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# THE MORALITY OF ABORTION LAWS<sup>†</sup>

ROBERT F. DRINAN\*

FOR A VARIETY OF REASONS Catholic thought in America has almost always sought to preserve and perpetuate those elements in the civil law which coincide with Catholic moral teaching. Catholics have, for example, resisted the liberalization of divorce laws, have generally opposed any easing in legislation making contraceptives more available and have spoken vigorously against any liberalization in America's abortion laws. Catholics have acted with respect to these legal-moral problems not by reason of a clearly articulated jurisprudential position; they have acted more out of a rejection of proposals for relaxed moral standards and a distrust for the utilitarianism of Jeremy Bentham (1748-1833) which has been so influential in American thought with respect to the relationship of morality and legality.

That utilitarianism was articulated by John Stuart Mill (1806-1873) who wrote as follows in his *Essay on Liberty*:

That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.

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<sup>†</sup> This article was an address to the Twenty-Third Annual Convention, Catholic Theological Society of America on June 19, 1968 at the Mayflower Hotel, Washington, D.C.

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Although there appears to be nothing binding on Catholics which would necessarily prevent a Catholic from endorsing Mill's view of the civil law in a pluralistic society, Catholic tradition and, possibly to some extent, Catholic teaching have been opposed to such a minimal role for the state in the exercise of its role as the preserver of morality. Catholics, it would appear, would in general be more sympathetic to the approach to civil law enunciated by Lord Devlin in his volume "The Enforcement of Morals" (Oxford Univ. Press, 1965) than to the opposing viewpoint of Professor H. L. A. Hart set forth in "Law, Liberty and Morality" (Oxford Univ. Press, 1963) and "The Morality of the Criminal Law" (Oxford Univ. Press, 1965).

It should be noted, however, that Catholics have not yet really explored the impact of the "Declaration on Religious Freedom" of Vatican II on what is thought to be the traditional view of the state's role in fostering public morality. That Declaration stated that:

The usages of society are to be the usages of freedom in their full range. These require that the freedom of man be respected as far as possible, and curtailed only when and in so far as necessary. (Documents of Vatican II, Abbott ed., p. 687).

As a perceptive footnote about this sentence explains, Vatican II here adds the concept of freedom to the traditional ideas of truth, justice and charity which had hitherto dominated Catholic thinking about the role of the state. The notion that the freedom of men may be restricted only "when and in so far as necessary" revived an element in medieval Catholic thought which can be said to be the essential element of what today is

widely called the "free society." To what extent this new exaltation of personal freedom may alter customary Catholic attitudes is not clear. But this new accent on freedom surely contains a new and profound principle which is capable of bringing about the most profound shifts in Catholic thinking about legal-moral problems.

It seems clear that the relatively new struggle about abortion and the law in America is taking place in an era when Catholics are seeking to incorporate the new emphases and nuances of Vatican II into their thinking while at the same time trying to avoid the possibility of being charged now or later with the sin of silence. Before any acceptable resolution of the abortion problem can be arrived at several crucial and complex questions must be posed and answered.

These questions can be conveniently catalogued under three headings—(1) Principles, (2) Pluralism and (3) Procedure. The following discussion will therefore center both on the nature of the principles which Catholics should articulate about an appropriate law regulating abortion in a religiously pluralistic society as well as the procedure or strategy which Catholics should follow in this area.

### Principles

Although a Catholic is free to advocate the theory of mediate animation (as Cardinal Mercier and others have done) the overwhelmingly probable opinion in Catholic theology is that a human soul is infused at the moment of conception. Whatever theological latitude may be available on this question is not, however, particularly relevant or helpful with respect to the issue of abortion and the law. The

moment of "ensoulment" is hardly pertinent when a woman, who is undeniably pregnant, seeks an abortion. The fact is that, whatever the conceptus at that moment may be named, it is an entity which possesses within it, as the geneticists would put it, the blueprint and the machinery to produce a human being.

This is not, however, to minimize the importance of the question as to when "human" life begins but rather to suggest that the metaphysical ambiguities which exist within Catholic tradition about the moment of the infusion of the soul do not seem helpful with regard to the jurisprudence of legislation regulating abortion. In the ultimate analysis Catholics do not differ from advocates of easy abortion because Catholics hold that a human life is present in the fetus from the earliest moment of its existence. Catholics differ with their opponents rather over the nature and quality of the reasons which can justify an abortion. Utilizing the traditional principles of moral theology Catholic thought justifies at least the termination of an ectopic pregnancy and the unintended destruction of a fetus when the removal of a uterus is medically required. Catholics therefore should move away from any line of reasoning or species of rhetoric which suggests that the proponents of abortion are advocating homicide. Catholics should delimit the question to the more precise issue involved, namely, the nature of the reasons which can furnish a moral justification for the termination of the existence of the fetus.

The "principles" therefore which Catholics employ to argue against abortion do not derive exclusively from Catholic tradition on the inviolability of the fetus but draw also on Catholic thought regarding the transcendence of any human or po-

tentially human being over the health or happiness of an older or more powerful human being. The struggle over abortion therefore is not a contest between those persons or groups who see a fetus as a human being and those who do not but rather between conflicting views as to the relative importance of mere existence *vis à vis* a high quality or excellence of existence. Catholics, to put it another way, tend to feel, in the words of Aquinas, that it is better to be than not to be, while some non-Catholics prefer to stress the quality of any existing being rather than the mere existence of such a being.

It seems fair to say that the real issues in the complex legal-moral abortion struggle have not yet really been clarified or enunciated. No Catholic group in America has to date advocated "liberalization" of the civil law regulating abortion nor has any group even expressed the opinion that Catholics are free to select their own views on this matter. Many factors may help to explain this phenomenon but the persistent inability or unwillingness of Catholics in America to separate morality from legality is surely one of the principal reasons.

It may be that no significant development can be expected in the refinement or the application of those moral principles by which Catholic thought condemns abortions in all but the *two* cases noted above. But can or should Catholics be so entirely certain of their own moral position in this regard that they should insist that their own hierarchy of values with regard to fetal life must be incorporated into the civil law?

Abortion, to be sure, is arguably more patently immoral than divorce or birth control. But does this fact justify Catholics taking the same negative and mon-

olitic positions on abortion which they have almost always assumed with respect to laws regulating divorce and birth control?

It is submitted that Catholics, while they continue to clarify and enunciate what they feel to be the profound moral implications of abortion, should simultaneously indicate their complete willingness to discuss abortion openly and completely and, if their judgment becomes so inclined, to accept and indeed advocate a legal regulation of abortion different from the present legal arrangement in America. Until this is done the pro-abortion forces will continue to think that Catholics are really not in favor of sincere dialogue on this issue and that Catholic power will remain totally and irreversibly behind the legal *status quo*.

It might eventuate, to be sure, that Catholics, after a thorough dialogue on all aspects of the question of abortion and the law, might come to the conclusion that existing bans on abortion represent the best and fairest method of regulating an almost intractable area of human existence. But Catholics would then have some factual and pragmatic arguments against changes in the abortion laws rather than the present Catholic position which simply asserts as self-evident the immorality (and therefore somehow the criminality) of extinguishing the life of a non-viable fetus regardless of the strength of the reasons asserted to justify such a course of action.

The indispensibility of true dialogue by Catholics on this question leads to the second division of this paper, the identification of ethical norms for a morally pluralistic society.

### Catholics, Morality and Pluralism

The statement on religious freedom of Vatican II gives some support to the contention that Catholics should not seek to impose their own moral principles on those who do not subscribe to them. At the same time the document speaks of the necessity of government action which "is to be controlled by juridical norms which are in conformity with the objective moral order." (Abbott, p. 686).

If one assumes that a fetus is a person deserving of the protection of the government one could argue that the Declaration on Religious Freedom is unequivocal since it states that the "protection and promotion of the inviolable rights of man ranks among the essential duties of government." (*Id.* at 684). One could similarly argue that the Declaration's assertion of "the need (by government) for a proper guardianship of public morality" (*Id.* at 687), gives support to the case for laws against abortion.

On the other hand, if one begins with the assumption that a significant minority or even a majority of persons in America think that women should have a legal right to dispose of an unwanted pregnancy one must look for guidance in other assertions in the Declaration. If one can conclude that those who favor legalized abortion are rejecting a doctrine which in the final analysis is a Christian or sectarian teaching then the firm repudiation of all forms of coercion contained in the Declaration on Religious Freedom become relevant. The Declaration urges that "in spreading religious faith and in introducing religious practices, everyone ought at all times to refrain from any manner of action which *might seem* to carry a *hint* of coercion or of a kind of

persuasion that would be dishonorable or unworthy. . . ." (*Id.* at 682) (emphasis supplied). If criminal sanctions against abortion were enacted a century ago into Anglo-American law because of Christian convictions is it arguable that today Christians who seek to perpetuate these laws as binding on non-believers are engaging in a "manner of action which might seem to carry a hint of coercion?" Neither the question nor its answer is particularly clear at this point in the discussion about abortion. But surely the question with all its ramifications needs to be raised and answered as candidly and courageously as possible.

The full thrust of the case for abortion on request must be explored by Catholics. In all candor it has not yet been taken very seriously by Catholics; its advocates have been impugned and sometimes treated almost as if they were public enemies.

The case for making abortion available on request is based on the following contentions:

1. The civil law of a religiously pluralistic and morally diverse nation such as America should not perpetuate a law based on moral concepts with which a significant number of persons disagree when the repeal of that law will not bring grave injury to third parties.

2. This principle is particularly applicable in the field of conduct involving sex and marriage since in this area the civil law is at best a feeble instrument to enforce public policy. The new notions of privacy and intimacy made applicable to marriage by the United States Supreme Court in the Connecticut birth control decision highlight the importance of allowing married couples the most complete freedom in planning their lives and their families.

3. A law forbidding abortion penalizes a part of the community while it re-enforces the morality of another group within the community. An absence of a law on abortion would not penalize one group nor would it harm those who are against abortion since it would merely withdraw the criminal sanctions which now are attached to their particular view of human existence—sanctions which those who are against abortion presumably do not need.

4. Criminal law cannot effectively operate in the area of abortion since all activity of this nature is clandestine and surreptitious. Abortion, like adultery and fornication, is not an appropriate subject for the criminal law.

Catholics and others may be in fundamental disagreement with some or all of these principles by which the advocates of abortion on request build their case. But a responsive answer cannot be forthcoming unless Catholics, having engaged in a meaningful dialogue, concede, reject or qualify the contentions of those who desire that abortion be removed from the criminal law, and become a matter of private concern.

Catholic attitudes on abortion legislation can become operative in a number of ways. No one disputes the right and duty of Catholic people and leaders to proclaim their viewpoints on the immorality of abortion. Indeed, one could say that such proclamation is really the only way to make this view prevail since laws forbidding abortion cannot be effective unless they are supported by a substantial segment of public opinion.

Catholic attitudes on abortion legislation can also be enunciated by individual bishops or by episcopal statements. These pronouncements, although directed to the

moral issue, can also be interventions in the political order in that they teach, directly or indirectly, that legislators should retain existing laws prohibiting abortion. It is submitted that episcopal statements going beyond the morality of abortion and entering into the question of jurisprudence or the best legal arrangement are inappropriate intrusions in a pluralistic society by an ecclesiastical official who wrongly assumes that he can pronounce on a legal-political question a moral and uniform position of his Church.

Sometimes Catholic bishops have made pronouncements on abortion and the law as a result of a statement made by some state-wide Protestant Council of Churches endorsing a version of the Model Penal Code. Protestants who desire no legalization of abortion or Protestants who feel that the law should allow abortion on request can make their convictions known. But Catholic clerics or laymen have not spoken out against the decrees of bishops condemning any change in the abortion laws. This may be due to the timidity, the ignorance, the loyalty or the subservience of Catholic clerics and laymen, but the impression that non-Catholics receive is that when a bishop or a group of bishops make a pronouncement on a complex legal-moral-political matter Catholics must accept it as binding on their minds and on their votes. Surely the image of freedom within the Church is not conveyed by such episcopal presumptions and such unquestioning docility on the part of the clerics and lay people.

The pluralism of moralities which exists in America does not make the Catholic Church's role as a guardian of moral values an easy one. But that role cannot effectively be exercised if Church

leaders continue to allow an unresolved legal-moral problem to grow to the point where the Church is on the defensive, has lost the initiative and ends up fighting a rear-guard action to preserve the *status quo*.

There is no doubt whatever that countless individuals and several opinion-molding groups in America are convinced that the Catholic Church is using its persuasion, its prestige and its political power to fight any change in the abortion laws. These individuals and associations are sometimes afraid to speak openly about the role of the Church lest they deepen the Church's antagonism to the causes they espouse. But the damage which is done to those who see the Church as a monolithic, unbending and powerful organization totally unresponsive to the requests of persons with a different view of morality is incalculable. The Church, to be sure, is destined, like its Founder, to be a "sign of contradiction." But, nonetheless, communication and conciliation must be engaged in responsively and endlessly.

It may be that some Catholics will conclude that their conscience forbids them to make any concessions on the abortion issue in the civil law. For these persons the issue is not negotiable. A reasoned position coming to this conclusion is not necessarily contrary to the recognition of plural moralities to which Catholics are bound by reason of the Declaration of Religious Freedom of Vatican II. But if one comes to such a judgment he must then resolve the question of the measures which he may utilize to implement his view in the context of a democratic, free and pluralistic society. That subject, though crucially important for Catholics, is complex and

not specifically relevant to the questions discussed here.

Having outlined the principles and the problem of pluralism which make the abortion problem a very troublesome one for Catholics let us proceed to the procedures or strategies which Catholics should follow in this area.

### **Procedures and Strategies for Catholics**

If Catholics are to be meaningfully involved in the formulation of a new policy with regard to abortion they must not remain on the sidelines but must recognize the serious social problem which arises from the fact that between 200,000 and 1,200,000 illegal abortions occur each year. From what is known of the problem—and the ignorance about it is monumental—some 80% of the persons receiving illegal abortions are married and from the middle class. Their problem is not medical; they simply want to dispose of an unwanted and unplanned pregnancy.

Catholics and everyone else should recognize that the Model Penal Code offers no solution to this social problem. Its provisions allowing abortion in cases of rape, incest or the predictably defective child would affect an infinitesimally small number of cases. The allowance by the Model Penal Code of abortion to prevent grave injury to the physical or mental health of the mother would similarly result in few abortions—unless the “mental health” provision is gravely abused and exploited.

The enactment of the Model Penal Code in 1967 in California, Colorado, North Carolina and Georgia has not, from any statistics available in June 1968, sharply escalated the number of abor-

tions in these states. Nor has the enactment of the Code in those states brought under medical supervision the vast number of illegal abortions in those regions; indeed, the passage of the Model Penal Code may have increased the number of illegal abortions—as its acceptance in Scandinavia did.

It should be clear therefore that a defeat of the Model Penal Code at the hands of Catholics does not “solve” the problem of abortion. Catholics cannot responsibly work each year to defeat any change in the abortion laws and think that they have thereby “solved” the problem. To cite one instance: Catholics cannot oppose legalized abortion for a predictably defective fetus while they fail to raise a hand to improve the almost primitive conditions found almost universally in those state institutions to which the retarded and deformed are sent.

More importantly, Catholics must admit the fact that abortion on demand is being urged by sincere and conscientious people who in their more candid moments concede that they desire easy abortion for situations where contraception has failed.

In reacting to the mounting momentum behind the request for easily available abortions, Catholics should seek to obtain a legal regulation of abortion which would attempt to achieve at least the following objectives:

1. Minimize the number of fetal deaths;
2. Avoid the imposition of sectarian beliefs on those who do not accept them;
3. Secure an arrangement by which women seeking an abortion will be treated humanely; and



4. Provide all possible safeguards to prevent any erosion of public respect for the sanctity of life.

It is, of course, possible that no law could be drafted which would achieve these four objectives. This possibility, however, does not alter the fact that neither a total ban on abortions nor the concessions made in the Model Penal Code achieve the four objectives stated above.

In view of the fact that abortion on request will continue to be sought, and in view also of the fact that the enactment of the Model Penal Code may tend to bring about a de facto system of abortion on demand, Catholics should look to those protections and safeguards which could be written into a law regulating abortion not with criminal sanctions but by legal provisions designed to attain the four objectives indicated above.

The opportunities and advantages of the withdrawal of criminal prohibitory sanctions and the imposition of a civil law regulating the granting of an abortion include the following:

1. The repeal of criminal laws forbidding all forms of non-therapeutic abortions would allow the government for the first time to prosecute vigorously all non-physicians who perform abortions. If a legal abortion were available through doctors and hospitals, those persons engaged in the unauthorized practice of abortions could be jailed as society would jail non-physicians attempting brain or even cosmetic surgery.

2. A mandatory waiting period with competent counselling for the woman seeking an abortion could also be required if criminality did not automatically attach to any activity preparatory to a

non-therapeutic abortion. Counselling with the mother and her husband (or the father of the child) might well convert an unwanted pregnancy into a wanted one; at least such counselling might assist a woman who proceeds to an abortion to profit by her experience and not become a repeater—a not unusual phenomenon.

3. Allowing the practice of abortion to come out of the “under-ground” would make possible for the first time a survey of the scope of the problem and would thus facilitate intelligent attempts at resolving it.

4. The repeal of unenforced and largely unenforceable laws against abortion would decrease the disregard and contempt for law which the widespread defiance of any law always breeds. The repeal of abortion laws, furthermore, may be inevitable because chemistry and pharmacology might well replace surgery as the ordinary abortifacient agent; the “morning-after” pill is a dramatic example.

Catholic acquiescence, therefore, in a legal arrangement which substitutes civil regulation of abortion for criminal sanctions against virtually all abortions should not be looked upon as a “surrender” or “abdication” of a system which worked or which “solved” the problem of abortion. There are many opportunities and advantages in a system which does not stigmatize a woman seeking an abortion as a criminal.

No one, of course, denies that there may well be a loss of opportunities and serious disadvantages in a legal system which allows a woman to have an abortion for reasons which seem sufficient to herself. Such an arrangement to be sure keeps the state out of the business of decreeing what type of pre-natal beings

may be eliminated but it also withholds the state's firmest protections—its criminal sanctions—from human beings during the first twenty weeks of their fetal life.

The central and crucial issue is whether the withdrawal of criminal sanctions (*not of all of the protections of the law*) from this very tiny area of human life will, may or could result in a diminution of that respect for human life which is the cardinal principle and indeed the centerpiece of all Anglo-American law. An answer to that imponderable question is difficult to document either way. If one begins with the reasonable assumption that at least the same number of illegal abortions will continue to occur each year in America regardless of the law's attitude on abortion, one could hope that insistence upon carefully supervised medical, hospital and counselling services for all women seeking an abortion would at least mitigate the harm to the mothers who would in any event secure an abortion regardless of the law. On the other hand, there is no blinking at the fact that for many persons neutrality towards abortion on the part of the civil law would be construed as society's acceptance of this practice as moral.

### Conclusions

If there is one thing which should be clear from the foregoing and from the state of the question regarding abortion and the law in America it is that there is no such thing as a "Catholic position" on the jurisprudence of abortion laws. Catholics are free to advocate any one of the three options available—strict legal prohibition of abortion, the Model Penal Code, or abortion on request.

Statements by bishops on abortion and the law have tended to give the impression of an episcopal preemption on the subject of what is best for the secular law to do about abortion. In the past episcopal "official" statements on legal-moral matters have inhibited initiative among Catholics, stifled freedom of thought and confused morality and legality. A striking example is the denunciation of the *McCullum* decision in the November 1948 annual message of the American hierarchy. That statement repudiated the 8 to 1 ruling of the U.S. Supreme Court (which banned released time programs from public school premises) as wrong in "law, logic and history" and called upon all Catholics to work "patiently and perseveringly" for the reversal of the *McCullum* decision. The bishops may have been right or wrong on a matter of constitutional law but one could raise a serious question whether the categorical denunciation on the part of the hierarchy inhibited Catholic jurists and scholars from creative thinking with respect to the place and role of religion in the public school.

It is painfully clear that Catholics confront in the abortion issue an agonizing question of public policy which could divide Catholics, weaken ecumenical relations and place Catholics and the Church in the years and decades ahead either in the position of having sinned by the use of its prestige and power against the sincerely held convictions of non-Catholics and non-believers or as a group which failed by silence to speak up when misguided men and women changed the law

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## MORALITY AND ABORTION LAWS

*(Continued)*

to permit the extermination of undesirable and unwanted human beings.

It seems self-evident that this challenge is unique in American Catholic experi-

ence, that it is awesome and that it is inescapable. Hopefully, it is a challenge which, unlike any previous challenge, will arouse the minds and consciences of American Catholics to original, creative thought on a legal-moral problem of incalculable significance.

