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Antigone’s Protest and the Covid Crisis Freedom astride Faith and Health

Abstract

The restrictions on human movements put into place by states in response to the 2020 global outbreak of the coronavirus SARS-CoV-2 have disrupted every category of society, not least religion and law.¹ Freedom of religion has been pitted against right to health across several categories. Areas of conflict such as the prohibition of holding church mass and the closing of churches have been fairly easy to reconcile against the greater weight of the right to health and safety. There is one area of conflict that seems to give pause, however, to even those most supportive of the current need for public restrictions: the handling of the moment of death and the funeral rites and rituals that typically follow. I would like to compare Italy, as the seat of the Catholic church and the first Western country struck by the pandemic, and the US, the country currently most affected by the virus at the time of this writing, and itself frequently at the center of religious freedom debates. I will explore the question: have state regulations imposed as part of efforts to contain the spread of Covid-19 specifically around death and funeral rites resulted in violations of religious freedom? If religious positions, specifically those of the Abrahamic faiths, are understood comprehensively with reference to their dogmatic origins, does the possibility for such a violation exist? I will argue that beyond a balancing of interests, the true relationship between state sponsored protective measures and religious understandings of right practice for human flourishing is one of harmony, making the violation of religious freedom, even at the most fraught moment of death, *categorically* impossible.

Keywords: Law, religion, freedom, liberty, Covid, funeral rites, Italy, secularism

1. Religious Freedom and COVID in Italy

The 2020 global outbreak of the coronavirus SARS-CoV-2 has disrupted every category of society, in the first place because of its impact on global health, and in the second because the measures required to manage it have imposed social distancing norms on every member of the global community as necessary to the preservation of life. Italy found itself unexpectedly in the spotlight when the tourists visiting from China brought the virus to Italy. The spread of the virus was exponentially explosive, and the government responded with a complete “lock down” of all public places (including places of worship) from March 9, 2020. There were rumblings of concern that religious freedom was being violated from the very first ministerial decrees in Italy banning congregations of people including those for religious purposes. Some argued that religious services could not be classified in the same category as other services and required special protection precisely because

¹ Consorti (2020: 7).

of the spiritual needs provoked by the crisis². Some went further to say that priests have the same function as doctors; as doctors care for the body, the priest cares for the soul.³ Historical comparisons were made, pointing out that in past times of pestilence, churches remained open, in 1576 in Milan and during the bubonic plague of 1629 in northern Italy⁴. A Catholic Italian historian lamented, “Once during the epidemics novenas and processions were organized to invoke divine protection, today the churches are closed.”⁵

When the “Phase 2” decree was issued by the government on April 26, 2020 allowing museums to open but not places of worship, the Italian Episcopal Conference (CEI) made their objections clear:

“The Italian Bishops cannot accept seeing the exercise of freedom of worship compromised. It should be clear to all that the commitment to service the poor, so significant in this emergency, stems from a faith that must be nourished at its source, especially sacramental life.”⁶

The headlines proclaimed that the Catholic premier was between a rock and a hard place⁷. A prominent journalist declared that an “incomprehensible and unjustifiable wound”⁸ had been inflicted upon the Church by the government. Another, that the church had been crushed under the weight of the government, forced to its knees.⁹ Some said this might be the worst schism between Catholic church leaders and government that Italy had seen since the signing of the Lateran Pacts in 1929.¹⁰ Nevertheless, less than two weeks later, the CEI announced their acceptance of government measures stating that while the reception of the decree was met by “suffering and difficulty for pastors, priests and faithful,” it would be accepted thanks to the Church’s desire to “do its part to contribute to the protection of public health.”¹¹

The need for the protection of public health became highly dramatic in very short order as the numbers in Italy skyrocketed from three cases on February 15, 2020, to 24,747 cases by March 15, to 165,155 cases by April 15.¹² The extremely rapid spread of the virus overwhelmed the public health system and has resulted in more than 32,000 deaths in Italy as of this writing. Not surprisingly, the protection of public health has been at the core of legitimacy for all the restrictions imposed as a result of the pandemic. Furthermore, there seems to be a legal consensus that the limitations imposed by government are specifically legitimated by Constitutional Article 32, which guarantees healthcare as a fundamental right of the individual and a

² <https://www.lastampa.it/cronaca/2020/02/29/news/se-per-battere-la-paura-del-contagio-da-coronavirus-si-mettono-in-ginocchio-le-nostre-chiese-1.38530058>

³ <https://www.ilgiornale.it/news/cronache/ecco-perch-chiese-non-dovevano-essere-chiuse-1834988.html>

⁴ <https://www.lastampa.it/vatican-insider/it/2020/03/05/news/lo-storico-franco-cardini-un-tempo-contro-le-epidemie-si-pregava-oggi-si-chiudono-le-chiese-1.38553779>

⁵ Cited by Lo Giacco (2020: 43).

⁶ Translation mine. Original: “I Vescovi italiani non possono accettare di vedere compromesso l’esercizio della libertà di culto. Dovrebbe essere chiaro a tutti che l’impegno al servizio verso i poveri, così significativo in questa emergenza, nasce da una fede che deve potersi nutrire alle sue sorgenti, in particolare la vita sacramentale.”

https://www.repubblica.it/politica/2020/04/26/news/coronavirus_cei_contro_governo-254972759/

⁷ https://rep.repubblica.it/pwa/commento/2020/04/26/news/i-vescovi_e_gli_alleati_il_premier_cattolico_tra_due_fuochi-254976390/

⁸ https://www.repubblica.it/politica/2020/04/26/news/coronavirus_cei_contro_governo-254972759/

⁹ <https://www.lastampa.it/cronaca/2020/02/29/news/se-per-battere-la-paura-del-contagio-da-coronavirus-si-mettono-in-ginocchio-le-nostre-chiese-1.38530058>

¹⁰ *Supra* at Note 6.

¹¹ Cited by Lo Giacco, *Supra* at Note 5.

¹² Data from <https://www.worldometers.info/coronavirus/country/italy>

community interest.¹³ Though religious freedom is also amply protected by Constitutional Article 19 (supported for its part by Articles 2,3, 7 and 8) nevertheless the right to health can be considered to outweigh this and other constitutional rights. This is because life, protected by health, is the supreme good, and every order must bend to it.¹⁴ Religious law experts have similarly concluded that Canon Law legitimates exceptional restrictions in times of crisis since Canon 1245 of the *Codex juris canonici*, “expressly allows the competent ecclesiastical authority (i.e. the Bishop and, according to its provisions, the parish priest) to ‘grant in individual cases a dispensation from the obligation of observing a feast day’ for a ‘just cause’, and it is possible to commute the precept ‘into other pious works.’”¹⁵ In short, there is ample support in both Civil and Canon law for the protection of health above other rights.

2. Antigone’s Anguish?

Even so, the sheer number of deaths in a compressed time period has brought the specific issue of religious funeral rites to the forefront. Italy is a secular country, but the presence and cultural influence of the Catholic church is undeniable and is perhaps most visible at existential moments of importance such as the end of life. As the Covid outbreak took hold, in many cases families, themselves in quarantine, were not permitted to see their loved ones as they passed away in hospital wards. Funerals for a period were completely banned, and cemeteries were closed. These restrictions were met by horror by some, including Don Paolo Tondelli, a priest who wrote a letter to the media describing his experience and expressing his concern:

“And so I find myself standing in front of the cemetery, with three children of a widowed mother who died alone at the hospital because the present situation does not allow for the assistance of the sick. They cannot enter the cemetery, the measures adopted do not allow it. So they cry: they couldn’t say goodbye to their mother when she gave up living, they can’t say goodbye to her even now while she is being buried. We stop at the cemetery gate, in the street, I am bitter and angry inside, I have a strong thought: even a dog is not taken to the grave like this. I think we have exaggerated for a moment in applying the rules in this way, we are witnessing a dehumanization of essential moments in the life of every person; as a Christian, as a citizen I cannot remain silent [...] I say to myself: we are trying to defend life, but we are running the risk of not conserving the mystery that is so closely linked to it”.¹⁶

The priest is here calling for a balancing of values. If the directives are intended to preserve life, shouldn’t we be careful to also take note of what kind of life is being preserved? Not unlike Sophocles’ Antigone, he is concerned that the state may be encroaching on something vital to our humanity, something at least as important if not more so than a tenaciously enforced protocol intended to protect lives in the abstract but perhaps at the cost of creating suffering for lives in their specificity. In a similar vein, French politician Jean-

¹³ Fuccillo et al (2020): “Si tratta, quindi, di una sospensione dei riti religiosi e di una limitazione all’accesso dei luoghi di culto, operata con atti di alta amministrazione basati sull’art. 3 del D.L. 6/2020, giustificati da una ragione di urgenza-emergenza e motivati in base alla precettività dell’art. 32 della Costituzione che, come è noto, stabilisce che ‘la Repubblica tutela la salute come fondamentale diritto dell’individuo e interesse della collettività, e garantisce cure gratuite agli indigenti.’”

¹⁴ Colaianni (2020: 32).

¹⁵ D’Arienzo (2020: 252).

¹⁶ Cited by the writing collective Wu Ming in a tribute to Salvatore Ricciardi and translated in English here: <https://ill-will-editions.tumblr.com/post/615509681891328000/the-funeral-of-salvatore-ricciardi-celebrating-a>

Original letter written by Don Paolo Tondelli available here: <https://www.reggionline.com/la-dignita-vivere-morire-tempo-coronavirus/>

Luc Melenchon made direct reference to Antigone, stating that if he were forbidden from attending the death of his aged parents, he would most likely refuse to obey because like Antigone, he would find a human duty to be superior to the legal one. He would take responsibility for his actions before the law out of respect for a human law imposed on his spirit.¹⁷

While it is perhaps easy to understand and empathize with these positions, the comparison to Antigone is not sustainable for two reasons. The first is that in case of Antigone, the state as represented by Kreon refuses to bury her brother Polynices because he is essentially accused of treason. As an enemy of the state, funeral rites must be denied to him. Antigone instead makes her claim for burial based on the prevailing importance of honoring kinship as part of a kind of pre-civic justice:

She bravely transgresses Kreon's prohibition of burial, not with a massive funeral, but with a handful of dust, a triple libation—all based on a scale of affection grounded in the womb and evoking the pre-polis, what we might call the tribal values, the world of the gene.¹⁸

Her act has been called one of defending unwritten natural rights, a set of core human values that eclipse the demands imposed on citizens of the state. Before she is a citizen, she is a sister, kin, who must care for the spirit of her fellow kin. There is no direct threat to her health in the burial of her brother, nor any perpetuated risks to others. If we were to imagine, instead, that Polynices had been affected by a highly contagious disease transmitted to anyone who approached his body, Antigone's burial act could have the effect of turning her into a weapon¹⁹ capable of propagating further deaths. Now, it could be argued that Antigone was, actually, willing to sacrifice her own life as she in fact does by committing suicide after Kreon imprisons her in a "living tomb." But responsibility for one's own life is of a different order from presenting a lethal risk to others. There has been some evidence that transmission of the current virus is not limited to the living²⁰, but even if it were, the human contact funerals entail is significant. Traditional Western Christian funerals involve the cleansing and care of the body and sometimes its public viewing, a funeral service which is marked by large groups of people in close quarters, speaking, sometimes singing, and expressing physical affection (embraces, kisses, etc.), followed by a procession to the cemetery and burial, similarly conducted in large groups in close contact. Each of these acts falls well within the highest risk profiles of spreading the sometimes symptom-less, sometimes lethal coronavirus.

The second reason the Antigone comparison is not quite apt is that the conflict therein is not one in which a secular state and a believer are at odds. Kreon is not denying the role or meaning of funeral rites, quite the opposite. It is precisely because he recognizes the value of these rites that denying them is a politically valuable move. He is exercising and defending his power as a state ruler, not contesting the value of ritual. Beneath the conflict between Antigone and Kreon is a shared understanding of the importance of kinship and the inescapability of divine power. This concordance is underscored by the tragic ending of the play in which Kreon loses his son and his wife and laments having acted against the will of the gods. In the conflicts regarding freedom of religion during the Covid crisis, on the other hand, the fear is that states are not recognizing the critical importance of the spiritual concerns of their citizens because the states are placing "right to health" over and above freedom of religion.

¹⁷ Translation from the Italian citation mine. Original available here: <https://www.agoravox.it/Covid-19-Sulla-non-celebrazione.html>

¹⁸ Pozzi and Wickersham (1991: 96).

¹⁹ At least one case has been reported in which someone deliberately infected another person. In London, a man infected with the coronavirus and apparently motivated by racist hatred, spat upon an English subway worker who had a respiratory condition. Days later, she died of coronavirus. <https://www.bbc.com/news/uk-england-london-52616071>

²⁰ <https://abcnews.go.com/Health/coronavirus-reach-grave-deceased-body-transmits-covid-19/story?id=7014480>

The “mystery connected to life” of which the priest speaks, however, is not about a politically motivated claim for the freedom of religion. Instead, there is an implication that universally shared values of human flourishing, also protected by state legal instruments, are not being respected because of the severe measures against funeral rites. While there are undoubtedly vital aspects inherent to funeral rites that are not being properly addressed during this health crisis, these aspects are better understood in their wholeness, meaning in their relationship to complex, in this case Catholic, understandings of the individual and the community and their profound interdependence. Despite the various conflicts that have taken place, the Catholic church has spoken of the motivations it holds for limiting its activities during the epidemic independent of state sanctions. These are to do with a sense of responsibility for promoting the common good fueled by a concept of a global human family. Understood anthropologically, religions’ core purpose is that of finding a continuum of sense between life and death, a means for better understanding the deepest most unknowable questions regarding the meaning of life. Christian religions hold human salvation as the ultimate aim, and this is understood in terms of body and soul, individual and community. The critical link between the individual and the community in the Catholic faith is evident.²¹ In the Catholic tradition, the sacrifice of one’s life is cause for sainthood, but only if this act is performed for the salvation of others²². When a religious figure conducts a rite or ritual, it is done on behalf of every Christian, both present and not.²³ The core tenet of incarnation can similarly be understood as a demonstration of the parallel importance of body and soul. The meaning of incarnation in the figure of Christ can be defined as “the infinity of the divine enclosed within a time and place.”²⁴ The body is the vessel for the divine, and is thus holy, not only for Christ, but for every Christian.

These observations show that a conflict between the prioritizing of the protection of health and the freedom to conduct religious rites that risk health is a kind of false conflict; it points to a dialectic that exists within religion itself. If the body is holy, then placing its protection above all else cannot be in conflict with the protection of the soul or spirit. If the divine is within every individual, then placing the protection of all individuals above other rights is itself a protection of the divine. If conducting religious rites puts people at risk, then it cannot be considered to be a genuine expression of the underlying core tenets of religion. Many religious leaders have recognized the important overlap in the fundamental goals toward the protection of human flourishing that lay beneath even some of the most stringent rules invoked during the Covid emergency. At the same time, there have been wildly divergent attitudes particularly within the discourse of freedom from some American religious voices.

3. American Religious Freedom during Covid: “I’ve been redeemed by the blood of the lamb, filled with the holy ghost I am...”²⁵

“The virus, we believe, is politically motivated. [...] We hold our religious rights dear and we are going to assemble no matter what someone says.” This was the statement of Faith Tabernacle Church pastor Tony Spell, who held services for 1,200 people in violation of state legal prohibitions against large gatherings in

²¹ The literature on this and Christian theological concepts more generally is, of course, enormous. For one comprehensive analysis of Christian theology with reference to canonical law, see Ries (1995).

²² For a recent analysis on the specific issue of the canonical threshold of self-sacrifice, see Ponzo (2020). As for the recent introduction of the ‘offering of life’ among the cases for the canonization of saints, see the Pope Francis’ *Motu proprio*, July 11th, 2017: http://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20170711_maiorem-hac-dilectionem.html

²³ Staglianò (2020).

²⁴ Maier (2020).

²⁵ Traditional Christian hymn.

Louisiana, USA, implemented in March 2020 in response to the Covid outbreak.²⁶ Despite the broad dissemination of the news that a massive church service held in South Korea was almost single-handedly responsible for a significant virus outbreak,²⁷ the American pastor was unrepentant. After a summons for his arrest was issued, Mr. Spell compared himself with Jesus, declaring, “Never been more proud to be persecuted for the faith like my savior.”²⁸ Mr. Spell made the point that religious congregation is ‘essential,’ telling the press, ‘If they close every door in this city, then I will close my doors. But you can’t say the retailers are essential but the church is not. That is a persecution of the faith.’²⁹ In the state of Florida another pastor, Rodney Howard-Browne, was also arrested for defying state regulations and holding church services for hundreds of worshippers. The pastor made statements referring to the government as “tyrannical” and threatened to sue Hillsborough County Sheriff Chad Chronister for arresting him.³⁰

These acts of brazen disregard for the law during a global pandemic could be dismissed as the ignorant arrogance of a few individuals. But the nomination of religious freedom as a defense has not been limited to these cases. In fact, there have been multiple lawsuits across several US states charging that the restrictions placed on religious organizations violate the First Amendment.³¹ One news outlet reported that when the mayor of Louisville, Kentucky asked church leaders to refrain from holding in-person or drive-through services on Easter Sunday³², Mitch McConnell, the Kentucky Republican and Senate majority leader, answered with a stern letter, arguing, ‘Religious people should not be singled out for disfavored treatment.’³³ Opponents have pointed out that the First Amendment, frequently thrust forth as a shield in defense of religious freedom, is not intended to provide religion with a higher protection, but rather an equal protection.³⁴

The thread of continuity that runs through these American conflicts is centered on the logic of personal freedom. Pastors—but also their congregants—hold the right to act in accordance with their personal beliefs in every circumstance, over and above the rights of others. The concept of personal dignity is frequently employed. The invocation of personal rights at any expense, however, is often ripe for ironic implementations. As statistics amply show, the rapid and easy spread of the coronavirus has made evident that large gatherings of people will result in deaths. The “right to worship” then translates into a “right” to potentially end other people’s lives. And yet this logic is used (frequently by these very communities) to support arguments against euthanasia and abortion under the aegis of the protection of human dignity.³⁵ “Mercy killing” is forbidden, but the kiss of death in church or even protests in the name of religious freedom, accepted.

²⁶ <https://www.cbsnews.com/news/coronavirus-louisiana-life-tabernacle-church-packed-services-again-charges-against-pastor-tony-spell/>

²⁷ Lee Man-hee, the leader of the Shincheonji Church of Jesus is being investigated for potential culpability in the Coronavirus outbreak in South Korea where about 60% of the country’s more than 4,000 confirmed cases are sect members. Of the confirmed cases, about 75% are from the southern city of Daegu and 73% of those have been linked to the Shincheonji Church. <https://www.bbc.com/news/world-asia-51701039>

²⁸ <https://www.toledoblade.com/opinion/editorials/2020/04/05/foolishness-isnt-faith-stay-at-home-coronavirus-churches/stories/20200401115>. Though Louisiana is not in the top 10 of US states in terms of population size, as of April 22nd, it ranked fifth in number of coronavirus cases.

²⁹ <https://abcnews.go.com/Health/states-crack-gatherings-due-coronavirus-exemptions-religious-groups/story?id=69847021>

³⁰ <https://www.nbcnews.com/news/us-news/florida-megachurch-pastor-caves-after-defying-coronavirus-rules-n1181491>

³¹ <https://www.npr.org/sections/coronavirus-live-updates/2020/04/17/837698597/opposing-forced-church-closures-becomes-new-religious-freedom-cause>

³² <https://louisvilleky.gov/news/mayor-fischer-thanks-louisville-faith-community-its-support-during-covid-19-outbreak>

³³ <https://www.nytimes.com/2020/04/20/us/politics/coronavirus-protests-democrats-republicans.html>

³⁴ “Equal treatment does not violate religious freedom; it ensures religious freedom is not misused to risk people’s lives,” said Rachel Laser, the group’s president and CEO.³⁴ Available at: <https://abcnews.go.com/Health/constitutional-questions-murky-churches-continue-defy-restrictions-gatherings/story?id=69973339>

³⁵ <https://prolifelouisiana.org/learn/center-for-medical-ethics/euthanasia-assisted-suicide-and-patient-rights/>

What is lacking in these approaches is attention to the categorization schemes and their underpinning values that are at work behind the scenes when conflict emerges. The limitation of the right to congregate is not a blocking of religious freedom but rather an act of protection imposed during a state of emergency which leaves little choice. When the protection of individuals biologically requires their physical separation, as in the case of this virus, the act of separating them transforms in its meaning. Similarly, the attendance of a mass designed to be a celebration of life and communion with others is dramatically transformed when that very act is life threatening. If we imagine the rite of the eucharist, in which a wafer is offered to believers by the priest as the body of Christ and wine is sipped as the blood of Christ, and then we consider that one infected person could turn every ingestion into a chain of contamination, we can immediately see how the rite is categorically transformed by the existence of a communicable virus. The performance of such a rite when contagion levels are so prevalent would be the very opposite of salvation. If the aim is the salvation of souls, it can under no circumstances require the death of those very souls. This is only one example of how any act when stripped of its original teleological meaning can suddenly become separated from its own ends. Rites and rituals, religious and non, are undertaken in an effort to acknowledge and nurture the relationship between the physical/material world and spiritual/transcendent exigencies. If the definition of a given act becomes rigidified, there is always the risk of betraying the original aims of the act. One Italian theologian pointed out that it is not the state that is persecuting the religious community but rather the virus, which infects the whole of the congregation, united as one body, a body that seeks to live. A Catholic mass which follows the measures required for protection from the coronavirus—people wearing masks and keeping one meter apart, prohibiting any embracing or touching, etc.—is transformed into something else altogether. Insofar as the ritual of mass is made of exchanging embraces, holding hands, sharing wine and wafers, dipping fingers in shared holy water, singing in unison, sharing sounds, smells, and tastes in communion, the “Covid Mass” is more readily qualified as a celebration of one spiritual body united in illness.³⁶ This is certainly not to say that there is no value in such a mass, nor that it is irremediably transformed so as to lose all touch with its original aims, but its transformation is inescapable.

The extent to which a categorical transformation is in line with original aims is something that is constantly in flux and must be continually re-evaluated. There are always great clusters of values at play, and every action they engender has consequences. Even the most outspoken of the evangelical priests would claim to be in the business of saving souls, not exterminating them. What cannot be avoided is the constant shifting and changing of meaning in relationship to human experience. We can find Christian support for this very thought in the Gospel of Mark. The Pharisees criticize the disciples of Jesus for picking grain on the Sabbath when it is forbidden, but Jesus famously replies, “The Sabbath was made for man, not man for the Sabbath.” Customs and traditions, religious and non, are created to achieve certain ends, not the other way around. If conditions change such that the behaviors once designed in pursuit of particular ends are no longer effective towards those ends, then the behaviors must also change, or else the ends must. The global outbreak of the coronavirus has already changed numerous conceptions that previously seemed intractable, including: online learning is not meaningful; older people lacking technical skills are too old to acquire them; travel is required for business to continue; online shopping is dangerous; and perhaps even, religious services must take place in a church.

³⁶ Maier (2020). Original: “Se non possiamo celebrare insieme non è in virtù di una persecuzione, ma di una malattia che ha colpito il corpo, questo corpo che abbiamo e che siamo, di questo corpo che, se smettesse di funzionare, non saremmo più. Pare che le messe ricominceranno con accorgimenti particolari: mascherine, guanti, distanza, numero chiuso. Ma la ritualità è fatta di volti, di mani intrecciate, di corpi che si nutrono insieme, di immagini da baciare e da toccare, di umori e di unguenti, di sapori e di odori: se ricominceranno così, le messe continueranno ad essere le celebrazioni di un unico grande corpo ammalato.”

In addition to the protestors, there have been voices of reason within American religious communities as well, such as The Massachusetts Council of Churches which highlighted in its published guide for Christian Funerals during the outbreak, “We will not risk more deaths in the celebration of life.”³⁷ The organization Religions for Peace has developed a comprehensive multi-religious online reference for a wide range of faith communities to support their response to the outbreak. The site is updated daily. Among the resources for American Muslim communities is a statement from the Fiqh Council General Body Meeting of March 24, 2020 which announced the suspension of communal prayers and specifies that, “not only is there no sin in doing so, rather it is sinful to flout such regulations and bring risk to oneself and to others. Of the primary goals of the Shari’ah is the preservation of life.”³⁸ This same statement contains detailed guidelines for funeral rites which are remarkable for their flexibility and acknowledgment of the many different changes that may need to take place to follow health and safety protocols. The description of each rite is followed by a recommendation for how to proceed in the event that the traditional method is not possible. It does not, however, represent a renunciation of core principles: the Muslim ban on cremation remains firm. This document and many others offered by religious leaders shows an understanding of the nature of cognitive categories as consisting of many differing aspects or qualities which are sometimes central and sometimes peripheral. During a pandemic, the need to perform prayer assembled in a place of worship, for example, becomes peripheral to the need to support health and safety protocols; for a specified period of time, the category “prayer” is redefined. Once the health risks have been mitigated with the passing of time or the development of vaccines, the category may shift once more. The meaning of prayer, like any other action, can only be understood by taking into consideration its consequences. Furthermore, each shift will generate new consequences which will in turn re-shape the original category. Perhaps modes of prayer and worship developed to respect social distancing will offer newfound value to believers and contribute to new post-pandemic conceptualizations of prayer and worship. There has been discussion of large-scale memorial services that could be held once the public threat of the pandemic has dissipated, and these too might change how death is memorialized in the future. Newly developed creative solutions to social problems point to another aspect of cognitive conflict that is perhaps at the root of some of the loudest contestations: a crucial distinction between freedom and liberties.

4. The Incommensurabilities of Freedom, Liberties, Religion, and the State

Though there are literally centuries of philosophy on the meanings of freedom, impossible to do justice to in a brief essay, nevertheless they must be addressed, even if in a woefully limited capacity. This is because the Covid crisis has brought to the fore questions of freedom and the state whose related actions and inactions have potentially lethal consequences. In the US there have been numerous protests against government-imposed restrictions across more than a dozen states,³⁹ with the largest, in Washington state, attracting as many as 2,500 participants. The organizer of this protest stated that he believed that Washington governor Jay Inslee had “gone beyond his constitutional authority in shutting down businesses and ordering people to stay at home.”⁴⁰ The specific claim was that the right to “peaceably assemble” had been violated. One wonders how exposing others to a potentially lethal virus might be qualified as peaceable. Regardless, the strong pushback

³⁷ <http://ihpemory.org/wp-content/uploads/2020/03/Guide-for-Christian-Funerals-During-COVID19.pdf>

³⁸ <http://fiqh-council.org/prayer-and-funeral-issues-pertaining-to-covid-19/>

³⁹ <https://www.bbc.com/news/world-us-canada-52359100>

⁴⁰ <https://www.bbc.com/news/world-us-canada-52417610>

from many Americans despite the ongoing spread of the virus points to a tension that can be best understood through an analysis of freedom, law, and the state.

At issue is the distinction between those actions that are explicitly “allowed” by governments, which are sometimes called liberties, and their relationship to the far vaster world of possibilities that can be called freedom. The very concept of the freedom of religion offers a useful entry point into this complex and age-old debate. Among the difficulties faced by nearly all Western states when regulating religion is that while the state embodies a top-level authority whose source of legitimacy within democracies is found in the citizens who sustain it, religion has an entirely different teleology. At the core of nearly all religions is a fundamentally different world view in which the source of authority is divine and unknowable through a mundane rationality. Claims for freedom of religion, therefore, are in some sense already conflictual from the moment the state attempts to “grant” that freedom. This is the heart of the trouble, so to speak, with secularization and freedom of religion conflicts.⁴¹ The state is limited to its authority to put in place or remove obstacles to people’s behaviors. In the case of religion, then, the state can protect houses of worship by preventing others from infringing on them, for example, or allow other religiously motivated behaviors such as the creation of parochial schools, organizations or even neighborhoods. It can protect religious expression and prevent discrimination against those with religious beliefs in the workplace⁴². The state cannot, on the other hand, *give* anyone her freedom of religion insofar as the state cannot define what religion precisely is or should be.⁴³ There are no universal criteria that can determine once and for all what “counts” as religion.⁴⁴

Instead, religious beliefs exist within what might be thought of as a universal sphere of human freedom. It is a sphere of potentialities, and it is limitless. The concept of “self-determination” is aligned with this view of intrinsic human freedom and its language can be found in many instruments of international law such as the Universal Declaration of Human Rights which begins with the statement that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience ...” If people are *born* free, then no state can *make* them free, and indeed when such an attempt is made, it becomes oxymoronic. In many cases, when freedoms are conceived of as rights, they quickly become detached from their teleological roots. This is because rights are typically defined and enforced by the state. But if one is free to do only what the state defines, what kind of freedom is it? Furthermore, rights as enshrined by law are necessarily somewhat static, whereas what each person feels to be her freedom or its expression is in constant flux. Insofar as the feeling of freedom is both intrinsic and self-determined, no state can decide what “counts” as freedom.

This of course is the great challenge of legal systems in their attempts to objectively define rights to protect freedoms. Though the law cannot define what freedom is, it can lay down rights, and through these,

⁴¹ The literature continues to expand as scholars take an increasingly interdisciplinary approach to the complexities of the secular and religious. Much of this work has been fueled and inspired by Charles Taylor’s seminal work, *A Secular Age* (Taylor 2007). Succinct current-state scholarship regarding the interdependence of the secular and the religious can be found in Warner et al (2010) and Calhoun et al (2011). For a similarly broad and diverse collection of analyses, see Latré et al (2014) and references therein.

⁴² In addition to these issues of “managing” religion, which challenge all Western states in various ways, there is the specific legal problem of how a religious denomination is determined/defined and then protected from discrimination. With its particular history of a dominant Catholic church which, however, became part of a secular state inclusive of other religious dominations, Italian jurisprudence offers an ample literature on the topic. See indicatively Randazzo (2008), Guazzarotti (2001) and Ferrari (1995).

⁴³ Italian jurisprudence is a particularly rich source for legal analysis of the challenges of how religion is defined and managed by and within states. In a vast literature, see AA.VV. (2002), Colaianni (1996), Consorti (2010), Dalla Torre (2003), Finocchiaro (1975) alongside many of the multiple foundational works by this author, Fuccillo and Santoro (2014), Loprieno (2009), Piccozza and Rivetti (2007), Randazzo (2008) and Tozzi (2000, 2003).

⁴⁴Shakman Hurd (2015:121).

control the practical/pragmatic consequences and eventual conflicts with other constitutionally protected rights. And yet this work must be understood to operate at a different level from Constitutions and other similar documents for whom freedom is a kind of source of law, an undefinable human potentiality. The law determines which behaviors are allowed and which are not, but freedom cannot be reduced to these possibilities, objectively defined from the outside. Like religion, freedom is something that is found within and/or determined by human beings, another domain, another universe of sense from that of law, even if it is referred to by law for hetero-integration.

There is, of course, a grave danger present within this conceptualization of freedom. We can find this tension in the Italian Constitution when it states, "All shall be entitled to profess their religious beliefs freely in any form, individual or in association, to promote them, and to celebrate their rites in public or in private, *provided that they are not offensive to public morality.*"⁴⁵ Who, then, determines what is offensive to public morality? Which public? Which morality? Who will determine (and how) what is to be safeguarded when one person's expression of freedom tramples on that of another? Herein lies the paradox of freedom: the expression of freedom is never identical to the meaning of freedom. One American protestor stated, "I'm gonna do what I got to do to feed my family. If it means I got to risk my health then so be it... and yes even potentially the health of others."⁴⁶ But if the meaning of freedom includes not being exposed to life-threatening risks, or indeed, imposing them on others, then this behavior is in contrast with that meaning. The work of the law is to balance interests so as to maintain the social contract between citizen and state in a democracy. This requires that the meaning of freedom and the wide range of expressions of freedom be continually negotiated so as to remain meaningful. Existential moments bring these issues out in stark relief. As the Covid emergency has so vividly demonstrated, freedom and its needed limitations cannot be defined in advance (nor once and for all) without putting people's very lives at risk. The vivid contrasts inherent in the passing of life during this outbreak serve as a sober reminder: human flourishing means negotiating and re-negotiating our freedoms, which will be emptied of meaning if they end our lives. Freedom is always ready to expand but it is also ready to contract according to the anthropological conditions/prerequisites of its necessary universalizing applications.

It is undoubtedly true that the rituals around the end of life are deeply important to our understanding, acceptance and ability to integrate the changes they involve. An instrumentalized use of freedom of religion against the protective of measures of states, however, misses an opportunity to leverage the conceptual flexibility and ministration that can be found at the core of religious traditions towards new creative solutions that privilege living. The human capacity for categorical transformation is perhaps our best bet for finding and unloosing new understandings and applications of freedom. We seem to be living a cultural moment where many find themselves disturbed by the decisions of states, where many feel their fundamental freedoms to be suppressed. The fury of Antigone resonates; when Kreon says that no one else in Thebes sees things the way she does, she snaps: "No actually they all do/ but you've nailed their tongues to the floor."⁴⁷ Still, it may be important to remember that though protective measures may sometimes feel intensely constraining, our tongues are not yet immobilized. We are still free to determine what freedom is and how to keep living it. There is harmony to be found if religious and political constituents can only find ways to categorize cooperatively and continuously.

⁴⁵Text in English provided by the UNCHR and available at <https://www.refworld.org/docid/3ae6b59cc.html>, italics mine.

⁴⁶ Supra at Note 38.

⁴⁷ Carson (2015).

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