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The Abortion Debate After Webster: The Catholic-American Moment

Rev. William F. Maestri

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On July 3, 1989, a badly and bitterly divided Supreme Court delivered its long awaited decision in the case of Webster v. Reproductive Health Services. By a 5-4 decision the Court let stand a Missouri law which regulates abortion in the following manner:

- specifies that a physician, prior to performing an abortion on any woman whom he has reason to believe is 20 or more weeks pregnant, must ascertain whether the fetus is 'viable' by performing such medical examinations and tests as are necessary to make a finding of (the fetus) gestational age, weight, and lung maturity;
- (2) prohibits the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life; and
- (3) makes it unlawful to use public funds, employees, or facilities for the purpose of encouraging or counseling a woman to have an abortion not necessary to save her life.¹

The Missouri law also declared in its preamble that "the life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being," and requires that all state laws provide the unborn with the same rights under the Federal Constitution as all other citizens enjoy. The Supreme Court did not rule on the constitutionality of this part of the law. The Court held that this declaration of when human life began did not play a role in this particular law's regulation of abortion. Furthermore, the ruling in *Roe* "implies no limitations on a State's authority to make a value judgment favoring childbirth over abortion." This value judgment by the Missouri law is not an issue for the Court at this time.

Contrary to much of the media madness following the decision, the Webster ruling is quite limited in its scope and very narrow in the areas of

abortion regulation. The Missouri statute concerns the use of public employees and facilities for the performance or assistance of nontherapeutic abortions. The restrictions by the statute do not go contrary to the Court's abortion decisions. Simply put, Roe has not been overturned. Chief Justice Rehnquist, writing for the majority, clearly indicated that there is no affirmative right to governmental aid in securing an abortion under the Due Process Clauses.³ What is important in the Webster decision is the active role that the legislatures will once again play in the formation of abortion policy and law. However, this opening to the legislature should not be interpreted as the Court's abandonment of ultimate decision-making in the area of abortion. The Court will continue to be the major decision-maker. In fact, there are three abortion cases set for hearing during the Fall term — Ohio, Minnesota, and a crucial case from Illinois. If Roe is to be overturned it may come from one of these. The Court made it clear that Webster is not the case for such a rollback.

The re-entry of the legislative process into the abortion debate should be a welcomed development. The issue of abortion should not be kept from democratically elected officials by an appointed for life judiciary. The Catholic Church is now presented with a splendid opportunity to make a significant contribution to the various local and national debates on abortion that will commence. The rich tradition of Catholic thought grounded in respect for reason, and the need for civil discourse, can only add to the quality of the debate. However, like any opportunity it can be missed if we experience either a collective loss of nerve or a terminal case of arrogance.

The following article will address three major areas for the abortion debate during this time after *Webster:* first, the need for civil discourse. As the abortion debate moves from the courtroom to the statehouse, passion must allow for reasoned debate and mutual respect among contending parties. Second, a prudent approach to abortion legislation. The legislative process is not without its limitations and abuses. The rights and liberties of all citizens must be respected. The tyranny of the majority is always a real danger. And finally, the need for the Catholic Church to take the lead in working for the transformation of culture and the elimination of those sinful social structures which dehumanize the human person.

Much has been written recently about the Catholic moment. One such moment is upon us. The Catholic Church's long history of commitment to the dignity of the human person, as made in the image of God, can be of great benefit as we debate abortion policy. The Catholic Church must be pro-life in the deepest sense of the term, that is, the Church must proclaim the sacred dignity of every human being and help build those institutional structures which promote free and rational beings. Personal witness must join with the equally hard and necessary task of building a social world which welcomes new life and defends the "unalienable rights" bestowed by God.

Throughout this article I hope to show that the Catholic Church has a

significant *public* contribution to make in the abortion debate. This contribution will not be made by coercion or the intensity of moral passion. The Catholic contribution must be made through the power of reasoned argument. It is to such a civil discourse and reasoned argument that we now turn our attention.

Aborton and Civil Discourse

Before we engage in any great debate as a nation, we should remember the kind of people we are and the kind of people we want to be. This little exercise in memory is often ignored to our sorrow. The United States of America is a democratic republic. As a political community, we believe that what binds us, one to another, is not force or fear, but virtue. We live a common life and tell a common story through a series of truths which we proclaim to ourselves and the world. Among the truths which made us our story or creed, the following bear special mention:

- each human being is endowed with certain unalienable rights bestowed by the Creator life, liberty, and the pursuit of happiness.
- human beings are not angels nor beasts but limited beings who are capable of both virtue and vice.
- government is the servant of the people and its powers must be limited and checked.
- a republican democracy is one which depends on a virtuous, informed citizenry.
- a republican democracy is one which upholds the rule of law in the form of a written constitution which expresses the will of the people while safeguarding the rights of the minority.
- a republican democracy calls for the citizenry to engage in a frank and open discussion of the leading issues of the day by means of an ongoing civil discourse.

No one in the American-Catholic community contributed more to the development and advancement of civil discourse than Father John Courtney Murray, S.J. In this time after *Webster*, it is civil discourse and reasoned debate that we need in pursuit of the common good. Father Murray characterized uncivil discourse in the following manner:

Argument ceases to be civil when it is dominated by passion and prejudice; when its vocabulary becomes solipsist, premised on the theory that my insight is mine alone and cannot be shared; when dialogue gives way to a series of monologues; when the parties to the conversation cease to listen to one another, or hear only what they want to hear, or see the other's argument only through the screen of their own categories; when defiance is flung to the basic ontological principle of all ordered discourse, which asserts that Reality is an analogical structure, within which there are variant modes of reality, to each of which there corresponds a distinctive method of thought that imposes on an argument

its own special rules. When things like this happen, men canot be locked together in argument. Conversation becomes merely quarrelsome or querulous. Civility dies with the death of dialogue.⁴

Father Murray did not view the need for civil discourse and dialogue as merely procedural niceties which could be abandoned at will. The loss of civil discourse and reasoned debate are serious cultural pathologies. The loss of rationality in public debate struck a mortal blow at the very foundation of democracy. Father Murray wrote,

I believe that nothing is more damaging to democracy than lack of rationality in public argument. The foundations of our society are indeed laid in an identifiable consensus. But they are more importantly laid in a reasonable disposition to argue our many disagreements in intelligent and temperate fashion . . . I believe that whatever corrupts rational public argument corrupts democracy.⁵

The most explosive moral and political issue of our time is abortion. If the past 16 years since *Roe* have taught us anything, it is the ever-present danger posed by the zealot or demagogue offering simple answers to complex questions. Reasoned argument and dialogue take flight and the public square becomes filled with the latest fad or the quick fix of technology. What Father Murray most feared was the loss of a public philosophy which could serve as a system of truths from which reasoned debate could take shape. Without a public philosophy we are left to fall back on our prejudices, the provincial beliefs of our tribe, and the violent instincts which turn society into a warlike clan.

... The real danger to America is not the communist, but the "idiot," the person who does not possess a public philosophy, and therefore the person who will fall back on the ethics of the tribe. And the tribe is essentially a warmaking group.⁶

The time after Webster will require of each citizen a commitment to the common good through the use of reasoned, civil discourse. The Catholic community has much to offer. The legacy of Father Murray is one which can be employed as a precious resource by all citizens as we debate abortion in a new way. However, there is no magic answer or quick fix being offered. Dialogue and reasoned debate require hard work. The reality of sin is ever present to darken the mind and weaken the will. Even those in leadership positions are not immune to the irrational, the opportunistic, and the zealot playing on the fears of others. The abandonment of reason in publicly presenting our truths is contrary to the Catholic tradition of faith seeking understanding. Again Father Murray:

Faith supposes reason as grace supposes nature. If the genuine powers of reason are destroyed or undermined, the true notion of Christian faith suffers the same fate. Faith becomes irrational, unintelligible, indefensible and unworthy of a man. Thus, the destinies of Christian faith are linked to those of human reason.

In a previous issue of the *Linacre Quarterly*, I tried to articulate the connection between the truth-claims of the Catholic story and the truth-claims we hold as Americans.⁸ The need for civil discourse in public debate

is not so much about the content of the truth-claims as it is about the manner in which these claims are presented. Yet I would contend that we ought not separate the content from the manner or style in which we take part in public debate. Hence, I would offer the following as some general and tentative guidelines for civil discourse concerning the issue of abortion:

- While we may passionately disagree with one another about abortion, mutual respect for one another as human beings remains primary.
- We must learn to discipline our speech so that we do not allow rhetoric to run ahead of reason.
- —We must learn to listen so that when debate is occurring there is the atmosphere for genuine dialogue and not a series of individual monologues.
- —We must be able to present the other person's viewpoint to *their* satisfaction and not our own. Too often we build up straw-man arguments or we assume what the other person believes. Reasoned debate requires that we know the genuine position of the other.
- —Faith and reason work together. We have a responsibility to be medically and scientifically informed about bio-medical issues. Certainly abortion is not only a medical procedure. It involves the deepest values of humankind. At the same time it does require that we develop a well prepared mind so that our faith can build on the insights of medicine.
- We must be humble enough to learn from others, even those with whom we disagree. Mutual learning cannot take place if all we do is preach at others with the message, "I have the truth, the whole truth, and nothing but the truth. Your task is to submit." Common ground will never be found through such arrogance.

The Webster decision has returned to the states, in a limited way, the authority to regulate certain aspects of abortion. Throughout this section, I have tried to present the need for civil discourse and the contribution Catholics can make to such a civil, reasoned debate. It is now time to turn our attention from the manner of the debate to the content of the laws we hope to enact. We turn our attention from civil discourse to the issue of prudent legislation.

The Legislative Challenge

The fashioning of prudent laws in a highly pluralistic society such as the United States is no easy task. In fact, many believe that our society is so pluralistic that on such issues as abortion it is best to leave the decision a purely private choice. Many who advocate unrestricted abortion fashion their position in the right to privacy: a woman cannot be told what to do

with her body. The pregnant woman holds all of the cards marked "Reproductive Rights". The woman, and she alone, must decide what to do with her body. No law or second party can legitimately deny this absolute right to privacy and reproductive decision-making (the word "procreation" must be avoided at all cost since this would acknowledge the presence and hence the claims of another). Excluded from the process is the father, family, and state. The woman alone, and too often lonely, must decide.

Those who advocate restrictions on abortion have greeted the Webster decision with great joy. However, such joy may be short lived if a consensus on the content of the law concerning abortion is not reached. Those in the pro-life group are not of one mind when it comes to the content of abortion legislation. Some members of the pro-life group favor a total ban on all abortions regardless of the consequences to the mother or child. Others who favor restricting abortion would allow for abortion if the pregnancy resulted from rape or incest. Still others would allow abortion if the physical life of the mother were in danger. And there are those who would allow abortion if the unborn child suffered from a serious genetic disorder. As one can easily see, the pro-life group is itself pluralistic.

The question: what kind of legislation should those who claim to be pro-life work to enact? It must be prudent. In order to further develop what I mean by prudent legislation, I will draw on the work of St. Thomas Aquinas and Harvard law professor Mary Ann Glendon.

St. Thomas Aquinas makes a careful distinction between the "formal" meaning of a concept and the "material" meaning of a concept. The formal meaning of a concept or ideal is the goal toward which we aim. The formal meaning lures us forward and never leaves us content with what is. The formal meaning always stands in judgment on the present in light of a fully realized future goal. The material meaning is one which captures the present reality or partial achievement of a goal or ideal. The material meaning helps us to appreciate our past achievements and gives us the encouragement to go forward. The material meaning of a concept or goal calls our attention to what is. The material meaning forces us to deal with current reality.

This distinction between the formal and the material can make a real difference in working for prudent abortion legislation. The formal goal we may hope to reach is a constitutional amendment which recognizes and defends the rights of the unborn to life and all legal protections associated with being a human being in the full constitutional sense of the term. We want the unborn to be recognized as persons and not property to be disposed of at the whim of the owner. We want the unborn to be included in both the human family and the political community. This is the formal goal toward which we work. It tells us that we have miles yet to run before a human life amendment is enacted. We cannot become complacent in the afterglow of *Webster* and we must resist the fatigue which may set in as we

face the twilight's long struggle with abortion policy.

The more immediate challenge, the reality of the current situation, calls us to focus on the material content of our desire to protect unborn human life. Professor Glendon has written brilliantly on the need to formulate prudent abortion legislation. She sees the upcoming political challenge as one of educating and mobilizing those who have a "soft" prolife attitude. This political task of "shaping the center" is one that the Catholic Church is in a key position to accomplish. Professor Glendon writes,

The rich reservoir of wisdom in the social teachings of our Church bears directly on three matters that are likely to be especially important to this group (the "soft" prolife group): first, that compassion and reconciliation are as essential a part of the prolife stance on abortion as is moral condemnation; second, that to be prolife is to be pro-woman; and third, that the campaign against abortion needs to be waged not only through the criminal law, but also by concrete assistance to pregnant women, especially those who find themselves poor, frightened, and alone.¹⁰

At present, it would seem prudent and plausible to enact abortion legislation which restricts public monies, facilities, and personnel from being used to perform nontherapeutic abortions. There is another step that has appeared on the horizon, namely, the overturning of *Roe*. Legislation after *Roe* may have to start with the protection of the unborn from abortion except in those cases where rape, incest, and severe genetic defects are present as well as when the physical life of the mother is in danger. There seems to be a moral consensus for such an approach to abortion policy. Many unborn children now aborted would be saved. However, there is still more legislation to be enacted at some time in the future (formal goal). The realization of a human life amendment should not be viewed as an all or nothing strategy. Legislation is a process of prudent compromise. And to compromise does not mean to copulate.

A word of caution and realism must be interjected at this point and it concerns the limits of the law. Professor Glendon in her excellent study, Abortion and Divorce in Western Law, reminds us that the law, taken by itself, is limited in its ability to influence human conduct. Even in a society such as ours which has the knack for turning everything into a legal issue, the law is only one cultural source for influencing behavior. At a deeper level, a society is influenced and held together by what Alexis de Tocqueville called "the habits of the heart." These are the mores and customs that are acquired by a people over many generations. These habits are passed on at very intimate and local levels of daily life: family, neighborhood, church, school, and the various associations to which one belongs. It is not that the law is powerless, rather; it is that we must view the law within a wider context of influences that shape character and behavior. Professor Glendon holds compromise legislation at this time may well help to create those mores essential for the protection of unborn human life.

Over time, I would say to my pro-life friend, compromise legislation may aid your cause, because it is what goes on in people's hearts and minds that you really

care about. The mores, not the law, are the best protection of the weak and dependent... the evolution of the mores is not an inexorable historical process in which we are helplessly caught. If we really believe that to a great extent we make ourselves, individually and as a society, what we are, then we have to assume an active role in the democratic process of education and persuasion, only part of which goes on in legislatures. 12

The legislative challenge, that is the challenge to fashion prudent laws within the context of American society, points us to a deeper and more lasting struggle. Namely, we must be about the very process of cultural transformation. The struggle is for the minds and hearts of our society in terms of how we value unborn human life. The struggle is much more profound than that of merely enacting legislation which may do little to effect cultural values. To be sure, it is important to have laws which protect the unborn. But this is not the whole story. We must be about helping to create those "habits of the heart" which actively affirm the value of the weak, vulnerable, and voiceless. For if these habits are not found in our hearts they will be absent in our laws as well.

The Cultural Challenge

In his now classic work, *Christ and Culture*, H. Richard Niebuhr traces the ways in which Christianity has interacted with culture. ¹³ One of the typologies discovered by Niebuhr was Christ transforming culture. Such an approach begins with the premise that the works of culture are naturally good. In addition, there are those aspects of culture which contain human arrogance and pride. Hence, the mission of the Christian Church from this perspective is to elevate what is naturally good and eliminate what is distorted by human pride. Christianity and culture are involved in a respectful dialogue of mutual learning and teaching. However, the ultimate norms of morality and truth lie with the Church. The Church builds on the natural goodness of cultural values and achievement. Culture is transformed or elevated so that glory and praise are given to God.

A strong case can be made that the Second Vatican Council called the Catholic Church to just such an approach to culture — a transforming relationship. 14 This transformation will not come about through arrogance or an abandonment of the truths we proclaim as Christians and Catholics. Such a transformation will require the hard work of civil discourse, reasoned debate, a willingness to learn, and a renewed respect for those mediating structures which build habits of the heart and strengthen virtuous mores (family, church-parish, school, neighborhood, and the various associations to which we freely join one with another). It will be a shallow victory indeed if all we do is pass laws while ignoring the deeper levels of cultural values and those structures which transmit them.

At this very moment there looms on the horizon a technological danger which threatens to render the entire legal and political approach to abortion moot, namely, RU-486. This pill will render the act of abortion a truly private choice. There will be no need for clinics or hospitals. In the

privacy of one's home, an abortion can be performed. There will be no need to picket or demonstrate in front of abortion clinics. They will be no more. Not because abortion is no more but because it has moved into the very sanctuary of the home. There will be no more need to argue cases before courts or lobby in statehouses for laws. In time, RU-486 will be viewed as just another pill to prevent another human mistake.

Do we really believe that RU-486 can be kept out of the American markets and away from pharmaceutical companies? Of course not. It is already being hailed as a way to save women's lives. Molly Yard, president of the National Organization for Women, said, "RU-486 can help save so many lives that we are determined to build a network both nationally and internationally to ensure that its research and development proceeds as fast as possible." Eleanor Smeal, currently president of the Fund for the Feminist Majority, is preparing to lobby the pharmaceutical industry. "We will meet with the American pharmaceutical company officials and medical leaders to expedite RU-486 and other fertility control research." ¹⁶

Is all this just rhetoric? Hardly. The Webster decision has served to activate those who favor unrestricted access to abortion. The courts are no longer rendering the abortion decisions which were so commonplace following the Roe case in 1973. Those who favor abortion must now turn their attention to the legislatures throughout this country. However, a quick victory could be won through the distribution of RU-486 and various other fertility limiting technologies. In addition, RU-486 carries a powerful cultural appeal to Americans — private, fairly inexpensive, utilitarian, pragmatic, technological, quick, and gives one a sense of power and control. With this pill there is no "sexual mistake" that cannot be erased.

The transformation of culture requires more than winning legislative and judicial victories. It is about changing the vision of a whole society so that the unborn and vulnerable can be viewed as human and deserving of care. The transformation of culture will involve the Catholic Church in a number of significant ways. I will briefly mention just three.

- Mediating Structures. The Catholic Church has within its tradition the
 principle of subsidiarity. This principle affirms the wisdom of the
 local, the intimate, and the near at hand in solving problems.
 Subsidiarity also reminds us of the importance of family, school,
 church, neighborhood, and association for fostering moral character
 and transmitting habits of the heart. The dignity of each person and
 the sacredness of life must be taught and experienced at the most
 fundamental levels of our lives. The total structure of parish life offers
 a splendid system for developing those mores, habits, and values which
 respect the dignity of all human life.
- Catholic Church as Pro-Woman. To be opposed to abortion is not to be against women. The misperception and prejudice of some is that the Catholic Church is against abortion because the Church is against

the dignity of women. At the same time, women have been ignored and ill treated. Sexism, like racism, is present in the Church. This must change. Women must come to feel that they are fully respected as human beings and members of the Body of Christ. The Church must reach out materially, spiritually, and psychologically to women who are considering abortion as well as to those who have had abortions. The Catholic Church is a people who lives the good news of God's healing love made visible in Jesus Christ. To the woman who is thinking of an abortion we must say, "Come, we offer you a better way." To the woman who has had an abortion we must say, "Come, we extend to you the kiss of peace and the oil of gladness. We share with you what each of us has received — the forgiving love of God."

3. The Catholic Church as Public Church. The Gospel according to Matthew ends with the great commission of the Risen Lord to his disciples: "Go therefore and make disciples of all nations . . . teaching them to observe all that I have commanded you; and lo, I am with you always, to the close of the age" (Mt 28:19-20). The Christian faith is anything but an exclusive club or a private affair of the heart. The Gospel is a public proclamation of what God has done for humankind through Jesus. The Catholic Church, as the community which heralds the Good News, is a public church. The faith we hold in earthen vessels is a public faith which must address the great issues which we face as a nation. The Catholic Church, entrusted with the Gospel, must resist being assigned some private little corner of society where it will address only those who already share the faith. The Church must, through reasoned, civil discourse, bring its faith-witness and truth-claims to the public square. 18

This is easier said than done. There are strong forces within culture, and within the Church itself, that reject the notion of a public dimension to the Gospel or religious faith. However, these forces must be rejected as contrary to the Catholic traditions of a public faith seeking understanding and to the liberal tradition of the free exchange of ideas in the marketplace. And the public square must make room for the expression of religious ideas. If religion is only what goes on between the individual and God, then our faith must be silent when it comes to abortion, euthanasia, the economy, and the issues of war and peace. Prof. Robin W. Lovin of the University of Chicago Divinity School offers the following observation concerning the danger of religious communities withdrawing into enclaves of private meaning which ignore public issues.

While the privatization of meaning in self-conscious communities of believers protects freedom for all of us by dispelling the illusion that some central authority could provide all of the common commitments we need, privatization may also lead us to consider important public choices meaningless. To insist that one cannot really explain one's actions in a public forum invites a positivistic view of the decisions that must, finally, be made in that forum.²⁰

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What is even more frightening with the privatization of religious beliefs is the loss of confidence in public debate and the need for rational discourse. The naked public square will not remain naked for long. The power of the state is awesome and its appetite for more power is insatiable. In the face of force and tyranny, reason and civility are among the first casualties. If religion has retreated from the public square, then so has its prophetic mission to call to repentance all human pretensions to ultimacy. As Professor Lovin goes on to remind us, without the prophetic, public role of religion, we are that much closer to Hobbes' leviathan and Orwell's 1984.

It is beyond the scope of this article to develop further the need for a cultural transformation and the role the Catholic Church can play in such a cultural renewal. However, there can be little doubt that such a renewal is essential for the formulation of a more just abortion policy. There also can be little doubt that the Catholic Church has the intellectual and spiritual resources to make a major contribution to this renewal. It can only be hoped and prayed that the Catholic Church will seize this moment.

Conclusion: Beyond Webster

The Supreme Court in its Webster decision has opened a window of opportunity to the voiceless and vulnerable in our society. At the same time, every window requires that one have the courage to accept the challenge of going through and the wisdom to seize the opportunity. It is within our reach to formulate a more just public policy concerning abortion. It is within our reach to help bring about a major transformation in the ways our culture values human life, treats the unborn and vulnerable, and respects the family, woman, and human sexuality. The work of cultural renewal is not accomplished by any one generation. Cultural renewal requires the accumulated efforts of many "little platoons" and mediating structures. Each person and every local community has a key role to play in confronting sinful social structures and helping to build a more just and compassionate world.

The legislative and cultural tasks ahead will demand that we call on those "finer angels" who live within each of us. The temptation is great to be satisfied with the present or to grow weary as we look down that long and winding road. Both temptations must be resisted. An unknown poet and prophet spoke the Lord's word to Israel during their time of exile in Babylon. He reminded the people that exile gives way to restoration and through suffering there is redemption. The poet's words speak to the heart of all who struggle, and will struggle, to defend the unborn: "They that hope in the Lord will renew their strength, they will soar as with eagles' wings; they will run and not grow weary, walk and not grow faint" (Is, 40:31).

A not unknown Pope in his encyclical, On Social Concern, reminds us of the frailty of the human condition, but more importantly, of the

Spirit Who fills our hearts with courage. What is sown today will bear fruit in God's time. In the words of John Paul II:

This path is long and complex, and what is more, it is constantly threatened because of the intrinsic frailty of human resolutions and achievements, and because of the mutability of very unpredictable and external circumstances. Nevertheless one must have courage to set out on this path, and where some steps have been taken, or a part of the journey made, the courage to go on to the end.²¹

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- 14. One of the most lively and important debates taking place in theological circles today is the relationship between religion and culture. Stanley Hauerwas (A Community of Character; The Peaceable Kingdom), Richard John Neuhaus (The Catholic Moment; The Naked Public Square), and Alasdair MacIntyre (After Virtue; Whose Justice? Which Rationality?) have been among the most creative and significant in this debate. The Catholic community would do well to become familiar with the writings of these scholars.
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 - 16. Ibid.