

WE HOLD THESE TRUTHS AND THE PROBLEM OF PUBLIC MORALITY

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This essay maintains that although We Hold These Truths represented an important milestone in Catholic reflection on the American regime, Murray's analysis of public morality and the state's role in its promotion and enforcement is notably weak and of little assistance to us today. More specifically, it argues that Murray's analysis is insufficiently philosophical and too concerned with the pragmatic task of forging an approach widely acceptable in the America of his day; that it rests on an artificial distinction between "private" and "public" morality that fails to sufficiently appreciate the essential dependence of sound morals legislation upon the government's recognition of moral truth; and that it too closely identifies the whole of law's competence with the scope of its coercive jurisdiction, thus failing to appreciate the directive and educative properties of law and its role in the establishment of conditions conducive to human flourishing.

John Courtney Murray, S.J., was the central intellectual figure on the victorious side of the Church's intramural battle about religious liberty that found conclusive resolution in *Dignitatis Humanae*. Indeed, there can be no question that *Dignitatis Humanae* represents one of the seminal documents of modern Catholic social teaching. In the forty-five years since it was promulgated, nothing of an authoritative nature has been added to it. No key point has been the subject of papal modification, or clarification. It is as it was. In fact, the importance of this stable and lasting achievement continues to increase over time. Both Pope John Paul II and Pope Benedict XVI regularly, and in prominent venues, have defended the Council's teaching about religious liberty as not just an important human right, but also a bulwark of other rights and of the free society itself.¹

Although it is common knowledge that Murray had reservations about the argument of *Dignitatis*—most notably, that it was insufficiently grounded in man's dignity as a moral subject²—his fingerprints are all over the first half of that document. Its definition of religious liberty, its universal scope, its rootedness in natural reasoning unaided by revelation—many of the main lines of argument—all accord with Murray's thought. In fact, they partly owe their presence there to Murray's work during the Council (as Cardinal Spellman's *peritus*), and to the work of others who were guided by Murray's whole corpus. For

this reason alone, careful reading of Murray's many articles on the subject, all written between the end of World War II and the Council, well repays the effort.

Yet while all that Murray contributed to these achievements is to be justly celebrated, *We Hold These Truths* (hereafter, *WHTT*) has almost nothing to say about internal Church arguments about religious liberty.³ It does, however, include Murray's most important paper on the First Amendment Religion Clauses, featuring his famous typology of them as "Articles of Faith" or "Articles of Peace" (45-78). I have elsewhere criticized this part of *WHTT* and shall say nothing further about it in these pages.⁴ Here I shall instead concentrate upon Murray's analysis of the role which civil law may and should play in maintaining public morality, an analysis principally found in Chapter 7 of *WHTT*, "Should There Be a Law? The Question of Censorship" (155-174). It is, as far as I can tell, Murray's most philosophical treatment of morals laws (such as those punishing the distribution of obscene literature). I think Murray's analysis is seriously defective. The bulk of this essay comprises my explanation of why I think so.

I

What was Murray trying to do in *WHTT* in his treatment of morals laws? Notwithstanding the passage of fifty years since he wrote it, we can gain easy entry into the subject matter of Murray's project. The basic structure of his problem is the same now as it was then. We are today as vexed with questions of legal moralism as they were in the 1950s. The leading problems then centered upon sexual morality, as they do now. For Murray, as for us, the legal regulation of obscenity—what Murray labeled "censorship"—was a prominent concern. Then, as now, the relationship of law to marriage was perhaps the most important aspect of legal moralism. Then, it was largely about divorce reform, married couples' access to contraception, and the legal treatment of non-marital sexual conduct (subjects which Murray does treat in this chapter). Those matters have all but disappeared from serious debate about the reach of the criminal law. But moral judgments about contraception and adultery continue to play a role in our lively debates about conscience protection and post-divorce child custody proceedings. Abortion rankles us. Murray did not live long enough to contend with it, at least in his publications.

We have enough points of practical contact with Murray's problematic, I think, to understand what he was talking about. And there are ample clues about what he was attempting to do, his analytical

objective. *WHTT* was (as John Quinn establishes in his contribution to this symposium) conceived by Sheed & Ward as well as by Murray as a distinctively Catholic attempt to analyze the limits of law on moral questions in (then) contemporary conditions of American *pluralism*. Murray accepted the publisher's invitation, stating that he saw the work as "a primer of pluralism, paying special attention to the dilemmas posed to and by Catholics in a pluralistic society."⁵ America is today no less pluralistic than it was when Murray wrote, and its peace continues to be disturbed by these dilemmas.

II

My first criticism of Murray's treatment of morals laws arises directly from his stated aim, which was to produce a distinctively *American* template for addressing them. (I refer here to Murray's aims for *WHTT*, and not to his aims for each of the chapters when they were first published or delivered.) I do not claim to know whether Murray put together *WHTT* primarily for America's non-Catholics, and to whom he would communicate the welcome news that an enlightened Church was in the offing, that they could reasonably anticipate a more Kennedyesque body which portended relief from (what we would call) "culture wars" instigated by the Legion of Decency and Cardinal Spellman; or whether he principally sought to persuade Catholics to break with the too-conservative wing of the Church which so worried America's Protestants. In any event, Murray sought answers that possessed very wide non-denominational appeal. He sought answers that were distinctively *ours*: hence his overweening emphases upon American positive law (especially the Constitution), "consensus," what "pluralistic" America could actually, in fact, agree upon, and the American proposition.

Indeed, the subtitle of *WHTT* is "Catholic Reflections on the American Proposition." In his Preface to the 1988 edition, Fr. Walter Burghart, S.J., wrote that the "unifying thread" of the chapters (all were previously published papers) was "Murray's effort to explore, on a high level of reasoned rhetoric, America's public philosophy, the civic consensus whereby a people acquires its identity and sense of purpose" (iii).

I wrote above that "Should There Be a Law?" was Murray's most philosophical treatment of legal moralism. He nonetheless intended it to be decidedly unphilosophical. Throughout the paper he eschews "ideal" solutions, "doctrinaire grounds," and "rationalism." His watchwords are instead "pragmatism" and "prudence." His four "rules"

about censorship were not, he admitted, “made in heaven.” “On the contrary, they are to be considered as rules made on earth, by the practical reason of man, for application in the conditions—by no means ‘ideal’—of a religiously and morally divided society” (169).

Murray was not so earthbound as to attempt many judgments about specific issues. Apart from his (later revised) call to use “coercion” against the “contraceptive industry” (157), the closest he comes to a concrete decision is to say that “few would deny” “repression [of pornography] is necessary” (165). He intended to “attempt to define certain central issues and to state some of the principles that bear upon their solution” (158), and sought out a “general orientation” on the matter (164). It seems that Murray produced the best set of foundational considerations he could mine from American experience and wisdom. He gave his readers a portable template, one forged from our best thoughts on the subject of morals laws. In other words: *Murray put on offer a body of normative considerations of a distinctly American provenance, and asserted that its pedigree counted strongly in favor of its correctness.*

This distinctive project no doubt contributed something of value to the 1950s debate about morals laws. But I should think that it did no more than that, and thus that it is of very little use to us today. For a variety of reason, the matters of public morality vexing us today do not call for resolutions that are distinctly *ours*. By and large we do not seek answers bearing the “made in America” tag. Nor should we. A uniquely “American” answer to these questions has much less purchase—and rightly so—upon our judgment than it did, evidently, in the world of American “consensus” politics in the 1950s.

Among the reasons why we are so much less inclined than was Murray to dig deep for “American” “consensus” are: global mass communications, which tend to relativize every country’s tradition and culture; the loss of reverence for the American past and for the political genius of the founders, which supported the view that whatever has long been practiced by wide segments of American society was very likely to be in harmony with the demands of right reason; the welcome decline of an uncritical patriotism, as well as the more ambiguous decline of belief in American exceptionalism and even in the country’s essential and extraordinary goodness; the slow but steady penetration of international legal norms into domestic policy-making; and the ever-rising consciousness of human rights and universal human dignity as a result of which basic questions of justice have to depend for their correct answer upon moral truths supported by sound critical reasoning, rather than a particular community’s conventions or customs. We do not seek answers that are distinctly “American”; we seek answers that are *true*.

To be sure, there is a substantial local (contingent and cultural) element to any helpful answer to a question about morals laws. But we live in a time of widespread disagreement—“pluralism”—about fundamental matters of justice, about what constitutes human flourishing, and even the possibility of secure, objective moral knowledge. We need to know, for example, the truth about when people begin and about what marriage really is, so that we can justly legislate about (against) abortion and same-sex marriage. The moral *truth* about torture and capital punishment is the basic guide to whether our law should sanction either. (Here I speak of what the law should be, and not necessarily about constitutional interpretation by judges.) Our questions about law and obscenity depend for their proper resolution upon truths about sexual morality and the deleterious effects upon genuine human flourishing and valuable human relationships caused by the disintegrated and narcissistic pleasures that the consumption of obscenity involves. The truth about human equality and the radical extension to everyone of an equal right not to be intentionally killed lie at the heart of today’s debates about just war and non-combatant immunity. And, these examples do not exhaust the set of practical legal issues whose just resolution depends essentially upon foundational moral and metaphysical truths.

III

Murray did not see how mightily dependent questions about morals laws were upon moral truth. Partly this obscurity is excusable: the “pluralism” of his day was, in some important respects, shallower than (though still perhaps as broad as) it is today. Some of Murray’s tunnel vision owes, though, to his own determination to seek a consensus-grounded *modus vivendi*, a relentlessly homegrown approach to morals law (a “primer”) which could unite precisely by turning to Americana and away from critical morality as touchstone of the debate. Murray rightly insisted in *WHTT* that the genuine immorality of a practice (such as contraception) did not in itself establish that legal prohibition of it was justified. (*Pace* Murray, I do not think anyone ever held otherwise; that is, no one has ever thought that immorality was a *sufficient* condition for making anything a crime.) More than the sheer fact of immorality is needed, and for Murray that “more” was what is “necessary for the healthy functioning of the social order,” to what is “minimally acceptable, and in this sense socially necessary” (166).

This is not nearly enough. Murray also seems to have implied that whenever coercion for the sake of public morality is unjustified,

government becomes incompetent to know the moral truth about the (now) “private” activity, thus effectively depriving public authority of a premise necessary for promoting moral perfection through non-coercive measures.

Let me explain. Murray relied strategically in *WHTT* upon a division between “public” and what he called “private” morality. He uses this distinction most famously to deal with the problem of contraception. In “Should There Be a Law?,” he criticized Protestants for a characteristic failure to grasp this distinction and its pivotal importance to solving the legal moralism problem: “Protestant moral theory . . . seems never to have been able to grasp the distinction between private and public morality” (158). There he identified the *use* of contraception as a matter of “private” morality, while recognizing that application of the criminal law to what he called the “contraceptive industry” could in principle be justified (157–158). Yet, several years later in his Memorandum to Cardinal Cushing about what the Church should publicly say about pending revisions to Massachusetts’ laws against *distributing* contraceptives, Murray located that activity on the “private” side of morality.⁶

We have little reason to doubt that at this time (1965) Murray believed that using contraceptives was immoral. Doubt on that score arises only later, near the end of his life, in a perhaps inaccurately recorded lecture to a Toledo audience on the morality of contraception (where he appears to be either deeply confused about the matter or simply approving of contraceptives).⁷ So, when Murray describes in these earlier writings contraceptive use or distribution as a matter of “private” morality, we should *not* understand him to be asserting that there is no objective moral truth of the matter upon which public authority could predicate legislation.

But no distinction between “public” and “private” morality exists in nature. Moral evaluations may be true or false. These judgments may pertain to conduct typically performed in private (masturbation, for example) or in public (falsely swearing under oath). There surely is a complex set of considerations by which the conscientious legislator may rightly judge whether to leave conduct free of government regulation (and in that sense “private”), or not. “Public morality” pertains to public moral ecology. But none of these truths implies, entails, or even suggests that public authority either is or should be deemed to be altogether incompetent to act on the basis of sound moral judgments about *any* such act.

Consider perhaps the most uncontroversial “private” immorality there is: masturbation. There should indeed be no law

punishing anyone for masturbating. But children should not be taught how to do so in public school, and aircraft carrier commanders ought not to mime it on shipboard television. The reason is simple: Masturbation is immoral and public authority ought not to suggest otherwise.

For Murray, however, “private” morality was beyond the government’s ken. He told Cardinal Cushing that such matters “lie beyond the scope of law; they are left to the personal conscience.”⁸ He seems to have taken a familiar shortcut to justifying privacy as against government intrusion and civil liberties more generally: the path of epistemic abstinence, or moral “neutrality.”

IV

Murray’s judgment that some conduct—using contraceptives, for example—was “private” was a *conclusion* to a chain of reasoning about the scope of public authority. What does that chain look like? In his Memorandum to Cushing, Murray supplied criteria of “private” morality, including the fact that a practice is widespread, widely thought to be morally licit, and that it is sanctioned by some religious groups. Murray also wrote to Cushing that an issue of “public morality arises when a practice seriously undermines the foundations of society or gravely damages the moral life of the community as such, in such wise that legal *prohibition* becomes necessary to safeguard the social order as such.” Here we come across another source of Murray’s mishandling of public morality.

Throughout the chapter with which we are concerned here, Murray is concerned about *coercion*. He speaks nearly univocally about law as “prohibitive,” “coercive,” “restrictive,” “restrain[ing],” “repressi[ve],” and as a “command.” The topic is “police power” (159) and the legal enforcement of morals. Murray says flatly that “[l]aw is indeed a coercive force; it compels obedience by the fear of penalty” (167). The antonym to “law” is “freedom”: the total absence of law from the picture. But this flat view of law was not then and is not now faithful to the phenomenon. For it is easy to see that law can promote and encourage (by funding or educating) compliance with true moral norms without coercing anyone. Anyone can see too that the law effectively discourages even that which it does not prohibit, as it did during Murray’s lifetime by taxing child labor and alcohol consumption, and as it does today with smoking and obesity.

It turns out that all the way through “Should There be a Law?” Murray runs together the justification for the exercise of the state’s coercive authority with the scope of its competence to make moral

judgments, and to act non-coercively on those judgments for the common weal. Murray's categorization of an activity as falling within the province of "public" or "private" morality tracks his account of justified coercion. As a result, he ends up in an impossible predicament: what the government may not coerce is "private," and what is "private" may not be the subject of government's moral evaluation. What Caesar may not prohibit, he may not, evidently, know.

But the state's jurisdiction is wider than its coercive authority. The state engages in all types of non-coercive actions directing persons towards their perfection, steering them away from vice, encouraging them to do what is morally required (but which the state cannot command or prohibit), and assisting the non-political institutions of civil society (including the Church) so as to contribute to the common good and also to the perfection of the members of society. It is true that in "Should There Be a Law?" Murray recognizes these educative and directive properties of law. But he greatly underappreciates and undervalues them, in large part because he identifies law, at root, with coercion: the unwelcome heavy hand of the enforcer. And (as Murray might say) no one learns how to be good (in any direct way) from the sheriff.

The "perfection" of persons lies beyond the ken of political life, even beyond this world entirely. But it does not follow that the "conditions" which contribute to that perfection lie beyond the *eschaton*. They do not. This message is unmistakably conveyed by *Dignitatis Humanae*: The custodian of the common good is charged with maintaining conditions conducive to persons' achievement of their perfection (in "a certain fullness of measure and also with some relative ease"⁹). To wisely discharge this special form of stewardship, there is *no* non-trivial moral judgment that is, in principle, beyond the lawmakers' ken.

V

In *WHTT*, Murray seemed to be mainly concerned about how Catholics could be—or could be persuaded to be—better Americans. He worried about the "dilemmas posed to and by Catholics in a pluralistic society."¹⁰ I rather think that the first order of relevant business would be to consider how Catholics can participate in any nation's political life in a way that does not compromise their faith, and most especially in a manner which does not call upon them to check their faith at the gate of the public square. This is not to say that Catholicism is essentially or even likely (as a practical matter) to be incompatible with conscientious

civic engagement and full political participation. But often enough Catholicism is going to be in significant tension with some embedded practices and institutions of a given political society, and thus preserving the integrity of one's faith is the first priority, because the demands of the faith are non-negotiable.

In any event, the central reality today is that Catholics can make America better by being better Catholics, by forcefully bringing the splendor of moral truth to bear on contested issues of morality and law.

Notes

1. For a recent example, see Pope Benedict's Message for 2011 Peace Day, issued on December 8, 2010 and available online at <http://www.zenit.org/article - 31261!+english>.
2. For what it is worth, I disagree with Murray here: The right of religious liberty articulated in *Dignitatis Humanae* is grounded in the moral duty of everyone to seek and to embrace religious truth, and the freedom from coercion which the discharge of that duty requires. That ground seems to be as much about human dignity as one should like it to be.
3. *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed & Ward, 1960; Lanham, MD: reprint, Rowman & Littlefield, 1988), 52–53 (page citations are to the reprint edition). Further citations of this work will be given parenthetically.
4. Gerard V. Bradley, "Beyond Murray's Articles of Faith and Peace," in *John Courtney Murray and The American Civil Conversation*, ed. Robert P. Hunt and Kenneth L. Grasso (Grand Rapids: William B. Eerdmans Publishing Co., 1992), 181-204.
5. Quoted in John Quinn, "The Enduring Influence of *We Hold These Truths*," p. 74 (above). By 1959 (when *WHTT* took shape) Murray was not being conceited in thinking he could deliver such a work. He was already widely, and rightly, regarded as America's leading Catholic public intellectual, at least if Fulton Sheen is considered to be an apologist, and not a "public intellectual." Just weeks after *WHTT* hit the bookstores, *Time* magazine would confirm Murray's iconic and even authoritative status by placing him on its cover, just as the nation prepared to inaugurate its first Catholic President. See Douglas Auchincloss, "U.S. Catholics and the State," *Time*, 12 December 1960, 64-70.
6. "Memo to Cardinal Cushing on Contraception Legislation," at <http://woodstock.georgetown.edu/library/murray/1965f.htm>.
7. "Toledo Talk," at <http://woodstock.georgetown.edu/library/murray/1965g.htm>. Murray died before the publication of *Humanae Vitae*, and so we do not know whether his apparent approval of contraception in 1967 would have been overridden by religious assent to the magisterium.
8. Quoted in John Quinn, "The Enduring Influence of *We Hold These Truths*," p. 78 (above).
9. *Dignitatis Humanae*, section 6.
10. Quoted in John Quinn, "The Enduring Influence of *We Hold These Truths*," p. 74 (above).

PART II
ARTICLES
