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Abortion And Penal Law

It is disturbing to note the failure of the American Law Institute[1] to provide for adequate consideration of the inter-relationship of law, morality and the public welfare particularly as they pertain to the justification of abortion under the Model Penal Code.[2]

A draft of the proposed section on abortion was distributed to the members of the A.L.I. for discussion at the 36th Annual Meeting in May 1959. In their introductory requests for advice the draftsmen asked the members:

"Should abortion be authorized on the ground of substantial risk that the child if born would suffer from 'grave physical or mental defect?' Subsection (2) (a), Comment 4.

"Should abortion be authorized where pregnancy resulted from forceful rape or incest? Subsection (2) (a), Comment 5.

"Does the Institute wish to take a position on possible additional justification, e.g. in case of statutory rape, or other 'hardship' situations?" See Comment 6 and Scandinavian legislation in the Appendix, especially paragraph 2 of the Swedish law.[3]

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[1] The American Law Institute was organized in 1923 "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to carry on scholarly and scientific legal work."

[2] Model Penal Code, Tentative Draft No. 9, 148 fn. 12 contains some references to the Modern Protestant and Catholic points of view but confuses the Catholic philosophy of personal morality with the Catholic philosophy of penal law.

The Comments of the draftsman in support of a "cautious expansion of the categories of lawful justification of abortion" might lead one to conclude that he believes that the opponents of such a policy would have "the criminal law in this area . . . draw the line where religion or morals would draw it." *Id.* 150.

This is not at all the Catholic position.

[3] *Id.* XV.

The draftsmen of the Code had taken for granted that abortion should be permitted to save the life of a mother and even to safeguard her mental health.[4] Evidently the majority of those present at the meeting were of the same opinion because a wave of incredulous laughter greeted a member who rose to move that any justification for abortion be completely deleted from the Code. The presiding officer seemed to doubt for a moment that it would be seriously argued but willingly recognized a second to the motion and permitted two members to address themselves to the motion.

The first speaker deplored the refusal of the Institute to recognize the unborn child as a human being with rights equivalent to those of its mother. The second speaker warned the Institute of the danger of excluding ethical or religious principles in formulating laws concerning abortion and in resorting to purely emotional considerations. The speaker closed with the caveat that the Institute should take great care lest in rejecting a basis for the protection of human life which transcends the vagaries of public opinion or the parliamentary majorities of "responsible professional groups" it may go farther than it intends. Without further debate the question was called for and the motion overwhelmingly defeated.

A subsequent motion to permit the abortion of a child which if born would be illegitimate was defeated because (and seemingly only because) "American public opinion is not yet prepared for it."

A possible explanation of the failure of the Code to give adequate consideration to the moral aspects of abortion lies in the nature of the American Law Institute and its method of operation. The Institute is made up almost exclusively of lawyers, legal educators and judges.[5] The competence of its members lies primarily in the field of English and American law and it is in this area that they are best qualified to act as experts in the clarification and simplification of the law. The first projects of the Institute lay well within this limitation since they were Restatements of existing law. The areas chosen for the Restatements

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[4]Art. 207 Sexual Offenses and Offenses Against the Family: Section 207.11 Abortion and Related Offenses.

[5] The Institute is composed of two classes of members – elected life members and official members. Official members are the justices of the Supreme Court of the United States, senior judges of the United States Circuit Courts of Appeals, the chief justices of the highest courts of the several states and the District of Columbia, the president and members of the Executive Committee of the American Bar Association, the presidents of the State Bar Associations, the president of the National Conference of Commissioners on Uniform State Laws, the presidents of certain learned legal societies such as the American Society of International Law, and the deans of member schools of the Association of American Law Schools. The articles of association provide for 750 elected members chosen on a nation-wide basis.

were Contracts, Agency, Conflict of Laws, Judgment, Property, Restitution, Security, Torts and Trusts.

Under the guidance and with the assistance of a reporter for each branch of the law and a competent staff, each section of the Restatements was subjected to the scrutiny of the Council, composed of thirty-three members, and to that of the general membership at its annual meeting in Washington, D. C. The resulting Restatements contributed much to the growth, development, improvement and uniformity of the law and have well justified their cost in time, labor and money.

In recent years, however, the Institute has gone far beyond its original object of restating existing law. Commencing in 1939, work was begun on a Model Code of Evidence and the basic approach was not that of clarification but of revision since many of the rules of evidence, even though clarified would still be so defective as to operate to suppress truth rather than develop it. Accordingly, a thorough revision of law was made and a Model Code of Evidence was adopted in 1942.

Prior to this project the Institute had deliberately avoided the invention of words to express a legal concept even though there existed no single word or expression in general use by the profession to express the concept. Nor was a word used with a connotation not familiar to the legal profession.[6]

In drafting the Restatements, the Institute had been chiefly concerned with the highly technical problems involved in stating, commenting on, and illustrating rules of law in accurate, concise legal terminology. For this sort of task the membership of the Institute was uniquely qualified. The Model Code of Evidence departed from the form of the Restatements by proposing new or different rules of evidence rather than merely clarifying old ones. Since the subject matter was that which concerned problems involving the day to day work of lawyers and judges, the membership was equally well qualified in the new approach.

An even greater departure from the nature of the original Restatements was the Uniform Commercial Code which the Institute drafted in co-operation with the National Conference of Commissioners on Uniform State Laws. Since the commercial code involved major innovations consisting of novel terminology and concepts new to commercial law it was immediately recognized by the membership that the assistance of those outside the legal profession was required. Accordingly, bankers, merchants, economists, sociologists, and representatives of many other trades, professions or specialties were called upon to act as consultants to the draftsmen in the preparation of this major innovation. The soundness of this approach has been proven by the fact that four states have

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[6] RESTATEMENT, CONTRACTS, Introduction vi (1932).

already enacted the Code into law and the latest version meets many of the criticisms and has adopted many of the suggestions of the New York Law Revision Commission which had questioned the soundness of certain parts of the earlier versions.

The practice of consulting with experts in fields other than law which was employed in successive drafts of the Uniform Commercial Code has been neglected in the instance of the Model Penal Code. The Criminal Law Advisory Committee includes sociologists, psychiatrists and other medical experts but the area of morality and ethics seems not to be represented at all.

No one has intimated that the exclusion was deliberate. In fact the Chief Reporter has repeatedly asked for suggestions and assistance although his requests have been directed almost solely to the members of the American Law Institute. Unfortunately, the background and experience of the general membership of the Institute is similar to that of the Council and of the Criminal Law Advisory Committee. Moreover, the opportunity for consideration of proposed drafts prior to the Annual Meeting is grossly inadequate. Tentative Draft no. 9 was submitted to the members by the Council on May 8, 1959 for discussion on May 20, 1959.

Equally unfortunately, the extremely brief period for discussion, the year long intervals between meetings and the pressure to press on to a consideration of new sections, all contribute to a spirit of compromise which comes perilously close to abdication of responsibility.

The damage is not irreparable, however. The Code cannot become law until it is adopted in whole or in part by each of the states. Practical considerations therefore make it important to the Institute that the final draft of the Code embody not merely sound technical and enforceable rules of law but also policies and principles which will be generally acceptable to the legislatures and to the public. The Reporter and the Council are sincere in their requests for assistance and those who disagree in whole or in part with the basic philosophy or the phraseology of the Model Penal Code have an opportunity and perhaps a duty not merely to register timely protest but to offer constructive suggestions.

The statement of the case against justification of abortion is simple and concise. Direct and voluntary abortion is intrinsically wrong since it is the direct killing of an innocent human being. It is never justifiable because the person who is killed has not been guilty of any crime or unlawful aggression on account of which he could be said to have forfeited his right to live. The State does not have, nor can it ever have, the right to kill an innocent person.

Other problems in the Penal Code are much less clear cut and require an application of principles derived from the science of ethics. The penal

law cannot and should not attempt to enforce the moral law in every last detail but it cannot ignore, much less violate, that law.

The Editors of THE CATHOLIC LAWYER urge that qualified individuals or groups both within and without the legal profession give serious and immediate attention to those sections of the Model Penal Code, including the section on abortion, which are of particular significance to public morality or to private morality in which the public has a legitimate interest.

Future issues of THE CATHOLIC LAWYER will contain detailed and documented studies of the major problems of morality as presented by the Model Penal Code.

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EDITOR