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# OF HUMAN DIGNITIES

Mark L. Movsesian\*

## INTRODUCTION

*Dignitatis Humanae*: “Of Human Dignity.” The Second Vatican Council’s 1965 declaration on religious liberty must have seemed a triumph—an exclamation mark signaling the success of a decades-long project, begun during the Second World War, to restore human rights to the center of Catholic social teaching.<sup>1</sup> In wartime addresses, Pope Pius XII had called for recognition of human rights, based in human dignity, as the foundation for a stable peace.<sup>2</sup> In 1963, Pope John XXIII had made universal human rights, including religious liberty, part of the Magisterium.<sup>3</sup> The project had had effects outside the Church as well. In 1948, largely as a result of Catholic influence, the United Nations had adopted a Universal Declaration of Human Rights with human dignity at its core.<sup>4</sup> That declaration contained a ringing endorsement of religious liberty: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his

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1 Human rights have long roots in Catholic thought, going back at least to the sixteenth-century neo-Scholastics. But the Church had distanced itself from rights-talk in the nineteenth century, alarmed by the excesses of the Enlightenment and the French Revolution. See John Witte, Jr., *Introduction to CHRISTIANITY AND HUMAN RIGHTS* 8, 22, 24 (John Witte, Jr. & Frank S. Alexander eds., 2010).

2 Drew Christiansen, S.J., *Commentary on Pacem in Terris*, in *MODERN CATHOLIC SOCIAL TEACHING* 217, 236 (Kenneth R. Himes ed., 2005); SAMUEL MOYN, *CHRISTIAN HUMAN RIGHTS* 3 (2015).

3 See Christiansen, *supra* note 2, at 217, 233; Christopher McCrudden, *In Pursuit of Human Dignity: An Introduction to Current Debates*, in *UNDERSTANDING HUMAN DIGNITY* 1, 16–17 (Christopher McCrudden ed., 2013).

4 G.A. Res. 217 A (III), art. 1, Universal Declaration of Human Rights (Dec. 10, 1948). Although the drafters came from varied cultural backgrounds, see MARY ANN GLENDON, *A WORLD MADE NEW* 225–26 (2001), Catholic ideas had a powerful influence, through thinkers like Maritain, Malik, and others. Christiansen, *supra* note 2, at 235–36 (discussing influence of Catholic ideas).

religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”<sup>5</sup>

How different things looks now. True, numerous treaties protect human rights; international organizations monitor their enforcement.<sup>6</sup> Conventional wisdom holds that human rights, including religious liberty, are universal.<sup>7</sup> Yet, as Allen Hertzke writes, “[d]espite considerable progress since the passage of the *Universal Declaration*, only a minority of people on earth enjoys the kind of religious freedom called for in international covenants.”<sup>8</sup> According to a recent Pew Survey, “some 70 percent of the world’s 6.8 billion people live in countries with high restrictions on religion.”<sup>9</sup> One cannot know, of course, what the situation would be like without them. But there is little evidence that either the *Universal Declaration* or *Dignitatis Humanae* have done much to secure, as a practical matter, the universal vision of religious freedom they contemplate.<sup>10</sup>

Notwithstanding a surface consensus, fifty years after *Dignitatis Humanae*, nothing like universal agreement exists on what human dignity means and what it entails for religious liberty.<sup>11</sup> A variety of competing understandings exist. There are objective understandings that ground dignity in external factors beyond individual choice. The Catholic Church advocates one such understanding; the Russian Orthodox Church and the Organization of Islamic Cooperation advocate others.<sup>12</sup> Objective understandings conflict with a subjective conception of human dignity, based on the will of the individual, which most secular human rights advocates prefer. The rival conceptions of dignity clash, particularly in the context of “new rights” like same-sex

5 G.A. Res. 217 A (III), *supra* note 4, art. 18.

6 For a good overview, see T. Jeremy Gunn, *The Human Rights System, in CHRISTIANITY AND HUMAN RIGHTS*, *supra* note 1, at 193.

7 See Christoph Grabenwarter, *Freedom of Religion: The Contribution of Benedict XVI to a Universal Guarantee from a European Perspective, in POPE BENEDICT XVI’S LEGAL THOUGHT* 150, 153 (Marta Cartabia & Andrea Simoncini eds., 2015).

8 Allen D. Hertzke, *Religious Freedom in the World Today: Paradox and Promise, in UNIVERSAL RIGHTS IN A WORLD OF DIVERSITY* 118 (Mary Ann Glendon & Hans F. Zacher eds., 2012).

9 *Id.*

10 See ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* 7 (2014) (“[T]here is little evidence that human rights treaties, on the whole, have improved the well-being of people, or even resulted in respect for the rights in those treaties.”).

11 See Thomas Banchoff & Robert Wuthnow, *Introduction to RELIGION AND THE GLOBAL POLITICS OF HUMAN RIGHTS* 3 (Thomas Banchoff & Robert Wuthnow eds., 2011) (noting that notwithstanding the “near-global consensus that human rights are a good thing,” controversy rages about “[w]hat rights mean and how to realize them”).

12 For a recent analysis of the human rights perspectives of these three religious voices, see generally Peter Petkoff, *Religious Exceptionalism, Religious Rights, and Public International Law, in THE CHANGING NATURE OF RELIGIOUS RIGHTS UNDER INTERNATIONAL LAW* 211 (Malcolm D. Evans et al. eds., 2015) [hereinafter *CHANGING NATURE OF RELIGIOUS RIGHTS*].

marriage.<sup>13</sup> In that context, groups and countries that advocate objective conceptions of dignity join forces to resist supporters of the subjective understanding.

A conflict also exists between individualist and corporate understandings.<sup>14</sup> The former conceive dignity mostly in terms of individual persons. Notwithstanding disagreement on the objective/subjective question, both the Catholic and the secular understandings of human dignity are principally individualist. Corporate understandings, by contrast, emphasize group dignity and rights. On corporate understandings, religious communities—in particular, traditional religious communities—can assert claims to religious liberty against outsiders who threaten communal integrity. Although important differences exist between them, the Russian Orthodox Church and the Organization of Islamic Cooperation both endorse understandings of religious liberty with strong corporate elements. The conflict between individualist and corporate understandings plays out particularly in controversies over proselytism and the right to convert. On these issues, the Catholic Church and secular human rights advocates find themselves on the same side, arguing together against voices from other traditions.

In short, the postwar project to forge a universal notion of human dignity has failed. Instead, radically different understandings contend against one another and prevent agreement on crucial issues. How are we lawyers to respond? One response is to work harder to achieve consensus. At a conference on religious freedom the St. John's Center for Law and Religion co-sponsored in Rome in 2014, Pope Francis asked us all to recommit to the universal conception of religious liberty contained in *Dignitatis Humanae*. Recognizing “universally shared values,” Francis maintained, could promote “mutual respect” among religions and “global cooperation in view of the common good.”<sup>15</sup> Serious scholars, particularly from the United States, have advocated more robust promotion of a universal notion of human dignity, and religious liberty, across the globe.<sup>16</sup>

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13 See Marta Cartabia, *The Challenges of “New Rights” and Militant Secularism*, in UNIVERSAL RIGHTS IN A WORLD OF DIVERSITY, *supra* note 8, at 428, 428–29.

14 José Casanova, *Globalization and the Free Exercise of Religion Worldwide*, in CHALLENGES TO RELIGIOUS LIBERTY IN THE TWENTY-FIRST CENTURY 139, 140–41 (Gerard V. Bradley ed., 2012) [hereinafter CHALLENGES TO RELIGIOUS LIBERTY].

15 Pope Francis, Address of Pope Francis to Participants in the Conference on “International Religious Freedom and the Global Clash of Values” (June 20, 2014), [http://w2.vatican.va/content/francesco/en/speeches/2014/june/documents/papa-francesco\\_20140620\\_liberta-religiosa.html](http://w2.vatican.va/content/francesco/en/speeches/2014/june/documents/papa-francesco_20140620_liberta-religiosa.html). For the conference proceedings, see LA LIBERTÀ RELIGIOSA SECONDO IL DIRITTO INTERNAZIONALE E IL CONFLITTO GLOBALE DEI VALORI (Monica Lugato ed., 2015).

16 See, e.g., THOMAS F. FARR, WORLD OF FAITH AND FREEDOM: WHY INTERNATIONAL RELIGIOUS LIBERTY IS VITAL TO AMERICAN NATIONAL SECURITY (2008); Daniel Philpott, *A Foreign Policy of Religious Freedom: Theoretical and Evidentiary Foundations*, in CHALLENGES TO RELIGIOUS LIBERTY, *supra* note 14, at 175.

With respect, these efforts seem to me misguided. True, one can point to examples that suggest a convergence of ideas about human dignity.<sup>17</sup> But, on the whole, the differences are too profound to be resolved easily. The chances that any one camp will persuade the others to adopt its views on dignity and religious freedom seem to me slim. Rather than trying to forge agreement on universal concepts, we lawyers should commit to a more modest approach, one that accepts the reality of disagreement and finds a humane way to accommodate it. Such an approach will seem defeatist to universalizers. But it has greater likelihood of success in the real world than the more ambitious programs currently on offer.

I proceed as follows. In Part I, I discuss the conflict between objective and subjective conceptions of human dignity, particularly in the context of same-sex marriage and “traditional values” resolutions at the UN Human Rights Council. In Part II, I discuss the conflict between individualist and corporate conceptions, focusing on proselytism and the right to convert. In Part III, I conclude with some observations on the implications of the disagreements I have identified.

Two notes before I begin. First, the taxonomy I offer is only partial. Other conceptions of human dignity exist, and my categories overlap somewhat. Moreover, I treat the various approaches to human dignity in broad terms. The traditions I discuss have many nuances and multiple expressions. Within each, dissenters quarrel with the mainstream positions I describe. Nonetheless, I believe my categories offer useful heuristics for appreciating the current situation.

Second, my goal in this Article is principally analytic rather than normative. My main goal is to explain in some detail the different conceptions of dignity and identify the implications for neuralgic controversies in contemporary human rights law. Unpacking the various definitions of human dignity and understanding their implications takes time. But it is a necessary step to understanding the crisis in human rights law today.

## I. OBJECTIVE AND SUBJECTIVE APPROACHES

Louis Henkin famously referred to human dignity as the “ur-principle” of contemporary human rights.<sup>18</sup> Dignity is the “ultimate value,” the universally agreed foundation for the entire regime.<sup>19</sup> The Universal Declaration’s preamble affirms that “recognition of the inherent dignity . . . of all members of the human family” is the basis for freedom, justice, and world peace.<sup>20</sup>

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17 See, e.g., Andrea Pin, *The Arab Road to Dignity: The Goal of the “Arab Spring”* (unpublished manuscript) (on file with author).

18 LOUIS HENKIN ET AL., *HUMAN RIGHTS* 80 (1999).

19 See Mary Ann Glendon, *International Law: Foundations of Human Rights—The Unfinished Business*, in *RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW* 317, 319 (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007) (discussing Henkin and other scholars).

20 G.A. Res. 217 A (III), *supra* note 4, pmbl. This language tracks the UN Charter. See Glendon, *supra* note 19, at 319.

Article 1 states that “all human beings are born free and equal in dignity and rights” and “are endowed with reason and conscience.”<sup>21</sup> In the references to “dignity,” “reason,” and “conscience,” one readily perceives the influence of Catholic social thought, though the Universal Declaration had other sources as well.

According to the Universal Declaration, a series of universal rights, applicable to everyone, everywhere, follows from this core principle of human dignity, including the right to religious liberty in Article 18, which I quote above. Over the ensuing decades, many other human rights instruments, both international and domestic, have followed the Universal Declaration in grounding human rights in human dignity, including the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Like the Universal Declaration, the latter contains a right to religious liberty in its own Article 18.<sup>22</sup>

Neither the Universal Declaration nor any of these other instruments actually defines “human dignity,” however. Nor do they explain why certain rights follow from human dignity, nor why their scope should be universal. In the Universal Declaration itself, the omission was deliberate.<sup>23</sup> Given the diversity of viewpoints, agreement on first principles would have been very difficult, perhaps impossible.<sup>24</sup> In a lawyerly way, the drafters obtained agreement on the text and “left the problem of foundations for another day.”<sup>25</sup> Later instruments followed the same pattern. As a result, no consensus definition of human dignity exists in international human rights law. The term has many meanings, some of them quite inconsistent. As Christopher McCrudden observes, “[h]uman dignity often seems to be used on both sides of many of the most controversial political debates: on issues such as abortion, assisted suicide, genetic experimentation, freedom of expression, and gay rights, human dignity is invoked to justify apparently conflicting positions.”<sup>26</sup>

#### A. *Objective Understandings*

Nonetheless, it is possible to group the different conceptions of human dignity into four broad, overlapping categories, each with implications for

21 G.A. Res. 217 A (III), *supra* note 4, art. 1.

22 G.A. Res. 2200A (XXI), art. 18, International Covenant on Civil and Political Rights (Dec. 16, 1966); *id.* pmb.; *cf.* GLENDON, *supra* note 4, at 175 (discussing the “large family of dignity-based rights instruments that were adopted after the Second World War” and tying them to the Universal Declaration).

23 See Paolo G. Carozza, *Human Rights, Human Dignity, and Human Experience*, in UNDERSTANDING HUMAN DIGNITY, *supra* note 3, at 615, 621.

24 See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 678 (2008). Jacques Maritain famously quipped that any attempt to define “dignity” would have prevented agreement. GLENDON, *supra* note 4, at 77–78.

25 Glendon, *supra* note 19, at 317.

26 McCrudden, *supra* note 3, at 1.

religious liberty. The first category is objective understandings. Objective understandings tie human dignity to external factors beyond the individual person. Dignity derives, not from a person's subjective choice, which may be disoriented or otherwise unworthy of respect, but from some "particular, pre-existing norm or value" that sets the boundary of dignity and "delimits" the rights that follow from it.<sup>27</sup>

In this Section, I address three such conceptions of human dignity, all of them from religious traditions. I begin with the mainstream Catholic conception, manifested most clearly in *Dignitatis Humanae*, which ties dignity to essential characteristics of human nature.<sup>28</sup> I next discuss the Russian Orthodox Church's conception, which links dignity to enduring national and cultural traditions. Finally, I consider the version of dignity advocated by the Organization of Islamic Cooperation, which ties dignity to practice of "[t]rue faith"—Islam.<sup>29</sup>

## 1. The Catholic Church

Catholic thought ties dignity to human nature, which it sees as an objective, universal phenomenon. Dignity, properly understood, consists in conforming to human nature; rights, properly understood, promote dignity by allowing human beings to act in accordance with their nature. Although, for Catholics, the truths about human nature follow both from divine revelation and from human reason, in explaining its position to the outside world, the Church has tended to emphasize the latter. For example, in a 2008 address to the United Nations, Pope Benedict XVI made a strong, natural-law argument for an objective understanding of human rights and warned against a more subjective approach. "Human rights," he said,

are based on the natural law inscribed on human hearts and present in different cultures and civilizations. Removing human rights from this context would mean restricting their range and yielding to a relativistic conception, according to which the meaning and interpretation of rights could vary and their universality would be denied in the name of different cultural, political, social and even religious outlooks. This great variety of viewpoints must not be allowed to obscure the fact that not only rights are universal, but so too is the human person, the subject of those rights.<sup>30</sup>

*Dignitatis Humanae*, which makes a Catholic argument for religious liberty as a civil right, offers a good illustration. It begins by grounding religious

27 Christopher McCrudden, *Benedict's Legacy: Human Rights, Human Dignity, and the Possibility of Dialogue*, in POPE BENEDICT XVI'S LEGAL THOUGHT, *supra* note 7, at 165, 168.

28 For a discussion of alternative Catholic voices on human dignity, see McCrudden, *supra* note 3, at 22–25.

29 ORG. OF ISLAMIC COOPERATION, THE CAIRO DECLARATION ON HUMAN RIGHTS IN ISLAM art. 1 (1990) [hereinafter CAIRO DECLARATION], <http://www.oic-oci.org/english/article/human.htm>.

30 Pope Benedict XVI, Address of His Holiness Benedict XVI to the General Assembly of the United Nations (Apr. 18, 2008), [http://w2.vatican.va/content/benedict-xvi/en/speeches/2008/april/documents/hf\\_ben-xvi\\_spe\\_20080418\\_un-visit.html](http://w2.vatican.va/content/benedict-xvi/en/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit.html).

liberty “in the very dignity of the human person as this dignity is known through the revealed word of God and by reason itself.”<sup>31</sup> Note the two, independent justifications: divine revelation and human reason. It is fair to say, though, that *Dignitatis Humanae* emphasizes the latter, natural-law approach.<sup>32</sup> John Courtney Murray later explained that, as the only Vatican II document “formally addressed to the whole world—Christian and non-Christian, religious and atheist”—the Declaration appropriately led with an argument from reason alone.<sup>33</sup>

*Dignitatis Humanae* maintains that reason reveals an essential truth about human nature. By nature, human beings are “impelled” to seek the truth about ourselves and the world in which we live, “especially religious truth.”<sup>34</sup> Human dignity thus requires that people have religious liberty. People must have the right, free from state interference, to do what their nature impels: to inquire into religious truth; to determine the content of that truth; and to act in conformity with that truth, in good conscience.

Note that *Dignitatis Humanae* does not ground dignity in the subjective choice of the individual.<sup>35</sup> It could not do so and maintain the Church’s teaching that Catholicism is objectively true—and nothing in the document alters that teaching.<sup>36</sup> After all, given freedom, many people will choose other religions, or atheism, for reasons they find subjectively compelling. Many will fail to bother with the choice at all. Instead, according to *Dignitatis Humanae*, dignity inheres in objective facts about human nature itself, in the essentially human curiosity about transcendent reality:<sup>37</sup>

[T]he right to religious freedom has its foundation not in the subjective disposition of the person, but in his very nature. In consequence, the right . . . continues to exist even in those who do not live up to their obligation of seeking the truth and adhering to it and the exercise of this right is not to be impeded, provided that just public order be observed.<sup>38</sup>

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31 Paul VI, Declaration *Dignitatis Humanae* para. 2 (Dec. 7, 1965), [http://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_decl\\_19651207\\_dignitatis-humanae\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html).

32 See Thomas Pink, *The Right to Religious Liberty and the Coercion of Belief: A Note on Dignitatis Humanae*, in *REASON, MORALITY AND LAW: THE PHILOSOPHY OF JOHN FINNIS* 427, 434–45 (John Keown & Robert P. George eds., 2013).

33 John Courtney Murray, S.J., *Religious Freedom*, in *THE DOCUMENTS OF VATICAN II* 672, 688 n.24 (Walter M. Abbott ed., 1966).

34 *Dignitatis Humanae*, *supra* note 31.

35 See David-Maria Jaeger, OFM, *The Holy See’s Understanding of Religious Freedom*, in *CHANGING NATURE OF RELIGIOUS RIGHTS*, *supra* note 12, at 235, 242; see also Murray, *supra* note 33, at 679 n.5.

36 See Jaeger, *supra* note 35, at 238.

37 See *id.* at 242; see also Hertzke, *supra* note 8, at 111 (“Human reason . . . propels an innate quest by people everywhere to understand ultimate truths about their purpose, meaning, and destiny.”).

38 *Dignitatis Humanae*, *supra* note 31.



## 2. The Russian Orthodox Church

A 2008 statement by the Russian Orthodox Church, the *Basic Teaching on Human Dignity, Freedom and Rights*, adopts a somewhat different objective approach.<sup>39</sup> The statement is the most systematic, official treatment of human rights to date in the Orthodox tradition.<sup>40</sup> It has drawn controversy, both within Orthodoxy, which, like Catholicism, encompasses different viewpoints on human rights, and in the wider world.<sup>41</sup> Some critics decry the statement's conservatism. Others dismiss it as a political document meant to enhance the prestige of the Putin regime.<sup>42</sup> Whatever the motivations of the statement's authors, though, the arguments deserve to be taken on their own terms.

Like *Dignitatis Humanae*, the *Basic Teaching* grounds human dignity in the fact of divine creation: God has created human beings in His image and likeness.<sup>43</sup> It contains no additional argument from natural reason, however. Indeed, it asserts that divine creation “is the only ground which makes it possible to assert that human nature has an inherent dignity.”<sup>44</sup> Moreover, it ties human dignity directly to moral behavior.<sup>45</sup> “According to the Orthodox tradition,” it explains, “a human being preserves his God-given dignity and grows in it only if he lives in accordance with moral norms.”<sup>46</sup> Human dignity cannot be grounded in the subjective choice of the individual, since the individual may choose to live in an immoral, sinful way. Such a choice would not “ruin the God-given dignity ontologically,” but would “darken[ ] it so much as to make it hardly discernible.”<sup>47</sup>

In one of its most controversial aspects, the *Basic Teaching* goes on to identify morality with nations' cultural and religious traditions.<sup>48</sup> Such tradi-

39 *Basic Teaching on Human Dignity, Freedom and Rights*, THE RUSSIAN ORTHODOX CHURCH, <https://mospat.ru/en/documents/dignity-freedom-rights/> (last visited Feb. 21, 2016) [hereinafter *Basic Teaching*].

40 See Alfons Brüning, “Freedom” vs. “Morality”—On Orthodox Anti-Westernism and Human Rights, in ORTHODOX CHRISTIANITY AND HUMAN RIGHTS 125, 129 (Alfons Brüning & Evert van der Zweerde eds., 2012) [hereinafter ORTHODOX CHRISTIANITY AND HUMAN RIGHTS].

41 Cf. Alfons Brüning & Evert van der Zweerde, *Introduction: Orthodox Christianity and Human Rights—An Ambiguous Relationship*, in ORTHODOX CHRISTIANITY AND HUMAN RIGHTS, *supra* note 40, at 1, 14 (noting the “complex[ ]” and “controversial” relationship “between the Orthodox Christian tradition and the ‘Western’ concept of Human Rights”).

42 See, e.g., Alexander Agadjanian, *The Russian Orthodox Teaching on Human Rights—Its Socio-Cultural Significance and Its Social Theory Perspective*, in ORTHODOX CHRISTIANITY AND HUMAN RIGHTS, *supra* note 40, at 271, 272 (recounting these criticisms).

43 See *Basic Teaching*, *supra* note 39, § I.1.

44 *Id.*

45 See ARISTOTLE PAPANIKOLAOU, *THE MYSTICAL AS POLITICAL: DEMOCRACY AND NON-RADICAL ORTHODOXY* 93 (2012).

46 *Basic Teaching*, *supra* note 39, § I.5.

47 *Id.* § I.4.

48 There is some ambiguity in the Russian text, but the best reading comports with the analysis here. See, e.g., KRISTINA STOECKL, *THE RUSSIAN ORTHODOX CHURCH AND HUMAN RIGHTS* 72–74 (2014); Brüning, *supra* note 40, at 132–33.

tions, it argues, have objective moral authority. They embody “generally accepted and long established” values that are constitutive of enduring societies.<sup>49</sup> Morality and dignity must be understood consistently with such traditions. This has obvious implications for human rights, which the *Basic Teaching* makes explicit. “[T]he implementation of human rights,” it declares, “should not come into conflict with God-established moral norms and traditional morality based on them.”<sup>50</sup> Human rights “should not . . . justify any encroachment on . . . cultural values and the identity of a nation.”<sup>51</sup> Cultural and religious traditions, in other words, act as legitimate limits on human rights.

I will have more to say about how traditions can operate to limit rights below. For now, two aspects of the *Basic Teaching* deserve emphasis. First, like *Dignitatis Humanae*, the *Basic Teaching* grounds human dignity in objective reality rather than subjective choice. True, not everyone will be persuaded that traditional values reflect objective moral reality, just as not everyone will be persuaded that human nature contains an innate quest for transcendence. But the *Basic Teaching*’s justification of human dignity is objective, nonetheless. Second, the *Basic Teaching* poses a challenge to the concept of universal human rights. Cultural and religious traditions differ among nations; if traditions are the criteria for human rights, human rights will not be the same everywhere. The *Basic Teaching* seems to accept this. Indeed, it contains an oblique criticism of the Western tendency to export its own understanding of human rights across the globe: “Some civilizations ought not to impose their own way of life on other civilizations under the pretext of human rights protection.”<sup>52</sup>

### 3. The Organization of Islamic Cooperation

A third example appears in the Cairo Declaration on Human Rights in Islam, which the Organization of Islamic Cooperation (OIC) adopted in 1990.<sup>53</sup> The OIC is an intergovernmental body comprising fifty-seven member states with Muslim-majority populations; its website proclaims it to be “the collective voice of the Muslim world.”<sup>54</sup> Adopted by the OIC’s Council of Foreign Ministers, the Cairo Declaration purports to offer member states “general guidance” on human rights.<sup>55</sup> It is comprehensive, and, notwithstanding some disagreement about how well it reflects Islam or even state

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49 Brüning, *supra* note 40, at 133; *see also id.* at 137.

50 *Basic Teaching*, *supra* note 39, § III.5.

51 *Id.* For more on this point, see PAPANIKOLAOU, *supra* note 45, at 94.

52 *Basic Teaching*, *supra* note 39, § III.4.

53 CAIRO DECLARATION, *supra* note 29. Before 2011, the organization was known as the Organization of the Islamic Conference. *See* ANN ELIZABETH MAYER, *ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS* 2 (5th ed. 2013).

54 *History*, ORG. OF ISLAMIC COOPERATION, [http://www.oic-oci.org/oicv2/page/?p\\_id=52&p\\_ref=26&lan=en](http://www.oic-oci.org/oicv2/page/?p_id=52&p_ref=26&lan=en) (last visited Feb. 19, 2016).

55 *See* CAIRO DECLARATION, *supra* note 29.

practice, quite influential.<sup>56</sup> The OIC, which typically coordinates the votes of member states on human rights issues in international forums, treats the declaration as “the central Islamic statement on human rights” and assiduously promotes it at the UN.<sup>57</sup> One must take the declaration seriously as “an Islamic countermodel of human rights.”<sup>58</sup>

Like *Dignitatis Humanae* and the *Basic Teaching*, the Cairo Declaration offers an objective justification for human dignity: the fact of divine creation. As a result of common “descent from Adam,” it states, “[a]ll men are equal in terms of basic human dignity . . . without any discrimination on the grounds of race, color, language, sex, religious belief, political affiliation, social status or other considerations.”<sup>59</sup> But it goes beyond this statement to make an argument for human dignity that differs greatly from the ones found in those other documents. Where the Catholic document speaks in terms of intrinsic human nature, and the Russian Orthodox document in terms of religious and cultural traditions, the OIC’s statement ties human dignity to the practice of Islam.

This conclusion follows from a fair reading of the text.<sup>60</sup> The preamble speaks of the need to affirm man’s “freedom and right to a dignified life in accordance with the Islamic Shari’ah.”<sup>61</sup> After grounding dignity in the fact of divine creation, Article 1 continues with this somewhat cryptic statement: “True faith is the guarantee for enhancing such dignity along the path to human perfection.”<sup>62</sup> The meaning is not entirely clear, but several other provisions suggest strongly that the phrase “true faith” refers to Islam. As Ann Mayer writes, “the entire declaration has a pronounced Islamic bias.”<sup>63</sup> The preamble refers to the Islamic *Ummah* as “the best nation,” a “universal and well-balanced civilization in which . . . knowledge is combined with faith.”<sup>64</sup> Article 10 proclaims Islam to be “the religion of unspoiled nature.”<sup>65</sup> Article 24 provides that the entire declaration is “subject to the Islamic Shari’ah.”<sup>66</sup> And, for good measure, Article 25 warns that “[t]he Islamic Shari’ah is the only source of reference” for explaining or clarifying anything in the declaration.<sup>67</sup>

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56 See KRISTINE KALANGES, RELIGIOUS LIBERTY IN WESTERN AND ISLAMIC LAW: TOWARD A WORLD LEGAL TRADITION 151 (2012) (“Scholars are divided as to whether the Cairo Declaration defines authentic Islamic teachings on religious liberty and other human rights.”); MAYER, *supra* note 53, at 31 (noting inconsistency with state practice).

57 MAYER, *supra* note 53, at 31; *see also id.* at 12 (noting that OIC “has coordinated the positions adopted by its member states, which now typically vote as a bloc”).

58 KALANGES, *supra* note 56, at 150.

59 CAIRO DECLARATION, *supra* note 29, art. 1.

60 MAYER, *supra* note 53, at 147.

61 CAIRO DECLARATION, *supra* note 29, pmbl.

62 *Id.* art. 1.

63 MAYER, *supra* note 53, at 147.

64 CAIRO DECLARATION, *supra* note 29, pmbl.

65 *Id.* art. 10.

66 *Id.* art. 24.

67 *Id.* art. 25.

The implication is inescapable: even if everyone is born with equal dignity, pious Muslims attain an enhanced dignity, superior to that of non-Muslims and, in fact, dissident Muslims.<sup>68</sup> This understanding has obvious implications for human rights, especially religious liberty. Indeed, the Cairo Declaration omits a specific guarantee of religious liberty.<sup>69</sup> In addition to Article 1's reference to religious non-discrimination, the Declaration does contain a vague allusion to the right to "live in security" for one's religion.<sup>70</sup> But one must read these articles in light of Article 24, which makes all rights subject to the Sharia. In mainstream, classical interpretations, the Sharia allows for many restrictions on the religious practice of non-Muslims that would violate international norms.<sup>71</sup> The Cairo Declaration suggests these restrictions are nonetheless consistent with its own, alternative human rights regime.

In recent years, the OIC has downplayed Islamic exceptionalism in order to cooperate with Russian Orthodox, Catholic, and other conservative groups on "traditional values" resolutions in international forums.<sup>72</sup> I explore this alliance below. Before doing so, though, it is important to contrast all three objective versions of human dignity with a rival, subjective conception that grounds human dignity in the fact of individual choice.

### B. *A Subjective Approach: Secular Human Rights Theory*

The subjective view of human dignity has drawn significant support among secular, Western human rights advocates.<sup>73</sup> Indeed, it is so familiar to most of us in the West that it hardly requires exposition. It begins with the understanding that human beings are autonomous agents who can legitimately construct their own identities. On this view, as Alasdair MacIntyre once observed, the self is "a set of perpetually open possibilities."<sup>74</sup> One's identity is not set, but "changeable," a matter of individual volition.<sup>75</sup> Dignity inheres in the choice itself, in the construction of one's identity as one thinks best, free from external constraints. It is meaningless to ask whether the choice is the correct one, according to some objective criterion. Dignity is not a matter of conforming oneself to objective moral reality, whether essential human nature, perduring communal traditions, or the true faith. It is

68 MAYER, *supra* note 53, at 147.

69 KALANGES, *supra* note 56, at 150; *see* MAYER, *supra* note 53, at 185.

70 CAIRO DECLARATION, *supra* note 29, art. 18; *see* MAYER, *supra* note 53, at 147.

71 *See* KALANGES, *supra* note 56, at 155.

72 Petkoff, *supra* note 12, at 218–19.

73 *See* McCrudden, *supra* note 27, at 177; *see also* Matthias Mahlmann, *The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law*, in UNDERSTANDING HUMAN DIGNITY, *supra* note 3, at 593, 600 (noting the importance of "autonomous subjectivity" in "international case law and legal doctrine").

74 ALASDAIR MACINTYRE, *AFTER VIRTUE* 32 (3d ed. 2007).

75 McCrudden, *supra* note 27, at 177.

acting in a way that realizes one's authentic self—"a subjective assent to one's true end."<sup>76</sup>

This conception of dignity has obvious implications for human rights. Rights exist to protect the individual as he attempts to construct his identity—to liberate him, in Marta Cartabia's words, "from all forms of paternalism and alienation," that is, all attempts by public and even private authorities to coerce him in ways that would violate his authentic self.<sup>77</sup> As long as he does not harm someone else—and harm is typically defined, narrowly, to mean something like physical injury—he must be allowed to realize his potential as he understands it. In the words of the joint opinion in *Planned Parenthood v. Casey*, he has "the right to define [his] own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>78</sup>

The subjective understanding has clear implications for religious liberty. As Julian Rivers writes, on the subjective understanding, religion can have value only as a personal belief, a "projection[ ]" of the individual.<sup>79</sup> It cannot claim an objective authority that legitimately restricts the individual in the construction of his authentic self. But that is precisely what most religions do claim. Consequently, the subjective understanding "has always carried within itself the seeds of a fundamental antagonism to religion," a wariness about religion's capacity to repress self-actualization.<sup>80</sup> This antagonism appears with increasing frequency nowadays, for example, in controversies surrounding LGBT rights generally and same-sex marriage in particular.

### C. *Same-Sex Marriage and Traditional Values Resolutions*

Although it doesn't involve religious liberty per se, the controversy over same-sex marriage offers a good illustration of the conflict between objective and subjective views of dignity. Same-sex marriage is not, at the moment, a generally recognized international human right.<sup>81</sup> Some scholars maintain that it should be, however, and, on a subjective understanding, the argument is quite strong.<sup>82</sup> If dignity is a matter of constructing one's own identity, and categories like "male" and "female" are illegitimate external constraints, why

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76 Joel Harrison, 'A Communion in Good Living': Human Dignity and Religious Liberty Beyond the Overlapping Consensus, in UNDERSTANDING HUMAN DIGNITY, *supra* note 3, at 451, 455.

77 Cartabia, *supra* note 13, at 428, 435.

78 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

79 Julian Rivers, *Justifying Freedom of Religion: Does 'Dignity' Help?*, in UNDERSTANDING HUMAN DIGNITY, *supra* note 3, at 419.

80 *Id.*; see also Louis Henkin, *Religion, Religions, and Human Rights*, 26 J. RELIGIOUS ETHICS 229, 235 (1998) ("From the human rights perspective, religions have often achieved order at the cost of repression" and "limitations on individual liberty and on individual development.").

81 Lynn D. Wardle, *Equality Principles as Asserted Justifications for Mandating the Legalization of Same-Sex Marriage in American and Intercountry-Comparative Constitutional Law*, 27 BYU J. PUB. L. 489, 513 (2013).

82 See *id.* (noting that advocates have long argued that international human rights treaties should be interpreted to include a right to same-sex marriage).

would a right to same-sex marriage not exist? On a subjective understanding, restricting marriage to opposite-sex relationships seems repressive of persons' authentic selves—their freedom and dignity. The recent American Supreme Court decision, *Obergefell v. Hodges*, relies on this reasoning to declare same-sex marriage a constitutional right in the United States.<sup>83</sup>

Because of their commitment to a subjective view of dignity, most secular human rights advocates find opposition to same-sex marriage incomprehensible, dismissing it, if they are being polite, as a sectarian preoccupation. On an objective understanding of dignity, however, a right to same-sex marriage is deeply problematic. Consider the mainstream Catholic position, which holds that human dignity consists in conforming to essential human nature. In mainstream Catholic thought, sexual difference and complementarity are fundamental aspects of human nature.<sup>84</sup> In Pope Francis's recent words at the UN, there is "a moral law written into human nature itself, one which includes the natural difference between man and woman."<sup>85</sup> This difference acts as a legitimate constraint on human conduct. As a consequence, same-sex marriage, which denies sexual difference and complementarity, is inconsistent with human dignity, and no human right to same-sex marriage exists.<sup>86</sup> Note this is not, from the Catholic perspective, a religious argument that depends on divine revelation. It is a natural-law argument accessible to all people, everywhere, at all times, on the basis of human reason.

Similarly, the Russian Orthodox position, which ties dignity to longstanding moral tradition, cannot accommodate a right to same-sex marriage, nor can the OIC's position, which links dignity with the practice of Islam.<sup>87</sup> Indeed, in recent years, the Russian Orthodox Church and the Organization of Islamic Cooperation have formed a strategic alliance, along with some Catholic and conservative NGOs, to promote a "traditional values" agenda at the UN Human Rights Council. Putting aside theological differences, these

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83 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (noting that liberty, under the Constitution, "extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs").

84 See, e.g., CATECHISM OF THE CATHOLIC CHURCH § 2333 (2d ed. 2000) ("Everyone, man and woman, should acknowledge and accept his sexual *identity*. Physical, moral, and spiritual difference and complementarity are oriented toward the goods of marriage and the flourishing of family life.").

85 Pope Francis, Meeting with the Members of the General Assembly of the United Nations Organization, Address of the Holy Father (Sept. 25, 2015), [http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco\\_20150925\\_onu-visita.html](http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150925_onu-visita.html).

86 See, e.g., U.S. CONF. OF CATHOLIC BISHOPS, BETWEEN MAN AND WOMAN: QUESTIONS AND ANSWERS ABOUT MARRIAGE AND SAME-SEX UNIONS, <http://www.usccb.org/issues-and-action/marriage-and-family/marriage/promotion-and-defense-of-marriage/questions-and-answers-about-marriage-and-same-sex-unions.cfm> (last visited Apr. 13, 2016).

87 For a helpful discussion of various conceptions of tradition in the context of human rights, see Christopher J. McCrudden, *Human Rights, Southern Voices, and 'Traditional Values' at the United Nations* (U. of Mich. Pub. Law and Legal Theory Research, Paper No. 419, 2014) [hereinafter McCrudden, *Human Rights, Southern Voices*], [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2474241](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2474241).

groups have cooperated to make traditional values a central element in international human rights discourse.<sup>88</sup> Opponents, including many Western governments and progressive NGOs, see the traditional values campaign as an attempt to counter the increasing prominence of LGBT rights, including same-sex marriage. The conflict over traditional values resolutions thus offers a window into the deeper conflict between subjective and objective approaches to human dignity.

The conflict began in 2008, with an address at the Human Rights Council by Patriarch Kirill of the Russian Orthodox Church.<sup>89</sup> Among other things, Kirill criticized human rights law for ignoring nations' cultural and moral traditions.<sup>90</sup> The following year, the Russian representative introduced a resolution, supported by OIC members, on promoting human rights "through a better understanding of traditional values of humankind."<sup>91</sup> The Council approved the resolution and convened a conference on traditional values the following year, in which several representatives of the Russian Orthodox Church participated as members of the Russian delegation.<sup>92</sup> In 2011, the Council requested a report from its Advisory Committee "'on how a better understanding and appreciation of traditional values' could contribute to the promotion and protection of human rights."<sup>93</sup>

The Advisory Committee's report the following year revealed deep disagreement on the place of traditional values in human rights discourse.<sup>94</sup> Although it did not directly address same-sex marriage or LGBT rights, it warned that traditional values could be used in a way to subjugate minorities and marginalized groups, including persons who challenge "the social constructions of gender on the basis of values said to be traditional, cultural or religious."<sup>95</sup> The debate did not end there. In October 2012, the Council

88 See, e.g., MAYER, *supra* note 53, at 206 (noting that this alliance "has given OIC members expanded influence in the UN human rights system but has also necessitated adjusting their tactics").

89 Metropolitan Kirill of Smolensk and Kaliningrad, Chairman of the Moscow Patriarchate, Address on the Panel Discussion on Human Rights and Intercultural Dialogue at the Seventh Session of UN Human Rights Council (Mar. 18, 2008), <http://www.interfax-religion.com/?act=documents&div=121>.

90 *Id.*

91 Human Rights Council Res. 12/21, U.N. Doc. A/HRC/RES/12/21 (Oct. 12, 2009).

92 STOECKL, *supra* note 48, at 110. On the centrality of the Russian Church in promoting the traditional values initiative, see *id.* at 113, and Christopher McCrudden, *Faith-Based Non-Governmental Organizations in the Public Square*, in CHANGING NATURE OF RELIGIOUS RIGHTS, *supra* note 12, at 185, 188.

93 McCrudden, *Human Rights, Southern Voices*, *supra* note 87, at 23.

94 Rep. of the U.N. Human Rights Council Advisory Comm., *Study of the Human Rights Council Advisory Committee on Promoting Human Rights and Fundamental Freedoms Through a Better Understanding of Traditional Values of Humankind*, U.N. Doc. A/HRC/22/71 (Dec. 6, 2012) [hereinafter Advisory Comm. Report]. McCrudden provides fascinating background on the drafting of the report and the divergent views expressed. McCrudden, *Human Rights, Southern Voices*, *supra* note 87, at 23–26.

95 Advisory Comm. Report, *supra* note 94, § 42; see also STOECKL, *supra* note 48, at 112 (noting that Advisory Committee Report did not directly address LGBT rights).

had passed yet another resolution noting that “traditional values” could be applied to promote human dignity and human rights, and requesting that the High Commissioner solicit the views of nations and NGOs on “best practices in the application of traditional values” while upholding human dignity and rights.<sup>96</sup>

The High Commissioner reported back in June 2013.<sup>97</sup> Like the Advisory Committee report the year before, the High Commissioner’s summary revealed substantial disagreement about the benefits of traditional values. Western governments and progressive NGOs voiced skepticism. The European Union, for example, noted that traditional values could pose a danger to human rights, especially with regard to “violence against women, sexual orientation, gender identity, age and disability.”<sup>98</sup> Amnesty International warned that governmental authorities might “misuse their power to define the community’s traditional values in order to maintain the status quo.”<sup>99</sup> By contrast, religious and conservative NGOs voiced support for traditional values. The Catholic Family and Human Rights Institute, for example, intervened to highlight the “key role of the family, composed of a mother and a father,” in promoting the “core values” of the “human rights project.”<sup>100</sup>

The fight over traditional values resolutions, which ended in a draw, was a complex one. The crucial point is this. The resolutions represented an attempt by actors with an objective understanding of dignity to define human rights in a way that fit their understanding. The opposition reflected a competing, subjective understanding, which sees human rights as a way to transcend tradition and promote human fulfillment. The conflict continues. In the summer of 2015, the HRC adopted a new resolution, supported by Russia and OIC members, reaffirming “that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>101</sup> Western nations, including the United States and eleven European countries, had strenuously opposed the resolution “on grounds that it put too much emphasis on traditional family structures.”<sup>102</sup>

96 Human Rights Council Res. 21/3, U.N. Doc. A/HRC/RES/21/3 (Oct. 9, 2012).

97 U.N. High Comm’r for Human Rights, *Summary of Information from States Members of the United Nations and Other Relevant Stakeholders on Best Practices in the Application of Traditional Values While Promoting and Protecting Human Rights and Upholding Human Dignity*, U.N. Doc. A/HRC/24/22 (June 17, 2013).

98 *Id.* § 3.

99 *Id.* § 42.

100 *Id.* § 47.

101 Human Rights Council Res. 29/22, U.N. Doc. A/HRC/RES/29/22, at 2 (July 22, 2015).

102 Erasmus, *The UN and Family Values: A New Global Force Is Fighting Liberal Social Mores*, *ECONOMIST* (July 11, 2015), <http://www.economist.com/blogs/erasmus/2015/07/un-and-family-values>.



## II. INDIVIDUALIST AND CORPORATE APPROACHES

The conflict between objective and subjective conceptions of dignity is not the only one. A conflict also exists between individualist approaches, which conceive dignity and rights mostly in terms of individual persons, and corporate approaches, which stress the dignity and rights of religious communities, especially traditional religious communities with ties to national histories and cultures.<sup>103</sup> The differences are matters of degree. Individualist approaches make room for communal claims, and corporate approaches do not completely deny the value of personal choice. But, as José Casanova writes, the individualist and corporate understandings exist in “fundamental tension in the modern world.”<sup>104</sup> The differences between them have serious practical consequences, particularly with respect to issues like proselytism and the right to convert.

### A. *Individualist Approaches*

Most Western readers will be familiar with individualist views of human dignity.<sup>105</sup> In this Section, I discuss two such approaches, the Catholic and the secularist approach. Important differences exist between them, particularly on the legitimate demands of religious communities. But both approaches emphasize the claims of the individual. The individual, not the religious community, is the primary subject of dignity and rights.

#### 1. The Catholic Church

Consider first the mainstream Catholic position, expressed in *Dignitatis Humanae*. *Dignitatis Humanae* is shot through with references to individual human dignity.<sup>106</sup> Indeed, the first sentence, from which the Declaration draws its name, refers to “the dignity of the human *person*.”<sup>107</sup> Repeatedly, the Declaration speaks in terms of individual rights and conscience. A few examples will suffice: “This Vatican Council declares that the human person has a right to religious freedom.”<sup>108</sup> “[E]very man has the duty, and therefore the right, to seek the truth in matters religious in order that he may with prudence form for himself right and true judgments of conscience . . . .”<sup>109</sup> “[A] man is bound to follow his conscience in order that he may come to

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103 See, e.g., Casanova, *supra* note 14, at 140–41.

104 *Id.* at 140.

105 Cf. *id.* at 141–42 (noting that the individualist view is “the taken-for-granted cultural understanding of religious liberty by most people, religious as well as secular, in most Western societies”).

106 Cf. *id.* at 146 (noting that *Dignitatis Humanae* “recognized the inalienable right of every individual to freedom of conscience based on the sacred dignity of the human person” (emphasis omitted)).

107 *Dignitatis Humanae*, *supra* note 31, para. 1 (emphasis added).

108 *Id.* para. 2.

109 *Id.* para. 3.

God . . . .”<sup>110</sup> It is only “by a personal assent” that man may adhere to the truth.<sup>111</sup> The import of these statements is clear. *Dignitatis Humanae*’s argument for human dignity rests fundamentally on “the inviolability of *the person*’s specifically human interiority.”<sup>112</sup>

To be sure, *Dignitatis Humanae* makes clear that human dignity and religious freedom have important corporate dimensions as well.<sup>113</sup> Because humans are by nature social beings, it teaches, human dignity requires they be allowed to act together in religious communities. Such communities have the right, among other things, to “govern themselves according to their own norms”; to select their own ministers; to form institutions to further their common life and worship; and to worship in public and teach their faith.<sup>114</sup> The only permissible restrictions are those government may legitimately impose in order to promote the “common welfare”—the rights of other citizens, the preservation of public peace, and the “guardianship of public morality.”<sup>115</sup> Such restrictions must themselves conform to “the objective moral order.”<sup>116</sup>

This corporate aspect of religious liberty has been central to Catholic thought since at least the Papal Revolution of the eleventh century, and it remains so today.<sup>117</sup> Indeed, as I shall explain, the issue of collective religious freedom divides the Catholic and secularist understandings. But its corporate elements should not obscure the fact that Catholic thought conceives religious freedom primarily as a right attaching to the individual human person. Under *Dignitatis Humanae*, for example, the corporate dimension of religious liberty cannot justify state restrictions on the freedom of persons outside the church—restrictions on the right to practice another religion, for example. Indeed, conservative Catholics like Patrick Brennan criticize *Dignitatis Humanae* for muting some of the Church’s traditional jurisdictional claims in order to promote individual liberty instead.<sup>118</sup>

Moreover, under *Dignitatis Humanae*, all religious communities have an equal right to religious freedom. Government may not act “in an unfair spirit of partisanship.”<sup>119</sup> Even where historical circumstances give a particular community a special role in society, the state cannot create obstacles for the effective exercise of religion by other communities.<sup>120</sup> As we shall see,

110 *Id.*

111 *Id.*

112 Jaeger, *supra* note 35, at 242 (emphasis added).

113 See Richard W. Garnett, “*The Freedom of the Church*”: (Towards) an Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33, 51 (2013) (discussing this aspect of *Dignitatis Humanae*).

114 *Dignitatis Humanae*, *supra* note 31, para. 4.

115 *Id.* para. 7.

116 *Id.*

117 See, e.g., HAROLD BERMAN, LAW AND REVOLUTION (1983); Garnett, *supra* note 113.

118 Patrick McKinley Brennan, *The Liberty of the Church: Source, Scope, and Scandal*, 21 J. CONTEMP. LEGAL ISSUES 165, 192 (2013).

119 *Dignitatis Humanae*, *supra* note 31, para. 7.

120 *Id.* para. 6.

the approach of both the Russian Orthodox Church and the Organization of Islamic Cooperation differs from the Catholic position on this point—a difference that becomes apparent in controversies surrounding proselytism and the right to convert.

## 2. The Secularist Understanding

The secularist conception of human dignity is more radically individualist than its Catholic counterpart. As I explained in Part I, in the secularist understanding, dignity inheres in the subjective act of choice, not the objective value of the option chosen. Dignity is a matter of allowing the individual to construct his own idea of meaning and live accordingly, without the hindrance of external constraints.

This subjectivism leads to a radically individualist conception of rights, including religious freedom. If what matters is subjective choice, then religion can have significance only because an individual has chosen it.<sup>121</sup> Put differently, religious exercise can merit protection only because of its importance to the individual believer—to his pursuit of meaning and the construction of his identity. In principle, therefore, only individuals have the right to religious freedom.<sup>122</sup> The secularist position acknowledges a corporate dimension of religion—the fact that people often join together to worship in religious communities. But these communities have importance, and merit protection, only as voluntary associations of individual believers, not as entities in themselves.<sup>123</sup> Their rights are entirely “derivative.”<sup>124</sup> Indeed, in some circumstances, the state must intervene in order to protect the individual believer from communal assertions of authority, which may stymie his self-expression and spiritual authenticity.<sup>125</sup>

The disagreement concerning the rightful claims of religious communities distinguishes the Catholic and the secularist understandings. As an illustration, consider the recent controversy over the so-called ministerial exception. Under this exception, which a unanimous Supreme Court endorsed in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, anti-discrimination laws do not apply to a religious body’s employment of its ministers.<sup>126</sup> The exception has a constitutional basis, the Court explained, and, although the Court did not use the phrase “church autonomy,” it rests ultimately on the corporate right of a

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121 See Banchoff & Wuthnow, *supra* note 11, at 4.

122 See, e.g., Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 920–21 (2013).

123 See, e.g., Banchoff & Wuthnow, *supra* note 11, at 4 (noting the view of religious organizations as “free associations of individuals”).

124 Schragger & Schwartzman, *supra* note 122, at 921.

125 Cf. Cartabia, *supra* note 13, at 435 (discussing the function of “new rights” in protecting “the individual from all forms of coercion on the part of public and private powers”).

126 132 S. Ct. 694 (2012).

religious community to govern itself.<sup>127</sup> The community's right to choose its ministers is essential to its own exercise of religion—to the community's "right to shape its own faith and mission through its appointments."<sup>128</sup>

On the Catholic understanding, *Hosanna-Tabor* is not controversial.<sup>129</sup> Indeed, much of the Court's language echoes *Dignitatis Humanae*'s argument about the right of a religious community to govern itself. On a secularist understanding, however, the decision is deeply problematic. *Hosanna-Tabor*'s endorsement of the corporate right of the religious community comes at the expense of individual believers within the church—the only persons who possess a right to exercise religion in the first place.<sup>130</sup> The Court's holding allows religious communities to assert their authority against individual believers in an arbitrary and discriminatory way, thus making a mockery of human dignity, properly understood. In Leslie Griffin's phrase, the Court's holding shows it has "lost sight of individual religious freedom."<sup>131</sup>

The disagreement with respect to corporate religious exercise is an important one, but it should not distract us from the underlying commitment, in both Catholic and secularist thought, to the individual. Neither Catholic nor secularist thought would allow a religious community to limit the right of the individual to exit. Neither would allow such a community to seek the state's help in restraining the religious expression of the individual outside the community—attempts to proselytize, for example. And neither would argue that a religious community may legitimately seek protection, vis-à-vis the individual, on the ground that the community embodies traditional cultural authority. Strong corporate claims such as these do appear in other versions of human dignity and rights, however.

### B. Corporate Approaches

Corporate approaches are less familiar to Western readers. These approaches do not ignore individual rights, but, on important issues, they give priority to the dignity and rights of religious communities. Some approaches emphasize the "natal" quality of the religious community in question—the fact that people are born into it.<sup>132</sup> Others stress the community's

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127 The concurring justices in *Hosanna-Tabor* did use the phrase "religious autonomy." See *id.* at 710 (Thomas, J., concurring) ("[T]he Religion Clauses guarantee religious organizations autonomy in matters of internal governance . . . ."); *id.* at 711 (Alito, J., concurring).

128 *Id.* at 706.

129 See, e.g., *Our First, Most Cherished Liberty*, U.S. CONF. OF CATHOLIC BISHOPS, <http://www.usccb.org/issues-and-action/religious-liberty/our-first-most-cherished-liberty.cfm> (last visited Feb. 21, 2016) (quoting *Hosanna-Tabor* with approval).

130 For an argument that *Hosanna-Tabor* is consistent with an individualist view of religious freedom, see Schragger & Schwartzman, *supra* note 122, at 975–76.

131 Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 982 (2013).

132 See Casanova, *supra* note 14, at 142. Casanova gives Judaism and Hinduism as examples of this sort of justification. *Id.*

traditional role in national culture and identity.<sup>133</sup> Still others emphasize the essential truth of the community's spiritual claims.<sup>134</sup> But all corporate approaches share the conviction that the state may legitimately act to protect religious communities from threats to their integrity.

In this Section, I address two corporate approaches, those of the Russian Orthodox Church and the Organization of Islamic Cooperation. Serious differences exist between them. For example, Islam's prohibition on conversion and its conception of religion as, at least in part, a matter of descent, have no equivalents in Orthodox thought. Yet both approaches have strong corporate elements that appear neither in the Catholic nor secularist understandings.

## 1. The Russian Orthodox Church

In some respects, the Russian Orthodox Church's *Basic Teaching* tracks the language of *Dignitatis Humanae*. Like *Dignitatis Humanae*, it acknowledges that "the dignity and ultimate worth of every human person are derived from the image of God."<sup>135</sup> Similarly, it affirms the importance of individual freedom of conscience. Every human person has the right to choose "particular philosophical guidelines for his life."<sup>136</sup> Freedom of conscience "protects the individual against any arbitrary treatment of his inner world, against any forcible imposition of particular convictions upon him."<sup>137</sup> For this reason, the state must treat citizens equally, "regardless of their attitude to religion."<sup>138</sup>

Like *Dignitatis Humanae*, too, the *Basic Teaching* maintains that freedom of conscience has a corporate dimension. Religious organizations, as well as individuals, enjoy its protection. "[T]he freedom of conscience, proclaimed and confirmed by law," it proclaims, allows the "Church to preserve her identity and independence from people of other convictions and gives her a legal ground both for the immunity of her internal life and public witness to the Truth."<sup>139</sup> This freedom extends to all religious communities—provided they have roots in a country's history and tradition, an important limitation, as I shall explain. Finally, like *Dignitatis Humanae*, the *Basic Teaching* recognizes that a nation's culture may give certain religions a dominant role in public life, and that civil law may appropriately reflect that fact.<sup>140</sup>

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133 See Silvio Ferrari, *Proselytism and Human Rights*, in CHRISTIANITY AND HUMAN RIGHTS, *supra* note 1, at 253, 257 (discussing Orthodox Christianity).

134 See Casanova, *supra* note 14, at 142.

135 *Basic Teaching*, *supra* note 39, § I.2.

136 *Id.* § IV.3.

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

Nonetheless, the *Basic Teaching* shows a fundamental ambivalence about individual freedom of conscience that *Dignitatis Humanae* does not.<sup>141</sup> In a somewhat cryptic statement, the *Basic Teaching* suggests that legal protection for freedom of conscience, although necessary, represents a kind of social failure: “[T]he freedom of conscience asserted as a legal principle points to the fact that society has lost religious goals and values.”<sup>142</sup> The document does not elaborate, but Alexander Agadjanian offers a plausible explanation: the fact that individuals assert a legal right to freedom of conscience reflects the fact that civil society has failed to live out the truth of Orthodox Christianity and that some individuals therefore wander from the correct faith.<sup>143</sup> Civil society must allow those individuals to do so, but their choice reflects a sad societal breakdown.

Of course, *Dignitatis Humanae* also posits the existence of objective religious truth. But the Vatican II document contains no such language suggesting that legal protection for freedom of conscience reflects a social failing. Where *Dignitatis Humanae* celebrates the free exchange of religious ideas, even erroneous ideas, the *Basic Teaching* sometimes seems to “resent[ ] the pluralism of worldviews that is normal in modern societies.”<sup>144</sup> Moreover, the *Basic Teaching* privileges the corporate claims of religious communities in a way that goes well beyond *Dignitatis Humanae*. According to the *Basic Teaching*, in some circumstances, the claims of a religious community outweigh the rights of individuals—not only with respect to internal church governance, but more broadly.

For example, the *Basic Teaching* contains a paragraph, titled “Collective Rights,” which opposes the rights of communities—including, importantly, religious communities—to those of individuals.<sup>145</sup> “The rights of an individual should not be destructive for the unique way of life and traditions . . . for various religious, national and social communities,” it states.<sup>146</sup> Other passages provide more detail. For example, the document indicates that freedom of conscience cannot be employed in a manner that allows an individual to “damage” another person’s “spiritual and cultural identity.”<sup>147</sup> In fact, the *Basic Teaching* holds that the “preservation of religious and cultural traditions” is itself a human right.<sup>148</sup> Indeed, according to Agadjanian, the document’s final section suggests that, as between individual and corporate rights, the latter receive priority.<sup>149</sup>

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141 On the ambivalence toward freedom of conscience in the *Basic Teaching*, see STOECKL, *supra* note 48, at 79.

142 *Basic Teaching*, *supra* note 39, § IV.3 (emphasis omitted) (quoting RUSSIAN ORTHODOX CHURCH, DEP’T FOR EXTERNAL CHURCH RELATIONS, *The Basis of the Social Concept*, III.6, <https://mospat.ru/en/documents/social-concepts/iii/> (last visited Feb. 21, 2016)).

143 See Agadjanian, *supra* note 42, at 279.

144 STOECKL, *supra* note 48, at 79.

145 *Basic Teaching*, *supra* note 39, § IV.9.

146 *Id.*

147 *Id.* § IV.3.

148 *Id.* § V.2.

149 See Agadjanian, *supra* note 42, at 281.

The *Basic Teaching's* ambivalence about individual rights and its emphasis on the religious community reflect central themes in Orthodox thought, which distrusts Western-style individualism.<sup>150</sup> It is not simply a matter of rejecting the “excesses of individualism” in the matter of Western communitarian scholars.<sup>151</sup> Orthodoxy often expresses discomfort with the very idea of the autonomous individual as a rights-holder.<sup>152</sup> Orthodox thought emphasizes the relational self: a person is defined by relationship to others in the body of the Church. As Daniel Payne writes, “the Orthodox tradition understands the human being ecclesially rather than individualistically.”<sup>153</sup> As a consequence, the tradition has a problem with the idea of individual rights in the Western manner.<sup>154</sup> “[I]f there is any concept of rights in Orthodox political culture,” Payne explains, it is not individual rights, but “group rights.”<sup>155</sup>

Moreover, Orthodox thought conflates religious and national identities in a stronger way than in the West. To be sure, religion can serve as a marker of national and cultural identity in the West as well; consider Italy and Poland. And citizenship in Orthodox countries is not directly tied to religion; as a formal matter, one can be a Russian citizen and not an Orthodox Christian. But religion and nationality are intertwined in a particularly powerful way in the Orthodox world. In Russia, for example, it is a “widely accepted idea”—“shared by politicians, intellectuals and clergy”—that Orthodoxy is *the* fundamental factor in national identity.<sup>156</sup> Other historical and ethnic factors pale in comparison. The same may be said for other Orthodox countries, like Greece.<sup>157</sup>

As a consequence, challenges to the Orthodox Church, especially by persons claiming individual human rights, are apt to be seen as threats to national and cultural identity, as well as to religious integrity. This dynamic appears especially in connection with disputes about proselytism by Western groups. Before turning to those controversies, however, it is useful to con-

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150 *E.g.*, Brüning & van der Zweerde, *supra* note 41, at 10. For an alternative view, see PAPANIKOLAOU, *supra* note 45, at 6.

151 Agadjanian, *supra* note 42, at 287.

152 *Id.* at 287–88.

153 Daniel P. Payne, *The Clash of Civilisations: The Church of Greece, the European Union and the Question of Human Rights*, 31 RELIGION ST. & SOC'Y 261, 263 (2003) (citing JOHN D. ZIZIOULAS, *BEING AS COMMUNION* 49–66 (1993)).

154 Among the Orthodox theologians most cited for this proposition are Christos Yannaras and Vigen Guroian. *See generally, e.g.*, Vigen Guroian, *Human Rights and Modern Western Faith: An Orthodox Christian Assessment*, 26 J. RELIGIOUS ETHICS 241 (1998); Christos Yannaras, Presentation at Holy Cross Greek Orthodox School of Theology: Human Rights and the Orthodox Church (Oct. 4, 2002), <http://www.goarch.org/special/pluralistic2002/presentations/yannaras>. For a critique of these theologians, see John A. McGuckin, *The Issue of Human Rights in Byzantium and the Orthodox Christian Tradition, in* CHRISTIANITY AND HUMAN RIGHTS, *supra* note 1, at 173, 187.

155 Payne, *supra* note 153, at 263.

156 Brüning, *supra* note 40, at 144.

157 *See* Payne, *supra* note 153, at 265.

sider another corporate approach to dignity and rights—that of the Organization of Islamic Cooperation.

## 2. The Organization of Islamic Cooperation

Mainstream Islam places even more emphasis on the dignity of the religious community. This is not to say that Islam ignores the individual believer. On the contrary, individual personal responsibility is central to Islam.<sup>158</sup> “The first and most important element of Muslim identity,” Tariq Ramadan writes, is personal faith.<sup>159</sup> The *Shahada*, recitation of which is sufficient to make one a Muslim, is expressed in the singular (“I testify that there is no god but Allah, and I testify that Muhammad is the Messenger of Allah.”).<sup>160</sup> And Islamic human rights instruments recognize the claims of the individual. The Cairo Declaration, for example, grants individual persons the right to property, privacy, security, and freedom from unlawful arrest, among other things, as well as the right to equality under the law.<sup>161</sup>

Yet Islam gives priority to corporate religious identity to a greater degree than either contemporary Catholicism or Orthodox Christianity. This is because Islam, at least in part, is what José Casanova calls a “natal” religion.<sup>162</sup> In addition to personal choice, one may become a Muslim simply by birth.<sup>163</sup> In classical Islamic law, the child “of a Muslim father is Muslim irrespective of any expression of will.”<sup>164</sup> By contrast, a child of Christian parents is not a Christian until baptism.<sup>165</sup> (The practice of infant baptism, in which parents stand in to express a decision in the child’s behalf, elides the distinction somewhat, but no Christian tradition teaches a person is a Christian simply by virtue of his ancestry). Indeed, in some interpretations, the concept of Islam by descent goes back beyond one’s “parents” to one’s “grandparents, or even more distant ancestors.”<sup>166</sup> People born Baha’is may be considered apostates from Islam, for example, because their ancestors left the religion generations ago.<sup>167</sup>

It follows that Islam, like other natal religions, has a particularly powerful corporate dimension. In Islam, one may draw one’s religious identity, not from any personal decision, but from the faith community into which one is born—the Islamic *Ummah*. Put another way, one’s religious identity may not

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158 See Abdullahi Ahmed An-Na’im, *The Compatibility Dialectic: Mediating the Legitimate Coexistence of Islamic Law and State Law*, 73 *MODERN L. REV.* 1, 3 & n.3 (2010).

159 TARIQ RAMADAN, *WESTERN MUSLIMS AND THE FUTURE OF ISLAM* 79 (2004).

160 MALISE RUTHVEN, *ISLAM IN THE WORLD* 60 (3d ed. 2006).

161 See CAIRO DECLARATION, *supra* note 29, arts. 15, 18–20.

162 Casanova, *supra* note 14, at 142. Casanova uses this term to refer to Judaism and Hinduism, but it applies to Islam as well.

163 Asher Maoz, *Proselytism and the Right to Change Religion*, in *LAW AND RELIGION IN THE 21ST CENTURY* 243, 245 (Silvio Ferrari & Rinaldo Cristofori eds., 2010).

164 Ferrari, *supra* note 133, at 255.

165 See Maoz, *supra* note 163, at 245.

166 MAYER, *supra* note 53, at 171.

167 See *id.*



be something one chooses for oneself, but a given. For a person born into Islam, the only possible choice would be the affirmative one to abandon it, a choice that would entail abandonment of one's family and community as well.<sup>168</sup> This reasoning helps explain why Islam holds the *Ummah* in such high regard, and why it views conversion from Islam with such alarm. Apostasy represents not only a personal reversion to unbelief, but a kind of treason, a decision to cut oneself off from, and thus weaken, the *Ummah*—in Muslim understanding, the only guarantor of eternal life.<sup>169</sup> Moreover, apostasy is naturally seen as reflecting a threat from the outside, an attempt by enemies to lessen the *Ummah's* cohesion and steal souls from their rightful home. The convert is a sort of collaborator.

Indeed, classical Islamic law bars apostasy. Once one becomes a Muslim, conversion to another religion is legally impossible.<sup>170</sup> Apostasy, like treason in secular legal systems, is a crime punishable by death (or, in some interpretations, imprisonment for women).<sup>171</sup> The *Ummah* must offer the apostate an opportunity to repent and return to Islam; if he fails to do so, he is executed.<sup>172</sup> Apostasy works a kind of "civil death" as well.<sup>173</sup> The convert is expunged from the community; his marriage dissolved, his children taken, and, at least in some interpretations, his entire property forfeited to the state.<sup>174</sup> The apostate may neither inherit nor pass property by bequest to someone else.<sup>175</sup> True, some contemporary Muslim scholars question these classical rules. An-Na'im, for example, points out that the Qur'an itself does not impose a punishment for apostasy, and that "substantial confusion and fluidity" have always existed in the treatment of apostasy in classical Islamic law.<sup>176</sup> And Mohammad Kamali argues that the hadith imposing the death penalty for apostasy is limited to a specific, historical context.<sup>177</sup> But the classical view of apostasy and its consequences remains very powerful in Islamic law today.<sup>178</sup>

The Cairo Declaration reflects this fact. Notwithstanding its references to individual rights, the structure of the Declaration suggests that the religious community has priority. For example, unlike either *Dignitatis Humanae*

168 For a helpful discussion, see Ferrari, *supra* note 133, at 255.

169 See KALANGES, *supra* note 56, at 95; see also Casanova, *supra* note 14, at 142.

170 See ABDULLAHI AHMED AN-NA'IM, ISLAM AND THE SECULAR STATE 119 (2008).

171 See MAYER, *supra* note 53, at 169. For the analogy to treason, see AN-NA'IM, *supra* note 170, at 118.

172 See MAYER, *supra* note 53, at 169.

173 *Id.*; see also Robert W. Hefner, *Human Rights and Democracy in Islam: The Indonesian Case in Global Perspective*, in RELIGION AND THE GLOBAL POLITICS OF HUMAN RIGHTS, *supra* note 11, at 39, 48 (noting accused would lose all civil rights).

174 For a good discussion of the consequences of apostasy in classical Islamic law, see THE ASHGATE RESEARCH COMPANION TO ISLAMIC LAW 129–30 (Rudolph Peters & Peri Bearman eds., 2014).

175 See AN-NA'IM, *supra* note 170, at 119.

176 *Id.* at 122.

177 See MOHAMMAD HASHIM KAMALI, SHARI'AH LAW: AN INTRODUCTION 173 (2008).

178 See KALANGES, *supra* note 56, at 95.

or the *Basic Teaching*, the Cairo Declaration does not begin by affirming the dignity of the individual person. Instead, it begins by affirming the Muslim community, the *Ummah*. The very first clause praises “the civilizing and historical role of the Islamic Ummah which God made the best nation,” the one “that has given mankind a universal and well-balanced civilization in which harmony is established between this life and the hereafter and knowledge is combined with faith.”<sup>179</sup> In case anyone should miss the point, the preamble goes on to affirm “the role that this Ummah should play to guide a humanity confused by competing trends and ideologies and to provide solutions to the chronic problems of this materialistic civilization.”<sup>180</sup> Article 1, which contains the Declaration’s general teaching on human dignity, likewise speaks first in terms of community. Before stating that “[a]ll men are equal in terms of basic human dignity,” it notes that “[a]ll human beings form one family whose members are united by submission to God.”<sup>181</sup> This seems an unmistakable reference to the *Ummah*. In Islamic thought, the community that is “united by submission to God” is the *Ummah* itself.

Similarly, the Declaration reflects the classical Islamic prohibition on apostasy. Article 10 provides, “Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.”<sup>182</sup> Although Article 10 speaks in terms of compulsion and exploitation, one must remember that it is ultimately “subject to the Islamic Shari’ah,”<sup>183</sup> which provides “the only source of reference for the explanation or clarification of any of the [Declaration’s] articles.”<sup>184</sup> The Sharia prohibits *all* conversions from Islam, not only those from compulsion or exploitation. As Mayer writes, given the Declaration’s general outlook, one must “assum[e] that all conversions from Islam would be deemed to have resulted from ‘compulsion’ or ‘exploitation,’ whereas presumably any technique that was applied to convert people *to* Islam would be acceptable.”<sup>185</sup>

The Cairo Declaration’s recognition of the classical Islamic prohibition on apostasy implicates two of the most controversial issues in contemporary human rights law: proselytism and conversion.<sup>186</sup> On those issues, individualist accounts of human dignity diverge sharply from their corporate counterparts.

179 CAIRO DECLARATION, *supra* note 29, pmb1.

180 *Id.*

181 *Id.* art. 1.

182 *Id.* art. 10.

183 *Id.* art. 24.

184 *Id.* art. 25.

185 MAYER, *supra* note 53, at 185 (quoting CAIRO DECLARATION, *supra* note 29, art. 10).

186 See Maoz, *supra* note 163, at 243 (“Proselytism and the right to change religion are among the most controversial issues in the area of religious human rights.”).

C. *Proselytism and the Right to Convert*

In the nature of things, an implicit link exists between conversion and proselytism. A person is unlikely to change his religion unless he first learns about a new religion from someone else. And, in fact, the two rights—the right to convert and the right to seek converts—have been linked in international human rights instruments from the beginning. As we have seen, Article 18 of the Universal Declaration provides that freedom of religion “includes freedom to change [one’s] religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”<sup>187</sup> Today, a broad consensus exists among lawyers that international human rights law grants both the right to change one’s religion and the right to persuade others to change their religion through non-coercive means.<sup>188</sup>

Nonetheless, both rights have met significant resistance, mostly, but not exclusively, from Muslim-majority countries. One can appreciate the resistance by tracing changes in the language of international instruments over time. At the vote on the Universal Declaration in 1948, although most Muslim-majority nations endorsed the document, Saudi Arabia abstained, objecting that the provision on the right to change one’s religion was inconsistent with Islam.<sup>189</sup> The fact that the Declaration did not create binding obligations may explain why other Muslim-majority nations went along with it.<sup>190</sup> Two decades later, at the time of the ICCPR—which, unlike the Universal Declaration, does create binding obligations—opposition from Muslim-majority countries had hardened.<sup>191</sup> The ICCPR’s provision on religious freedom softens the language about the right to change one’s religion.<sup>192</sup> It grants only the right “to have or to adopt a religion or belief of [one’s] choice.”<sup>193</sup>

By 1981, when the UN adopted another declaration on religious freedom, the language weakened still further, again because of objections from Muslim-majority countries.<sup>194</sup> The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief contains no language about changing or adopting a religion. It refers only to the

187 G.A. Res. 217 A (III), *supra* note 4, art. 18.

188 See Special Rapporteur, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, §§ 16, 26, U.N. Doc. A/67/303 (Aug. 13, 2012) (by Heiner Bielefeldt) [hereinafter Special Rapporteur’s Report].

189 See GLENDON, *supra* note 4, at 154, 168.

190 Cf. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 63 (2010) (“The general consensus about the itemization of rights suggests that little was at stake . . .”); Gunn, *supra* note 6, at 196 & n.7 (absence of formal objections explained by the fact that the Declaration was understood not to bind states).

191 See KALANGES, *supra* note 56, at 63.

192 See Christian Walter, *The Protection of Freedom of Religion Within the Institutional System of the United Nations*, in *UNIVERSAL RIGHTS IN A WORLD OF DIVERSITY*, *supra* note 8, at 588, 591.

193 G.A. Res. 2200A (XXI), *supra* note 22, art. 18.

194 See Maoz, *supra* note 163, at 248–49.

right “to have a religion or whatever belief of [one’s] choice.”<sup>195</sup> The most recent Human Rights Council resolution on religious freedom, adopted in 2014, restores the language about the right to “adopt” a religion, but does so in a way that implicitly slights the right to convert.<sup>196</sup> The resolution provides for “the freedom to have or not to have, or to adopt, a religion or belief of one’s choice.”<sup>197</sup> As Malcolm Evans observes, “[t]he very structure of the sentence points to what remains missing—the right to change religion or belief.”<sup>198</sup>

Most human rights lawyers maintain that these linguistic changes are not substantive, and that the right to convert remains.<sup>199</sup> The 1981 Declaration, for example, contains a savings clause that preserves any right contained in the Universal Declaration—including, presumably, the right to convert—and a 1993 Human Rights Committee statement maintains that freedom of religion continues to include “the right to replace one’s current religion or belief with another.”<sup>200</sup> But the changes obviously reflect unease with the idea that individuals have a right to convert. And, notwithstanding international commitments, many nations, not only Muslim-majority nations, continue to restrict conversions and non-coercive efforts to proselytize.<sup>201</sup> Often, these restrictions take the form of laws against so-called fraudulent conversions that result from missionaries’ taking advantage of listeners’ poverty or naiveté.<sup>202</sup> In practice, however, these laws restrict non-exploitative proselytism as well.<sup>203</sup> Indeed, the U.N.’s Special Rapporteur for Freedom of Religion or Belief wrote recently that such restrictions have become “a human rights problem of great concern . . . in various parts of the world.”<sup>204</sup>

The controversy surrounding proselytism and conversion reflects the conflict between individualist and corporate perspectives on human dignity.<sup>205</sup> From individualist perspectives, both the right to convert and the right to seek converts are obvious. Consider first the secularist understand-

195 G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, art. 1 (Nov. 25, 1981) [hereinafter 1981 U.N. Declaration].

196 Human Rights Council Res. 25/12, § 1, U.N. Doc. A/HRC/RES/25/12 (Jan. 3, 2014).

197 *Id.*

198 Malcolm D Evans, *Challenging Conventional Assumptions: The Case for a Preventive Approach to the Protection of the Freedom of Religion or Belief*, in CHANGING NATURE OF RELIGIOUS RIGHTS, *supra* note 12, at 25, 30.

199 *See, e.g.*, Special Rapporteur’s Report, *supra* note 188, §§ 17–18.

200 Human Rights Comm., General Comment No. 22, *Freedom of Thought, Conscience or Religion*, art. 18, § 5 (1993), in COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, U.N. Doc. HRI/Gen/Rev.9 (May 27, 2008); *see also* 1981 U.N. Declaration, *supra* note 195, art. 8.

201 *See* Special Rapporteur’s Report, *supra* note 188, §§ 36–39, 44–46; *see also* Hertzke, *supra* note 8, at 124.

202 *See* Special Rapporteur’s Report, *supra* note 188, § 44.

203 *See id.* § 45.

204 *Id.* § 15.

205 *See* Casanova, *supra* note 14, at 141–42.

ing, in which human dignity inheres in the subjective choice of the individual person. This understanding implies that the individual always has “the freedom to change a belief or to retain one, as well as to invite others to reconsider their faith.”<sup>206</sup> Heiner Bielefeldt describes the position well: Religious freedom “implies having options to freely develop, change, or defend one’s . . . identity and to reach out to others.”<sup>207</sup> One’s religious identity “is always an identity in the making, in the sense that it can change in many different ways and can legitimately be exposed to non-coercive missionary activities, including non-violent forms of provocation.”<sup>208</sup> As long as proselytism does not involve coercion or exploitation—both of which would render the choice to convert illegitimate—the secularist position would allow it.

The Catholic understanding is the same. As we have seen, *Dignitatis Humanae* teaches that the individual human person has the right to inquire into religious truth and conform himself to it as best he can.<sup>209</sup> In the nature of things, the inquiry cannot be a solitary one. The individual must be able to communicate with others in an unimpeded way. The inquiry into religious truth must be “free” and “carried on with the aid of teaching or instruction, communication and dialogue, in the course of which men explain to one another the truth they have discovered, or think they have discovered, in order thus to assist one another in the quest for truth.”<sup>210</sup>

Note the phrase, “think they have discovered.” Under *Dignitatis Humanae*, the right to proclaim one’s religious beliefs, and to try to convince others, does not depend on the correctness of the message. Even erroneous religions have the right to seek converts. True, *Dignitatis Humanae* condemns coercive and exploitative proselytism. “[I]n spreading religious faith and in introducing religious practices,” it teaches, “everyone ought at all times to refrain from any manner of action which might seem to carry a hint of coercion or of a kind of persuasion that would be dishonorable or unworthy, especially when dealing with poor or uneducated people.”<sup>211</sup> In principle, however, in contemporary Catholic understanding, all individual persons and religious communities have the right publicly to seek converts. A state may not restrict them in order to protect traditional or culturally significant religions.

Since Vatican II, the Catholic Church has honored this teaching in practice. Catholic bishops occasionally complain about “sheep-stealing,” particularly in Latin America, where Pentecostal and Evangelical churches have had notable success in gaining converts from Catholicism.<sup>212</sup> But they have not called for legal restrictions. As Silvio Ferrari explains, although Catholic rep-

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206 Heiner Bielefeldt, *Misperceptions of Freedom of Religion or Belief*, 35 *HUM. RTS. Q.* 33, 44 (2013).

207 *Id.*

208 *Id.*

209 *See Dignitatis Humanae*, *supra* note 31, para. 3.

210 *Id.*

211 *Id.* para. 4.

212 *See Ferrari*, *supra* note 133, at 261.

representatives frequently stress that Pentecostals and Evangelicals should respect Latin America's Catholic heritage, they have never argued that proselytism by these groups should be unlawful.<sup>213</sup> This is so, he maintains, because the Catholic Church in Latin America has internalized the teachings on religious freedom contained in Vatican II documents like *Dignitatis Humanae*.<sup>214</sup>

In short, both the secularist and the contemporary Catholic positions endorse the rights to convert and to seek converts, limited only by a concern with preventing coercive or exploitative conduct. In this, both positions differ greatly from corporate approaches like those of the Organization of Islamic Cooperation and the Russian Orthodox Church. From these perspectives, proselytism and conversions pose illegitimate threats to the target community.<sup>215</sup> Because religion and culture are often deeply intertwined, proselytism is perceived as an effort to erase traditional communal identities and replace them with new, foreign ones. As An-Na'im writes, proselytism is not seen as letting the "free market of religious ideas" prevail.<sup>216</sup> It is about unfair domination on the part of proselytizers, who inevitably come from outside.

Consider first the position of the OIC. I have already explained the Cairo Declaration's implicit endorsement of the classical rule prohibiting apostasy from Islam. The Declaration also reflects the traditional rule against attempts to proselytize among Muslims, even in non-coercive ways. Under Article 22, individuals have a right to express their opinions freely and "advocate what is right"—but only in a manner consistent with the Sharia.<sup>217</sup> Of course, proselytism inevitably involves criticism, if only implicit, of the Sharia, and classical Islamic law would certainly not view the propagation of a rival faith as "advocating what is right." As a result, one must understand the Cairo Declaration to restrict attempts by non-Muslims to convince Muslims to join their faith.

Indeed, as I have explained, resistance from Muslim-majority countries has led to the weakening of international human rights instruments on the right to convert. And a number of Muslim-majority states (though not all) continue to restrict conversions from Islam and proselytism among Muslims.<sup>218</sup> A few examples will suffice. Morocco and Algeria criminalize any attempt to "shake the faith of a Muslim."<sup>219</sup> Pakistan formally allows both proselytism and conversion, but prohibits blasphemy and other speech that insults Islam. In practice, the blasphemy laws operate as a limitation on both

213 See *id.* at 262.

214 See *id.*

215 See ABDULLAHI AHMED AN-NA'IM, *MUSLIMS AND GLOBAL JUSTICE* 203–07 (2010).

216 *Id.* at 205 (quotation omitted).

217 CAIRO DECLARATION, *supra* note 29, art. 22.

218 See Roberta Aluffi Beck-Peccoz, *Proselytism and the Right to Change Religion in Islam, in LAW AND RELIGION IN THE 21st CENTURY*, *supra* note 163, at 253, 253.

219 *Id.* at 255 (Morocco); *id.* at 256 (Algeria).

conversions and the propagation of non-Muslim faiths.<sup>220</sup> In Malaysia, the constitution allows the state to criminalize “the propagation of any religious doctrine or belief among persons professing the religion of Islam.”<sup>221</sup> In all these cases, the principal concern is the collective. Proselytism is restricted “because it is perceived as a major threat to the coherence and cohesion” of the *Ummah*.<sup>222</sup>

Although the Russian Orthodox Church’s position differs significantly from the OIC’s—it does not endorse legal bans on conversion, even implicitly—it too reflects a corporate understanding that restricts proselytism.<sup>223</sup> The *Basic Teaching*, recall, emphasizes the dignity of religious communities, particularly those that embody national and cultural traditions, and holds that preservation of those traditions is itself a human right. It follows that the state has a legitimate interest in protecting traditional religious communities from outside threats, including from rival religions. Indeed, the Russian Orthodox Church consistently has invoked a corporate understanding of religious freedom to support restrictions on the activities of non-Orthodox religions in Russia.

For example, although the Church’s 2000 statement, *Basic Principles of Attitude to the Non-Orthodox*, endorses cooperation with “traditional confessions” on social issues, it calls for restrictions on the missionary activities of non-Orthodox groups within the Russian Orthodox Church’s “canonical territory,” including Russia and the Baltic States.<sup>224</sup> Traditional religious communities, the statement concedes, have a right “to witness to their faith and conduct religious education among the population groups that traditionally belong to them.”<sup>225</sup> But they may not proselytize among Orthodox Christians and attempt to “steal[ ]” Orthodox faithful.<sup>226</sup> The statement contemplates even greater restrictions on non-traditional religions—non-Trinitarian Christians, for example. It opposes “any destructive missionary activity” at all on the part of these “sects.”<sup>227</sup>

Subsequent statements by Russian Orthodox Church leaders elaborate on the idea of a “cultural canonical territory,” within which a church may properly limit proselytism by foreign religious organizations.<sup>228</sup> Because of cultural and historical ties, the argument goes, a particular religion may have

220 *Id.* at 257–58.

221 Ferrari, *supra* note 133, at 264 (quoting MALAY. CONST. art. 11, § 4).

222 Beck-Peccoz, *supra* note 218, at 259.

223 *Cf.* Petkoff, *supra* note 12, at 218–19 (noting cooperation between Russian Orthodox Church and Muslim organizations on the question of proselytism).

224 *Basic Principles of Attitude to the Non-Orthodox*, THE RUSSIAN ORTHODOX CHURCH § 6.1, <https://mospat.ru/en/documents/attitude-to-the-non-orthodox/vi/> (last visited Feb. 21, 2016).

225 *Id.* § 6.3.

226 *Id.* § 6.2.

227 *Id.* § 6.3.

228 *See* Ferrari, *supra* note 133, at 260 (quoting Hilarion Alfeyev, *The Practical Application of the Principle of Canonical Territory*, 87 EUROPAICA BULLETIN (Feb. 17, 2006), <http://orthodoxeurope.org/page/14/87.aspx>).

a natural home in a particular country, and a legitimate claim to protection from outsiders. In Russia, for example, “the entire population” has “cultural roots” that attach it to Orthodoxy.<sup>229</sup> Even non-religious Russians are, in a way, latent Orthodox. Religious freedom for the Orthodox Church thus requires non-Orthodox groups to limit their activities to their own members and allow the Orthodox to tend to everyone else.<sup>230</sup> This communal view of religious freedom obviously conflicts with the individualism of both the Catholic and secularist understandings. Indeed, when the Catholic Church re-established its own hierarchy in Russia in 2002, it occasioned a sharp debate in which the Catholic and Russian Orthodox Churches each accused the other of violating human rights.<sup>231</sup>

The second example is the Russian anti-proselytism law of 1997. Formally known as the Law on Freedom of Conscience and Religious Associations, the law imposes a number of restrictions on the activities of non-Orthodox groups in Russia.<sup>232</sup> For example, no religious group may operate legally unless it has been registered with the government for fifteen years.<sup>233</sup> Moreover, the act’s preamble divides religious groups into three categories, implicitly in order of merit. Orthodoxy comes first, as having made a “special contribution” to Russian history, spirituality, and culture.<sup>234</sup> Next come non-Orthodox Christianity, Islam, Buddhism, Judaism, and other religions that have “inseparable” historical associations with “Russia’s peoples.”<sup>235</sup> Finally, at the bottom, are new religions that lack any traditional place in Russia.<sup>236</sup>

The Russian Orthodox Church strongly supported (and supports) the 1997 law, and it is easy to see why.<sup>237</sup> The law reflects the Church’s understanding of religious freedom, which emphasizes the dignity and rights of traditional religious communities—principally, of course, the Russian Orthodox Church itself.<sup>238</sup> The law comports with the corporate vision of religious freedom the Russian Orthodox Church has consistently expressed in documents like the *Basic Teaching* and the *Basic Principles*. Of course, it entirely fails to comport with individualist understandings of religious freedom, and it has occasioned great criticism from human rights advocates in the West.<sup>239</sup> The U.S. Commission on International Religious Freedom regularly cites the law in its annual reports on violations of religious freedom.<sup>240</sup>

229 *Id.*

230 *See id.*

231 *See id.* at 260–61.

232 *See* STOECKL, *supra* note 48, at 29.

233 *See id.*

234 *Id.* at 30.

235 *Id.*

236 *See id.*

237 On the influence of the Moscow Patriarchate in the law’s passage, see *id.* at 29.

238 As Katherine Stoeckl observes, the Church led the process of defining which groups would be included in the list of traditionally important religions. *Id.* at 31.

239 *See, e.g.,* FARR, *supra* note 16, at 23.

240 *See* STOECKL, *supra* note 48, at 30.



## III. CONCLUSION: TOWARD A MORE MODEST APPROACH

Fifty years after *Dignitatis Humanae*, no universal definition of human dignity exists. A variety of inconsistent understandings compete with one another, preventing agreement on crucial legal issues. With respect to same-sex marriage and other “new rights,” objective understandings of dignity, such as those promoted by the Catholic and Russian Orthodox Churches and the Organization of Islamic Cooperation, conflict with the secularist, subjective understanding that most Western states and NGOs endorse. On other issues, like proselytism and the right to convert, the alliances shift. With respect to those issues, the individualism of the Catholic Church, secularist human rights advocates, and many Western states conflicts with the corporate understanding of dignity endorsed by the Russian Orthodox Church, the Organization of Islamic Cooperation, and many non-Western states. When it comes to human dignity, a stalemate exists.

How should we lawyers respond? I can only offer some brief observations here. One response would be to work harder to achieve a universal consensus on dignity and rights. Some scholars, particularly those from a Western perspective, favor this approach. Invariably, it involves convincing others to accept the scholars’ own definitions of dignity: the universal standard, it turns out, is one’s own. For example, Thomas Farr argues the United States should do more to promote the objective, individualist, natural-law understanding of dignity reflected in documents like *Dignitatis Humanae*.<sup>241</sup> Farr criticizes American administrations for failing to persuade other international actors of the wisdom of this understanding. For example, he says, the United States should make it “a strategic priority” to convince the Russian Orthodox Church to abandon its “shortsighted” opposition to proselytism.<sup>242</sup> For Farr, the Church’s focus on communal religious identity is a pretext for maintaining an illegitimate “religious monopoly” over believers’ consciences—a monopoly which, in the long run, will only serve to injure Russian Orthodoxy.<sup>243</sup>

Most Western-oriented legal scholars would not share Farr’s commitment to natural law. But even scholars with a subjective understanding often share his conviction that others across the globe must give up their mistaken ideas about dignity in order to join an international consensus. Recall those who argue that human dignity requires that same-sex marriage be an international human right. Or those who insist that human dignity requires that international law include the rights to proselytize and convert. Like Farr, these scholars and lawyers also maintain that international institutions must adopt a universal understanding of dignity—their own.

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241 See FARR, *supra* note 16, at 20–25; cf. Philpott, *supra* note 16, at 176 (agreeing with Farr that the United States should “promote[ ] democratic regimes characterized by religious freedom and the participation of religious actors”).

242 Thomas FARR, *International Religious Freedom and Moral Responsibility*, in CHALLENGES TO RELIGIOUS LIBERTY, *supra* note 14, at 193, 199.

243 *Id.*

Perhaps these strategies will be successful with time. Perhaps, with commitment, Western human rights advocates will convince the rest of the world that individualist conceptions of dignity and religious freedom are normatively superior to others. Individualism has transformed religious communities in the past.<sup>244</sup> Maybe those communities that worry today about the corroding effects of individualism on tradition will also be convinced, in time, that they have nothing to fear, and much to gain, from adopting the Western approach.<sup>245</sup> Some evidence does exist for an emerging consensus on dignity. Andrea Pin, for example, argues that developments since the Arab Spring suggest the influence of international human rights standards on the Arab concept of *karama*, or dignity.<sup>246</sup>

To my mind, though, universalizing approaches seem doomed to failure. The different understandings of dignity and rights are simply too profound. Consider arguments within the West itself. It is very unlikely that actors with an objective understanding of dignity, such as the Catholic Church, will be persuaded to accept a subjective understanding that would reverse centuries of reflection and practice. Even Pope Francis, who more than other recent popes has suggested change within the Church, has endorsed the approach of *Dignitatis Humanae*.<sup>247</sup> Similarly, it is unlikely that advocates of subjective understandings will accept an objective approach that would negate policy goals, such as same-sex marriage, that they view as vital to human flourishing. Indeed, my impression, based on experience in the American legal academy, is that these two sides have increasingly little to say to one another.<sup>248</sup>

And that's just within the West. Disagreements that reflect what Samuel Huntington famously referred to as civilizational divides will be even more difficult to bridge.<sup>249</sup> Such disagreements often implicate profound concerns about cultures' histories, values, and identities. It is not a matter of failing to understand Western concepts of dignity and freedom; it is a matter of considering and rejecting them. Recall, for example, the Orthodox resistance to "Western" individualism that underlies much of the *Basic Teaching*, or the devotion to the *Ummah* that runs through the Cairo Declaration.<sup>250</sup> If the fights about traditional values resolutions at the Human Rights Council reveal anything, it is the deep resentment many non-Western countries and organizations feel for attempts by foreigners to change domestic cultures and

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244 See Casanova, *supra* note 14, at 151.

245 Cf. Farr, *supra* note 242, at 197 (discussing sociological research suggesting the benefits to religious communities of religious competition).

246 See Pin, *supra* note 17, at 73–80.

247 See *supra* note 15 and accompanying text.

248 Cf. Marc O. DeGirolami, *The Ideological Fragmentation of Public Law*, CTR. FOR L. & RELIGION F. (Jan. 12, 2015), <http://clrforum.org/2015/01/12/the-ideological-fragmentation-of-public-law/>.

249 See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 28 (1996).

250 See *supra* notes 150–55 and accompanying text (discussing *Basic Teaching*); *supra* notes 179–81 (discussing Cairo Declaration).

values.<sup>251</sup> As I once heard a leading law-and-religion scholar remark, if you give people a choice between “human rights” and their religion, most people will choose their religion every time. It is no more likely that the Russian Orthodox Church will adopt a “Western” understanding of proselytism than Western human rights advocates will adopt the Russian Orthodox Church’s view—a result, incidentally, which no one in the West seems ever to contemplate.

To my mind, the better part of wisdom lies in accepting the global disagreement on dignity and finding humane ways to accommodate it. Mary Ann Glendon has suggested one plausible solution: reliance on the margin of appreciation.<sup>252</sup> This concept, borrowed from the jurisprudence of the European Court of Human Rights, allows nations some discretion to adapt international human rights guarantees, including religious liberty, to local cultural and social realities.<sup>253</sup> The concept is not a panacea. As Glendon concedes, “[t]he devil . . . is in the details.”<sup>254</sup> It will be hard to achieve agreement on precisely how much discretion nations should have: “Where does legitimate pluralism end and pure cultural relativism begin?”<sup>255</sup> Moreover, the margin of appreciation would do nothing to resolve debates about dignity and religious liberty within a culture. Nonetheless, adopting the concept with respect to international guarantees of religious liberty could help resolve some of the tensions I have identified.

Alternatively, we might adopt a more modest conception of human rights, including the right to religious liberty—a minimalist approach that would seek agreement on basic things like ending violent persecution and providing a modicum of security for besieged religious minorities. Such an approach would no doubt seem defeatist to universalizers. Indeed, Farr has criticized the American State Department for limiting itself only to “denouncing persecution and saving victims” rather than “promoting freedom in any long-term political sense.”<sup>256</sup> But a more modest approach, one that attempts to prevent or at least limit the severity of humanitarian “catastrophe[s],” could do real good.<sup>257</sup> At this writing, millions of religious refugees are fleeing for their lives from Iraq and Syria, and the international community seems incapable of coordinating a response. An effective, minimalist

251 On the traditional values resolutions, see *supra* Section I.C.

252 See Mary Ann Glendon, *Religious Freedom in the 21st Century: Old Biases, Fresh Challenges, New Frontiers*, in UNIVERSAL RIGHTS IN A WORLD OF DIVERSITY, *supra* note 8, at 651, 659.

253 See *id.*

254 *Id.*

255 *Id.* at 659–60.

256 FARR, *supra* note 16, at 13.

257 MOYN, *supra* note 190, at 226 (discussing Professor Henry Steiner’s distinction between “human rights as catastrophe prevention and human rights as utopian politics”); cf. POSNER, *supra* note 10, at 7 (arguing that human rights law should follow developmental economics and “abandon . . . utopian aspirations” in favor of “small-scale interventions” that “can do good by relieving the worst forms of misery and poverty in the short term”).

approach would offer these suffering people much more help than attempts to forge a deep consensus on the contours of human dignity.

Developing these ideas must await another day. For now, I have shown that we lawyers should forgo the search for universal definitions of human dignity and religious freedom. In a world of competing cultures and values, such a search can only end in frustration. Either of the two more modest approaches I outline here would be much more likely to succeed in the real world—a world of human dignities—than the more ambitious programs currently on offer.