

Beyond Moralism: A Critique and a Proposal for Catholic Institutional Religious Freedom

HELEN M. ALVARE[†]

Catholic institutions' current responses to laws demanding cooperation with others' sexual expression are troubling. Their claim, for example, that the federal contraception mandate¹ burdens free exercise can seem thin and attenuated to an ordinary observer. How burdensome is it to fill out a paper refusing to incorporate contraception into one's insurance plan thus empowering the government to provide it directly?

A Catholic school's assertion that they cannot hire a same-sex-married food-services director because he is a "minister of the mission,"² seems practically unlikely. It sounds rather like an opportunistic claim to allow an employer to completely avoid the requirements of the employment nondiscrimination law.³

And a Catholic school's firing of a teacher for using assisted reproductive technologies on the grounds that the school is legally entitled to prefer co-believers⁴ can appear personally judgmental and even unkind to a family unable to have children any other way.

Unsurprisingly, this array of defenses is generating backlash from both outsiders and insiders. Outsiders view Catholic institutions' refusals to hire same-sex-married individuals as affronts to the dignity of LGBT people.⁵ They see sex discrimination in an institution's refusal to provide contraception insurance. Insiders – e.g. parishioners, fellow employees, and parents of schoolchildren – are increasingly charging their own religion with violating the fundamental Christian command of "love thy neighbor." They undertake protests or other public outcries in order to pressure Catholic parishes or schools to change their minds.⁶ In the process, both outsiders' and insiders' affection for religious freedom is weakened; free exercise claims are viewed as demands for a license to discriminate. And Catholic teachings regarding sex, marriage and parenting (hereafter collectively

[†] Professor of Law, Antonin Scalia Law School, George Mason University. The author would like to thank Sarah Christensen, David Rihl, Esther Koblenz and Peter Vay for their research assistance, as well as the Scalia Law Summer Research Grant Program.

¹ Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456–76 (2013).

² *Barrett v. Fontbonne Acad.*, No. NOCV2014-751, 2015 WL 9682042, at *11 (Mass. Super., Dec. 16, 2015).

³ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).

⁴ 42 U.S.C. § 2000e (2019).

⁵ Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L. J.* 2516, 2560 (2015).

⁶ See *infra* Part I.C.2.

called “sexual expression” or “human sexuality” teachings) become increasingly disdained. They are cast as unrelentingly negative and personal moral judgments, dissociated from the rest of the faith, destructive of a welcoming Catholic community, and contrary to the Christian love command.

It is the ironic icing on the cake, too, that this dynamic is playing out at precisely the same time as the Catholic Church is embroiled in a monumental scandal at every level concerning the sexual abuse of minors and others, alongside an extensive cover-up. Charges fly about Catholic inconsistency at best and rank hypocrisy at worst.

It doesn't have to be this way. By this I am not suggesting that the Catholic Church can soon achieve widespread agreement with its religious freedom claims or its human sexuality teachings. I am saying only that there is a way to mitigate the severity of the criticisms launched by outsiders and insiders, and perhaps even to boost sympathy for the logic and benefits both of institutional religious freedom, and Catholic sexual expression teachings. The method I will propose also has the further advantage of being more accurately theologically “Catholic” and more common-sensical to ordinary ears, than the current methods the Church is employing. But it will not appeal to every Catholic institution. It would require a fair amount of soul-searching about an institution's real goals and operations, and a willingness to speak publicly and more cogently about its controversial teachings on human sexuality.

My proposal is as follows: in every case in which a Catholic institution is legally demanded to cooperate with sexual expression violating its teachings, the institution should respond with a clear statement about the character of the Church as a believing *community* whose members are called to witness the living Christ to one another and to onlookers. It must communicate that this communal witness is theologically and practically constitutive of Catholicism. It is the method used and handed on by Jesus Christ. Without it there is no sustaining or transmitting the faith. The Church's communal character grounds the necessity of its institutions' maintaining final authority over membership in the community - including not only leadership and employees, but in some cases also students or clients. Finally, the Catholic institution must state clearly the role that Church teachings on sex, marriage and parenting play in the pivotal work of witnessing to the living Christ, *i.e.* how these teachings reveal who he is, how he loves the human race, and how he wants human beings to love one another. The institution would do well also to explain the value of these teachings for the wider society. They should be framed as a contribution to the common good versus idiosyncratic preferences.

Only by communicating the essentially communal structure of Catholic life and the relationship between this structure and Catholic sexual expression teachings can Catholics' free exercise demands accurately

express Catholic theology, appeal to observers, and satisfy relevant free exercise standards, all at the same time. Were institutions to articulate their defenses in this way, it would be far more obvious to onlookers why it is important for the institution to incorporate into its community and operations only those persons and policies at least working to understand and observe Catholic teachings on sex, marriage and parenting.

I should immediately observe that sexual tenets are not the essence of Catholic life. They are but one of many faith commitments intended to forward the essential Catholic work of loving God and loving one's neighbor as oneself. This article focuses upon Catholic sexual expression teachings only because they are repeatedly challenged by the state today, and because an increasing number of people believe that these teachings pit Catholic "law" against Jesus' overarching command to "love one another. As I have loved you, so you also should love one another." (*John 13:34*).

The theology undergirding my proposal is not simple or brief; potentially relevant sources are innumerable. But it is also not so complicated that I cannot accurately characterize it within the space of this article or in a legal pleading making a religious freedom claim. Briefly summarized, it provides evidence that Catholicism is built upon the method of mutual witness to Christ, and that it is the method adopted by Jesus Christ to communicate the faith. Furthermore, this method appeals to common sense human understanding. And sociological and psychological sources confirm that values, including religious values, are not communicated solely by words or by trained and ordained personnel. Credible witnesses move hearts and minds. Interactions with such witnesses occur not only within families, but in other close communities, including parishes, schools, or other religious institutions.

Even an initial reflection upon my proposal indicates its advantages. It becomes easier to understand, for example, why a Catholic school might rely upon its Title VII⁷ privilege to employ co-believers, and thus to fire an employee in a same-sex marriage, if one understands the method of communal witness, alongside Catholic teaching about how marriage uniquely communicates who God is, how God loves, and how we are to love one another. It becomes easier to understand why a Catholic school would call a science teacher a "minister" whose employment the state must not control. It becomes easier to understand why an order of nuns caring for the elderly poor insist upon the right to buy health insurance that does not facilitate the use of contraception or abortion among employees hired to execute their mission. In every case, the Catholic institution is not claiming that the Church is a museum of saints perfectly observing Catholic ideals. It is rather – in the iconic words of Pope Francis – a "field hospital"⁸ for

⁷ 42 U.S.C. § 2000e-1(a) (2019).

⁸ Deborah Castellano Lubov, 'Church is to Be Field Hospital,' *Pope Reminds Pilgrims from Middle*

wounded sinners of every stripe. But hospitals of sinners are always seeking repentance and healing as they work to conform their lives to God's way of loving. This holds true regarding every kind of human failing that impairs a person's relationship with God or fellow human beings, not just sexual immorality. As noted above, the focus on the clash between Catholicism and sexual expression laws arises only because of law and culture's presently heightened demands that Catholic institutions conform to the state's new orthodoxies on these matters.

Should Catholic institutions fail to plead the communal character of the faith, it will be small wonder that onlookers continue to perceive Catholic free exercise demands as thin, judgmental, opportunistic, and socially harmful. The religious integrity of the community is not captured in a pleading that simply labels every employee a minister, without reference either to the theology or practical reality of faith transmission. It is not captured in a religious institution's assertion that "they cannot cooperate with" an employment mandate regarding a particular sexual expression, without reference to the role that the sexual expression plays in forming and sustaining a community of faith.

If, however, a defendant Catholic institution speaks clearly about the centrality of community witness, and the role that faithful, sacrificial, fruitful love plays in revealing the meaning of love – transcendent and human – there is at least a chance that onlookers will understand its need for authority over membership and operations. The causes of religious freedom and of healthy sexual mores might both advance.

Likely some Catholic organizations will not be able to claim to be the kind of community in which members are held responsible to witness Christ to one another, including on matters of sexual expression. Despite this, because of the way in which the Supreme Court and Congress have structured religious freedom claims, even these organizations might plead and win a free exercise case. They can point to how a state mandate contradicts well-known Church teachings or insist rightly that all elementary school teachers promise to be "ministers" or rely upon Title VII's right of religious institutions to prefer co-believers.

In my view though – which may well be controversial – such institutions should seriously reflect upon whether they want to demand free exercise rights in the context of sexual expression mandates or nondiscrimination laws. Their partial grasp of the functioning of Catholic community life, and/or the role played by Catholic sexual expression teachings, means that their public efforts to demand religious freedom might do more harm than good. They might easily appear hypocritical or opportunistic. Not only might they weaken Americans' stomach for religious freedom, but they

East, Egypt, Holy Land, ZENIT (Aug. 9, 2017), <https://zenit.org/articles/church-is-to-be-field-hospital-pope-reminds-middle-east-pilgrims/>.

could also increase disdain for Catholic teachings already rejected by myriad and influential institutions.

Regarding institutions that *do* wish to assert the importance of integrity and mutual witness in the community, they should ensure that they apply the logic of communal witness to *all* Catholic teachings essential to sustaining and transmitting the faith, *not only* teachings about sex, marriage and parenting. Such consistency would stabilize or even increase appreciation for institutional religious freedom, by putting daylight between this question and neuralgic culture-wars issues.

In order to propose a more positive, appealing, and theologically accurate account of Catholic institutions' case for religious freedom in the context of current sexual expression laws, this article will proceed as follows: Part I will discuss the sexual expression laws commonly triggering free exercise defenses by Catholic institutions, the defenses themselves, and the negative reactions they provoke. Part II will treat Catholic theology about the necessity of mutual witness within a community for sustaining and transmitting the Catholic faith. Part III will discuss the relationship between Catholic teachings on sex, marriage and parenting, and forming and transmitting Catholic faith. It will note that these teachings are only one part of Catholic community life and identity, but that they require special attention today in light of the frequency with which the state is intruding into Catholic communities on the basis of claimed sexual expression rights. Part IV will suggest how each type of free exercise defense commonly used by Catholic institutions in sexual expression lawsuits, might be strengthened if framed according to my proposal. These defenses would better conform to Catholic theology, allow for positive expression, appeal to common sense, and more fully satisfy both the spirit and the letter of the law of free exercise. A brief conclusion will reassert the necessity for Catholic institutions' authority over employment and operations, and address a few collateral questions concerning implications for state funding, and fears about too broad a scope of institutional freedom.

PART I. SEXUAL EXPRESSION LAWS, RELIGIOUS FREEDOM DEFENSES, AND REACTIONS

A. Sexual Expression Laws and Free Exercise Defenses

Currently, a wide variety of laws and regulations impose requirements upon religious institutions regarding employment and operations, in connection with sexual expression. Some of the most noteworthy include the federal insurance mandate requiring some religious institutions to provide free contraception in their insurance plans⁹, and state and federal

⁹ See the federal contraception mandate, *supra* note 1.

employment nondiscrimination laws. Unlike federal employment nondiscrimination law, state laws sometimes include categories like sexual orientation and marital status nondiscrimination in addition to the federal categories of race, sex, disability and others.¹⁰

Federal and some state employment nondiscrimination laws specifically protect the right of religious employers to favor hiring co-believers, though religious employers are not permitted to discriminate on the basis of *other* characteristics such as race or sex, or in some states, sexual orientation. Title VII's¹¹ prohibition against religious discrimination in employment does not apply to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."¹² The Supreme Court has held that this may constitutionally apply even respecting employees who do not perform explicitly religious activities, such as an engineer working in a gym affiliated with the Church of Jesus Christ of Latter-day Saints.¹³ The Establishment Clause is not thereby violated.

State laws may have additional terms or interpretations that result in further restrictions upon the actions of religious institutions. For example, Massachusetts excludes from its definition of religious institutions, those that hire or serve *nonbelievers*.¹⁴ State or federal courts might also interpret a ban on discrimination phrased as banning *status* discrimination (e.g. the status of having a particular sexual orientation or the marital status of being married, divorced or single), to also bar discrimination based on *conduct* related to that status (e.g. entering into a same-sex marriage, or cohabiting nonmaritally).¹⁵ This type of interpretation can result in liability for religious employers who insist that they are happy to hire LGBT individuals, but not persons who have entered a same-sex marriage.¹⁶ It can ensnare religious employers who are happy to hire persons of any marital status – married, divorced, single, widowed – but not those who have chosen to cohabit with

¹⁰ NAT'L CONFERENCE OF STATE LEGISLATURES, DISCRIMINATION-EMP'T LAWS (July 27, 2015), <http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx>.

¹¹ 42 U.S.C. § 2000e (2019).

¹² 42 U.S.C. § 2000e-1(a) (2019).

¹³ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (holding that an athletic facility affiliated with the Latter-day Saints could dismiss an engineer on the grounds that he did not qualify for a temple recommend).

¹⁴ See e.g. Massachusetts Employment Nondiscrimination Law in *Barrett*, *supra* note 2, (Mass. G. L. c. 151B, sec.1(5), exempting from the law's provisions only those religious organizations that "limit [] membership, enrollment, admission, or participation to members of that religion.")

¹⁵ *Richardson v. Northwest Christian Univ.*, 242 F. Supp. 1132 (D. Ore. 2017) (interpreting Oregon's ban on "marital status" discrimination to a religious university's firing an employee for the conduct of nonmarital cohabiting); *Barrett*, No. NOCV2014-751, 2015 WL 9682042 (interpreting Massachusetts' ban on "sexual orientation" nondiscrimination to cover refusing to hire an employee who had entered into a same-sex marriage).

¹⁶ See *Barrett*, No. NOCV2014-751, 2015 WL 9682042 at *4.

a romantic partner.¹⁷

When Catholic institutions are confronted with a requirement to maintain an employment relationship with a person openly violating Catholic teaching, they regularly assert that the employee is a “minister” whose employment the state may not control, and/or that they are exercising their Title VII privilege to prefer co-believers. The former defense relies upon the Supreme Court’s opinion in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*¹⁸, wherein the Court announced a “ministerial exception” barring employment discrimination suits by ministers against their religious employers. (This will be considered at length below)¹⁹.

Outside of the employment discrimination context, Catholic institutions might also be confronted with a mandate affecting their operations. For example, state or federal laws might require employers to provide contraception in employees’ health insurance, or to perform transgender surgeries in their hospitals. In such cases, Catholic institutions reply that their free exercise is “burdened” by the choice between following their religious belief and suffering a legal penalty, such as a large fine.²⁰ If a court acknowledges the burden, then – if the applicable free exercise standard is strongly religion-protective – there is triggered a requirement that the state show a compelling state interest realized by means least restrictive of religious freedom.²¹ If the applicable free exercise standard is not terribly religion protective, then after a religious institution shows a “burden”, the state has only to show that the law bears a “rational relationship to a legitimate state interest.”²² Federal laws are subject to the stricter standard under the Religious Freedom Restoration Act (“RFRA”),²³ or under the First Amendment’s Free Exercise Clause *if* there is some indication that the law targets religion in some fashion, *i.e.* that the law is not “neutral” or “generally applicable.”²⁴ Federal laws that are neutral laws of general applicability, however, are subject only to rational basis scrutiny even after a finding that they burden the constitutional guarantee of free exercise of religion. This is the result of the Supreme Court’s 1990 decision in

¹⁷ See *Richardson*, 242 F. Supp. 3d at 1138.

¹⁸ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 199 (2012).

¹⁹ See *infra* Part IV. C.

²⁰ See Brief for Petitioners, *Zubik v. Burwell*, U.S. Supreme Court Nos. 14-1418, 14-1453 & 14-1505 (Jan. 4, 2016), 27-40.

²¹ See *e.g.*, Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (codified in scattered sections of 5 and 42 U.S.C.); and *Gonzales v. O Centro Espirita Beneficente Uniao*, 546 U.S. 418 (2006).

²² *Emp’t Division v. Smith*, 494 U.S. 872, 894 (1990).

²³ Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1(b) (“Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”)

²⁴ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993).

*Employment Division v. Smith.*²⁵

States vary in the degree of protection accorded free exercise. Some state constitutions are highly protective of religion and some states have state versions of the federal RFRA. But some states have neither, and would scrutinize a claimed burden on free exercise under the far less protective rational basis standard of review.²⁶

B. The Cases and Controversies

A look at a sampling of Catholic institutions' free exercise assertions, illustrates the problems I highlighted in the introduction: seemingly attenuated claims of burdens on free exercise; broad and facially dubious assertions of the ministerial exception; brief but devastating judgments of an employee's behavior; and a negative and disjointed articulation of Catholic teaching about sex, marriage and parenting.

Looking first at the federal contraception mandate of 2012,²⁷ this required many religious institutions, including the Little Sisters of the Poor, to cooperate with the Department of Health and Human Services ("HHS") to provide insured employees and their daughters free contraception, as well as several drugs and devices that HHS agreed could act to destroy a human embryo.²⁸ In their pleadings before the Supreme Court, the Little Sisters focused on Catholic moral disapproval of contraception and abortion, and forced cooperation with it. They framed their burden as being forced "to violate their sincerely-held religious beliefs under threat of massive penalties."²⁹ Speaking of cooperating to facilitate contraception insurance, they referred to "being forced to participate in the provision of healthcare benefits that conflict with their religious beliefs."³⁰ They also stated that "in order to stay true to their Catholic faith, they may hire an insurance company only if it will not provide their students and employees with coverage that may destroy human life or artificially prevent its creation"³¹

The federal government denied that the process by which the Little Sisters would provide a form to HHS stating their objection and allowing a third party to direct contraception coverage to their employees, could

²⁵ *Emp't Division*, 494 U.S. at 880-82.

²⁶ Jonathan Griffin, *State Religious Freedom Restoration Acts*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/religious-freedom-restoration-acts-lb.aspx>.

²⁷ See *supra* note 1.

²⁸ In *Burwell v. Hobby Lobby Stores, Inc.*, the Court noted that the Department of Health and Human Services had acknowledged in its brief that some of the methods of "birth control" HHS required employers to provide "may result in the destruction of an embryo." See *Burwell v. Hobby Lobby* at 720, citing Brief for HHS in No. 13-354, at 9, n. 4.

²⁹ Brief for Petitioners, *Zubik v. Burwell*, U.S. Supreme Court Nos. 14-1418, 14-1453 & 14-1505 (Jan. 4, 2016), 3.

³⁰ *Id.* at 29.

³¹ *Id.* at 36.

constitute a “substantial burden” under RFRA. More than a few federal courts of appeals agreed with the government on this point.³² In its final

³² See *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 237 (D.C. Cir. 2014), *vacated and remanded* (“We conclude that the challenged regulations do not impose a substantial burden on Plaintiffs’ religious exercise under RFRA. All Plaintiffs must do to opt out is express what they believe and seek what they want via a letter or two-page form. . . . The ACA shifts to health insurers and administrators the obligation to pay for and provide contraceptive coverage for insured persons who would otherwise lose it as a result of the religious accommodation.”); *Id.* at 256 (“The regulatory requirement that they use a sheet of paper to signal their wish to opt out is not a burden that any precedent allows us to characterize as substantial”); *Catholic Health Care Sys. v. Burwell*, 796 F.3d 207, 219–21, (2d Cir. 2015), *cert. granted, judgment vacated* (“Thus, under the challenged regulatory scheme, the only obligation actually imposed on Plaintiffs is identifying themselves as religious objectors. . . . Assessing this obligation objectively, we cannot conclude that the simple act of completing the notification form imposes a substantial burden on Plaintiffs’ religious exercise. Indeed, in past decisions favoring religious objectors, the burden imposed was considerably more substantial than the burden of notification at issue here.”); *Geneva Coll. v. Sec’y U.S. Dept. of Health & Human Servs.*, 778 F.3d 422, 437 (3d Cir. 2015), *vacated and remanded* (“The appellees urge that a burden exists here because the submission of the self-certification form triggers, facilitates, and makes them complicit in the provision of objected-to services. But after testing that assertion, we cannot agree that the submission of the self-certification form has the effect the appellees claim. First, the self-certification form does not trigger or facilitate the provision of contraceptive coverage because coverage is mandated to be otherwise provided by federal law. *Federal law*, rather than any involvement by the appellees in filling out or submitting the self-certification form, creates the obligation of the insurance issuers and third-party administrators to provide coverage for contraceptive services.”); *Id.* at 442 (“While *Hobby Lobby* rejected the argument that the burden was too attenuated because the actual use of the objected-to contraceptive methods was a matter of individual choice, here, where the actual provision of contraceptive coverage is by a third party, the burden is not merely attenuated at the outset but totally disconnected from the appellees.”); *E. Texas Baptist Univ. v. Burwell*, 793 F.3d 449, 459–60 (5th Cir. 2015), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016), and *cert. granted, judgment vacated sub nom. Univ. of Dallas v. Burwell*, 136 S. Ct. 2008 (2016) (“Although the plaintiffs have identified several acts that offend their religious beliefs, the acts *they* are required to perform do not include providing or facilitating access to contraceptives. Instead, the acts that violate their faith are those of third parties. Because RFRA confers no right to challenge the independent conduct of third parties, we join our sister circuits in concluding that the plaintiffs have not shown a substantial burden on their religious exercise.”); *Mich. Catholic Conf. & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 387–88 (6th Cir. 2014), *cert. granted, judgment vacated* (“However, the inability to ‘restrain the behavior of a third party that conflicts with the [appellants’] religious beliefs,’ *Michigan Catholic Conference*, 989 F.Supp.2d at 587, 2013 WL 6838707, at *7, does not impose a burden on the appellants’ exercise of religion.”); *University of Notre Dame v. Sebelius*, 743 F.3d at 547, 558 (7th Cir. 2014), *cert. granted, judgment vacated sub nom. Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015) (“The process of claiming one’s exemption from the duty to provide contraceptive coverage is the opposite of cumbersome. It amounts to signing one’s name and mailing the signed form to two addresses. Notre Dame may consider the process a substantial burden, but substantiality—like compelling governmental interest—is for the court to decide (citation omitted). Otherwise there would have been no need for Congress in the Religious Freedom Restoration Act to prefix ‘substantial’ to ‘burden.’”); *Little Sister of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1173–74 (10th Cir. 2015), *vacated and remanded* (“We conclude that the accommodation scheme relieves Plaintiffs of complying with the Mandate or paying fines and does not impose a substantial burden on Plaintiffs’ religious exercise for the purposes of RFRA. . . . Plaintiffs do not ‘trigger’ or otherwise cause contraceptive coverage because federal law, not the act of opting out, entitles plan participants and beneficiaries to coverage. Although Plaintiffs allege the administrative tasks required to opt out of the Mandate make them complicit in the overall delivery scheme, opting out instead relieves them from complicity. Furthermore, these *de minimis* administrative tasks do not substantially burden religious exercise for the purposes of RFRA.”).

opinion in the case involving the Little Sisters and other religious objectors (*Zubik v. Burwell*³³), the Supreme Court did not express a view on the merits of the case, including on the substantial burden claim. The prior mandate decision, however, *Burwell v. Hobby Lobby*³⁴, indicated clearly that the Court would be quite deferential to a religious institution's claim of a burden on free exercise. This is because of precedents including *Thomas v. Review Board*³⁵, in which the Court adopted a nearly hands-off approach to religious conclusions about what constitutes a burden on their beliefs or practices. The *Hobby Lobby* majority wrote that the Court's "narrow function ... is to determine whether the plaintiffs' asserted religious belief reflects an 'honest conviction, ... and there is no dispute here that it does.'"³⁶ The *Zubik* Court remanded the case to the courts of appeals and requested the Catholic complainants and the government to pursue an agreement regarding a way to provide contraception to employees using the "least restrictive means."³⁷

In another lawsuit involving a federal mandate to undertake a behavior forbidden by Catholic teaching, a Catholic hospital system articulated its free exercise right to refuse to provide transgender surgeries in a statement about what Catholic teaching forbids.³⁸ The hospital system wrote: "As part of its religious practices, Franciscan provides care consistent with its religious beliefs and follows The Ethical and Religious Directives for Catholic Healthcare Services, issued by the U.S. Conference of Catholic Bishops."³⁹ These directives require the protection and preservation of bodily and functional integrity.⁴⁰ The hospital system also maintained that "[t]o provide or otherwise facilitate these services would also violate our deeply held religious beliefs." It would "constitute impermissible material cooperation with evil."⁴¹

Turning to cases involving employment discrimination claims against religious institutions, the defendant institutions regularly assert their ability to prefer co-believers under extant laws and/or to exercise complete authority over their ministers. For example, in a case about a Catholic school's refusal to renew the contract of a grade-school teacher who used

³³ *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

³⁴ *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014).

³⁵ *Thomas v. Rev. Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) (stating that "the judicial process is singularly ill equipped to resolve" how important or substantial a religious practice is).

³⁶ *Hobby Lobby*, 573 U.S. at 686 (citing *Thomas v. Rev. Bd. Of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)).

³⁷ *Zubik*, 136 S. Ct. at 1560-61.

³⁸ *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

³⁹ Brief for Petitioner in Support of their Motion for Partial Summary Judgment or, in the Alternative, Preliminary Injunction at *10, *Franciscan All., Inc. v. Burwell*, (No. 7:16-cv-00108-O), 2016 WL 9049696).

⁴⁰ US CONFERENCE OF CATHOLIC BISHOPS, *Ethical and Religious Directives for Catholic Health Care Services*, 5th ed., 29 (2009).

⁴¹ Brief, *Franciscan Alliance v. Burwell*, *supra* note 38, (citing Sister Klein Decl. ¶ 32).

IVF⁴², a diocese stated that “[t]he Church teaches that in vitro fertilization (or “IVF”) is gravely immoral, an intrinsic evil which no circumstance can justify.”⁴³ In his deposition, the parish priest stated “What is intrinsically evil is what she [the teacher] engaged in.”⁴⁴

The school lost. Although they attempted to characterize the teacher as a minister on the grounds that “the Church, the School, and the parents of students at the school expected and relied on her to perform the function of a minister every day while teaching her students,”⁴⁵ the court held that she was not a minister because she was not clergy, and did not have teaching qualification requirements or job responsibilities similar to the Lutheran school teacher in *Hosanna-Tabor*.⁴⁶ In connection with its refusal to grant summary judgment to the religious institution, the court stated that a jury might find that, because the Diocese hasn’t terminated any men for participating in infertility treatment, it might have engaged in sex discrimination toward the female plaintiff.⁴⁷

Courts in a number of states have also decided cases involving employment discrimination claims by same-sex married individuals. In a case challenging the Archdiocese of Chicago⁴⁸ and a local parish, for example, the Church successfully invoked the ministerial exemption to cover an organist who announced his impending marriage to a man. The Church’s case focused largely upon the relationship between the organist’s musical tasks – with their expressive, celebratory, sacred, and prayer- and scripture-enhancing qualities – and the Church’s mission.⁴⁹ In the Church’s reply brief, it focused on his functions of “convening and leading groups of parishioners to fashion music and liturgy recommendations for the pastor.”⁵⁰

In a similar case in Illinois⁵¹, a same-sex married music director and organist was fired with the explanation that the Church was within its rights because: “Your union is against the teachings of the Catholic Church.”⁵² The parish and the court ultimately agreed that the ministerial exemption applied because of the relationship between his functions (“selecting, directing and playing the music at Catholic masses”) and “convey[ing] the Church’s message.”⁵³

⁴² *Herx v. Diocese of Ft. Wayne-S. Bend, Inc.*, 48 F. Supp.3d 1168, 1170 (N. D. Ind. 2014).

⁴³ Defendants’ Trial Brief at 2, *Herx v. Diocese of Ft. Wayne-S. Bend, Inc.*, 48 F.Supp. 3d 1168 (N.D. Ind. 2014) (No. 1:12-CV-122-RLM-RBC), 2014 WL 7682604.

⁴⁴ *Id.* (citing Dep. of Msgr. Kuzmich at p. 84, l. 6-9).

⁴⁵ *Herx v. Diocese of Ft. Wayne-S. Bend, Inc.*, 48 F.Supp.3d at 1176.

⁴⁶ *Id.* at 1177.

⁴⁷ *Id.* at 1178.

⁴⁸ *Collette v. The Archdiocese of Chi.*, 200 F.Supp.3d 730, 730 (N.D. Ill. E. Div., 2016).

⁴⁹ *Id.* at 734.

⁵⁰ Def. Reply in Support of Motion for Summary Judgment at 2, *Collette v. The Archdiocese of Chicago*, 200 F.Supp.3d 730 (2016) (No. 16-cv-2912), 2016 WL 9445421, at *2.

⁵¹ *Demkovich v. St. Andrew the Apostle Parish*, 343 F.Supp. 3d 772, 772 (N.D. Ill.E.Div.2018).

⁵² *Id.* (citing Compl. ¶ 33).

⁵³ *Id.* at 786.

A Catholic school in Massachusetts refused to hire a same-sex married man for the position of food-services director, and defended against his employment discrimination claim by relying upon the ministerial exception, and their statutory privilege to prefer co-believers.⁵⁴ The school called the prospective food service director's same-sex marriage, "incompatible with [the school's] mission and its expectations of its employees."⁵⁵ The state court refused to apply the "ministerial exception," on the ground that the functions of a food-service employee "do not include formally presenting the gospel values or the ... teachings of the Catholic Church."⁵⁶ The court also refused to accept the school's claim that it was acting on its right to prefer co-believers as employees; instead, it interpreted Massachusetts' law to exclude from the definition of "religious employer"⁵⁷ institutions that hire and serve nonbelievers, as did the school at issue.

The employment nondiscrimination cases just described showcase Catholic institutions' poor framing of their free exercise defenses. Such framing also appears in some Catholic institutions' statements to the press about sexual expression conflicts not yet the subject of lawsuits. The institution will raise the relevant "Catholic rule" being violated, reference the ministerial exception or a religion's right to refuse to hire a dissenting employee, or talk about its right to refuse to cooperate with or facilitate bad behavior. For example, in a 2019 incident involving an Indiana Catholic school that removed a same-sex married teacher at the demand of the diocese, the school's letter to its community of parents, students, employees and graduates featured all of these weaknesses, alongside the message that it had no choice but to bow to authority:

It is Archbishop Thompson's responsibility to oversee faith and morals as related to Catholic identity within the Archdiocese of Indianapolis. Archbishop Thompson made it clear that Cathedral's continued employment of a teacher in a public, same-sex marriage would result in our forfeiting our Catholic identity due to our employment of an individual living in contradiction to Catholic teaching on marriage.

...

We are committed to educating our students in the tenets of the Catholic faith with an emphasis on the Holy Cross tradition. For every Catholic, the celebration of the Sacraments is central to the life of faith. Similarly, as a

⁵⁴ *Barrett*, No. NOCV2014-751, 2015 WL 9682042, at *11.

⁵⁵ *Id.* at *7.

⁵⁶ *Id.* at *8.

⁵⁷ *Id.*

Catholic community, the celebration of the Sacraments is essential for Cathedral. Therefore, in order to remain a Catholic Holy Cross School, Cathedral must follow the direct guidance given to us by Archbishop Thompson and separate from the teacher.⁵⁸

The archdiocese involved also publicly invoked the ministerial exception, and identified all teachers, guidance counselors and administrators as ministers. It gestured to the communal witness needed in Catholic schools, stating that every Catholic school teacher should “effectively bear witness to Christ, whether they teach religion or not,” in both “their professional and private lives.”⁵⁹ An article reporting this story noted that similar policies are written into many Catholic schoolteachers’ employment contracts⁶⁰

In 2019, a controversy erupted in the Archdiocese of Kansas when the diocese refused to allow a Catholic school to enroll children being reared by a same-sex couple. In its media statement, the Archdiocese wrote:

Our schools exist to pass on the Catholic faith. Incorporated into our academic instruction and spiritual formation, at every grade level are the teachings of the Catholic Church.

Matrimony is held up by the Catholic Church as a sacrament entered into between a man and a woman. Marriage is considered the building block of the family, of society and the heart of the Church.

...

[T]he challenges regarding same sex couples and our Catholic schools is that that same-sex parents cannot model behaviors and attitudes regarding marriage and sexual morality with essential components of the Church’s teachings. This creates a conflict for their children between what they are taught in school and what is experienced at home. It also becomes a source of confusion for the other school children.

...

⁵⁸ Letter from the Chairman of the Board of Directors and the President of Cathedral High School to “Cathedral Family” (June 23, 2019), <https://www.gocathedral.com/about/news-marketing/school-news/news-post/~board/homepagenews/post/dear-cathedral-family>.

⁵⁹ Arika Herron, *Indianapolis Archdiocese Aggressive, but Not Alone, in Firing Gay Teachers. Here’s Why*, THE INDIANAPOLIS STAR (July 7, 2019 6:00 A.M.), <https://www.indystar.com/story/news/education/2019/07/07/indianapolis-archdiocese-not-first-fire-gay-teachers-but-among-most-active/1555277001/>.

⁶⁰ *Id.*

We do not feel it is respectful of such individuals, nor is it fair, loving or compassionate to place their children in an educational environment where the values of the parents and the core principles of the school conflict.⁶¹

The pastor at the parish involved wrote a letter to parishioners regarding his “distress[]” at the “division this sensitive and complex issue has caused,” and noted that some other dioceses allow such children into Catholic schools. He also stressed that the diocese has final authority in these matters while “individual diocesan schools do not.”⁶² He referenced the opinions of angry parishioners as coming “from a place of love and compassion for the family and the desire for inclusivity within our school and community.”⁶³

As with the letter from the Indianapolis school, the Kansas communications stressed Catholic rules and the school’s duty to bow to superior authority. The Kansas pastor also contrasted Church law with the “love,” “compassion” and “inclusivity” demonstrated by those opposing the diocesan decision. There was some reference in Kansas to communal witness to Church teachings, but it was brief.

The theme of Church “law” versus “love” is common. It was also articulated in a letter from a private girls’ Catholic school in Washington DC to its school community, after the school decided to celebrate same-sex weddings in its alumnae magazine. There, the President Emerita of the school opined:

[W]e can focus on Church teaching on gay marriage or we can focus on Church teaching on the Gospel commandment of love. We know from history - including very recent history - that the Church, in its humanity, makes mistakes. Yet, through the grace of God and the power of the Holy Spirit, it learns and grows. And so, we choose the Gospel commandment of love.⁶⁴

⁶¹ ARCHDIOCESE OF KANSAS CITY IN KS, MEDIA STATEMENT: ADMISSIONS POLICIES IN CATHOLIC SCHOOLS IN THE ARCHDIOCESE (2019), <https://www.documentcloud.org/documents/5761141-Archdiocesan-Media-Statement-Regarding-Same-Sex.html>.

⁶² Letter from Fr. Craig J. Maxim, Pastor, St. Ann’s Parish, to St. Ann School Families, Faculty, and Staff (Feb. 27, 2019), available at <https://assets.documentcloud.org/documents/5761765/Letter-from-the-Rev-Craig-J-Maxim-to-St-Ann.pdf>.

⁶³ *Id.*

⁶⁴ Dick Uliano, *Catholic Girls School in DC Adopts Policy Contrary to Church Teaching*, WTOP NEWS (May 13, 2019), <https://wtop.com/dc/2019/05/catholic-girls-school-in-dc-adopts-policy-contrary-to-church-teaching/>; Flo Martinez Addiego et al., *An Open Letter to Georgetown Visitation*, FIRST THINGS (May 23, 2019), <https://www.firstthings.com/web-exclusives/2019/05/an-open-letter-to-georgetown-visitation>.

C. Backlash and Shortcomings

1. External

As summarized above, there are several types of negative effects resulting from Catholic institutions' manner of articulating free exercise rights. First, some observers interpret refusals of complicity with immoral behavior as accusations directed against vulnerable people. They read these defenses as assaults on their dignity and social equality.

It is an understatement to say that in US culture today lionizes the values of equality, nondiscrimination and human dignity. Against this backdrop, statements by Catholic institutions to the effect that a particular behavior is wrong, not coincident with Catholic morals, and that the Church cannot be complicit, provoke furious and negative reactions. Furthermore, the Church's actions (i.e. rejecting employees or legally mandated benefits or services such as contraception and transgender surgeries) are often directed against the behaviors of women, and homosexual or transgender persons. That the Church's actions are a response to a stream of laws promoting controversial sexual expression rights, does not blunt this criticism.

In response to these free exercise defenses, critics are calling upon lawmakers to narrow religious freedom rights in cases in which churches articulate a complicity- or cooperation- type claim. As summarized in a well-known article by Professors Douglas NeJaime and Reva Siegel:

Persons of faith are now seeking religious exemptions from laws concerning sex, reproduction, and marriage on the ground that the law makes the objector complicit in the assertedly sinful conduct of others. ... The distinctive features of complicity-based conscience claims matter, not because they make the claim for religious exemption any less authentic or sincere, but rather because accommodating claims of this kind has the potential to inflict material and dignitary harms on other citizens.⁶⁵

This is not a new theme. Particularly since the rise of the visibility of the same-sex marriage debate, it is articulated regularly. In 2016, for example, in the last report of the Obama-era US Commission on Civil Rights Commission, Chairman Martin Castro opined that the "phrases 'religious liberty' and 'religious freedom' will stand for nothing except hypocrisy so long as they remain code words for discrimination, intolerance, racism, sexism, homophobia, Islamophobia, Christian supremacy or any form of

⁶⁵ Douglas NeJaime & Reva B. Siegel, *Conscience-Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516, 2516 (2015).

intolerance.”⁶⁶

Another form of criticism points to the hypocrisy of Catholic institutions’ refusing to comply with contemporary sexual expression laws, at the same time that horrible sex abuse and cover-ups within the Church are coming to light. And finally, there is the suspicion that the ministerial exception is sometimes used as a tactical maneuver to deflect investigation of blatantly unfair reasons for refusing employment. The teacher in the *Hosanna-Tabor* case was returning from sick leave over her narcolepsy when the church denied her re-employment.⁶⁷ A teacher in a California Catholic school was let go after a cancer diagnosis.⁶⁸

2. Internal

Backlash against Catholic institutions occurs not only among outsiders to the faith, but also among insiders. Parishioners and parents of school-aged children in particular have staged protests and letter writing campaigns and spoken frequently to the media in opposition to their institutions’ choices to raise free exercise defenses to the application of sexual expression laws. After a parochial school in Kansas refused to enroll the children of a same-sex couple, the parish Facebook pages featured comments such as: “Wonder how many parishioners take birth control or eat meat on Fridays? ... Have any parishioners cheated on spouses? Sooo hypocritical.”⁶⁹

At a parish in Minnesota, after a same-sex married musician was asked to resign “[s]ome parishioners [] talked about withholding financial support from the parish, or withdrawing from it entirely.”⁷⁰ Parents at schools involved in similar controversies have also given interviews to newspapers or show up in person to complain.⁷¹ In the words of a parent at a Miami school that fired a teacher who entered a same-sex marriage: “‘We were extremely livid. They treated her like a criminal,’ ... said Cintia Cini, parent of one of the children in Morffi’s class. Cini said that the parents hadn’t known Morffi was gay but did not care about her sexual orientation. ‘Our only concern was the way she was with our children, the way she taught our children and this woman by far was one of the best teachers out there,’ she

⁶⁶ US COMM’N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES, 29 (2016).

⁶⁷ *Hosanna-Tabor Evangelical Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 179 (2012).

⁶⁸ *Biel v. St. James School*, 911 F.3d 603 (2018), cert. granted 2019 WL 6880705, Dec. 18, 2019.

⁶⁹ Christine Hauser, *Catholic School in Kansas Facing a Revolt for Rejecting a Same-Sex Couple’s Child*, THE NEW YORK TIMES (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/us/kansas-catholic-school-same-sex-parents.html>.

⁷⁰ Brian Roewe, *Minnesota Parish Rallies Around Gay Musicians Ousted by New Priest*, NAT’L CATHOLIC REP. (Dec. 22, 2017), <https://www.ncronline.org/news/parish/minnesota-parish-rallies-around-gay-musicians-ousted-new-priest>.

⁷¹ *Id.*

said.”⁷² They argue that homosexuality is being singled out for condemnation.

A parent at an Indiana Catholic school also stressed the overarching importance of teacher qualifications, in connection with the school’s employment of a same-sex married man: “‘The teachers in question are longtime teachers who are highly qualified and highly valued,’ said Butch Humbert, who has two children enrolled at Brebeuf.”⁷³

When a school counselor was fired from a Catholic high school in Indiana, the students “sport[ed] rainbow apparel at school and during sporting events. The football team kicked off the season by running onto the field waving a large rainbow flag. A group of students started a nonprofit in [the teacher’s] name to advocate for change in the church; they appeared on Ellen Degeneres’ daytime talk show with [the fired teacher].”⁷⁴

This review of Catholic institutions’ religious objections, and the backlash they can provoke, vividly illustrates the shortcoming of the current Catholic religious freedom argumentation. Disappointed Catholics view their religion as overly concerned with negative rules especially about sex, marriage and parenting. They disapprove that highly competent, likeable employees get hurt. They believe that their leaders do not treat all dissent from Catholic teaching alike and are therefore hypocrites or sex-obsessed. They interpret refusals to incorporate into the community dissenting individuals and married LGBT persons and their children, as a preference for law over love.

These reactions further suggest that many Catholics believe that Catholic institutions exist primarily for the purposes of competently providing secular services, such as education, and for welcoming anyone who wants to join “as they are,” without expectation that they embrace or are working toward embracing the Catholic faith. For their part, Church leadership uses the language of rules and authority to refuse to obey sexual expression laws requiring them employ certain people or operate in a certain way.

Neither the leaders’ statements nor the reactions of “Catholics in the pews,” refer much if at all to the communal character of Catholic institutions, or the role that Catholic sexual expression teachings play in creating and sustaining this. From time to time, an official statement will briefly or obliquely touch upon one of these points. The Kansas diocese’s statement referred to the need to avoid confusing children or others by exposure to ideas and lives contradicting Catholic values. Some Catholic institutions’ ministerial exception claims refer to schoolchildren’s need for

⁷² Robert Shine, *Lesbian Teacher Fired by Catholic School Over her Same-Gender Marriage*, NEW WAYS MINISTRY (Feb. 13, 2018), <https://www.newwaysministry.org/2018/02/13/lesbian-teacher-fired-catholic-school-gender-marriage/>.

⁷³ Herron, *supra* note 59.

⁷⁴ *Id.*

role models. Objections to situations involving ARTs or contraception sometimes refer to the moral theological point about preserving both the unitive and procreative functions of sex; but these have not clarified how this teaching undergirds or is integrated with the wider Catholic mission of the institution. Looking generally at this array of Church responses, one is forcefully reminded of Pope Francis' admonition about the disutility of "disjointed" Catholic moral teachings and their responsibility for putting observers off the faith.⁷⁵ I would add that it puts them off religious freedom too.

In the next two parts, I offer theological and practical accounts of Catholic institutions that might serve to mitigate the backlash against their current free exercise assertions. These address Catholic doctrine about the nature of the Church ("ecclesiology") as a community of persons unified by and for Christ, and the role that the sexual expression teachings play in that community. Part III then shows why free exercise accounts relying on this theology are superior ways of meeting the demands of both the letter and the spirit of current free exercise defenses.

PART II. CATHOLIC IS COMMUNAL

The Catholic Church subsists in communities. This derives from the words and actions of Jesus Christ. When asked about "first of all the commandments" Jesus replied that "You shall love the Lord your God with all your heart, with all your soul, with all your mind, and with all your strength. The second is this: 'You shall love your neighbor as yourself.' There is no other commandment greater than these." (*Mark* 12: 30-31). Both the horizontal and the vertical relationships are necessary; they are also interrelated. If Catholicism were to be illustrated with a photo, it would not be a woman alone in a room with a Bible and a candle seeking through individual self-discipline to meet particular religious standards and thereby gain salvation. It would more likely be a picture of the Last Supper with Jesus and all his Apostles, or Jesus mobbed by a group of children, or delivering the Sermon on the Mount. It might be a photo of a Sunday Mass. As many have noted, with few exceptions even Catholic monks live in community.

While it borders on the ridiculous to attempt to condense the vast literature available on the matter of the nature of the Church as community, I will attempt to convey its essence, which involves not only theology but also overlapping observations about history, Revelation, and even about human nature and the role of communities in inspiring and sustaining faith. The object of this summary is to demonstrate that Catholic institutions' free

⁷⁵ Laurie Goodstein, *Pope Says Church is 'Obsessed' With Gays, Abortion and Birth Control*, THE NEW YORK TIMES (Sept. 19, 2013), <https://www.nytimes.com/2013/09/20/world/europe/pope-bluntly-faults-churchs-focus-on-gays-and-abortion.html>.

exercise claims are theologically more accurate when they convey the constitutively communal nature of the Church. They would also be more comprehensible and appealing.

A. Scripture

Catholics believe that God’s way of revealing himself in Jesus Christ was prefigured in his relationship with the people of Israel. As summarized by Vatican II, Catholics hold that God “does not make men holy and save them merely as individuals, without bond or link between one another. Rather has it pleased Him to bring men together as one people, a people which acknowledges Him in truth and serves Him in holiness. He therefore chose the race of Israel as a people unto Himself.”⁷⁶

Like the God of Israel, Jesus Christ comes to a community. He arrives as a child within a family. He performs his public ministry with 12 companions, the Apostles, and moves among towns and villages where he encounters and speaks with individuals and both large and small groups. One of the leading contemporary theologians on the nature of the Catholic Church, the Reverend Luigi Giussani, refers to Jesus “method” of evangelization as mutual witness to Christ within a community. He writes that Jesus’ method was also carried forward by the Church throughout history and persists today.⁷⁷ In other words, Jesus’ method of human communication should dictate the method by which later-born human beings can come to know him: within a personal encounter with the living God.⁷⁸ Given that Jesus has not walked the earth for nearly 2000 years, Giussani asks how humans can attain reasonable certainty about Christ by means of personal encounter today. His simple answer, which summarizes a great volume of Church teachings: through encountering persons who believe in him and who can, by the witness of their lives, reveal that he is not a mere memory, but rather alive in human beings who are “*imago dei*” – image of God – and with whom Christ promised to dwell after his ascension into heaven.⁷⁹

During his life on earth, Jesus’ Apostles and disciples come to know and love him as human beings come to know and love one another – through personal interactions over time. Giussani compares these to the interactions of a child with her parents. The child bonds with parents – becomes convinced of their love – not on the basis of empirical evidence, but by co-existence and companionship.⁸⁰ In the same way, over time and through daily interactions, Jesus’ companions become attracted to his person.

⁷⁶ Pope Paul VI, Dogmatic Constitution on the Church: *Lumen Gentium* § 9.

⁷⁷ LUIGI GUISSANI, WHY THE CHURCH 1 (Viviane Hewitt trans., 2001).

⁷⁸ *Id.* at 6.

⁷⁹ *Id.* at 20–21.

⁸⁰ *Id.* at 81.

Eventually, they become convinced that he is the Christ. As Giussani describes it, they witness his genius, which confounds the wise of the day. They also witness his effortless command of nature and flawless command of Scripture. Alongside this, however, they witness his extraordinary compassion for the weakest and outcast, his lack of arrogance, and his total sacrificial love. He is like no other human. He is too good to be true. He is the answer to their hopes for their own lives, for the human race, and to all of their most essential human longings – for perfect love, truth, justice, and freedom. They become convinced that he must be the Messiah.⁸¹

The Church today is intended to be the place of encounter with human beings who, by their lives, can verify other human beings' search for the living Christ, a Christ who is the complete response to humans' fundamental needs. The members of the Church should assist each other to believe that it is desirable and possible to live and love as Jesus did.⁸² Though it seems shocking - "scandalous" in Catholic theological terms – Catholic theology holds that human beings have been charged to communicate the divine by way of the human, as Jesus did.⁸³

Jesus began to "delegate" to his apostles the work of bringing Christ to other human beings even while he remained on earth. When he sent out the 72 disciples ahead of him, he told them: "Whoever listens to you listens to me. Whoever rejects you rejects me." (*Luke* 10:16) He referred to himself as the "vine" and his followers as the "branches." (*John* 15:5) He promised to make the Apostles Peter and Andrew "fishers of men." (*Matthew* 4:19) When he sent out the twelve apostles to announce the inbreaking of the Kingdom of heaven, he directed them to "Cure the sick, raise the dead, cleanse lepers, drive out demons." (*Matt* 0:5-8) After his resurrection Jesus commissions the Apostles to "Go, therefore, and make disciples of all nations, baptizing them in the name of the Father, and of the Son, and of the holy Spirit, teaching them to observe all that I have commanded you." (*Matt* 28: 19-20)

Jesus also used metaphors encouraging unity within the diversity of followers. He referred to his followers as the sheep of his flock while he is the shepherd. He calls them children of the same Father, and thus brothers and sisters to one another. And Jesus promises them that in their work of human encounter, he will be *actually* present: "And behold, I am with you always, until the end of the age." (*Matt* 28:20) He makes this promise at the Last Supper as well, when he promises that he will be present in the bread and wine transformed at the Eucharistic meal. (*Luke* 22:19-20)

Catholic theology teaches, in other words, that Jesus' words and actions during his life charge every follower to participate personally in his universal

⁸¹ LUIGI GUISSANI, AT THE ORIGIN OF THE CHRISTIAN CLAIM 51-58 (Viviane Hewitt trans., 1998).

⁸² *Id.* at 208.

⁸³ *Id.* at 119, 123.

salvific mission. This structures their horizontal relations with other people so as to be directed always toward the building of the community's vertical, unified witness to God. This is the essence of Jesus' prayer: "I pray not only for them, but also for those who will believe in me through their word, so that they may all be one, as you, Father, are in me and I in you." (*John* 17:20-21) The Church is the community engaged in this work, the living presence of God on earth two thousand years after his ascension into heaven.

B. *Early Christianity*

Immediately after Jesus' departure from earth, his Apostles carry on life in community, believing God to be actually present with them in the person of the Holy Spirit and in the Eucharistic meal. Their unity was not based upon race or nation or sex or social status. "There is neither Jew nor Greek, there is neither slave nor free person, there is not male and female, for you are all one in Christ Jesus." (*Gals* 3:28). Rather, it is comprised of their common faith, which gives rise to their common mission to evangelize the world. St. Paul characterizes this simultaneously horizontal and vertical Christian existence in his famous "Body of Christ" passage: "As a body is one though it has many parts, and all the parts of the body, though many, are one body, so also Christ. For in one Spirit we were all baptized into one body, whether Jew or Greeks, slaves or free persons, and we were all given to drink of one Spirit." (*1 Cor* 12:12-13).

Accounts of the lives of the earliest Christian communities show how they understood and lived this exhortation – to direct their relations with one another toward a unified relationship with God. The Acts of the Apostles records that they: "devoted themselves to the apostles' teaching and fellowship, to the breaking of bread and the prayers." (*Acts* 2:42). Their communal lives included meeting regularly to celebrate the Eucharistic meal. Acts also records the early Christians' intuition about the necessity of care for their community's material needs as part of their life in Christ: "All who believed were together and had all things in common; they would sell their property and possessions and divide them among all according to each one's need." (*Acts* 2:44-45). When Jerusalem was suffering material want, they took up a collection. (*1 Cor* 16:1-4).

This same intuition – that love of God is inextricably tied to love of the fellow humans beings God had made, called, and saved – led the early Christian communities to pioneer charitable institutions at the service of all.⁸⁴ In the words of historian Robert Louis Wilken: "From earliest times Christian leaders had taken to heart the exhortations in the Scriptures to care for the poor."⁸⁵ He points out that even by the second century some Christian

⁸⁴ ROBERT LOUIS WILKEN, *THE FIRST THOUSAND YEARS: A GLOBAL HISTORY OF CHRISTIANITY* (2012), 154-62.

⁸⁵ *Id.* at 156.

churches were purchasing burial land for the poor and by the fourth century were constructing buildings to house them.⁸⁶

Early Christians' communal life was not merely a response to Christ's commands, but arose also out of their emerging understandings about what naturally frail and interdependent human beings require. They came to understand their community gatherings as opportunities for mutual assistance. In his letter to the Hebrews, St. Paul reminds them: "We must consider how to rouse one another to love and good works. We should not stay away from our assembly, as is the custom of some, but encourage one another, and this all the more as you see the day drawing near." (*Hebrews* 10:24-25).

C. *Later Catholic Theological Formulations*

Later documents of the Catholic Church interpreting scriptures, early church tradition and the development of the Christian community over hundreds and then thousands of years, offer authoritative formulations about the communal character of the Church, which can be highlighted according to the following sub-categories.

1. *The laity*

Given the Church's understanding of its mission to carry out Jesus' universal salvific mission, it is no surprise that all members of the Church are charged with the task of evangelization. In the words of Vatican II's Dogmatic Constitution on the Church, (*Lumen Gentium*), every layperson, "in virtue of the very gifts bestowed upon him, is at the same time a witness and a living instrument of the mission of the Church itself according to the measure of Christ's bestowal."⁸⁷ A recent Vatican document devoted solely to the matter of evangelization⁸⁸ stresses that every Catholic must be a "true witness of God" and "render an account for one's faith." Each member must "show how the ... Christian faith is a valid response to the pressing problems of life in every age and culture, problems which necessarily affect every person" in order to "overcome[e] the separation of the Gospel from life."⁸⁹

On a practical level, this makes sense. Clergy and religious are relatively few; but laypersons are everywhere, in every culture and work and state of life. Their potential for evangelization is overwhelming. It is unsurprising therefore that the Catechism of the Catholic Church directs that one of the

⁸⁶ *Id.* at 156, 158.

⁸⁷ *Lumen Gentium*, *supra* note 76 at 2, 33.

⁸⁸ Synod Of Bishops, *Instrumentum Laboris: The New Evangelization For The Transmission Of The Christian Faith*, at 119 (Nov. 16, 2019, 11:29 AM), http://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_20120619_instrumentum-xiii_en.html

⁸⁹ *Id.*

primary works of the ordained clergy is to be “at the service” of the laity.⁹⁰ The laity are not described in the Catechism by what they are “not” (*i.e.* clergy) – a negative view commonly held by both outsiders and insiders – but rather by what they *are* and must do. The Catechism defines the laity as persons who, by Baptism, are incorporated into Christ, with their “own part to play in the mission of the whole Christian people in the Church and in the world”⁹¹ to engage in temporal affairs, to illuminate and order them, to “grow according to Christ.”⁹²

The Catechism specially emphasizes that lay duty is the more pressing when it is *only* through them that humanity can come to know Christ.⁹³ Given the relative rarity of priest and religious, and lay management of the vast majority of Catholic institutions today, this applies directly to the institutions here under consideration.

2. *Personal witness*

This theme of personal witness – “Jesus’ method” as Giussani calls it – has played a crucial role in Catholic theology of community. A 2012 Vatican document on evangelization, for example, notes that “[m]odern man listens more willingly to witnesses than to teachers, and if he does listen to teachers, it is because they are witnesses. ... It is therefore primarily by her conduct and by her life that the Church will evangelize the world, in other words, by her living witness of fidelity to the Lord Jesus.”⁹⁴ The document defines witnessing to require that “through our actions, words and way of being, Another makes himself present. Witness could be described as the means by which the truth of God's love comes to men and women in history, inviting them to accept freely this radical newness. Through witness, God lays himself open, one might say, to the risk of human freedom.”⁹⁵

Pope Benedict XVI used the colloquial phrase “dependable company,” to summarize the nature of the Church. He wrote that all Catholics are to “help[] one another to enter into a living relationship with Christ and with the Father. This has been from the start the fundamental task of the Church as the community of believers, disciples and friends of Jesus. The Church ... is that dependable company within which we have been brought forth and educated to become, in Christ, sons and heirs of God. ... [I]t means while walking, helping one another to become truly friends of Jesus Christ and children of God.” Such a witness, “through the coherency of [a person’s]

⁹⁰ THE CATECHISM OF THE CATHOLIC CHURCH, 1547.

⁹¹ *Id.* at 873.

⁹² *Id.* at 898.

⁹³ *Id.* at 900.

⁹⁴ *Instrumentum Laboris*, *supra* note 88, at 158, citing Pope Paul VI, Apostolic Exhortation *Evangelii nuntiandi* (8 December 1975), 41: *AAS* 68 (1976) 31, 32, n. 84.

⁹⁵ *Id.*

own life, becomes a dependable reference point.”⁹⁶

Of course, as Popes Benedict XVI and Francis point out, such witnesses must already themselves be already evangelized. In Francis’ words: “all religious teaching ultimately has to be reflected in the teacher’s way of life, which awakens the assent of the heart by its nearness, love and witness.”⁹⁷ They must themselves have a “relationship with Christ and with the Father” in order to be “effective educators in the faith.”⁹⁸ Their witness must be visible in “personal deeds and public testimony as well as the internal life of our communities and their missionary zeal. . . . The world must witness this manner of response, based on the logic of our faith, in not only the Church as a whole but in the life of every Christian.”⁹⁹

The Church has also pointed out that the need for personal witness is especially acute today because “following Christ is not easy and is little understood by the world . . . [which] makes it more compelling for communities and individual Christians to be courageous witnesses of the Gospel.”¹⁰⁰ As Giussani has observed, in society, the “religious mentality” that could pose the religious question and propose an answer is gone. Supportive communities of fellow believers are needed more than ever.¹⁰¹

I want to introduce here a brief empirical aside to complement this theological material about the importance of Christian communities being “dependable company.” There is a body of literature about the important role such communities play in the transmission of faith, especially to adolescents and young adults. Summarizing quite briefly, it suggests that people are importantly persuaded by witnesses, and not merely by words. Regularly, these witnesses are laypersons, not clergy or religious, although the vowed and ordained can also play a role. In the words of one of the leading studies of Catholic faith transmission, “before children need catechism or theology, they require witness.”¹⁰² This will include “resources outside the household” which are essential if parents are to have any chances of success. In the authors’ words, “[i]t is unimaginable that parents could transmit a religious worldview without exposing their children to outside

⁹⁶ Benedict XVI, *Discourse at the Inauguration of the Convention of the Diocese of Rome* (June 11, 2007), http://w2.vatican.va/content/benedict-xvi/en/speeches/2007/june/documents/hf_ben-xvi_spe_20070611_convegno-roma.html.

⁹⁷ Pope Francis, *Apostolic Exhortation Evangelii Gaudium of the Holy Father Francis to the Bishops, Clergy, Consecrated Persons, and the Lay Faithful on the Proclamation of the Gospel in Today’s World*, (Nov. 24, 2013), http://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html;

⁹⁸ Benedict XVI, *supra* note 96.

⁹⁹ *Instrumentum Laboris*, *supra* note 88, at 120.

¹⁰⁰ *Id.* at 119.

¹⁰¹ GIUSSANI, *supra* note 77, at 34.

¹⁰² Justin Bartkus and Christian Smith, *A Report on American Catholic Religious Parenting, University of Notre Dame: McGrath Institute for Church Life and Center for the Study of Religion and Society* (2019), 67, <https://churchlife-info.nd.edu/thank-you-for-downloading-a-report-on-american-catholic-religious-parenting?submissionGuid=dbf09fec-ce92-451f-a0df-82fa4b080685>.

persons, communities, and experiences which constitute the cultural ‘world’ in which Catholic belief makes sense.”¹⁰³

In perhaps the leading study of faith transmission,¹⁰⁴ author Vern Bengtson reported that faith is most likely transmitted in intact families who regularly practice their faith and who have “affectual solidarity” with their children.¹⁰⁵ It also appears that not only parents’ but also the community’s¹⁰⁶ and schoolmates’ religiosity – which helps set their community tone – matter to adolescents’ likelihood of practicing religion.¹⁰⁷ A study about the extent that religious youth group participation might have some impact on faith transmission to young adults concluded that a possible pathway included such groups’ facilitating young adults’ “talking with more adults in the parish and feeling like there are more adults one could turn to for support.”¹⁰⁸

An important project on the “Spirituality of Emerging Adults,” expressed its conclusions about church communities that more successfully transmit the faith to the next generation, saying:

Building community and developing friendships need to be incorporated into all ministry and faith formation with emerging adults. Churches that do an exceptional job of attracting and involving emerging adults find that community is vital to the emerging generations. Emerging adults long to be deeply invested in others and have others deeply invested in them. They desire to be a major part of each other’s lives—the day-to-day, big and small “stuff of life.” They also think that others should be a part of the most important aspect of their lives—their spiritual journey. Churches that are effective at attracting and developing young adults place a high value on moving people into a healthy small group system. Young adults are trying to connect and will make a lasting connection wherever they can find belonging in a congregation.¹⁰⁹

One sees these insights brought to life in stories about conversions to

¹⁰³ *Id.*

¹⁰⁴ VERN BENGTSON, *FAMILIES AND FAITH: HOW RELIGION IS PASSED DOWN ACROSS GENERATIONS* (2013).

¹⁰⁵ *Id.* at 61, 63, 73–74, 79, 117.

¹⁰⁶ *Id.* at 166.

¹⁰⁷ Mark D. Regnerus & Jeremy E. Uecker, *Finding Faith, Losing Faith: The Prevalence and Context of Religious Transformation During Adolescence*, 47 *Rev. of Religious Res.* 217, 230–31 (2006).

¹⁰⁸ Patricia Snell, *What Difference Does Youth Group Make? A Longitudinal Analysis of Religious Youth Group Participation Outcomes*, 48 *J. FOR THE SCIENTIFIC STUDY OF RELIGION* 572, 578 (2009).

¹⁰⁹ John Roberto, *Directions for Faith Formation with Emerging Adults: Insights from the Changing Spirituality of Emerging Adults Project*, CATHOLIC UNIVERSITY OF AMERICA (2008), <https://cuislandora.wrlc.org/islandora/object/achc-cseapc%3A6/datastream/PDF/view>.

Catholicism. At a website that collects such stories, there are a large number of accounts of the roles played by the witness of others, whether of children at a Christian school,¹¹⁰ fellow parishioners,¹¹¹ or members of a university's Catholic community.¹¹² Giussani describes one skeptic's encounter with a believing couple that led him to want more exposure to them and to their religious beliefs. He says to them "[l]et's get together more often, because when I'm with you, I'm less afraid, too."¹¹³

It should be noted here that advocates for new forms of sexual expression likewise understand the power of personal witness. It is regularly observed – sometimes under the heading of a theory entitled the “contact hypothesis” – that Americans' opinions on same-sex marriage changed extraordinarily swiftly from disapproval to approval in the last decade as a function, in part, of visible, same-sex married couples in more communities.¹¹⁴

3. *Sin*

It is clear that there is an enormous gap between Catholicism's call to its members, and their response.¹¹⁵ In short, human beings are manifestly weak and sinful. The Catechism refers to our primary weakness as “original sin,” “a deprivation of original holiness and justice.”¹¹⁶ At the same time, “human nature has not been totally corrupted: it is wounded in the natural powers proper to it, subject to ignorance, suffering and the dominion of death, and inclined to sin – an inclination to evil that is called concupiscence.” Baptism, by imparting the life of Christ's grace, erases original sin and turns a person back towards God, but the consequences for nature, weakened and inclined

¹¹⁰ Curtis Walker, *How I Grew Into the Catholic Faith, The Coming Home Network: Conversion Stories* (July 1, 2019) <https://chnetwork.org/story/how-i-grew-into-the-catholic-faith/>.

¹¹¹ Pete Johnson, *Love at First Sight, and Love at Last, The Coming Home Network: Conversion Stories* (June 24, 2019), <https://chnetwork.org/story/love-at-first-sight-and-love-at-last/>.

¹¹² Chad Torgerson, *Agnostic Convert* (Nov. 16, 2019, 12:15 PM) <http://whyimcatholic.com/index.php/conversion-stories/agnostic-converts/105-agnostic-convert-chad-torgerson>.

¹¹³ JULIAN CARRON, *DISARMING BEAUTY: ESSAY ON FAITH, TRUTH, AND FREEDOM* (2017), 15..

¹¹⁴ Samantha Schmidt, *Americans' views flipped quickly on gay rights. How did minds change so quickly?* THE WASHINGTON POST (June 7, 2019), https://www.washingtonpost.com/local/social-issues/americans-views-flipped-on-gay-rights-how-did-minds-change-soquickly/2019/06/07/ac256016-8720-11e9-98c1-e945ae5db8fb_story.html (reporting that the “gay rights movement managed to change people's minds faster than any other civil rights movement in memory.” Factors included “growing visibility in popular culture,” “privileged and powerful social leaders,” and the “contact hypothesis”, meaning meeting more gay people; if you like a person, you will change your mind about their behavior, especially leaders in one's own communities); see also Tessa E.S. Charlesworth & Mahzarin R. Banaji, *Patterns of Implicit and Explicit Attitudes: I. Long-Term Change and Stability From 2007 to 2016*, 30 PSYCHOLOGICAL SCIENCE 74 (2019), https://journals.sagepub.com/doi/pdf/10.1177/0956797618813087?casa_token=X-Y76EoKb-0AAAAA:kGN_RmaibDgW5vOy9Kvo9oRYSRTy067ysibtQH2YZLGaA_Gl6Fyen5DVsdyaqhBj_6bRboC3fvZJvQ.

¹¹⁵ GIUSSANI, *supra* note 77, at 140.

¹¹⁶ THE CATECHISM OF THE CATHOLIC CHURCH, *supra* note 90, at 389.

to evil, persist in man and summon him to spiritual battle.¹¹⁷ As St. Paul wrote: “I am carnal, sold into slavery to sin. What I do, I do not understand. For I do not do what I want, but I do what I hate.” (*Roms* 7:14-15). The Gospel of John speaks of humans’ need for “prun[ing]” so that we “bear[] more fruit” (*John* 15:2).

The Church is therefore a “field hospital” for sinners, as noted above. But while there, as Pope Francis writes, “[t]he Church, in her maternal concern, tries to help them experience a conversion which will restore the joy of faith to their hearts and inspire a commitment to the Gospel.”¹¹⁸ There also the Catholic community “without detracting from the evangelical ideal, ... accompan[ies] with mercy and patience the eventual stages of personal growth as these progressively occur.”¹¹⁹ Francis writes that growth is not, however, “therapy,” saying: “[t]o accompany them would be counterproductive if it became a sort of therapy supporting their self-absorption and ceased to be a pilgrimage with Christ.”¹²⁰

4. All Catholic institutions

Parishes play a crucial role in making Christ present in a given territory, and for “growth in the Christian life, for dialogue, proclamation, charitable outreach, worship and celebration.”¹²¹ But other Catholic institutions likewise participate in the core mission of the Church. As Pope Benedict XVI has written: “all of the Church’s activities are meant to glorify God and fill his people with the truth that sets us free.” And all are places where Christianity is “proposed to others always with respect but also without compromise.”¹²² He has noted that Catholic schools, in particular, must be “genuinely Catholic and therefore capable of passing on those truths and values necessary for the salvation of souls and the up-building of society.”¹²³ This necessarily involves understanding the work as an “expression of the love of God for humanity through the charity and example of the clergy, religious and lay faithful who staff them.”¹²⁴

Institutions oriented to the common good have been a characteristic of Christianity since early days. This was remarked by ancient writers including Justin Martyr and Tertullian.¹²⁵ In an extended but essential

¹¹⁷ *Id.* at 405.

¹¹⁸ *Evangelii Gaudium*, *supra* note 97, at 15.

¹¹⁹ *Id.* at 44.

¹²⁰ *Id.* at 170.

¹²¹ *Evangelii Gaudium*, *supra* note 97. Pope Benedict XVI, Address of His Holiness Benedict XVI to Bishops of the Episcopal Conference of India on their “Ad Limina” Visit (Sept 8, 2011), http://w2.vatican.va/content/benedict-xvi/en/speeches/2011/september/documents/hf_ben-xvi_spe_20110908_bishops-india.html.

¹²² Pope Benedict XVI, *supra* note 121.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *I Apologia*, 67: PG 6, 429; Tertullian, *Apologeticum*, Ch. 39, (Wm. Reeve, trans., 1894).

passage from Benedict XVI, he explains how these institutions arose out of the nature of Christianity:

As a community, the Church must practice love. Love thus needs to be organized if it is to be an ordered service to the community. The awareness of this responsibility has had a constitutive relevance in the Church from the beginning: “All who believed were together and had all things in common; and they sold their possessions and goods and distributed them to all, as any had need” (*Acts* 2:44-5). In these words, Saint Luke provides a kind of definition of the Church, whose constitutive elements include fidelity to the “teaching of the Apostles”, “communion” (*koinonia*), “the breaking of the bread” and “prayer” (cf. *Acts* 2:42). The element of “communion” (*koinonia*) is not initially defined but appears concretely in the verses quoted above: it consists in the fact that believers hold all things in common and that among them, there is no longer any distinction between rich and poor (cf. also *Acts* 4:32-37). As the Church grew, this radical form of material communion could not in fact be preserved. But its essential core remained: within the community of believers there can never be room for a poverty that denies anyone what is needed for a dignified life.¹²⁶

The Acts of the Apostles also records how the social services offered by Christians were always also evangelization. As Pope Benedict XVI describes it: the “group of seven” designated by the Apostles for social service were to be persons “full of the Spirit and of wisdom” (cf. *Acts* 6:1-6). “In other words, the social service which they were meant to provide was absolutely concrete, yet at the same time it was also a spiritual service; theirs was a truly spiritual office which carried out an essential responsibility of the Church, namely a well-ordered love of neighbour. With the formation of this group of seven, ‘*diaconia*’—the ministry of charity exercised in a communitarian, orderly way—became part of the fundamental structure of the Church.”¹²⁷ It is as essential as sacraments and the proclamation of the word of God.

The Church's deepest nature is expressed in her three-fold responsibility: of proclaiming the word of God (*kerygma-martyria*), celebrating the sacraments (*leitourgia*), and

¹²⁶ Pope Benedict XVI, *Encyclical Letter Deus Caritas Est*, at 20, (Dec. 25, 2005).

¹²⁷ *Id.* at 21.

exercising the ministry of charity (*diakonia*). These duties presuppose each other and are inseparable. For the Church, charity is not a kind of welfare activity which could equally well be left to others, but is a part of her nature, an indispensable expression of her very being.¹²⁸

Consequently, and again according to Benedict XVI, the personnel in the Church's social endeavors must "want to work with the Church and therefore with the Bishop, so that the love of God can spread throughout the world. By their sharing in the Church's practice of love, they wish to be witnesses of God and of Christ, and they wish for this very reason freely to do good to all."¹²⁹ And the operations themselves must "not become just another form of social assistance,"¹³⁰ but themselves reveal "love of neighbour ... as a consequence deriving from ... a faith which becomes active through love."¹³¹

Pope Francis has echoed this final caution with a pithy reminder to Catholic service institutions about their need to keep Christ in their mission: On his first day as Pope at a Mass in the Sistine Chapel he preached: "If we do not confess to Christ, what would we be? We would end up a compassionate NGO [nongovernmental organization]. What would happen would be like when children make sandcastles and then it all falls down."¹³²

The most cogent summary of all of the above material about the nature of Christian community as union with one another, directed to union with Christ, appears in Pope Benedict XVI's first encyclical, *Deus Caritas Est*. There he writes:

Union with Christ is also union with all those to whom he gives himself. I cannot possess Christ just for myself; I can belong to him only in union with all those who have become, or who will become, his own. Communion draws me out of myself towards him, and thus also towards unity with all Christians. ...The transition which [Jesus] makes from the Law and the Prophets to the twofold commandment of love of God and of neighbour, and his grounding the whole life of faith on this central precept, is not simply a matter of morality—something that could exist apart from and alongside faith in Christ and its sacramental

¹²⁸ *Id.* at 25. (citation omitted)

¹²⁹ *Id.* at 33.

¹³⁰ *Id.* at 31.

¹³¹ *Id.*

¹³² *Pope Francis warns Church could become 'compassionate NGO'*, BBC NEWS (March 14, 2013), <https://www.bbc.com/news/world-europe-21793224>.

re-actualization. Faith, worship and *ethos* are interwoven as a single reality which takes shape in our encounter with God's *agape*. ... A Eucharist which does not pass over into the concrete practice of love is intrinsically fragmented.

...

Love of neighbour is thus shown to be possible in the way proclaimed by the Bible, by Jesus. It consists in the very fact that, in God and with God, I love even the person whom I do not like or even know. This can only take place on the basis of an intimate encounter with God, an encounter which has become a communion of will, even affecting my feelings. Then I learn to look on this other person not simply with my eyes and my feelings, but from the perspective of Jesus Christ. His friend is my friend. Going beyond exterior appearances, I perceive in others an interior desire for a sign of love, of concern. This I can offer them not only through the organizations intended for such purposes, accepting it perhaps as a political necessity. Seeing with the eyes of Christ, I can give to others much more than their outward necessities; I can give them the look of love which they crave. Here we see the necessary interplay between love of God and love of neighbour which the First Letter of John speaks of with such insistence. If I have no contact whatsoever with God in my life, then I cannot see in the other anything more than the other, and I am incapable of seeing in him the image of God. But if in my life I fail completely to heed others, solely out of a desire to be "devout" and to perform my "religious duties", then my relationship with God will also grow arid. It becomes merely "proper", but loveless.¹³³

The next section will consider the relationship between this section's material on Catholicism's communal nature and operation, and its teachings about human sexual expression.

PART III. HUMAN LOVE AND THE DIVINE

This section will discuss the how the Catholic faith understands its teachings on sex, marriage and parenting as a means of coming to know God and living in right relationship to him and to fellow human beings, thereby grasping and transmitting the faith. I will note here again that I am discussing the role of Catholic sexual expression teachings *not* because these

¹³³ Pope Benedict XVI, *supra* note 126, at 14, 18.

are the sum of Catholic faith or life. They are not – even as they have played an important role in Catholics’ self-understanding since early Christianity. But because their role is ignored or discounted today in religious freedom contexts, by many Catholics and non-Catholics alike, it is necessary to point out their significance.

This is an enormous topic that has occupied innumerable scholars throughout history. It can be treated here in a limited way for the narrow purpose of showing how imposing new sexual expression norms upon Catholic institutions would distort core, internal theological commitments.

First, allow me to offer a general observation about the relationship between Catholic morality and Catholic faith. Catholic community – persons gathered together based upon faith in Jesus Christ – is historically and theologically prior to morality.¹³⁴ Christians came to understand moral obligations as natural outgrowths of the command to love God and one another. As Pope Francis has observed: Christianity’s ways of living are a “respon[se] to the God of love who saves us, to see God in others and to go forth from ourselves to seek the good of others. ... All of the virtues are at the service of this response of love.”¹³⁵ Even when they are negatively phrased, Christian moral prescriptions flow from the positive embrace of a Gospel way of life, representing, writes Francis, “our rejection of the evils which endanger that life.”¹³⁶

From the beginning, alongside core messages about his divinity, Jesus frequently spoke about how human beings are to love one another, including in familial relations. He taught new things about sex, marriage and parenting, which distinguished Christianity. Jesus repudiated multiple marriage and divorce. (*Matt* 19:6). He taught that a man who even “looks lustfully at a woman,” has committed adultery. (*Matt* 5:27-28). He demonstrated extraordinary welcome to children and urged that adults should become like children in order to enter the kingdom of heaven and that “whoever receives one child such as this in my name receives me.” (*Matt* 18:3-5).¹³⁷

St. Paul also spoke frequently on these subjects. Perhaps most importantly, he spoke of marriage as nothing less than a figure and glimpse of the relationship between God and his people. (*Eph* 5: 32). Breaking free of surrounding cultural conventions, Paul urged husbands to “love their wives, even as Christ loved the church and handed himself over for her.” (*Eph* 5:25). He exhorted couples to “[b]e subordinate to one another, out of reverence For Christ.” (*Eph* 5:21). Paul also rejected same sex relations, characterizing them as related to idolatry. Breaking new ground, he spoke

¹³⁴ GIUSSANI, *supra* note 77, at 101. See also LUIGI GIUSSANI, MORALITY, MEMORY AND DESIRE (1986), 1–7, and *passim*.

¹³⁵ Pope Francis, *Apostolic Exhortation Evangelii*, *supra* note 97., at 39..

¹³⁶ *Id.* at 168.

¹³⁷ See also GIUSSANI, *supra* note 81, at 54.

against such relations for *both* men and women: “They exchanged the truth of God for a lie and revered and worshiped the creature rather than the creator, who is blessed forever. Amen. Therefore, God handed them over to degrading passions. Their females exchanged natural relations for unnatural, and the males likewise gave up natural relations with females and burned with lust for one another.” (*Rom* 1:25-27). And partly due to an expectation of God’s imminent return, and partly on the grounds of the priority of our relationship with God, Paul relativized the importance of marriage; he strongly recommended virginity for the sake of testifying to the primary importance of the vertical relationship between God and human beings. (*1 Cor* 7:7; *1 Cor* 7:38).

The early Christian communities quickly developed distinctive sexual expression practices. These became in fact – according to a landmark treatment of this subject, Kyle Harper’s *From Shame to Sin* –¹³⁸ one of the most distinctive markers of early Christian communities.¹³⁹ Christians practiced chastity before marriage, avoided divorce, treated wives with notable respect, and abjured abortion, infanticide and same-sex relations.

The reasoning undergirding Christians’ practices differed sharply from the Roman society in which they lived. There, according to Harper, social roles determined sexual rules. Social relations were the matrix for judging sexual acts.¹⁴⁰ Thus rules differed for men and women and for masters and slaves, on the basis of their differing status.¹⁴¹ For Christians, on the other hand, the “cosmos replaced the city as the framework of morality.”¹⁴² This was due to Christians’ understanding of human love as a means of manifesting the nature of all love, including love of God and of one another. To love like God means to love faithfully, generously, sacrificially, fruitfully, and for the good of the other. As this applied to God’s love for human beings and their love for him, it should also apply to Christians’ love of one another – no matter whether rich or poor, master or slave, or male or female. Sexual “disorder” thus appeared to be the single most powerful symbol of the world’s alienation from God.¹⁴³ Sexual fidelity, on the other hand “was the corollary of monotheism, while the [Romans’] worship of many gods,” like their sexual code “was in every way, promiscuous.”¹⁴⁴ Harper reports that this “conspicuous chastity of the Christians”¹⁴⁵ alongside their treatment of women, proved a strong recommendation of Christianity

¹³⁸ KYLE HARPER, *FROM SHAME TO SIN: THE CHRISTIAN TRANSFORMATION OF SEXUAL MORALITY IN LATE ANTIQUITY* (2013).

¹³⁹ *Id.* at 1, 3, 5, 7, 85, 100, 132–33.

¹⁴⁰ *Id.* at 78, 132.

¹⁴¹ *Id.* at 89.

¹⁴² *Id.* at 8.

¹⁴³ *Id.* at 94.

¹⁴⁴ HARPER, *supra* note 139.

¹⁴⁵ *Id.* at 100.

to the world, and especially to women, slaves and other socially vulnerable persons.

Christians' sexual code has continued to be a hallmark of Christianity. Today, many nations – including the United States – are re-evaluating nearly every major tenet of this code, which has governed Western societies for millennia. Consequently, many talented theologians have attempted to express the continuing importance of Christian precepts in this totally new context. There is a great deal of excellent scholarship on this subject; but unfortunately, little of it has found its way into religious freedom argumentation about the necessity of Catholic institutions' authority over their communities' sexual expression norms. Some useful formulations are covered below. Popes John Paul II, Benedict XVI and Francis have offered some of the most recent explanatory, succinct texts.

Pope John Paul II, for example, has written extensively about the way in which the design of human beings communicates God's intentions for human love. Such love should exhibit, for example, equality married to diversity, differences as oriented to union, love as fruitful, and human love as oriented to perfect or divine love, which is permanent, faithful and fruitful.¹⁴⁶ He observes that the human body is “capable of making visible what is invisible,”¹⁴⁷ and must therefore manifest humanity's being created in the image of a threefold God who is always in loving relation even within himself.¹⁴⁸ He also observes the ease with which human sexual love leads to mutual exploitation.¹⁴⁹

Pope Benedict XVI takes up similar themes. In his *Deus Caritas Est*, he contrasts Christian choices with those of Roman fertility cults, including their notion that divine ecstasy could be achieved via anonymous sex with temple prostitutes. He points to the dehumanization of women subjected to this.¹⁵⁰ Recalling the central Christian belief in the unity of body and soul, he points to the necessity of physical love always also manifesting love of the entire person.¹⁵¹ He shows that human love is always meant to witness God's love, which is sacrificial, forgiving, and directed to the salvation and freedom of the other.¹⁵² He points to the Old Testament's Song of Songs' account of love between a man and a woman as also and “ultimately describ[ing] God's relationship to man and man's relationship to God.”¹⁵³ He summarizes Christian teaching about marriage between a man and a

¹⁴⁶ See generally JOHN PAUL II, MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY (Michael Waldstein, ed., 2006).

¹⁴⁷ *Id.* at 203.

¹⁴⁸ *Id.* at 163–64.

¹⁴⁹ KAROL WOJTYLA (POPE JOHN PAUL II), LOVE AND RESPONSIBILITY, 184–87 (H.T. Willetts, trans. 1981).

¹⁵⁰ Pope Benedict XVI, *supra* note 126.

¹⁵¹ *Id.* at 7.

¹⁵² *Id.* at 10.

¹⁵³ *Id.* at 11.

woman as the proper context for sexual love, writing:

Corresponding to the image of a monotheistic God is monogamous marriage. Marriage based on exclusive and definitive love becomes the icon of the relationship between God and his people and vice versa. God's way of loving becomes the measure of human love. This close connection between *eros* and marriage in the Bible has practically no equivalent in extra-biblical literature.¹⁵⁴

Immediately following this material, in this landmark treatment of sexual love, Benedict links these standards for human love to the essential nature of Catholic charitable work, the work provided today by Catholic institutions engaged in services such as education, health care, poverty alleviation, or adoption. There, he develops the link between a proper understanding of every kind of love, which “seeks the integral good of man”¹⁵⁵ and its manifestation in organizations which arise out of “[t]he Church's deepest nature.”¹⁵⁶

These persistent Catholic theological observations about the relationship between all forms of love are easily paired with common sense observations about how human beings experience love in the world by way of family relations, and also learn how to love one another. Russian theologian Vladimir Solovyov¹⁵⁷, for example, writes about how romantic love enables a human being – sometimes for the first time – to understand the crucial importance of another human being who is neither himself nor a member of one's family.¹⁵⁸ The birth of a child further grows human understanding of the crucial importance of the other, as does the realization that everybody is somebody's child. The recognition that sex is God's exclusive means for creating new human life reminds human beings that sex is intrinsically numinous. Also considering that human sexual relations are regularly associated with love (e.g., commonly characterized as “making love”), and that any child created is the physical form of the couple's union, human beings are reminded that life is created by means of love, which involves union.

These common-sense observations can be paired with material about the practical efficacy of Catholic sexual mores respecting the transmission of the faith. Empirical studies tend to show, for example, that declines in religiosity among adolescents are associated with family structures other than biologically intact, two-parent households, and that adolescent sexual

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 19.

¹⁵⁶ Pope Benedict XVI, *supra* note 127, at 25.

¹⁵⁷ VLADIMIR SOLOVYOV, THE MEANING OF LOVE (Thomas R. Beyer, Jr., trans., 1945), 35-51.

¹⁵⁸ *Id.*

activity appears linked to exiting religious communities.¹⁵⁹ The former dynamic may be related to robust findings about the important role that married parents and especially fathers play in transmitting faith to their children, even as mothers also play a role.¹⁶⁰

Regarding adults, a new program called *Communio* suggests the mutually beneficial effects of strong marriages and thriving religious communities. As one summary proposed:

Organized religion, through its teaching and programming, provides a coherent cultural framework built around ideas and stories that consistently emphasizes the importance of marriage and family; its various institutions, authority figures, informal support networks, and relationships all aim to strengthen families in one form or another. ... Of course, these various components are only fully activated when individuals or couples are deeply embedded in a church (or other worship) community. The more embedded they are – and the stronger the community, with its guiding stories, social ties, and bonding rituals – the more influence the community has on their lives.¹⁶¹

Having considered the theological and practical bases for the communal nature of the Catholic Church, and the role played therein by its sexual expression teachings, I now suggest how Catholic institutions should plead their religious freedom defenses in the leading types of sexual expression challenges they face.

PART IV. MEETING THE LETTER AND THE SPIRIT OF FREE EXERCISE

Presently, Catholic institutions' articulation of religious freedom defenses – including the ministerial exemption, the Title VII privilege to hire co-believers, and the refusal to facilitate activities contrary to Catholic teaching – do not sufficiently incorporate Catholic ecclesiology as spelled out above. Instead, their pleadings and public statements are excessively negative, individualistic, moralistic, and disjointed from the thrust of Catholic faith and life.

In this section, I show how Catholic institutions might alter each of their usual religious freedom defenses to better reflect their theologically commanded communal dynamics, and how such changes would boost observers' appreciation for religious freedom and for Catholic sexual ethics.

¹⁵⁹ Mark D. Regnerus & Jeremy E. Uecker, *supra* note 107, at 231, 232.

¹⁶⁰ VERN BENGTON, *supra* note 104, at 76.

¹⁶¹ Seth D. Kaplan, *Reversing Social Disintegration*, 40 *National Affairs* (Summer, 2019), available at <https://www.nationalaffairs.com/publications/detail/reversing-social-disintegration>.

A. *Mandates Provoking Claims of “Substantial Burdens on Free Exercise”*

Catholic institutions regularly assert that a state directive concerning sexual expression creates a substantial burden on their free exercise of religion. Recently, these have included regulations requiring religious institutions to provide contraception insurance to their employees or requiring Catholic hospitals to provide transgender surgeries (or burdensome procedures to avoid so doing). As described above, some Catholics and non-Catholics viewed the claim regarding the free-exercise burden created by the contraception mandate as too attenuated. No one was forcing the Little Sisters of the Poor, or their clients or employees, to use contraception.

Though the Supreme Court did not rule on this point, it seems likely under both *Hobby Lobby* and *Thomas v. Review Board* that a religious institution would succeed in establishing a “substantial burden,” even without referencing the burden’s effect on the life and witness of the Little Sisters’ community. It would be better, however, for reasons repeatedly stated, were Catholic institutions to plead this type of burden with reference to the community they are and seek to be.

What would such a pleading look like? It would begin with a succinct summary of the mission of the institution, and how it is carried out. In the case of the Little Sisters, for example, this would mean a statement that their care for the poor aged is a manifestation of the love of Jesus Christ for the life of every single human being, including the powerless poor elderly, regardless of race or religion. They would relate how their community life and work has Jesus Christ as its “center and source of our unity.”¹⁶² They would explain (as the Sisters’ materials do) their intent to create a “home where [the poor elderly] will be welcomed as Christ, cared for as family and accompanied with dignity until God calls them to himself.”¹⁶³ And they would add that the Sisters model their communal life of service upon the gentle and loving model of the Holy Family, including in their personal vow to live a life of poverty and chastity as a means of putting their entire lives at God’s disposal. The Sisters beg for their entire living and for the resources to care for others. They would tell the court – as a testimonial on their website states – that each member of the community aims to be a “living reminder[] that there are no disposable human beings; that everyone is a someone for whom the Son of God entered the world, suffered and died; and that we read others out of the human family at our moral and political

¹⁶² *Community Life*, LITTLE SISTERS OF THE POOR (2019), <http://www.littlesistersofthepoor.org/our-life/community-life/>.

¹⁶³ *Mission*, LITTLE SISTERS OF THE POOR (2019), <http://www.littlesistersofthepoor.org/our-life/mission/>.

peril.”¹⁶⁴

At this point, instead of simply reminding a court that Catholic teaching rejects birth control, they would closely link this teaching to their particular mission, referencing here the meaning of Christian love as including obedience, permanence, fidelity, and generous welcome to all human life, even when this is hard. They might add that while no religious community will consist solely of persons perfectly living the Catholic faith, every community must consist of those at least striving toward a Catholic understanding of Christ-like love. This love is radical. It is the love that can bring a woman to eschew all worldly things, vow chastity, beg for her own and others’ living, and devote her life to caring for impoverished strangers as family. It is also the love that invites a Catholic woman with a vocation to marriage, to love a man faithfully, permanently, sacrificially, and with an openness to caring jointly for new human life. The pleading should leave a court to understand that it is no wonder that an institution founded and operating on the basis of Christian love would not knowingly agree to introduce contraception and some abortifacients into their community life.

Some observers will read such a statement as a personal, negative judgment of others. While it is theoretically possible to do so, it is easier to see it as a description of a Catholic community’s effort to show one another and the world a fully integrated witness to the radical love of Jesus Christ. The Sisters’ care for the aged poor and their choices concerning human sexual love – whether via their vow of chastity or their health care benefits – are part of this integrated witness.

Such a pleading would far better communicate the full nature of the “substantial burden” created by the contraception mandate. It would show how the mandate marks a climate change at the institution, by contradicting Catholics’ theology of love. Among the institutions’ employees – and in a society well aware of the social changes provoked by the separation of sex, children and marriage – the Sisters’ way of life might even provoke some curiosity and admiration. At the very least, it is a real contribution to the good of the wider society for some communities to witness to the full weight of sex and to radically other-centered forms of love.

Very likely most people have difficulty grasping both the full meaning of Catholic teaching on contraception, and how this teaching might be communicated comprehensibly. My own experience with this issue is perhaps helpful in explaining how this operates in practice. When I arrived to work at a Catholic nonprofit in my twenties, I disdained Catholic teaching on contraception. I hadn’t explored the theology much, but it seemed to me both archaic and at least insensitive to the challenges women face. It was also a challenge to my fear of children, to my desire to work in the field for

¹⁶⁴ *Testimonials About Our Mission*, LITTLE SISTERS OF THE POOR (2019), <http://www.littlesistersofthepoor.org/our-life/mission/testimonials-about-our-mission/>.

which I had studied so long, and to my beliefs about financial stability.¹⁶⁵ I was the very model of the woman in the television ad for contraception who enters the “life plan” store and selects from the shelf the Eiffel Tower instead of the baby bootie.

This Catholic nonprofit did not insure for contraception. But there I was surrounded by female employees who were mothers *and* who used the natural methods recommended by the Church for spacing children. I was struck by their keen intelligence, but even more, by their good nature about pregnancy and childrearing. They perceived the fun of motherhood alongside feelings of exhaustion and inadequacy. They talked about integrating interesting work with parenting. They handled the humorous parts of sex, marriage, childbearing and natural family planning (“NFP”) with wit and realism. They spoke about how conversations with spouses about NFP greatly enriched their marriages. My intellect and heart were opened. When I changed my mind on this teaching and became a mother, those women were still there for me, with meals, laughs, prayers and commiseration. In other words, but for the witness of this community – its policies and its personnel – I would not likely have opened my mind to embrace Catholic teaching or the possibility of growth toward more fundamental Catholic values including sacrifice, fidelity and the radical commitment to others that family life demands.

This practical discussion of the goals of Catholic sexual expression teachings points toward another advantage of the pleading practices I am here recommending: they should make it easier for a religious institution to demonstrate that their communal standards advance outcomes which meet or even exceed the state goals underlying sexual expression laws – *e.g.* the goals of feminine empowerment, equality, dignity and freedom.

Sketched roughly for reasons of space, this advantage can be described as follows. When the state passes sexual expression laws which provoke a claim that religious freedom is burdened, the state then claims to possess a “compelling state interest” sufficient to override any burdens. In the case of *Wisconsin v. Yoder*¹⁶⁶, for example, the state’s compulsory education law was enacted for the important goal of educating children for their independent future in a pluralistic democracy. In *Rader v. Johnston*,¹⁶⁷ a state university’s requirement that all freshmen live in on-campus housing was enacted to secure the important goals of fostering diversity, tolerance and academic achievement. Both laws provoked free exercise claims – the first on the part of the Amish who trained their children in agricultural and domestic arts after age 14, and the second on the part of a student wishing to live in a Christian dormitory. Regarding the first, the *Yoder* Court found

¹⁶⁵ Helen M. Alvaré, *Fear of Children*, in *BREAKING THROUGH: CATHOLIC WOMEN SPEAK FOR THEMSELVES* 19–32, (Helen Alvaré, ed. 2012).

¹⁶⁶ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁶⁷ *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996).

the state interests compelling, but eventually noted that the objectors' religious practices possibly *better* fulfilled the state's interests. The Court wrote:

Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. ... When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the "sturdy yeoman" who would form the basis of what he considered as the ideal of a democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.¹⁶⁸

In *Rader*, the federal district court conceded that the state's interests might be "important"¹⁶⁹ but also noted that the religious housing appeared to meet or even exceed the University's stated purposes for the on-campus housing rule, not only because of its very international and interdenominational student body, but also because the "stringent code of conduct in effect at CSF [the Christian housing] would likely produce an environment much more conducive to academic pursuits than that in the residence halls."¹⁷⁰

Likewise, Catholic institutions seeking to hold on to their norms respecting human sexuality can use the rationale that they equally or better achieve state goals. They might point to reports, for example, that women eschewing manufactured contraception and embracing natural methods not only experience fewer disturbing side effects,¹⁷¹ but also report improved

¹⁶⁸ Wisconsin, *supra* note 167, at 225–26.

¹⁶⁹ Rader, *supra* note 168, at 1557.

¹⁷⁰ *Id.* at 1558.

¹⁷¹ Andrea V. Jackson, et al., *Racial and Ethnic Difference in Women's Preferences for Features of Contraceptive Methods*, 93 *Contraception* 406-11 (2016); Katherine He, et al., "Women's Contraceptive Preference – Use Mismatch, 26 *J. of Women's Health* (Larchmt) 692-701 (2016) (noting that one reason

marriages,¹⁷² bodily knowledge, and quality of sex life.¹⁷³ In fact, natural family planning is increasingly chosen by non-Catholics for its health properties, lack of side effects, and feeling of control. In the App Store's health and fitness category, NFP Apps have the second largest number of downloads next to running apps.¹⁷⁴

A similar type of argument might be launched in favor of at least leaving religious communities free to witness to the value of the two bodily sexes, given the scientific community's current and bitter divisions over the wisdom of transgender surgeries - especially for young people - and their regularly troubling aftermaths.¹⁷⁵ Likewise, Catholic institutions' objections to cohabiting employees can be described as a way of forwarding the public interest in the well-being of women and children and families, given cohabitation's association with later divorce, its higher domestic violence rates, and its poorer outcomes for children.¹⁷⁶ Catholics' preferences for premarital abstinence and marital childbearing are also easily tied to robust public interest in alleviating poverty - especially among women and children - and to mitigating the alarming growth of income and wealth gaps between socioeconomic and racial groups.¹⁷⁷

Even on the most neuralgic issue facing Catholic institutions today - same-sex unions - there is an argument that Catholic institutions could make about how they promote the health and well-being and dignity of LGBT persons in urging them to avoid acting upon their sexual orientation. It will certainly not enjoy universal approbation. But it represents a position, endorsed by many, including the thousands of gay and transgender men and

that sterilization is popular in the United States is because of many women's distaste for long-acting reversible contraceptive methods such as the IUD).

¹⁷² *Id.* at 101.

¹⁷³ Matthias Unsel, et al., Use of Natural Family Planning (NFP) and Its Effect on Couple Relationships and Sexual Satisfaction: A Multi-Country Survey of NFP Users from US and Europe, 5 *Frontiers in Public Health* 1 (March 2017); Richard J. Fehring, *Contraception and Natural Family Planning: The Impact on the Sexual Lives of Couples?*, 34 *ANTHROPOTES* 101, 107 (2018).

¹⁷⁴ Shannon Roberts, *Could Hormonal Contraception Be on its Way Out? Natural Fertility Takes Over the App Store*, MERCATORNET (July 12, 2019), <https://www.mercatornet.com/demography/view/could-hormonal-contraception-be-on-its-way-out/22646>.

¹⁷⁵ Lisa Naingolan, *It's Complicated: Docs Say Gender-Questioning Kids Need Better Science*, MEDSCAPE MED. NEWS (Feb. 15, 2019), <https://www.medscape.com/viewarticle/909129> (reporting on physicians from a variety of fields questioning current practices to rapidly transition minors experiencing gender dysphoria).

¹⁷⁶ See generally W. Bradford Wilcox, *Cohabitation Doesn't Compare: Marriage, Cohabitation and Relationship Quality*, INSTITUTE FOR FAMILY STUDIES (Feb. 7, 2019), <https://ifstudies.org/blog/cohabitation-doesnt-compare-marriage-cohabitation-and-relationship-quality>; Wendy Wang & W. Bradford Wilcox, *Less Stable, Less Important: Cohabiting Families' Comparative Disadvantage Across the Globe*, INSTITUTE FOR FAMILY STUDIES (March 12, 2019), <https://ifstudies.org/blog/less-stable-less-important-cohabiting-families-comparative-disadvantage-across-the-globe>.

¹⁷⁷ HELEN M. ALVARE, *PUTTING CHILDREN'S INTERESTS FIRST IN U.S. FAMILY LAW AND POLICY: WITH POWER COMES RESPONSIBILITY* (Cambridge University Press 2017), 63-65.

women assisted by the Catholic program, Courage.¹⁷⁸ There are many testimonies about the way in which the Catholic approach brings freedom, love and a sense of dignity to the participants, helping them, for example, to understand themselves as first and foremost a child of God – and not as a person largely defined by their sexual desires – and to understand the qualities of loving intimacy.¹⁷⁹ To the argument that it is patently ridiculous to believe that LGBT persons might find freedom in Catholic communities, I would add that in addition to these testimonies, research indicates that among LGBT persons who self-identify as Church-attending, most belong to Churches teaching explicitly against same-sex relations.¹⁸⁰

B. *The Title VII Privilege to Prefer Co-Believers*

A religious institution's pleading of its Title VII privilege to prefer co-believers would be immensely strengthened by employing the arguments suggested above about the necessity of communal witness to Christ. Rather than simply stating how the rejected employee has violated a rule, the institution should more accurately and more convincingly describe the interactions and influences among employees and/or students and/or clients that sustain and transmit faith in the community involved.

This community-focused pleading would also help with the not uncommon situation in which courts have held that religious institutions have fired cohabiting or same-sex married employees, *not* in order to exercise their statutory privilege to prefer co-believers, but *rather* to discriminate against unmarried or LGBT persons. Were a religious institution to explain how the community sustains and transmits the faith, *and* how an opposing witness distorts understanding of sexual expression teachings, there would be far less room for judges' speculating about hidden status-based discrimination. Of course, this will not save a religious institution that, for example, has indeed treated male and female employees differently. But it could assist Catholic institutions sincerely attempting to live out a consistent witness to the meaning of love, including sexual love.

It should be noted here that the material in this section and the prior both assume that the religious institution involved actually subscribes to Catholic communal ideals. Some nominally Catholic institutions will not. This is sufficiently prevalent to inspire a law review article concerning Catholic hospitals far removed from their founding mission entitled *Zombie Religious*

¹⁷⁸ See Member Testimonies at Couragerc.org/resources, the website of the Catholic Church's apostolate of accompaniment of men and women experiencing same-sex attractions.

¹⁷⁹ Michael Hobbes, *Together Alone: The Epidemic of Gay Loneliness*, HUFFINGTON POST (March 2, 2017), <https://highline.huffingtonpost.com/articles/en/gay-loneliness/>.

¹⁸⁰ David M. Barnes & Ilan H. Meyer, *Religious affiliation, internalized homophobia, and mental health in lesbians, gay men and bisexuals*, 82 AMER. J. OF ORTHOPSYCHIATRY 505 (2012), available at <https://psycnet.apa.org/fulltext/2012-27485-006.pdf>.

*Institutions.*¹⁸¹ Likely, more than a few Catholic institutions understand themselves as primarily in the business of delivering competent secular services. These are the “secular NGOS” referenced by Pope Francis.¹⁸² They may not want to make the argument about their communal witness to Christ, or they may not credibly be able to do so.

As mentioned immediately above, explaining Catholic community to a court does not help in situation where a Catholic institution can be factually accused of making employment decisions *not* based upon its preference for co-believers but on the basis, for example, of sex. But it might help respecting state laws – like the Massachusetts law described in *Fontbonne*¹⁸³ – which provide less protection to religious institutions who hire or serve nonbelievers. These institutions would not have a statutory right to prefer believers as employees. But in some cases, schools or other religious institutions incorporating non-Catholics might be able to show that they have policies and practices in place to ensure at the very least that members do not contradict Catholic teachings, or even that all members must actively advance Catholic teachings. To impose upon these institutions employees who do otherwise, might well violate free exercise, non-establishment, or religious institutions’ authority to appoint ministers.

C. *Who “Ministers” in the Catholic Community?*

Catholic institutions’ ministerial exception defense will possibly benefit most from my proposal. This is because the way the Supreme Court has framed the purposes of this exception – leaving religion to govern its own faith communications – perfectly describes what the Catholic Church is doing, both theologically and practically, when it staffs and manages its institutions. Fears about the consequences of a too-broad use of the ministerial exception should not have the last word. The means necessary for a religion to sustain and transmit its faith should.

As described above, Catholic institutions regularly use the ministerial exemption as a defense to employment discrimination lawsuits, most recently involving same-sex married applicants or employees. They will claim that the person cannot “role model” the faith, or they will make a list of specific functions linking that person’s work with an important aspect of Catholic practice – like the organist’s choosing the music to enhance the Mass. Often in these disputes, the school will raise contract language in which the employee promised to maintain a Catholic profile, both in- and outside of work. Because marriage is legally¹⁸⁴ and practically a public act,

¹⁸¹ See Elizabeth Sepper, *Zombie Religious Institutions*, 112 NORTHWESTERN L. REV. 929 (2018).

¹⁸² See Pope Benedict XVI, *supra* note 126.

¹⁸³ See Barrett, *supra* note 2, at *2.

¹⁸⁴ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (*citing* *Maynard v. Hill*, 125 U.S. 190, 211 (1888)) (“Marriage, the *Maynard* Court said, has long been ‘a great public institution, giving character to our whole civil polity.’ This idea has been reiterated even as the institution has evolved in

same-sex marriage will violate such a contract.

Also, as noted above, onlookers sometimes consider use of the ministerial exception ridiculous or mean. They might associate “ministry” with ordination, or at least the formal teaching of religion. This might result from their reading of the ministerial exception case, *Hosanna-Tabor*.

Such a narrow reading of *Hosanna-Tabor* would ignore the historical and legal context into which the Court set its finding, as well as its repeated references to its overarching rationale: the authority of *religion*, and *not the state*, to determine who will personify a faith in order to transmit it to others. Even the concurrence of Justices Kagan and Alito – often cited as narrowing the scope of the ministerial exception – nearly perfectly supports a successful invoking of the exception in Catholic communities of the kind I am here describing. To conclude otherwise is to fall into the trap of denominational non-neutrality: limiting constitutional protection for ministerial appointments to the model of ministers adopted by the Lutheran church in *Hosanna-Tabor*, or similar churches.

The unanimous *Hosanna-Tabor* opinion may appear to be narrowly focused upon the right of a church to “select its ministers” in the context of a “suit alleging discrimination in employment.”¹⁸⁵ But the portion of the opinion describing the constitutional necessity of a ministerial exception corrects this misimpression:

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According to the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.¹⁸⁶

Several paragraphs later, when the Court was explaining the distinction between the case at hand, and free exercise cases that must be analyzed

substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. ... Marriage remains a building block of our national community.”)

¹⁸⁵ *Hosanna-Tabor*, *supra* note 3, at 188.

¹⁸⁶ *Id.* at 188–89.

according to *Employment Division v. Smith*¹⁸⁷, it distinguished churches’ “internal decisions” such as the appointment of ministers from the “outward physical acts” it claimed *Smith* involved.¹⁸⁸ Ministerial appointments, it said, are “internal church decision[s] that affect[] the faith and mission of the church itself.”¹⁸⁹

Later, in its conclusion reprising the heart of the opinion, the Court spoke of the “the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.”¹⁹⁰

Of course, a significant portion of *Hosanna-Tabor* treats factors such as: whether the employee’s *assigned duties* involved conveying the religious institution’s message or carrying out its mission; her *title* and its relationship to duties; whether the employee *held herself out* as a minister; and whether she performed *important religious functions ... for the Church*.¹⁹¹ While these capture the type of ministry exercised by the complaining teacher at the Lutheran school involved in *Hosanna-Tabor*, they do not exhaust the roles or functions or behaviors that actually transmit faith in and by a religious group. To conclude that they do is to equate a Lutheran ministry model with the scope of the ministerial exception, and thereby to tie religious freedom to the pattern of one religion in violation of the Constitution’s imperative of denominational neutrality.¹⁹² It would allow the state to significantly interfere with Catholic communities’ internal, theologically determined means of faith transmission.

Even the concurrence in *Hosanna-Tabor* by Justices Alito and Kagan – often cited to cabin the scope of the exception – deduced religious institutions’ ministerial authority from their broader right to determine the “critical process of communicating the faith.”¹⁹³ In its fleshing out of the contents of this right, the concurrence also referred to religions’ freedom “to govern themselves in accordance with their own beliefs”¹⁹⁴; authority over “matters of church government as well as those of faith and doctrine”¹⁹⁵; authority to select personnel who will “express those views, and only those views, that it intends to express”¹⁹⁶; and right to determine who will “serve as the very “embodiment of its message” and “its voice to the

¹⁸⁷ *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

¹⁸⁸ *Hosanna-Tabor*, *supra* note 3, at 190.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 196.

¹⁹¹ *Id.* at 190–92 (emphases added).

¹⁹² *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”); *see also* *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658 (7th Cir. 2018).

¹⁹³ *Hosanna-Tabor*, *supra* note 3, at 199 (Alito and Kagan, JJ., concurring).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 186 (citing *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

¹⁹⁶ *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

faithful.”¹⁹⁷ The Justices’ use of the language of “voice” and “embodiment” is important, given how these terms assume that *persons*, including their acts and statements, are important transmitters of faith. This supports the Catholic claim to maintaining religious authority over the community’s personnel.

Altogether *Hosanna-Tabor* affirms a ministerial exception that gives religious institutions the final word over employment. This conclusion is strengthened by an earlier statement of the Supreme Court’s about religious employers’ need for latitude regarding hiring for mission in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*.¹⁹⁸ There, the Court allowed a religious organization running a gymnasium to employ building engineers on the basis of religious membership, saying:

[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.¹⁹⁹

Furthermore, the concurrence of Justices Alito and Kagan explicitly eschewed the “term “minister” or the concept of “ordination” as central to defining the ministerial exception,²⁰⁰ and explicitly left it to churches to determine how important to its mission is the matter about which the employee is dissenting, and how it relates to his or her religious function.²⁰¹

It is not only in the discussion of “rationale” that the lead and concurring opinions in *Hosanna Tabor* affirmed churches’ authority over their faith communications; the Court’s discussion of history and precedent do likewise. This discussion referenced states’ obligations to eschew involvement in “rules and proceedings relative purely to the organization and polity” of a Church (citing President Madison’s refusal to sign a bill incorporating a church in Alexandria, VA.). It referred to churches’ self-government “according to [the institutions’] own voluntary rules without interference from the civil authority” (citing Jefferson’s correspondence with a Catholic sister regarding the effect of the Louisiana purchase upon

¹⁹⁷ *Hosanna-Tabor*, *supra* note 3, at 201 (Alito and Kagan, JJ., concurring) (citing *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3rd Cir. 2006)).

¹⁹⁸ *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

¹⁹⁹ *Id.* at 336.

²⁰⁰ *Hosanna-Tabor*, *supra* note 3, at 198 (Alito and Kagan, JJ., concurring).

²⁰¹ *Id.* at 206.

the freedom of her school).²⁰² It also relied upon *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*,²⁰³ – wherein the Court acknowledged the state’s lack of authority regarding the Russian Orthodox Church’s decisions about property and hierarchical appointments.²⁰⁴ *Kedroff* moves beyond the matter of freedom in ministerial appointments, affirming a “spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”²⁰⁵

Hosanna-Tabor also relied upon *Serbian Eastern Orthodox Diocese for United States and Canada v. Miliojevich*²⁰⁶, wherein the Court refused to interfere with a hierarchical church’s control over property and episcopal appointments. There, it spoke of the right of “hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters.”²⁰⁷

Hosanna-Tabor also repeats language from earlier cases about the authority of church hierarchies and governance, which applies to several of the employment controversies at Catholic institutions. In several of the cases the contested employment decisions were made by hierarchical personnel. In an Indiana case about a grade school’s decision to let go a teacher who had publicly disclosed her use of IVF, it was the parish pastor exercising his authority over the parish school and principal.²⁰⁸ In a more recent Indiana case involving the firing of a same-sex married high school teacher, the bishop was directly involved due to his canon law authority over religion teachers at Catholic high schools.²⁰⁹ While the involvement of ordained or hierarchical authority is not a necessary prerequisite for applying the ministerial exception, Catholic institutions might want to highlight this when it obtains, given *Hosanna-Tabor*’s frequent reliance upon cases protecting churches’ internal authority structures and personnel.

²⁰² Sr. Therese de St. Xavier Farjon to Thomas Jefferson, 13 June 1804, The Thomas Jefferson Papers, Series 1: General Correspondence, 1751-1827, Library of Congress Manuscript Division, <https://bit.ly/2WajvU7>.

²⁰³ *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952).

²⁰⁴ *Hosanna-Tabor*, *supra* note 3, at 186–87 (citing *Kedroff*, *supra* note 204, at 115.)

²⁰⁵ *Hosanna-Tabor*, *supra* note 3 (quoting *Kedroff*, *supra* note 204, at 116).

²⁰⁶ 426 U.S. 696 (1976).

²⁰⁷ *Hosanna-Tabor*, *supra* note 3, at 187 (citing *Miliojevich*, *supra* note 207, at 724).

²⁰⁸ See *Herx*, *supra* note 42, at 1180.

²⁰⁹ See J.D Flynn, Catholic News Agency, *Catholic school teacher fired for gay marriage sues Archdiocese of Indianapolis* (July 10, 2019) (quoting the bishop’s communication stating that the Code of Canon Law gave him the responsibility to ensure that religion teachers are “outstanding in true doctrine, in the witness of their Christian life and in their teaching ability” and, in cases where “religious or moral considerations require it, the right to remove [religion teachers] or to demand that they be removed.”)

Altogether, *Hosanna-Tabor*'s reliance on the above-described history and precedents further supports application of the ministerial exception to Catholic communities who clearly communicate to a court the relationship between the behavior of a particular employee, and that person's role in the community requiring mutual witness to the person of Jesus Christ. The depth and age of the Catholic Church's self-understanding and operation as a community of mutual witness – involving both lay and clergy – ought to fully satisfy the Court's conditions for refraining from interfering in the Church's employment decisions.

V. CONCLUSION

Catholic institutions need authority over employment and internal operating decisions to preserve the faith and transmit it to one another, to outsiders and to future generations. The theology undergirding this imperative is clear, ancient and conceptually foundational. *Hosanna-Tabor*, and the line of cases from which it came, explicitly protect churches' internal decisions in pursuit of their religious missions. It is well accepted that "personnel is policy,"²¹⁰ in any institution. And in Catholic and other religious institutions, personnel literally and theologically personify the faith. In the words of Vatican II, the Church is the "People of God"; it is not the hierarchy or the vowed or ordained by themselves. It is not the buildings or the institutional forms. It is the *people* who organize and staff institutions, and – especially in the case of schools – the "clients" as well. This is common sense, and churches' demanding to assert authority over their employment should not shock to observers, especially if their pleadings foreground the dynamics of mutual witness. But of course – as I have argued throughout – Catholic institutions have to articulate this dynamic regularly and quite specifically. This was brilliantly done, for example in the *Wisconsin v. Yoder* case discussed above, in the brief for the Amish parents:

There exists no Amish religion apart from the concept of the Amish community. A person cannot take up the Amish religion and practice it individually. The community subsists spiritually upon the bonds of a common, lived faith, sustained by common traditions and ideals which have been revered by the whole community from generation to generation.²¹¹

²¹⁰ Lin Gensing-Pophal, *Hiring for Fit vs. Hiring for Inclusion: Which Route Should You Take*, SOC. FOR HUMAN RES. MGMT, (Sept 22, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/hiring-for-fit-vs-hiring-for-inclusion.aspx>.

²¹¹ Brief for Respondent at 21, *Wisconsin v. Yoder*, No. 70-110 (quoting J. Hostetler, *Amish Society* 2d ed., 1968, 131).

Policies contradicting the internal operations of the Catholic institution – e.g. the services performed, the benefits offered – do not just countermand discrete “rules” about sex, marriage and parenting. They rather distort fundamental theological commitments out of which the “rules” on sexual expression arise. These include theological commitments regarding the identity of God, how God loves, and how human beings ought to love one another. These are the theological commitments out of which arise Catholic “rules” about sexual relations, the nature of marriage, and the meaning of parenthood.

Those who fear personal and social harms arising out of broad protections for Catholic institutions are ignoring the theological and practical *communal* dynamics by which the Catholic faith is articulated and transmitted. Currently they are laser-focused only upon strengthening the state’s authority to demand agreement with a new orthodoxy about sexual expression. But of course, the outcomes they obtain in sexual expression cases might eventually serve to require Catholic conformity with any new state-decreed orthodoxy, should they succeed in these types of cases in overbearing religious institutions’ internal employment and operations decisions. How much more intrusive to religion can laws be, save possibly for laws directing what religious institutions must teach? Should employment and internal operating decisions be taken from churches, it will be much easier to reason in favor of the mandatory application of other state intrusions into the conduct, governance and mission of religious institutions.

My proposal cannot be extended to protect harms such as sexual abuse or cover-ups. Not only is such behavior clearly outside any plausible religious mission to articulate and transmit a faith, and outside any plausible ministerial function, but the state certainly has a compelling interest in punishing these.

As to fears about harms arising out of churches’ contradicting to ascendant sexual mores, there is already substantial evidence, as described above,²¹² that the sexual mores advanced by Catholics and others in fact *better* serve human flourishing, as well as human equality, dignity, freedom and happiness. This argument is intelligently joined, and only the most partisan or ideological perspective would exclude the evidence that current sexual expression values harm a lot of people, especially the already vulnerable.

There is furthermore an argument that there arises a greater need to protect competing institutions’ voices on matters – like sexual mores – characterized by overwhelming powers lined up on the other side. Today, this is the situation regarding sexual expression – whether it involves huge

²¹² See *supra* Part IV.A. and nn. 172–81.

retailers' banning books dissenting from the new orthodoxy,²¹³ announcing public positions on same-sex marriage²¹⁴ or celebrating Pride Month.²¹⁵ It includes newspapers' daily reporting and editorializing in favor of abortion or same sex marriage, or leading celebrities'²¹⁶ or educational institutions'²¹⁷ championing of emerging sexual practices.²¹⁸ In such an environment, to prohibit religious institutions from teaching differently – including by way of personnel and operating decisions – seems unbalanced or even hostile.

Furthermore, as discussed at length by Paul Horwitz in his book *First Amendment Institutions*²¹⁹, there is no reason to believe that Catholic and other institutions assuming often unpopular positions will be exempt from robust internal and external criticism. In fact, the opposite is true and is already happening, as described above.²²⁰ As for internal criticism, the Pope himself has launched some. He has exhorted Catholics and others to treat LGBT individuals with respect and to refrain from personal judgment.²²¹ He has urged welcoming and personally “accompanying” all those striving to live according to the faith.²²² Catholic parishioners, teachers, parents, and others freely criticize or complement various Catholic institutions' decisions relating to sexual expression. There is no doubt that considerable internal and external dialogue and criticism on these matters is happening and will continue to happen.

Some will question whether religious institutions refusing to conform to sexual expression laws should receive federal or state funding. There is a strong argument that they should, not only because they are excellent practitioners of all kinds of socially valuable services, but also because they articulate position on sex, marriage and parenting that contribute to the human flourishing of members and the larger society. There may come a

²¹³ Joseph Nicolosi, Jr., *Amazon Just Banned My Dad's Therapy Books, Caving to LGBT Activists*, THE DAILY SIGNAL (July 10, 2019).

²¹⁴ Kim Bhasin, *Target Finally Comes Out in Support of Gay Marriage*, THE HUFFINGTON POST (Aug. 7, 2014), https://www.huffpost.com/entry/target-gay-marriage-stance_n_5654924.

²¹⁵ Alex Abad-Santos, *How LGBTQ Pride Month became a branded holiday: And why that's a problem*, VOX (June 25, 2018), <https://www.vox.com/2018/6/25/17476850/pride-month-lgbtq-corporate-explained>.

²¹⁶ *Top 10 Most Outspoken Celebrities Who Support Planned Parenthood*, THE HOLLYWOOD REP. (Aug. 23, 2015), <https://www.hollywoodreporter.com/news/celebrities-support-planned-parenthood-top-816610>; Lynsey Eidell, *The Cast of Juno is Reuniting to Raise Money for Planned Parenthood*, SELF MAGAZINE (March 20, 2017), <https://www.self.com/story/juno-reuniting-planned-parenthood>.

²¹⁷ Kaitlin Mulhere, *Red-Faced Over Sex Weeks*, INSIDE HIGHER ED (Oct. 15, 2014), <https://www.insidehighered.com/news/2014/10/15/sex-week-events-draw-criticism-some-campus>.

²¹⁸ *Colleges and Universities that Cover Transition-Related Medical Expenses Under Student Health Insurance*, CAMPUSPRIDE.ORG, <https://www.campuspride.org/tpc/student-health-insurance/> (2019) (last visited Aug. 7, 2019).

²¹⁹ PAUL HORWITZ, FIRST AMENDMENTS INSTITUTIONS (2012).

²²⁰ See *supra* Part I.C.2.

²²¹ Joshua J. McElwee, *Francis explains 'who am I to judge?'*, THE NATIONAL CATHOLIC REP. (Jan. 10, 2016), <https://www.ncronline.org/news/vatican/francis-explains-who-am-i-judge>.

²²² Carol Glatz, *Francis Urges Priests: Be Close to Sinners*, CATHOLIC HERALD (March 29, 2018), <https://catholicherald.co.uk/news/2018/03/29/pope-francis-urges-priests-be-close-to-sinners/>.

time, however, when particular legislators or executives decide that religions' conformity to certain positions regarding sexual expression is more important than any useful services they provide. This is certainly a possibility given the vehemence of the support for these new positions. Catholic and other religious institutions will have to decide at that time where to stand.

Likewise, some Catholic institutions will not be able or will not want to clearly articulate their religious freedom argument in the terms I have proposed here. Some might be encouraged by reminding them that they will not always be speaking about "all sex all the time." Currently, laws challenging institutional sovereignty are sexual expression-focused. But that will not always be the case. There have been and will be periods of time in which the Church will want to exert employment and operations authority to fend off state control on matters concerning, for example, immigration, unjust war, death, or other "nonpelvic" issues. Even now, the Church will want to be sure that its theology of community is consistently applied respecting all the teachings that members ought to strive to observe.

But some Catholic institutions are not or do not wish to be communities characterized fundamentally by their witness to Jesus Christ. They do not or do not wish to claim that Catholic teachings on sexual expression naturally arise out of foundational Catholic commitments about the nature of God and the demands of love. These institutions may go forward with religious freedom claims based on more cramped readings of *Hosanna-Tabor* or because of the Supreme Court's great deference to religions' definitions of "burdens" on free exercise. Unfortunately, they are not operating in accordance within their own ecclesiological tradition. They are not assisting Catholics to understand the scope or integrity of their faith. And they are also not doing the larger cause of religious freedom any favors, nor helping to advance the aid that Catholic traditions on sex, marriage and parenting might provide to those suffering from current values.