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# THE LUSTRE OF OUR COUNTRY

THE AMERICAN EXPERIENCE  
OF RELIGIOUS FREEDOM

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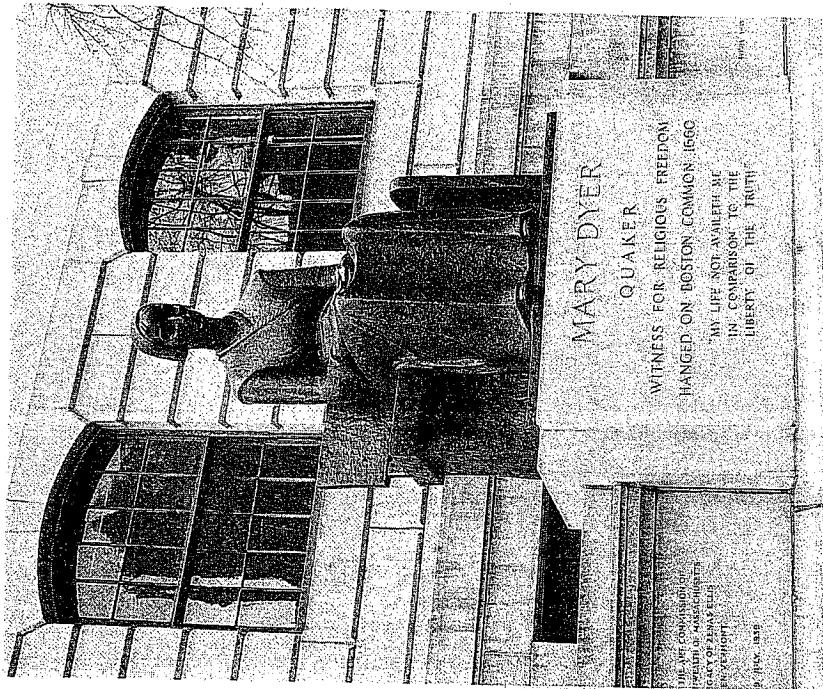
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CHAPTER 2

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TO KILL A QUAKER,  
TO BEAT A BAPTIST

*Religious Liberty before the Revolution*



MARY DYER  
executed June 1, 1660

“My life not availeth me in  
comparison to the liberty of the Truth.”

As befits the matter, I set it out in catechetical form.

*Where are the roots of religious liberty to be found?*

In Holy Writ, which makes obligations to God superior to those to any human being or any human contrivance. As the Acts of the Apostles have Peter say, summing up one strain of the precedent tradition, "We must obey God rather than man." Hence, conscience comes first.

*An example before Peter?*

The prophets of Israel denouncing the rulers of Israel, e.g., Nathan denouncing David.

*What was the theological significance of the action of the prophets?*

The sovereignty of God and His law was proclaimed.

*What sociological significance?*

A split of authority was created. The split provided space in which liberty of conscience appeared. Two interests were set in competition with each other. Legitimate power was no longer unitary.

*By liberty of conscience in this ancient context you mean?*

Liberty of certain charismatics to speak in judgment of the government, e.g., Isaiah: "Your very rulers are rebels, confederates with thieves; every man of them loves an offering and itches for a gift; they do not give the orphan his rights and the widow's cause never comes before them."

*Did ancient Hebrew have a word for conscience?*

It had the concept, not the word. For example, Solomon to Shimei: "You know all the evil that your heart knows that you did to my father David."

*How did Christianity perpetuate this split of authority, this space for conscience?*

By creating a Church that could speak such judgments.

*How did Christianity enlarge the split and the space?*

In two ways: by proclaiming the crucifixion of Christ at the hands of a lawful Roman governor, with the unspoken but momentous implication that lawful authority could make stupendous mistakes. By separating religion from obligation to family, obligation to tribe, obligation to nation, obligation to empire; in short, by making it personal.

*What central moral notion of the pagan world converged with the Christian tradition?*

Conscience.

*Explain.*

Conscience, as early as Cicero, is an inner judge. As Cicero first uses the word, "Bad thoughts and the consciousnesses of the mind terrify; these are the constant domestic Furies who day and night seek punishment on behalf of parents from their wickedest sons." From a state of mind, conscience becomes for Cicero a judge: "Your mind's conscience," he tells the senators judging Cluentius, "you receive from the immortal gods. It cannot be torn from you. You will live without fear and with the height of decency if this will be for you, for your whole life, the witness of your best counsels and deeds." Witness and judge, conscience has the character of the Stoic concept of divine reason in which all share. Witness, judge, reason, voice of God, conscience enters the moral consciousness of Christians.

thought and deed. Collectively, these concepts are at the core of liberty of conscience and liberty of religion.

*Explain why liberty of religion was not recognized at once?*

The pressures of inherited convention, the lure of power, the sense that fidelity should be enforceable.

*Explain further.*

The Mediterranean world linked religious practice to civic security and success. To separate religion entirely from public life required a vision held by no one. Christianity moved from the status of a minority religion persecuted to a minority religion entrenched, a religion promoting the power of its ministers, enjoying discrimination in favor of its adherents, and encouraging the persecution of dissidents from its teachings.

*Why was fidelity a key?*

By force of analogy. In the words of Augustine, "Is it a lighter matter for a soul not to keep faith in God than for a woman not to keep it with her husband?" Adultery was punished by the law, so then should unfaithfulness in keeping the faith.

*To whom were these words applied?*

To those who were Christians, who departed from orthodoxy. In particular, to the Donatists whose error was to believe that for Christians the surrender of the sacred books of Christianity under pagan persecution was an unforgivable sin; so that by an irony not rare in religious history those Christians most adamant in their Christianity were themselves persecuted by other Christians for their adamancy.

*What kind of force was employed?*

Fines; civic disabilities and disinheritance; corporal punishment.

*What was the practical benefit of such persecution?*

According to Augustine, it worked.

*Were other Christian heretics subject to disabilities and penalties under Christian emperors?*

Yes. The Apollinarians, the Arians, the Eunomians, the Macedonians, the Montanists, the Phrygians, and the Priscilianists, to name those proscribed in Augustine's day.

*Sum these answers.*

By the first century A.D. there is in the Mediterranean world a religion, which will spread widely in the West, that carries the concepts of a God, living, distinct from and superior to any human being, society, or state, of obligations to that God, distinct from and superior to any society or state; of authorized teachers who can voice these obligations and judge any society or state; of an inner voice of reason that is one way God speaks as well as by His authorized teachers. According to these concepts as taught by this religion, each person, individually and not as part of a family, tribe, or nation, will have to account to God as Judge for every

*Is it accurate to assert that persecution was the logical corollary of the absolute conviction of the truth of one's faith drawn by those with the power to persecute?*

It is inaccurate. At no time did Christian thought embrace this proposition, which ran directly counter to two fundamental axioms: first, that faith was a gift and second, that the acceptance of that gift must be free—two convictions forged in blood when the Christians suffered savagely from persecutions by defenders of the old gods. “Religion,” Lactantius had then written, “cannot be compelled. The whole thing must be done with words, not whips, so that it be voluntary.” Religion, the Roman persecutors were informed, is to be defended “not by killing but by dying.” “None of us,” Lactantius could add, “are kept against our will. For he who lacks faithful devotion is of no use to God.” In this time of their oppression, religious persecution by the empire was said by the Christians to be “against the law of humankind, against all established rightness.” Only after Christianity became the established religion of the empire was breach of faith put forward as worthy of corrective punishment. Lack of belief in Christianity by a pagan or a Jew was not itself made a crime.

*What was the proper approach to Jews in papal perspective?*

“Those who differ from the Christian religion should be brought to the unity of the faith by mildness and kindness, by counselling and persuasion . . . not repelled by threats and terrors,” declared Gregory the Great in 591, setting out for the benefit of the bishop of Terracina the way he should treat the Jewish population of his diocese.

*Sociologically speaking, how is the different treatment of pagans, Jews, and heretics to be explained?*

By inherited conventions, by the limits of power, by the intensity of feeling against those closest in belief who do not share the belief fully; for they are seen as those most likely to corrupt the faith, the ones most culpable in their disbelief, the ones most vulnerable to coercion.

*Is it not true, nonetheless, that those who had never been Christians were at times the object of discrimination and repression that should be accounted persecution?*

Undoubtedly. To give three examples, in the time of Augustine himself, the Manichaean religion was the subject of severe penal laws. In the age of the Second Crusade, Bernard of Clairvaux in a letter addressed to “all

Christians” urged that the pagan Slavic nations be converted or destroyed. Throughout the Middle Ages and up to the French Revolution, the Jews of Christian Europe were of second-class status. In the rough rhetoric of many Christian apologists, adopted by such popes as Innocent III, they were “worthy of servitude” and “bound to perpetual servitude.”

*The freedom of even non-Christians was then far from fully respected?*

True. Even as to the performance of religious rites, Thomas Aquinas taught that Jewish ceremonies should be tolerated as foreshadowing Christian ones; but that “the rites of other infidels which bear nothing true or useful, are not to be tolerated in the same way except perhaps to avoid some evil, to wit scandal or a division that could arise from this or an obstacle to the salvation of those who would gradually be converted to the faith if they were tolerated. On this account the Church has sometimes tolerated the rites of even heretics and pagans when there was a great multitude of infidels.”

*Toleration when opportune, extermination of alien rites when appropriate, disadvantages at all times, but no formal compulsion of unbelievers to convert: Is that the formula?*

Apparently.

*As Thomas Aquinas built on Augustine to develop Christian thought, how far was it taught that the persecution of Christian heretics should go?*

To death if they were warned in time and failed to correct themselves.

*Could not even those heretics who had relapsed into heresy count on forgiveness inasmuch as no sin is unforgivable?*

They could count on forgiveness with God, not with the Church. As Thomas Aquinas phrased it, remarkably refusing the imitation of God: God “knows who are truly returning. But the Church cannot imitate this. She presumes that they are not truly returning who, after they have been received back, have again relapsed. Therefore she does not deny them a way of salvation but she does not safeguard them from the peril of death.”

*What was the relation of the Church to a medieval Christian state?*

The Church was established, that is, supported and used by the state. The personnel of each institution interpenetrated the other. The liberty of the Church was asserted against the power of the prince. A split in

interests, power, space remained, as the famous conflict between Henry II and Archbishop Thomas Becket illustrates. At the same time the two authorities often overlapped. For example, most of the bishops of England were aligned with the king, not the archbishop. The Church was often put to secular ends, as the condemnation of Joan of Arc on a trumped-up charge of being a relapsed heretic illustrates. The space between Church and state was sometimes uncomfortably small.

*What happened to conscience?*

It enjoyed a kind of schizophrenic recognition.

*Amplify.*

The supremacy of conscience was sustained, for conscience "is in a certain way the dictate of reason" and what is proposed by reason is proposed as true and therefore as "derived from God, from Whom is every truth." Consequently although conscience could make a mistake—the possibility of mishearing the divine voice is foreseen—one must obey one's conscience; for "it is the same thing to flout the dictate of reason and the commandment of God." If conscience, that is, reason, teaches one not to believe in Christ, conscience must be obeyed.

*Did not the supremacy of conscience imply the liberty of conscience?*

No. The supremacy of conscience was equivalent to the obligation to conscientize. The obligation to conscience implied not the liberty of conscience but the obligation to form conscience correctly. Gross ignorance, deliberate or negligent, would lead to a deformed conscience. Although one would act correctly in following the deformed conscience, one would have committed a moral fault by failing to form it correctly. One was consequently open to correction not for following conscience but for forming it.

*Conscience, then, had no protection against coercion?*

Not if those judging the matter found fault in its formation.

*Did this view of the matter change with the Reformation?*

No. The Reformation created more heretics to be persecuted. The Reformation created new churches that had their own heretics whom they persecuted. But yes. Heretics became so numerous that they had to be tolerated for the sake of peace. The emperor Maximilian II, a Catholic, in 1568 extended legal toleration to Lutheran lords and practical toleration to other Lutherans. The nobles of Poland in 1571 pledged themselves to

refrain from bloodshed, imprisonment, or confiscation "over differences of faith or changes of church"; the elected king of Poland swore to uphold this agreement, styled the Warsaw Confederation. The mutual toleration granted was between lords, not between lord and peasant. Still, until it ceased to exist as a kingdom, Poland was the most tolerant nation in Europe.

*What else did the Reformation result in?*

The Catholics of England, out of power, came, as Cardinal Allen put it in 1584, to "desire above all the liberty to exercise publicly those requirements of their worship which persecution forces them to perform secretly"; they sought "some liberty for the exercise of their consciences." When James I treated with the French for the marriage of his son Charles to a Catholic princess, Henrietta Maria, the French desired that the English should promise to the Catholics "the free exercise of their religion." But "the English would not listen to the word exercise." In the end, "free exercise" was publicly accorded by treaty only to the princess and her suite. Already by 1624, in the light of religious repression, "exercise" had a robust significance; and free exercise had a particular meaning for James's court in a way that had a consequence for America.

*What more did the Reformation lead to?*

It brought into existence in the sixteenth century authors who had suffered persecution and who came to write about persecution as contrary to the teaching of the Gospel, for example, Sebastian Franck; Caspar Schwenckfeld, who gave his last name to the Schwenkenfelders; Menno Simons, who gave his first name to the Mennonites; Sébastien Castillon, a Savoyard who in 1554 urged the example of Christ and His Apostles as contrary to persecution.

*What was the effect of these writings?*

The creation of belief in religious freedom among small communities of Christians without the power conferred by large numbers and the possession of great material resources; the scattering of the idea of a Church not dependent on support by the state; the hardening of the hearts of the persecutors.

*What happened in the following century to increase the chances of religious liberty?*

The outbreak of more revolts, reversals, revolutions, and wars fed by difference of religion; the proliferation of religious sects; the founding of

refuges for religious dissidents; the emergence of a learned criticism of religious persecution; the exhaustion of religious combatants; the increase of limited legal toleration of religious dissent.

*Exemplify the revolts, reversals, revolutions, and wars in England.*  
The Revolution against Charles I; the Restoration of Charles II;  
Monmouth's Rebellion; the Revolution against James II.

*What was the effect of the exhaustion of the religious combatants?*  
Widespread desire to find a basis for accommodation of theological conflict.

*Exemplify the proliferating sects.*

The Congregationalists; the Presbyterians, Scottish and English; the Baptists; the Quakers; the Ranters.

*Name and date the refuges.*

New Plymouth (1620); the Massachusetts Bay Colony (1629); Maryland (1632); Providence Plantations (1636); Pennsylvania (1680).

*Name the leading learned critics of persecution.*

Roger Williams; Baruch Spinoza; John Locke.

*What ironies attended the refugees?*

New Plymouth was founded by Separatists from the Church of England who were committed to a church composed of the born-again. It accepted the presence in the community of those not committed to the church but restricted citizenship to believers in the true worship of God. It ultimately could not survive by itself and merged with the Massachusetts Bay Colony, whose religious practices and prejudices it found congenial.

Massachusetts Bay Colony was founded by Christians seeking a pure church than the Church of England. They evolved their own distinct church, the Congregationalist, which the colony supported by local taxation. In the words of John Norton, appointed as "teacher," that is, pastor, by order of the legislature, New England was "a *Plantation religious* not a *Plantation of Trade*." Consequently, "we through grace abound ing abhor prejudicing the liberty of Conscience in the least measure, but "blasphemies and heresies carried on with a high hand and persisted in, are to be suppressed with weapons & punishments."

*The significance of these two statements?*

In one of the first American colonies, in a colony founded as a refuge from persecution, in a town sometimes self-described as "the cradle of liberty," religious freedom was prized, and religious persecution thrived.

*Detail the legislation.*

In 1656 the General Court—the governing body of the colony, combining legislative and judicial functions and including the executive in its membership—proscribed the presence of Quakers in the colony. One set of measures was directed to keeping "alien" or "vagabond" Quakers out; the other set was directed to such Quakers "as shall arise from amongst ourselves." Alien Quakers were to be apprehended, jailed, whipped, and deported. Ship captains bringing in Quakers were to be fined 100 pounds. The same monetary penalty, plus imprisonment, was to be inflicted as of 1657 on any inhabitant who, "directly or indirectly," caused a Quaker to be brought into the jurisdiction. Anyone harboring a Quaker was also to be fined and imprisoned. The importation of Quaker literature became criminal. By 1658 it was also criminal to propose Quaker doctrine at a church meeting or to "approve of any known Quaker" or the Quaker's tenets. The penalties were a fine and whipping. Security had to be given not to repeat the offense. If security were not given, the offender was to be banished, any return to the colony subject to the penalties provided for the return of deported "stranger" Quakers.

*Was there more legislation?*

Yes. Return was a particular problem. In 1657 the General Court prescribed for banished male Quakers who came back that they should lose one ear, a second time the other ear; females were to be "severely" whipped. On a third return, "he or she" should "have their tongues bored through with a hot iron." A year later, on October 19, 1658, the ultimate penalty—death by hanging—was provided for banished Quakers who returned. This punishment had hitherto been reserved for Jesuit or other Catholic priests who came back to Massachusetts after being banished.

*Detail the implementation of the legislation.*

Under the energetic leadership of John Endecott, repeatedly elected governor, the laws against the Quakers were enforced. The milder penalties such as flogging were inflicted on men and women alike. The General

Court ordered that Provided Southwick and her brother Daniel, two children of Quakers, be put in the stocks and then sold to Englishmen in Virginia or Barbados when their Quaker parents were unable to pay a fine. Climactically, on October 18, 1659, the General Court decreed death for returned Quakers William Robinson, Marmaluke Stephenson, and Mary Dyer. The men were hanged on Boston Common nine days later. Dyer underwent a mock execution. As the General Court then put it, through its "mercy and clemency" she had "liberty to depart within two days." She went back to her husband in Rhode Island.

*Why does Dyer's statue now stand in front of the State House on Beacon Street in Boston?*

She came back to Boston. She was rearrested. The General Court ruled that her sentence now be executed. On June 1, 1660, she was hanged on the Common. Her statue, erected three hundred years after the event, recalls her own view of liberty: "My life not availleth me in comparison to the liberty of the Truth."

*Did any contemporary call the attention of the General Court to its inconsistency on religious liberty?*

Yes. Anne Brinley Coddington, Mary Dyer's next-door neighbor in Newport, wrote the Massachusetts magistrates a month after her execution: "Would you not have thought it hard Measure, if any of you had been so used by the Bishops? Nay, did you not so think, though they did less than you yourselves have done? Is this following the Command of Christ, who said, *Whatsoever ye would that Men would do unto you, that do unto them?*"

*Was Dyer the last Quaker they put to death?*

No. That was William Ledra, also executed on the Common.

*Was the legislation made more onerous?*

Yes. In May 1661 under the double pressure of criticism in the colony and the threat implicit in the restoration in England of Charles II, a monarch open to Quaker lobbying, the General Court intensified the persecution. New legislation provided that any vagabond Quaker should by "the constable of the towne wherein he or she is taken . . . be stripped naked from the middle upwards and tied to a carts tayle and whipped thro the towne"<sup>22</sup> and so in every town till reaching "the borders of our jurisdiction."

*Why was the legislation so careful in its use of pronouns identifying each gender?*

Because women were particularly persistent Quakers.

*Was the new legislation enforced?*

If was.

*Why was the persecution by the colony so vigorous?*

Because, in the words of the General Court, Quakers were persons "despising government and the order of God in church and commonwealth" or again, as the General Court in a theological manifesto quoting the Reverend Norton declared, the "opinion of theirs of being perfectly pure and without sin tends to overthrow the whole gospel and the very vitalls of Christianity;" or again, in the words of John Endecott to Charles II, "the Quakers died, not because of their other crimes, how capitall soever but had they not been restrained, so far as appeared, there was too much cause to feare that wee ourselves must quickly have died, or worse."

*The real reasons?*

The Quakers were "a hideous Döppelganger" dogging the Puritans' steps. They believed in the same God, the same Trinity, the same Savior, the same Bible as their persecutors. They claimed an Inner Light that guided them differently from the clergy and laity they confronted. What could be more of an affront?

The Quakers were incorrigible. They came back. Who can give a criminal more than three chances?

The Quakers might have converted Congregationalists. What else is meant by Endecott's "or worse"? "For liberty of conscience," as the General Court instructed its agents on March 17, 1681, "wee have been, as wee then conceived, necessitated to make more severe laws to prevent the violent and impetuous intrusions of the Quakers."

*How long did the persecution last?*

About one generation. As late as 1675 constables were instructed by the General Court to arrest persons found at any Quaker meeting and subject them to a fine and to discipline at the house of correction. Only in 1681 did the General Court actually repeal the capital punishment prescribed for Quaker returnees and suspend the other measures.

*Was the persecution successful?*

Yes. Quakers came to avoid Massachusetts; Quaker societies did not flourish in the commonwealth. Quakers settled on Nantucket, which fell within the jurisdiction of New York, and in Rhode Island, ruled by a refugee from Massachusetts, and ultimately in Pennsylvania, given them by Charles II. Massachusetts was spared.

*What does it all show?*

That neither the soil of America, nor the experience of having suffered persecution, nor explicit belief in freedom of conscience were sufficient in themselves to prevent men carrying out persecution on account of religion.

*Describe the other refuges.*

Maryland was founded by Lord Baltimore, a Catholic who feared for the future of his religion in England, secured the patent for his colony from the king, who was the head of the Church of England, and agreed that in his colony no Christian should be molested "for or in respect of his or her religion nor in the free exercise thereof." In this way, the exact expression "free exercise" entered the American continent, echoing the use of the phrase in England to indicate more than adherence to one's private religious belief. Before the end of the century the Anglicans controlled the government and Catholics could not hold public office or practice law within the colony.

Providence Plantations was founded by Roger Williams after he was exiled by the Congregationalists from Massachusetts. He secured a charter from Parliament, confirmed by the king who was also the head of the Church of England, that granted the widest latitude of religious practice. The colony attracted many Baptists and Quakers and a small number of Jews. By the end of the century the colony forbade Jews and Catholics to vote. Roger Williams himself as president of the colony condemned "such an infinite liberty of conscience" as would recognize the conscientious objection, held by many Baptists and Quakers, to bearing arms.

Pennsylvania was founded by a Quaker as a refuge for his coreligionists and was chartered by the king who was also the head of the Church of England. No one acknowledging "One Almighty God, the Creator, Upholder, and Ruler of the World" was to be molested because of his "conscientious Persuasion or Practice." Catholics, however, were not permitted to have visible churches. Only persons professing "to believe in Jesus Christ, the Savior of the World," were eligible for public office.

*Complete religious freedom never existed in any of these refuges?*

True.

*How, then, did they change the situation?*

Plymouth and the Bay Colony provided an ideal and a rhetoric more permanent than their descent into persecution. Rhode Island dimly (for it was poor and its reputation dingy) and Pennsylvania strikingly (for it was prosperous and well regarded) showed that organized government could exist without supporting a church. Maryland provided the phrase that is at the core of the First Amendment. All four colonies demonstrated that the Church of England could tolerate other forms of Christian worship and so prepared the ground for the English Act of Toleration.

*What part was played by the proliferation of sects?*

The proliferation of sects created a variety of alternatives to the established Church of England and to the old Church and thereby created political constituencies that politicians had to consider.

*What was the critical contribution of Roger Williams?*

Principally, *The Bloody Tenent, of Persecution, for Cause of Conscience, Discussed, In A Conference Between Truth and Peace*, wherein he taught "that the blood of so many hundred thousand souls of Protestants and Papists spilt in the wars of present and former ages, for respective consciences, is not required nor accepted by Jesus Christ the Prince of Peace"; that civil officials are "not judges, governors, or defenders of the spiritual or Christian state of worship"; and that "it is the will and command of God" that "permission of the most paganish, Jewish, Turkish, or antichristian consciences and worships, be granted to all men in all nations and countries."

*What was the critical contribution of Baruch Spinoza?*

His *Tractatus theologicopoliticus*, wherein he taught that "no one can transfer to another his own natural right or his faculty of reasoning freely and judging"; that hence, it is usurpation and injury when the supreme civil power attempts to prescribe "what opinions ought to move each mind with devotion to God"; that so doing, the "civil power endangers itself, creates hypocrites, causes divisions, destroys peace, and discourages those of good education, the integrity of morals and the cultivation of virtue."

*And of John Locke?*

His *Letter Concerning Toleration*, which answered an Arminian theologian's inquiry about the desirability of "the mutual toleration among Christians" and declares, "I esteem that toleration to be the chief distinguishing mark of a true church"; which taught that the method of "the Captain of our salvation" was to send out His soldiers "not armed with the sword, or with force, but furnished with the Gospel, the message of peace, and the exemplary holiness of their conduct"; which analyzed a civil commonwealth as limited to temporal objectives and having a jurisdiction that "neither can nor ought in any way to be extended to the salvation of souls"; which declared, "No way that I walk in against my conscience will ever bring me to the mansions of the blessed"; which argued for civil toleration to all except those who deny the being of a God (for promises and oaths, the bonds of human society, "can have no hold upon or sanctity for an atheist") and except "those who refuse to teach the duty of tolerating all men in matters of mere religion" (for they ask for toleration only until they are strong enough to end it).

*The influence and effect of these teachings?*

Williams's work had an especial impact on, and following among, dissenters from the Church of England, and, in the time of James Madison, upon Isaac Backus, the most forceful and effective of Baptist expositors of religious freedom in America. Spinoza's book, the work of a Jew communicated by his synagogue, showed the intellectuals of Europe how philosophical argument for religious freedom should be developed. Of the three, Locke's letter paid the largest dividends. Written in Latin, the language of the learned, it was within three years translated into English, the language of the politicians. Written anonymously in exile, it was ultimately known as Locke's and benefited from his prestige as the foremost English philosopher, psychologist, and theorist of government. Written by an author who was, arguably above all, a theologian, written by such a master of biblical exegesis and argumentation, Locke's *Letter* spoke with as much, or more, force to the devout Christian as it did to deists. Excepting those who did not themselves teach toleration, it excluded Catholics from benevolence, to the satisfaction of the Protestant administration that replaced James II.

*How was toleration legally accepted?*

By the Act of Toleration conditionally passed in 1688 after the ouster of

James II to "give some ease to scrupulous consciences in the Exercise of Religion"; confirmed by a second Act of Toleration in 1711 as a permanent settlement of full establishment for the Church of England, civil rights for Protestant dissenters willing to be regulated, legal disabilities for atheists, Catholics, Jews—an almost Lockean law for forbearance among Protestants.

*What was the law, then, in 1765, as expounded by William Blackstone in the most authoritative, most influential, and most up-to-date treatise on the laws of England?*

That human beings have "natural rights," which "God and nature have established" and "no human legislature has power to abridge or destroy." That "the principal aim of society is to protect individuals in the enjoyment of those absolute rights," vested in them by the "immutable laws of nature." That Christianity was once "deformed by the daemon of persecution" but the reign of Elizabeth restored "the religious liberties of the nation" while a statute of Charles II abolishing the punishments for heresy delivered "our minds from the tyranny of superstitious bigotry."

That "the persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or sound religion." That the enforcement of the penalties against papists would be "the destruction of every principle of toleration and civil liberty." That "the idea and practice" of civil liberty "flourish in the highest vigor in these kingdoms [England, Scotland, Ireland], where it falls little short of perfection."

Also, that the Church of England is established by law. That neither its canons nor its book of common prayer can be insulted; and that no other Protestant ministers may preach unless they publicly pledge themselves to hold certain Christian doctrines specified by statute. That Catholics are subject to a broad range of punishments and legal incapacities; that Catholic landowners can lose their land and Catholics educated abroad their inheritance on the claim of a Protestant relation; and that Catholic priests celebrating mass are subject to life imprisonment, and that these laws, although "seldom enforced in their utmost vigor," may be applied. That no one can hold office in the military or the national government without receiving the sacrament according to the rites of the established church and without acknowledging by oath the English king as head of the church. Nor can one be naturalized without a similar oath

(relaxation in favor of Jews in 1753 having been abandoned "with some precipitation"). Those who "falsely pretend an extraordinary commis-

## JM'S ORIGINAL INSIGHT

After all, then, natural rights were extolled, liberty of conscience celebrated, religious bigotry deplored, religious conformity encouraged and rewarded, and religious controls retained?

Yes.

Was Blackstone less schizophrenic on the natural rights of conscience than his medieval predecessors?

Not perceptibly, but his tone was less strident.

Did Blackstone's bland representation of tolerance reflect the actual application of the law?

No. Mass had still to be celebrated covertly in London. As to Catholics of property, "several lived under great terror and some under actual contribution" in consequence of the penal statutes.

Does Mr. Thwackum of Tom Jones accurately reflect the state of mind represented by the English law as it applied in the American colonies? That is, "When I mention Religion, I mean the Christian Religion; and not only the Christian Religion, but the Protestant Religion; and not only the Protestant Religion, but the Church of England."

Yes as to Anglican Virginia; no as to such colonies as Congregationalist Connecticut and pluralist Pennsylvania.

Was the killing of Quakers unacceptable but the beating of unlicensed Baptist preachers acceptable in certain colonies?

As events proved, yes.

What, then, was the importance of the ideas furnished by Williams, Spinoza, Locke, and perceptible if deformed in Blackstone?

The ideas inhabited the mind of James Madison and the minds of those he addressed at the time of the American Revolution. The ideas prepared them for a more perfect expression of the ideal. The ideas pushed them toward the taking of a momentous legal step.



JAMES MADISON, JR.  
age thirty-one, two years before writing  
the Memorial and Remonstrance

"We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance."

sion from heaven" can be fined, flogged, or imprisoned. Those who deny the being or the providence of God or cast contumelious reproaches on Christ or expose Scripture to contempt or ridicule are subject to the same punishments; "for Christianity is part of the laws of England."

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Was Blackstone less schizophrenic on the natural rights of conscience than his medieval predecessors?

Not perceptibly, but his tone was less strident.

Did Blackstone's bland representation of tolerance reflect the actual application of the law?

No. Mass had still to be celebrated covertly in London. As to Catholics of property, "several lived under great terror and some under actual contribution" in consequence of the penal statutes.

Does Mr. Thwackum of Tom Jones accurately reflect the state of mind represented by the English law as it applied in the American colonies? That is, "When I mention Religion, I mean the Christian Religion; and not only the Christian Religion, but the Protestant Religion; and not only the Protestant Religion, but the Church of England."

Yes as to Anglican Virginia; no as to such colonies as Congregationalist Connecticut and pluralist Pennsylvania.

Was the killing of Quakers unacceptable but the beating of unlicensed Baptist preachers acceptable in certain colonies?

As events proved, yes.

What, then, was the importance of the ideas furnished by Williams, Spinoza, Locke, and perceptible if deformed in Blackstone?

The ideas inhabited the mind of James Madison and the minds of those he addressed at the time of the American Revolution. The ideas prepared them for a more perfect expression of the ideal. The ideas pushed them toward the taking of a momentous legal step.

CHAPTER 4

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THE FOREMOST OF OUR  
POLITICAL INSTITUTIONS



ALEXIS DE TOQUEVILLE  
1830

*"Religion—which with the Americans never mixes directly in the government of the society—must be considered as the foremost of their political institutions."*

traditional Judaism, and a toleration of unbelief; a Christian commitment that animates many voters and many governmental officers; a division in numbers such that no Christian sect has the upper hand nationally; and a concern with religion as it bears on the practical questions of morality—such are the chief characteristics of the United States playing upon the place of religion in the society. It is the last characteristic that interests me most, for it coincides with an observation made by my brother that differs sharply from his comments on the unworldly character of religion; it points as well to the possibility of even armed religious conflict in the United States.

My brother's observation went as follows: "Religion—which with the Americans never mixes directly in the government of the society—must be considered as the foremost of their political institutions. For if it does not give them the taste of liberty, it singularly facilitates their use of liberty. It is from this perspective that the inhabitants of the United States themselves view religious beliefs. I do not know if all Americans have faith in their religion, for who can read the depths of the human heart? But I am sure that they believe religion necessary to the maintenance of republican institutions. This opinion is not peculiar to one class of citizen or one party but to the entire nation; one sees it in every social rank.

The reason that religion has this essential utilitarian role follows from a syllogism—the same syllogism so justly celebrated for its invocation by President Washington in his famous Farewell Address. Morality is necessary for the existence of republican government. Religion is necessary for morality. Therefore, religion is necessary for the continued existence of the republic.

This deep involvement of religion with morality can have no pernicious effects so long as there is general agreement on what morality, especially sexual morality, consists in. But suppose that a new religion should preach a different morality as to relations between the sexes? Would it enjoy the liberty the Americans now accord so readily to the Christian churches? Could not my brother see that, if division should occur on such a fundamental point, the Americans would not easily accept their differences? Could not my brother see that if some single, commanding moral good should evoke the allegiance of part of the population, logic would lead its advocates to try every expedient to advance its cause? He had only to think of Saint-Just and Robespierre in our parents' past or of Saint Bernard in our national history. I mention Frenchmen, but the compulsion of such a logic is not confined to France. Suppose that slavery, which has, it is believed, its own special institu-

tional impact on sexual morals—suppose that slavery were regarded from the perspective of that most elementary of Christian duties, the commandment to love one's neighbor as oneself. Could neighborly kindness, religiously inculcated, inflame passions and divide the regions of the nation? Already Congregationalist ministers in Boston are actually saying openly that slavery is a national sin. My brother anticipated an insurrection by the Southern blacks; he did not envisage a clash of North and South. But if Mr. Adams is correct, Southern slavery and Northern religion have made up the chief ingredients of the American character. May it be that the national character will dissolve into two parts? There has never been a war of religion in the new republic. But what should that conflict be called if religious righteousness led to a demand that the Southern states set aside their peculiar institution as offensive to the morals of Christian people? Can religion be the foremost of their political institutions and not affect the liberty of each person in the country?

On that same day Boris Yeltsin participated in the Christmas celebration which took place at the restored Cathedral of Christ the Savior in Moscow. At this first patronal holiday of the Cathedral, which is dedicated to the Birth of Christ, the Patriarch of Moscow and All Russia, Aleksei II, led a brief service. Then the President of Russia and the Head of the Russian Orthodox Church performed the symbolic placement of the last stone in the Cathedral's outside wall.

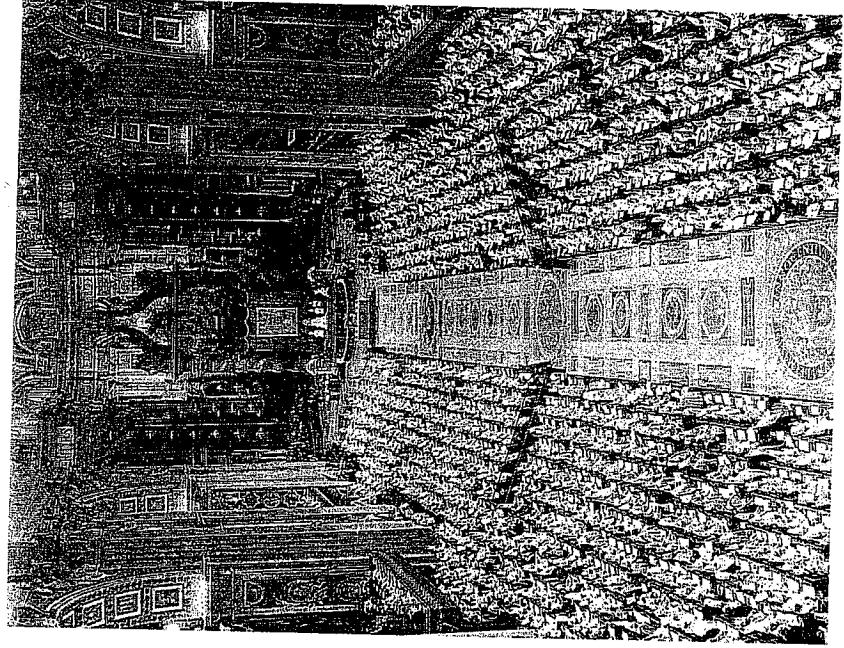
Boris Yeltsin, meeting with journalists, observed that "the stabilization and elevation of Russia lie ahead" and "the Cathedral of Christ the Savior symbolizes this process." And the fact that they built it in one year shows that this is possible. "It means—Russia is alive, the Russian spirit is alive, the Orthodox Church—which has made a large spiritual contribution—is alive." Boris Yeltsin expressed certainty that the rebuilding of the cathedral "will now revive belief in the people." "I am certain: this belief will bring about that Russia will now be revived more quickly than before. In this I see the chief significance of the Cathedral—besides its primary function, to be a Cathedral—it's a memorial to the war dead of the Patriotic War of 1812."

Had religious freedom come to Russia or had the state found it expedient, as had Stalin in 1942, to put the Moscow patriarchate in a privileged position as the state's good servant?

Free exercise in Russia remained an experiment. The bare phrase was not dispositive of any outcome. The history of the country, the politics of the moment, the example of the United States, and the advice of American advisors and the reaction to American religions all were factors affecting how the experiment would prosper. The voice of outside counsel was raised to suggest that the divided churches should enter into *sobornost*—dialogue, negotiation, spiritual harmony freely reached. To achieve that end there was necessary "the power of prayer." Free exercise was as much a religious as a legal issue; perhaps more so.

## CHAPTER 13

## THE LIGHT OF REVELATION AND THE LUSTRE OF AMERICA



FOURTH SESSION OF THE SECOND VATICAN COUNCIL  
Rome, 1965

*"This Vatican Council declares that the human person has a right to religious freedom . . . founded in the very dignity of the human person as it is known by the revealed word of God and by reason itself."*

I turn from the impact of the American experience on the constitutional law of particular nations to a distinctively different encounter: the American mark upon the teaching of that church to which I adhere. It has always seemed to me presumptuous for America to put itself forward as especially favored by Providence, to be a model for the nations, to be almost as it were a second Israel. The Messianism that has characterized some Russians writing about Russia has always appeared to me to be a delusion, not to be mimicked by Americans writing about America. But as the evidence just reviewed in relation to France, Japan, and Russia has shown, the United States has had a right to contribute on the special subject of religious liberty. Is it unimaginable then that America had a contribution to make to an overtly spiritual institution possessing among its accumulated doctrinal accoutrements a militant thesis on the proper relation of the state to the Church? A condition of American religious variety, it has been suggested, is space; in the apparent openness of the continent there has been room for old religions and new. The Catholic Church, in arguable contrast, has cherished its continuity in time. Could this institution that had its own primordial charter and developed character, that had maintained its identity over so many centuries, that had coexisted with and survived so many forms of secular government, incorporate the insight which James Madison had so presciently articulated and asked his country to experiment with?

#### FATHER MURRAY FINDS HE'S THROUGH

The debate over religious freedom begun by John Courtney Murray I have already chronicled as part of my experience at the Catholic University of America, and it is time now to trace the debate's course after the 1940s. The American Jesuit Murray, it will be recalled, had challenged the reigning doctrine that the ideal Catholic state would suppress heresy; he had been vehemently opposed by a few traditional American

theologians, led by Joseph Fenton; and Fenton had turned to Rome for help. It was, no doubt, a coming of age that such a debate occurred in American Catholic theologians had in the past docilely followed where European theologians had led. The Catholic Theological Society of America, the first professional association of these teachers (mostly men, mostly priests, mostly seminary faculty) was only three years old when Murray delivered his challenge; his was the first American voice to draw much attention from European Catholic theologians. The display of American independence was not welcome to Cardinal Alfredo Ottaviani, who as head of the Holy Office presided over the department of the Roman curia charged with policing heresy among theologians; his own *Institutiones iuris publici ecclesiastici* took the conventional position that Murray's work had been published in Rome in 1948 the same year Murray had spoken in Chicago.

The debate continued from 1948 to 1953, when Ottaviani spoke in Rome, definitively restating his position, and Pius XII, a few months later, addressed the elements of the problem in a speech to Italian jurists and pointedly refrained from endorsing Ottaviani. Thereupon Murray was advised by Robert Leiber, the pope's Jesuit secretary, that Pius XII's words were meant as indication that Ottaviani's position was not necessarily the pope's. Murray then publicly interpreted the pope as deliberately rejecting what Ottaviani held. In response, Fenton argued that Pius XII had maintained the traditional thesis; no "careful, honest, and competent examination" could conclude otherwise. Ottaviani himself, his tenure at the Holy Office unaffected, pointedly noted Murray's "offensive" lecture in a letter to Cardinal Francis Spellman, archbishop of New York, a battle was under way, in Rome and in America.

Murray apologized to Ottaviani for any personal criticism the cardinal could have found in Murray's remarks; but the doctrinal issue was beyond personal feelings, and Murray's apology was not accepted. The suit headquarters in Rome, which had already shown some uneasiness over Murray's boldness, was now closely scrutinizing his writings. In conformity with the usual rules governing a member of a religious order, what he wrote was subjected to censors in advance of publication. In July 1954 a Jesuit censor in Rome declared that his article, "Leo XIII and Pius XII: Government and the Order of Religion," could not be published. The American assistant to the general of the Jesuits added, as communicated this verdict: "It seems to me a mistake to wish to gain connection, the formal logic requiring persecution rested on the proposition that broken faith should be punished. The Feeney affair did

through.'" The American assistant promptly answered, "You are far from through, I hope." Murray came back: "It was kind of you to say, 'You are far from through, I hope.' I do not share that hope." He had returned all the books on church and state to the library. Ottaviani with his American ally Fenton had won hands down. The six-year-old fight was over. The most knowledgeable man in America on the Catholic doctrine on religious freedom as it related to the American experience was effectively eliminated from the argument. Twice again he tried—in 1958 and in 1959—and twice again his articles were rejected by the Roman censors. He remained silent or, rather, silenced on the subject for a total of nine years.

#### JAMES MARIAIN LOVES JAMES MADISON

A foreshadowing of change had taken place in the archdiocese of Boston in the 1940s. Leonard Feeney, a Jesuit attached to the chaplaincy for Catholic students at Harvard, had seized upon an ancient patristic phrase, *extra ecclesiam nulla salus est*—"outside the Church there is no salvation." In the course of doctrinal development the sense of this expression had undergone metamorphosis, as theologians attributed to all sincere seekers of truth a kind of membership in the Church. Leonard Feeney, however, insisted that the phrase be taken narrowly so that on every side he saw persons damned by their unbelief. He was rebuked by Richard J. Cushing, archbishop of Boston, and by his own Jesuit superiors. He would not relax his tenacious grip on the literal meaning. His most fervent follower, a laywoman named Katherine Clark, wrote a small book whose climax was the imagined vindication of Feeney by the pope with the newsboys in Harvard Square shouting, "Extra! Extra! Extra! *Ecclesia nullus salus est!*"

This apocalyptic fantasy was not realized. Feeney was dismissed from the Jesuit order and excommunicated—and so, for insisting that there was no salvation outside the Church, he found himself put out of it. For those writers of whom William Lecky is typical, who have insisted that the doctrine of the Church as the exclusive way of salvation was at the root of the persecuting mentality, the Feeney affair signified the end of any belief justifying persecution. But as chapter two demonstrated, the ability to repress heresy was not formally dependent on a claim that salvation could be found only in the visible Church. Whatever the subterranean connection, the formal logic requiring persecution rested on the proposition that broken faith should be punished. The Feeney affair did

show that the literal reading of a hallowed formula could be mistaken; that theological terms are capable of expansion, that the development of Christian doctrine requires spiritual discernment.

On January 25, 1959, the new pope, John XXIII, convoked a council of the bishops of the Catholic Church, and in due course suggestions were solicited as to what the council should consider. Archbishop Cushing wrote to Rome that "controversies have arisen about the relation of the Church to the modern State"; there was need for an exposition of fundamental principles, theological and juridical, in order to "supply a new conception of this relation, as the old concepts in force are rooted in political matters no longer in force." Murray's position, exactly. Non habet the Jesuits forgotten him. Their general, Jean Janssens, wrote of the desirability of a declaration by the council on the Church's relation to the state in today's circumstances. He added—whose work could he have meant but that of theologians like Ottaviani?—that the doctrine was sometimes "less aptly expounded" with "not small inconvenience." America and Rome again interacted to keep the argument alive.

The task of addressing the issue was turned over to a new body, the Secretariat for the Promotion of Christian Unity, one of several committees set up to draft texts for the coming council. This choice was appropriate: what could be less encouraging to Christian ecumenism than any trace of the old teaching that heresy should be suppressed and the heretics themselves forced to conform? The first drafting session for the new declaration of the Church's position was held at the end of December 1960 in Fribourg, Switzerland. A Swiss bishop and a Swiss theologian, a Belgian bishop and a Belgian theologian were the draftsmen. The Belgian bishop, Emile Joseph De Smedt of Bruges, was to be the reporter. The document through its next five years of drafts and redrafts. The final bourg draft stressed tolerance as a virtue and, beyond tolerance, Christian charity (shades of George Mason!), and it discarded the ideal of Catholic state as the enforcer of orthodoxy. It was a good beginning, that exclusively by moderate Europeans.

To understand the point to which European thought had evolved, assisted only by a diffuse glow from America—a brief recall of the recent European past is necessary. Italy had experienced Fascism, Germany and occupied Europe had experienced Nazism, Eastern Europe was suffering Communism. In reaction to these forms of modern totalitarianism Pius XI and Pius XII had increasingly insisted on the rights of the human person. *Mit brennender Sorge*, addressed by Pius XI to the bishops of Germany in 1937, spoke of "this fundamental fact that man

person possesses rights given by God, which must remain safe against every attempt by the community to deny them, to abolish them, or to prevent their exercise." In *Divini Redemptoris*, issued five days later, Pius XI declared that Communism "denigrates and denies the rights of the human person, his dignity, his freedom." So, during World War II, Pius XII stated that the human person must be acknowledged to have "the dignity with which God at the beginning endowed the human person." As this pope observed, the peoples who had experienced totalitarianism had become "questioning, critical, distrustful" of the state and wanted government "more compatible with the dignity and freedom of citizens." It was this new consciousness that was reflected postwar in the United Nations' adoption of the Declaration of the Rights of Man. The new nations that came into existence after the war chose constitutions setting out human rights, including the right of religious freedom.

The popes not only reacted, like the nations, against the totalitarian experience. They also followed and strengthened a line of Christian personalism, elements of which could be found in Christian tradition. The French philosopher Jacques Maritain had developed these elements into a compelling synthesis. Maritain came from a Protestant family of lawyers; he breathed the spirit of religious freedom and fidelity to law that Louis Méjani embodied; and he was a convert to Catholicism. On the one hand, Maritain saw it, the bourgeois liberalism of the nineteenth century stressed the individual at the expense of the common good; it was this unrestrained individualism, each man for himself and each conscience free to make itself as it pleased, that the nineteenth-century Church condemned. At the other extreme, as a kind of built-in revenge, was the absorption of the individual by the collectivity that totalitarian doctrine presented in the twentieth century. The trick—if that is not too frivolous a term for a philosopher's analysis—was to say how both the common good and the uniqueness of each human being could be preserved.

Maritain's solution was to distinguish two aspects of every human being: the material, individuating each being in space and time, and the spiritual or personal, transcending space and time. The common good, for which the State has responsibility, relates to both the material needs of persons and their spiritual needs. The State in its care for the material welfare of the community is superior to any individual; but the State limits service to the spiritual welfare has limits set by the transcendence of the person. The common spiritual good consists in justice, beauty, truth, which the State properly cultivates. But in and through these goods the human person transcends this life. The human person is, indeed, or-

dained directly and ultimately to God as an absolute end, and this ordination "transcends every created good." The freedom of the human person is founded on this ordination beyond any material need. It is a freedom that the State does wrong by violating. Conserving the spiritual common good, the State may not intervene to coerce a person in the person's search for the truth; for it is the nature of a person to seek the truth freely. Who says "person" says freedom. The "right freely to believe the truth" is "the most basic of human rights."

If Maritain had written that the body belongs to the State, the soul to God, he would have had a wider if less discriminating audience. If he had said, without ontological preamble, that conscience cannot be coerced but man is part of a society that makes laws for him, his conclusion would not have differed from Madison's. But Maritain was a Thomist and rejected a Cartesian split between soul and body; he was a careful philosopher who knew of bourgeois excesses and socialist excesses; and he sought to find formulas that expressed the division and the unity of each human being, the enduring drive of each human being to a union with a Being beyond physical death, and the existence of spiritual values that the State should serve. So he wrote with a philosophical vocabulary focused on personhood, he made subtle and sometimes elusive distinctions, he taught at Princeton but did not declare himself a Madisonian. Old Bergsonian, neo-Thomist, epistemologist, and metaphysician moved by the horrors of European politics to plunge into the practical realm of political theory, he was the leading Catholic philosopher of his age. Refugee in America, later French ambassador to the Holy See, he could praise the constitutional arrangements of the United States, as being of "exceptional historic significance" and carry conviction at the Vatican.

Having translated into the language of person the traditional claims of conscience, Jacques Maritain spoke to and for those who cherished the idea of a Christian democracy in France, Italy, Germany, Belgium, and the Netherlands or chafed under its absence in Poland, Portugal, and Spain. His thought was equally attractive to those in Latin America who wanted no more military dictatorships. Maritain responded to the modern popes, and they to him. His deep piety, his gentleness, his gaiety of spirit assured him of friends. The future cardinal Charles Journeaux, his collaborator and the future pope Giovanni Battista Montini his admirer. And in his book *Man and the State* in the 1950s Maritain more than once quoted John Courtney Murray's writing on the subject. More broadly, like Tocqueville he saw and approved the American experience

of religious freedom, and he transmitted his enthusiasm to Catholic intellectuals at a time when human rights, including the right to religious liberty, were becoming the accepted standards for measuring governments in a large part of the world. If the Church's leading philosopher, if recent European experience, if common political discourse all pointed in the same direction, was it not obvious that the Second Vatican Council should bring the Church itself up to date? It was not obvious to a small and strategically placed opposition.

### THE GOOD GUYS COME TO TOWN

Two texts on religion and the state had been proposed for consideration by the Council, one elaborated by the Fribourg group for the Secretariat for Christian Unity, the other prepared by the Theological Commission, a separate preparatory committee chaired by Cardinal Ottaviani. The latter took the hard line of the past and put it forward as theologically true. Which text would go to the floor of the Council? The committee charged with sorting out jurisdictional disputes of this kind heard debate as to which committee had right of way. The Theological Commission insisted that the Secretariat had gone beyond its competence when it meddled with theology. Cardinal Augustin Bea warmly defended his Secretariat. Cardinal Ottaviani, who had brought Father Feron to Rome as his adviser, pressed the claims of the conservatives.

The initial reaction of the Council's central commission was to abandon the whole enterprise of a declaration on religious liberty as "too controversial." John XXIII suggested that the two texts be brought together in a compromise. It proved impossible. No draft on religious liberty was presented to the first session of the Council as it opened in the fall of 1962. Only on October 22, 1962, did John XXIII determine that the Secretariat for Christian Unity had the right to present its drafts directly to the Council, and only that decision kept open a channel for a declaration on religious liberty. The topic was still off the agenda.

The papal decision of October 22, 1962, however, showed how the tide was turning against the curial conservatives, of whom Cardinal Ottaviani was the most prominent. These were the men who had staffed the central administration of the Church, had policed doctrine and picked bishops, and seen the Church survive the Fascists and the Nazis and the Communists. They thought of the Church as well run and of its doctrines as well established. With all their hearts they did not want change. With all their hearts they feared what change in one doctrine implied for

the stability and certainty of all doctrines. They had not wanted the Council. They had taken two years and eight months to prepare for it. Their proposals for action by it were restatements of old formulas. To the extent they could, they controlled the mechanisms of the Council. They were in a position to fight; they had the interior lines of communication so important to success, and, as they were certain that they were defending the truth, they felt assured of victory.

Those of us who had never seen a council—and none of us had—were unfamiliar with the theology that treated as the last word in faith and morals the determinations of a council promulgated with the concurrence of the pope. Pictorial images of councils presented vast and still assemblies of learned males; in some paintings a light shone, or a dove representing the Holy Spirit hovered, above the solemn faces. The images were visual embodiments of the pouring out of grace upon the deliberations which resembled the reception of revelation rather than a parliament of planners.

What we found in fact was a legislature in action. A legislature with a right, center, and left. A legislature with a variety of committees composing legislation, compromising disputes, considering amendments. A legislature of bishops guided by staffs of experts. A legislature interacting with the executive power possessed by the pope. A legislature surrounded by lobbyists on every issue.

The conciliar sessions themselves took place in the great basilica of St. Peter, a space suited to the size of the assembly—over two thousand bishops. The side altars of the basilica were turned into coffee bars where over an espresso one could engage in argument with other participants. At the end of each day's session there were press conferences, lunches, cocktail parties, dinners. The work of the Council went on not only in the nave of St. Peter, not only in its coffee bars, but around the town in religious houses, in hotels, in embassies, in Roman congregations, and in the old palace of the Vatican. The experience of the Council was the experience of a demythologized church. Those experienced in biblical studies knew that in the documents gathered in Scripture God spoke through human tongues in human voices. Now the same phenomenon was observed in the flesh, as it were. The Council was the work of human beings. Faith would accept its conclusions as the will of God. But the conclusions did not come in a disembodied voice from heaven, carved on stone tablets.

When the bishops arrived from abroad, took stock of the process, and heard the experts, the great majority found themselves on the side of those

erate change on a variety of matters and conscious that they could make improvements. In the context of the Council they were liberals. The two popes who presided over the Council—John XXIII, succeeded in 1963 by Paul VI—were liberals, too. In Catholic belief certain statements made by a pope are infallible expositions of faith and morals; but the conditions set for such statements are of a nature to be very rarely met; and there are no infallible means of detecting an infallible statement. Nonetheless, ever since the doctrine of papal infallibility had been proclaimed at the First Vatican Council, a kind of creeping pseudo-infallibilism had taken place in which many papal utterances were treated as if they were absolutely dispositive of the issue addressed. A type of fundamentalism thrived in which particular papal utterances were invoked the way a scriptural verse might be cited by a biblical fundamentalist. Hedged about by this<sup>6</sup> "quasi-infallibility," the pope had a place and enjoyed greater prerogatives than any secular president in relation to a legislature. The popes, however, were respectful of the machinery the conservatives had set in place and ordinarily ready to let the proceedings be governed by it. A liberal majority and a liberal pope could be frustrated, or at least the conservatives had the chance of frustrating them. The papal prerogatives were always trumps; but it is usually an illusion to think that the man at the top can do wonders alone without much support from below to support and prodding were at work in the aftermath of the first session.

In this period John XXIII commissioned an encyclical, *Pacem in terris*, which he issued in April 1963. Addressing questions of world peace and justice, the pope insisted on "the universal, inviolable, inalienable rights and duties" of the human person; among these rights he prominently put the right "to honor God according to the dictate of an upright conscience." The conservatives were left squirming room; did an "upright conscience" mean "a Catholic conscience" or an erroneous but uprightly formed conscience? John XXIII did not decide this question, but the championing of inalienable rights pointed in the direction of Maritain, Murray, and Madiogian from Treviso who had been a collaborator of Giovanni Battista Montini. Pavan was a priest capable of reading and taking in the American sources, of citing the Virginia Statute on Religious Freedom as the first of its kind, and of distinguishing the American concepts from those developed by the French Revolution. Over thirty times the encyclical used the phrase "the dignity of the human person"—the phrase that was in the tend to introduce the document on religious liberty. Without *Pacem in*

*terris*—so Pavan later observed—"it would have been difficult to come to that conclusion [on religious liberty] to which the Council came." In Pavan John XXIII had found the liberal expert he needed to advance ideas that the pope must have personally cherished.

Murray himself reappeared on the scene, not too dissimilarly from Joseph confronting the brothers who, according to Genesis, had thought him permanently disposed of. How had this rehabilitation come about? As usual, through the convergence of several factors. First, and possibly most importantly, a Catholic had run for president of the United States. What Murray had called "the nemralic point" in ecumenical relations had become a sore spot in politics. Could a Catholic be trusted in the highest office? It seemed an insulting or silly question to many, but there was still a strain of Protestant thought that nourished itself on anti-Roman feeling, and in this constituency, largely Southern, the question seemed a good one, especially when fortified by reference to official Catholic documents. In the course of his campaign John F. Kennedy had to address the question and did so on September 12, 1960 before the Greater Houston Ministerial Association. The speech was read first to Murray: the Kennedy camp wanted to be able to say that Murray had not found it outrageous or untrue, even when the candidate avowed his belief in a separation of church and state that was "absolute." It was evident to everyone that the old line on an ideal government's duty to suppress heresy would have harmed the campaign. Kennedy's subsequent election made even more desirable a public doctrine of the Church that an American Catholic president could live with.

Murray, his importance acknowledged in the arena of affairs, had also been writing—not on Church and State but more comprehensively on "the American proposition." The book, as Murray described it, was "a primer of pluralism" and, without explicitly addressing the theological problems, celebrated American democracy and its freedoms and rooted them in European Christian tradition. *We Hold These Truths* appeared before the 1960 election. After the election, Henry Luce, a Republican but an admirer of Murray, put Murray on the cover of *Time*, whose masthead story was "U.S. Catholics and the State." Celebrated in the media consulted in a presidential campaign, the author of an acclaimed book, Murray could not be ignored in America even if Cardinal Ottaviani had made it clear that he was not welcome at the Council.

Almost simultaneously with the issue of *Pacem in terris* came an official notice from Rome: Murray was designated an expert of the Council and invited to participate in its proceedings. Murray ascribed them

vitation to Cardinal Spellman, who, as he put it, "pried me in." No doubt the pragmatic Spellman responded to the American admirers of Murray; but the American intervention would not have succeeded if the conservative curial position had not already been weakened by John XXIII. In November 1963, as the second session of the Council was under way, Murray appeared before the Theological Commission. The issue was whether the text prepared by the Secretariat for Christian Unity should be reviewed by another committee: John XXIII had died, and the conservatives had revived the jurisdictional objection. The chairman of the Theological Commission was Cardinal Ottaviani. Murray rose to speak, introduced by John Wright, bishop of Pittsburgh. "Who is that man?" asked Ottaviani, nearly blind and not hearing the introduction. "An expert, eminence," he was informed. The debate went on for two and one-half hours. At its conclusion Ottaviani's own commission voted 18 to 5 in favor of the Secretariat's text proceeding without further review. Murray reported the whole occasion to the Jesuit rector of Woodstock in the familiar parlance of an American Western. It was, he wrote, "a glorious victory for the Good Guys."

The Secretariat's text, however, was still not on the Council's agenda. Murray prepared a memorandum for the American bishops saying why the topic should be taken up. Meeting as a body in Rome, the Americans endorsed the memo. Cardinal Spellman presented the request to the Presidency of the Council, a committee composed of the presiding officers of the assembly. The curial conservatives had taken care to assure that its membership would be predominantly in their camp; it was the focal point of their power; and it was not certain how the presidency would respond to the Americans' petition.

The new pope, elected in June, was Giovanni Battista Montini, Paul VI. His election had been a notable setback for the conservatives. In his first address to the Council, he observed that all the Council Fathers had "our reverence, our esteem, our confidence, our love." Difficult as these feelings may have been to cultivate, Paul VI maintained them in regard to old opponents such as Ottaviani, whom he did not remove from his place at the head of the Holy Office. By this modest spirit the pope made it possible for most of the conservatives to accept what they would have rebelled against if he had pushed his own agenda ruthlessly.

In the same opening of the second session of the Council, Paul VI expressed his regret that in certain countries "religious freedom, like other outstanding rights of man," were impeded. Superficial readers could see a standard reference to the Communists; close readers would see that

Paul VI was implying that if religious freedom was an outstanding right, it must be a fundamental one. With this pope succeeding John XXIII the conservatives remained caught between the supreme executive and the legislative assembly. With Paul VI's collaboration, the American request met with approval from the beleaguered council presidency. The draft on religious liberty prepared by the Secretariat was presented to the Council. Presentation of the text was made by Bishop De Smedt, using a speech Murray wrote for him, which he "reworked in his own style." The *New York Times* promptly identified the true author. The report crisply set out four reasons for action by the Council:

1. The reason of Truth. Only by forming and following conscience could a human person obtain the end of human life, union with God.
2. The reason of defense. In a large part of the world atheistic materialists sought to deprive human persons of this liberty. The believers needed to assert it for all.
3. The reason of peaceful coexistence. In today's world there were no societies so closed that their actions of religious discrimination did not have repercussions elsewhere; human beings everywhere were called to live in peace with their neighbors throughout the world.
4. The reason of ecumenism. Many non-Catholics suspected Catholics of Machiavellianism in defending religious liberty when the Catholics were a minority while wanting to deny it to others if they became a majority. This distrust must be destroyed by frank commitment to freedom for everyone.

Religious liberty, the report continued, does not entail "indifferentism" as though it makes no difference what one believes, nor freedom from the human obligation to God, nor the relativism of truth, nor *pessimus dilettantismus*, that one has a quasi-right to be content with one's uncertainty as to religious truth and no need to search and struggle to discover it. The Fathers of the Council were asked not to take religious liberty in any of these senses. What did the term mean? Two things positively, "the right of the human person to the free exercise of religion according to the dictate of the person's conscience"; negatively, immunity from all external coercion in such matters. Affirming the existence of religious truth and the duty to seek it, the report asked the Council to assert the inviolability of the person in relationship to God.

Could such a declaration be controversial? To the curial conservatives it was not only controversial but unthinkable. As they looked at their prospects for defeating the Secretariat's text in the Council, they concluded that there was not even time for discussion of the issue. De Smedt's presentation had been made on November 19; the second session was scheduled to close on December 4. Without taking a vote, the presidency of the Council postponed debate to the following year.

Earlier in 1963 Joseph Fenton had vigorously defended Ottaviani against those "who dislike the unchanging continuity of Christ's teaching within His Church." Ottaviani, he wrote, had "insisted on the need for stating Catholic doctrine, even when that doctrine is opposed to the tenets of the Reformers and the Modernists." It could not have been especially pleasing to the leaders of the American hierarchy to be implicitly identified with the Reformation and with the Modernist heresy of Alfred Loisy. After the close of the second session the ecclesiastical machinery moved. In January 1964 the following note appeared in *The American Ecclesiastical Review*: "In December 1963 Msgr. Joseph Clifford Fenton, after twenty-five years of outstanding service as Editor-in-Chief of *The American Ecclesiastical Review*, resigned because of poor health. Made Prothonotary Apostolic by Pope Paul VI, Msgr. Fenton is now Pastor of St. Patrick's Church, Chicopee Falls, Massachusetts." Recalled from his tenured position as professor of theology at Catholic University to his home diocese of Springfield, "Butch" Fenton had been removed from the combat: the American liberals, like the curial conservatives, knew how to press the levers of power. The defenders of religious liberty were not entirely committed to liberty of speech in the Church.

Murray, meanwhile, was instructing the American hierarchy further by a magisterial essay entitled "Right of the Human Person to Liberty on Matters of Religion." Acknowledging that there were "serious differences" in the Church on religious liberty, Murray neatly summarized "the First View" as presenting "intolerance wherever possible, tolerance wherever necessary." The First View was guilty of "Fixism," the doctrine that the Church's understanding could not develop; "Archaism," a rejection of the present age and a return to the past; and "Misplaced Abstractness," insistence on an ideal where there were only concrete conditions. In contrast, the "Second View" saw the nature of man as "a historical nature, whose rational exigencies manifest themselves progressively." The notion of religious freedom as a human right was "explicitly the product of a twentieth-century insight into the exigencies of the per-

sonal and political consciousness." The answer to the question of religious freedom was new because the question, in terms of this consciousness, was new. The tradition of the Church had to respond to the new insight. The tradition had a "growing end." The theologian's task—Murray's accomplishment in fact—was to discern the growing end. Into a theological system that stressed continuity a dynamism was introduced. The key concept reflected the language of Bernard Lonergan, a Canadian Jesuit whose teaching at the Gregorian University in Rome had radiated an influence confirmed by his book *Insight*, a masterful modern treatment of theological method in general. Far more concrete than the fundamental work of Lonergan, and focused on a specific theological political-juridical problem, Murray's paper was published in *Theological Studies* as the conciliar debate continued, his first sustained exposition of the issues since his silencing in 1954. Prior to publication the paper was circulated to the American bishops. Before the debate was over it had been translated into Dutch, French, German, Portuguese, and Spanish, finding everywhere readers who resonated to its theme.

Bishop De Smedt presented a modestly revised text of the Declaration on Religious Liberty to the third session of the Council. Debate opened September 23, 1964, with both sides well represented by speakers and by written submissions. Cardinal Ernesto Ruffini, archbishop of Palermo, said that there was a single true religion; other religions deserved only "patient and benign tolerance." The Catholic Church had never coerced anyone; but the Church did have concordats made in 1929 with Italy, in 1940 with Portugal, in 1953 with Spain, in 1954 with the Dominican Republic; according to the concordats the Church held a privileged position.

Catholic feast days were civilly observed, the Catholic clergy was exempt from military service, and public education conformed to the dogmatic and moral principles of the Church. Would these concordats remain valid if the free exercise of religion was acknowledged? The negative answer that was implied was enough for Ruffini to reject the document.

Cardinal Ferdinando Quiroga y Palacios, archbishop of Santiago de Compostella, characterized the document as effecting "not an evolution but a revolution." *Liberanismus*, many times formally condemned by the Church, was being offered for approval. Archbishop Marcel Lefebvre, head of the Fathers of the Holy Spirit, noted that the freedom recognized included freedom to follow the moral precepts of one's religion. Polygamy would have to be allowed to Muslims, a reduction of the command in Lefebvre's book. Cardinal Ottaviani affirmed that Catholics had a natural and supernatural right to full religious freedom; but no one else.

did. Was the Church to say good-bye to the concordat with Italy, which safeguarded indissoluble Christian marriage and the Christian education of children? How could heretics be permitted "freedom of propaganda?" Against this band so stubbornly and so loyally defending concepts of past centuries and the legal arrangements made by the Church in this century, were Cardinal Franz Koenig, archbishop of Vienna, representing the view dominant on the European continent; Archbishop Silva-Henriquez of Santiago, Chile, speaking for fifty-eight Latin American bishops; Cardinal Emile Léger, speaking for the majority of Canadian bishops; and Cardinal Cushing of Boston speaking "for almost all the bishops of the United States." Using Murray's language, Cushing described freedom as "the highest political end." He quoted deliberately from the American Declaration of Independence, telling the Fathers of the Council that the Church must show "a decent respect to the opinion of mankind."

The text was remanded by the Council to the Secretariat for Christian Unity to consider amendments offered by the Fathers. Murray was designated "the first scribe," his work immensely aided by the presence of Pietro Pavan among the drafters. The conservatives attempted to reflect treatment of the topic to a new "mixed commission," three of whose four members had declared themselves opposed to the Secretariat's draft. An appeal to the pope, followed by his rejection of the conservatives' maneuver, ended this barefaced attempt to smother the declaration. The text, as revised by the Murray-Pavan team, was printed and distributed to the Fathers on November 17.

On November 19, the presidency announced that no vote would be taken until the following year. That day, as Murray recalled, was "the day of Wrath" on the council floor: *dies irae, dies illa*, as the thirteenth-century hymn had it. Cardinal Albert Meyer, archbishop of Chicago, led the protest. Over eight hundred Fathers signed a petition to the pope asking him to overrule the presidency, which had come to its decision without consulting the assembly as a whole and without even consulting all of the members of the presidency. Paul VI declined to step in, assuring the American bishops that the Council would consider the matter next year. The bishops went home, more conscious than before of their own agreement and the tenacity of their opponents, and not a little nettled at being outmaneuvered.

Paul VI's Christmas broadcast showed again where his heart was, in language dear to Pavan, he spoke of "the human gasp for God" (*l'anelito di Dio*) and said that public authority "exceeded its competence"

when it entered this area of sacred breathing. On December 29, 1964, Cardinal Joseph Ritter, archbishop of St. Louis, wrote all the American bishops asking them to stand behind the declaration as distributed at the third session. Murray himself had his second heart attack of 1964. Reconciling, he wrote an article for *America*, in which he reported on "the day of Wrath"; he also noted some divergences between the American and French supporters of the text and observed that his tenacious opponents were not so much opposed to religious freedom as opposed to "the affirmation of progress in doctrine that an affirmation of religious freedom necessarily entails." With great candor he declared that "development of doctrine is *the* issue underlying all the issues at the Council" (emphasis Murray's).

In Italy the Secretariat drafted and redrafted, not attempting to meet the objections of the irreconcilables, but trying to accommodate nuances suggested in hundreds of amendments sent in by the Council Fathers. During the summer of 1965 Murray was well enough to negotiate with the French bishops a text that reflected their view that theology as well as juridical principles should have a prominent place in the document. Scripture, the French successfully insisted, grounded religious freedom; the seeds of liberty were planted by the Gospel.

The fourth session of the Council opened on September 14, 1965. The revised document was, as Paul VI had promised, the first order of business. With the Council not scheduled to end before December 8 there was plenty of time for discussion and voting. Cardinal Spellman opened the debate as the champion of the proposed declaration.

The old opponents were still vocal and unconvinced. As Archbishop Lefebvre put their position most succinctly in writing: "If what is being taught is true, then what the Church has taught is false." From every quarter of the world, bishops spoke to the contrary. Especially notable was the oration of Cardinal Woytyla, the future John Paul II, speaking for the bishops of Poland: "In the very fact of Revelation is included the true and deep doctrine of religious liberty." Other bishops from the Communist countries, such as Joseph Slipyi, once a prisoner, now a cardinal, spoke of the essential need of a basis for the religious liberty of all persons regardless of their belief; only on a firm and universal foundation could the freedom of Christians from persecution be presented. The bishops from Eastern Europe were joined in this contention by bishops from the Islamic Middle East and Islamic Africa; they, too, had a sensitivity to present day persecution. Particularly eloquent, striking a note generally neglected, were the observations of Cardinal Joseph Beran, arch-

bishop of Prague, who testified to what he had seen under the Communists in Czechoslovakia. When religious freedom was radically restricted, he said, there was "a serious danger" to faith and "very serious temptations" to hypocrisy and lying. But hypocrisy in professing faith hurt the Church more than the hypocrisy of those who hid their faith under pressure. And the Church had once fostered the former hypocrisy. The Catholic Church in Czechoslovakia "now seems to do sad expiation for faults and sins committed in its name in times past against liberty of conscience, such as the burning of Jan Hus, priest, in the fifteenth century, and in the seventeenth century the external compulsion of a great part of the people of Bohemia to again adopt the Catholic faith." The Church's reliance on the secular arm had "left a certain wound hiding in the hearts of the people" that was still an impediment to their progress in the spiritual life. Religious liberty, therefore, should be declared by the Council "in clear words and without reservations" and "in a spirit of penance for sins committed in this matter in past centuries." The concreteness of Beran's speech—Hus's execution candidly described as a *crematio*—was as startling as his acknowledgment of the sins committed in the name of the Church.<sup>X</sup> The sins were a subject on which few articulate prelates wanted to dwell.

As of September 20, 1965, there had been sixty-two speeches and over a hundred written comments on the draft. The presidency of the Council saw its chance in this clamor of tongues. It decided that the text was not ready to be put to a vote. Once again there was a strong reaction by the Council Fathers. This time Paul VI acted. He required that the text be put to a preliminary vote. The clamor had been deceptive. The text passed 1,997 to 224. Under the rules the text was now "in possession" and could not be essentially changed; but amendments might be entered by the drafting committee. Murray himself became *hors de combat* with a collapsed lung.

Also before this session of the Council, planned to be its last, was what was, in a sense, a companion document entitled *Gaudium et spes* (Joy and hope), whose subject was "The Church in the Modern World." Among the topics addressed was marriage. Among the positions taken was the right of every couple to determine in accordance with the consciences of husband and wife the number of children they should bring into the world. The curial conservatives were highly concerned with the relation of this document to contraception, whose treatment by a curial compromise had been withdrawn from the Council and turned over to a special papal commission.

As *Gaudium et spes* entered the final drafting stage, after being approved by an overwhelming conciliar majority, the conservatives staged a coup, producing before the drafting committee a note from the pope that apparently required the Council's reaffirmation of the rule on contraception; the special commission would be preempted. Heated discussion broke out in the committee. "Christ himself has spoken," declared Cardinal Michael Browne, a curial conservative. The liberals went to Paul VI. He qualified the directive delivered in his name. The text suffered, but not fatally. The tenacity of the conservatives in continuing to fight after so many defeats was cautionary.

Israel Shenker, the correspondent of the *New York Times* covering the Council, had formerly covered the Kremlin. He saw analogues in the subterranean ways he had observed there and what he now saw at the Vatican. As he observed the factional maneuvers that were producing the solemn doctrine of the Church, he asked me, "Why do you believe?" I answered, "Because the Church has the Gospel and the sacraments." I could have added, "Because God acts through human beings." How different Rome was from contemporary Moscow! Here without violence in open debate and in written exchanges, and in personal confrontations and frank advocacy, the teaching of the Church was being "purified." That in a context which was political, political moves should be made could surprise only those who expected an incarnational process to be purely spiritual. As to the final outcome one could only work, wait, and trust.

A slightly revised text on religious liberty was passed by the Council on October 26, 1965. More amendments were proposed. A further vote was taken on separate sections of the document on November 19; the opponents never numbered more than 249. The day before this vote Murray with other selected experts celebrated mass with Paul VI in St. Peter's. The Good Guys were on the brink of victory. On December 7, a final vote was taken—70 no; 2,308 yes. On December 8, the feast of the Immaculate Conception, exactly 10 years after *Quanta cura* had denounced liberty of conscience as a madness, Paul VI promulgated the declaration as the teaching of the Church. Among those subscribing the names to the final text was Alfredo Ottaviani.

Person and of Communities to Social and Civil Freedom in Religious Matters. Cardinal Wojtyla had proposed that the solemn ecclesiastical term "doctrine" be used in place of "declaration." A slight concession to the minority could be seen in the retention of "declaration." But it had also been argued that "declaration" was appropriate for the Church making its mind known not only to the faithful but to the whole world; and the chosen word echoed the famous eighteenth-century declarations of America and France and the modern declaration of the United Nations. A clearer concession to the minority was the subtitle, making explicit that the declaration was not a recognition of total freedom from all obligation to God, but only of civic liberty.

The opening words of the Declaration declared that our day saw an increasing consciousness "of the dignity of the human person." The number of those had increased who wanted all to act "in free responsibility, not moved by coercion but by the consciousness of duty." Especially was this felt in what "concerns the free exercise of religion in society." The Council, attentive to these aspirations, had scrutinized the sacred tradition of the Church "from which it draws the new always in congruence with the old." In these succinct phrases the Council explained why it was taking up the topic at this point in history and acknowledged novelty while asserting continuity. In this area of political morality an evolving human consciousness was made a collaborator of the Church.

After this extraordinary exordium, there followed the fundamental teaching: "This Vatican Council declares that the human person has a right to religious freedom." The freedom was defined. The freedom consisted in immunity from coercion by individuals or by social groups or by "any human power," so that "no one in a religious matter may be compelled to act against his conscience or prevented from acting privately or publicly, alone or associated with others, according to his conscience, within due limits."

What followed was crucial: the basis for recognizing this right. The Council declared that the right was "founded in the very dignity of the human person as it is known by the revealed word of God and by reason itself." The repetition of the phrase "human person" (surely unnecessary when neither angelic nor divine persons were at issue) was an effort to emphasize the objective character of the right. It was in terms of the person—in terms of a "dignity" that pleonastically emphasized the person's special status and unique worth—that the Council marshaled revelation and reason on the side of liberty. The right belonged to each person because no one could satisfy, in a manner conformable to human

## OF THE DIGNITY OF THE HUMAN PERSON

Known by its opening Latin words, *Dignitatis humanae personae*, the declaration as it finally emerged from debate and amendment bore the title Declaration on Religious Freedom and the subtitle On the Right of the

nature, the moral duty to seek and adhere to the truth, except by "psychological freedom and immunity from external coercion." Using the approach of Maritain, the Council declared that human beings, directed as they are to God, "transcend by their nature the terrestrial and temporal order of things." The civil power "exceeded its limits" when it presumed to direct or impede this relationship to God. The right to freedom belonged to groups as well as individuals, because both human nature and religion have a social dimension.

A special section of the text was devoted to religious freedom "under the light of revelation." The teaching of Jesus Christ was manifest in his conduct. Christ compelled no one to believe. "Mild and humble of heart" in the words of the Gospel of Matthew, he had patiently attracted and invited his disciples; and he had testified to the truth not by the use of force but by submitting to death. The Apostles had followed the same path. The Fathers of the Church had unanimously taught that the act of faith must be voluntary, and so had the Church, "although sometimes in the life of the people of God in its pilgrimage across the vicissitudes of human history a way of action existed less conformed to the spirit of the Gospel and indeed contrary to it." The Gospel seed had nonetheless contributed in the course of time to the growing conviction that in religious matters all should be immune from compulsion.<sup>1</sup>

As a review of history, *Dignitatis humanae personae* failed badly. It referred to slips in conduct but not in teaching. It mentioned only the freedom traditionally accorded the nonbaptized. It never acknowledged the long record of coercing the baptized when they were considered to be in heresy. Details like the *crematio* of Jan Hus were missing along with the penitential spirit recommended by Cardinal Beran. Even the lapses in coercing the act of faith were noted in oddly impersonal terms as if in the vicissitudes of human history<sup>2</sup> were explanation and apology enough for acts of persecution urged and undertaken by responsible Christians in the name of the Church.

As a juridical document, the Declaration had the vagueness that has attended every effort, from the Virginia Declaration of Rights to the present, to say that religious freedom is not without bounds. Thrice the Council returned to the topic. It was "to do injury to the human person and the very order established by God" to deny "the free exercise of religion in society, provided a just public order is preserved." No attempt was made to specify what constituted a just public order. In the next section, "the just demands of public order" qualified the asserted freedom of religious associations (in itself a markedly liberal expansion of Madison's

ian doctrine; Madison had thought in terms of individual consciences, not churches). A little greater specificity was achieved in recognizing that these religious groups had a right to disseminate their beliefs but that "indecent or even less upright persuasion of the uneducated" was an abuse of the right. In section 7, again taking up this troublesome subject, the Council taught that civil society had the right to protect itself against abuses that could arise under the pretext of religious liberty. The Council acknowledged that the civil power had duties imposed "by the due care of public morality" (was Lefebvre's fear about polygamy being met and disarmed?). The Council concluded that the norm should be "that freedom is maximally recognized for human beings and not restrained except when necessary to the extent necessary." A doubly elastic formula.

The Declaration was wide open to interpretation in another area, that of establishment of a church by law. "Given the particular circumstances of a people," a religious association might be assigned "a special civil status in the juridical order." Responsibility for such arrangements was not attributed to anyone; as in the passage on "the vicissitudes of human history" a set of historical facts was referred to with no admission that the Church had brought these situations about; concordats went unmentioned. Such arrangements were neither condemned nor praised, but the Council insisted that the religious freedom of all should be respected and that the civil power "must provide that the juridical equality of citizens never be openly or hideously injured on account of religious reasons, nor any discrimination made among them." Was it really possible to have an established church and no religious discrimination? (Cardinal John Heenan, archbishop of Westminster, had testified in debate that such was the happy situation in England.) The Council went in two different directions.

Three large inadequacies, then—the failure to deal with history, the failure to deal with the implications of an establishment, the vague and tangled treatment of the civil power's right to limit actions based on religious convictions. In its failures, the Declaration reflected its character as a document composed by a committee issuing from a legislature-like assembly. It carried some wounds inflicted by the minority. It illustrated the practical impossibility of a worldwide church finding a single formula suitable for every country in the world. It demonstrated the difficulty of abandoning past precedents without appearing arbitrary and the difficulty of departing from one's ancestors without denouncing them. Although Murray had remarked that the development of doctrine was

the underlying issue of the Council, the Declaration did not even sketch a theory of development, other than a postulated growth in human respect for freedom. Even on this point it was open to criticism. As Murray himself remarked, the change in consciousness had come in the eighteenth century. The Church came late "to a war that has already been won." Not only the development but the lag in development needed to be accounted for. A tiny minority remained unconvinced that the development could properly take place. For them, the Church had married the French Revolution!

If an unkind critic should remark that the Declaration was as inevitable—and of as little significance—as a declaration that modern plumbing is preferable to a world without bathrooms, he or she would have to be answered that what now seems inevitable came close to not happening, and that far from merely registering the obvious, the Declaration was dynamic in its implications for the future of a large spiritual society. If the unkind critic should observe that the implications have scarcely been faced let alone developed, he or she would have to be answered that time must pass for the implications of a profound change to be drawn. Finally, if this hypothetical critic should cynically observe that what has been changed could be changed again and that at some later time it might be advantageous to the Church to assert its old position, no disavowal of such a possibility might disarm him or her, but a believer would see a development of the kind that is organic and that can as easily be reversed as an oak can be restored to the acorn from which it came.

Despite the disappointing deficiencies, *Dignitatis humanae personae* was a substantial accomplishment. However characterized, this act of a world assembly of the bishops of the Catholic Church had set a new course for that body as the champion of religious freedom everywhere for everyone. The demand of human nature for such freedom had been affirmed. Psychological freedom from pressure to believe had been posited as essential. The quibbles and the qualifications of the text paled in the light of the central contention that linked freedom to the search for truth. "The truth shall make you free," John's Gospel taught. In freedom only shall you reach the truth, the Council added.

Implicitly the Council had a theory of development. First, asserting the need for psychological freedom in reaching the truth, the Council indicated the basic condition of development, free and open debate, such as had ultimately occurred in the Council itself but had been suppressed by ecclesiastical authority in the years preceding the Council and hampered for two years in the Council itself by its presidency. Second, point

ing to the pedagogy of Christ as the model, the Council showed that development of Christian doctrine meant a deeper, more faithful response to Christ. Development was not to be unguided without binding criteria. Third, the Council proclaimed that the Church learned from human experience. In Murray's words, the Church here adopted "a principle accepted by the common consciousness of men and civilized nations." The learning had been largely from the United States: from its Constitution of such extraordinary importance praised by Maritain and from the Virginian Declaration pointed to by Pavan; from its bishops who kept the issue alive as "*the American issue*" in the Council; from its theologian John Courtney Murray; who poured his energy and insight into the shaping of the new teaching. Impossible without the recent European experience and the support of bishops from around the world and the receptivity of Italian popes, the Declaration on Religious Freedom would not have come into existence without the American contribution and the experiment that began with Madison.

## TEN COMMANDMENTS

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*First.* You shall conclude that the genealogy, the domestic environment, the educational exposure, the intellectual adventures, the friendships, and the professional life of anyone treating this topic influence the treatment; and you shall suspect that the spiritual life of the writer is relevant as well; and you shall know that no person, man or woman, historian or law professor or constitutional commentator or judge, is neutral in this matter.

*Second.* You shall acknowledge that the foundation of freedom in religion is the concept of the individual conscience; and you shall not worship an empty idol, attributing to "the Enlightenment" an insight that is of deeper and more ancient root.

*Third.* You shall respect the content and the context of the sixteen words creating religious freedom in the Constitution, and you shall not artfully divide the words from one another, nor omit any of them, nor impose two meanings on a single word.

*Fourth.* You shall read Tocqueville for his celebration of the holy union of freedom and religion, discount his excesses and omissions as an advocate, and meditate on his conviction that religion is the foremost of our political institutions.

*Fifth.* You shall observe that the free exercise of religion generated the moral energy and the bitter passions that produced the Civil War and led to the liberation of the millions held in bondage.

*Sixth.* You shall mark that government when it seeks to adjudicate the truth of a religion falls afoul of the First Amendment and when it attempts to adjudicate the sincerity of a believer enters on an enterprise beset by hazards.

*Seventh.* You shall realize that the words safeguarding religious freedom in the Constitution must be applied in order to achieve that end; that their application invites interpretation; that interpretation breeds disputes;

that disputes result in distinctions; and that only over time do the dominant distinctions become palpable, only then does a development of doctrine occur.

*Eighth.* You shall substitute neither State nor society for God nor suppose that religion may be analytically reduced to the self-worship of society.

*Ninth.* You shall recognize that the free exercise of religion can be divisive and dangerous to established institutions and customary ways as well as beneficent for believers and empowering for the forgotten, and that the price of our constitutional liberty is acceptance of this precarious condition.

*Tenth.* You shall acknowledge that religion itself requires religious freedom. Heart speaks to heart, spirit answers Spirit, freely.

## NOTES

### INTRODUCTION

*Cradle of Liberty:* Boston's double claim to this title on the basis of its revolution and its abolitionist activity is noted by William E. Gienapp, "Abolitionism and the Nature of Antebellum Reform," in *Courage and Conscience: Black and White Abolitionists in Boston*, ed. Donald M. Jacobs (Bloomington: Indiana University Press, 1993), 44; "the hanging of the Quakers"; *infra*, chapter 2.

as Newman says: the phrase *cor ad cor loquitur* (heart speaks to heart) was adopted by him as the legend of his cardinal's coat of arms. It was an adaptation of a phrase he had earlier used from St. Francis de Sales. See Ian Ker, *John Henry Newman: A Biography* (Oxford: Clarendon Press, 1988), 719 and John Henry Newman, *The Idea of a University*, ed. Ian Ker (Oxford: Clarendon Press, 1976), 332 and 655.

### CHAPTER I

O'Connell's career: James M. O'Toole, *Militant and Triumphant: William Henry O'Connell and the Catholic Church in Boston, 1859-1944* (Notre Dame: University of Notre Dame Press, 1992), 72, 79, 94 (advancement in office); 113-120 (resistance in diocese); 194-195 (losses in Rome); 181, 195-196 (nephew's secret marriage); "The Puritan has passed": 121; "The march to our duty": 129; disapproval of Curley: 124-126; the lawsuit: *Boston v. Santomasso*, 298 Mass. 175, 10 N.E.2d 271 (1937); "the walls"; O'Toole, *Militant*, 125.

odd pockets such as Quincy . . . Republicans: so I was informed by Paul Reardon, secretary to Republican governor Christian Herter and later a justice of the Supreme Judicial Court.

David Ignatius Walsh: O'Toole, *Militant*, 122; Carroll: see 220 Massachusetts Reports.

O'Connell's politics and political friends: O'Toole, *Militant*, 129; defeat of the lottery bill: 138-139.

referendum on birth control: for the negative result see Mass. Gen. Laws 272, 20-21 (1956).

this unholy, unpatriotic": O'Toole, *Militant*, 136; O'Connell and Sacco and Vanzetti: 164; "Almost hysterical": 137-138; "even before we have a chance":

at 304; “in the exercise of a determination by state authority”: id. at 307; “all others who respect”: id. at 309.

## CHAPTER 2

“We must obey God”: Acts 5:29.

Nathan denouncing David: 2 Sam. 12:1–23.

“Your very rulers are rebels”: Isaiah 1:22–23.

“You know all the evil”: 1 Kings 2:4; see David Daube, *Ancient Jewish Law* (Leiden: E. J. Brill, 1981), 123–129.

“Bad thoughts”: Cicero, *Pro Sex. Roscio Amerino*, in *Orationes*, ed. Albert C. Clark (Oxford: Clarendon Press, 1900), 67.

“your mind’s conscience”: Cicero, *Pro Cnuentio*, in *Orationes*, ed. Albert C. Clarke (Oxford: Clarendon Press, 1900), 159.

“Is it a lighter matter”: Augustine to Boniface, governor of Africa, Letter 185

“The Correction of the Donatists,” chap. 20, in *Patrologiae cursus completus*, Series latina, ed. J. P. Migne (Paris: Garnier, 1891), 33:802; that perser

cution worked: chap. 21.

The Apollinarians, the Arians . . . : *Theodosiani libri XVI cum constitutionibus Simoniidianis*, ed. T. Mommsen and P. Meyer (Berlin: Weidmanns, 1962) 16: chap. 5, secs. 12, 25, 34, 38, and 39.

corollary of the absolute conviction: see William K. Jordan, *The Development of Religious Toleration in England: From the Beginning of the English Reformation to the Death of Queen Elizabeth* (Cambridge, Mass.: Harvard University Press, 1932), 396. “The man who is dominated by an absolute conviction of the truth of his belief is so certain of his faith and of the inspiration of God that he inevitably attempts to persecute, in one fashion or another, the error which is quite as clear to him as the truth of his own conviction.”

“Religion cannot be compelled”: Lactantius, *Divinum institutionum libri*, 5:20. *Patrologiae* 6:614; “not by killing”: 6:12. “None of us”: 6:14; “against the law (ius) of humankind and against all established rightness (fas)”: 6:13.

“Those who differ”: Gregory I to Peter, bishop of Terracina, March 591. In Shlomo Simonsohn, *The Apostolic See and the Jews* (Toronto: Pontifical Institute of Medieval Studies, 1988), 1:3; that the Jews were to be won over by persuasion not force and that their religious rites were not to be suppressed was the pope’s ideal program, generally observed by his successors. See also Gregory I to Paschasius, bishop of Naples, November 602, 1:2:3–2:4.

the Manichaean religion: *Theodosiani libri*, blk. 15, 8, 2; blk. 16, 5, 3 and 7, 9, 11, 18, 40, 62, 64.

Bernard of Clairvaux in a letter to all Christians, Epistle 457, *S. Bernardi Opus*, ed. J. LeClercq (Rome: Editiones Cistercienses, 1957–1977), 7:432; for the debated interpretation of this letter, see Jürgen Mietke, *Bernard de Clairvax: Histoire, mentalités, spiritualité* (Paris: Editions du Cerf, 1992), 492–495.

“worthy of servitude”: Innocent III to Pierre de Courtenay, January 17, 1208, in marriage articles, enclosed in a letter from Zuanne Pesaro, Venetian ambas-

simonsohn, *Apostolic See*, 1:93 (English translation in Edward A. Synan, *The Popes and the Jews in the Middle Ages* [New York: Macmillan, 1965], 226); July 15, 1205, in *ibid.*, 1:86 (English translation in Solomon Grayzel, *The Church and the Jews in the XIIIth Century* [Philadelphia: Dropsie College for Hebrew and Cognate Learning, 1933]). “Servitude” is not to be understood as physical slavery, legally enforced, but as a status inferior to that of free citizens. Salo Wittmayer Baron, *Ancient and Medieval Jewish History*, 320–322. Innocent III took a high hand as to the property rights of Jews, regularly remitting the obligations to pay them what he termed “usury” in blanket dispensations to crusaders as a reward for taking the cross. Innocent III *See*, 1:71; Innocent III to the archbishop of Narbonne, August 15, 1198, in Simonsohn, *Apostolic* in *ibid.*, 1:78; Innocent III to the archbishop of Magdeburg, December 31, 1199, in *ibid.*, 1:97.

“the rites of other infidels”: Thomas Aquinas, *Summa theologiae*, 2–2, Q. 10, art. 10, ed. Pietro Carmello (Turin: Marietti, 1952).

To death if they were warned: *ibid.*, Q. 11, art. 3.

“knows who are truly returning”: *ibid.*, ad. 1.

the famous conflict between Henry II and Archbishop Thomas Becker: see David T. Noonan, Jr., *The Believer and The Powers That Are* (New York: Macmillan, 1987), 22–27.

the condemnation of Joan of Arc: see P. Doncoeur, S. J. and Y. Lanthers, *La Réhabilitation de Jeanne La Pucelle ordonnée par Charles VII en 1450 et le codicille de Guillaume Bouillé* (Paris: Librairie d’Athènes, 1956); Noonan, *The*

*Reformation of Joan of Arc*: see P. Doncoeur, S. J. and Y. Lanthers, *La Réhabilitation de Jeanne La Pucelle ordonnée par Charles VII en 1450 et le codicille de Guillaume Bouillé* (Paris: Librairie d’Athènes, 1956); Noonan, *The*

“is in a certain way the dictate of reason”: *Summa*, 1–2, Q. 19, art. 5.

“it is the same thing to flout”: *ibid.*, ad. 2; crass ignorance: *ibid.*

The Reformation . . . heretics . . . churches: Jean Leclerc, *Toleration and the Reformation*, trans. T. L. Weslow (London: Longmans, 1960), 1:162, 200, 208;

Maximilian: 268.

Warsaw Confederation: A. Brückner, “The Polish Reformation in the Sixteenth Century,” in *Polish Civilization*, ed. M. Giergielwic (New York: New York University Press, 1979), 8r.

“desire above all the liberty”: Cardinal William Allen, *A True, Sincere and Mod-*

*est Defense of English Catholics that suffer for their faith both at home and abroad* (St. Louis: Herder, 1914), 2:148; “the free exercise of their religion”:

Marc’ Antonio Morisini, Venetian ambassador in France, to the Doge and Senate, September 13, 1624. *Calendar of State Papers and Manuscripts Relating to English Affairs Existing in the Archives and Collections of Venice and in Other Libraries of Northern Italy*, ed. Allen B. Hinds (London: His

Majesty’s Stationery Office, 1912), 18:438. The princess and her suite: the

sador in England, to the Doge and Senate, December 27, 1624 (524). By a secret article added apart from the marriage contract, King James granted Catholics "security of life and property without their being interrogated about the Catholic faith, if they render the obedience they owe him" (525).

Sebastian Franck (1499–1542); Leclerc, *Toleration*, 1:166–175; Caspar Schwenckfeld (1489–1561); in ibid., 1:176–185. Menno Simons (1493–1561); Harold S. Bender, "A Brief Biography of Menno Simons," *The Complete Writings of Menno Simons*, ed. John Christian Wenger (Scottdale, Pa.: Herald Press, 1966), 1:4–28. On Sébastien Castillon's *Traité des Hérétiques* of 1554 see Jordan, *Development of Religious Toleration*, 310–313. Other writers who had an impact on England include Jacopo Aconico, a Socinian from near Trent who emigrated to England and in 1565 defended religious toleration in that country, and Faustus Socinius, whose *Catechism of Rakau* (1609) rejected the use of force in religious matters (Jordan, *Development of Religious Toleration*, 303–307); Jordan also reads the 1580 work of the English Jesuit martyrs, Robert Parsons, *A brief discourse contanguing certayne Reasons why Catholicks Refuse to goe to Church*, as arguing for universal civil toleration (394). Jordan in his 1936 volume on toleration from 1603 to 1641 finds two Baptist writers championing a freedom of religion that goes beyond mere toleration: Thomas Helways, *A Short Declaration of the Ministry of Inquisition* (1612); and Leonard Bushe, *Religious Peace; or a plea for liberty of conscience* (1614). See William K. Jordan, *The Development of Religious Toleration in England: From the Accession of James I to the Creation of the Long Parliament* (1603–1640) (London: G. Allen and Unwin, 1936), 275–286.

New Pymouth: John E. Pomette, *Founding The American Colonies* (New York: Harper and Row, 1970), 126–127; Massachusetts Bay Colony: Sydney E. Ahlstrom, *A Religious History of the American People* (New Haven: Yale University Press, 1972), 139–150.

"a Plantation religious": John Norton, *The Heart of New England Rent at the Blasphemies of the Present Generation* (1659), 58; "we through grace", 53. In 1656 the General Court: *Records of the Governor and Company of Massachusetts Bay*, ed. Nathaniel B. Shurtleff (Boston: W. White, 1853–1854); vol. 4, pt. 1, 277–278; "alien" or "vagabond": vol. 4, pt. 2, 3; "directly or indirectly": vol. 4, pt. 1, 308; "approve of any known Quaker": 346; importation of Quaker literature: 278; penalty for proposing Quaker doctrine: 321; "stranger" Quakers: vol. 4, pt. 2, 3; penalties for return: vol. 4, pt. 5, 21; "severely" whipped: 308–309; death penalty: 346; death penalty for returning priests: 2:193; 3:112; death penalties applied in 1659: 3:383–384; death penalty for Dyer: 3:407. Provided Southwick and her brother: ibid., vol. 4, pt. 1, 366. and Mary Dyer: Ruth Plimpton, *Mary Dyer: Biography of a Rebel Quaker* (Boston: Branden, 1994), 181–189; "mercy and clemency": 181; "My life now availeth me": 47. "Would you not have thought it hard": Anne Coddington to Governor Endecott and the General Court, July 7, 1660, reprinted in ibid., 192.

"the constable of the towne": *Records*, vol. 3, pt. 2, 348.

the new legislation enforced: Richard P. Hallowell, *The Quaker Invasion Of Massachusetts* (Boston: Houghton Mifflin, 1883), 183–187; George A. Selkirk, *Quakers in Boston 1656–1854* (Cambridge, Mass.: Friends Meeting at Cambridge, 1976), 14–17.

"despising government": *Records*, vol. 4, pt. 1, 277. "opinion of theirs of being perfectly pure": ibid., 386.

"the Quakers died": Endecott to Charles II, December 19, 1660, *ibid.*, 451. "a hideous Döppelganger": see Larzar Ziff, *Puritanism in America: New Culture in a New World* (New York: Viking Press, 1973), 139.

"For liberty of conscience": instructions of the General Court to its agents, Joseph Dudley and John Nichols, March 17, 1681; *Records*, 53:47; explanation to as late as 1675 constables were instructed: November 3, 1675, *ibid.*, 60; repeal of death penalty: 322; suspension of other laws against Quakers: 347.

"for or in respect of his or her religion": "An Act Concerning Religion," *Archives of Maryland: Proceedings and Acts of the General Assembly of Maryland, January 1637–September 1664*, ed. William Hand Browne (Baltimore: Maryland Historical Society, 1883), 246. George Calvert, principal secretary of state under James I from 1619 to 1625, was active in the negotiations for a Spanish marriage for Charles, negotiations that preceded, and set a precedent for, the negotiations that ended in the agreement with the French. Calvert announced his conversion to Catholicism in 1625, the year after Charles's marriage to Henrietta Maria was concluded. James made him baron of Baltimore and retained him in the Privy Council. William Hand Browne, *George Calvert and Cecilius Calvert: Barons Baltimore of Baltimore* (New York: Dodd, Mead, 1890), 6–13; Calvert had already obtained a patent from the king to Newfoundland, which he named Avalon, in honor of the legend that Christianity had first come to England at Avalon (16); when the area proved unpropitious for a colony, he sought a patent for land between the James and Passamagnus (Chowan) Rivers—and after Calvert's death in 1632, the patent was granted to his son Cecilius (30–31). The land was named Maryland in honor of Henrietta Maria (34) and, given its intended purpose as a colony for Catholics, in honor of the Virgin Mary. The instructions of Lord Baltimore of November 13, 1633, to those sailing on the *Ark* and the *Dove* to establish the colony insisted that the governor preserve "unity and peace amongst all the passengers on Shipp-board" (46). So from the outset religious peace was sought between Catholics and Protestants.

"such an infinite liberty": Roger Williams to the town of Providence, January 1654–1655, *The Complete Writings of Roger Williams*, ed. Perry Miller (New York: Russell and Russell, 1963), 6:278–279.

(One Almighty God": *Pennsylvania Charter of Privileges in The Federal and State Constitutions*, ed. Francis Newton Thorpe (Washington, D.C.: Government Printing Office, 1909), 5:3077.

"that the blood of so many hundred thousand souls": Roger Williams, preface to *Notes to Pages 52–55*

to *The Bloody Tenent, of Persecution; For Cause of Conscience, Discussed; In A Conference Between Truth and Peace*, in Williams, *Writings*, 3:3–4; “no one can transfer”: Baruch Spinoza, *Tractatus theologicoo-politicus*, in *The Political Works*, ed. A. G. Werham (Oxford: Clarendon Press, 1958), ch. 20 “I esteem that toleration”: John Locke, *A Letter Concerning Toleration*, trans. William Popple, ed. Raymond Klibansky (Oxford: Clarendon Press, 1968) 59. As Locke himself wrote in Latin, Popple had to decide whether *verae ecclesiae* meant “the true church” or “a true church.” Given Locke’s ecclesiology, Popple made the correct choice.

“not armed with the sword”: ibid., 65; “neither can nor ought”: 67; “No way” 99; “can have no hold”: 135; “those who refuse to teach”: 133–135. Impact . . . on Isaac Backus: *Isaac Backus on Church, State, and Calvinism: Pamphlets*, 1754–1789, ed. William G. McLoughlin (Cambridge, Mass.: Harvard University Press, Belknap Press, 1968), 17.

“give some ease”: Act of Toleration (1688), 1; William and Mary 74, chap. 18 confirmed by Act of Toleration (1711), 10 Anne 555, chap. 6.

“natural rights . . . God and nature have established”: William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765), i:54. For medieval anticipation of natural rights theory, see Brian Tierney, “Natural Rights in the Thirteenth Century: A *Quaestio* of Henry of Ghent,” *Speculum* 67 (1992): 58; and Brian Tierney, *The Idea of Natural Rights* (Atlanta: Scholars Press, 1997), 86–89.

“the principal aim of society”: Blackstone, *Commentaries*, I:124; “deformed by the daemon”: 4:46; “the religious liberties of the nation”: 4:432; “our minds from the tyranny”: 4:49; “the persecution and oppression”: 4:51; “the destruction of every principle”: 4:57; “flourish in the highest vigor”: I:124. Canons nor its book of common prayer: 4:40; publicly pledge: 4:54. Catholics are subject: ibid., 56–57. Although “seldom enforced” the penal statutes against Catholics occupied “no less than seventy pages” in Burn’s *Ecclesiastical Law* (see Mitford, speech in debate in the Commons on the Catholic Dissenters’ Relief Bill, 1791, *The Parliamentary History of England from the Earliest Period to the Year 1803*, ed. T. C. Hansard [London: T. C. Hansard, 1806–1820], 28:1262); and they had sufficient teeth so “that several lived under great terror, and some under actual contribution,” in consequence of the statutes. George Saville, speech, May 14, 1778, debate on Sir George Saville’s bill for the relief of the Roman Catholics, 19:139–140. For the covert character of Catholic worship in late eighteenth-century London see the memories recorded half a century later, Wilfred Ward, *The Life and Times of Cardinal Wiseman* (London: Longmans, Green, 1899), I:200. Even the 1791 bill repealing some disabilities of Catholics extended relief only to those willing to swear, “I acknowledge no Infallibility in the Pope” (3 *Geo. III*, c.22 [1791]).

no one can hold office: Blackstone, *Commentaries*, 4:59; can be naturalized: 4:59 “falsely pretend an extraordinary commission”: 4:63; “for Christianity”: 4:52 “When I mention Religion”: Henry Fielding, *The History of Tom Jones*, ed. F. J. Jackson (Oxford: Clarendon Press, 1907), 1:113.

son Bowers (New York: Book League of America, 1974), 1:127. For the unrest in the colonies produced by the Anglican establishment, see Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: The Belknap Press of Harvard University Press, 1967), 246–71.

### CHAPTER 3

“The Truth shall make you free”: John 8:32.

JM’s Notes: *The Papers of James Madison*, ed. Robert A. Rutland and William M. E. Rachal (Chicago: University of Chicago Press, 1973), 8:197–199 (hereafter JM, *Papers*, with editors varying by volume). He was baptized; editorial note JM, *Papers*, ed. William T. Hutchinson and William M. E. Rachal (Chicago, 1962), I:105, I:3. JM’s father: Irving Brant, *James Madison* (Indianapolis: Bobbs-Merrill, 1941), I:51; Robertson’s library and Thomas à Kempis: 54; priest as tutor: 65. “Be always gratefully remembered”: JM to Thomas Martin, August 10, 1769, JM, *Papers* I:42. “A man of both learning and piety” and Latin he learned: William C. Rives, *History of the Life and Times of James Madison* (Boston: Little, Brown, 1859–1868), I:16. “might be instrumental”: John Witherspoon, *Works* (London: E. and C. Dilly, 1800–1801), 4:10, quoted as a key to Witherspoon in Varnum Lansing Collins, *President Witherspoon: A Biography* (Princeton: Princeton University Press, 1925), 2:197.

“very early and strong impressions”: JM, *Papers* I:107; see also Douglas Adair, “James Madison,” in *Fame and the Founding Fathers*, ed. Trevor Colbourn (New York: W. W. Norton, 1974), 1:28. See also Dennis F. Thompson, “The Education of a Founding Father: The Reading List for John Witherspoon’s Course in Political Theory, as Taken by James Madison,” *Political Theory* 4 (1976): 523–524. “the magistrate ought to defend”: John Witherspoon, “Lectures on Moral Philosophy,” in *Works* 3:350; “we ought to guard”: J. Edward Colhoun, Notes on “Lectures on Moral Philosophy by John Witherspoon” (1774), Archives of Princeton University. Witherspoon taught that some natural rights were “inalienable” (e.g., the right to one’s own knowledge, 84–85), and some rights ought not to be alienated (e.g., the right of a man “to judge for himself in matters of religion,” 175). He cautiously said, “many are of the opinion” that the magistrate should make provision for the worship of God agreeably to majority sentiment (179), and more decisively taught that the magistrate “ought to encourage piety by his own example” (176). “to whom it gave more satisfaction”: Rives, *History*, 2:518. “pages of commentary on the Gospels: JM, *Papers* I:51–58. He had become sick: Brant, *Madison*, I:72–103. “the only valuable friend”: JM to Bradford, November 9, 1773, JM, *Papers* I:101; “callings in Life”: Bradford to JM, August 12, 1773, 91. “I cannot however suppress”: JM to Bradford, September 25, 1773, *ibid.*, 96. “every vacant hour”: Bradford to JM, November 5, 1773, *ibid.*, 98.

"when among the members present": James Madison to Joseph C. Cabell, September 18, 1828, *Writings*, ed. Gaillard Hunt (New York: G. P. Putnam's Sons, 1910), 9:332.

Congress regulated the Northwest Territory: Gerard V. Bradley, *Church-State Relationships in America* (New York: Greenwood Press, 1987), 101.

Grant to Ohio Company: Act of April 21, 1792, *United States Statutes*, 1:257. Reverend Mr. Cutler, in a sermon: William Parker Cutler and Julia Perkins Cutler, *Life, Journals, and Correspondence of Rev. Mansfield Cutler, LL.D.* (Cincinnati: R. Clarke, 1888), 1:342-346.

"Religion ought never to be made a political machine": Manasseh Cutler, sermon preached at Campus Martius, Marietta, Ohio, August 24, 1788, in *Life, 2:447*; "No one kind of religion": 444; "being burdensome to individuals": 448.

endowing the Moravian Brethren: Bradley, *Church-State*, 158.  
"translating the sacred Scriptures": Worcester v. Georgia, 31 U.S. 515, 529 (1832); "the chief magistrate": 562.

all the leading colleges of the United States: Lawrence Cremin, *American Education: The Colonial Experience, 1607-1783* (New York: Harper and Row, 1970); on Harvard: 2:10-2:12, 222; on William and Mary: 3:21, 335; on Yale: 3:21, 558-559; on College of New Jersey: 299, 558-559; on Dartmouth: 3:28; on Queen's College: 3:28-3:29; on King's College: 3:45.  
"no preferences or distinctions": James Madison, notes, *Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven: Yale University Press, 1911), 2:616.

land grants to Columbian (later George Washington University): Act of July 14, 1832, *United States Statutes*, 4:603 (1832); grant to Georgetown: Act of March 2, 1833, *United States Statutes*, 6:538 (1833).

"As long as a religion": Tocqueville, *De la démocratie*, 2:344 (*Democracy*, 1:310); "upon the desire of immortality": 3:43 (*Democracy*, 3:10).  
"The principal aim": Tocqueville, *De la démocratie*, 2:330 (*Democracy*, 1:299).

Félicité de Lamennais: see chapters 1 and 10; Jean-Baptiste-Henri Lacordaire: see mention in chapter 10.

men have diverged from women: see Ralph Gibson, *A Social History of French Catholicism, 1789-1914* (London: Routledge, 1989), 180-186.  
fire on the earth: Luke 12:49.

Our family had suffered: see Jardin, *Tocqueville*, 7-9.  
"You seem to me to have well understood": Alexis de Tocqueville to Eugène Stoffels, July 24, 1836, *Alexis de Tocqueville, Oeuvres et correspondance éditées* (Paris: M. Lévy Frères, 1861), 1:432 (emphasis in original).

The enactment in Virginia: Thomas Jefferson, *Writings: Autobiography*, ed. Albert E. Bergh (Washington, D.C.: Thomas Jefferson Memorial Association of the United States, 1907), 1:58.

In Massachusetts the disestablishment: McLoughlin, *New England Dissent*, 2:1189-1274, on the Establishment and Trinitarian Congregationalists, Universalists, and Baptists.

"What causes the religious tolerance": Tocqueville, *Voyage*, 43-44.  
"strong security": James Madison, speech at the Virginia convention on the Constitution, June 12, 1788. Madison, *Papers* 8:130.

"In the depths of their souls": Tocqueville, *Voyage*, 86, quoting James Brown. "Religion—which with the Americans never mixes": Tocqueville, *De la démocratie, 2:338* (*Democracy*), 1:305-306).

the same syllogism: Washington's Farewell Address, September 17, 1796, in *Messages and Papers of the Presidents, 1789-1897*, ed. James D. Richardson (Washington, D.C.: Government Printing Office, 1896), 1:220.

## CHAPTER 5

An extract from the correspondence: George Frothingham's letter, like Angélique de Tocqueville's commentary, is a cento. Contrast his views with the praise of Parker expressed by Octavius Brooks Frothingham in *Theodore Parker, a Biography* (Boston, 1874). . .

"our Savonarola": Ralph Waldo Emerson, "Historic Notes of Life and Letters in New England," in *The Complete Works of Ralph Waldo Emerson* (Boston: Houghton Mifflin, 1904), 10:341.  
"Men and brothers": Theodore Parker, "The Mexican War," in *Collected Writings: The Slave Power* (1907-1911), 7:266.  
"to talk the matter over," "Hangman Foote": Parker, "Discourse on Webster," in *Collected Writings*, 1:229.

he wrote the President an impudent letter: Parker's letter to President Fillmore, November 2:1, 1850, in John Weiss, *The Life and Correspondence of Theodore Parker* (1864), 2:100-101.

two runaways . . . marriage ceremony: William and Ellen Crafts, and their marriage in Henry Steele Commager, *Theodore Parker* (1947), 2:14-217.  
"The noblest deed": ibid., 2:19; Parker and piracy: 2:21; "in an immortal pillory": 2:22; "The senator with a conscience": 2:56. On Brooks's caning of Sumner in the United States Senate: Moorfield Story, *Charles Sumner* (1900), 145-149.  
"I have heard hurrahs": Parker, quoted in James Ford Rhodes, *History of the United States 1850-1877* (1910), 1:302.

"Why didn't he hit him?" . . . suspended: Commager; Parker, 2:36-2:37; ordered the return, see *Ela v. Smith*, 7:1 Mass. 121 (1855); law student, Albert Brown, Jr.: *The Boston Slave Riot and Trial of Anthony Burns* (Boston: Ferridge, 1854), 1:2.

indicted . . . let Parker off: Parker, *The Trial of Theodore Parker for the 'Misdeavor' of a Speech in Faneuil Hall against Kidnapping* (1855); and Commager, Parker, 2:44-247.  
a weak brother: the letterwriter's uncomplimentary reference to Justice Benjamin Curtis alludes to his dissent in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 564-633 (1857).

seminarian from Lane: his name was Amos Dresser. See "The Narrative of Amos

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8:332-333. Scriptural quotations: "the judgments of the Lord": Psalms 19:9; "woe unto the man through whom the offense cometh": Matthew 18:7. Over and over again: Carl Sandburg, *Abraham Lincoln* (1939), 4:361. friend and close companion: Julia Ward Howe, in Commager, *Parker*, 105. "Mine eyes have seen": Julia Ward Howe, "Battle Hymn of the Republic," *The Atlantic Monthly*, February 1862.

The chapter must end with the hymn; but it is not amiss to consider two tributes to Parker in Florence. The first is a distillation of his accomplishments, not an actual transcript; the second is an actual transcript.

THE MEMORIAL AT THE GRAVESIDE

*The Protestant Cemetery, at the Porta Pinto, Florence, Italy—May 8, 1870*

Three hundred and fifty years ago our ancestors crossed the sea for conscience's sake and found a land of liberty. From that stalwart stock came Theodore Parker. At his birth the land was in bondage. Conscience, coerced and compromised, cowered before lawless law. Wrong was in power. Right numbered or writhed in silence.

Theodore Parker raised the voice of Right. Conscience, he proclaimed, knew no compromise. Conscience, he demonstrated, could not be coerced. Liberty, the birthright of the land, must be the law. Right must be restored.

Theodore Parker spoke as a minister of the Gospel, from the pulpit provided by the Church. He projected that pulpit into the public business of the State, for he was angered by that practical atheism which shapes the State while God is confined to the cloisters of the Church. He spoke the age-old message: the commands of the constable must yield to the commandments of conscience. The statutes of man must be judged by the ordinance of God.

Words are our appropriate tribute today to Theodore Parker's memory. For Theodore Parker, words were not enough. Deeds must accompany them or follow them. He agreed to secure the freedom of escaped bondsmen and bondswomen. He was ready to undergo the loss of his own liberty to preserve the liberty of another. He fought for the freedom of three million Americans. He exhausted his vital energies, he gave his life for this comprehensive cause.

We have now gone through a great war. That war has brought about the end that Parker sought. He did not work, he did not die in vain. It is for us, his heirs in the Spirit, to ensure that that emancipation accomplished at such enormous expense of treasure and of blood shall be as full, as final, as fertile as Theodore Parker envisaged that it would be. To that tremendous task we dedicate ourselves anew.

Today Parker's burial place, the English Cemetery, is isolated by busy city streets. The grave is marked by a monument designed by William Wentworth Story, Joseph Story's son. Inscribed upon it are these words:

His Name Is Engraved In Marble  
His Virtues In The Hearts Of Those He  
Helped To Free From Slavery  
And Superstition

An inscription at the entrance to the cemetery reads:

English Cemetery  
(Swiss Property)  
Burial Place  
Of The English Poets  
E. Barrett Browning  
Arthur Clough  
Walter Savage Landor

Off Frances Trollope  
Mother of Anthony  
And The Great  
American Preacher  
Theodore Parker

CHAPTER 6

"In the mountains": T. S. Eliot, "The Wasteland," in *The Complete Poems of T. S. Eliot* (New York: Harcourt Brace, 1952), 61.

Guy and Edna Ballard: Bruce Campbell, *Ancient Wisdom Revived: A History of the Theosophical Movement* (Berkeley: University of California Press, 1980), 163.

Not before, not since: In *United States v. Moon*, 718 F.2d 1210 (2d Cir. 1983), cert. denied 466 U.S. 971 (1984), the Reverend Sun Myung Moon was convicted of tax evasion—not for propagation of his religious beliefs. Part of his defense was that he held more than \$1.7 million in trust for the Unification Church. To pass on this claim the court had to take account of the organization of the Unification Church, but the Church's teachings were not being examined for fraud. In another celebrated case Jim Bakker, a Protestant televangelist, was convicted of mail fraud, wire fraud, and conspiracy, and sentenced to a fine of \$500,000, and imprisonment for forty-five years. His crimes consisted in selling partnerships in a vacation park, Heritage Village, that was attached to a Christian retreat center for families. Bakker raised \$1.58 million by selling 152,000 partnerships carrying the benefit of annual lodging in Heritage Village. He used relatively little of the money to build facilities for lodging and used much of it to support his own lifestyle and pay the operating expenses of his corporation PTI (an acronym for Praise The Lord, or People That Love). The partnerships sold far exceeded the accommodations constructed. *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991). No fraud was alleged as to Bakker's religious teaching, and his conviction was sustained on appeal. His sentence, however, was reversed and the case remanded for resentencing because the district judge in sentencing him declared: "He had no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from money-grabbing preachers or priests." The appellate court held that Bakker was denied due process of law by the trial judge at 740. No doubt the severity of the sentence influenced the result.

John Rogge: *New York Times*, March 23, 1981, sec. B, 14; "a lot of complaints": Roosevelt to Robert Jackson, December 3, 1941, Jackson Papers, Library of Congress, Manuscript Division.

crime to use the mails to defraud: 25 Stat. 873 (1889).  
"the darling of the prosecutor's nursery": *Harrison v. United States*, 7 F.2d 59, 263 (2d Cir. 1925).

"as real and true": Godfrey Ray King [Guy Ballard], *Unveiled Mysteries* (Schauenberg, Ill.: Saint Germain Press, 1934), xvii (emphasis in original).

the Denman file in the National Archives. I am indebted to David Frederick for copies of them.

“*Hymn to the Mother of the Gods*”: “Rites and Ceremonies of the Indians of the Southwest, issued as Christmas greetings from Will and Leslie Denman, 1947” [Denman file, Bancroft Library, University of California, Berkeley]. “The modeller of gods” is quoted from Eli Faure, *History of Art: The Spirit of the Forms* (Garden City, N.Y.: Doubleday, 1937); “faith in a new power”: Leslie Van Ness Denman, introduction to her *The Peyote Ritual* (San Francisco: Grabhorn Press, 1957), 5; “the messenger gods”: 7; “the peyote man”: 13.

“Well could a sensitive woman”: *Bailard v. United States*, 152 F.2d at 952 (disent). “a body truly representative”: *Glasser v. United States*, 315 U.S. 60, 86 (1944). “the one large and vital religious group”: *Ballard v. United States*, 152 F.2d at 951 (dissent); “You here! I did not believe”: id. at 955; “Perhaps an agnostic psychiatrist”: id. at 955.

“social history of the imagination”: Clifford Geertz, *Islam Observed: Religious Development in Morocco and Indonesia* (Yale University Press, 1968), 19; “a confusion, endemic in the west”: Clifford Geertz, *Works and Lives* (Palo Alto: Stanford University Press, 1988), 140. For analogous tension between the literal sense and modern theological interpretation, see Raymond Brown, *The Birth of the Messiah* (Garden City, N.Y.: Doubleday, 1979), 190: Infancy Gospels give “oversimilitude, not . . . history.” According to Brown, religious imagination conceived the familiar Christmas stories to convey the great theological message—God has come among us. For discussion, see my “How Sincere Do You Have to Be Religious?,” *University of Illinois Law Review* (1988): 713, 720-722.

“not fungible”: *Ballard v. United States*, 329 U.S. 187, 194 (1946); “the democratic ideal”: id. at 195.

Vinson’s religion: *Biographical Dictionary of the Federal Judiciary* (1976), 285; Burton’s religion: *Who Was Who in America*, 1961-1968.

federal courts in California: *Ballard v. United States*, 329 U.S. at 206, n.2 (dissent). The point had been abandoned: id. at 198 (Frankfurter called his opinion neither a dissent nor a concurrence); the religious issue unresolved: id. at 200-203.

T. Lamar Caudle’s conviction: *New York Times*, June 14, 1956, 1. fraud order revoked: United States Post Office, *Fraud Records*, case 7168. the unjust judge of the Gospel: Luke 18:2-5.

## CHAPTER 7

hill of which Winthrop once spoke: John Winthrop, “A Model of Christian Char- ity,” in *Winthrop Papers* (Boston: Massachusetts Historical Society, 1934), 2:294-295. Hill to which John Kennedy alluded: John F. Kennedy, An Ad- dress to the Massachusetts Legislature (1961), reprinted in *Cong. Rec.*, 87th Cong., 1st sess., 1961, 107:169, appendix.

It’s like reading the Bible cf. Hugo Black: “That Constitution is my legal bible; its plan of government is my plan and its destiny my destiny. I cherish every word of it from the first to the last, and I personally deplore even the slightest deviations from its least important commands.” Hugo Black, *A Constitutional Faith* (New York: Knopf, 1968), 65.

“lay the article of the Constitution”: Owen J. Roberts, writing for the court in *United States v. Butler*, 297 U.S. 1, 62 (1936).

‘Congress’ meant ‘state’: see *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). over two hundred cases: see John T. Noonan, Jr., *The Believer and the Powers That Are* (New York: Macmillan, 1987), 489-492.

a bit confused about Jefferson’s part: “This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.” *Everson v. Board of Education*, 330 U.S. 1, 13 (1947) (per Black, J.). The error was pointed out by Justice Rehnquist: “Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States.” *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (dissenting).

“The ‘establishment of religion’ clause”: *Everson*, at 15. ‘respecting an establishment’ meant: see, e.g., *School District of Abington Township v. Schenck*, 374 U.S. 203, 309 (Stewart, J., dissenting): the provision was “primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments.” See also Mary Ann Glendon and Raul F. Yanes, “Structural Free Exercise,” *Michigan Law Review* 90 (1991): 477, 481, 497. When it said ‘No law’: *New York Times v. United States*, 403 U.S. 713, 717-718 (1971) (Black, J., concurring).

He wrote those words: Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Roberts, and Stephen S. Nelson, a committee of the Danbury Baptist Association: January 1, 1802, *The Thomas Jefferson Papers*, ed. H. A. Washington (1856), 8.

cutting the schools off from police protection: *Everson*, 330 U.S. at 17. school field trips: *Wolman v. Walter*, 433 U.S. 229, 254 (1977). state could buy textbooks: *Cochran v. Louisiana State Board of Educ.*, 281 U.S. 370 (1930), followed in *Board of Educ. v. Allen*, 392 U.S. 236 (1968). maps and globes and tape recorders: *Wolman*, 433 U.S. at 249-250. remedial help, therapy, and counseling: id. at 246-248; diagnostic services con- stitutional on premises: id. at 241-244; ‘the pressures of the environment’: id. at 247.

strictly supplemental help: *Agostini v. Felton*, 117 S.Ct. 1997, 2019 (1997), va- cating the judgment of the district court after remand in *Aguilar v. Felton*, 473 U.S. 402 (1985). some sorts of gerrymandering intolerable: e.g., *Shaw v. Reno*, 509 U.S. 630 (1993); *Bush v. Vera*, 116 S.Ct. 1941 (1996).

William Denman: Denman was a graduate of Berkeley and Harvard Law School;

Stephens was the product of the University of Southern California and Stanford; Mathews had gone to Peabody College in Tennessee and then studied law on his own. Adult experience is always germane: all three had practiced law—Denman had taught at Hastings College of the Law and had then been a reformer in the corrupt San Francisco of the early 1900s and a major ally of Hiram Johnson in the Progressives' effort to cleanse California politics; Stephens had been a superior court judge in Los Angeles; Mathews had been attorney general of Arizona. Stephens professed no denominational identity; Mathews listed himself as an Episcopalian. Biographies of Denman, Stephens, and Mathews: *Biographical Dictionary of the Federal Judiciary* (Detroit: Gale Research, 1976), 70, 179, and 261; "In Memoriam Honorable William Denman 1872-1959," 262 F.2d 7-12 (1959); Denman's bequest "Denman's Estate to Educate Indians," *San Francisco Chronicle*, March 17, 1959, 3.

"We may try to see things": Benjamin Cardozo, *The Nature of the Judicial Process* (1921), 13; he quotes William James, *Pragmatism* (Cambridge, Mass.: Harvard University Press, 1975), 9.

"that some, at least": *Ballard v. United States*, 138 F. 540, 545 (9th Cir. 1943);

"The district court did not give": id. at 546 (dissent).

the trial had consumed two months: O'Connor to Fahy, July 7, 1943, now in William O. Douglas Papers, Library of Congress, Manuscript Division; other precedents: *New v. United States*, 245 F.710, 712 (9th Cir. 1917), cert. denied, 246 U.S. 665 (1918). Judge O'Connor also relied on *Crane v. United States*, 259 F. 480 (9th Cir. 1919), and *Post v. United States*, 135 F.1022, 1(5th Cir. 1905).

"probably the greatest blow": O'Connor to Berge, October 19, 1943, now in William O. Douglas Papers, Library of Congress, Manuscript Division; "Dear Bill": O'Connor to Douglas, October 29, 1943 (in ibid.).

"justices' understanding of religion: John T. Noonan, Jr., *The Believer and the Powers That Are* (New York: Macmillan, 1987), 238-239; and *Biographical Dictionary of the Federal Judiciary* (1976). Jackson was an active enough Episcopalian to present the candidacy of the bishop of Buffalo at the diocesan convention in 1932 and to be the principal speaker in 1950 at the dedication of the two clerestory windows at the National Cathedral in Washington; he had a lifelong habit of reading the Bible. Eugene C. Gerhart, *Supreme Court Justice Jackson: Lawyer's Judge* (Albany, N.Y.: Q Corporation, 1961), 155.

"if there is any fixed star": *West Virginia State Bd. of Ednc. v. Barnette*, 319 U.S. 624 at 642 (1943).

requiring their recusal: 28 U.S. Code § 24 (1940 ed.); today, a negative answer; see, e.g., *United States v. Armistead*, 37 F.3d 466 (9th Cir. 1994). Indictment dismissed at Jackson's request: see letters of congratulation to Jackson, February 1940, from Archibald MacLeish, Norman Thomas, Max Lerner, and others. Robert Jackson Papers, Library of Congress, Manuscript Division, "a war" with Black: Jackson, quoted in Alpheus T. Mason, *Harlan Fiske Stone*,

*Pillar of the Law* (New York: Viking Press, 1956), 645. Made an issue: *Jewell Ridge Coal Corp. v. Local No. 6167, U.M.W.*, 325 U.S. 897 (1945).

"belief in their representations": *United States v. Ballard*, 322 U.S. 78, 84 (1944); no waiver: id. at 85; "The law knows no heresy": id. at 86, quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871); "justified on other distinct grounds," 88; Douglas's first draft: text of March 21, 1944. In Douglas Papers, Library of Congress, Manuscript Division.

Jackson . . . voted to grant certiorari: memorandum from P.N., Jackson Papers;

Jackson's intention to join Douglas: *ibid.*; Jackson's participation in services for a Theosophist: *Jamesstown Sun Magazine*, April 8, 1951: *ibid.*; Jackson's dissent: *United States v. Ballard*, 322 U.S. at 92-94; "Some who profess": *ibid.* at 94. Jackson quotes William James, *The Works of William James: The Varieties of Religious Experience* (1920), 15:428.

"The religious views espoused": *United States v. Ballard*, 322 U.S. at 87; "I should say that the defendants": id. at 92 (dissent).

"usually the slaves": John Maynard Keynes, *The General Theory of Employment, Interest and Money* (New York: Harcourt, Brace, 1936), 383.

"The mother sea and fountain-head": William James, quoted in Lewis, *The Jameses*, 502; "the feelings, acts and experiences": James, *Varieties of Religious Experience*, 34; "as an external art": 32; "serious": 39. The anti-communarian bias has been critically noted: by Mary Ann Glendon and Raul F. Yanes, "Structural Free Exercise," *Michigan Law Review* 90 (1991): 485, 501, 546; and by Michael J. Sandel, "Freedom of Conscience or Freedom of Choice?" in *Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy*, ed. James D. Hunter and Os Guinness (Washington, D.C.: Brookings Institution, 1990), 74, 87.

"the high seriousness which comes from absolute sincerity": Matthew Arnold, "The Study of Poetry" in *The Complete Prose Works of Matthew Arnold: English Literature and Irish Politics*, ed. R. H. Super (Ann Arbor: University of Michigan Press, 1974), 9:184; see also G. H. Lewes, "The Principle of Simplicity" in *The Principles of Success in Literature* (San Francisco: Bosqui Engraving and Printing, 1885).

"a listless, vigorous summation": *Ballard v. United States*, 152 F.2d 941, 943 (9th Cir. 1945); "no single unfair act" id. at 945 (dissent).

Leslie Van Ness Denman: San Francisco Chronicle, February 10, 1959; life became unbearable: Associated Press dispatch, March 1959, in personnel files, William Denman, Federal Record Center, St. Louis, National Archives.

himself addressed "Dear Franklin": Denman to the president, May 23, 1933; Denman to Thomas Walsh, February 3, 1933; Denman to the attorney general, June 16, 1933; applying for the appointment and listing supporters: Denman to the president, July 28, 1933; Archbishop Edward Hanna to the president, December 15, 1934. "At this moment when I feel stripped": Leslie Van Ness Denman to President Roosevelt, September 5, 1933. These letters are in

of sects.” *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 216–217 (1948) (dissenting). “When the state encourages religious instruction: *Walz*, 397 U.S. at 672 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313–314 [1952]). sales tax . . . food served by religious organizations . . . wine: *Texas Monthly*, 489 U.S. at 29–33 (Scalia, J., dissenting); ‘a new strain of irrationality’: id. at 45 (dissent).

“the hobgoblin of little minds”: Ralph Waldo Emerson, “Self-Reliance,” *Essays* (Boston: Houghton Mifflin, 1865), 52, referring to “a foolish consistency.” Saint Paul told slaves: *Ephesians* 6:5. take the Walnut Street Presbyterian Church: *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

That rule would have stopped: see Thomas A. Brady, Jr., *The Politics of the Reformation in Germany* (New York: Humanities Press International, 1997), 1:29.

Russian Orthodox Church: Dimitry Pospielovsky, *The Russian Church Under the Soviet Regime*, 1917–1982 (Crestwood, New York: St. Vladimir’s Seminary Press, 1984), 1:19–25; the pre-Soviet regime: 31–36; the election of the patriarch in 1917, the Renovationists: 56–58. John Kedrovsky: “The Takeover of St. Nicholas Cathedral,” *New York Times*, November 8, 1923, 21; dismissal of Platon and the response of the Detroit sobor: see *Saint Nicholas Cathedral v. Kreshik*, 164 N.E.2d 687 (N.Y. 1959), rev’d, *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960). courts of New York . . . gave Kedrovsky: *Kedrovsky v. Rojdesvensky*, 212 N.Y.S. 273 (N.Y. App. Div. 1925), aff’d, 152 N.E. 421 (N.Y. 1926). Transfer of Orthodox churches to trustees headed by Platon: Pospielovsky, *The Russian Church*, 2:283.

New York . . . Religious Corporation Law: § 107 (McKinney 1990) Venyamin Fedchenkov’s appointment. Pospielovsky, *The Russian Church*, 1:71–72; 2:289, 485; Aleksii: 2:209–211. the church rule controlled: *Kedroff v. Saint Nicholas Cathedral of Russian Orthodoxy Church in North America*, 344 U.S. 94, 120–121 (1952). ‘Freedom to select the clergy’: *Kedroff*, 344 U.S. at 116. On the significance of this development as it appeared at the time, see Mark DeWolfe Howe, “Forward: Political Theory and the Nature of Liberty, The Supreme Court, 1952 Term,” *Harvard Law Review* 67 (1953): 91–95; ‘a foreign and unfriendly state’: *Kedroff*, 344 U.S. at 131 (dissent).

‘a perversion of the implied trust’: *Kreshik*, 164 N.E.2d at 694; gave St. Nicholas’ *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960).

‘there are neutral principles’: *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

‘forfeited all ecclesiastical privileges of the PCUS’: *Lucas v. Hope*, 515 F.2d 234 (1975), cert. denied, 424 U.S. 967 (1976). 235 (5th Cir. 1975), cert. denied, 424 U.S. 967 (1976). not find an ‘implied trust’: *Jones v. Wolf*, 243 S.E.2d 859, 863–64 (Ga. 1978) vacated, *Jones v. Wolf*, 443 U.S. 595 (1979), decided *Jones v. Wolf*, 260 S.E.2d

84 (Ga. 1979), cert. denied, 444 U.S. 1080 (1980); neutral principles: *Wolf*, 443 U.S. at 602–603; ‘so long as the use of that method does not impair free-exercise rights’: id. at 608; ‘In undertaking such an examination’: id. at 604; S.E.2d at 85.

is ‘startling’: John H. Mansfield, “The Religion Clauses of the First Amendment and the Philosophy of the Constitution,” *California Law Review* 72 (1984): 846, 866.

‘were no more restrictive’: *Protestant Episcopal Church v. Baker*, 171 Cal. Rptr. 541, 554 (Cal. Ct. App. 1981), cert. denied, 454 U.S. 864 (1981); ‘If a Kentucky Fried Chicken franchisee’: id. at 553; ‘a constructive dissolution’: id. at 556.

principle of double effect: Thomas Aquinas, *Summa theologiae*, 2–2, 64, 7. preach on Sunday in a public park: *Fowler v. Rhode Island*, 345 U.S. 67 (1953); observance of Sunday constitutional: *McGowan v. Maryland*, 366 U.S. 420 (1961).

‘of solemnizing public occasions’: *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (concurrence).

‘for purposes of religious worship’: *Widmar v. Vincent*, 454 U.S. 263 (1981); ‘Sunday Mass’: id. at 285–86 (dissent).

use of public-school property . . . evangelical group: *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). *Wide Awake: Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). development of doctrine is a slow, laborious: John Henry Newman, *An Essay on the Development of Christian Doctrine* (London: W. Blanchard and Sons, 1846), 68–69; ‘The development then of an idea’: 37.

reading of these provisions . . . theological base: see Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (New York: Oxford University Press, 1995), 74 and 97. ‘an experiment’: see the discussion of JM’s original insight, in chapter 3.

## CHAPTER 8

*My fellow Americans*: the entire text is as follows:

*THE PRESIDENT’S D-DAY PRAYER ON THE INVASION OF NORMANDY. JUNE 6, 1944.*

*My fellow Americans:*

Last night, when I spoke with you about the fall of Rome, I knew at that moment that troops of the United States and our allies were crossing the Channel in another and greater operation. It has come to pass with success thus far. And so, in this poignant hour, I ask you to join with me in prayer:

Almighty God: Our sons, pride of our Nation, this day have set upon a mighty endeavor, a struggle to preserve our Republic, our religion, and our civilization, and to set free a suffering humanity.

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Lead them straight and true; give strength to their arms, stoutness to their hearts, steadfastness in their faith.

They will need Thy blessings. Their road will be long and hard. For the enemy is strong. He may hurl back our forces. Success may not come with rushing speed; but we shall return again and again; and we know that by Thy grace, and by the righteousness of our cause, our sons will be triumphant.

They will be sore tried, by night and by day, without rest—until the victory is won. The darkness will be rent by noise and flame. Men's souls will be shaken with the vicissitudes of war.

For these men are lately drawn from the ways of peace. They fight not for the lust of conquest. They fight to end conquest. They fight to liberate. They fight to let justice arise, and tolerance and good-will among all Thy people. They yearn but for the end of battle, for their return to the haven of home.

Some will never return. Embrace these, Father, and receive them, Thy heroic servants, into Thy kingdom.

And for us at home—fathers, mothers, children, wives, sisters, and brothers of brave men overseas,—whose thoughts and prayers are ever with them—help us, Almighty God, to rededicate ourselves in renewed faith in Thee in this hour of great sacrifice.

Many people have urged that I call the nation into a single day of special prayer. But because the road is long and the desire is great, I ask that our people devote themselves in a continuance of prayer. As we rise to each new day, and again when each day is spent, let words of prayer be on our lips, invoking Thy help to our efforts.

Give us strength, too—strength in our daily tasks, to redouble the contributions we make in the physical and the material support of our armed forces.

And let our hearts be stout, to wait out the long travail, to bear sorrows that may come, to impart our courage unto our sons wheresoever they may be.

And, O Lord, give us faith. Give us faith in Thee; faith in our sons; faith in each other; faith in our united crusade. Let not the keenness of our spirit ever be dulled. Let not the impacts of temporary events, of temporal matters of but fleeting moment—let not these deter us in our unconquerable purpose.

With Thy blessing, we shall prevail over the unholy forces of our enemy. Help us to conquer the apostles of greed and racial arrogancies. Lead us to the saving of our country, and with our sister nations into a world unity that will spell a sure peace—a peace invulnerable to the schemings of unworthy men. And a peace that will let all men live in freedom, reaping the just rewards of their honest toil.

They will be done, Almighty God.

Annen.

*The Public Papers and Addresses of Franklin D. Roosevelt*, ed. Samuel I. Roseman (New York: Harper, 1950), 13:152-153.

a comparable interest in treating scientifically: Emile Durkheim, *Pragmatism and Sociology*, trans. J. C. Whitehouse (New York: Cambridge University Press, 1983), 97.

“is a unified system of beliefs”: Emile Durkheim, *The Elementary Forms of the Religious Life*, trans. Joseph Ward Swain (New York: Free Press, 1963); 62; “an eminently collective thing”: 63; society creates the sacred: 242; society a religious phenomenon: 139.

“a sort of religion of which the majority will be the prophets”: Alexis de Tocqueville, *De la démocratie en Amérique* (1835, 1840), 2:11 (my translation); “immense pressure”: 330 (for parallel cite in its English-language version, see *Democracy in America*, trans. Henry Reeve, rev. Francis Bowen and Phillips Bradley [1989], 1:299). On the passages as anticipation of Durkheim, see Jean-Claude Lamberti, *Tocqueville and the Two Democracies*, trans. Arthur Goldhammer (Cambridge, Mass.: Harvard University Press, 1989), 162.

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“Taxes are the life-blood of government”: *Bull v. United States*, 295 U.S. 247, 259 (1935).

were “allowed to challenge”: *United States v. Lee*, 455 U.S. 252, 260 (1982). Glebe lands of the Protestant: *United States Statutes* 2, 194 (1802); District of Columbia exemptions: id. 16, 153 (1870); refunds: id. 6, 116 (1813), 6, 346 (1826), 6, 675 (1836).

exempted the income: id. 38, 172 (1913), now 26 U.S. Code § 501; income tax deduction: 26 U.S. Code § 170.

“to conduct an institution”: *Bob Jones University v. United States*, 461 U.S. 574, 579-580 (1983); “Charitable exemptions are justified”: id. at 591-592. Military chaplaincies: *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985); “an ecclesiastical endorsing agency”: id. at 225; “would suffer irremeasureable harm”: id. at 228; “so inherently impractical”: id. at 236; “to make religion available”: id. at 234.

“considered professional judgment”: *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986).

“There goes many a ship to sea”: Roger Williams to the town of Providence, January 1654-1655 in *The Complete Writings of Roger Williams*, ed. Perry Miller (New York: Russell and Russell, 1963), 6:278-279. “no person religiously scrupulous”: *Annals of Congress* (Washington, D.C.: Gales and Seaton, 1789), 1:778. “No man can claim this indulgence of right”: in *ibid.*, 780.

“duly ordained ministers”: *Selective Draft Law Cases*, 245 U.S. 366, 376 (1918). “And we pass”: id. at 389-390.

Members of newer sects such as the Jehovah’s Witnesses: Herbert Hewitt Stroup, *The Jehovah’s Witnesses* (New York: Columbia University Press, 1952), 165-166. “preparing for the ministry”: *United States Statutes*, 54, 885 (1940). “usually a political objection”: *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943) (per Augustus Hand, J.).

over five thousand Jehovah’s Witnesses: Mulford Q. Sibley and Philip E. Jacob, *Conscription of Conscience, The American State and the Conscientious Objector*, 1940-1947 (Ithaca: Cornell University Press, 1952), 84; for Robert Lowell, see Paul Mariani, *Last Puritan: A Life of Robert Lowell* (New York: W. W. Norton, 1994), 105-109. judicial deference to administrative: *Cox v. United States*, 332 U.S. 442 (1947). Justices Douglas and Black dissented.

“to give the selective service personnel”: *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 309 (1946).

“the most prominent”: see *United States ex rel. Levy v. Cain*, 149 F.2d 338, 340 (2d Cir. 1945); “Jewry is divided”: Irwin Levy quoted in id. at 340 n.2. Jacob S. Samuels and Henry Horowitz: *United States ex rel. Samuels v. Pearson*, 151 F.2d 801 (3d Cir. 1945), reversed, *Eagles v. United States ex rel. Samuels*, 329 U.S. 304 (1946) and *Eagles v. United States ex rel. Horowitz*, 329 U.S. 317 (1946). Douglas assumed what was far from clear: that Samuels and

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ourselves": Preamble, clause 9. "In conformity with the international treaties": Article 46.3.

The constitution was submitted to the electorate: Durham, 26. "own history": statement of the conference held March 21-23, 1993, James E. Wood, Jr., "The Battle Over Religious Freedom in Russia," *Journal of Church and State* 35 (1993): 495. The conferees from American law schools were Harold J. Berman (Emory); Albert P. Blaustein (Rutgers); Jesse H. Choper (Berkeley); Robert A. Destro (Catholic University); W. Cole Durham, Jr. (Brigham Young); and Edward M. Gaffney (Valparaiso).

"the difficult living conditions": Aleksii II to members of the Supreme Soviet, July 14, 1993; translated and quoted in Durham, "The Future," 9 n.10; examples of what was objected to: 8. As of September 1, 1993 a total of 9,489 religious associations were registered under the RSFSR Law. Of that number, the following religious denominations were most numerous: Russian Orthodox Church (5,019); Old Believers (121); Russian Orthodox Free Church (64); Muslim (2,639); Roman Catholic (90); Buddhist (59); Jewish (48); Lutheran (86); Evangelical Christian Baptist (49); Evangelical Christians (49); Pentecostal (165); Seventh-day Adventist (130); Charismatic (73); Hare Krishna (68); Christian nondenominational associations (137). In addition there were 21 Methodist associations, 41 Presbyterian, 47 Jehovah's Witnesses, 3 Mormons, and 1 Unification Church (Moon). The types of associations registered include religious centers, congregations, monasteries, convents, religious educational centers, nursing centers, and missions. Berman, "Religious Freedom," 432. "their almost total disregard": Solzhenitsyn, 801.

"On behalf of the Russian Orthodox Church": quoted in Durham, "The Future," 9 n.10. On "missionary activity": Law of the Russian Federation on Freedom of Conscience and Religious Belief, (1993 draft), Article 21 (quoted in ibid., 59); "contradict the standards": ibid.; "provided that the individual": Article 3 (48); "the traditional confessions": Article 8 (48). The religions intended to be excluded: Berman, "Religious Freedom," 436.

President Clinton, Senator Richard G. Lugar to President Boris M. Yeltsin, July 15, 1993 [copy in the author's files]; Yeltsin's pocket veto and letter and the bill's reenactment: Berman, "Religious Freedom," 434; skirmishes of 1995: 438-440.

"contradicts" the Russian constitution: Yeltsin to the president of the State Duma, G. N. Selenez, and president of the Federation Council, E. S. Stoer, July 23, 1997; *Radonezh* (August 12, 1997).

James Madison corrected by David Hume: see *supra*, ch. 3. the new law repealed: *Emory International Law Review* 12 (to be published in 1998): "Russian Federation Federal Law: 'On Freedom of Conscience and on Religious Associations'" (Lawrence A. Uzzell trans. 1997) (visited November 21, 1997), <<http://www.law.emory.edu/EILR/special/97law.html>> art. 27.6. Organizations were authorized: ibid., art. 16.1 (found religious buildings); 2.1 (own buildings); 4.3 (receive tax exemptions and receive government aid); 2.2 (use state property); 16.3 (conduct religious services in hospitals, etc.); 18.1

(charitable activities); 18.2 (organs of mass media); 19.1 (seminaries); 17.1 (religious literature); 2.3 (business undertakings); 5.3 and 4 (teach religion). "existed on the given territory": *ibid.*, arts. 9.1 and 11.5; required registration: 11.1; registering annually: 27.3, R. F. Law No. 125-F3, *Ross. Gazeta*, 10/1/97. "the activity": . . . involved violation of current law: *ibid.*, art. 12.1; liquidation on a variety of grounds: art. 14.1. required to file: *ibid.*, 11.4; "monitor" the observance: 25.2; the Procurator: 25.1. "a representative" in Russia: *ibid.*, art. 13.2; "Russia in its name": 8.5. "be interpreted in such a way": *ibid.*, art. 2.3; "on an equal footing": 3.2; "the establishment of privileges": 3.3.

the administration of the law: even before the passage of the statute, the collaboration of the Moscow patriarchate with the Ministry of the Interior in training officers of the ministry was critically noted: V. Polosin and G. Yakunin, "Federal Authorities and Freedom of Conscience," *Emory International Law Review* 12 (to be published in 1998). However, the supreme court of one of the constituent republics of the Russian Federation had held that the law of that republic restricting missionary activity violated the constitution of Russia. Decision, March 5, 1997 of the Supreme Court of Udmurt (Keston Institute trans. 1997) (visited November 21, 1997) <<http://www.law.emory.edu/EILR/special/97law.html>>.

the rebuilding of the cathedral of Christ: see *Current Digest of the Post-Soviet Press*, October 12, 1994; laying of the cornerstone: *Moscow Times*, January 10, 1995. "Let the reconstruction": address of Mayor Luzhkov, quoted in *ibid.*; estimates of cost \$100 million: *London Sunday Times*, September 11, 1994; \$300 million: *Moscow Times*, January 10, 1995; assailed by independent: Polosin and Yakunin, "Federal Authorities."

The decay of Communism was seen: see Harold J. Berman, "The Challenge of Christianity and Democracy in the Soviet Union," in *Christianity and Democracy in Global Context*, ed. John Witte, Jr. (Boulder, Colo.: Westview Press, 1993), 293-294.

"On January 7th": "We Must Believe in Russia and Then We Will Live!" "the power of prayer": Berman, "Religious Freedom," 446. A division of opinion among American consultants and commentators on religious liberty in Russia centered on whether the Russian Orthodox Church should have special recognition of its historical identification with the culture and spirituality of Russia. I observed this division at a conference on religious human rights, held at Emory University, Atlanta, October 6-9, 1994, attended by Russians involved in the legislative drafting and American legal experts.

### CHAPTER 13

A condition of American religious variety . . . space: see Sidney Mead, *The Lively Experiment: The Shaping of Christianity in America* (New York: Harper and Row, 1963), 11.

The debate over religious freedom: Donald E. Pelotte, *John Courtney Murray: Theologian in Conflict* (New York: Paulist Press, 1976), 13–16, 34–46; Ottaviani's address of March 2, 1953, "Church and State: Some Present Problems in the Light of Teachings of Pope Pius XII," was published in shortened form in the *American Ecclesiastical Review* (hereafter AER) 128 (May 1953): 321–334; Pius XII's address to the Italian jurists, *Ciriesci*, December 6, 1953, *Acta apostolicae sedis* (Rome: Vatican Polyglot Press, 1953), 45:794–802.

Robert Leiber's advice: Murray's notes, quoted by Pelotte, *Murray*, 47; Murray's challenge to Ottaviani: in *ibid.*, 46–47. "Careful, honest, and competent": Joseph C. Fenton, "Toleration and the Church-State Controversy," AER 130 (May 1954): 341. Murray's "offensive" lecture, Francis Spellman to Alfredo Ottaviani, April 5, 1954, quoted in Pelotte, *Murray*, 47; Murray's apology: Murray to Vincent McCormick, August 18, 1954, quoted at 49; nervousness at Jesuit headquarters: McCormick to Murray, November 15, 1953, quoted at 39; Jesuit censor's refusal of approval and "It seems to me a mistake": McCormick to Murray, July 9, 1955, quoted at 52; "delicate way of saying": Murray to McCormick, July 15, 1955, and "You are far from through, I hope": McCormick to Murray, July 21, 1955, and "It was kind of you": Murray to McCormick, August 3, 1955, all quoted at 53.

Twice again he tried: see J. Leon Hooper, *The Ethics of Discourse: The Social Philosophy of John Courtney Murray* (Washington, D.C.: Georgetown University Press, 1986), 126.

"controversies have arisen": Richard J. Cushing to Amleto Cicognani, secretary of state, August 3, 1959, *Acta et Documenta Concilii Oecumenici Vaticani II Apparato*, series 1, *Antepraeparatum*, vol. 2, *Consilia et Vota Episcoporum et Praelatorum* (Vatican City: Vatican Polyglot Press, 1960), pt. 6, 379; "less aptly expounded": Jean Janssens to Cicognani, August 25, 1959, pt. 8, 125.

The first drafting session for a new declaration: Jérôme Hamer, "Histoire du texte de la déclaration," in *La Liberté religieuse, déclaration "Dignitatis humanae personae"*, ed. J. Hamer and Y. Congar (Paris: Editions du Cerf, 1967), 53; content of the first draft: 55–56.

a brief recall of the recent European past: Pietro Pavan, *Libertà religiosa e pubblici poteri* (Milan: Ancora, 1965), 13–151.

"this fundamental fact": Pius XI, *Mit brennender Sorge*, March 14, 1937, *Acta apostolicae sedis* (1937), 29:159; "denigrates and denies": Pius XI, *Divini Redemptoris*, March 19, 1937, in *ibid.*, 72.

Jacques Maritain had developed these elements: Jacques Maritain, *The Person and the Common Good*, trans. John J. Fitzgerald (New York: Scribner's, 1947), 8–83; individuation by matter and transcendence by spirit: 25–28; the common good as serving the person: 66; the immaterial components of the common good: 53 and 73. "Transcends every created good": Jacques Maritain, *Man + the State*, ed. Richard O'Sullivan (London: Hollis and Carter, 1954), 136; as the preface to its English edition notes, this book was written in English by a Frenchman living in America. Maritain's *The Person and the Common Good*

*non Good*, as the acknowledgments explain, contains lectures given between 1939 and 1945, including one delivered at the Pontifical Academy of St. Thomas in Rome on November 22, 1945. At that time he was the ambassador of France to the Holy See and in contact with Giovanni Battista Montini. The "right freely to believe": Maritain, *Man + the State*, 137, "exceptional historic significance": 169; quotation of Murray: 144, 146, 149, 150.

Which text would go to the floor: Pavan, *Libertà religiosa*, reprinted in *Scritti del cardinale Pietro Pavan* (Rome: Città nuova, 1989), 1:270–272; Pelotte, "too controversial": Murray to Leo Ward, June 29, 1963, quoted in Pelotte, *Murray*, 8; no text presented: Hamer, "Histoire du texte," 61; the crucial decision of John XXIII: *ibid.*

"it would have been difficult": Pietro Pavan, "Il momento storico di Giovanni XXIII e della *Pacem in terris*: Sua influenza negli atti conciliari e nella vita della chiesa e sua influenza nella società contemporanea," in *Scritti*, 4:108; Pavan on the not too dissimilarly from Joseph: *Genesis* 4:1–8.

"the neuralgic point": Pietro Pavan, "Governmental Repression of Heteresy," *Proceedings of the Catholic Theological Society of America* 3 (1948): 26. "absolute": John F. Kennedy, televised address to the Houston Ministerial Association, *New York Times*, September 12, 1960, 22. The speech was read to Murray over the telephone by Theodore Sorensen as Sorensen stood by the side of a plane about to leave for Houston. In the question period one minister asked Kennedy if he would ask Cardinal Cushing to present Kennedy's "sincere statement" to the Vatican, "in order that the Vatican may officially authorize such a belief for all Roman Catholics in the United States." Kennedy replied that he would not intervene with the Vatican. At the same time he said that as president he would stand "around the globe" for "the right of free religious practice." See Pelotte, *Murray*, 76.

"the American proposition": John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed and Ward, 1960). "a primer of pluralism": Murray's notes, quoted in Pelotte, *Murray*, 75. "U.S. Catholics and the State": *Time*, December 12, 1960. Not well-known at the Council: Murray to Richard J. Regan, February 23, 1967, quoted in Pelotte, *Murray*, 109.

"a glorious victory": Murray to Amleto Cicognani to Murray, April 4, 1963, quoted in Pelotte, *Murray*, 8; "pried me in": Murray to Leo Ward, June 29, 1963, quoted at 82.

"our reverence": Murray to Michael F. Maher [rector of Woodstock], November 22, 1963, quoted in *ibid.*, 82; Murray's memo and Spellman's presentation: *ibid.*

"sancti Concilii Oecumenici Vaticani Secundi" (hereafter *Acta Synodalia Sacrae*): Vatican Polyglot Press, 1973), 2:1, 184; "religious freedom, like other outstanding rights of man": 196. The significance of the pope's words: Pavan,

*Scritti*, 1:237. Paul VI characterized the rights as *praecipua* (= "principal" or "paramount" or "outstanding"), which Pavan translates as *fondamentali*. Presentation of the text was made: De Smedt, November 19, 1963, *Relatio. Acta Synodalia*, 2:5, 485-491. "reworked in his own style": Murray to Maher, November 22, 1963, quoted in Pelotte, *Murray*, 84; postponement of debate: ibid.

"insisted on the need": Joseph Fenton, "Cardinal Ottaviani and the Council," *AER* 148 (January 1963): 53. "In December 1963, Msgr. Joseph Clifford Ren-ton": *AER* 150 (January 1964): 1.

"intolerance wherever possible": John Courtney Murray, "The Problem of Religious Freedom," *Theological Studies* 25 (December 1964): 509; Fixism, Archaism, and Misplaced Abstractness: 560-562; "a historical nature": 559; "explicitly the product": 568; a "growing end": 569. The original title and circulation to the American bishops: Pelotte, *Murray*, 88; its translations: 111. On the influence of Lonergan see Hooper, *Ethics of Discourse*, 124-125, 138, 140.

"patient and benign tolerance": Ruffini, *Oratio*, September 23, 1964, *Acta Synodalia*, 3:2, 355; concords: 356; "not an evolution": Quiroga y Palacios, 358; danger of polygamy: Lefebvre, September 24, in *ibid.*, 491; Catholics' supernatural rights and "freedom of propaganda": Ottaviani, September 23, in *ibid.*, 375; Léger: 359; Silva-Henriques, 369; Koenig, 470; Cushing, 361-362.

"the first scribe": Pelotte, *Murray*, 94; collaboration with Pavan: 94-95, quoting Murray to Richard J. Regan, January 31, 1967; the mixed commission gambit: 95; the squelching of a vote and "the day of Wrath": 96. "the human gasp for God": Paul VI, Christmas broadcast, December 22, 1964, *Acta apostolicae sedis* (1965), 57:181. Paul VI's assurance to the American bishops: Pelotte, *Murray*, 97, quoting Joseph Ritter to the American bishops, December 29, 1964; Murray's two heart attacks: 99.

reported on "the day of Wrath": John Courtney Murray, "This Matter of Religious Freedom," *America* 112 (January 1965): 40; "the affirmation of progress": *ibid.*; "development of doctrine": 43. Negotiations of Murray with French bishops: Pelotte, *Murray*, 97. The French view: John Courtney Murray, "Religious Freedom," in *Freedom and Man*, ed. John Courtney Murray (New York: P. J. Kennedy, 1965), 139-140.

"If what is being taught": Lefebvre, September 20, 1965, comment, *Acta Synodalia*, 4:1, 792. "In the very fact of Revelation": Cardinal Wojtyla, *Oratio*, September 22, 1965, in *ibid.*, 4:2, 11; "a serious danger": Beran, September 20, in *ibid.*, 4:1, 393; "in clear words": 394.

The presidency of the Council . . . Paul VI acted: Pietro Pavan, "Testimonianza per papa Paolo VI," in *Scritti*, 4:391-392.

The text passed: Hamer, "Histoire du texte," 106-108. Murray's lung: Pelotte, *Murray*, 99.

a special papal commission; it was in connection with this commission that I was in Rome. To cite briefly my own experience, peripheral to the issue of reli-

gious freedom but illustrative of the freedom of argument that characterized the Council, I declared myself neutral on the question of contraception. "No historian worth his salt was ever neutral," exclaimed F. X. Murphy, the Re-demptorist historian largely responsible for the pseudonymous Xaiver Rynne's account of Vatican II. With this prompting my position became clearer. With F. X.'s aid, I expounded the subject to Cardinal Heenan, archbishop of Westminster, and his sidekick George Dwyer, archbishop of Birmingham; I talked to Cardinal Léger, who anxiously wondered what "they" wanted to happen; led by Mark Calegari, S.J., through the corridors of the Vatican palace in the best tradition of *The Three Musketeers*, I spoke to Paul VI's close collaborator, Cardinal Journet. The time was open for argument and rearrangement. "Christ himself has spoken": so I heard at the time from persons present at the meeting of the drafting committee. Text and footnotes of *Gaudium et spes*: September 20, 1965, *Acta Synodalia*, 4:7, 766-771.

Murray with other selected . . . mass with Paul VI: Pelotte, *Murray*, 100. Among those subscribing their names: *Acta Synodalia*, 4:7, 807.

"doctrine" be used in place of "declaration": Cardinal Wojtyla, *Oratio*, September 22, 1965, *ibid.*, 4:2, 11. On the title chosen and reasons for it: Yves M. J. Congar, "Que faut-il entendre par 'déclaration'?" in *La Liberté religieuse*, 50-52.

"of the dignity": Second Vatican Council, *Dignitatis humanae personae*, sec. 1, *Acta Synodalia*, 4:7; "This Vatican Council declares" and "founded in the" and "Mild and humble," citing Matthew 11:29: sec. 2; "although sometimes": sec. 12; "to do injury": sec. 3; "the just demands": sec. 4; "by the due care": sec. 7; "Given the particular circumstances" and "must provide": sec. 6. The example of England: John Heenan, *Oratio*, September 28, 1964, *Acta Synodalia*, 3:2, 572.

"to a war that has already been won": Murray, "This Matter of Religious Freedom": *America* 109 (November 1963), 704; "the American issue," John Courtney Murray, "On Religious Liberty," *America* 112, 40 (January 9, 1965) (cf. the German bishop Walter Kompe citing Murray for making "the American contribution to the Council": Pelotte, *Murray*, 101).

married the French Revolution: Lefebvre refused to subscribe to either *Gaudium et spes* or *Dignitatis humanae*; see Jean-Anne Chalet, *Monseigneur Lefebvre* (Paris: Pygmalion, 1976), 158-159. Subsequently he entered into schism, denounced the Council for "marrying the Church to the [French] Revolution," and declared that prior to the council, for a century and a half, the popes "condemned liberal Catholicism, refused this marriage with the ideas of the Revolution" (Lefebvre, "Honni à Lille," August 29, 1976, quoted in *ibid.*, 209-210). Leonard Feeney had put himself outside the Church by insisting that there was no salvation outside of the Church. Marcel Lefebvre was at the point of leaving the Church, insisting that, in an ideal state, there should be no freedom for a Christian to deny the teachings of the Church.

*End of Notes*