

## When Is a Catholic Doing Legal Theory Doing “Catholic Legal Theory?”

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It is important at the outset to note the limits of this Essay: providing a comprehensive overview of Catholic legal theory is such a formidable mountain that I disclaim any intention to embark on that climb. It is practically impossible for one person to capture the whole field given its breadth, depth, and history. On the question of breadth, there are scholarly journals devoted in substantial part to the development of Catholic legal theory,<sup>1</sup> blogs like *Mirror of Justice*,<sup>2</sup> anthologies of Catholic legal theory,<sup>3</sup> an annual conference on Catholic legal theory,<sup>4</sup> and hundreds of journal articles, not to mention a robust pedagogical dimension, with an increasing number of law schools offering courses that incorporate significant themes from the Catholic intellectual tradition. As for depth, the field is inescapably interdisciplinary and remarkably sophisticated. Law professors tend to be professional dabblers, and though I think we are well positioned to play a valuable role in making philosophical and theological concepts more practically accessible by tracing their implications for law, we need to be careful not to force two millennia worth of reflection and thought into our easy and occasionally superficial legal concepts and categories. And obviously, the history of the Catholic

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<sup>1</sup> For example, such journals include Villanova University’s *Journal of Catholic Social Thought* and St. John’s University School of Law’s *Journal of Catholic Legal Studies*.

<sup>2</sup> See *Mirror of Justice*, [www.mirrorofjustice.blogs.com](http://www.mirrorofjustice.blogs.com) (last visited Apr. 5, 2010).

<sup>3</sup> See, e.g., *RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW* (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007).

<sup>4</sup> The Conference on Catholic Legal Thought convenes at a different Catholic law school each June.

legal theory project is not easily summarized—the project among American law professors is of fairly recent vintage, but the roster of Catholic legal theorists includes, of course, Thomas Aquinas, Augustine, the Apostle Paul, and arguably even Aristotle.

As such, I will not even purport to be the final or exhaustive word on the state of Catholic legal theory. Any authentic insight I can provide will most likely be more personal, deriving from my own efforts to contribute to the Catholic legal theory project. I think I can best capture the aspirations and challenges of Catholic legal theory methodologies by sharing my own experience with those aspirations and challenges. Hopefully my comments will resonate with others engaged in the project and will shed a bit of light on the project for those who are not so engaged.

My experience working on my book, *Conscience and the Common Good*, provides a synopsis of my experience with Catholic legal theory. To get a sense of how I approach Catholic legal theory, you have to get a sense of the book, so please bear with me. My book's central claim is that our law's individualized understanding of conscience threatens the full flourishing of conscience, which is relational in nature. Americans have traditionally embraced the liberty of conscience as an essential limitation on state power, but this understanding has not been much help in resolving an expanding range of conscience claims in which the individual is opposed not by the state but by the similarly conscience-driven claims of other individuals and groups. As a bulwark against state power, a robust right of conscience is indispensable. As a trump card that empowers individuals to shut down the moral claims of other marketplace actors, a right of conscience becomes significantly more problematic.

Consider one recent conscience battle in New Mexico. Vanessa Willock contacted Elane Photography, a husband-and-wife photo agency in Albuquerque, New Mexico, through its Web site to inquire about photographing her same-sex commitment ceremony.<sup>5</sup> Co-owner Elaine Huguenin emailed back: "We do not photograph same-sex weddings. But thanks for checking out our site!"<sup>6</sup> Willock filed a complaint with the state human rights commission, alleging a violation of the state's public accommodations law, which covers sexual orientation.<sup>7</sup> At the hearing, Willock testified that the email "was a

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<sup>5</sup> *Morning Edition: Gay Rights, Religious Liberties: A Three-Act Story* (NPR radio broadcast June 16, 2008), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=91486340>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

shock” and caused her “anger and fear.”<sup>8</sup> Jonathan Huguenin explained at the hearing that they made sure that “everything that [they] photographed, everything [they] used [their] artistic ability for,” was in line with their Christian values.<sup>9</sup> The commission rejected the photographers’ constitutional claims, found that they unlawfully discriminated on the basis of sexual orientation, and ordered them to pay attorney’s fees of nearly \$7000 to Willock.<sup>10</sup>

When the state moves against the individual, either foreclosing dissent or coercing assent to the majority’s ideals, it makes sense to view liberty of conscience as a legal protection that arises at the point of conflict between an individual’s deeply held moral or religious beliefs and state power.<sup>11</sup> Unlike cases regarding the military draft<sup>12</sup> or pledge of allegiance,<sup>13</sup> both sides in the Elane Photography case can wrap themselves in the mantle of conscience. Willock acted on her belief in the moral legitimacy of same-sex relationships by seeking to solemnize her commitment with the same celebratory trappings that have long been part of traditional marriage ceremonies. The Huguenins provide the more straightforward conscience claim, to be sure, in their refusal to participate in the celebration of a relationship that they deem immoral. But unlike traditional claims seeking to protect individuals against the state’s coercive power, both Willock and the Huguenins are seeking to protect their moral autonomy against the threat of non-state actors. While Willock’s critics argue that the liberty of conscience should not be interpreted as empowering individuals to force others to assist their morally contested projects, the Huguenins’ critics argue that liberty of conscience should not be interpreted as a license for marketplace providers to define their professional duties so as to discriminate against members of historically marginalized groups.

To get a firmer grasp on why New Mexico’s resolution of this dispute reflects an inaccurate and dangerous understanding of con-

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See Brief of Respondent at 2, *Willock v. Elane Photography*, No. 06-12-20-0685 (N.M. Human Rights Comm’n Feb. 20, 2008), available at <http://volokh.com/files/willockrespondentbrief.pdf> (describing constitutional claims); Andrew Webb, *State: It’s Discrimination; Photographer Refused to Shoot Gay Ceremony*, ALBUQUERQUE J., Apr. 11, 2008, at A1 (discussing the commission’s decision).

<sup>11</sup> See, e.g., *Girouard v. United States*, 328 U.S. 61, 68 (1946) (“The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual.”).

<sup>12</sup> See, e.g., *United States v. Seeger*, 380 U.S. 163 (1965).

<sup>13</sup> See, e.g., *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

science, we need to reclaim a dimension of the term that is discernible from its earliest usage: conscience is a set of moral truth claims that can be shared with others. The dictates of conscience are defined, articulated, and lived out in relationship with others. Our consciences are shaped externally, our moral convictions have sources, and our sense of self comes into relief through interaction with others. By conveying my perception of reality's normative implications, my conscience makes truth claims that possess authority over conduct—both my own and the conduct of those who share, or come to share, my perception. Conscience, by its very nature, connects a person to something bigger than herself, not only because we form our moral convictions through interaction with the world around us, but also because we invest those convictions with real world authority in ways that are accessible, if not agreeable, to others. This is the relational dimension of conscience.

Cultivating and maintaining the conditions necessary for these relationships to thrive should be a priority for our society if we are serious about freedom of conscience. The problem today is that the state, in *Elane Photography* and other cases, pays insufficient heed to these relationships, effectively giving the individual customer's conscience a trump over the provider's conscience through the imposition of broad nondiscrimination laws. Increasingly, such laws appear aimed not simply at ensuring access to an essential good or service, but at enshrining nondiscrimination as a blanket requirement for providers' participation in the marketplace.

Too often, however, the response of those concerned with the erosion of providers' liberty is to champion the recognition of a blanket right of conscience on their behalf. They ask the law to immunize an individual employee's conscience-driven marketplace conduct from state penalty or employer reprisal. If an individual employee of a provider has the unfettered legal right to make her own decisions about the morally contested goods and services she will provide, it becomes more difficult for institutions to create and maintain their own distinct moral identities. For example, does the relentless focus on giving individual pharmacists rights of conscience to be deployed against their employers stand in tension with a discernible rise in the number of small, intentionally pro-life pharmacies?<sup>14</sup>

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<sup>14</sup> See Rob Stein, "Pro-Life" Drugstores Market Beliefs; No Contraceptives for Chantilly Shop, WASH. POST, June 16, 2008, at A1. Not all of these drugstores have proven to be economically viable. See Petula Dvorak, *Pharmacy with Moral Convictions Found Few Clients*, WASH. POST, Apr. 13, 2010, at B1.

Wedding photographers and pharmacists are the tip of a very large iceberg. Participants in an exploding array of debates over the provision of goods and services in our society tend to invoke conscience as a freestanding, absolute value without acknowledging—much less articulating—the real-world relationships and associational ties that empower individuals to live out the dictates of conscience. Besides the battle in the pharmacy, consumer-provider conscience battles have also erupted over a Christian physician's refusal to provide reproductive assistance to a patient because she is a lesbian or is not married,<sup>15</sup> Muslim taxi drivers' refusal to transport passengers carrying alcohol,<sup>16</sup> Muslim cashiers' refusal to handle pork products,<sup>17</sup> and a Catholic lawyer's unsuccessful effort to decline a court appointment to represent a minor seeking an abortion,<sup>18</sup> to name just a few.

Other legal challenges have taken aim more directly at an organization's moral identity, particularly its religious identity, based on perceived threats to the moral autonomy of individual employees or customers. EHarmony, a leading dating Web site founded by an evangelical Christian, was forced via litigation to begin offering matchmaking services for same-sex relationships.<sup>19</sup> State universities have revoked recognition of Christian student groups that exclude non-Christians or non-celibate homosexuals;<sup>20</sup> legislatures in California and New York have forced Catholic Charities to cover the cost of con-

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<sup>15</sup> See *N. Coast Women's Care Med. Group, Inc. v. San Diego County Superior Court*, 189 P.3d 959, 967–68 (Cal. 2008) (holding that religious liberty and free speech rights did not exempt physicians from complying with state prohibition against sexual orientation discrimination); Eithne Donnellan, *Infertility Treatment Refusal Led to Inquiry*, IRISH TIMES (Dublin, Ir.), Apr. 15, 2010, at 3 (reporting on disciplinary proceedings against Catholic physician who limited fertility treatments to married couples).

<sup>16</sup> See Curt Brown, *Cabbies Ordered to Pick up All Riders*, STAR TRIBUNE (Minneapolis, Minn.), Apr. 17, 2007, at 1A.

<sup>17</sup> See Chris Serres & Matt McKinney, *Target Is Transferring Cashiers Who Avoid Pork*, STAR TRIBUNE (Minneapolis, Minn.), Mar. 17, 2007, at 1A.

<sup>18</sup> See Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 640–48 (1997)

<sup>19</sup> See Victoria Kim, *EHarmony Settles Suit Brought by Gays and Lesbians*, L.A. TIMES, Jan. 27, 2010, at A9.

<sup>20</sup> See Adam Liptak, *Rights and Religion Clash in Court Case*, N.Y. TIMES, Dec. 8, 2009, at A24 (“The Supreme Court on Monday agreed to hear an appeal from a Christian student group that had been denied recognition by a public law school in California for excluding homosexuals and nonbelievers.”).

traceptives for employees;<sup>21</sup> and the Massachusetts legislature required Catholic Charities to place children with same-sex couples as a condition of maintaining its license to perform adoption services.<sup>22</sup> The modern inclination is to presume that the cause of conscience is represented by the individuals whose own exercise of conscience may be burdened by an organization's distinctive moral identity. Little attention is paid to the conscience-facilitating function of the organizations themselves.

These individualized conceptions of conscience—whether espoused by the consumer or the provider—do not hold much promise for resolving the new wave of conscience battles because they overlook the relationships that are key to conscience's long-term flourishing. The state would more prudently support the liberty of conscience by stepping back from the winner-take-all language of rights talk and allowing Vanessa Willock and the Huguenins to live out their convictions in the marketplace. Assuming that other wedding photographers are willing and able to shoot a same-sex commitment ceremony, the state should leave the Huguenins to answer to the customer, not the state, and allow customers to utilize market power to contest (or embrace) the moral norms of their choosing. Rather than making all photography agencies morally fungible via state edict, the market allows the flourishing of plural moral norms in the provision of these services. At the same time, if the Huguenins cannot find market support for their agency's moral claims, they would not have an absolute right to force other agencies to hire them and accommodate their claims of conscience. They should have the freedom to create an economically viable agency with a distinct moral identity; they should not have the authority to hinder the cultivation of another agency's conflicting moral identity. Put differently, the scope of legal intervention necessary to dismantle Jim Crow should not serve as the template for which we reflexively reach in our moral contests today. The remedy of the Civil Rights Act fit the problem posed by a society hard-wired for the subjugation and exclusion of African Americans. The marginalization and division accompanying today's moral contests do not, in my view, warrant a similar legal response given the conscience-squelching fallout of such massive state intrusion into the landscape of morally distinct institutions.

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<sup>21</sup> See *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67 (Cal. 2004) (upholding California law); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006) (upholding New York law).

<sup>22</sup> See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, at A1.

Recently, I was laying out these arguments in a conversation with the religion reporter for a national newspaper. We talked for a half-hour about my thesis and its policy implications, including my disagreement with the cases involving Catholic Charities. Then the reporter asked, “So are you Catholic?” and I hesitated. I am certainly not embarrassed about being Catholic, but I had this gnawing sense of, “Uh-oh, where is this headed?” And then she asked the follow-up: “Is that why you reached the conclusions you reached?”

I did not really want to answer that question. Of course my Catholic identity shaped my conclusions, but admitting that seemed like it would compromise my scholarly integrity in her eyes, or so I assumed. I did not want her to think that I figured out the policy outcomes I needed to achieve as a Catholic and then rigged my theoretical framework accordingly. So the question I have to grapple with is this: what does it mean for me to be a Catholic doing legal theory, even when I am not trying to do “Catholic legal theory”?

Answering that question requires me to ask some methodological questions about Catholic legal theory. There are a couple of different ways to get at this. First, I would distinguish between Catholic legal theory that describes and Catholic legal theory that proclaims. Second, I would distinguish between Catholic legal theory that is prophetic and Catholic legal theory that is pragmatic. These distinctions are not rigid or absolute, of course, but they do describe meaningful differences, and being clear about those differences can help us understand what it means—and equally important, what it does not mean—to be engaged in Catholic legal theory. In my own work as a Catholic legal theorist, I might be describing a tradition, I might be proclaiming its truth, I might be speaking prophetically to power, or I might be speaking pragmatically about reasonably debatable methods by which to cultivate the common good. At different points, if I want to contribute to the full flowering of our project, I hope that I do all of these.

To take the first category, sometimes a Catholic legal theorist is essentially standing outside the tradition, describing it. In my book, I do this in the section that traces the intellectual history of conscience, showing how conscience has been understood through most of the Christian tradition as moral knowledge that can be shared. At around the time Augustine was writing, Jerome introduced the concept of “synderesis” to the discussion of conscience (though his discovery of the new term was possibly the result of an error in transcription). While “conscientia” was used to refer to the person’s application of moral knowledge to conduct, Jerome used synderesis

to designate the person's apprehension of moral knowledge itself. In his commentary on the prophet Ezekiel, Jerome analyzed Ezekiel's vision of four beings—a man, a lion, an ox, and an eagle—and mentions other writers' interpretations of the vision:

These writers interpret the vision in terms of Plato's theory of the three elements of the soul. There are Reason, Spirit, and Desire; to these correspond respectively the man, the lion, and the ox. Now, above these three was the eagle; so in the soul, they say, above the other three elements and beyond them is a fourth, which the Greeks call *synderesis*. This is that spark of conscience which was not quenched even in the heart of Cain, when he was driven out of paradise. This it is that makes us, too, feel our sinfulness when we are overcome by evil Desire or unbridled Spirit, or deceived by sham Reason. It is natural to identify *synderesis* with the eagle, since it is distinct from the other three elements and corrects them when they err.<sup>23</sup>

Note that Jerome did not contend that *synderesis* automatically or unfailingly corrects the erroneous operation of reason, spirit, and desire. He cautions that "in some men we see this conscience overthrown and displaced; they have no sense of guilt or shame for their sins," and they "deserve the rebuke, 'Still never a blush on thy harlot's brow.'"<sup>24</sup> Conscience, in early Christian understandings, connected a person to objective (divine) truth, but its perception of that truth could be mistaken.

Thomas Aquinas went further, asserting that "conscience is neither a faculty nor a habit, but an act: the act of applying knowledge to conduct."<sup>25</sup> But conscience is not simply the exercise of the will—it is in dialogue with the will, though the will should obey its commands. Like other Scholastics, Aquinas held that the will must be judged by the good as presented by reason, not by the good as it actually exists.<sup>26</sup> He wrote that "every act of will against reason, whether in the right or in the wrong, is always bad."<sup>27</sup> In other words, according to Aquinas, every dictate of conscience is binding, regardless of its truth or falsity.

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<sup>23</sup> ERIC D'ARCY, CONSCIENCE AND ITS RIGHT TO FREEDOM 16–17 (1961) (quoting St. Jerome, *Commentarium in Ezechielem*, in 25 PATROLOGIAE CURSUS COMPLETUS 15, 22 (J.P. Migne ed., Venit Apud Editorem 1845) (n.d.) (internal citations omitted)).

<sup>24</sup> *Id.* at 17 (quoting St. Jerome, *Commentarium in Ezechielem*, in 25 PATROLOGIAE CURSUS COMPLETUS 15, 22 (J.P. Migne ed., Venit Apud Editorem 1845) (n.d.) (quoting Jeremiah 3:3)).

<sup>25</sup> *Id.* at 45.

<sup>26</sup> *Id.* at 87–88.

<sup>27</sup> THOMAS AQUINAS, SUMMA THEOLOGIAE, IaIIae, ques. 19, art. 5, at 63 (Thomas Gilby trans., Blackfriars 1966) (n.d.).

The gap between the moral law and a person's application of the moral law—a gap which can widen or narrow over time—helps clarify what is lacking when we characterize conscience as a self-contained moral code. Conscience is subject to continual shaping by the person's experience of, and exposure to, sources of moral influence. In other words, the modern conception of conscience as a mysterious and inaccessible "black box" is less relational than conscience as part of an ongoing dialogue that is neither static nor self-contained. The Christian tradition of conscience can help us understand the external orientation of conscience, which can in turn show us why the liberty of conscience must be a social liberty. For this analysis, the fact that I am Catholic is not all that relevant to my analysis; I am just hopefully getting the history right. Participants in the Catholic legal theory project may have greater motivation than other scholars to devote sustained attention to the portrayal of the Catholic tradition and its contributions to law, and the community of Catholic legal scholars may provide a more supportive venue for ensuring the accuracy of the descriptive work. But obviously this type of scholarship is not limited to the project's participants.

Another possibility, though, is that my scholarship leads me to stand within the Catholic tradition, not simply describing its development, but proclaiming its truth. One foundational claim throughout my book regards the social nature of the human person. If I just say, "Well, some people say that the human person is inherently social," that cannot really carry my thesis. I need to own it. This sort of scholarship has the potential to alienate readers, especially if my proclamation explicitly or implicitly appeals to the authority of my religious tradition for its persuasive power. For example, in my book I cite Pope Benedict XVI in order to describe the progression of Catholic thinking on a particular issue, but I am more hesitant to cite the pope when I am seeking to persuade the reader of the truth of the matter asserted. This is where the Catholic legal theory project encounters a sort of resistance that may be more pronounced than the resistance encountered by our Jewish, Protestant, and Muslim friends: in pursuing truth, we are also accountable to a fairly clear line of human authority, not just the authority of sacred texts.<sup>28</sup>

This was undoubtedly a factor in my hesitation to the reporter's question, and why I could not just say, "Well, everyone is shaped by some perspective." There is something about the Catholic perspec-

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<sup>28</sup> I realize that questions regarding the clarity of the authority wielded by the Church are themselves much disputed by Catholic legal theorists.

tive that does not quite fit: a real scholar is not supposed to take marching orders from anyone, much less from a person at the head of a church spouting, to put it charitably from the secular academic perspective, “counter-cultural” views. Now I may believe that the pope says X because X is true, but it is easy for readers (and students in my classes) to dismiss my citation on the ground that I think X is true because the pope is saying it, and even more provocatively, that I would feel restrained from denying X even if I did not believe it was true because the pope said it was true. So in my own work developing Catholic legal theory, I need to proclaim the underlying ideas, not the authoritative packaging in which the ideas are often found. It is important to build bridges between the Catholic worldview and those who stand outside the tradition.

There are many bridge-building figures from within the Catholic tradition, such as the philosopher Charles Taylor. Taylor’s formidable intellectual legacy is built on a Catholic understanding of the human person, but his profound insights into the human condition flow from the depth of his simultaneous immersion in Catholic and modern social narratives. Taylor does not “circle the wagons” against a hostile secular culture; he opens himself (and his readers) to learning from secular culture without marginalizing the relevance of his own worldview, which in many ways runs counter to that culture. For my purposes, Taylor’s work is essential for drawing out the relationship between personal identity and other selves. Taylor shows that the self is inescapably relational because “[a] self can never be described without reference to those who surround it.”<sup>29</sup> Human life is dialogical in that we can only understand ourselves and acquire an identity via languages of self-expression, but we enter into these languages only in exchange with others.<sup>30</sup> It is not simply that a person is strongly attached to a particular moral framework; the framework is the horizon against which a person is able to make more particular moral judgments, locating herself within the everyday world. Without such a framework, a person “wouldn’t know anymore, for an important range of questions, what the significance of things was for them.”<sup>31</sup> The individual’s articulation of a framework is itself deeply relational. Taylor points out that “I can identify my identity only

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<sup>29</sup> CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 35 (1989).

<sup>30</sup> See CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 32–33 (1991) (“No one acquires the languages needed for self-definition on their own.”).

<sup>31</sup> TAYLOR, *supra* note 29, at 27.

against the background of things that matter,”<sup>32</sup> which inescapably draws a person outside herself. American law reflects the truth that conscience is at the core of personal identity, but the law too often fails to reflect the additional truth that the core of personal identity is inescapably relational.

The most profound insights from within the Catholic tradition are not exclusive to the Catholic tradition because they express fundamental human truths. Relying on work from outside the tradition can bring this home. For example, Kwame Anthony Appiah notes that “part of the material that we are responding to in shaping our selves is not within us but outside us, out there in the social world.”<sup>33</sup> And significantly, our universe of “what matters” will not always be products of conscious individual choice. This is the point Michael Sandel makes by asking,

Are we as moral agents bound only by the ends and roles we choose for ourselves, or can we sometimes be obligated to fulfill certain ends we have not chosen—ends given by nature or God, for example, or by our identity as a member of a family or people, culture or tradition?<sup>34</sup>

No matter how individualist our moral framework might be, the process of articulating that framework is not—and cannot be—successfully undertaken by the individual in a vacuum. Making sense of ourselves requires looking beyond ourselves. As a constitutive element of self-identity, conscience is relational.

So when I, as a scholar, proclaim truths found within my faith tradition, I need not put up walls between me and my non-Catholic readers. I should be expanding the conversation, not narrowing it. Catholic legal theory is not self-contained or inward gazing. Big “C” Catholic is small “c” catholic, affirming truth and goodness whatever its source. This is how I think about the natural law. I do not spend much time writing expressly about natural law, and I fear that, on some issues, the broader premises from which more particular policy conclusions proceed are themselves so deeply contested that invocations of “the natural law” seem to shed more heat than light. The ability of natural law arguments to gain traction in our political and legal discourse is limited, and those limits must be part of our thinking about how the arguments are most effectively utilized. I do believe that the natural law can help us articulate moral truths that we

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<sup>32</sup> TAYLOR, *supra* note 30, at 40.

<sup>33</sup> KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 21 (2005).

<sup>34</sup> MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 186–87 (2d ed. 1998).

know to be true but which often go ignored. In other words, references to the natural law may not always convince people of truths they deny, but they may force people to stop ignoring truths they cannot deny, such as the social nature of the human person.

This leads to the second set of categories one sees in the methodology of Catholic legal theory: am I speaking prophetically or practically? Or is it possible to do both? Speaking prophetically, making truth claims to power—on the sanctity of unborn life, for example, or on the nature of marriage, or on health care as a right rather than a privilege, or on the dignity of the immigrant, or on the preferential option for the poor. There are lots of examples where Catholic legal theory stakes out principles that run counter to society's prevailing judgment. In my book, I am speaking a truth about human flourishing to the emerging legal order—that the liberty of conscience is an important and natural right, and that a strictly individualized liberty of conscience is missing much of what is important about conscience.

But we also should have capacity to speak prophetically to the religious order. If I want to reframe the way society thinks about the liberty of conscience, I cannot be afraid of including my own religious community in my criticism. Occasionally I hear arguments from Catholics in favor of conscience protection based on the assertion that the underlying claim comports with the natural law. That argument is a nonstarter politically, and it is also inconsistent with much of the Catholic intellectual tradition's understanding of conscience. A person may be culpable for improperly forming her conscience, but not for following the dictates of that improperly formed conscience. If Catholics want to secure freedom for Catholic Charities, for example, to resist laws compelling the provision of contraceptives or the placement of children with same-sex couples, the argument cannot be that "these institutional claims are the products of well-formed consciences." That argument prevails only as long as the claims themselves prevail politically (in which case there would be no need for a conscience-based exemption). The whole point is that, on an expanding variety of issues, the majority of citizens have decided that consciences reflecting traditional natural law teaching are *not* well formed. Yes, they may be "well formed" according to our interpretation of the natural law, but the claim for an exemption does not aim at persuading the legislature to embrace the "well formed" judgment as a normative proposition, but to defer to the claimant's own understanding of "well formed."

Or to restate a message I have expressed to the pro-life community: is your commitment to conscience really about conscience, or is

it just new packaging for the same arguments about abortion? If our commitment to conscience only extends to the issues we lost politically and is not anchored to a broader framework, the other side can easily extinguish our conscience claims when they do not share our view on the importance of a specific issue.

Catholic legal theorists cannot simply speak prophetically; we must also speak practically. The practical dimension is where we have struggled at times to know what to say. For example, what should a post-*Roe v. Wade*<sup>35</sup> legal regime look like? How should the law respect the dignity of gays and lesbians? If health care is a right, who has the corresponding duty to provide it, and if resources are limited, then how do we pay for that right? The fact that an issue is subject to prudential judgment does not mean that the issue is less important, even when there is room for disagreement among faithful Catholics. Staking out broad truth claims is essential, but ignoring the thorny real-world questions over implementing those truths makes the Catholic legal theory project appear otherworldly and academic. We should not shirk from speaking on issues about which reasonable people may disagree, though in those cases, we should be careful not to portray our conclusions as the only acceptable “Catholic” positions.

In my own book, I try to take practical issues head-on. For example, many Catholics champion individual rights of conscience for employees, but I am more cautious based in part on Catholic teaching about the important role institutions play in furthering the common good. Creating space for employees’ exercise and expression of conscience in the workplace is important, but the efforts should not substitute for the parallel endeavor of constructing the corporation’s institutional conscience. The corporation’s moral identity is not simply the sum of its parts; the corporation needs discretion to shape its own identity. Under some circumstances, this will limit the conscience-driven conduct of individual employees, but that is the price of the corporation’s mediating role.

To cite another example on which reasonable Catholics can disagree, I do not believe that the liberty of conscience can or should be limited to religiously formed consciences. If the right of conscience is to mean something, the modern state is hard-pressed to exclude nonreligious sources of moral belief from its protection, especially in light of Establishment Clause concerns. While we should hesitate to legitimize religiously derived claims of conscience over other types, it remains important not to diminish the importance of accommodat-

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<sup>35</sup> 410 U.S. 113 (1973).

ing religious convictions, and one effective way of doing so is to address religious convictions specifically. The Establishment Clause should not be read to foreclose the law's treatment of religion as a distinct category of conscience-driven claims. Again, Catholic legal scholars cannot just trumpet the liberty of conscience—we must help figure out how it should work in the real world, even when Catholic legal theory will not propose a single correct answer.

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In the end, maybe my hesitation in answering the reporter's question, "Are you Catholic?" is the same hesitation that I would feel when that question follows any substantive discussion I am having about issues that matter. Perhaps my fear is that the religious label, especially the Catholic label, will be an easy way to pigeonhole me and more easily dismiss my opinions as preordained conclusions dictated by the fact of my submission to an authority beyond reason, rendering them less authentic and even less human. In this regard, my hesitation reflects my own misconception of what it means to be a Catholic legal scholar *and* about what it means to be a Catholic. My faith should be the impetus to delve even more deeply into the heart of what it means to be human, to grapple unflinchingly with the reality of our existence. In a real sense, Catholic legal theory exhibits much of the same promise and peril of my own personal faith journey. When I use faith as an escape, when I toss off trite prayers to numb myself to the tragedy that unfolds around me, rather than praying to express and share in the depth of that grief, I am rightly dismissed by the grieving. Similarly, when I use faith in my scholarship as a bludgeon to wield against those who reject my worldview, or when I dress up my unsupported assertions as self-evident simply because they come from my faith tradition, I am rightly dismissed by those legal scholars who are authentically struggling with the question of how imperfect people should govern themselves in an imperfect world. The Catholic legal theory project has much to contribute to the legal academy, starting with the anthropological question of what it even means to be human. Our contribution depends not just on the relevance of our answers, but also on the humanity with which we extend those answers.

Of course, I wrote *Conscience and the Common Good* as a Catholic. I could not have written it any other way. This fact should not serve as a conversation stopper, but as an invitation to a deeper, truer conversation, because Catholic legal theory is the working out in law of the fundamental truths comprising the human condition. In other

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words, Catholic legal theory is about what we, as humans, share; put even more starkly, it is about what we cannot help but share.