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# Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom

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MORAL LIMITS ON MORALS  
LEGISLATION: LESSONS FOR  
U.S. CONSTITUTIONAL LAW  
FROM THE *DECLARATION ON  
RELIGIOUS FREEDOM*

GREGORY KALSCHEUR, S.J.\*

ABSTRACT

A persistent American confusion regarding the proper relationship between law and morality is manifest in the opinions in *Lawrence v. Texas*.<sup>1</sup> The Second Vatican Council's *Declaration on Religious Freedom* provides the foundation for an analytical framework that can bring clarity to that confusion. The heart of this framework is the moral concept of public order. This concept offers a principled explanation of both the holding in *Lawrence* and the limitations the Court placed on that holding. The Court could clarify the confusion manifest in *Lawrence* by explicitly acknowledging that a state interest only becomes legitimate for purposes of rational basis review when the asserted interest constitutes a public order concern. A constitutional jurisprudence that aspires to be faithful to the sort of limited government that is demanded by respect for human dignity should recognize that the state can only use law to restrain human freedom when that limitation serves a public order function.

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<sup>1</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

*[T]he Declaration [on Religious Freedom] adopts the concept of public order. The concept has good warrant in constitutional law. However, it is more frequently used than defined. The Declaration undertakes to define it. In doing so, it makes a contribution to the science of law and jurisprudence.*<sup>2</sup>

## I. INTRODUCTION

“[T]he American mind has never been clear about the relation between morals and law.”<sup>3</sup> This persistent lack of clarity is an urgent problem at a time when the American political and legal landscape teems with issues raising questions about the proper relationship between law and morality. Banning partial-birth abortion, prohibitions of physician-assisted suicide, proposals both to limit and to promote embryonic stem-cell research, efforts to preserve marriage for opposite-sex couples, control of Internet pornography and gambling; all of these are issues that we easily characterize as raising the question of whether it is appropriate to use the law to enforce contested moral norms. At the same time, we should also recognize that the protection of civil rights, the use of affirmative action, the regulation of immigration, the death penalty, the procedures governing military tribunals and detainee interrogations, and the propriety of the estate tax are all properly understood as issues that call us to think about the proper relationship between law and morality as well.<sup>4</sup>

Indeed, moral judgments “are inextricably bound up in our lawmaking and, as a result, [they are] inevitably present in our adjudication.”<sup>5</sup> Profound moral judgments, for example, are involved simply in trying to decide what sorts of activities or conduct constitute harms to society that are properly addressed by legislators and courts.<sup>6</sup> This inextricable

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<sup>2</sup> John Courtney Murray, S.J., *Commentary and Notes on the Declaration on Religious Freedom*, in THE DOCUMENTS OF VATICAN II 672, 686 n.20 (Walter M. Abbott, S.J., ed., 1966) [hereinafter *Notes on the Declaration*].

<sup>3</sup> JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 156 (1960).

<sup>4</sup> See, e.g., JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 189–90 (2005) (invidious discrimination is illegal because it is “conduct deemed unjust and immoral by contemporary American law.”) (“[I]f we defend Title VII as it should be defended, in the language of equality and justice, then we are defending it on the basis of a moral judgment.”); *id.* at 189 (“[T]here has never been any general prohibition in American constitutional jurisprudence against laws based on morality. Our entire legal system would probably be unconstitutional if there were.”).

<sup>5</sup> Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1304 (2004). Goldberg’s article “aims to reinforce the urgent need to facilitate meaningful review of majoritarian invocations of morality without demanding the complete eradication of morals-based interests from lawmaking.” *Id.* at 1301. She proposes a fact-based rationale requirement as “one potential approach to resolving this tension.” *Id.* Her approach would limit governments to “adopting laws and policies that can be justified by reference to observable or otherwise demonstrable harms.” *Id.* at 1305. This Article proposes an alternative approach for evaluating the use of morals-based interests in lawmaking and adjudication.

<sup>6</sup> *Id.* at 1302; see also *id.* at 1301 (“[N]ormative judgments about individual and social well-being underlie” many legal arguments.); *id.* at 1301 n.281 (citing ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (1981) for the argument that “liberalism’s support for government neutrality among diverse aims does not represent a non-neutral position”); see also M. Cathleen Kaveny, *Autonomy, Solidarity and Law’s Pedagogy*, 27 LOUVAIN STUDIES 339, 341 (2002) (“Always and everywhere, law teaches a moral lesson—it imbues a vision of how the members of a particular society

interrelationship between law and morality is, in part, reflected in the Supreme Court's frequent acknowledgment that morality is a subject within the traditional scope of legitimate legislative power.<sup>7</sup> Yet, when the Supreme Court in *Lawrence v. Texas*<sup>8</sup> struck down a Texas statute criminalizing same-sex sexual conduct, the Court "rejected explicitly a morality-based justification for [the] law on the ground that it lacked legitimacy."<sup>9</sup> Thus, American constitutional law must confront a serious question: in the wake of *Lawrence*, how are we to distinguish those moral justifications that provide a legitimate basis for lawmaking from those that do not? The Supreme Court in *Lawrence* failed to provide an explicit answer to that question.

The opinions produced by the Justices of the Supreme Court in *Lawrence* provide compelling evidence that the persistent American confusion about the proper relationship between law and morality has now borne fruit in doctrinal incoherence. This Article argues that resources

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should live their lives together. We need to find a way, first, to acknowledge the fact that law teaches, and second, to take responsibility for what it teaches."

<sup>7</sup> See, e.g., *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order— these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."); RUBENFELD, *supra* note 4, at 189 ("The official American understanding has always been that legislators have the prerogative, or even the duty, to protect the 'health, safety, and morals' of their constituents."); see also MURRAY, *supra* note 3, at 159 ("[E]very government has always claimed what is called police power, as an attribute of government. This power in itself is simply the principle of self-preservation and self-protection transferred to the body politic. It extends to the requirements of public morals, public health, public safety, public order, and the general comfort of society. The only question is, how far and in what circumstances does it extend to all these social values?").

Suzanne Goldberg notes that "[t]he Supreme Court . . . has not sought to define morality even in its most enthusiastic celebrations of the morals-based police power." Goldberg, *supra* note 5, at 1241. Goldberg goes on to explain that "the Court tends to invoke morality to refer to a systematic way of thinking about right and wrong forms of conduct, consistent with the term's dictionary definition." Goldberg, *supra* note 5, at 1241–42 & n.25 (noting that the American Heritage Dictionary of the English Language defines "morality as [a] system of ideas of right and wrong conduct"). Goldberg also cites a range of more refined scholarly efforts to define morality, which, in her view, "illustrate the challenges of even defining morality, let alone relying on it as a justification for government action." Goldberg, *supra* note 5, at 1242 n.26. At the same time, however, Goldberg recognizes that moral judgment is pervasive in law. Goldberg, *supra* note 5, at 1302. This Article uses the term "morality" to refer to reflection concerned with the question of how human beings ought to live, individually and in community, if they are to flourish. See, e.g., MICHAEL J. PERRY, *MORALITY, POLITICS & LAW* 11 (1988); MICHAEL J. PERRY, *LOVE & POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* 76 (1991) [hereinafter PERRY, LOVE & POWER] (moral beliefs are "beliefs about how it is good or fitting for human beings to live their lives"); Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L. J. 97, 120 (2005) [hereinafter Perry, *The Morality of Human Rights*] (describing the following questions as "fundamental moral inquir[ies]: What states of affairs are good—truly good—for human beings . . . what states of affairs are bad for them? What states of affairs are friendly to or even constitutive of authentic human well being (eudaimonia), and what states are hostile to or even destructive of it?"). While much contemporary moral philosophy gives a narrower focus to the concept of morality, this Article adopts the position proposed by Michael Perry: political thinking from which disputed beliefs about the human good are excluded is "impossibly restrictive. Such a politics is bereft of the normative resources required for addressing, much less resolving, the most fundamental political-moral issues that engage and divide us . . . [including a question that] is indisputably and appropriately at the very heart of domestic and international politics: Are there human rights and, if so, what are they?" PERRY, LOVE & POWER, at 29; see also *id.* at 181 n.45 (discussing philosopher Charles Taylor's views on the "'cramped and truncated view of morality in a narrow sense'" adopted by "'[m]uch contemporary moral philosophy'" (quoting CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 3 (1989)).

<sup>8</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>9</sup> Goldberg, *supra* note 5, at 1243.

drawn from the tradition of Catholic social thought and articulated in the Second Vatican Council's *Declaration on Religious Freedom*<sup>10</sup> can rectify that incoherence by generating an analytical framework for understanding the relationship between law and morality. The heart of this framework is the moral concept of public order. After providing a comprehensive overview of those resources, the Article uses them in the context of *Lawrence* to illustrate the significant contribution those resources can make to contemporary U.S. constitutional jurisprudence.

The Texas statute at issue in *Lawrence* criminalized private, adult, consensual same-sex sexual activity. Texas argued that the legitimate governmental interest of promoting morality provided a valid constitutional basis for the law.<sup>11</sup> The Court rejected this argument, and asserted that a governing majority's belief that this activity is immoral fails to provide a sufficient reason to uphold a law prohibiting the activity.<sup>12</sup> Justice O'Connor, in an opinion concurring in the judgment, similarly argued that the Constitution prohibits "[a] law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class."<sup>13</sup> At the same time, both the Court and Justice O'Connor sought to draw a distinction between laws that are unconstitutional because they are based simply on moral disapproval of homosexual conduct and laws protecting the traditional institution of marriage.<sup>14</sup>

Justice Scalia in dissent mocked the Court and Justice O'Connor's efforts to draw such a distinction. He maintained that the Texas statute should be upheld on the basis of the "ancient proposition" holding "that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."<sup>15</sup> Justice Scalia fears that, in the course of rejecting this "ancient proposition," the Court has "appl[ie]d an unheard-of form of rational-basis review that will have far reaching implications beyond this case,"<sup>16</sup> effectively decreed an end to

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<sup>10</sup> The Second Vatican Council was an authoritative gathering of Catholic bishops from all over the world that took place between 1962 and 1965. The Council was convened in order to promote the spiritual renewal of the church and to consider the relationship of the church to the contemporary world. The *Declaration on Religious Freedom* was promulgated in 1965 as the Council was drawing to a close. The *Declaration's* common Latin title—*Dignitatis Humanae*—is taken from the opening words of the document's Latin text: "A sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man." *Declaration on Religious Freedom*, in THE DOCUMENTS OF VATICAN II 675, *supra* note 2 [hereinafter *Declaration*].

<sup>11</sup> *Lawrence*, 539 U.S. at 582.

<sup>12</sup> *Id.* at 577.

<sup>13</sup> *Id.* at 585 (O'Connor, J., concurring in the judgment).

<sup>14</sup> *Id.* at 578 (majority opinion) (noting that *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"); *id.* at 585 (O'Connor, J., concurring in the judgment) ("Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.").

<sup>15</sup> *Id.* at 589 (Scalia, J., dissenting).

<sup>16</sup> *Id.* at 586. Some have suggested that *Lawrence* is more convincingly read as a fundamental rights case applying a form of heightened scrutiny. See, e.g., Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004). But cf. Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 959–60 (2004).

all legislation on morals,<sup>17</sup> provided the doctrinal foundation for “a massive disruption of the social order,”<sup>18</sup> and left on “pretty shaky grounds state laws limiting marriage to opposite-sex couples.”<sup>19</sup> For Justice Scalia, the logical implications of the holding in *Lawrence* are clear. He characterized the Court’s effort to distinguish a law criminalizing consensual same-sex sexual activity from legal recognition of same-sex unions as a “bald, unreasoned disclaimer”<sup>20</sup> that should not be believed, “This case ‘does not involve’ the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.”<sup>21</sup>

Thus, the Court and Justice O’Connor seem to seek to exclude moral disapproval entirely from the range of legitimate purposes that law might promote,<sup>22</sup> while Justice Scalia appears to accept all majoritarian moral disapproval as a presumptively legitimate basis for legal coercion. Each of these opinions is rooted in different, but equally confused, understandings of the relationship between law and morality. A more nuanced understanding of that relationship<sup>23</sup> ought to govern how we think about what constitutes a legitimate basis for legal coercion, both in constitutional adjudication and in public policy deliberation in a limited, constitutional government.

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(“To be sure, there are textual morsels in the Court’s opinion in *Lawrence* that hint that there is something more than minimal scrutiny at work in its decision. . . . When taken out of the context of the entire opinion, one would think these passages declarative of a fundamental liberty interest, the trigger for strict scrutiny under conventional substantive due process analysis. Yet . . . Justice Kennedy punctures this balloon by stating that the Texas law ‘furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.’”) (quoting *Lawrence*, 539 U.S. at 578); see also *Muth v. Frank*, 412 F.3d 808, 817–18 (7th Cir. 2005) (*Lawrence* did not announce a fundamental right for adults to engage in all forms of consensual sexual conduct); *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1238 (11th Cir. 2004) (“[W]e decline to extrapolate from *Lawrence* and its *dicta* a right to sexual privacy triggering strict scrutiny. To do so would be to impose a fundamental rights interpretation that rested on rational-basis grounds, that never engaged in *Glucksberg* analysis, and that never invoked strict scrutiny.”), *cert. denied sub nom. Williams v. King*, 543 U.S. 1152 (2005); *Andersen v. King County*, 138 P.3d 963, 979 (Wash. 2006) (“The [*Lawrence*] Court did not apply strict scrutiny as would be expected if a fundamental right were at stake.”).

<sup>17</sup> *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting).

<sup>18</sup> *Id.* at 591.

<sup>19</sup> *Id.* at 601.

<sup>20</sup> *Id.* at 604.

<sup>21</sup> *Id.* at 605.

<sup>22</sup> Some scholars have suggested that the Court has put an end to morals-based justifications for law. See, e.g., Keith Burgess-Jackson, *Our Millian Constitution: The Supreme Court’s Repudiation of Immorality as a Ground of Criminal Punishment*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 407, 415 (2004) (“Thus ends legal moralism as a constitutional principle. In effect, Justice Kennedy and his colleagues in the majority read the United States Constitution as rejecting legal moralism and embracing, or at least moving toward, Millian liberalism.”); Lino A. Graglia, *Lawrence v. Texas: Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139 (2004). But see *Williams v. King*, 420 F. Supp. 2d 1224, 1254 (N.D. Ala. 2006) (holding that “public morality” provides a rational basis for an Alabama statute prohibiting the commercial distribution of sexual devices) (“[T]his court’s holding illustrates that Justice Scalia’s ominous prediction – that the majority’s opinion in *Lawrence* ‘effectively decrees the end of all morals legislation’ – will not be realized.”).

<sup>23</sup> Cf. M. Cathleen Kaveny, *Law, Morality and Common Ground*, 183 AMERICA, Dec. 9, 2000, at 8 (“If we are to find common ground on complicated issues of law and morality, we need to begin by refusing to oversimplify their relationship. In this regard, the Roman Catholic jurisprudential tradition has a great deal to contribute to the contemporary public conversation . . . [I]t provides a remarkably sophisticated and powerful way of analyzing the interaction between legal and moral concerns . . .”).

This Article will argue that the analytical framework generated by the *Declaration* can clarify the confusion manifest in the *Lawrence* opinions. By rejecting the long-held position that “error has no rights”<sup>24</sup> and solemnly affirming a fundamental human right to religious freedom, the *Declaration* stands as “a tacit recognition” that the church had in fact learned something through its often tumultuous encounters with the Western liberal tradition during the previous two centuries.<sup>25</sup> Through those encounters, the church’s doctrine regarding religious freedom developed; the encounters with the liberal tradition prompted a process of learning that led the church to a “richer and more explicit . . . view of the dignity of the human person and of the rights intrinsic to” that dignity.<sup>26</sup> Indeed, the *Declaration* might well be remembered for the sober witness that it provides to the church’s humble recognition of its need to learn before it can effectively exercise its critical mission of teaching.<sup>27</sup>

This Article contends that an analogous opportunity for learning and development in American constitutional jurisprudence might emerge from an encounter between American constitutional law and central elements of the tradition of Catholic social thought that are manifest in the *Declaration*. The *Declaration* deserves the attention of constitutional lawyers because of what it can teach us about the nature of constitutional government: government whose legitimate scope and power are limited by the demand for responsible freedom rooted in human dignity. The *Declaration*’s

<sup>24</sup> See Leslie Griffin, *Commentary on Dignitatis Humanae*, in *MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES AND INTERPRETATIONS* 244, 254 (Kenneth R. Himes, O.F.M. ed., 2005); see also *infra* note 49.

<sup>25</sup> HERMINIO RICO, S.J., JOHN PAUL II AND THE LEGACY OF DIGNITATIS HUMANAЕ 8 (2002).

<sup>26</sup> *Id.* As Rico explains, in the *Declaration* the church “came around to adopt an institutional development that it had not promoted, and which it had strongly resisted for a long time. In considerable measure, the church was led by others to the acceptance of values and institutions very much in conformity with the Christian view of the person and of society, but to which the church had been blinded . . .” *Id.*; see also JOHN T. NOONAN, JR., A CHURCH THAT CAN AND CANNOT CHANGE 145–58 (2005); JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM 329–53 (1998). For a discussion of the idea of doctrinal development in both theology and constitutional law, see Gregory A. Kalscheur, S.J., *Christian Scripture and American Scripture: An Instructive Analogy?* 21 J.L. & REL. 101, 121–33 (2005–2006).

<sup>27</sup> John Courtney Murray, S.J., *The Declaration on Religious Freedom*, in *VATICAN II: AN INTERFAITH APPRAISAL* 565, 566 (John H. Miller ed., 1966) (The *Declaration* “was a major act of humility on the part of the teaching Church.”). See also John Courtney Murray, S.J., *Introduction to Declaration on Religious Freedom*, in *THE DOCUMENTS OF VATICAN II*, *supra* note 2, at 672, 673 (“It can hardly be maintained that the *Declaration* is a milestone in human history – moral, political, or intellectual. The principle of religious freedom has long been recognized in constitutional law . . . . In all honesty it must be admitted that the Church is late in acknowledging the validity of the principle.”); cf. Joseph Cardinal Bernadin, *The Consistent Ethic of Life after Webster*, in *A MORAL VISION FOR AMERICA* 79, 92 (John P. Langan S.J., ed., 1998) (“The [church’s teaching] style should be persuasive, not preachy. . . . We should be convinced we have much to learn from the world and much to teach it.”); *The Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)*, in *THE DOCUMENTS OF VATICAN II*, *supra* note 2, at 199, 246 (“With the help of the Holy Spirit, it is the task of the entire People of God, especially pastors and theologians, to hear, distinguish, and interpret the many voices of our age, and to judge them in the light of the divine Word. In this way, revealed truth can always be more deeply penetrated, better understood, and set forth to greater advantage.”) (emphasis added); DAVID HOLLENBACH, S.J., THE GLOBAL FACE OF PUBLIC FAITH: POLITICS, HUMAN RIGHTS, AND CHRISTIAN ETHICS 31 (2003) (“It was [John Courtney] Murray’s genius to have discovered intellectually compelling arguments that could incorporate the insights contained within both traditions [i.e., Catholicism and liberalism] and to do so on terms that could enable both Catholicism and liberalism to hold their valid insights while learning from each other.”).

understanding of limited, constitutional government provides us with a crucial framework for exploring the relationship between human dignity, freedom, morality, and the proper function and limits of law in the contemporary American constitutional order. It is here that the *Declaration* might continue to make “a contribution to the science of law and jurisprudence”<sup>28</sup> forty years after its promulgation.

The urgent need for such a framework in American constitutional law is evident in the strikingly different approaches to the question of the proper relationship between law and morality articulated by the Justices in *Lawrence*. Justice Kennedy for the Court, Justice O’Connor concurring in the judgment, and Justice Scalia in dissent each staked out competing positions regarding the manner in which the relationship between law and morality ought to influence constitutional analysis. This Article argues that the approach to the question of the proper relationship between law and morality suggested by the *Declaration* provides a more coherent understanding of that relationship than any of the approaches articulated by the Justices in *Lawrence*. The analytical framework generated by the *Declaration* allows us to see that there are *moral limits on morals legislation*—indeed, there are moral limits on the state’s use of law, whether the action is characterized as morals legislation or not.<sup>29</sup> At the same time, while the sort of morals law invalidated in *Lawrence* is properly seen as going beyond the state’s legitimate authority to act through coercive law,<sup>30</sup> explicit reliance on moral rationales for law should not be banished altogether from the realm of legitimate government interests.

Part II of this Article will describe the analytical framework established by the *Declaration*, with a particular focus on the moral concept of public order as a limit on the legitimate sphere of governmental action, the distinction between private morality and public morality, and the way in which the public morality component of public order provides a legitimate basis for governmental action through law. This Part will conclude by articulating a framework of six central principles drawn from the *Declaration* that illuminate a nuanced understanding of the relationship between law and morality. Part III of the Article will then bring the

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<sup>28</sup> *Notes on the Declaration*, *supra* note 2, at 686 n.20.

<sup>29</sup> For a theological argument drawing more explicitly on Scripture to reach a similar conclusion, see David Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, U. PA. J. CONST. L.:

Conflating God’s law and man’s law . . . does violence to both. It makes far too much of man’s law and far too little of God’s. Which leads to surprising implications about contemporary American politics: The deep divide between moralists and libertarians may be needless, the result more of theological error than of spiritual disagreement. Libertarians seek to minimize formal legal restraints on private conduct. That agenda should hold some appeal for wise moralists, at least if the moralists are Christian. After all, the rule of law is a moral good in Christian terms. And the law is likely to be honored best where legal restraints are most modest. The rule of good morals, meanwhile, must be honored – if it is to be honored at all – in the hearts and minds of the citizenry. Not in its courthouses.

*Id.* at 839.

<sup>30</sup> As will become clear through the course of the argument in Part II, to state that the Court reached the proper result in *Lawrence* is not to take any position with respect to the morality or immorality of same-sex sexual activity. See *infra* text accompanying notes 42 & 51–58.

clarifying potential of the moral concept of public order to bear on the confusion manifest in the opinions issued in *Lawrence*. Finally, Part IV will argue that understanding the public order concept as a moral limit on legitimate state action will avoid the problem of massive social disruption that Justice Scalia (perhaps hyperbolically) fears.

My hope is to demonstrate that the analytical framework established by the Council's *Declaration* will allow us to see the Court's result in *Lawrence* as a proper and coherent exercise of rational basis review.<sup>31</sup> By helping us to explain the Court's action in *Lawrence* as something other than covert or implicit fundamental rights adjudication, the *Declaration's* framework may, in fact, cut the "Gordian knot" presented by *Lawrence*.<sup>32</sup> The moral concept of public order as a limit on the legitimate reach of law enhances our understanding of what constitutes a legitimate governmental interest under the rational basis test and allows us to see why a law criminalizing private, adult, consensual sexual activity within the context of a relationship is properly held to be beyond the state's police power, while other sorts of regulations often understood as morals-based legislation should withstand constitutional challenge, at least when the challenged law is properly subject to review under the rational basis test.<sup>33</sup>

## II. CONSTITUTIONAL GOVERNMENT AND THE MORAL LIMITS OF LAW

The doctrinal core of the *Declaration* consists of its affirmation of a right to religious freedom that "has its foundation in the very dignity of the human person."<sup>34</sup> The Council insists that this natural human right must be

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<sup>31</sup> My argument in this Article is limited to demonstrating that the *Declaration* can help us to understand what constitutes a legitimate state interest for purposes of rational basis review. It is not my intention here to argue that the public order concept as articulated in the *Declaration* provides adequate constitutional protection for the right of religious freedom, especially when religious exercise is constrained by the regulatory actions of the contemporary administrative state. For example, it is possible to imagine laws supported by a public order rationale that impose arguably *undue* restraints on the exercise of religious freedom by individuals, see *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding there is no free exercise violation in penalizing sacramental use of peyote, where state law prohibits possession of peyote as a controlled substance), and institutions, see *Catholic Charities of Sacramento, Inc. v. Superior Ct.*, 85 P.3d 67 (Cal. 2004) (holding religion clauses of federal and state constitutions did not prohibit state from mandating that a church-affiliated employer provide insurance coverage for prescription contraceptives, even though use of contraceptives violated church teaching), *cert. denied*, 543 U.S. 816 (2004).

<sup>32</sup> Massey, *supra* note 16, at 995; see also Massey, *supra* note 16, at 990 ("*Lawrence* makes a shambles of the search for nontextual liberties by trivializing the difference between fundamental and nonfundamental liberties.>").

<sup>33</sup> Because the public order limitation is a general moral limit on the state's use of law, it would also apply to legislation reviewed under various forms of heightened scrutiny. Discussion of the relationship of the public order concept to constitutional adjudication in cases involving fundamental rights or protected classes is beyond the scope of this Article, but it would follow from the argument presented here that an important public order interest (in the case of intermediate scrutiny) or a compelling public order interest (in the case of strict scrutiny) would be demanded if the challenged governmental action were to be upheld. Cf. Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 637-38 (2003) (discussing the question of when, and to what degree, courts appropriately defer to the politically accountable branches and when it is appropriate in a democracy for courts to have "the power to oppose, in the name of one or more entrenched human rights norms, choices made by, or actions of, electorally accountable government officials").

<sup>34</sup> *Declaration*, *supra* note 10, at 679.

“recognized in the constitutional law whereby society is governed.”<sup>35</sup> Protected in this way as a civil right, the right to religious freedom articulated by the Council consists of two-fold immunity from coercion in religious matters: no one is to be forced to act in a manner contrary to their own beliefs, and no one is to be restrained from acting in accordance with their own beliefs, “whether privately or publicly, whether alone or in association with others, *within due limits*.”<sup>36</sup>

#### A. HUMAN DIGNITY AND RESPONSIBLE FREEDOM

The nature of the human right to religious freedom as an immunity from coercion, and the *Declaration's* understanding of what sorts of restraints on conduct flowing from religious beliefs are “due,” both flow from the understanding of human dignity developed in the *Declaration*. The *Declaration* opens by acknowledging that “[a] sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man.”<sup>37</sup> This increased consciousness makes itself manifest in two demands that the Council declares “to be greatly in accord with truth and justice.”<sup>38</sup> The first is a demand for responsible freedom—the ability to act on one’s own judgment, “not driven by coercion but motivated by a sense of duty.” The second is a demand for freedom in human society—a demand “that constitutional limits should be set to the powers of government, in order that there may be no encroachment on the rightful freedom of the person and of associations.”<sup>39</sup> Thus, in declaring a right to religious freedom, the Council is really affirming “a principle of wider import – that the dignity of man consists in his responsible use of freedom.”<sup>40</sup>

The *Declaration* also clearly acknowledges that respect for the dignity of the human person in no way depends on whether or not the person’s beliefs or actions are in accord with religious or moral truth. By means of this acknowledgement, the Council departed from the older understanding that “error has no rights.”<sup>41</sup> The Council thus rejected the notion that only the conscience that had apprehended the objective truth was worthy of freedom and immunity from coercion. At the same time, this development in church teaching regarding the relationship between truth and freedom must not be understood as approval of any efforts to sever the connection between truth and freedom. Instead, the Council insisted that the exercise of responsible freedom is, indeed, oriented toward the truth: as beings endowed with reason and free will, “all men should be at once impelled by

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<sup>35</sup> *Declaration*, *supra* note 10, at 679.

<sup>36</sup> *Declaration*, *supra* note 10, at 679 (emphasis added).

<sup>37</sup> *Declaration*, *supra* note 10, at 675.

<sup>38</sup> *Declaration*, *supra* note 10, at 676.

<sup>39</sup> *Declaration*, *supra* note 10, at 675. Cf. Richard W. Garnett, *The Freedom of the Church*, July 10, 2006, <http://ssrn.com/abstract=916336> (arguing that the freedom of the church as an institution is a crucial component of religious freedom).

<sup>40</sup> John Courtney Murray, S.J., *Introduction to Declaration on Religious Freedom*, in THE DOCUMENTS OF VATICAN II, *supra* note 2, at 672, 674.

<sup>41</sup> See Griffin, *supra* note 24, at 251, 254.

nature and also bound by a moral obligation to seek the truth, especially religious truth. They are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth.”<sup>42</sup>

It is, in fact, the affirmation of this duty to seek and follow the truth that helps to ground the *Declaration's* articulation of a right to a responsible freedom immune from coercion. In order to carry out the obligation to seek and adhere to the truth *in a way that accords with human dignity*, the person must have both “psychological freedom” and freedom from “external coercion.”<sup>43</sup> If the search for truth is to proceed in a manner proper to the dignity of human nature, that search must move toward a personal appropriation of the truth, rather than the acceptance of an externally imposed truth. In the search for truth, each person has the duty, and therefore the right, “[to] form for himself right and true judgments of conscience, with the use of all suitable means. . . . [A]s the truth is discovered, it is *by personal assent* that men are to adhere to it.”<sup>44</sup> Moreover, once one comes to know the truth, one has a right to act in ways that are faithful to the truth:

*In all his activity* [i.e., not just in his religious activity] a [person] is bound to follow his conscience faithfully . . . . It follows that he is not to be forced to act in a manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, *especially* in matters religious.<sup>45</sup>

Indeed, injury is done to both the human person and the moral order “if the free exercise of religion is denied in society when the just requirements of public order do not so require.”<sup>46</sup>

Because this imperative of human nature to search for truth in a manner that accords with human dignity gives rise to the right to religious freedom, the possession and exercise of that right cannot be dependent on “the subjective disposition of the person.”<sup>47</sup> In other words, the right to immunity from coercion is not dependent on whether or not one has actually apprehended the truth. “In consequence, the right to this immunity continues to exist even in those who do not live up to their obligation of seeking the truth and adhering to it.”<sup>48</sup> Instead, the right to religious freedom, and by implication, the more general right to seek the truth and act on it of which the right to religious freedom is a privileged component, is not to be impeded so long as “the just requirements of public order are observed.”<sup>49</sup> The dignity of the human person is injured if one’s exercise of

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<sup>42</sup> *Declaration*, *supra* note 10, at 679.

<sup>43</sup> *Declaration*, *supra* note 10, at 679.

<sup>44</sup> *Declaration*, *supra* note 10, at 680–81 (emphasis added).

<sup>45</sup> *Declaration*, *supra* note 10, at 681 (emphasis added).

<sup>46</sup> *Declaration*, *supra* note 10, at 681.

<sup>47</sup> *Declaration*, *supra* note 10, at 679.

<sup>48</sup> *Declaration*, *supra* note 10, at 679.

<sup>49</sup> *Declaration*, *supra* note 10, at 680. Herminio Rico argues that these affirmations of section two of the *Declaration* state the “novelty brought about by *Dignitatis Humanae*.” By “definitively steering [the

responsible freedom is restrained when the just demands of public order do not require the restraint.

Drawing on this central affirmation of the *Declaration*, Pietro Pavan, a key theological advisor at the Council who was involved in drafting the text, insisted that the human dignity affirmed in the *Declaration*, a dignity shared by all human persons simply by virtue of their humanity, must be understood as an existential or ontological dignity, not a dignity founded in morally upright behavior.<sup>50</sup> For Pavan, the *Declaration*

is concerned not with the *moral* dignity that belongs to a person because of the uprightness of his or conscience, but with the very *nature* of person. This dignity is grounded on the human reality which the person is, that is, on elements rooted in his or her being as endowed with intelligence and freedom. It is a dignity that every human person possesses always and everywhere simply by being a person, and not by behaving rightly in the moral field. It is the dignity that flows from the being of the person and inheres in the being of the person and does not depend on the deeds of the person – whether these be right or wrong, whether these be right because they correspond to objective truth, or right because of invincible ignorance.<sup>51</sup>

Thus, the fact that someone’s deeds may be objectively immoral—or that a governing majority in the community might regard the person’s deeds as immoral—does not strip that person of inherent human dignity, nor of the responsible freedom that inherently flows from that dignity. Legal restrictions on that person’s freedom, therefore, constitute an injury—a violation of the person’s human dignity—unless the coercive restriction is a “due restraint” mandated by the “just requirements of public order.”

Pavan further explained that this ontological dignity of the human person consists of three key elements: “(1) the inescapable responsibility of every person to fix his or her relationship with God, (2) the nature and immediacy of the relationship between the person and truth, and (3) identity – or the need for the person to be himself or herself.”<sup>52</sup> The

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*Declaration*] away from the old reasoning that ‘only truth has rights,’” section two of the *Declaration* constitutes “the big doctrinal turn, which needs to be manifest in all its incisiveness . . . . Even if a person ignores or rejects truth, still that person’s right to immunity from coercion stands undiminished; freedom is upheld even when it is invoked against truth. Therefore, the aim of compliance with the truth can never justify the bracketing of one’s personal right to immunity; no material upholding of truth ever justifies its perfunctory realization at the expense of personal freedom.” RICO, *supra* note 25, at 79, 80.

<sup>50</sup> RICO, *supra* note 25, at 65.

<sup>51</sup> Pietro Pavan, *Ecumenism and Vatican II’s Declaration on Religious Freedom*, in RELIGIOUS FREEDOM, 1965–1975: A SYMPOSIUM ON A HISTORIC DOCUMENT 7, 15 (Walter J. Burghardt, S.J. ed., 1976), quoted in RICO, *supra* note 25, at 65 (noting that “Pavan sometimes qualifies this dignity as ‘existential’ or ‘ontological’ to make an unmistakable demarcation from any moral undertone. It is not a dignity dependent in any way on the rightness (objective or subjective) of one’s conscience. By this clarification, the pitfalls of the discussion of the rights of the erroneous conscience are avoided.”).

<sup>52</sup> *Id.*; see also *id.* at 20–21. Cf. Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862 (2006). Greene argues that anti-sodomy laws threaten “the quite specific liberty to be oneself,” and describes this liberty as a right to metaprivacy: “the right to engage in status-definitional conduct free from normalizing governmental interference.” *Id.* at 1875; see also *id.* at 1866–67

elements of responsibility and immediacy suggest that human nature demands that each person enter into a relationship with God—with truth—by her own free decision, without coercion. “Adherence to the truth cannot be forced. Nothing can come between the person and truth; any coercive interference can only harm.”<sup>53</sup>

The element of identity concerns the relationship between one’s beliefs and the external expression of those beliefs through action in the world. Pavan insisted that the human dignity affirmed in the *Declaration* demands that one always be allowed to be oneself in thought, will, and action. This demand for continuity in thought, will, and action further supports recognition of immunity from any undue external, coercive restrictions: “to break this continuity *in any sphere of life*, but above all in the religious, by forcing a person to act in opposition to his own mind and will, or *by hindering him from acting in harmony with either*, is to harm deeply his dignity, to violate a fundamental right.”<sup>54</sup>

Thus, Pavan understood the freedom to be oneself in an “indivisible unity” of thought, word, and action as central to the responsible freedom affirmed by the *Declaration*. Human dignity, therefore, gives rise to “a sphere of autonomy,”<sup>55</sup> “a sanctuary that needs to be guarded against intrusion in order for [the person’s] dignity not to be harmed.”<sup>56</sup> This sanctuary “grant[s] the inviolability of a personal realm within the confines of which the person may conduct his or herself on his or her own initiative and responsibility without the coercive interference of civil authorities or any other powers in society. Freedom means first securing the possibility to exert self-determination.”<sup>57</sup> Autonomy, or responsible freedom, therefore, is understood as the freedom to take responsibility for the sort of person one chooses to become. *Absent any threat to public order*, therefore, human dignity demands that each person be given the possibility of deciding how to act, “even if it can be seen clearly that the way the person is deciding is objectively wrong.”<sup>58</sup>

It must be emphasized that to speak of a sphere of autonomy in this sense is neither to promote “any kind of disconnected individualism”<sup>59</sup> nor

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(identifying the right to metaprivacy, “the right to remain free of government interference with one’s transcendent identity,” is the “nonarbitrary principle that justifies [the] result” in *Lawrence*).

<sup>53</sup> RICO, *supra* note 25, at 66.

<sup>54</sup> Pavan, *supra* note 51, at 18 (emphasis added).

<sup>55</sup> See RICO, *supra* note 25, at 66 (quoting Pavan, *supra* note 51, at 171,172).

<sup>56</sup> See RICO, *supra* note 25, at 66 (quoting Pavan, *supra* note 51, at 171,172).

<sup>57</sup> See RICO, *supra* note 25, at 66 (quoting Pavan, *supra* note 51, at 171,172). Pavan insisted that the immunity from coercion affirmed in section two of the *Declaration* “‘must be understood thus: In the religious sphere no one may be compelled to act in a way different from that in which he himself has *decided* to act, and no man may be prevented from acting according to this way.’” See RICO, *supra* note 25, at 67 (emphasis in original). The responsible freedom at the heart of human dignity is, thus, the freedom to assume responsibility for one’s life and relation to God through a *personal* decision. See RICO, *supra* note 25, at 67; see also RICO, *supra* note 25, at 68 (“‘Though all expressions of life may conform to the truth that has been grasped, they are not humanly valid if they are produced not through personal decision but under pressure from the surrounding world.’”).

<sup>58</sup> See RICO, *supra* note 25, at 67.

<sup>59</sup> See RICO, *supra* note 25, at 69. The *Declaration* notes that the search for truth takes place in a necessary social context which is also a demand of human nature: “Truth . . . is to be sought after in a manner proper to the dignity of the human person and his social nature. The inquiry is to be free, carried

to imply indifference toward the truth. The *Declaration's* "emphasis on autonomous decision does not imply . . . any devaluation of the natural human obligation toward God and the moral duty before the truth."<sup>60</sup> Instead, a reserved sphere of autonomy needs to be protected precisely so that the human person can fulfill her moral duty to pursue the truth in community in a *humanly* responsible manner. As Pavan explained,

Vatican II presupposes the existence of an order of truth objective, universal, absolute, valid for all; order of truth of which the dignity of the human person is an essential element; dignity understood in an existential sense . . . ; order which everyone must strive to get to know, to which one must adhere in the measure one has already discovered it, and according to which one ought to live: *freedom as right is affirmed in order that there may be no obstacles to act and celebrate freedom as duty*, and as love for the good, above all for the supreme Good which is God.<sup>61</sup>

Thus, the immunity from coercion affirmed in the *Declaration* recognizes a *moral limit* on the law's ability to enforce moral duties toward God and the truth—a moral limit required by the order of truth of which the dignity of the human person is an essential element. The moral duties toward God and the truth still exist, *but the law's role is morally limited to protecting the public order of society.*<sup>62</sup>

## B. CONSTITUTIONAL GOVERNMENT

In the course of affirming a right to religious freedom that includes immunity from coercion in religious matters, the *Declaration* elaborates a defense of limited, constitutional government. The *Declaration* holds that

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on with the aid of teaching or instruction, communication, and dialogue. In the course of these, men explain to one another the truth they have discovered, or think they have discovered, in order thus to assist one another in the quest for truth." *Declaration*, *supra* note 10, at 680–81; *see also* RICO, *supra* note 25, at 70 ("The formation of one's responsible decision takes place in social interchange, which cannot be regulated by force, but, instead, works through the method of rational persuasion and profits from the largest participation possible of all in a committed search for the common good."). In terms of its orientation to both an objective order of truth and a necessary social context, this understanding of autonomy differs in significant respects from the autonomy celebrated in *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992) and *Lawrence*. *See infra* text accompanying notes 176–177.

<sup>60</sup> RICO, *supra* note 25, at 68.

<sup>61</sup> RICO, *supra* note 25, at 69 (quoting Pietro Pavan, *Il diritto della persona e delle comunità alla libertà sociale e civile in material religiosa*, in SCRITTI/1: L'ANELITO DELL'UOMO ALLA LIBERTÀ (Mons. Franco Biffi ed., 1989)).

<sup>62</sup> *See* CHARLES CURRAN, *THE MORAL THEOLOGY OF POPE JOHN PAUL II* 233 (2005) ("Freedom in the political sphere does not result from moral relativism but from respect for the dignity of the human person, who is to be free from external coercion in order to freely embrace the truth."). *Cf.* Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire* WM. & MARY L. REV. (forthcoming Apr. 2007) (manuscript at 28, available at <http://ssrn.com/abstract=900254>) ("The argument for limiting law's consideration of morality is inescapably a moral argument . . ."); *id.* at 29 (Law exists as a limited domain because law is "the morally-prompted social institution that sees the moral value in settlement and the moral value in moral certainty."). The moral value of the settlement function of law explains "why the moral enterprise of law is and must be at least partially closed to the direct consideration of morality itself. That law is so in the legal systems of the world we experience is not a moral failing of law – rather it is the embodiment of morality at morality's fullest, and thus of morality's best." *Id.*

the state, acting through law, lacks the competence to impose compliance with religious truth. “The religious acts whereby men, in private and in public and out of a sense of personal conviction, direct their lives to God transcend by their very nature the order of terrestrial and temporal affairs”<sup>63</sup> that are the proper and limited field of action for human law. “[I]t would clearly transgress the limits set to [the state’s] power were it to presume to direct or inhibit acts that are religious.”<sup>64</sup>

This immunity from coercion in religious matters does not, however, simply arise from the state’s incompetence to decide religious matters. The *Declaration* also insists that it is *not the function of government acting through law* to take *total* responsibility for the promotion of the common good of society. The common good of society “consists in the entirety of those conditions of social life under which men enjoy the possibility of achieving their own perfection in a certain fullness of measure and with some relative ease.”<sup>65</sup> It is the obligation of all the members of society—individuals, families, religious groups, voluntary associations, and the state—to promote the common good “in the manner proper to each.”<sup>66</sup>

Thus, the *Declaration* affirms that there is a distinction between society and the state, and insists that the state’s role in promoting the common good is limited.<sup>67</sup> Accordingly, conduct, including conduct flowing from religious convictions, only becomes a proper concern of the state acting through law when that conduct implicates that dimension of the common good which is the state’s proper role to promote. The *Declaration* characterizes this dimension of the common good as “public order.” The maintenance of public order is the necessary—but limited—function that the state legitimately exercises in promoting the common good.

Part Seven of the *Declaration* provides the central text articulating the moral limitations on government action. The *Declaration* first observes that “society has the right to defend itself against possible abuses”<sup>68</sup> that can arise from the exercise of all freedoms in society, including the exercise of religious freedom. It is the state’s particular, proper, and limited role to provide this protection through law:

It is the special duty of government to provide this protection.  
However, government is not to act in arbitrary fashion or in an unfair

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<sup>63</sup> *Declaration*, *supra* note 10, at 681.

<sup>64</sup> *Declaration*, *supra* note 10, at 681.

<sup>65</sup> *Declaration*, *supra* note 10, at 683.

<sup>66</sup> *Declaration*, *supra* note 10, at 683. See also John Courtney Murray, S.J., *The Problem of State Religion*, 12 THEOLOGICAL STUDIES 155, 158 (1951) (“[T]he whole society . . . has the function of preserving and developing itself as a whole. There is a good-of-the-whole, a common good, the social good, pluralist in structure but still somehow one.”).

<sup>67</sup> See also MURRAY *supra* note 3, at 81 (“We distinguish between the state and society, between the relatively narrow order of law as such and the wider order of the total public good.”). For further discussion of the importance of the distinction between state and society, see Gregory A. Kalscheur, S.J., *John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, 1 J. CATH. SOC. THOUGHT 231, 245–48, 265–66 (2004).

<sup>68</sup> *Declaration*, *supra* note 10, at 686.

spirit of partisanship. Its action is to be controlled by juridical norms which are in conformity with the objective moral order.

These norms arise out of the need for effective safeguard of the rights of all citizens and for peaceful settlement of conflicts of rights. They flow from the need for an adequate care of genuine public peace, which comes about when men live together in good order and in true justice. They come, finally, out of the need for a proper guardianship of public morality. These matters constitute the basic component of the common welfare: they are what is meant by public order.

For the rest the usages of society are to be the usages of freedom in their full range. These require that the freedom of man be respected as far as possible, and curtailed only when and in so far as necessary.<sup>69</sup>

Commenting on this text, John Courtney Murray suggested that “secular experts may well consider” this last sentence—what Murray called the principle of the integrity of freedom in society— “to be the most significant sentence in the *Declaration*. It is a statement of the basic principle of the ‘free society.’ ” This principle, and the moral limits on governmental action that flow from it, serves to safeguard the responsible freedom rooted in human dignity that is the foundation of the entire *Declaration*. In order to safeguard the dignity giving rise to the demand for responsible freedom, the powers of government must be limited. In other words, government must be “constitutional.”<sup>70</sup>

Murray thus saw the *Declaration* as a juridical formula—a statement of the rights and duties governing the relationship between the person and the state, as well as the limitations on governmental power that are necessary to safeguard human dignity. The responsible freedom that is a manifestation of human dignity demands recognition of a sphere of human activity whose integrity must be protected from coercive intrusion. This protected sphere encompasses those activities that do not implicate public order concerns. The government is not to enter into the sphere itself; it is not “there to pass moral or theological judgments on the beliefs expressed, or on the actions performed, within the sphere. Such judgments are ‘unconstitutional,’ beyond the competence of purely juridical authority.”<sup>71</sup>

<sup>69</sup> *Declaration*, *supra* note 10, at 686–87; see also *Declaration*, *supra* note 10, at 685 (“[G]overnment is to see to it that the equality of citizens before the law, which is itself an element of the common welfare, is never violated for religious reasons whether openly or covertly. Nor is there to be discrimination among citizens.”).

<sup>70</sup> See Murray, *supra* note 27, at 573 (The principle of the free society articulated in section seven of *Declaration* (“as much freedom as possible, and only as much restraint as necessary”) and the principle of equality before the law (see *Declaration*, *supra* note 10 at 685, quoted in *supra* note 69) “furnish the solution to the political issue raised by the question of religious freedom as the immunity of the person from coercive restraint of action in accordance with his own beliefs. Together they require that government should be ‘constitutional.’ ”); see also RICO, *supra* note 25, at 36 (“The argument for the universal right to religious freedom almost resolves itself in a defense of the constitutional government.”); cf. *Notes on the Declaration*, *supra* note 2, at 676 n.2 (The *Declaration* manifests “direct continuity with two basic doctrinal themes of John XXIII in the encyclical *Pacem in Terris*: the dignity of the human person and the consequent necessity of constitutional limits to the powers of government.”).

<sup>71</sup> John Courtney Murray, S.J., *The Declaration on Religious Freedom*, in VATICAN II: AN INTERFAITH APPRAISAL, *supra* note 27, at 568 (emphasis added). A similar argument for the proposition that there

The *Declaration*, therefore, rests on a moral argument about the requirements of human dignity that concludes by characterizing the state as “a purely juridical authority.” The state’s role is *not* to take direct responsibility for the entire common good of society, which would include direct responsibility over the moral character of individuals whose flourishing is the ultimate criterion establishing the requirements of the common good. Respect for the demands made by human dignity instead restricts the government’s legitimate role to the more limited juridical function of preserving that limited component of the common good characterized as public order. As Bryan Hehir explains:

The public order criterion assumes that the state has positive moral responsibilities, but it sets limits to the use of the coercive power of the state through civil law. *The limit is set by the requirement that an issue must be shown to affect directly the core values of public order (i.e. public peace, defense of rights and public morality) before an appeal can be made to invoke the prohibitions or prescriptions of civil law.* The use of the public order criterion is first found in Catholic teaching in Vatican II; the previous guide for civil law had been the more expansive concept that the state and the law should be invoked to promote the common good.<sup>72</sup>

The use of the public order criterion thus marks a crucial development within the tradition of Catholic social thought; a development that Murray described as a shift from an “ethical” to a “juridical” or political view of the state.

According to the ethical view of the state, the function of government was to lead the subject of governmental authority “toward the life of virtue by the force of good laws reflecting the demands of the moral order.”<sup>73</sup> Murray saw this understanding of the state at work in the encyclicals of Leo XIII, whose teachings on religious freedom and the proper relationship

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are simply certain things that a limited, constitutional government cannot do was made by Justice Chase:

I cannot subscribe to the omnipotence of a *State Legislature*, or that it is *absolute and without control*; although its authority should not be *expressly* restrained by the *Constitution*, or *fundamental law*, of the State . . . . The purposes for which men enter into society will determine the *nature* and *terms* of the *social compact*; and as *they* are the foundation of the *legislative power*, *they* will decide what are the *proper* objects of it: The *nature* and *ends* of *legislative power* will limit the *exercise* of it . . . . There are acts which the *Federal* or *State Legislature* cannot do, *without exceeding their authority* . . . . An *ACT* of the *Legislature* (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise* of *legislative authority*.

*Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387–88 (1798).

See also SANFORD LEVINSON, CONSTITUTIONAL FAITH 214 n. 45 (1988) (characterizing Justice Chase “as a participant in the ‘catholic’ strain of American constitutional theory” which recognizes unwritten constitutional tradition as a limit on governmental power).

<sup>72</sup> J. Bryan Hehir, *The Consistent Ethic: Public Policy Implications*, in CONSISTENT ETHIC OF LIFE 218, 227 (T.G. Fuechtmann, ed., 1988) (emphasis added).

<sup>73</sup> John Courtney Murray, S.J., *The Declaration on Religious Freedom*, in CHANGE IN OFFICIAL CATHOLIC MORAL TEACHINGS 1, 9 (READINGS IN MORAL THEOLOGY NO. 13) (Charles Curran ed., 2003).

between church and state reflected the notion that “error has no rights.” The ruler’s duty was to render society virtuous from the top down. The role of government was paternal, and society was understood as the “family writ large,” with the ruler as paterfamilias.<sup>74</sup> Murray noted that, in Leo XIII’s encyclicals, the traditional Catholic “distinction between society and state was largely lost from view.”<sup>75</sup> Moreover,

nowhere in the immense body of Leo XIII’s writings is there to be found a satisfactory philosophy of human law and jurisprudence. He was always the moralist, not the jurist. His concern was to insist that the juridical order of society must recognize the imperatives of the objective moral order.<sup>76</sup>

In contrast, Murray saw a development toward the political or juridical view of the state in the teachings of Pius XII and John XXIII. The threat of twentieth-century totalitarianism led both popes to focus more attention on the necessary distinctions between state and society. Totalitarianism was seen as “threatening the basic dignity of the human person, which is his freedom,” and Pius XII, therefore, “revived the distinction between society and state, the essential barrier against totalitarianism.”<sup>77</sup> This distinction provided the foundation for a key insight: “society is to be built and rendered virtuous from the bottom up, as it were; the role of government is subordinate, a role of service to the human person.”<sup>78</sup> Government is simply political, and the relation between the person and the state is not familial, but simply civil. The primary function of government is, therefore, juridical:

The protection and promotion of the exercise of human and civil rights and the facilitation of the discharge of human and civil duties by the

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<sup>74</sup> See *id.* at 10.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* Murray sometimes described the ethical view, whose roots are in classical and medieval political philosophy, as the “Leonine doctrine,” because of the role it played in the encyclicals of Leo XIII. See *id.* Leo XIII’s understanding of the state’s role in promoting moral truth led him to reject calls for religious freedom, and Murray’s great scholarly accomplishment was to demonstrate how the doctrine affirmed in the *Declaration on Religious Freedom* was, in fact, more faithful to the traditional Christian understanding of the proper relationship between state, society, and the human person. See CURRAN, *supra* note 62, at 228, 246 n. 33 (discussing Leo XIII’s encyclical *Libertas Praestantissimum* and the pre-Vatican II notion that “error has no rights” and citing Murray’s scholarship on the Leonine understanding of the state). Cf. JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 235–39 (1998) (arguing that affirmation of the subsidiary role of the state can be drawn from the work of Thomas Aquinas).

<sup>77</sup> See Murray, *supra* note 73, at 11. Murray notes that Leo XIII gave little attention to the moral limits on the state and the distinction between state and society because he was faced with a different “polemic necessity”—the need to counter the “moral antinomianism and juridical positivism of continental laicism.” Murray, *supra* note 73, at 10. See also Murray, *supra* note 73, at 4–5 (“The order of civil law and political jurisdiction was not simply being differentiated from the order of moral law and ecclesiastical jurisdiction; a complete rupture was made between the two orders of law and the two authorities, and they were set at hostile variance, each with the other. Society and state were not invested with their *due* secularity; they were roughly clothed in the alien garments of continental laicism.”) (emphasis added). In contrast, the doctrine affirmed in the *Declaration on Religious Freedom* recognizes “a proper and legitimate secularity of society and state.” Murray, *supra* note 73, at 4.

<sup>78</sup> Murray, *supra* note 73, at 4.

citizen who is fully citizen, that is, not merely subject to, but participant in, the processes of government. . . . “Man as such, so far from being regarded as the object of social life or a passive element thereof, is rather to be considered its subject, foundation and end.”<sup>79</sup>

Like Murray, John Finnis also sees the understanding of the role of the state articulated in the *Declaration* as representative of a shift away from a traditional understanding of the state (with roots in classical Athens) toward a “standard modern position” in which the state has a limited and subsidiary role with respect to the moral formation of the human person.<sup>80</sup> The older view held that “the state should encourage true worth and discourage immorality,” from which it followed that the state could legitimately exercise a “directly parental disciplinary role” with respect to the moral conduct of citizens—including consenting adults.<sup>81</sup>

The standard modern position, in contrast, reflects the distinction between the proper roles of state and society in promoting morality, and “considers that the state’s proper responsibility for upholding true worth (morality) is a responsibility *subsidiary* (auxiliary) to the *primary* responsibility of parents and non-political voluntary associations.”<sup>82</sup> Pursuant to this conception of the state, “the proper role of government has been taken to exclude the state from assuming a directly parental disciplinary role in relation to consenting *adults*.”<sup>83</sup> In contrast, the state acting through law *does* have a legitimate role in supervising the influences on moral development that are manifest in the public realm or environment. However, because the state has a limited, subsidiary role in promoting human fulfillment, the state does *not* have the legitimate authority “to direct people to virtue and deter them from vice by making even secret and truly consensual adult acts of vice a punishable offence against the state’s laws.”<sup>84</sup>

Finnis finds this distinction appropriate for reasons that echo Pavan’s elaboration of the right to religious freedom.<sup>85</sup> The state acting through law cannot “make” people good, moral, or virtuous in the same way that a craftsman makes a good chair by imposing his design on the wood with

<sup>79</sup> Murray, *supra* note 73, at 9 (quoting Pius XII).

<sup>80</sup> See John Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1052–53, 1070–76 (1994) [hereinafter Finnis, *Law, Morality, and Sexual Orientation*]; see also John Finnis, *Is Natural Law Theory Compatible with Limited Government?*, in NATURAL LAW, LIBERALISM, AND MORALITY: CONTEMPORARY ESSAYS 1, 6–7 (Robert P. George ed., 1996) [hereinafter Finnis, *Natural Law Theory*].

<sup>81</sup> Finnis, *Law, Morality, and “Sexual Orientation,”* *supra* note 80, at 1052.

<sup>82</sup> Finnis, *Law, Morality, and “Sexual Orientation,”* *supra* note 80 (emphasis in original).

<sup>83</sup> Finnis, *Law, Morality, and “Sexual Orientation,”* *supra* note 80, at 1052 (A state adhering to the standard modern position “has by no means renounced its legitimate concern with public morality and the education of children and young people towards truly worthwhile and against alluring but bad forms of conduct and life.”); see also *infra* text accompanying notes 116–121. Cf. Andrew Koppleman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1679 (2005) (While pornography can cause moral harm, the law should not criminalize the sale of pornography to adults. “Parents can appropriately decide that certain materials are worthless and harmful, and that children cannot be trusted to see them. But it is not a light thing to treat adult citizens as if they were children.”).

<sup>84</sup> Finnis, *Natural Law Theory*, *supra* note 80, at 8.

<sup>85</sup> See *supra* text accompanying notes 53–57.

which he is exercising his expert technique. Instead, “helping citizens to choose and act in line with integral human fulfillment must involve something which goes beyond any art or technique. *For only individual acting persons can by their own choices make themselves good or evil.*”<sup>86</sup> The state thus has a proper role in helping<sup>87</sup> people to make virtuous choices, but the state is incapable of “making” people good or evil. People have to be allowed to exercise responsible freedom: they must be left free to make the self-constituting choices through which they make themselves good or evil. The individual’s exercise of practical reasonableness in choosing how to live is itself an intrinsic dimension of human flourishing that the individual should be free to pursue unless that pursuit threatens the rights of others or degrades the public environment in which all pursue their flourishing.<sup>88</sup>

The state serves a properly subsidiary role; government acting through law fulfills its limited role when it, as the “public managing structure” of society, helps to secure a *public* economic and cultural environment that will allow all the different individuals and groups who make up society to pursue their fulfillment (which includes moral virtue). And government possesses no legitimate authority to act beyond this subsidiary role. For the state to use “its public powers, and law’s coercive pedagogy, to require of all citizens the acts and forbearances which will advance their fulfillment and complete virtue” is for the state to engage in an effort that is “an abuse of public power, *ultra vires* because directed to an end which state government and law do not truly have.”<sup>89</sup> Because it is an institution with a limited, subsidiary role, government as understood by Finnis, Murray, and Vatican II “is precisely *not* presented . . . as dedicated to the coercive

<sup>86</sup> Finnis, *Natural Law Theory*, *supra* note 80, at 7–8 (emphasis added).

<sup>87</sup> Finnis, *Natural Law Theory*, *supra* note 80, at 5–6 (“[The state’s] purpose must be to carry out a function which the Jesuit social theorists of the early twentieth century taught us to call subsidiarity (i.e., helping, from the Latin *subsidiium*, help) . . . .”); *see also* FINNIS, *supra* note 76, at 235 (“[G]overnments’ or lawmakers’ responsibility to promote virtue does not authorize them to require more than the actions and forbearances necessary, directly or indirectly, for maintaining public and interpersonal good.”); FINNIS, *supra* note 76, at 237 (For Aquinas, the individual was not to be subordinated to the political community; “[H]ere we may add Aquinas’ partial anticipation of the principle of subsidiarity: ‘it is contrary to the proper character of the state’s governance to impede people from acting according to their responsibilities – except in emergencies.’”); FINNIS, *supra* note 76, at 237 n.82 (According to the principle of subsidiarity, “it is unjust for more extensive associations to assume functions which can be performed efficiently by individuals or by less extensive associations, since the proper function of instrumental associations is to help their members help themselves.”).

<sup>88</sup> *See* FINNIS, *supra* note 76, at 245 (the lives of individuals and families “directly instantiate basic goods”); FINNIS, *supra* note 76, at 247–48 (Government acting through law has the subsidiary function of helping individuals and families to do what they cannot do well on their own; “[I]ndividuals and families cannot well secure and maintain the elements which make up the *public good* of justice and peace . . . . And so their instantiation of basic goods is less secure and full than it can be if public justice and peace are maintained by law . . . in a way that no individual or private group can appropriately undertake or match. Individuals’ and groups’ need for political community is *that* need, and the political community’s specific [limited] common good is, accordingly that *public good*.”).

<sup>89</sup> FINNIS, *supra* note 76, at 239; *see also* FINNIS, *supra* note 76, at 228 (“[T]hose vices of disposition and conduct which have no significant relationship, direct or indirect, to justice and peace are not the concern of state government or law. [This] position [of Aquinas] is not readily distinguishable from the ‘grand simple principle’ . . . of John Stuart Mill’s *On Liberty*.”); Finnis, *Natural Law Theory*, *supra* note 80, at 4 (“The government of political communities is rationally limited not only by constitutional law and by the moral norms which limit every decent person’s deliberation and choice, but also by the inherent limits of its general justifying aim, purpose or rationale.”).

promotion of virtue and the repression of vice, as such, even though virtue (and vice) are of supreme and constitutive importance for the well-being (or otherwise) of individual persons and the worth (or otherwise) of their associations.”<sup>90</sup>

### C. THE JUST DEMANDS OF PUBLIC ORDER

As we have seen, the *Declaration* adopts the concept of public order as the moral principle that limits the legitimate action of government. The dignity of the human person demands immunity from coercion in the exercise of responsible freedom,<sup>91</sup> “except where just demands of public order are proven to have the urgency of a higher force.”<sup>92</sup> The state’s properly subsidiary role in promoting the common good is defined by the demands of public order. The *Declaration* articulates the demands of public order in terms of three criteria:

1. the effective protection of the rights of all citizens and the peaceful settlement of conflicts of rights;
2. the adequate protection of that just public peace which is to be found where people live together in good order and true justice; and
3. the proper guardianship of public morality.<sup>93</sup>

These three criteria reflect the understanding of public order articulated by Murray in the years leading up to the Council’s promulgation of the *Declaration*.

Murray characterizes public order as that limited segment of the common good that is committed directly to the care of the state; that limited area in which “the public powers may legitimately apply their

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<sup>90</sup> Finnis, *Natural Law Theory*, *supra* note 80, at 6–7 (emphasis added). *But cf.* Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 28–31 (2000) (disagreeing with Finnis’ proposed principled moral limit to the authority of the state to enforce morality); *id.* at 30 (“[P]erhaps I’ve caught John Finnis, in his great generosity of spirit, straining to find a kernel of wisdom in the liberal account of freedom and public morality.”).

<sup>91</sup> John Courtney Murray, S.J., *Arguments for the Human Right to Religious Freedom*, in RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM 229, 241 (J. Leon Hooper, S.J. ed., 1993). The vision of the relationship between the human person, society, and the state manifest in the *Declaration* is fundamentally oriented toward freedom:

The foundation of human society lies in the truth about the human person, or in its dignity, that is, in its demand for responsible freedom. That which in justice is preeminently owed to the person is freedom – as much freedom as possible – in order that society thus may be borne toward its goals, which are those of the human person itself, by the strength and energies of persons in society bound together with one another by love. Truth and justice, therefore, and love itself demand that the practice of freedom in society be kept vigorous, especially with respect to the goods belonging to the human spirit and so much more with respect to religion. Now this demand for freedom, following as it does from the objective truth of the person in society and from justice itself, naturally engenders the juridical relationship between the person and the public power. The public power is duty bound to acknowledge the truth about the person, to protect and advance the person, and to render the justice owed the person. *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *See Declaration*, *supra* note 10, at 686–87 (quoted in the text accompanying *supra* note 69).

coercive powers.”<sup>94</sup> Murray identified three goods that can and must be achieved by the power proper to the state, “the power inherent in the coercive discipline of public law”:

The first is the *public peace*, which is the highest political good. The second is *public morality*, as determined by moral standards commonly accepted among the people. The third is *justice*, which secures for the people what is due them. And the first thing that is due to people in justice is their freedom, the enjoyment of their personal and social rights. . . .<sup>95</sup>

Murray further specified his understanding of the limited sphere of public order in the work presenting his most comprehensive articulation of Catholicism’s potential contribution to American public discourse: *We Hold These Truths: Catholic Reflections on the American Proposition*.<sup>96</sup> In Chapter Seven of *We Hold These Truths*, Murray notes that the American mind “has never been clear about the relation between morals and law. These two orders of reality are frequently confused, in either one of two ways.”<sup>97</sup>

The first confusion stems from a failure to understand the difference between moral precepts and civil statutes. While there is truth in the medieval adage that “whatever is right ought to be a law,” its truth does not lie in the notion that coercive statutes, backed up by state police power, should compel people to do whatever is right.<sup>98</sup> Instead, the adage means that *whatever is right ought to become a customary norm of life*; “the moral order ought to be reflected in the habitual order of everyday life and

<sup>94</sup> JOHN COURTNEY MURRAY, S.J., *The Problem of Religious Freedom*, 25 THEOLOGICAL STUD. 503, 520 (1964).

<sup>95</sup> *Id.* at 521 (emphasis added). Charles Curran has suggested that the order of justice identified by Murray and the *Declaration on Religious Freedom* should be understood to include “social justice and human rights . . . . The state should intervene to protect basic human rights, to promote economic rights . . . and also to prevent public disturbances of the peace.” CHARLES E. CURRAN, DIRECTIONS IN CATHOLIC SOCIAL ETHICS 132 (1985). Curran concludes that neither Murray nor the Vatican declaration focused on “social justice as a legitimate and necessary function of government and law.” Perhaps their focus on the narrow issue of religious freedom precluded them from giving “enough importance to the role of the state in preserving and promoting social justice.” *Id.* at 133. Robert McElroy describes five legitimate state objectives identified by Murray within the subsidiary common good that is called public order: (1) the Thomistic or juristic end (domestic tranquility understood as unity in political society achieved by law and stable social structures); (2) the Augustinian end (protection of the moral standards of the community; this end “gives substance to society because it supports all the procedures of law and the total edifice of tranquility that we call peace”); (3) the end of freedom (the empowerment to do what one ought and immunity from being constrained to do what one ought not to do); (4) the Christian end (government’s obligation to seek to attain a fullness of human welfare); and, (5) the power end (government’s responsibility for the common defense of the nation from external enemies). See ROBERT W. MCELROY, THE SEARCH FOR AN AMERICAN PUBLIC THEOLOGY: THE CONTRIBUTION OF JOHN COURTNEY MURRAY 86 (1989) (citing John Courtney Murray, S.J., *Analysis for the Rockefeller Brothers’ Project* 28–29, JOHN COURTNEY MURRAY PAPERS (available at the Georgetown University library)).

<sup>96</sup> MURRAY, *supra* note 3, at v. In his preface to the 1986 edition of *We Hold These Truths*, Walter Burghardt, S.J., notes that Murray, the “architect of Vatican II’s Declaration on Religious Freedom[,] has been increasingly recognized as primarily responsible for bringing the Catholic tradition on Church, state, and society into civilized conversation with the ‘American proposition’ of pluralist democracy.” MURRAY, *supra* note 3, at v.

<sup>97</sup> MURRAY, *supra* note 3, at 156.

<sup>98</sup> MURRAY, *supra* note 3, at 156.

action.”<sup>99</sup> Moreover, while the reverse formulation of the medieval adage is also true, “whatever is law (custom) ought to be right,” it does not mean that customs oblige simply because they exist. Instead, they are obligatory because of their rightness—their reflection of the moral order.<sup>100</sup> Thus, we need to be wary of those who shout, “There ought to be a law!” without considering whether the matter of concern is the sort of good or evil “that the law can, or ought to, cope with.”<sup>101</sup>

The second confusion flows from this failure to understand that *the law is not meant to deal with every sort of moral evil*. It finds expression in the notion that, “if what is moral ought by that fact to be legal, it follows that what is legal is by that fact also moral.”<sup>102</sup> This confusion reflects a sort of moral chaos that stems from “ignorance of the traditional rules of jurisprudence”—that “subtle discipline, at once a science and an art, that mediates between the imperatives of the moral order and the commands or prohibitions of the civil law.”<sup>103</sup> This “subtle discipline” reminds us that there is a difference between private sin and public crime,<sup>104</sup> a distinction between private morality and public morality.

Moreover, “unless this distinction, like that between morality and law, is grasped, the result is a fiasco of all morality.”<sup>105</sup> The foolish position that all sins should be crimes devolves into the “knavish” position that those acts that are not crimes are not even sins.<sup>106</sup> “Upon [this] foolish disregard of the distinction between private and public morality there ensues a knavish denial that there is any such thing as public morality.”<sup>107</sup>

This distinction is rooted in the more fundamental distinctions between society and state and between the common good and public order. It is a basic principle of jurisprudence that “morals and law are differentiated in character, and not coextensive in their functions”; the civil law should not forbid everything that the moral law forbids or enjoin everything that the moral law commands.<sup>108</sup> “The moral law governs the entire order of human conduct, personal and social; it extends even to motivations and interior acts.” The civil law, in contrast, “looks only to the public order of human society; it touches only external acts, and regards only values that are

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<sup>99</sup> MURRAY, *supra* note 3, at 156.

<sup>100</sup> See MURRAY, *supra* note 3, at 156.

<sup>101</sup> MURRAY, *supra* note 3, at 156.

<sup>102</sup> MURRAY, *supra* note 3, at 157.

<sup>103</sup> MURRAY, *supra* note 3, at 156.

<sup>104</sup> MURRAY, *supra* note 3, at 156. See also Skeel & Stuntz, *supra* note 29, at 838 (“Jesus’ definitions of adultery and murder proved that immorality and illegality cannot and must not be coextensive. God’s law reigns over a broad empire that man’s law cannot hope to govern.”). Jesus’ Sermon on the Mount offers radically interior understandings of murder and adultery. See *Matthew* 5:21–22 (NRSV) (“You have heard it said to those of ancient times, ‘you shall not murder’ and ‘murderers shall be liable to judgment.’ But I say to you that if you are angry with a brother or sister, you will be liable to judgment . . . .”); *Matthew* 5:27–28 (NRSV) (“You have heard that it was said, ‘You shall not commit adultery.’ But I say to you that everyone who looks at a woman with lust has already committed adultery with her in his heart.”).

<sup>105</sup> MURRAY, *supra* note 3, at 158.

<sup>106</sup> MURRAY, *supra* note 3, at 158.

<sup>107</sup> MURRAY, *supra* note 3, at 158.

<sup>108</sup> MURRAY, *supra* note 3, at 165–66.

formally social. For this reason the scope of the law is limited.”<sup>109</sup> Moreover, because civil law ultimately operates through coercion, it can only have a *limited* effect on shaping internal moral character—“men can be coerced only into a minimal amount of moral action.”<sup>110</sup> As a result, Murray concludes that:

[T]he moral aspirations of the law are minimal. Law seeks to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order. It does not look to what is morally desirable, or attempt to remove every moral taint from the atmosphere of society. It enforces only what is minimally acceptable, and in this sense socially necessary.<sup>111</sup>

If society wishes to elevate and maintain moral standards above this minimal level of social necessity, it must look to institutions other than the law.<sup>112</sup> This contention highlights Murray’s view of the crucial role played by voluntary, mediating institutions—for example, the church, the family, the school—in working to build up the common good through efforts to raise the level of public morality.<sup>113</sup> All of these institutions have a legitimate role to play with respect to issues of public morality; the field is not left to the state and the law alone.<sup>114</sup> This again emphasizes the importance of Murray’s distinction between society and state. The state and the law have a necessary—but necessarily limited—role to play in civil society’s goal of establishing and maintaining the common good.

Thus, while law and morality are related, they are also differentiated. The premises of the law are ultimately found in the moral law—reason compels civil society to seek the common good and to recognize that the effort to secure some aspects of the common good may require the help of the state acting through the coercive force of the law. Moreover, civil law invariably looks to the “moralization of society.”<sup>115</sup> The civil law concerns itself with public morality. But given its mode of action, which is ultimately coercion, the law must not moralize excessively. If it does so, “it

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<sup>109</sup> MURRAY, *supra* note 3, at 166.

<sup>110</sup> MURRAY, *supra* note 3, at 166. *See also* MCELROY, *supra* note 95, at 88 (“Law, in Murray’s view, had to be rooted in morality. But its aims were not to generate a truly moral society; rather, [its aims] consisted of establishing a threshold of moral standards in society.”).

<sup>111</sup> MURRAY, *supra* note 3, at 166.

<sup>112</sup> *Cf.* Skeel & Stuntz, *supra* note 29, at 831 (“[L]aw works best when its ambitions are modest. . . . The grander ambitions our law seems to have . . . are proper jobs for ethicists or philosophers, or perhaps doctors and economists, but not for lawyers and judges.”).

<sup>113</sup> MURRAY, *supra* note 3, at 166.

<sup>114</sup> *Cf.* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1416 (1990) (“The principle of free exercise of religion effectively removes government from the development and transmission of virtue at its most fundamental level – thus devolving upon voluntary religious societies . . . the central function thought by ‘republicans’ to be vested in the state. The free exercise principle therefore . . . points . . . toward a social order that is neither strictly individualistic nor statist in its understanding of the good.”).

<sup>115</sup> MURRAY, *supra* note 3, at 166.

tends to defeat even its own modest aims, by bringing itself into contempt.”<sup>116</sup>

As the preceding discussion suggests, the public morality component of public order may be the most difficult of the three dimensions of public order to define and apply.<sup>117</sup> Scholars like Christopher Wolfe and Robert George use the term “public morality” to refer to the public enforcement of moral standards to promote the common good by directly shaping the character of citizens.<sup>118</sup> Yet this understanding of public morality *cannot* be what is meant by the term as it is used in the *Declaration*—such an understanding would fail to reflect the *Declaration’s* affirmation of a limited, subsidiary role for the state in promoting the common good,<sup>119</sup> and it would fail to protect the right to religious freedom itself from illegitimate infringement if the public chooses to enforce compliance with religious truth as an aspect of the common good that the state should promote.

Charles Curran, following Murray, distinguishes between public morality and private morality, and characterizes public morality as “the

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<sup>116</sup> MURRAY, *supra* note 3, at 166; *see also* POPE JOHN PAUL II, EVANGELIUM VITAE [THE GOSPEL OF LIFE] §71, at 130 (1995) (citing THOMAS AQUINAS, SUMMA THEOLOGIAE, I-II, q. 96, a.2) (stating that legal precepts that expect too much virtue will be despised by imperfect men, who will hold law in contempt and break into greater evils); Skeel & Stuntz, *supra* note 29, at 838 (“[L]egal moralism is almost always counterproductive. . . . Good moral principles are often vague and open-ended, and they reach into every nook and cranny of our lives and thoughts. Legal principles that have these qualities only serve to invite arbitrary and discriminatory enforcement [which] in turn invite contempt for the law. Moral education becomes an exercise in educating the public in bad morals.”). *Cf.* PERRY, LOVE AND POWER, *supra* note 7, at 134 (noting that “[t]he central problem . . . of the legal enterprise is the relation of love to power.” If we are compassionate, and if we value community, we will be especially wary about relying on extreme coercion: The costs – extreme suffering and extreme resentment – are great and sometimes terrible.” (quoting JOHN NOONAN, PERSONS AND MASKS OF THE LAW xii (1976))).

<sup>117</sup> *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 215 (1980) (noting that “neither ‘morality’ nor ‘public order’ is a term clear in its meaning (quite apart from any substantive controversies about the requirements of morality or public order).”) Some of the ambiguity with respect to morality stems from the tendency in modern legal usage to equate “morality” almost exclusively with sexual morality, while in philosophical usage, sexual morality “is merely one small portion of the requirements of practical reasonableness.” Appending the adjective “public” to the noun “morality,” as is the case in many international human rights documents referring to “public order or morals” may not resolve the ambiguity. Finnis further notes that the term “public order” suffers from its own “irremediable ambiguity;” in common law systems the term refers to “absence of disorder,” while the civil law concept of *ordre public* (which Finnis understands to be at work in section seven of the *Declaration*) is “almost as wide as the concept of public policy in common law.” *Id.* *See also* HOLLENBACH, *supra* note 27, at 91 (noting the existence of “serious disagreements about where to draw the line between the domain of public morality (where civil law has a legitimate role to play) and that of private morality (where civil freedom should prevail)”).

<sup>118</sup> *See, e.g.*, Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 65 (2000) (“Public morality . . . concerns laws and public actions focused on the moral conduct and especially the stable patterns of conduct (character) of individual citizens. The question of what role the political community should take in promoting norms of morality for citizens is at the heart of public morality. The focal cases of public morality are those involving laws that limit certain forms of conduct of consenting adults, on the grounds that they are morally wrong.”); George, *supra* note 90, at 28–31 (rejecting Finnis’s attempt to place a principled moral limit on the state’s authority to enforce morality).

<sup>119</sup> *See, e.g.*, Wolfe, *supra* note 118, at 68 (“The permission of particular acts by a community has something of an educative effect, contributing to the ‘normalization’ and hence the legitimization of such acts. . . . Conversely, the absence of laws may make certain practices more widespread, and thereby contribute to people’s sense that such conduct is normal or at least unobjectionable, and it may help to shape people’s ideas about whether certain conduct is legitimate, since *society* withholds any negative public judgment about that conduct.”) (emphasis added). *Cf.* MURRAY, *supra* note 3, at 157–58 (on the confusion inherent in this position).

morality necessary for people to live together in society.”<sup>120</sup> For this to be a workable formula, however, we need to have a clearer sense of what sorts of moral regulations are “necessary” for life together in society. In a helpful effort to elaborate this concept, John Finnis argues that the “public morality” criterion involves “the preservation of a social environment conducive to virtue.”<sup>121</sup>

Finnis draws a crucial distinction between two different sorts of legal supervision: (1) “supervising the truly private consensual conduct of adults” and (2) “supervising the *public realm or environment*.”<sup>122</sup> The use of legal coercion to supervise and control the truly private consensual conduct of adults—the sphere that Murray would identify with private morality—falls outside the state’s limited subsidiary role in promoting the common good of society.<sup>123</sup> As noted above, the state’s purpose is not to “make” people wholly virtuous through legal coercion.<sup>124</sup> When the law tries to do this, the law improperly restrains the exercise of responsible freedom.

The limited, subsidiary role of the state acting through law, however, *does* properly extend to supervising and securing the sort of social milieu in which individuals and groups can pursue their own flourishing. To say that the state’s role in promoting public order includes the end of promoting public morality is to say that the state can properly use the tool of legal coercion to promote the sort of public “moral-cultural-educational

<sup>120</sup> CURRAN, *supra* note 95, at 132. *See also* CURRAN, *supra* note 95, at 133 (“The theory proposed here is fundamentally that found in the Declaration on Religious Liberty of the Second Vatican Council, which itself is heavily based on the work of John Courtney Murray.”).

<sup>121</sup> Finnis, *Natural Law Theory*, *supra* note 80, at 6; Finnis, *Law, Morality, and “Sexual Orientation,” supra* note 80, at 1073. *See also* FINNIS, *supra* note 117, at 215–18, 229 (discussing public order and public morality as those concepts are used in the *Declaration* and contemporary human rights documents).

<sup>122</sup> Finnis, *Law, Morality, and “Sexual Orientation,” supra* note 80, at 1053.

<sup>123</sup> Finnis, *Law, Morality, and “Sexual Orientation,” supra* note 80, at 1053; *see also* Finnis, *Law, Morality, and “Sexual Orientation,” supra* note 80, at 1076 (The rationale that justifies the state’s use of legal coercion does not “require[ ] or authorize[ ] the state to direct people to virtue and deter them from vice by making even secret and truly consensual adult acts of vice a punishable offence against the state’s laws.”). Finnis explains that, “[a]part from such special arrangements as marriage, no one’s human rights include a right that other men or women should not conduct themselves sexually in certain ways.” FINNIS, *supra* note 117, at 216. Within the special context of marriage, spouses do have a right to expect sexual fidelity from one another. Society as a whole, however, does not have a right to expect that every sin be made a crime. *See* MURRAY, *supra* note 3, at 157–58, 166. It should be emphasized that recognition of a sphere of private morality that is beyond the proper reach of law does *not* mean that all conduct that occurs in private is beyond the proper reach of the law. Justice and peace can be violated in private, as when domestic violence occurs within the family home. The law properly extends to violations of rights within private settings. *See* FINNIS, *supra* note 76, at 251 (“The public good of justice is not restricted to ‘public spaces’ or the transactions of public business. It can be desirable to get the rule of law into some private relationships which otherwise become the occasion of injustice, wrong done by one person to another.”); *see also* State v. Russell, 890 A.2d 453, 462–63 (R.I. 2006) (no constitutionally protected liberty interest prevents the criminal law from operating to address domestic violence in the home).

<sup>124</sup> *See supra* text accompanying notes 85–88. *See also* Kaveny, *supra* note 6, at 352–53 (“According to Thomas [Aquinas], the major concern of the positive law . . . is not the inner disposition of the acting agents, but instead, the external situation of right relations that ideally would be produced when such agents act virtuously. Consequently, the law targets its strictures on actions that disturb the appropriate situation of right relations between various members of society, not on actions primarily affecting the character of the agent.”).

environment”<sup>125</sup> in which human rights can be securely enjoyed: “[A] context or framework of mutual respect and trust and common understanding, an environment which is physically healthy and in which the weak can go about without fear of the whims of the strong.”<sup>126</sup>

The use of law to secure a public environment or milieu conducive to human flourishing extends to each of the elements of public order. There is, for example, a socially shared benefit to maintaining a milieu in which the law protects individuals’ rights and preserves public peace: “Rioting and bombing, and threats thereof, are not merely prejudicial to the rights of those killed or injured, but to everyone who has now to live in a community where such things happen.”<sup>127</sup> Similarly, Finnis explains that “[t]he operation of a grossly noisy aeroplane can be said to violate the rights of those awakened and deafened by it, but the problem is quite reasonably described as one of public order or public nuisance and not pinned down to the rights of those who happen to have been affected.”<sup>128</sup>

These examples focus on the maintenance of a physical environment “essential to the well-being of all members of a community, especially the weak.”<sup>129</sup> The concept of public morality extends a similar concern to supervising the public moral-cultural-educational environment that allows individuals to pursue their own proper good.<sup>130</sup> The law, for example, has a role to play in shaping the public milieu in which parents raise their children, including the way in which that public milieu influences or inhibits the development of character and virtue.

Laws regulating sexuality in the public realm fall within this understanding of the public morality element of public order. Finnis notes that sexuality is a powerful force that needs to be “integrated with other aspects of human personality and well-being.”<sup>131</sup> It seems to be the case that human sexual psychology can tend “towards regarding other persons as bodily objects of desire . . . and as mere items in an erotically flavoured classification (e.g., ‘women’), rather than as full persons.”<sup>132</sup> Accordingly, there is reason for using the law to “foster[ ] a milieu in which children can be brought up (and parents assisted rather than hindered in bringing them up) so that they are relatively free from inward subjection to an egoistic, impulsive, or depersonalized sexuality.”<sup>133</sup>

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<sup>125</sup> Finnis, *Law, Morality, and “Sexual Orientation,”* *supra* note 80, at 1053.

<sup>126</sup> FINNIS, *supra* note 117, at 216.

<sup>127</sup> FINNIS, *supra* note 117, at 217.

<sup>128</sup> FINNIS, *supra* note 117, at 218.

<sup>129</sup> FINNIS, *supra* note 117, at 217.

<sup>130</sup> See Finnis, *Law, Morality, and “Sexual Orientation,”* *supra* note 80, at 1075 (The state properly acts through law for the end of “securing an economic and cultural environment in which all [individuals and lawful associations] can pursue their own proper good.”).

<sup>131</sup> FINNIS, *supra* note 117, at 217.

<sup>132</sup> FINNIS, *supra* note 117, at 217. See also Koppleman, *supra* note 83, at 1647–55 (discussing objectification, the power of sex, and the need to protect children).

<sup>133</sup> FINNIS, *supra* note 117, at 217. Finnis argues that legal supervision of the public realm or environment is a proper public order concern because “that is (1) the environment or public realm in which young people . . . are educated, (2) the context in which and by which everyone with responsibility for the well-being of young people is helped or hindered in assisting them to avoid bad forms of life, and (3) the milieu in which and by which all citizens are encouraged and helped, or

Comparing a law prohibiting the private use of contraceptives with a law regulating abortion helps to illustrate the difference between issues of private morality and issues of public order. Finnis argues, for example, that the Supreme Court in *Griswold v. Connecticut*<sup>134</sup> reached the correct result when it struck down a Connecticut law prohibiting the *private* use of contraceptives by spouses.<sup>135</sup> Such a law constituted impermissible direct supervision of the private consensual conduct of adults. Abortion, however, is difficult to characterize as an issue of private morality.<sup>136</sup> As then-Justice Rehnquist noted in his dissent in *Roe v. Wade*, the performance of a medical abortion by a licensed physician “is not ‘private’ in the ordinary usage of that word.”<sup>137</sup> More importantly, a court deciding whether abortion is a matter of public order must directly confront the fact that abortion involves “the killing of a living thing.”<sup>138</sup> If that “thing” is a human being,<sup>139</sup> then abortion clearly is a public order issue that the law properly addresses, because it is reasonable to characterize the destruction of human life as a violation of public peace, a matter of justice and human rights, and an issue of public morality involving the maintenance of a public milieu that promotes human flourishing by respecting the dignity of human life.<sup>140</sup>

Finnis suggests that a similar distinction should be drawn between laws that would recognize same-sex marriages and laws that directly prohibit private, adult, consensual same-sex behavior.<sup>141</sup> A community can—in

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discouraged and undermined, in their own resistance to being lured by temptation into falling away from their own aspirations to be people of integrated good character, autonomous, and self-controlled persons, rather than slaves to the passions.” Finnis, *Natural Law Theory*, *supra* note 80, at 17. As point (3) suggests, safeguarding “public morality” by means of legislation dealing with sexuality extends beyond fostering a milieu conducive to assisting parents to raise well-integrated children. Public decency laws, for example, are “a related but distinguishable matter, concerned with the maintenance of (to be very summary) a certain ‘distance’ from other people’s bodily features and sexuality, a distance that most people find essential to maintaining the integration of their own bodily nature and sexuality with their self-possession, friendship, etc.” FINNIS, *supra* note 117, at 229.

<sup>134</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>135</sup> Finnis notes that *Griswold* was convicted as an accessory to the substantive prohibition of the use of contraception by spouses. See Finnis, *Law, Morality, and “Sexual Orientation,” supra* note 80, at 1076.

<sup>136</sup> Indeed, if the Court had used the distinction between private morality and public order as the basis for its decision in *Griswold* (instead of invoking a more nebulous right to privacy), *Griswold* would not easily have served as the foundation of a line of cases leading to recognition of a fundamental constitutional right to make the abortion decision.

<sup>137</sup> *Roe v. Wade*, 410 U.S. 113, 172 (1973).

<sup>138</sup> Rubinfeld, *supra* note 4, at 187.

<sup>139</sup> Rubinfeld notes that, even if one concludes that the embryo is not a human being, “we don’t usually suppose that law can prevent harms only to human beings. That would be news to anyone who supports laws preventing cruelty to animals, not to mention the Endangered Species Act.” Rubinfeld, *supra* note 4, at 187. Rubinfeld, however, argues that *Roe* can be understood as rooted in a principle drawn from the Fourteenth Amendment’s prohibition of legal efforts to recreate the conditions of slavery: “a free woman cannot be forced into motherhood against her will.” (More broadly, “no state may force particular occupations on individuals, or otherwise instrumentalize them as masters could do to their slaves.”) Rubinfeld, *supra* note 4, at 188, 230 n.4.

<sup>140</sup> See Todd David Whitmore, *What Would John Courtney Murray Say? On Abortion and Euthanasia*, 121 COMMONWEAL 17, 18 (Oct. 7, 1994). While abortion is a proper subject for law to deal with, what the law should be with respect to abortion—especially in a society where there is significant disagreement over the morality of abortion—is a distinct question. The public, for example, “may not be ready to receive a law that simply mirrors what is morally true.” *Id.* at 19; see also *supra* note 95 and accompanying text; see also *infra* note 166 (discussing the prudential and pragmatic limits on good law); see also Kaveny, *supra* note 6, at 350–53 (discussing the practical and moral considerations that characterize the making of good law).

<sup>141</sup> See Finnis, *Law, Morality and “Sexual Orientation,” supra* note 80, at 1050, 1076.

accord with the public morality component of public order—use the law to regulate the public environment and to structure the social milieu in order to encourage the understanding of marriage that it judges to be in accord with human flourishing.<sup>142</sup> At the same time, respect for the moral limits on the law's power that are reflected in the public order concept, with its critical distinction between private morality and public morality, leads Finnis to argue that legal coercion should *not* be used to discourage homosexual activity “by way of a law of the type upheld in *Bowers v. Hardwick*.”<sup>143</sup> The law in this area should be limited to supervising the public realm or environment, not the truly private conduct of adults.<sup>144</sup>

#### D. AN ANALYTICAL FRAMEWORK

The conception of limited, constitutional government that flows from the *Declaration* generates an analytical framework for understanding the relationship between human dignity, freedom, morality, and the proper functions and limits of law. To synthesize the foregoing terrain, the analytical framework is composed of the following six central principles:

1. *Human Dignity Demands Respect for the Exercise of Responsible Freedom.*

The right to religious freedom articulated by the Council is rooted in a commitment to respect the exercise of responsible freedom that is demanded by human dignity. Because the dignity of the human person consists in the responsible use of human freedom, individuals and associations must possess an ability to seek the truth and act on their own judgment, immune from coercion.

2. *Immunity from Coercion in the Exercise of Responsible Freedom is Not Dependent on a Person's Morally Upright Behavior.*

This immunity from coercion is not dependent on whether or not one has actually apprehended the truth, and this immunity from coercion must

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<sup>142</sup> See Finnis, *Law, Morality and “Sexual Orientation,”* *supra* note 80, at 1050, 1076; see Finnis, *Natural Law Theory,* *supra* note 80, at 17. Much of Finnis's argument relies on his conclusion that same-sex sexual activity is immoral. A public order argument in support of traditional marriage law, however, need not be rooted in that moral conclusion; see also discussion of Justice Cordy's dissent *infra* text accompanying notes 221–225.

<sup>143</sup> See Finnis, *Natural Law Theory,* *supra* note 80, at 17; see also discussion of *Bowers v. Hardwick*, 478 U.S. 186 (1986) *infra* text accompanying notes 151–153.

<sup>144</sup> Finnis, *Natural Law Theory,* *supra* note 80, at 17; see Finnis, *Law, Morality, and “Sexual Orientation,”* *supra* note 80, at 1076 (“The truth and relevance of [the] distinction [between public morality and private morality], and its high importance for the common good, would be overlooked . . . if laws criminalizing private acts of sodomy between adults were to be struck down by the Court on any ground which would also constitutionally require the law to . . . recognize homosexual ‘marriages’ or permit the adoption of children by homosexually active people, and so forth.”). See also SAMUEL J.M. DONNELLY, *A PERSONALIST JURISPRUDENCE, THE NEXT STEP: A PERSON-CENTERED PHILOSOPHY OF LAW FOR THE TWENTY-FIRST CENTURY* 175 (2003) (A right to be let alone, rooted in fundamental human dignity, provides the basis for arguing that *Bowers* was wrongly decided. “In *Bowers* the activities in question took place in the privacy of the home. Public homosexual or heterosexual activities or abusive actions were not presented to the Court. Any state or private interests in conflict with the right of privacy in this instance would seem to be outweighed by the interest in protecting the primary social good of the struggle for moral growth and appropriate relations with others.”).

be protected even in those who fail to seek the truth or whose actions do not conform to the truth. The human dignity affirmed by the *Declaration* is a dignity shared by every person simply by virtue of his humanity; the existence of the human dignity that must be respected in the constitutional order is not tied to a person's morally upright behavior. The fact that someone's deeds might be objectively immoral—or that a governing majority in the community might regard the person's deeds as immoral—does not strip that person of his inherent human dignity, nor of the right to exercise responsible freedom that inherently flows from that dignity.

3. *Respect for the Moral Order Demands Immunity from Legal Coercion Unless the Coercive Use of Law Is a Due Restraint Mandated by the Just Requirements of Public Order.*

Legal restrictions on a person's freedom constitute a violation of his human dignity unless the coercive restriction is a due restraint mandated by the just requirements of public order. To preserve a sphere of autonomy for the exercise of responsible freedom, the legitimate scope and power of government to act coercively through law must be limited. This immunity from coercion is a moral limit on the law's ability to enforce duties toward the truth—a *moral limit required by the order of truth of which the dignity of the human person is an essential element*. To protect responsible freedom demanded by human dignity, the law's role is limited to protecting the public order of society.

4. *The State Has a Limited, Subsidiary Role in Promoting the Common Good of Society, and the Maintenance of Public Order is the Necessary—but Limited—Function that the State Legitimately Exercises.*

“Public order” is that limited dimension of the common good of society that it is the state's function to coordinate through law. Every member of society—individuals, families, religious groups, voluntary associations, and the state—is obliged to promote the common good in an appropriate manner. The maintenance of public order is the necessary—but limited—function that the state legitimately exercises. The concept of public order has three essential components, which bear repeating: the effective protection of the rights of all citizens and the peaceful settlement of conflicts of rights; the adequate protection of that just public peace which is to be found where people live together in good order and true justice; and the proper guardianship of public morality. If the state attempts to use law with respect to matters that go beyond protection of public order—for example, if the state attempts to take direct responsibility for shaping the moral character of individuals through coercive laws that prohibit private, adult, consensual behavior that is thought to be immoral—then the state is asserting power that is not justified by its limited subsidiary role in promoting the common good. Such ultra vires governmental action injures human dignity by invading the sphere reserved for the exercise of responsible freedom.

5. *Care for Public Morality Is an Essential Component of the State's Legitimate Role in Maintaining Public Order.*

The state's legitimate power to maintain public order properly includes the power to supervise public morality, because the preservation of a social environment conducive to the pursuit of virtue is a necessary element of the common good of society that individuals and voluntary associations cannot promote on their own; individuals and groups need the help of the state acting through law in order to secure a social milieu or public moral-cultural-educational environment in which they can pursue their own flourishing.

6. *While Care for Public Morality Is a Legitimate State Concern, the State's Limited, Subsidiary Role in Promoting the Common Good Prevents the State from Legislating with Respect to Private Morality.*

To distinguish public morality (which is a proper concern of the state) from private morality (whose supervision is beyond the limited power of the state) is to recognize that not every sin should be a crime; the state's limited subsidiary purpose is not to "make" people wholly virtuous through legal coercion. The state does properly act through law, however, to regulate behavior which directly affects the core values of public order, including the value of preserving a public milieu or environment in which all the members of society are able to exercise their responsible freedom and pursue human flourishing.

### III. APPLYING THE FRAMEWORK TO *LAWRENCE V. TEXAS*

The Supreme Court in *Lawrence* addressed a constitutional challenge to a Texas statute "making it a crime for two persons of the same-sex to engage in certain intimate sexual conduct."<sup>145</sup> The Court concluded that "the case should be resolved by determining whether the petitioners were free as adults to engage in the private [and consensual] conduct [criminalized by the statute] in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." Invoking the line of substantive due process precedents stemming from *Pierce v. Society of Sisters*,<sup>146</sup> *Meyer v. Nebraska*,<sup>147</sup> and *Griswold v. Connecticut*,<sup>148</sup> and culminating in *Roe v. Wade*<sup>149</sup> and *Planned Parenthood of Southeastern Penn. v. Casey*,<sup>150</sup> the Court struck down the Texas statute and explicitly overruled its 1986 decision in *Bowers*.<sup>151</sup>

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<sup>145</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>146</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

<sup>147</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>148</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>149</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>150</sup> *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992).

<sup>151</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578 (2003). "*Bowers* was not correct when it was decided and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." *Lawrence*, 539 U.S. at 578. Justice Kennedy's opinion for the Court was joined by Justices Stevens, Souter, Ginsburg, and Breyer.

The Court in *Bowers* had rejected a constitutional challenge to a Georgia statute criminalizing sodomy, holding that the federal constitution did not recognize a fundamental right to engage in homosexual sodomy. Absent a fundamental right, the Georgia statute needed only to survive rational basis review, and the *Bowers* Court rejected the argument that “the presumed belief of a majority of the electorate in Georgia . . . is immoral and unacceptable” was “an inadequate rationale” in support of the law.<sup>152</sup> In rejecting the claim that the majority’s “sentiments about the morality of homosexuality” should be declared an inadequate basis for the law, the *Bowers* Court advanced the following argument: “The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”<sup>153</sup>

#### A. JUSTICE KENNEDY’S OPINION FOR THE COURT

Justice Kennedy, writing for the Court in *Lawrence*, rejected the understanding of the relationship between law and morality embraced by the Court in *Bowers*.<sup>154</sup> Instead, the *Lawrence* Court expressly adopted the view advanced by Justice Stevens in his *Bowers* dissent: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”<sup>155</sup> Because Texas advanced no rationale for its law apart from its assertion that a governing majority believed the practice of same-sex sexual activity to be immoral, the Court concluded that the Texas statute violated the Due Process Clause of the Fourteenth Amendment: “‘It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.’ The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”<sup>156</sup>

The Court in *Lawrence* seems to have seen itself as engaged in the task of using the doctrinal tool of substantive due process to consider this question: what sorts of legal limits on freedom are consistent with respect for human dignity?<sup>157</sup> The Court, for example, begins its critique of *Bowers* with the assertion that the *Bowers* Court—by focusing on the question of whether there is a fundamental right to engage in homosexual sexual

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Justice O’Connor declined to join in the Court’s substantive due process analysis or in overruling *Bowers*. She did, however, concur in the judgment of the Court on equal protection grounds.

<sup>152</sup> *Bowers*, 478 U.S. at 196.

<sup>153</sup> *Id.*

<sup>154</sup> See *Lawrence*, 539 U.S. at 577.

<sup>155</sup> *Id.* at 558, 560 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J. dissenting)).

<sup>156</sup> *Id.* at 578 (quoting *Casey*, 505 U.S. at 847) (internal citation omitted).

<sup>157</sup> See Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 741 (2006) (noting that “human dignity played a prominent role in the Supreme Court’s constitutional decision-making” in *Lawrence*). Cf. Perry, *The Morality of Human Rights*, *supra* note 7, at 101–02 (the inherent dignity of the human person provides the foundation for the morality of human rights that is reflected in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights).

activity—“fail[ed] to appreciate the extent of the liberty at stake”<sup>158</sup> in the case. Statutes like those at issue in *Bowers* and *Lawrence* do not simply implicate a right to engage in certain sexual conduct; instead, such statutes “seek to control a personal relationship that, *whether or not entitled to formal recognition in the law*, is within the liberty of persons to choose without being punished as criminals.”<sup>159</sup>

The Court then argues that, “as a general rule,” legal control of such personal relationships is beyond the power of the state, “absent injury to a person or abuse of an institution the law protects.”<sup>160</sup> This general rule, in turn, is rooted in the Court’s acknowledgement that the dignity of free persons is protected by the Due Process Clause:

It suffices for us to acknowledge that adults may choose to enter upon this relationship *in the confines of their homes and their own private lives* and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.<sup>161</sup>

The Court recognized that for centuries many people have condemned homosexual conduct as immoral on the basis of deeply held moral convictions “shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.”<sup>162</sup> The conviction that such conduct is immoral serves for many people as a moral principle “to which they aspire and which determine[s] the course of their lives.”<sup>163</sup> Yet the Court was unwilling to acknowledge such a moral principle as a proper basis for a criminal prohibition:

These considerations do not answer the question before us . . . . [T]he issue is whether the majority may use the power of the State to enforce these views on the whole society through the operation of the criminal law. “Our obligation is to define the liberty of all, not mandate our moral code.”<sup>164</sup>

*Bowers* adopted a different view of the relationship between law and morality, and the *Lawrence* Court expressly rejected that view. The Court explained that *Bowers* was incorrect on the day that it was decided, in part because it failed to acknowledge that developments in “our laws and traditions in the past half century . . . . show an emerging awareness that

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<sup>158</sup> *Bowers*, 539 U.S. at 566–67.

<sup>159</sup> *Id.* at 567 (emphasis added).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (emphasis added).

<sup>162</sup> *Id.* at 571.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 850 (1992)).

liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>165</sup> In support of the Court’s conclusion that this emerging awareness should have been apparent when *Bowers* was decided in 1986, Justice Kennedy pointed to four pieces of evidence: (1) the American Law Institute’s (ALI’s) 1955 decision not to recommend or provide for “criminal penalties for consensual sexual relations conducted in private,”<sup>166</sup> (2) a history of nonenforcement of existing American sodomy laws,<sup>167</sup> (3) the 1957 Wolfenden Report recommending that the British Parliament repeal laws criminalizing homosexual conduct,<sup>168</sup> and (4) a 1981 decision of the European Court of Human Rights, *Dudgeon v. United Kingdom*,<sup>169</sup> holding that laws prescribing consensual homosexual conduct were invalid under the European Convention on Human Rights.<sup>170</sup>

The Court’s reliance on this evidence may create a bridge to the understanding of the moral limits on law that I present in this Article. For example, the Wolfenden commission based its recommendation on a formulation of the proper function of the criminal law which reflects the public order principle: the function of the criminal law “is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable.”<sup>171</sup>

<sup>165</sup> *Id.* at 571–72. *Cf. Declaration*, *supra* note 10, at 675–77 (a growing consciousness of the dignity of the human person and increasing demands for responsible freedom in human society lead to development in doctrine).

<sup>166</sup> *Bowers*, 539 U.S. at 572. The Court noted that the ALI “justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail.” *See also* MURRAY, *supra* note 96, at 166–67. The ALI justifications for declining to adopt a legal prohibition are strikingly similar to the questions that John Courtney Murray, drawing on the thought of Thomas Aquinas, suggests a good lawmaker should ask in judging whether or not it would be prudent to adopt a legal ban of a particular moral evil: “[1] Will the law be obeyed, at least by the generality? [2] Is it enforceable against the disobedient? [3] Is it prudent to . . . enforce [ ] . . . this or that ban, . . . [given] the possibility of harmful effects in other areas of social life? [4] Is the instrumentality of a coercive law a good means for the eradication of this or that social vice? [5] Since a means is not a good means if it [usually] fails . . . what are the lessons of experience [with this sort of ban?] [6] [Moreover, in evaluating our experience,] what is the prudent view of results – the long view or the short view?”; *see also* Skeel & Stuntz, *supra* note 29, at 829 (noting that legal moralism tends to backfire; “When lawmakers try [to use the law to teach wisdom or express society’s highest ideals], the effort usually backfires. Prohibition did not produce an alcohol free culture, any more than contemporary law enforcement crusades have produced a culture that is drug-free. (It seems closer to the truth to say that our culture is drug obsessed, perhaps in response to the law’s ceaseless efforts to fine-tune what substances Americans can and cannot consume.)”); *see also* Skeel & Stuntz, *supra* note 29, at 838–39 (discussing the dangers of arbitrary enforcement that often accompany legal moralism).

<sup>167</sup> *Lawrence*, 539 U.S. at 572.

<sup>168</sup> *Id.* at 572–73.

<sup>169</sup> *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. B) at 45 (1981).

<sup>170</sup> *Lawrence*, 539 U.S. at 573 (noting that, because a decision of the European Court of Human Rights is “[a]uthoritative in all countries that are members of the Council of Europe (twenty-one nations then, forty-five nations now), [*Dudgeon*] is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization”). *See* FINNIS, *supra* note 117, at 211–16. A number of international human rights documents, including the United Nations Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights, make use of a public order limitation on legislative power similar to that outlined in the *Declaration on Religious Freedom*.

<sup>171</sup> THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 23 (1963).

The commission further noted that it is not the function of the law to restrain the private lives of citizens any further than is necessary to accomplish those public order purposes.<sup>172</sup>

Moreover, the commission thought it inappropriate to equate the “sphere of crime” with that of sin; accordingly, there is “a realm of private morality . . . which is . . . not the law’s business.”<sup>173</sup> And, in words that resonate with the *Declaration’s* insistence that respect for human dignity demands protection of a realm of responsible freedom, the Wolfenden commission explained that private morality lies beyond the legitimate reach of the law in order to “emphasize the personal and private responsibility of the individual for his own actions . . . a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law.”<sup>174</sup>

The *Lawrence* Court went on to argue that the holding of *Bowers* had been undermined by its post-*Bowers* decisions in *Casey* and *Romer v. Evans*.<sup>175</sup> Justice Kennedy drew from *Casey* a connection between the personal dignity and autonomy that are both central to the liberty protected by the Due Process Clause. The Court’s substantive due process

<sup>172</sup> THE WOLFENDEN REPORT, *supra* note 171, at 23–24. The distinction the Report makes between public order and decency may reflect the more limited common law understanding of public order noted by John Finnis. See FINNIS, *supra* note 117, at 215. By including the protection of decency within the proper function of the criminal law, the Wolfenden Report seems to adopt a functional understanding of the public order principle that resembles the way in which the concept of public order is used in this Article and in the *Declaration on Religious Freedom*.

<sup>173</sup> THE WOLFENDEN REPORT, *supra* note 171, at 48. Cf. MURRAY, *supra* note 91 at 157–58; Skeel & Stuntz, *supra* note 29, at 839–40. This recognition of a sphere of private morality that the law has no legitimate business regulating is not foreign to the U.S. constitutional tradition. See, e.g., CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 150 (1886) (“The police power of the government cannot be brought into operation for the purpose of exacting obedience to the rules of morality, and banishing vice and sin from the world. The moral laws can exact obedience only *in foro conscientiae*.”); see also *id.* at 4–5 (“Any law which . . . undertakes . . . to limit the exercise of rights beyond what is necessary to provide for the public welfare and general security, cannot be included in the police power of government. It is a governmental usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions.”). Suzanne Goldberg notes that “*Bowers* stands alone in its endorsement and acceptance of a pure morals-based justification for lawmaking,” and she demonstrates that, apart from *Bowers*, the Supreme Court’s post-World War II jurisprudence has looked for “observable social harms” as the basis for sustaining governmental action. Goldberg, *supra* note 5, at 1254, 1259; see also Goldberg, *supra* note 5, at 1259–61 (discussing Tiedeman’s understanding of the scope of the police power). What Goldberg characterizes as “observable social harms,” fall within the sphere of public order concerns that I argue it is the law’s legitimate business to regulate. The distinction between a private realm that lies beyond the government’s regulatory power and threats to public order that the law can properly address is also reflected in the Court’s distinction between the private possession of obscene material and the legitimate regulation of the commercial distribution of obscene material. Compare *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (states’ broad power to regulate obscenity “simply does not extend to mere possession by the individual in the privacy of his own home”), with *United States v. Orito*, 413 U.S. 139, 143 (1973) (“Government has a legitimate interest in protecting the public commercial environment by preventing such material from entering the stream of commerce.”), *id.* at 142–43 (“[A] myriad of activities may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public.”), and *United States v. Extreme Associates, Inc.*, 431 F.3d 150, 161 (3d Cir. 2005) (rejecting argument that *Lawrence* undermines *Orito*; federal statutes regulating commercial distribution of obscenity do not violate any constitutional right to privacy), *cert. denied*, 126 S. Ct. 2048 (2006). Cf. Goldberg, *supra* note 5, at 1268–33 (discussing the Court’s recognition that concern about public secondary effects of adult entertainment provide a legitimate basis for regulation).

<sup>174</sup> THE WOLFENDEN REPORT, *supra* note 171, at 48.

<sup>175</sup> *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992); *Romer v. Evans*, 517 U.S. 620 (1996).

jurisprudence holds that the Constitution demands respect for the autonomy of the human person in making personal decisions regarding marriage, procreation, contraception, family relationships, child rearing and education:

“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.” Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.<sup>176</sup>

There is without a doubt much that can be criticized in this passage. For example, is the heart of liberty the right *to define one’s own concept* of existence, of meaning, of the universe, and of the meaning of human life?<sup>177</sup> Or, is liberty—the responsible freedom demanded by human dignity—more properly understood as the right *to seek the truth* about existence, meaning, the universe, and the mystery of human life free of compulsion of the state?<sup>178</sup> And what does it mean to “seek autonomy” in order to make choices that define one’s beliefs about the meaning of the universe free of state compulsion in this context? Isn’t the due process question in *Lawrence* more properly framed as whether the state has an adequate basis for limiting the autonomy that is demanded by human dignity by depriving someone of their liberty (i.e., coercively restraining their conduct—no one is being compelled to believe anything here) simply because a governing majority is convinced that the conduct is immoral? Questions like these suggest that the *Lawrence* Court has failed coherently to articulate the relationship between human dignity, freedom, morality, and law. Yet the passage does indicate that properly articulating the demands of that relationship *is* at the heart of substantive due process analysis.

The Court then turns to *Romer*, where the Court struck down, as a violation of the Equal Protection Clause, a Colorado constitutional amendment that deprived persons who are homosexual the ability to seek protection under state antidiscrimination laws.<sup>179</sup> The Court in *Romer* concluded that the Colorado constitutional provision was “ ‘born of

<sup>176</sup> *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851).

<sup>177</sup> See, e.g., *id.* at 588 (Scalia, J., dissenting) (“[T]he dictum of [*Casey*’s] famed sweet-mystery-of-life passage . . . ‘casts some doubt’ upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one’s ‘right to define’ certain concepts; and if the passage calls into question the government’s power to regulate *actions based on* one’s self-defined ‘concept of existence, etc.’ it is the passage that ate the rule of law.”); RUBENFELD, *supra* note 4, at 185 (describing the “grand vapidity” of *Casey*’s mystery-of-life passage) (“The language quoted is so magniloquent that it is virtually contentless – any action could fall within the ‘right to define one’s own concept of existence, of meaning, of the universe.’ ”).

<sup>178</sup> Cf. *Declaration*, *supra* note 10, at 679–81; see also *supra* text accompanying notes 42–58.

<sup>179</sup> *Lawrence*, 539 U.S. at 574.

animosity toward the class of persons affected' ” and “had no rational relation to a legitimate governmental purpose.”<sup>180</sup> Rather than simply relying on *Romer*, however, to strike down the Texas statute as a provision “born of animosity” toward homosexuals and therefore lacking a rational relation to a legitimate governmental purpose, Justice Kennedy concluded that the Court must squarely address the continuing validity of *Bowers* itself.

The Court explained that failure to address the central holding of *Bowers* might suggest that a sodomy statute drawn to criminalize the conduct between both same-sex and different-sex participants would be substantively valid. Even if such a statute could not be enforced against homosexual conduct alone without violating the equal protection clause, a law declaring homosexual conduct to be a criminal offense “in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”<sup>181</sup> Thus, leaving *Bowers* in place as a valid precedent “demeans the lives of homosexual persons.”<sup>182</sup> Moreover the stigma imposed by the offense defined in Texas’ criminal statute is not trivial.<sup>183</sup> Even though it is a minor offense (a class C misdemeanor), “it remains a criminal offense with all that imports for the dignity of the persons charged.”<sup>184</sup>

While the Court’s rejection of *Bowers* declared that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,”<sup>185</sup> the Court did not go on to state what more might be required to satisfy the Constitution. The Court, however, did emphasize what this case did *not* involve:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons may seek to enter.<sup>186</sup>

Although the Court does not use this language, it appears that the Court’s conclusion rests on the absence of any factors that would implicate “public order” concerns. This case would be different if it involved injury to minors or coerced, non-consensual conduct. In such cases, the law can properly intervene in the name of protecting public order: the effective safeguarding of the rights of all citizens to be free from injury.

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<sup>180</sup> *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

<sup>181</sup> *Id.* at 575.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 577.

<sup>186</sup> *Id.* at 578.

This case would also be different if it involved public sexual conduct, prostitution, or formal legal recognition of homosexual relationships. Each of these cases can be characterized as implicating the public morality component of public order—society’s right to invoke the law to supervise the public social environment in order to secure a moral-cultural-educational milieu conducive to human flourishing. *Lawrence*, in contrast, involves the state’s improper attempt to use legal coercion to address an issue of private morality. The Texas criminal prohibition of private, adult, consensual same-sex sexual activity constitutes an effort to “make” individuals virtuous—it is not an effort to regulate behavior affecting the public social milieu—and, thus it is “an abuse of public power, *ultra vires* because directed to an end which state government and law do not truly have[.]”<sup>187</sup>

Absent any “public order” justification, the Texas law cannot survive rational basis scrutiny because it furthers no legitimate state interest:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government . . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.<sup>188</sup>

Thus, while the Court did not characterize its holding explicitly in these terms, the Court’s holding, along with the limitations the Court placed on that holding, can be read together to support the following proposition: the “substantive reach of liberty under the Due Process Clause”<sup>189</sup> bars the state from criminalizing or prohibiting conduct without some “public order” justification.

Such a conclusion is consistent with the analytical framework elaborated in the *Declaration*—human dignity demands that the coercive power of the state only be used to restrain freedom when the limitation serves a “public order” function related to the state’s limited role in promoting the common good.<sup>190</sup> Acknowledging that a state interest only

<sup>187</sup> FINNIS, *supra* note 76, at 239. See *supra*, text accompanying notes 85–90.

<sup>188</sup> *Lawrence*, 539 U.S. at 578.

<sup>189</sup> *Id.* at 564.

<sup>190</sup> There is an interesting resonance between the concluding sentences of Justice Kennedy’s opinion and the *Declaration*’s acknowledgment that it is drawing new implications out of the foundational truth of human dignity. Compare *Lawrence*, 539 U.S. at 578–79 (“[T]hose who drew and ratified the Due Process Clauses of the Fifth and Fourteenth Amendment . . . did not presume to have this insight [into the components of liberty in its manifold possibilities]. They knew that times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”) with *Declaration*, *supra* note 10, at 676 (recognizing that new demands are being made for responsible freedom in human society and that constitutional limits be set to the powers of government. “This Vatican Synod takes careful note of these desires in the minds of men. It proposes to declare them to be greatly in accord with truth and justice. To this end, it searches into the sacred tradition and doctrine of the Church – the treasury out of which the Church continually brings

becomes “legitimate” for purposes of rational basis review when that interest constitutes a public order concern thus serves to explain *both* the Court’s holding in *Lawrence* and the limits that it wishes to place on that holding.

#### B. JUSTICE O’CONNOR’S CONCURRENCE

Although Justice O’Connor did not join Justice Kennedy’s opinion for the Court overruling *Bowers*, her opinion concurring in the judgment on equal protection grounds also attempts to analyze the relationship between morality and law in the context of rational basis review. Drawing on the line of equal protection cases that culminated in the Court’s decision in *Romer*, Justice O’Connor explained that the Court has “consistently held . . . that some objectives, such as ‘a bare . . . desire to harm a politically unpopular group,’ are not legitimate state interests.”<sup>191</sup> While Texas argued that its statute served the legitimate, *Bowers*-endorsed, state interest of promoting morality, Justice O’Connor chose to read *Bowers* quite narrowly: *Bowers*’ morality rationale might insulate a law criminalizing sodomy from a substantive due process challenge, but “*Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished.”<sup>192</sup>

*Lawrence*, in contrast, directly presented the equal protection issue of whether moral disapproval by itself is a legitimate state interest justifying a statute criminalizing homosexual sodomy but not heterosexual sodomy. In Justice O’Connor’s view, moral disapproval alone was *not* a legitimate interest justifying such a statutory distinction:

Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.<sup>193</sup>

Moral disapproval of a group fails as a legitimate state interest, because “legal classifications must not be drawn for the purpose of disadvantaging the group burdened by the law.”<sup>194</sup>

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forth new things that are in harmony with the things that are old.”). The notion of development of doctrine is at work in both the *Declaration* and Justice Kennedy’s opinion for the Court in *Lawrence*. See also Kalschur, *supra* note 26, at 126–28.

<sup>191</sup> *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring in the judgment) (quoting Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973)). See also *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985); *Romer v. Evans*, 517 U.S. 620, 632 (1996).

<sup>192</sup> *Lawrence*, 539 U.S. at 582.

<sup>193</sup> *Id.* (internal citations omitted).

<sup>194</sup> *Id.* at 583.

The Texas statute targets only conduct that is closely correlated with being homosexual and is rarely enforced in the context of private, consensual acts; thus Justice O'Connor concludes that the Texas statute serves as an animus-driven statement of dislike and disapproval "directed toward gay persons as a class,"<sup>195</sup> and "the State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law."

But what else besides moral disapproval is necessary to provide a legitimate state interest supporting a criminal prohibition? Presumably a state's criminal prohibition of robbery reflects animosity toward, and moral disapproval of robbers, and is targeted against a class defined by the conduct that defines the class.<sup>196</sup> What then, separates Texas' criminalization of same-sex sexual conduct from its criminalization of robbery?<sup>197</sup> The threat to "public order" posed by robbery, but absent in the case, of private, consensual sexual conduct like that at issue in *Lawrence*, would seem to fill the gap.

Justice O'Connor seems to gesture toward a similar sort of public order argument when she contends that the invalidity of Texas' statute as applied to private, consensual conduct "does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail rational basis review."<sup>198</sup> Such a distinction in the context of national security or traditional marriage law might well be supported by a legitimate state interest beyond moral disapproval. "Unlike the moral disapproval of same-sex relations – the asserted state interest in this case – other reasons exist to promote the institution of marriage beyond the mere moral disapproval of an excluded group."<sup>199</sup> Justice O'Connor does not make those "other reasons" explicit, but public order moral reasons would provide a principled basis for the distinction she seeks to draw.<sup>200</sup>

### C. JUSTICE SCALIA'S DISSENT

Justice Scalia's *Lawrence* dissent rejects the rational-basis analyses of both Justice Kennedy and Justice O'Connor. He contends that the Texas statute should be upheld on the basis of the "ancient proposition" holding "that a governing majority's belief that certain sexual behavior is 'immoral

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<sup>195</sup> *Id.*

<sup>196</sup> *Cf. United States v. Bass*, 404 U.S. 336, 348 (1971) (noting that "criminal punishment usually represents the moral condemnation of the community").

<sup>197</sup> *Cf. Lawrence*, 539 U.S. at 600–01 (Scalia, J., dissenting) (rejecting Justice O'Connor's critique of the Texas same-sex sodomy statute on the ground that it targets conduct defining a class: "Of course the same could be said of any law. A law against public nudity targets 'the conduct that is closely correlated with being a nudist,' and hence 'is targeted at more than conduct'; it is 'directed toward nudists as a class.'"). It should be noted, that a public nudity prohibition would have a public order purpose—the maintenance of public morality: a social "milieu in which children can be brought up (and parents assisted rather than hindered in bringing them up) so that they are relatively free from inward subjection to an egoistic, impulsive, or depersonalized sexuality." FINNIS, *supra* note 117, at 217.

<sup>198</sup> *Lawrence*, 539 U.S. at 585.

<sup>199</sup> *Id.* (O'Connor, J., concurring in the judgment).

<sup>200</sup> See discussion of marriage and public order, *infra* text accompanying notes 220–239.

and unacceptable' constitutes a rational basis for regulation."<sup>201</sup> Indeed, Justice Scalia fears that rejection of that "ancient proposition" leads the Court to engage in "an unheard-of form of rational-basis review that will have far reaching implications beyond this case."<sup>202</sup> He argues that, by rejecting *Bowers* and its affirmation of majoritarian moral disapproval as a legitimate state interest providing a rational basis for legislation, the Court has effectively decreed an end to all morals legislation<sup>203</sup> and left on "pretty shaky grounds state laws limiting marriage to opposite-sex couples."<sup>204</sup>

Justice Scalia claims that *all* morals legislation is at risk, because it is *impossible* to distinguish the now unconstitutional prohibition of same-sex sexual conduct from laws against "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."<sup>205</sup> All such laws are "sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding."<sup>206</sup>

For Justice Scalia, the logical implications of *Lawrence* are clear. The Court's effort to distinguish the criminal prohibition of same-sex sexual activity from the legal recognition of same-sex unions is a "bald, unreasoned disclaimer" that should not be believed:

Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct, . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.<sup>207</sup>

For Justice Scalia, it seems that the only principled way for constitutional law to avoid this head-on collision with traditional marriage

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<sup>201</sup> *Lawrence*, 539 U.S. at 589 (Scalia, J., dissenting).

<sup>202</sup> *Id.* at 586.

<sup>203</sup> *Id.* at 599.

<sup>204</sup> *Id.* at 601.

<sup>205</sup> *Id.* at 590.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 604–05. See also *id.* at 601–02 ("Justice O'Connor seeks to preserve [laws limiting marriage to opposite-sex couples] by the conclusory statement that 'preserving the traditional institution of marriage' is a legitimate state interest. But 'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples. . . . In the jurisprudence Justice O'Connor has seemingly created, judges can validate laws by characterizing them as 'preserving the traditions of society' (good); or invalidate them by characterizing them as 'expressing moral disapproval' (bad).").

law is to affirm the propriety of legal regulation of the entire field of morality, unless some specific constitutional protection prevents the state from acting. Perhaps the clearest statement of Justice Scalia's understanding of the scope of the law's legitimate role in regulating morality is to be found in his concurring opinion in *Barnes v. Glen Theatres*,<sup>208</sup> where the Court, without a majority opinion, upheld enforcement of an Indiana public indecency statute. Scalia there offered the following argument rejecting the contention that offense to others ought to be the only reason for prohibiting public nudity:

Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "*contra bonos mores*," *i.e.*, immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be a great diversity of views on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality" . . . The purpose of the Indiana statute, as both its text and the manner of its enforcement demonstrate, is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified.<sup>209</sup>

The state under Justice Scalia's view thus has the power to prohibit conduct, absent specific constitutional protection of such conduct, simply because it is immoral—against good morals. Understood in this way, Justice Scalia's view serves as an example of the ethical or moral view of the state rejected in the *Declaration on Religious Liberty*. *Bowers* and *Barnes* are representative for Justice Scalia of "[c]ountless judicial decisions and legislative enactments [that] have relied on this ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."<sup>210</sup>

Justice Scalia warns that to depart from this "ancient proposition," which he believes is the *only* ground for morals legislation or traditional marriage law, is to invite "a massive disruption of the current social order."<sup>211</sup> Yet, the public order concept would serve to save society from much of the massive disruption that Justice Scalia fears, while at the same time helping us to understand *Lawrence* as a proper exercise of rational-basis review. If we were to conclude that the freedom demanded by human dignity should not be restricted unless the state can offer a public order

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<sup>208</sup> *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

<sup>209</sup> *Id.* at 575.

<sup>210</sup> *Lawrence*, 539 U.S. at 589 (Scalia, J., dissenting).

<sup>211</sup> *Id.* at 591.

justification in support of the restriction the implications feared by Justice Scalia need not be so far reaching.

#### IV. PUTTING THE CONCEPT OF PUBLIC ORDER TO WORK

Many of the legal prohibitions that Justice Scalia describes as traditional morals offenses can be easily understood as offenses against public order. As such, the state, with its limited subsidiary role in promoting the common good, has a legitimate interest in prohibiting them. For example, the ordinance at issue in *Barnes* can be understood as dealing with a public order concern, namely, public morality. Indiscriminate public display of one's private parts properly is prohibited by law not simply because a governing majority believes such conduct to be immoral, but because that conduct constitutes a particular sort of moral problem—a problem of public morality. Such conduct is destructive of a public moral-cultural-educational environment in which all can flourish; it is therefore a public order concern, providing a legitimate basis for government to act through law.<sup>212</sup>

Similarly, in the course of rejecting *Lawrence*-based challenges to laws criminalizing prostitution, courts have identified a variety of legitimate state interests that justify laws against prostitution: the prevention of communicable disease, prevention of sexual exploitation, reducing prostitution-related crimes of violence and theft, and protecting the integrity and stability of family life.<sup>213</sup> While crime and sexual exploitation are easily seen as public order concerns, as threats to one's right to be free from harm, the whole ensemble of interests identified as justifying prohibitions of prostitution might be aptly characterized as public morality concerns.<sup>214</sup> Whether framed in terms of crime prevention or public morality, these interests fall within the category of public order concerns.

Justice Scalia is right to predict that not all traditional morals laws will survive *Lawrence*. For example, the Court's holding in *Lawrence* did lead the Virginia Supreme Court to recognize the constitutional invalidity of the state's criminalization of fornication. Virginia law provided that “[a]ny person, not being married, who voluntarily shall have sexual intercourse with any other person shall be guilty of fornication.”<sup>215</sup> In *Martin v. Zihlerl*,<sup>216</sup> this statute was invoked by Kristopher Zihlerl, an unmarried partner in a sexually active relationship, as a defense to a tort claim alleging that he had knowingly infected Muguet Martin with the sexually transmitted herpes virus while they were engaged in unprotected sexual

<sup>212</sup> See *supra* text accompanying notes 117–133.

<sup>213</sup> *State v. Freitag*, 130 P.3d 544, 546 (Ariz. Ct. App. 2006); see, e.g., *State v. Thomas*, 891 So.2d 1233, 1237 (La. 2005) (“no protected privacy interest in public, commercial sexual conduct”); *People v. Williams*, 811 N.E.2d 1197, 1199 (Ill. App. Ct. 2004) (The commercial sale of sex is excluded from the *Lawrence* analysis; statute reflects the distinction between private, noncommercial acts and the business of selling sex).

<sup>214</sup> See *supra* text accompanying notes 117–133.

<sup>215</sup> VA. CODE ANN. § 18.2–344 (2004), *invalidated* by *Martin v. Zihlerl*, 607 S.E.2d 367 (Va. 2005).

<sup>216</sup> *Martin*, 607 S.E.2d 367.

conduct. Zihlerl asserted that Martin could not recover damages because her injuries were caused by her participation in an illegal act, i.e., violation of the statutory prohibition of fornication.<sup>217</sup>

The Virginia court rejected Zihlerl's argument, explaining that it could "find no relevant distinction between the circumstances in *Lawrence*" and the circumstances in the case before it. Indeed, it is difficult to see how the private, consensual adult behavior in the context of a relationship at issue in *Martin* could remain illegal in the wake of *Lawrence*.<sup>218</sup> Yet, the court in *Martin* was careful to place limits on its holding: "Our holding, like that of the Supreme Court in *Lawrence*, addresses only private, consensual conduct between adults and the respective statutes' impact on such conduct. Our holding does not affect the Commonwealth's police power regarding regulation of public fornication, prostitution, or other such crimes."<sup>219</sup> Thus, the state's ability to act in order to regulate behavior posing a more direct threat to core public order concerns remains undisturbed. It would seem clear that, so long as the state can act through law in order to promote the state's moral interest in protecting public order, the dire social consequences feared by Justice Scalia are unlikely to be realized.

In particular, Justice Scalia's assertion that there is no principled way in which to avoid a head-on collision between *Lawrence* and traditional marriage law is mistaken. The concept of public order provides the principled distinction that was not articulated in *Lawrence* itself. The questions of what the institution of civil marriage means, how it should be structured, and to whom it should be open are not questions of private morality—they are public questions of the highest importance.<sup>220</sup> Nor are all arguments supporting the maintenance of traditional marriage law properly understood as manifesting moral disapproval of same-sex sexual conduct or animus toward homosexuals.

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<sup>217</sup> *Id.* at 368.

<sup>218</sup> *Id.* at 370. "We find no principled way to conclude that the specific act of intercourse is not an element of a personal relationship between two unmarried persons or that the Virginia statute criminalizing intercourse between unmarried persons does not improperly abridge a personal relationship that is within the liberty interest of persons to choose." See also *Hobbs v. Smith*, 2006 WL 3103008 (N.C. Super. Ct. Aug. 25, 2006) (invalidating North Carolina's prohibition of unmarried cohabitation on the ground that the statute "violates plaintiff's substantive due process right to liberty as explained in *Lawrence*").

<sup>219</sup> *Martin*, 607 S.E.2d at 371; see also *Tjan v. Commonwealth*, 621 S.E.2d 669, 672 (Va. Ct. App. 2005) (no substantive due process protection for sexual behavior in a public restroom in a department store; prohibition of "public sexual conduct does not implicate the more narrow liberty interest upheld in *Lawrence*"); *Singson v. Commonwealth*, 621 S.E.2d 682, 687 (Va. Ct. App. 2005) (same). Cf. Sonia K. Katyal, *Sexuality and Sovereignty: the Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J., 1429, 1435 (2006) (noting that the post-*Lawrence* case law often reads *Lawrence* to reflect "an implicit logic of containment that has relegated the exercise of sexual autonomy to private, rather than public, spaces . . .").

<sup>220</sup> See also Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 921 (2006) ("[M]arriage is readily characterized as a 'public' act and accordingly could be argued to lie outside *Lawrence's* holding."); *State v. Holm*, 137 P.3d 726, 742–43 (Utah 2006) (rejecting a *Lawrence*-based challenge to Utah's prohibition of bigamy; the case falls outside the scope of the holding in *Lawrence* because marriage is a public institution protected by law).

Justice Cordy's dissenting opinion in *Goodridge v. Dept. of Pub. Health*,<sup>221</sup> for example, articulates a clear public order argument demonstrating a rational basis for traditional marriage law.<sup>222</sup> Justice Cordy explains that the traditional structure of civil marriage—one man and one woman committed for life—“reflects society’s judgment as how optimally to manage procreation and the resultant child rearing.”<sup>223</sup> This judgment is based on centuries of experience with the institution of civil marriage; it is reflected in consistent judicial acknowledgement of the institutional importance of marriage as an organizing principle of society;<sup>224</sup> and a range of studies support the conclusion that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children.<sup>225</sup>

Few would disagree with Justice Cordy that ensuring, promoting, and supporting an optimal social structure for the bearing and raising of children is a valid exercise of the state’s police power.<sup>226</sup> Moreover, it should be clear that this exercise of the police power is not being invoked to address an issue of private morality. Instead, civil marriage law promotes a central moral purpose involving public order: supporting a social structure in which children can flourish and take their place in society.<sup>227</sup>

<sup>221</sup> *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (state lacks rational basis for excluding same-sex couples from marriage); *see also id.* at 995–1005 (Cordy, J., dissenting) (discussing the purposes of the institution of civil marriage and the rational basis for excluding same-sex couples from civil marriage).

<sup>222</sup> *See Hernandez v. Robles*, 7 N.Y.3d 338 (N.Y. 2006) (The New York Court of Appeals drew on Justice Cordy’s dissent in holding that New York’s exclusion of same-sex couples from marriage survived rational basis review); *see also Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (limiting marriage to opposite-sex couples is rationally related to the state’s legitimate interests in procreation and encouraging families with a mother and father and children biologically related to both). *Cf.* Posting of Dale Carpenter, to *The Volokh Conspiracy*, [http://www.volokh.com/archives/archive\\_2006\\_07\\_09-2006\\_07\\_15.shtml#1152628917](http://www.volokh.com/archives/archive_2006_07_09-2006_07_15.shtml#1152628917) (July 11, 2006, 10:41) (copy on file with author) (“It would be surprising if [existing marriage laws] couldn’t satisfy [rational basis review], notwithstanding the conclusion of the majority of the Massachusetts high court in *Goodridge*. In fact, the best example of the application of rational basis to uphold the exclusion of gays from marriage is still Justice Cordy’s dissent in that case. His opinion is at once respectful of homosexuals’ claims, temperate in tone, closely reasoned, and a model of the kind of judicial humility associated with the [rational basis] test.”).

<sup>223</sup> *Goodrich*, 798 N.E.2d at 1002 n.34 (Cordy, J., dissenting).

<sup>224</sup> *Id.* at 996.

<sup>225</sup> *Id.* at 999–1000; *see also id.* at 995–99 (Justice Cordy citing a range of historical and social science material); *see also* Don Browning & Elizabeth Marquardt, *What About the Children? Liberal Cautions on Same-Sex Marriage*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET AND MORALS* 29, 50 (Robert P. George & Jean Bethke Elshtain eds., 2006) (noting that marriage is classically defined as “a public institution that integrates sexual desire and affection into the heavy-duty tasks of generativity and kin-based intergenerational child care”); *see also id.* at 43, 46 (the majority in *Goodridge* “defines marriage as primarily a ‘private,’ ‘intimate,’ ‘committed,’ and ‘exclusive’ union that is ‘among life’s momentous acts of self-definition’ . . . while ‘brush[ing] aside the now-large body of social science data which indicates that children raised by their married biological parents do better, on average, than those raised by single parents or stepparents[.]’ . . . “[O]ur society’s experience with . . . alternative family forms [other than same-sex couples] suggests that these families will not, on average, be able to reduplicate the investments and consolidations of marriage built on the energies of kin altruism, the consolidation of which has been in the past the primary goal of marriage.”).

<sup>226</sup> *See Goodrich*, 798 N.E.2d. at 983.

<sup>227</sup> *Id.* at 996 (“The marital family is also the foremost setting for the education and socialization of children. Children learn about the world and their place in it primarily from those who raise them, and those children eventually grow up to exert some influence, great or small, positive or negative, on society. The institution of marriage encourages parents to remain committed to each other and to their

Indeed, society's care for "what contributes to human flourishing by meeting the unique needs of the individuals in question," i.e., children, can be characterized as a question of justice.<sup>228</sup> This then, is the central question: is there a rational basis on which the legislature can conclude that the exclusion of same-sex couples from civil marriage furthers the undeniably legitimate purpose of ensuring, promoting, and supporting the optimal social structure for the bearing and raising of children?<sup>229</sup>

Justice Cordy offers two reasons why a legislature could rationally conclude that the traditional understanding of civil marriage should not be altered to include same-sex couples. First, taking into account all of the information now available, the legislature could rationally conclude that

[t]he raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm. Working from the assumption that recognition of same-sex marriages will increase the number of children experiencing this alternative, the Legislature could conceivably conclude that declining to recognize same-sex marriages remains prudent until empirical questions about its impact on the upbringing of children are resolved.<sup>230</sup>

Second, Justice Cordy argued that redefining the institution of marriage to include same-sex couples would undermine the state's interest in promoting and supporting heterosexual marriage as the social institution that best integrates procreation and child rearing. In other words, the legal redefinition of civil marriage will send a new and different message to people about why society believes marriage to be important and what its social purpose is:

[A]s long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor; that if they are to procreate, then society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children; and that benefits are available explicitly to create a supportive and conducive atmosphere for those purposes. If society proceeds similarly to recognize marriages between

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children as they grow, thereby encouraging a stable venue for the education and socialization of children.").

<sup>228</sup> See Browning & Marquardt, *supra* note 225, at 45 ("Dismissing [the] core relation between kin altruism and marriage constitutes the ultimate injustice to children."); Browning & Marquardt, *supra* note 225, at 46 ("To disregard the needs of children, the traditions that have understood these needs, and contemporary social science evidence offends natural justice."); Browning & Marquardt, *supra* note 225, at 47 ("[T]he legalization of same-sex marriage is . . . unjust to children.").

<sup>229</sup> *Goodrich*, 798 N.E.2d at 998 (Cordy, J., dissenting).

<sup>230</sup> *Id.* at 1000 (internal citations omitted).

same-sex couples who cannot procreate, it could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation[;] just as the potential of procreation would not be necessary for a marriage to be valid, marriage would not be necessary for optimal procreation and child rearing to occur. In essence, the Legislature could conclude that the consequence of such a policy shift would be a diminution of society's ability to steer the acts of procreation and child rearing into their most optimal setting.<sup>231</sup>

Thus, Justice Cordy concludes, a rational legislature "could at least harbor rational concerns about possible unintended consequences of a dramatic redefinition of marriage,"<sup>232</sup> and thus a structure of civil marriage law that does not extend to same-sex couples is rationally related to a legitimate state purpose.<sup>233</sup>

The legitimacy of this state purpose does not lie in its moral neutrality.<sup>234</sup> Neither the traditional definition of marriage, nor the definition of marriage adopted by the Massachusetts Supreme Judicial Court in *Goodridge*, is morally neutral. Proponents of the traditional definition of marriage, which strives to place generativity at the center of marriage by integrating sexual behavior, birth, and child rearing by natural parents, so that children are raised, "as nearly as possible, by the parents who conceive them,"<sup>235</sup> are making a moral argument about how society should be ordered to best promote human flourishing, especially the flourishing of children.

In contrast, the redefinition of marriage adopted by the court in *Goodridge* makes "the exclusive and permanent commitment of the

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<sup>231</sup> *Id.* at 1002 (internal citations omitted).

<sup>232</sup> *Id.* at 1003. See also Browning & Marquardt, *supra* note 225, at 45 ("[I]t is the classic intentionality of [marriage] law that the *Goodridge* majority rejects – the intention to guide and channel the integration of this list of goods [sex, love, dependency, childbirth, and childrearing] as nearly as possible."); Browning and Marquardt argue that *Goodridge*'s "redefinition of marriage raises to the level of public policy the rejection of the historic relation between marriage and kin altruism. It dispenses with the principle that the individuals who give life to children should be the ones who raise them in a bonded and enduring relation. We believe that the reasons implicit in this tradition . . . pass the rationality standard requested by the Judicial Supreme Court of Massachusetts." Browning & Marquardt, *supra* note 225, at 45.

<sup>233</sup> Under rationality review, the overinclusiveness of traditional marriage law is not constitutionally fatal. "Although the marriage statute is overinclusive because it comprehends within its scope infertile [or voluntarily nonreproductive opposite-sex couples], this overinclusiveness does not make the statute constitutionally infirm. The overinclusiveness present here is constitutionally permissible because the Commonwealth has chosen, reasonably, not to test every prospective married couple for fertility and not to demand of fertile prospective married couples whether or not they will procreate. It is satisfied, rather, to allow every couple whose biological opposition makes procreation theoretically possible to join the institution." *Goodrich*, 798 N.E.2d at 1002–03 n.35 (Cordy, J., dissenting) (internal citations omitted); see also Browning & Marquardt, *supra* note 225, at 44–45 (questioning the capacity of opposite-sex couples to have children is not necessary; "In the name of privacy, the law rightfully does not pry[.]"').

<sup>234</sup> Cf. M. Cathleen Kaveny, *Toward a Thomistic Perspective on Abortion and the Law in Contemporary America*, 55 THE THOMIST 343, 370–71 (1991) ("[T]he aim of liberals to achieve a value-neutral stance above or beyond competing conceptions of the good life is unrealistic. . . . Liberal individualism does in fact choose certain goods over others, and so does a society which conceives of abortion as a private matter of individual choice.").

<sup>235</sup> Browning & Marquardt, *supra* note 225, at 46.

marriage partners to one another, not the begetting of children, . . . the sine qua non of civil marriage.”<sup>236</sup> Yet this redefinition of marriage is no less rooted in morality than the traditional definition. The redefinition, which “make[s] sexual exchange, affection, and mutual dependency the center of [marriage] with its generative goals secondary, incidental, [or] even ignored,”<sup>237</sup> is simply rooted in a different normative vision of what sort of social ordering will best promote human flourishing and protect human dignity.

My objective in this Article is not to advocate which of these views of human flourishing should form the basis of civil marriage law. There are serious and important arguments on both sides of that question. My point is simply to emphasize that the arguments on both sides of the question are *moral* arguments. And they are arguments about an area of morality that the law *should* properly deal with, because the institution of marriage implicates public order concerns, understood either in terms of justice (i.e., the child’s right to be raised in an optimal social setting)<sup>238</sup> or in terms of public morality (i.e., the question of how law should structure the public environment in which children are raised to best promote the flourishing of all).

Thus, the public order concept does provide a principled way to head off the constitutional collision between *Lawrence* and traditional marriage law that Justice Scalia fears. The public order concept would explain the care taken by Justice Kennedy to make clear what *Lawrence* was *not* about. Justice Cordy similarly ended his *Goodridge* dissent by emphasizing what the case was not about; it was *not* about a government intrusion into a matter of person liberty, or the rights of same-sex couples to live together or be intimate with each other. Instead, *Goodridge* raised a much different question—must the state *endorse* the choices made by same-sex couples “by changing the institution of civil marriage to makes its benefits, obligations, and responsibilities applicable to them”?<sup>239</sup> This is a public order question, not a question of private morality.

The public order concept articulates the principle that drives the distinctions being made by both Justice Kennedy and Justice Cordy, and thus provides the principle that Justice Scalia fears is lacking in *Lawrence*—civil marriage is a public order issue and is, therefore, a proper subject for law. Private, adult, consensual same-sex sexual conduct within the context of a relationship does not directly affect the public order, and

<sup>236</sup> Browning & Marquardt, *supra* note 225, at 43 (quoting *Goodridge*, 798 N.E.2d at 961 (majority opinion)).

<sup>237</sup> Browning & Marquardt, *supra* note 225, at 45.

<sup>238</sup> See Browning & Marquardt, *supra* note 225, at 45 (Children “have the right to expect to be raised in a society whose legal and cultural institutions attempt to maximize the possibility that they will be raised by the parents who conceived them.”).

<sup>239</sup> *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 1004–05 (Mass. 2003) (Cordy, J., dissenting). See also *id.* at 978 (Spina, J., dissenting) (*Lawrence* and *Griswold* “focus on the threat to privacy when government seeks to regulate the most intimate activity behind bedroom doors. The statute in question does not seek to regulate intimate activity within an intimate relationship, but merely gives formal recognition to a particular marriage. The State has respected the private lives of the plaintiffs, and has done nothing to intrude in the relationships that each of the plaintiff couples enjoy.”).

thus falls within a sphere of responsible freedom that lies beyond the legitimate reach of law.

## V. CONCLUSION

The law *is* constantly based on notions of morality. The *Bowers* Court was right about that.<sup>240</sup> Human rights, justice, equality, and due process are all moral concepts—they are norms and principles that protect human dignity and promote human flourishing. But the law does *not* properly deal with the *whole* of morality. The *Lawrence* Court correctly recognized that limitation, but failed to articulate a principle for distinguishing between moral purposes that are properly pursued through law, and moral issues that lie beyond the proper reach of the law. Instead, the Court generated confusion by speaking as though moral purposes are never a legitimate ground for state action.

There was no need for the *Lawrence* Court to suggest that moral disapproval has no legitimate place in the law. A principled explanation of both the *Lawrence* holding and its limitations is found in the moral concept of public order. The Court could clarify the confusion regarding the relationship between law and morality manifest in the various opinions in *Lawrence* if it were to acknowledge explicitly that a state interest only becomes legitimate for purposes of rational basis review when the asserted interest constitutes a public order concern. The question of whether or not a law legitimately serves a public order concern or illegitimately regulates private morality may sometimes be difficult to answer.<sup>241</sup> But it has the virtue of being the proper question over which to fight. A constitutional jurisprudence that aspires to be faithful to the sort of limited, constitutional government that is demanded by respect for human dignity should recognize that the coercive power of the state may only be used to restrain human freedom when that limitation serves a public order function related to the state's limited, subsidiary role in promoting the common good. The analytical framework that this Article draws from the *Declaration on Religious Freedom* can contribute useful insights to this jurisprudence.

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<sup>240</sup> See Goldberg, *supra* note 5, at 1300–01, 1301 n.280.

<sup>241</sup> See, e.g., FINNIS, *supra* note 76, at 254 n.e (simply invoking the words “public” and “private” can be “unhelpfully circular”; the analytical focus must be on whether a given issue implicates the rationale which justifies the state’s use of legal coercion or falls outside the limits of that rationale); Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 199–206 (2004) (while the distinction between public and private can be contested, maintaining the distinction reflects deeply held American cultural values that favor protecting autonomy).