believe, more for the powerful—and coercive—communitarian vision they express than for the arguments they make. Indeed, I can discern precious little actual argumentation in the arti-

23 Maimon Schwarzschild, *How Much Autonomy Do You Want?*, 51 San Diego L. Rev. 1105 (2014).

24 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

25 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

26 Robin West, *Freedom of the Church and Our Endangered Civil Rights: Exiting the Social Contract*, *in* The Rise of Corporate Religious Liberty 404, 407, 410 (Micah Schwartzman et al. eds., 2016).

27 Robin West, *A Tale of Two Rights*, 94 B.U. L. Rev. 893, 893 (2014).

28 West, *supra* note 26, at 412 ("[V]irtually by definition, exit rights splinter our communities. They divide us up every which way. . . . [T]hey move us, inexorably, . . . from an aspirational ideal of *e pluribus unum*, to that of *e pluribus pluribus*."); *see also* West, *supra* note 27, at 911 ("The new generation of exit rights . . . have the potential to unravel civil society, depending on the extent to which they are embraced.").

29 West, *supra* note 26, at 409–11.

30 554 U.S. 570 (2008).

31 268 U.S. 510 (1925).

cles. The distinction between rights to exit and to enter seems dubious and manipulable. For example, a right to engage in caustic and crude speech on political issues (as in, say, *Cohen v. California*[32]) can be characterized as a right to "exit" from a community norm of civility.[33] Or, on the contrary, it can be characterized as a right of full participation in the democratic debate. In the same way, West describes *Hobby Lobby* as creating a right of religious businesses to exit from antidiscrimination and other societal norms,[34] but the case might just as readily be characterized as seeking to permit Christians like the Greens entrance into and full participation in the marketplace. Even if West's core distinction between rights to exit and rights to enter is viable, moreover, she offers nothing beyond her *ipse dixit* to support her classification of some exit rights (to abortion, to contraception) as good and of others (like church autonomy) as bad.[35] It is telling, I think, that working within the academic community, West seemingly feels no need to offer anything more. Though stingingly critical of the *Hosanna-Tabor* decision, she does not directly engage with the question of church autonomy either as a matter of constitutional doctrine or of political philosophy, but instead liberally sprinkles the decision, and other decisions she disapproves, with adjectives like "worrisome," "tragic," and "profoundly troubling."[36]

Despite (or by means of) these defaults, West does powerfully convey a forceful conception of the claims of community. This conception is reflected in the aggressively beatific descriptions she piles onto "our civic society."[37] That society is "less insulting, less hurtful, more inclusive, more fully participatory, more generous, and fairer" than alternatives.[38] It promises "a world of equal opportunity and full participation that is free of racism and sexism and their related effects."[39] It is "a national community of broad based participation and civic equality."[40] Although West repeatedly invokes the idea of a "social contract,"[41] she nowhere systematically seeks to justify or explicate the terms of that contract or, as social contract theorists have typically done, to provide a rationale for determining what powers the contract does and does not confer on government. Rather, her implicit presumption seems to be that *everything*—every institution, every domain of life—is potentially within the scope of the "contract":[42] that is why she can characterize any limitation on governmental power as an "exit right."

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32 403 U.S. 15 (1971).

33 Although West says little about freedom of speech, there is some indication that she would regard it as an "exit right." Thus, she contrasts "civil rights"—which in her view are participation rights—with "rights of conscience and speech." West, *supra* note 26, at 413.

34 *Id.* at 406.

35 *See id.* at 417–18.

36 *Id.* at 404, 416.

37 *Id.* at 407.

38 *Id.* at 400.

39 *Id.* at 401.

40 *Id.* at 404.

41 *See, e.g.*, *id.* at 403.

42 *See generally id.*

Nor does West engage with the formidable issue of "consent," as social contract theorists often do: the difficulty is instead casually deflected by the prodigious bestowal of the adjective "shared" in connection with "*our* civil society."[43] An innocent observer might wonder: if the laws and commitments West favors are indeed "shared," then why are so many citizens—thousands or even millions of them, apparently—seeking "exit" from those laws and commitments? Nowhere does West forthrightly acknowledge the existence of legitimate disagreement about what a good community would be: instead, there is only "our civil society"—our "shared" society—from which hosts of ungrateful citizens are perversely seeking to "exit." Precedents come to mind.

If West were merely an idiosyncratic academic, her essays would perhaps be nothing more than a kind of curiosity. But I think a similar communitarian impulse is readily discernible in broader political developments. With respect to the contraceptive mandate, for example, it appears (as Justice Kennedy argued in *Hobby Lobby*) that there was and is a perfectly viable way in which contraceptive coverage can be provided even to employees of the few businesses that have a religious objection to providing it.[44] Why then were dissenting Justices and critics of the decision so vehemently insistent that *the business itself*—and thus its Christian owners, the Greens—be required to provide the coverage?[45] In a similar vein, Douglas Laycock and Thomas Berg observe that in reality, no sensible same-sex couple either needs or wants the services of, say, a wedding photographer or counselor who is religiously opposed to their union.[46] Why then have litigants and courts been insistent on subjecting religiously scrupulous actors to antidiscrimination laws? A complete answer to that question would no doubt be complex. But one discerns in these movements the same kind of insistent, coercively communitarian project expressed in Robin West's recent writings.

In earlier decades, the communitarian impulse was typically perceived as a traditionalist or conservative one, expressed in, for example, regulations of obscenity. In the famous Hart-Devlin debate, for example, it was the more conservative contributor, Judge Patrick Devlin, who articulated the communitarian rationale: Professor Hart, the liberal, was on the side of individualism.[47] In our time, by contrast, the communitarian aspiration has become liberal, or rather "progressive"; it is primarily embodied in the idea of equal-

43 *E.g.*, *id.* at 412 (emphasis added); 407; 409; 410; 416.

44 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2786–87 (2014) (Kennedy, J., concurring).

45 *Id.* at 2787, 2790–91 (Ginsburg, J., dissenting).

46 *See, e.g.*, Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1, 8 (2013) ("Of course, no same-sex couple would ever want to be counseled by such a counselor. Demanding a commitment to counsel same-sex couples does not obtain counseling for those couples, but it does threaten to drive from the helping professions all those who adhere to older religious understandings of marriage.").

47 For a retrospective review of the debate, see Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 74–78 (1995).

ity and implemented through a variety of antidiscrimination laws. And at least for the moment, equality is a kind of cultural and political bulldozer. Analytically, the idea may be "empty," as Peter Westen famously argued,[48] but its conceptual emptiness does not make it any less potent politically. On the contrary. And any agenda that succeeds in wrapping itself in the rhetoric of equality—the campaign for so-called "marriage equality," for example—thereby becomes almost irresistible.[49]

Some years ago, Robert Nisbet argued that "[e]quality feeds on itself as no other single social value does. It is not long before it becomes more than a value. It takes on . . . all the overtones of redemptiveness and becomes a religious rather than a secular idea."[50] And Nisbet added that

> it would be hard to exaggerate the potential spiritual dynamic that lies in the idea of equality at the present time. One would have to go back to certain other ages, such as imperial Rome, in which Christianity was generated as a major historical force, or Western Europe of the Reformation, to find a theme endowed with as much unifying, mobilizing power, especially among intellectuals, as the idea of equality carries now.[51]

Forty years later, Nisbet's observations seem eerily prescient. Which leads to the third problem I want to discuss.

III. The New Religiosity

I want to call attention to one point in Nisbet's claim that in the past I had quickly passed over as merely metaphorical: Nisbet says that equality has become a "religious" rather than a "secular" idea. I've come to think that this suggestion may deserve to be taken more literally than I previously realized.

This realization came to me earlier this year, actually, in March. News gets old fast these days, as you know, but you may recall the brouhaha that occurred when the state where this conference was convened—Indiana—enacted a statute seeking to protect religious freedom for its citizens and businesses. And, as they say, all hell broke loose. Headlines written by people who either did not know or did not care about the law's actual contents decried Indiana's "Anti-Gay Law."[52] Late-night entertainers mocked the law

48 Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537, 547 (1982).

49 For further development of this claim, see Steven D. Smith, *Equality, Religion, and Nihilism* 1 (San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 14-169, 2014), http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=30840#hide2516400.

50 Robert Nisbet, Twilight of Authority 202 (1975).

51 *Id.* at 201–02.

52 *See, e.g.*, Eric Bradner, *NCAA "Concerned" over Indiana Law that Allows Biz to Reject Gays*, CNN (Mar. 26, 2015), http://www.cnn.com/2015/03/25/politics/mike-pence-religious-freedom-bill-gay-rights/; Scott Neuman, *Indiana Governor: Lawmakers to "Clarify" Anti-Gay Law*, NPR (Mar. 30, 2015), http://www.npr.org/sections/thetwo-way/2015/03/29/396131254/indiana-governor-lawmakers-to-clarify-anti-gay-law; Editorial, *In Indiana, Using Religion as a Cover for Bigotry*, N.Y. Times (Mar. 31, 2015), http://www.nytimes.com/2015/03/31/opinion/in-indiana-using-religion-as-a-cover-for-bigotry.html; Amanda Terkel, *Indiana Governor Signs Anti-Gay "Religious Freedom" Bill at Private Ceremony*, Huffington Post

in similar terms. As did columnists for major newspapers and magazines, who asserted—without evidence, but with unflappable certainty—that the law was little more than a license to discriminate against gays and lesbians.[53] CEOs, major corporations, athletic directors, politicians, and pundits (including one of my favorites, Charles Barkley) denounced the law.[54] As it happened, Barkley a/k/a Barles Charkley was starring in a series of commercials promoting "March Madness" (a singularly appropriate term, in this instance), which was nearing its gala culmination—in, as luck or providence would have it, Indiana. It was too late for the athletic powers-that-be to move college basketball's Final Four tournament out of Indianapolis, but those powers did sternly warn that unless the state recanted, future such events (and their considerable revenues) would likely be withheld from the state.[55] Other groups and individuals declared boycotts. Mayors and governors announced that state employees would not be reimbursed for travel to the state.[56] And a profusely apologetic Indiana governor and legislature

(Mar. 26, 2015), http://www.huffingtonpost.com/2015/03/26/indiana-governor-mike-pence-anti-gay-bill_n_6947472.html.

53 Editorial, *Big Business and Anti-Gay Laws*, N.Y. TIMES (Apr. 3, 2015), http://www.nytimes.com/2015/04/04/opinion/big-businesss-critical-role-on-anti-gay-laws.html; Tim Holbrook, Opinion, *Indiana Uses Religious Freedom Against Gays*, CNN (Mar. 31, 2015), http://www.cnn.com/2015/03/31/opinions/holbrook-indiana-law/; Eugene Robinson, Opinion, *A Large Pizza with a Side of Hate*, WASH. POST (Apr. 2, 2015), https://www.washingtonpost.com/opinions/indianas-flip-flop-on-its-religious-freedom-law/2015/04/02/45c3b63c-d96c-11e4-8103-fa84725dbf9d_story.html.

54 *See, e.g.*, Michael Barbaro & Erik Eckholm, *Indiana Law Denounced as Invitation to Discriminate Against Gays*, N.Y. TIMES (Mar. 27, 2015), http://www.nytimes.com/2015/03/28/us/politics/indiana-law-denounced-as-invitation-to-discriminate-against-gays.html; Daniel Berger, *Reggie Miller, Charles Barkley Rail Against Indiana Law*, MSNBC (Mar. 29, 2015), http://www.msnbc.com/msnbc/reggie-miller-charles-barkley-rail-against-indiana-law; Emma Margolin, *Indiana's New Religious Freedom Law Sparks Outrage*, MSNBC (Mar. 27, 2015), http://www.msnbc.com/msnbc/indiana-religious-freedom-law-sparks-outrage; Cole Stangler & David Sirota, *Indiana "Anti-Gay Law": Firms Criticizing Pence Funded Him as He Fought LGBT Rights*, INT'L BUS. TIMES (Apr. 2, 2015), http://www.ibtimes.com/indiana-anti-gay-law-firms-criticizing-pence-funded-him-he-fought-lgbt-rights-1867874; Jeff Swiatek & Tim Evans, *9 Ind. CEOs Call for Changes to "Religious Freedom" Law*, USA TODAY (Mar. 30, 2015), http://www.usatoday.com/story/money/business/2015/03/30/ind-religious-freedom-bill-business-reaction/70693326/.

55 Marc Tracy, *Controversial Indiana Law Puts Pressure on N.C.A.A. and Other Leagues*, N.Y. TIMES (Mar. 26, 2015), http://www.nytimes.com/2015/03/27/sports/ncaabasketball/controversial-indiana-law-puts-pressure-on-ncaa-and-other-leagues.html.

56 Adam Edelman, *Connecticut Gov. Dannel Malloy Bans State-Funded Travel to Indiana Due to State's New Discrimination Law*, N.Y. DAILY NEWS (Mar. 30, 2015), http://www.nydailynews.com/news/politics/conn-gov-bans-state-funded-travel-indiana-due-new-law-article-1.2167205; Matt Ferner, *Denver Mayor Bans Government Travel to Indiana over Religious Freedom Law*, HUFFINGTON POST (Mar. 31, 2015), http://www.huffingtonpost.com/2015/03/31/denver-indiana-travel-ban_n_6981240.html; Kenneth Lovett & Jennifer Fermino, *Cuomo, de Blasio Bans* [sic] *Government-Funded Travel to Indiana over Law Seen as Discriminatory to Gays and Lesbians*, N.Y. DAILY NEWS (Apr. 1, 2015), http://www.nydailynews.com/news/politics/ny-lawmakers-call-ban-state-funded-travel-indiana-article-1.2168280.

promptly issued their "mea culpa," amending the law in a way designed to eliminate its ostensibly iniquitous provisions.[57]

The deluge of denunciation was remarkable in more than one way. As more sober commentators pointed out, the Indiana law was virtually identical to a federal statute adopted twenty-two years earlier with nearly unanimous approval in Congress. In signing that statute, President Bill Clinton had delivered an eloquent address praising religious freedom as "perhaps the most precious of all American liberties" and urging Americans to "fight to the death to preserve the right of every American to practice whatever convictions he or she has."[58] Could anyone possibly have foreseen that the "first freedom" could fall from grace so quickly?

The anti-Indiana campaign was remarkable as well for its ferocious, almost frantic quality, so foreign to the cool pragmatism that supposedly distinguishes Americans, especially those of a "secular" disposition. Douglas Laycock pointed out that none of the dire consequences confidently predicted for the Indiana law had occurred with the federal law or with the substantially similar laws in twenty other states.[59] In fact, Laycock explained, these laws had *not* been interpreted to license discrimination against gays, and very few claimants had even tried to use them in this way.[60] Which is hardly surprising: after all, many Americans remain opposed to same-sex marriage, but few (including the New Mexico wedding photographer or the Washington florist of recently publicized cases) have any religious objection to serving someone on the basis of sexual orientation. The myth that large numbers of businesses are eagerly seeking an excuse to turn away customers—and to subject themselves to crippling boycotts and social media criticism—is just that: an untenable myth.

But this sort of sober appeal to facts appeared to have no impact at all on the critics. It was hard to avoid the conclusion that their campaign was not primarily about remedying real, concrete deprivations suffered or likely to be suffered by real people. It had a different, larger, more evangelical purpose, and was being pursued with an evangelical zeal. The campaign was about stamping out wickedness. And the conflict was between righteousness and evil—or at least between what Indiana's critics experienced as righteousness and what they took to be evil.

Another noteworthy feature of the anti-Indiana campaign was its apparent mendacity. The content and implications of the statute were routinely misrepresented, not only by pundits and politicians but by scholarly critics as

57 Tony Cook et al., *Indiana Governor Signs Amended "Religious Freedom" Law*, USA TODAY (Apr. 2, 2015), http://www.usatoday.com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination/70819106/.

58 President William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 PUB. PAPERS 2000, 2000–01 (Nov. 16, 1993).

59 *See supra* note 22.

60 *See supra* note 22.

well.[61] I qualify the charge of "mendacity" with "apparent," though, for two reasons. First, many of those who misrepresented the law were quite likely simply ignorant. They believed and repeated what others said. I want to excuse Barkley on this ground, but the excuse might even apply to some of the more scholarly critics. You might think that academics would inform themselves before signing on to letters or statements or manifestos denouncing something like the Indiana law. But in the politicized atmosphere of academia today, it is hardly unknown (as I can attest, alas, from first-hand experience) that busy scholars will sometimes sign letters or amicus briefs at the request of friends and in a presumed good cause without rigorously studying the contents of the polemics.

Even so, I have to admit that some of the scholarly misrepresentations left me feeling troubled and resentful. For example, one longish letter[62] signed by a number of academics whom I respect and regard as friends argued at one point that *in its terms* the Indiana law went well beyond the federal law, and the letter offered in support of this crucial claim an explanation so palpably implausible that I couldn't help wondering: "How can they say this stuff when they have to know it just isn't true?"[63]

The question was unsettling, because although it is natural and routine for scholars to differ in their views and in the strength they attribute to different arguments, scholarly discourse still proceeds on the assumption that participants will at least speak sincerely and in good faith: and it was hard for me to see how that assumption could be honored here. But then it occurred to

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61 For a more detailed explanation of this charge of misrepresentation, read Laycock's interview on the subject. *See supra* note 22.

62 Letter from Ctr. for Gender & Sexuality Law, Columbia L. Sch., to Representative Ed DeLaney, Ind. House of Representatives (Feb. 27, 2015), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/law_professors_letter_on_indiana_rfra.pdf.

63 The explanation asserts:

> [T]he state RFRA bills do not, in fact, mirror the language of the federal RFRA. The federal RFRA and most other state RFRAs provide that in order to pass constitutional muster the alleged burden on the exercise of sincerely held religious beliefs must be "in furtherance of a compelling governmental interest." Some versions of the state RFRA now pending before the Indiana Legislature, by contrast, set forth that the state must demonstrate that "applying the burden to the person's exercise of religion is: (1) essential to further a compelling governmental interest; . . ." This difference in language, creating a much higher burden for the state in defending the application of otherwise generally applicable laws in cases where there is an alleged burden on religious liberty rights, is extremely important.

Id. at 6–7 (alteration in original). The reasoning here is not easy to follow, for me at least, but it seems the ostensible difference is that the federal RFRA would deny exemptions if the law from which exemption is sought is "*in furtherance of*" a compelling interest, whereas the version of the Indiana law referred to would deny exemptions only if a law is "*essential to*" a compelling interest. But given the federal RFRA's "least restrictive means" provision, this alleged distinction seems illusory; it surely does not create a "much higher burden for the state."

me—and this is my second reason for saying "*apparent* mendacity"—that the letter exuded a sort of righteous zeal, and that its departure from literal truth was somewhat akin to the sorts of departures characteristic of some religious literature—old hagiographical accounts of the saints, for example. The writers of such accounts seem to have conceived of themselves as speaking Truth in a higher and more spiritual sense, even if not merely on the mundane level of ordinary facts. The law professors' letter had something of this zealous character. Which once again pointed to the conclusion that what was going on with the Indiana controversy was a conflict among religions. Or at least among competing religiosities.

In this respect, moreover, the Indiana controversy was typical of the contemporary culture wars generally, encompassing conflicts over abortion, homosexuality, contraception, assisted suicide, and marriage. It is possible—but it is not plausible or perspicuous, I think—to describe or explain these conflicts in simple "secular vs. religious" terms. Rather, the committed actors—the actors on *both* sides of these issues—exhibit a distinctly, passionately, "religious" quality.

And in fact observers increasingly recognize that our current cultural struggles are most perspicuously described as a contest between competing religiosities.[64] But *what* religions are in conflict? It is easy enough to identify the religious folks on one side of these conflicts—conservative Christians, evangelical Protestants, Mormons, sometimes devout or orthodox Jews. But what religion or religions are lined up on the other side of the controversies? What exactly are we dealing with here?

IV. The Return of the Pagan?

I have no worked-out answer to that question. But we might get some help here from a distinguished if occasionally inscrutable poet. In the dark days just preceding World War II, T.S. Eliot gave a series of lectures at Cambridge University; these were published under the title of *The Idea of a Christian Society*.[65] Eliot's lectures advanced an argument that, though it may seem prima facie implausible and even offensive to contemporary readers, is at least intriguing. For our purposes, that argument might be summarized in terms of three main claims—one predictive, one interpretive, and one prescriptive.

The predictive claim was that the future of Western societies would be determined by a contest between Christianity and a rival that Eliot described as "modern paganism."[66] "I believe," he told his English audience, "that the choice before us is between the formation of a new Christian culture, and the acceptance of a pagan one."[67] Looking outward to America and the Domin-

64 *See* William Voegeli, *That New-Time Religion*, 15 Claremont Rev. of Books, Summer 2015, at 12.

65 T.S. Eliot, *The Idea of a Christian Society*, *in* Christianity and Culture 1–77 (1948).

66 *Id.* at 48.

67 *Id.* at 10.

ions, similarly, Eliot declared that "if these countries are to develop a positive culture of their own, . . . they can only proceed either in the direction of a pagan or of a Christian society."[68]

The interpretive claim was that Western societies as of his time should be characterized as "Christian"—but not because they were deeply or self-consciously Christian in any substantial sense. On the contrary, Eliot looked out on the world and perceived a religious and cultural muddle. Regarding "the division between Christians and non-Christians," he observed, "the great majority of people are neither one thing nor the other, but are living in a no man's land."[69] In this muddled situation, people's self-labeling could not be taken at face value. "In the present ubiquity of ignorance, one cannot but suspect that many who call themselves Christians do not understand what the word means, and that some who would vigorously repudiate Christianity are more Christian than many who maintain it."[70] Even so, Western societies had once been Christian, and "a society has not ceased to be Christian until it has become positively something else."[71] That, he thought, had not happened.[72] Not yet.

Eliot's interpretive claim about a society's character was reminiscent of the law's traditional treatment of domicile: you remain a domiciliary of a state until you establish domicile in a different state.[73] So if you were born and raised in Kansas, say, then although you may have wandered around the world for the last half century without once setting foot in Kansas during all that time, you will still be a domiciliary of Kansas until you establish a permanent residence somewhere else. In a similar way, Eliot thought that England and other Western societies had formerly been Christian, and until they became "positively something else," they would remain "Christian" societies—even if there was precious little Christianity left in them.[74]

Eliot's prescriptive claim was that a Christian society is preferable to a pagan one. Not that a Christian society, or at least one that could possibly be achieved, would be any sort of Shangri-La. Eliot made no great claims for a potential Christian society of the kind that, say, Robin West makes for our current "shared" "civil society"—the one from which so many citizens are trying to "exit."[75] On the contrary. "[W]e must remember," Eliot cautioned, "that whatever reform or revolution we carry out, the result will always be a sordid travesty of what human society should be."[76]

Eliot understood as well that his preference for a Christian society would not find ready acceptance with the kind of people who attend learned lec-

68 *Id.* at 36.
69 *Id.* at 39.
70 *Id.* at 34–35.
71 *Id.* at 10.
72 *Id.*
73 *See, e.g.*, White v. Tennant, 8 S.E. 596, 597 (1888).
74 ELIOT, *supra* note 65, at 10.
75 *See supra* notes 26–29 and accompanying text.
76 ELIOT, *supra* note 65, at 47.

tures at eminent universities like Cambridge—or, for that matter, anywhere else.[77] But he suggested that the other option was even less inviting. "A Christian society only becomes acceptable after you have fairly examined the alternatives."[78] And once those alternatives—the "pagan" alternatives—are considered, it becomes apparent, he thought, that "the only hopeful course for a society which would thrive and continue its creative activity in the arts of civilisation, is to become Christian. That prospect involves, at least, discipline, inconvenience and discomfort: but here as hereafter the alternative to hell is purgatory."[79]

On first hearing, and probably on second and third hearings as well, Eliot's argument will strike many readers today as implausible, and probably offensive as well. Just for a moment, though, bracket your initial incredulity (and, probably, your indignation) and consider how Eliot's assessment just might illuminate our current situation.

In accordance with his claims, we might say that American society through much of its history and at least until quite recently was a "Christian" society (as indeed the Supreme Court declared it to be in 1892).[80] It was a Christian society not because its citizens were uniformly or deeply Christian—some were, some were not, many were probably "neither one thing nor the other, but [were] living in a no man's land"[81]—but because it once *had been* (or had *descended from*) a world more distinctively Christian, and because Christianity as a sort of once-dominant cultural presence had not been replaced by "positively something else."[82]

By the late twentieth century, however, many discerned a decisive change. Under the influence of progressivism and the civil rights agenda refracted through the prism of the Sexual Revolution, the former faintly Christian culture was being displaced, at least at the elite, official, and judicial levels, by "something else."

And what was that "something else"? Like most other observers, I have often described it (including earlier in this Essay) as "secular." But that description begins to seem too insipid, at least if "secular" is understood mostly in negative terms as "not religious" or in association with the supposedly dispassionate and value-neutral enterprise of empirical science. Rather, the "something else" plainly has its own muscular, profoundly and even aggressively value-laden, motivational or inspirational content and quality. The spectacularly sudden adoption/imposition of same-sex marriage and the virulent reaction to the Indiana religious freedom law would count as cogent evidence of this change.

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77 "[P]aganism," he acknowledged, "holds all the most valuable advertising space." *Id.* at 18.

78 *Id.*

79 *Id.* at 18–19.

80 Church of the Holy Trinity v. United States, 143 U.S. 457, 470 (1892).

81 ELIOT, *supra* note 65, at 39.

82 *See supra* notes 69–71 and accompanying text.

Not content to describe the new "something else" as "secular," someone (like Eliot) might prefer to call it "modern paganism." That label will provoke objections, obviously. Even conceding that "secular" is too open or noncommittal a term to adequately describe current cultural and political movements, why would we choose "pagan" as a better description? Indeed, what would it even mean, today, to embrace a "pagan" society? To revive the practice of sacrificing bulls to Apollo? To make important political and military decisions by solemnly inspecting the entrails of birds? Nobody wants anything like that—or at least nobody worth bothering about.

Eliot, of course, talked of "*modern* paganism," which presumably would be different from ancient or classical paganism. Even so, the viability of his diagnosis would presumably depend upon the articulation of some conception of "paganism" that would be plausible and perspicuous in conveying a common essential quality connecting the religiosity of the classical Greek and Roman world with the religious zeal evident in, for example, the passionate opposition to the Indiana religious freedom law.

Could such a conception be articulated? I believe that it could, but I am not going to try to do that articulation here; and so I will have to be content for now with a general observation. As noted, we (and I in particular) have typically understood modern conflicts over religious freedom, along with related "culture war" conflicts, in terms of a contest between "religious" and "secular" constituencies and movements. Such descriptions are obviously simplifications, but that I think is not in itself a strong objection: *any* theory or description of large-scale social phenomena will necessarily generalize, round off, and simplify. But it begins to seem that the "religious v. secular" diagnoses are misguided in a more serious way: they not only simplify but they affirmatively misdescribe our situation. That is because, whether or not you think (with Eliot) that "modern paganism" is the most apt description, our conflicts seem to pit different religiosities, or different religious constituencies, against each other. And until we can get our descriptions at least approximately right, we are unlikely to do very well with our prognoses and our prescriptions.

Conclusion

I have suggested that *Dignitatis Humanae* did a creditable job of articulating the commitment to religious freedom under what appeared to be the prevailing attitudes and assumptions of the mid-twentieth century. But I have also suggested that the world has changed significantly since that time. What we see today is a conflict between traditional Christian (or Judeo-Christian) religiosity and a new, energetic religiosity that might be described, as T. S. Eliot suggested, as "modern paganism."

I quickly acknowledge that a good deal of work and explanation would be needed to make this alternative diagnosis persuasive. There are lots of "promissory notes," as they say, in my presentation. Whether those promis-

sory notes will be paid . . . who knows?[83] For now, I will only conclude by saying that *if* Eliot's thesis *is* correct, then it seems that we may today be in a position not so disanalogous to that reported at the end of the book of Joshua in what Christians call the Old Testament. Joshua famously presented his people with a choice: they could follow and serve the one God of Israel, or they could serve the pagan gods—the gods from "beyond the River" and the gods of the Amorites.[84] The Israelites chose the first alternative—or at least they said (and presumably thought) they did. But the choice continued to challenge and torment them throughout biblical history. Convenient though it might be to make the choice once-and-for-all, it seems that possibility is not within the capacities of mortals. So basically the same choice confronted the Christian subjects of Rome in the first centuries under the Empire—over and over again.[85]

Arguably, it confronts us still. And whether and how we think of religious freedom will be powerfully affected by that choice.

83 This is a current project-in-progress, very tentatively entitled "Christians and Pagans in the City."

84 *Joshua* 24:14–16.

85 *See generally, e.g.*, BRUCE W. WINTER, DIVINE HONOURS FOR THE CAESARS: THE FIRST CHRISTIANS' RESPONSES (2015).