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VOICES OF CONSCIENCE

RICHARD SCHENK, OP*

I. THE PLACE OF CONSCIENCE IN *LIBERTY OF CONSCIENCE*¹

IN her remarkable book *Liberty of Conscience*, Martha Nussbaum chooses Roger Williams as her chief reference point for the historical and programmatic unfolding of *America's Tradition of Religious Equality*. Like Williams's work on *The Bloody Tenent of Persecution*,² this newer study might well be described as "a dialogue between truth and peace." The peace that is sought here is in answer to "dangers" perceived by the author *in recto et in obliquo*, trying to measure off a kind of cease-fire zone in particular between a perceived Christian right that would seek undue presence and preference in the political order and prominent forces on the left, and a right that would deny all attempts to accommodate religious interests in the public domain. Nussbaum locates this place of potential accord in conscience as the open space between such accommodations required or allowed by the First Amendment's Free Exercise Clause and those limited or precluded by its Establishment Clause.³ It is here that the *Cause of Conscience* can be provided the legal space it needs to flourish as the common ground required to keep open that space against the danger of collapse on one or both its sides.

The longest and, not surprisingly, from my vantage point one of the most convincing chapters of the book is dedicated to "The Struggle Over Accommodation."⁴ Here it is that the considerations associated especially with Free Exercise mark off one boundary of the sought-after field of civic tranquility. As Nussbaum recognizes, "[u]nder our Constitution, religion is special."⁵ While religion shares with the conscientious commitments that oppose it the common dignity of conscience, the special place of religion in the Constitution and the special protections provided there for religions are defended by the author—despite the memory of the theologian, Williams's contributions—less with any anticipated specific contribution of religions to the common good of religionists and nonreligionists alike than with the knowledge that religions are especially prone to be-

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1. MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* (2008).

2. ROGER WILLIAMS, *THE BLOODY TENENT OF PERSECUTION* (1644).

3. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

4. See NUSSBAUM, *supra* note 1, at 115-74.

5. *Id.* at 164.

come the target of specific persecution. Their special protection is argued here less from any anticipation of their specific contribution to the shared good of looking for ultimate meaning than from their more pronounced vulnerability to attack. We will see soon why that is the case.

With special attention directed to those whose critique of religion has sharpened rather than eased since the end of the Enlightenment, the limitation of religion checks the accommodations that could be expected under the Free Exercise Clause and forms that other boundary of our sought-after pacified space. Set amidst much impressive erudition, this blunt statement of the shape of today's challenge to religious accommodation is one of the most welcome contributions of the study. "And yet there remains always the question: why is it 'the free exercise of *religion*' that gets the breaks, when citizens have so many things to care about, and so many ways, both religious and nonreligious, of arranging their most fundamental conscientious commitments?"⁶ As Nussbaum notes:

[I]t has been a perpetual problem whether conscientious commitments that do not take a religious form receive any protection under the Free Exercise Clause. If they do not, there is an equality problem [I]f religion gets special breaks under the Free Exercise Clause, isn't this by itself a kind of establishment, of the sort Madison feared?⁷

This contemporary concern states with new force a question that was not entirely absent in the founding years of the Constitution, as Nussbaum stresses, but despite the Enlightenment trends of the epoch, seems to have been less ubiquitous than today. The question is less whether there has been development in the general attitude toward religion, than whether this newer development is more in continuity or in discontinuity with the fundamental direction of the Constitution's dynamic. The emphases set by the author are telling. Despite Nussbaum's passionate distancing of her own hermeneutic of reading Constitutional texts from the appearance of any interpretive fixation on "original" meanings, i.e. dedicated in principle to looking back at the texts appreciative of their development and transformation in later jurisprudence, Nussbaum finds it nevertheless important in arguing her case to stress the continuity over the discontinuity between the Founders' reservations regarding the establishment of religion and the potential offence to heightened atheistic sensitivities to be avoided today. This sense of correspondence is underscored by accentuating the antipathy of the Founders, while presenting current antipathies in remarkably even-handed terms; the current trend towards accommodation portrayed here seems at first surprisingly definite and secure. Corresponding to her accentuation of early opposition even to the nonpreferential sponsorship by government of any religious activity what-

6. *Id.* at 22.

7. *Id.* at 102, 104.

soever, the author mentions but—here in contrast to her description of fearful critiques aimed at specific religious minorities—does not dramatize the present-day arguments of those who “simply say there is no good reason for religion to be preferred, for accommodation purposes, over weighty secular commitments Cutting back on Free Exercise accommodation seems just the way to go for such people, since it evens up the playing field.”⁸ Such voices “are not exactly standing up for fairness across the board, much though they might be pursuing it for nonreligious people.”⁹ Rather, this option “defends an end to accommodation on fairness grounds, thinking about the wrong done to nonreligious people.”¹⁰

Rather understated in the book is the fact that the anxiety and fear of “the other” described here is directed not only at the unfamiliar “other” of religious minorities. As Bernhard Waldenfels has shown in his *Topography of the Stranger*,¹¹ the strangeness needed for certain kinds of love and hate is not simply given and received but is constituted to a large degree by the initially less distant “observer.” In good part, we make our strangers and what we find strange. The trend toward “cutting back on free exercise accommodation” follows the popular portrayal of religiosity itself as “foreign” and nefarious. In contemporary political discourse, religious believers of every stripe are increasingly identified as strange outsiders. Especially when the competition for the open space between the two clauses is one of symbolic recognition or “respect,” the xenological contours of current fundamental stances hostile to religion as a whole tend to be more pronounced than even in the 18th century.

While Nussbaum recognizes here the legitimate concern for nonreligious commitments and sees the Establishment Clause as that other boundary of civic peace that tries to protect these interests, her preference would be to do justice to such concerns without simply dismissing those rights to religious exemptions that enable free exercise. She thus pursues “[t]he other common course . . . to propose some account of what might be thought special about religion. If that or those characteristics are present in at least some secular commitments, perhaps accommodation should be cautiously extended to those cases.”¹² The strategy of identifying a good common to both religionists and nonreligionists has a high degree of a priori plausibility. If this strategy could succeed, it might well have the best claim to be called Solomonic. Nussbaum turns our attention to the question of which characteristics deserving of legal protection and privilege are shared by religion and even its “cultured despisers” (to bor-

8. *Id.* at 166.

9. *Id.* at 173.

10. *Id.* at 174.

11. BERNHARD WALDENFELS, *TOPOGRAPHIE DES FREMDEN: STUDIEN ZUR PHÄNOMENOLOGIE DES FREMDEN I* (1997).

12. NUSSBAUM, *supra* note 1, at 167.

row now a term from Schleiermacher). Nussbaum points here to “equal respect for conscience.”¹³

II. EQUAL RESPECT FOR CONSCIENCE IN *LIBERTY OF CONSCIENCE*

The centrality of conscience is a further key feature that Nussbaum wants to draw from Roger Williams, whose view of the conscience is described as characteristically Protestant, but articulated here less in a Reformational sense than as reflecting the Stoic tradition of “the god within.”¹⁴ Given the central mediatory role that Nussbaum assigns to “equal respect for conscience,”¹⁵ we might have expected a more expansive presentation of what should be understood under respect and conscience. In a social climate where, as the author rightly stresses, symbolic claims are often as controverted as pragmatic advantages, if less easily distributed, the potential meanings of a right to respect seem too many and too broad to be left undefined. The initial working definitions include “equal respect,” but mention little more than the context, that “we want not just *enough* freedom, but a freedom that is itself *equal*, and that is compatible with all citizens being fully equal and being equally respected by the society in which they live.”¹⁶ Defining conscience as a faculty, the author continues:

[A]nyone who has it [i.e., conscience] (and all humans do) is worthy of boundless respect, and that respect should be equally given to high and low, male and female, to members of the religions one likes and also to members of religions one hates. Conscience is precious, worthy of respect, but it also vulnerable, capable of being wounded and imprisoned.¹⁷

While the image of the possible imprisonment of the soul is borrowed directly from Williams to describe external pressures of coercion, the provenance of the term “equal respect” is less clear and possibly more interpretive. In the context of the second of six normative principles, “The Respect-Conscience-Principle,” we are told that “[r]espect for fellow citizens does not mean saying or believing that their religious views are correct, or even that all religions are valid routes to the understanding of life.”¹⁸ There is talk here of respecting citizens, persons, religions, and consciences; but also more qualified objects. “Respect for citizens requires that the public sphere respect the fact that they have different religious commitment If respect for persons is to be equal, this consideration for the conditions in which conscience operates must also be equal: all citizens enter the square ‘on equal conditions.’”¹⁹ Twice in her work,

13. *Id.* at 230, 328, 332.

14. *Id.* at 78.

15. *Id.* at 230, 328, 332.

16. *Id.* at 19.

17. *Id.*

18. *Id.* at 23 (emphasis added).

19. *Id.* at 22-23.

Nussbaum quotes with general approval from a lecture published by Jacques Maritain in 1957, who expresses the desire to “tolerate” the right of others to profess what he holds to be untrue, “because he *respects* in them human nature and human dignity and those very resources and living springs of the intellect and of conscience which make them potentially capable of attaining the truth he loves.”²⁰ Where Maritain distinguishes between *tolerance* of statements he deems are false from the *respect* he owes to human dignity, Nussbaum expresses her preference for “respect” over “tolerance” in both sentences, as “tolerance” seems “too grudging and weak.”²¹ Nussbaum, too, intends to associate respect first and foremost with the acknowledgement of the dignity of the person and the faculty of conscience which that implies, not with the religious exercise or views to which a particular conscience might have attained. This distinction, however, does not lead to any explicit qualification of the seemingly boundless “respect” claimed for the particular expressions of conscience. But their all too close association leads here of necessity to ancillary forms of required respect as well:

It is the faculty, not its goal, that is the basis of political respect, and thus we can agree to respect the faculty without prejudging the question whether there is a meaning to be found [by religion], or what it might be like. From the respect we have for the person’s conscience, that faculty of inquiring and searching [for ultimate meaning in life], it follows that we ought to respect the space required by any activity that has the general shape of searching for the ultimate meaning of life, except when that search violates the rights of others or comes up against some compelling state interest.²²

The question is whether “equal respect for conscience,”²³ defined this broadly and unconditionally, can keep open the space intended for the free exercise of religion, or if the accommodated religious exercise of the one—because taken as a symbolic denial of others’ alternative religion or nonreligion—is viewed as the equivalent to “establishment” in violation of the respect owed to others. “Indeed, in order to avoid endorsing one religion over another, or religion over nonreligion, the state will wisely seek to avoid making public statements of either agreement or disagreement.”²⁴ Arguably, the state would then need to avoid granting exceptions or accommodations as well, if no way can be found to exercise religion without demeaning the basal dignity of nonreligionists. The extension of this governmental abstinence to directly symbolic matters like

20. *Id.* at 23, 333 (quoting JACQUES MARITAIN, *Truth and Human Fellowship*, in ON THE USE OF PHILOSOPHY: THREE ESSAYS 16, 24 (1961)) (emphasis added).

21. *See id.* at 24.

22. *Id.* at 169.

23. *Id.* at 230, 328, 332.

24. *Id.* at 23.

the Pledge of Allegiance or the decoration of legal tender seems far less important than the possible future avoidance of indirect symbolism that could be inferred from the very accommodation of religious practice as such. If the link between the conscience respected as a faculty and the conscience respected in its conclusions is too immediate, unbounded in both cases, then the respect directed toward any one exercise of religion can all too easily be interpreted as disrespect shown to another, an “attack on equality,” measured in terms of equal respect.²⁵

If, by contrast, the qualitative difference between the unbounded respect owed to the conscience as a faculty and the more qualified respect due its conclusions could be more thoroughly articulated, in the direction that Nussbaum suggests at critical points of her argument, then it might be possible to move toward a common understanding of the religion clauses that lets them appear in greater proximity to the rights of free speech, where what is said and the right to say it are more commonly differentiated. Put in other terms: We should consider searching here for a less divine model of conscience, one more forthright about the finitude and partiality of its wisdom, which could then perhaps occupy that pacific zone sought here between the Free Exercise and Establishment Clauses. Aware of the breadth and complexity of reflection on the conscience, I will restrict myself for the purposes of this paper to asking about the sense of conscience presupposed by a major Roman Catholic development in the twentieth century that aimed at reducing religious conflict, one that is not without striking parallels to the project of this book: the “paradigm-shift” contained in *Dignitatis Humanae*, the 1965 Declaration of the Second Vatican Council, “On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious.”²⁶

III. THE VOICES OF CONSCIENCE IN *DIGNITATIS HUMANAЕ*

The Declaration sought to secure the right to the “free exercise” of religion against governments hostile to its practice and in like measure to reject the use of force or coercion, including by the Church and states favorable toward it, in leading persons and communities toward religious practice.²⁷ The need for political and civil distance from both hindrance

25. See *id.* at 360.

26. SECOND VATICAN COUNCIL, *DIGNITATIS HUMANAЕ: DECLARATION ON RELIGIOUS FREEDOM* (1965) [hereinafter *DIGNITATIS HUMANAЕ*].

27. The prominent discussion of the document was spread out across the Council, especially from November 1963 into December 1965. For more recent accounts of the genesis, debate, and meaning of the Declaration, compare Claude Soetens, *The Ecumenical Commitment of the Catholic Church*, in 3 *HISTORY OF VATICAN II* 257 (Joseph A. Komonchak ed., 2000), Evangelista Vilanova, *The Intercession (1963-1964)*, in 3 *HISTORY OF VATICAN II*, *supra*, at 347, Giovanni Miccoli, *Two Sensitive Issues: Religious Freedom and the Jews*, in 4 *HISTORY OF VATICAN II* 95 (Joseph A. Komonchak ed., 2003), Riccardo Burigana & Giovanni Turbanti, *The Intercession: Preparing the Conclusion of the Council*, in 4 *HISTORY OF VATICAN II*, *supra*, at 453, and Gilles Routhier, *Finishing the Work Begun: The Trying Experience of the Fourth Period*, in

and coercion in the exercise of religion was rooted by the Council in the dignity of the human person and in the pivotal role played by the conscience. That already suggests some of the many parallels to the dual project of the book under discussion. The kind of American influence on Europe that Nussbaum recommends in a number of asides was likewise operative at the Council. Stemming importantly from John Courtney Murray's work on most of the drafts and discussions of the text, as well as from the solid and consistent support given to the document by the American episcopate (in what was easily its most considerable contribution to the Council), the political and social problematic of the Declaration owes more than usual to American involvement. At times, the successive drafts of the emerging text seemed vulnerable to dismissive critiques as reflecting merely an American political preoccupation; increasingly, the theological components were strengthened to offset the impression of mere pastoral pragmatism. The goal of drawing attention to the political and religious burdens that inevitably are created anywhere by the use of coercion, either to prevent or to force religious practice, remains paramount throughout the document.

While few, if any, commentators would portray the Declaration as merely a continuation of previous trends in Roman Catholicism, the debate that developed during the Council and that has continued since then centers on whether the Declaration marks chiefly a break with the past, be it for better (John Noonan) or worse (Marcel Lebevre), or whether it is the mix of continuity and discontinuity that the text claims for itself, perhaps minus some of the "harmony" suggested by the English translation.²⁸ Despite the appearance created by the final vote (with "only" seventy opposing the somewhat over 2,300 affirmative votes), the document was and would remain one of the most controversial texts of the Council. The debate over it in 1964 raised the most obvious tumult the plenum would experience. That it was adopted only on the final working day of the

5 HISTORY OF VATICAN II 49 (Joseph A. Komonchak ed., 2006), with Giuseppe Alberigo, *The Announcement of the Council: From the Security of the Fortress to the Lure of the Quest*, in 1 HISTORY OF VATICAN II 1 (Joseph A. Komonchak ed., 1995); see also Roman A. Siebenrock, *Theologischer Kommentar zur Erklärung über die religiöse Freiheit Dignitatis humanae*, in 4 HERDERS THEOLOGISCHER KOMMENTAR ZUM ZWEITEN VATIKANISCHEN KONZIL 125 (Peter Hünemann & Bernd Jochen Hilberath eds., 2005).

28. See *DIGNITATIS HUMANAЕ*, *supra* note 26, ¶ 1. The Council noted: This Vatican Council takes careful note of these desires in the minds of men. It proposes to declare them to be greatly in accord with truth and justice. To this end, it searches into the sacred tradition and doctrine of the Church—the treasury out of which the Church continually brings forth new things that are in harmony with the things that are old.

Id. The notion of congruence employed in the Latin text leaves open the question of how harmonious its recognition was: "haec Vaticana Synodus sacram Ecclesiae traditionem doctrinamque scrutatur, ex quibus nova semper cum veteribus congruentia profert." SECOND VATICAN COUNCIL, *DIGNITATIS HUMANAЕ: DECLARATION ON RELIGIOUS FREEDOM* ¶ 1 in *CONSTITUTIONES DECRETA DECLARATIONES* 511-12 (1993).

Council on December 7, 1965, was in good measure the result of nearly successful attempts to derail its adoption altogether. This very acrimony, however, added to the mix of newer and older insights in the text, as the majority tried to retrieve from the tradition previously understated principles, notably on the conscience, that would lend credence to the relatively new sense of tolerance that was being sought.

The reference to a long-established but hitherto inconsequentially applied theology of conscience,²⁹ now the chief argument for the innovative aspects of the Declaration, was a hallmark of the argumentation from the beginnings of the discussions, when on November 19, 1963, Bishop De Smedt (Brügge) first introduced to the plenary sessions of the Council an initial proposal for the text, still conceived as part of a larger document on ecumenism.³⁰ While none of the several competing medieval schools of theology, given their many disagreements over the meaning of conscience, is cited in the Declaration, the genesis, reception, and the key argumentative use made of the conscience reflect the influence of at least some of Thomas Aquinas's reflections on the conscience.

Thomas had adopted the two-tiered analysis of conscience found in his predecessors: a higher faculty, *synderesis*, which—unlike many of his contemporaries—Thomas views as thoroughly human but as more intellectual than volunative, comparable to Aristotle's first principles of practical reason or to Kant's moral postulates; unthematized, *habitualiter*, simply in practice, not as the object of reflection, they do not err, nor can they be lost.³¹ What can err is at the level of that second tier, the application of these principles to concrete issues by *conscientia*, conscience in the narrower sense of the term. Like his contemporaries, Thomas points to the many voices of conscience: all qualifications that go beyond the *de facto* order of things, including *ligare*, *instigare*, *excusare*, *accusare*, and *remordere*. Because the eternal law is not known by us directly, we are to look in conscience particularly for the natural law, learning about it especially from a shared experience of suffering.³² What are arguably Thomas's most influential—and controversial—thoughts revolve, however, around the obligations of conscience. Thomas's twin positions (articulated in somewhat

29. For an example of a merely partial breakthrough in the logic of non-coercion and the freedom needed for the exercise of faith, see ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* II-II Q. 10 Art. 8.

30. Siebenrock sees this first public presentation of an early draft text at the Council as exclusively an argument based on the dignity of a conscience erring in its concrete religious convictions: "Der erste Konzilstext ist im Vergleich mit den früheren Entwürfen auf ein Kapitel über den Glauben reduziert und ausschließlich als Lehre über das Gewissen, speziell des irrenden Gewissens und seiner Rechte entworfen." Siebenrock, *supra* note 27, at 157.

31. See St. Thomas Aquinas, *Quaestiones disputatae De veritate* 16, 1-3 (Opera omnia, Vol. XXII, Ed. Leonina, Rome 1972) 501-11.

32. For the historical development of the natural law, see generally PAMELA M. HALL, *NARRATIVE AND THE NATURAL LAW: AN INTERPRETATION OF THOMISTIC ETHICS* (1994).

abbreviated form in *STh* I-II Q. 17 Art. 5-6), first, that any acts against the conscience, even against an erring conscience, are sinful, and second, that acts in accord with erring conscience are either sinful or tragic, or both, were the topic of controversial discussion in his own day and would become so again in our times after the Council.³³

If one were to look for references to internal tragic conflict in Thomas Aquinas that display parallels to the dilemmas that Martha Nussbaum has analyzed in earlier studies on Aeschylus's portrayal of Agamemnon or W. James's figure of Maggie Verver,³⁴ it would be best to begin with Thomas's reflections on the possibilities of becoming *perplexus supposito quodam*. While, in contrast to Nussbaum,³⁵ Thomas dismisses the notion that conflicting duties could lead of themselves to the necessity of sinning ("*non perplexus simpliciter*"), he insists that, *supposito quodam*, given certain conditions and for as long as those conditions continue, three other situations can: where prior sin leaves even the remorseful culprit no quick and innocent option; where a sinful intention in one matter demands a less welcome sin in another; and, most importantly, where ignorance of a moral norm (*ignorantia iuris*) that we should have known leaves us for the moment only the choice between sinful or at least destructive behavior and sinful intent.³⁶ Following Nussbaum's reading, Aeschylus, speaking through his chorus, does not seem prepared to "respect" the decision of Agamemnon's conscience either to sacrifice or to spare Iphigenia, especially as the Greek leader was lacking that often overlooked exercise of conscience called remorse; and yet, this perceived tragic perplexity did not destroy but rather underscored Aeschylus's sense of Agamemnon's dignity. For Thomas, the conditioned but very real perplexity that can follow upon any of the three situations mentioned does not remove the dignity of the person or the respect owed that dignity; indeed, it is a dignity expressed in the still infallible voice of *synderesis*, which calls

33. For the range of his contemporaries', especially Franciscan, reactions to his positions on the conscience, which highlight the *proprium* of Thomas's thought, see RUDOLF HOFMANN, *DIE GEWISSENSLEHRE DES WALTER VON BRÜGGE O.F.M. UND DIE ENTWICKLUNG DER GEWISSENSLEHRE IN DER HOCHSCHOLASTIK* (BGPhtMA, XXXVI 5-6, Münster, Aschendorff 1941); Richard Schenk, *Perplexus supposito quodam: Notizen zu einem vergessenen Schlüsselbegriff thomanischer Gewissenslehre*, in *RECHERCHES DE THÉOLOGIE ANCIENNE ET MÉDIÉVALE* LVII 62-95 (1990).

34. See MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* (2d ed. 2001); MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* (1990).

35. See HALL, *supra* note 32; DANIEL MCINERNEY, *THE DIFFICULT GOOD: A THOMISTIC APPROACH TO MORAL CONFLICT AND HUMAN HAPPINESS* 17-29 (2006).

36. See, e.g., St. Thomas Aquinas, *Quaestiones de quolibet*, *Quodlibet Tertium*, Q. 12 Art. 2 (*Opera omnia*, Ed. Leonina, Vol. XXV, 2, Rome/Paris 1996) 286, lin. 77-79, probably from around Easter of 1270 ("Non est autem inconueniens quod, aliquo posito, aliquis homo sit perplexus."); ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* III Q. 64 Art. 6 ad 3 ("Non est autem inconueniens quod sit perplexus supposito quodam."); see also St. Thomas Aquinas, *supra* note 31, at 526, lines 256 sqq. ("Et hoc non est inconueniens ut aliquo supposito homo peccatum vitare non possit.").

from within for the reform of erroneous conviction. What it does qualify is the respect owed the erroneous conviction itself about a concrete course of action. What is of itself, not without its tragic dimensions, is here the basis of a dignity that would be less, not more, were the convictions of conscience self-justifying. The dignity of conscience demands for Thomas its ability to come into conflict with itself.³⁷ That is what makes the conscience's ability to err the condition of its possibility to lead progressively to greater truth and justice. The internal conflict that by this account follows from ignorance of what can be expected of us also allows development to come from within, as our own conscience prods us forwards. Moral learning stems only secondarily from outside the conscience. The acknowledgment of the dignity of the other person and her conscience does not demand here an equal respect, even on the symbolic level, for all her convictions or decisions.

The Council obviously did not intend to enshrine in its documents a theory of conscience proper to Thomas Aquinas, despite the widely acknowledged influence of his insistence that all acts against conscience are sinful.³⁸ In particular, the Council did not make its own the entirety of Thomas's notion of the *perplexus supposito quodam*. While not forgetting the reminder of recent commentaries that the representatives of majority and minority positions at the Council were not always the same for each text or issue, the fundamental understanding of the conscience expressed in paragraph sixteen of the Pastoral Constitution *Gaudium et Spes* "On the Church in the World of our Times" can be assumed to reflect at least the general sense of conscience operative in *Dignitatis Humanae* as well:

In the depths of his conscience, man detects a law which he does not impose upon himself, but which holds him to obedience. Always summoning him to love good and avoid evil, the voice of conscience when necessary speaks to his heart: *do this, shun that*. For man has in his heart a law written by God; to obey it is the very dignity of man; according to it he will be judged. Conscience is the most secret core and sanctuary of a man. There he is alone with God, Whose voice echoes in his depths. In a won-

37. There is a parallel here to Paul Ricœur's reference to the conscience as one of three cited, scattered witnesses ("witness" or "attestation" is said on page 289 to be "the password for this entire book") to the possibility of genuine selfhood, which depends upon the flourishing relation of initial subjectivity to the other of itself. See PAUL RICŒUR, *ONESELF AS ANOTHER* 289, 341-56 (Kathleen Blamey trans., Univ. of Chicago Press 1992) (1990). The question arises whether Nussbaum's demands in the present book for a state-sanctioned, equal symbolic respect of religious and nonreligious convictions doesn't threaten what Ricœur described as the genius of her early work, "the tragic wisdom capable of directing a practical wisdom," one grafted onto conflicts internal to opposing protagonists. See *id.* at 243-44.

38. See Richard Schenk, *Evangelisierung und Religionstoleranz: Thomas von Aquin und die Gewissenslehre des II. Vatikanums*, 8 FORUM KATHOLISCHE THEOLOGIE 1 (1992).

derful manner conscience reveals that law which is fulfilled by love of God and neighbor. In fidelity to conscience, Christians are joined with the rest of men in the search for truth, and for the genuine solution to the numerous problems which arise in the life of individuals from social relationships. Hence the more right conscience holds sway, the more persons and groups turn aside from blind choice and strive to be guided by the objective norms of morality. Conscience frequently errs from invincible ignorance without losing its dignity. The same cannot be said for a man who cares but little for truth and goodness, or for a conscience which by degrees grows practically sightless as a result of habitual sin.³⁹

Here, “invincible ignorance” seems to extend to *ignorantia iuris* as well as to *ignorantia facti*; with that, the weight is shifted away from Thomas’s reflections on the *perplexus supposito quodam*. And, yet, on one crucial point the notion of the conscience in *Dignitatis Humanae* seems closer than this passage of *Gaudium et Spes* both to Thomas Aquinas and to Martha Nussbaum: that even when the error of conscience happens to be culpable and not from invincible ignorance, the conscience taken as the faculty anchored in the infallible habit of *synderesis* and reflecting the dignity of the human person still retains its own dignity as well. In *Dignitatis Humanae*, the focus is upon the perceptive powers and the obligations of conscience with the corresponding need for freedom from coercion. Because the conscience is the locus of divining God’s intentions and because to act against it could only deepen our entanglements, coercive measures for or against religion are detrimental to religious faith and to “the dignity of the human person,” the title ultimately chosen for the declaration, even when those who are rejecting religion are not entirely “*sine culpa*.”⁴⁰

In its opening words, the Declaration alludes to a development that began outside the Church, carried initially by forces critical of established religion, but leading to a greater appreciation of the “dignity of the human person,” one that can be (and at the Council was in the process of being) assimilated by reasons proper to faith:

A sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of our contemporaries and the demand is increasingly made that human beings should act on their own proper judgment, enjoying and making

39. SECOND VATICAN COUNCIL, *GADIUM ET SPES: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD* ¶ 16 (1965) (emphasis added).

40. See SECOND VATICAN COUNCIL, *LUMEN GENTIUM: DOGMATIC CONSTITUTION ON THE CHURCH* ¶ 16 (1964). As the mature work of Thomas came to recognize, the aids of Providence needed for salvation do not merely follow good deeds, nor is the movement of God’s grace limited to those who follow their consciences “*sine culpa*.” See JOSEPH P. WAWRYKOW, *GOD’S GRACE AND HUMAN ACTION: ‘MERIT’ IN THE THEOLOGY OF THOMAS AQUINAS* (1995).

use of a responsible freedom, not driven by coercion but motivated by a sense of duty. The demand is likewise made that constitutional limits should be set to the powers of government, in order that there may be no encroachment on the rightful freedom of the person and of associations.⁴¹

The line of argument proceeds from the dignity of the human person and her capacity for truth to the obligations of conscience as an argument against coercion either for or against religion:

This Vatican Council . . . professes its belief that it is upon the human conscience that these obligations fall and exert their binding force. The truth cannot impose itself except by virtue of its own truth, as it makes its entrance into the mind at once quietly and with power In all his activity a man is bound to follow his conscience in order that he may come to God, the end and purpose of life. It follows that he is not to be forced to act in manner contrary to his conscience. Nor, on the other hand, is he to be restrained from acting in accordance with his conscience, especially in matters religious The freedom or immunity from coercion in matters religious which is the endowment of persons as individuals is also to be recognized as their right when they act in community. Religious communities are a requirement of the social nature both of man and of religion itself.⁴²

It is this notion of conscience that the Declaration uses to make understandable why neither God, nor Christ, nor the apostles used force or coercion in drawing the human race toward the divine:

9. The declaration of this Vatican Council on the right of man to religious freedom has its foundation in the dignity of the person, whose exigencies have come to be are fully known to human reason through centuries of experience. What is more, this doctrine of freedom has roots in divine revelation, and for this reason Christians are bound to respect it all the more conscientiously. Revelation does not indeed affirm in so many words the right of man to immunity from external coercion in matters religious. It does, however, disclose the dignity of the human person in its full dimensions

10. It is one of the major tenets of Catholic doctrine that man's response to God in faith must be free: no one therefore is to be forced to embrace the Christian faith against his or her own will The act of faith is of its very nature a free act It is therefore completely in accord with the nature of faith that in

41. DIGNITATIS HUMANAE, *supra* note 26, ¶ 1.

42. *Id.* ¶¶ 1, 3, 4.

matters religious every manner of coercion on the part of men should be excluded

12. Thus the leaven of the Gospel has long been about its quiet work in the minds of men, and to it is due in great measure the fact that in the course of time men have come more widely to recognize their dignity as persons, and the conviction has grown stronger that the person in society is to be kept free from all manner of coercion in matters religious.⁴³

For the present context, it is important to note that the Declaration could introduce this paradigm-shift into Catholic thought, based on the respect for the dignity of the person and conscience, while still assuming that at least much of the resistance to religion in general or to Roman Catholicism in particular is culpably misled. The argumentative goal of the majority was to show that the respect for the conscience of the other is more a matter of principle than the respect for any of its concrete conclusions or convictions. The majority interested in convincing the Council of the need for this paradigm shift in Catholic thinking was keen to answer the charges by the minority that they were proposing a merely subjective sense of the conscience and a relativistic notion of religion:

3. Wherefore every 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, under use of all suitable mean On his part, man perceives and acknowledges the imperatives of the divine law through the mediation of conscience

11. God calls men to serve Him in spirit and in truth, hence they are bound in conscience but they stand under no compulsion. God has regard for the dignity of the human person whom He Himself created and each man is to be guided by his own judgment and he is to enjoy freedom.⁴⁴

Yet the argumentative goal of the Declaration comes into view where this premise leaves off: Without trying to identify the sources, options, or chances of success for the obligation to seek the *unica vera religio*, without ascribing the rejection of the Christian faith either to some *ignorantia iuris* or to something more akin to an innocent *ignorantia facti*, it was affirmed that the failure to seek the *unica vera religio*, even when and where sinful, still did not justify the application of coercion in an attempt to redress this deficiency.

43. *Id.* ¶¶ 9, 10, 12.

44. *Id.* ¶¶ 3, 11.

IV. THE TOLERATION OF RELIGIOUS ALTERITY

Admittedly, the declaration *Dignitatis Humanae* has a more restricted message than the declaration *Nostra Aetate* "On the Relation of the Church to Non-Christian Religions."⁴⁵ Where *Nostra Aetate* sought to state recognition and appreciation for non-Christian religious, albeit based in large part on the "inclusivist" logic of identifying their participation in the same truth proclaimed by the Catholic faith, *Dignitatis Humanae* is arguing the case for not coercing or restricting the exercise of religion even where such commonality between contending parties is most obviously missing. It calls more for tolerance of disagreement than for the celebration of agreement.

In the years immediately following the Council, the discussion of the conscience in Catholic theological circles shifted for some years prior to the widespread ascendancy of political theology from the social and political realm prominent in the declaration to an emphasis on private moral behavior. As the sense of possible perplexity was lost, the impression became widespread in academic and especially popular Catholic circles that the Council had suggested the notion that, because actions against the conscience are always reprehensible, actions in accord with conscience were *ipso facto* laudable. With that shift, much of the sense of the dramatic character of the Declaration on Religious Freedom was blunted. The sense of the dignity of the conscience and the human person found both in the declaration and in Thomas's broader reflections on conscience that provided one of the resources for the argument of the declaration suggests the need to distinguish between respect of conscience itself and the respect of any given conviction to which it might come. This more restricted, more "grudging" sense of tolerance vis-à-vis the appreciative recognition of what I already agree with has the advantage of freeing the respect of the person from its perceived need to "always be right" or even to share a common viewpoint. If the respect for others can coexist with the assumption of their failings, as was true both in the Thomas's reflections on moral perplexity and in the Council's strictures against coercion for or against religion, then the toleration of thoughts or practices, the justice or prudence of which I seriously question, need not be bought at the price of a challenge to personal dignity, my own or that of the other. This holds true as well for the perception of religious activity by those skeptical of its validity. The accommodation of religious exercise by governmental agencies need not be seen as the kind of establishment that is understood as an attack on the dignity of those not sharing the same kinds of faith-commitments. Were this otherwise, it would seem impossible to imagine any long-term compatibility between the two religious clauses of the First Amendment. The tolerance of subsidiary forms of religion, not shared by the entire populace, need not contradict solidarity with those

45. SECOND VATICAN COUNCIL, *NOSTRA AETATE: DECLARATION ON THE RELATION OF THE CHURCH TO NON-CHRISTIAN RELIGIONS* (1965).

whose searches are leading in other directions. Rather, it underlines the need to continue the often difficult negotiation of the coexistence of free exercise and nonestablishment.

