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The Tension Between Individual and Political Ethics: Morality, Public Policy, and Abortion in the United States

by

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It should not come as a shock to point out that "pro-life" and "pro-choice" advocates display little in common regarding their moral stances on issues of unborn life. Ironically, however, they often *do* have one important thing in common: confusions regarding the principles governing the relation of people's moral views to law, that is, confusions regarding the relationship of individual morality to public policy. This article will explore that relation as it has been articulated in the classical western tradition, especially as explicated by Aquinas and certain contemporary authors, with a view to gleaning a few general principles which could serve as a focus for determining what law ought, and ought not, to regulate with regard to abortion.

Law

Law has two major purposes in this tradition. First, its object is to foster the good life in positive ways in order to assure what is necessary for the achievement of the common good of society. This is the realm corresponding to "general" or "legal" justice.¹

Secondly, the object of law is to try to get people to act reasonably with regard to others in their private affairs, and also to ensure that all have equal, if proportional, rights to participate in the public goods of society. This is the realm of "particular" justice, and it comes close to what the Second Vatican Council's "Declaration on Religious Liberty" articulated as being necessary to secure the *public order*, which consists of three elements: the *order of justice* which safeguards both the individual and social rights of individuals, the *order of peace*

which enables people to live together in harmony, and the *order of public morality*, which fosters those moral principles or virtues which are minimally necessary for the common life.² Law achieves the good of public order by two interrelated means: by restraining people from doing flagrantly unjust things to each other it creates an atmosphere of freedom from harm that is necessary for life in an ordered society, and pedagogically it fosters those basic human virtues — particularly those allied with justice — that are positively necessary if social life is going to flourish. The following will focus on this second purpose of law, that of securing the public order by restraining people from evil and fostering in them basic moral principles by these twin means of *coercion* and *pedagogy*.

Before we take up the question of the limits of law's coercive power, it should be noted that what we call the classical understanding of law — that which has dominated Western thought up to the advent of modernity — has its roots in the ancient Greek vision of the relation between virtue and the good life. In this classical view human beings were actually intended to become righteous by obedience to society's laws. There was here an awareness that virtue and prosperity correspond; the *polis*, in actively fostering the virtuous life of its citizens, was by that very reason fostering the common good of society, which makes a good and happy life possible.³ Even in the classical vision, however, the role of the state, and hence also of its laws, was limited in scope. The ancients thus made the distinction between individual and political prudence, a distinction which delimited two different realms of ethics; they realized that it was not in all cases politically prudent to legislate or effect what was indeed prudent conduct for individuals. *Political* ethics thus did not correspond to *individual* ethics. This does not mean, as John Dolan points out, that the purpose of law is not moral (it is), but only "that its moral purpose is limited."⁴ In this vision, the role of the society was to legislate ethically right conduct, to be sure, but only as required for the protection of the public good, which meant, among other things, that the state was only *directly* concerned with certain virtuous — particularly just — actions, rather than in an ethically right virtuous mode of those actions.

This idea was developed and systematized in late classical and particularly medieval and early Renaissance Christian thought. The distinction was drawn between the virtue of *legal* justice, whose purpose was to direct actions to the common good by either making or obeying law, and *particular* justice, whose object was the realization of equality between individuals (in the case of commutative justice), or between society and individuals (in the case of distributive justice). Since legal justice includes reference to the divine and natural (or moral) laws as well as to civil law, its objects are all those things which are due to oneself or another, that is, all those things which are reasonable. It includes, in other words, both what is *morally* due and what is *legally* due.

Particular justice, on the other hand, in the strict sense requires only those reasonable actions which are due to another as determined by civil legislation, that is, only those actions which are strictly necessary for the realization of that basic equality that is itself necessary for the realization of the common good of temporal society. It does not include, strictly speaking, all actions that are reasonable, or all actions that are morally due to another. The legal due is and must be possible to enforce, and always concerns only outward action; the moral

due, which includes such actions as religious worship, respect for parents, truth-telling, gratitude, etc., is neither legally due nor particularly easy to enforce.

Coercion. Only the virtue of justice directly interests civil law because it is proper to justice to perfect us in relation to others. And in regard to justice, civil law directly commands or restrains only external actions, for these are the proper matter of justice; law, then, is not directly concerned with the heart, with people's *motivations* for doing just actions. Nor is its concern directly with the acts of other virtues, such as temperance and courage, or those virtues which fall short of the full notion of justice, such as religion, gratitude, and truth-telling. Civil law directly aims at only one part of the moral order, the good of justice, whereby our *actions* are regulated with respect to other individuals and the common good. As Dolan says, a person's "individual moral integrity is of no immediate interest to the law except as it touches on justice."⁵ The law may want me to be temperate and brave, for instance, but its concern is not my personal moral integrity, but rather that I not "become *publicly* drunk or panic in *battle*."⁶ In other words, its concerns are my actions as they affect others and the common good, rather than the internal source of those actions.

There are limitations even within this circumscribed area to what law can accomplish by commanding/restraining. It is limited first by the necessity that most people must, at least in a general way, consent to the law. Law is unenforceable and hopelessly coercive if it runs counter to what the majority believe to be right. The second limitation of law — not completely distinguishable from the first — concerns what is often called the "utility" or "possibility" of law. Law must be able to be equitably enforced without causing other types of harm. As Aquinas put it, "human law is said to permit certain things, not as approving them, but as being unable to direct them."⁷ The example he used — as did Augustine before him — was prostitution.⁸ Another example would be American prohibition, which went a long way toward creating organized crime in this country, and also a cultural backlash in which drinking was seen to be a status symbol.

Aquinas⁹ noted also that the realm of law must be limited to the ordinary virtue possible to the majority of people. Dolan reflects this understanding as follows:

Laws must be such as the majority of men find relatively easy to obey, which means their aim must be modest, just as the majority of men are of modest virtue. The state must be satisfied with containing passion and appetite within limits that keep them from accomplishing notable harm to the common good. The justice demanded by law will always fall below natural, not to say Christian, justice. . . . While all law implies the need for coercion, it cannot coerce a whole community without provoking disaffection.¹⁰

He continues by usefully summarizing these reflections on the limitations of civil law:

The legislating of natural [or moral] law must be modified as a matter of principle and not mere expediency (or, more exactly, *by expediency as a matter of principle*), by the moral and physical freedom of the members within the body politic. To the first of these

corresponds the canon of *consent* or the right of the people to ratify its law. To the second corresponds the canon of *utility* (or 'possibility') which confines the province of law to what it can usefully exact, all things considered (the customary morality especially), in the way of conduct affecting the common good.¹¹

Thus M. Kathleen Kaveny writes that, for Aquinas, "the limits of *criminal* sanctions are the limits of ordinary virtue. The more purely pedagogical features of law will have to take over from there."¹²

Pedagogy. We now move on to the second means by which society secures the public order: the task of inculcating virtue and concern for the common good through legislation. Through its pedagogical function, law fosters moral principles in at least three ways:

1) By forcing people to *act* well in view of the common good, law habituates them to good action:

Since some are found to be deprived, and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by force and fear, in order that, at least, they might desist from evildoing, and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous.¹³

2) By actively promoting virtuous acts (through such things as tax breaks for married couples and charitable contributions).

3) By helping people to take counsel, that is, by helping people to decide for themselves what is the best course of action (perhaps by legislating mandatory waiting periods and disseminating information on alternatives to abortion).

But again, even the pedagogical purpose of civil law is limited by its direct concern with those aspects of morality that are minimally necessary to the public order: moral principles, for instance, concerning the respect for the rights of others, the importance of keeping one's promises, respect for marriage as a prerequisite for stable family life, a sense of obligation and loyalty to society at large, respect for law itself, etc.

Besides the coercive and pedagogical purposes of law, two other factors are necessary to consider in the classical understanding of the role of law: its stability (or lack of it), and the obligation to obey unjust laws.

Stability. It has long been recognized that for laws to be effective, they must be respected, and that an important ingredient in respect is stability. Laws that are too readily changed simply lose some of their sociological force which stems from their perceived inevitability: thing just are this way, so one must adapt to them, and obey them. As Aquinas put it, (long before the advent of modern sociological insight):

Human law is rightly changed, in so far as such change is conducive to the common good. But, to a certain extent, the mere change of law is of itself prejudicial to the common good: because custom avails much for the observance of laws Consequently, when a law is changed, the binding power of the law is diminished, in so

far as custom is abolished. Wherefore human law should never be changed, unless, in some way or other, the common weal be compensated according to the extent of the harm done in this respect.¹⁴

This must be a major consideration in forming a consensus with regard to abortion laws: where there is no consensus, laws are unlikely to be stable.

Unjust Laws. Aquinas, for one, pulled no punches in characterizing unjust laws: they are to be considered acts of violence, rather than of law. And hence he holds that they do not bind in conscience.¹⁵ A caveat immediately follows, however: we might indeed be bound to obey them, in order to avoid greater harms, such as those that would stem from a generalized disrespect for law, from the advent of an unacceptable amount of violence directed against the innocent, or even anarchy. And here great prudence is called for: one must weigh the evil effects of obeying (or at least of not actively fighting) an unjust law against the possible effects of civil disobedience. One must ask oneself such question as:

- How great is the injustice stemming from the law?
- Is the unjust law the exception, or the rule, in a given society?
- What would be the overall effects on the common good were one to disobey this law?

Richard Gula cogently delineates the following seven principles which should guide any decision for civil disobedience: 1) One must be ready to assume the penalty for the law's violation. In other words, one "must be convinced that the harm brought to oneself is less than the harm being perpetrated by following the law." 2) It is to be done in the name of the law. "It is oriented toward reforming the law in order to protect the public order." 3) It is always the last resort, "only after others ways of bringing the wrong to public attention have been tried" and found ineffective. 4) It must grow "out of analysis of some specific wrong," rather than out of a negative reaction to the established order. 5) It should respect the Christian bias in favor of non-violence, because "since violent means are so destructive and so difficult to control, they can too easily go beyond the intended objectives and undermine the values being upheld." 6) One works within the structures of society in the attempt to reform them; civil disobedience is not revolution. "Accepting the appropriate penalty for violating the law is an example of respecting the structures of the community." 7) After the disobedient action, one must "work to heal the disruption in the community and help to create the structures which will correct the wrong." One further criterion might be that the law that is directly disobeyed must be unjust — the end does not justify the means. For example, blocking the Golden Gate bridge to protest the war in Vietnam is wrong because the laws ensuring free use of the bridge to all people is not itself unjust.¹⁶

It would be appropriate to end this section with Isodore's description of law, quoted affirmatively by Aquinas:

Law shall be virtuous, just, possible to nature, according to the custom of the country, suitable to place and time, necessary, useful; clearly expressed, lest by its obscurity it lead to misunderstanding; framed for no private benefit but for the common good.¹⁷

Abortion

Most Roman Catholic moral theologians agree that the position of the Supreme Court in *Roe v Wade* (and several other subsequent decisions) is simply untenable, from both the legal and ethical points of view. A fundamental equality is violated by direct abortion. Unborn human lives, virtually everyone agrees, need some kind of legal protection: but the critical question is, what kind? Given that individual human life is the subject of certain basic rights, how do we protect and enforce those rights?

There are at least four characteristics of law that must be taken into consideration in the debate about abortion: 1) One of law's central purposes is to protect the innocent against injustice, especially their rights to life, bodily integrity, and freedom. 2) But law also deals with the realm of the possible. It must reflect some kind of consensus of society. If laws were imposed on large dissenting groups, they would be unenforcable, and lead to a general contempt for law. This unenforcability is exacerbated in the case of abortion both by the ease of some new techniques for abortion which do not require outside help, and by general unwillingness in society to punish people for that type of crime. As people are punished, a backlash could be created in favor of abortion. 3) In spite of this, law has an pedagogical role; it must coax people to gain a moral respect for basic principles of justice. This was especially effective in civil rights legislation. 4) Yet it also constrains with the threat of force: it uses and must use criminal penalties to protect rights.

The problem with designing public policy with regard to abortion is the problem of balancing these four aspects of law. Although it is not possible to give a systematic presentation of all the issues pertaining to abortion law here, six points relevant to the issue will be mentioned.

One. The main aim of public policy should be to make abortions as unnecessary as possible. In other words, the best way to prevent abortion is to have viable alternatives to abortion readily available to all women. We must think seriously about effective sex education, day care, easy adoption procedures, emotional and financial support to young women willing to come to term, etc.

Two. Kaveny says that

First, good abortion law must be consistent with the view that abortion constitutes the killing of a being which is fully human from very early on in pregnancy. Like other types of killing, it may objectively be justified in certain instances and mercifully pardoned in others. In the vast majority of the cases, however, it is an action which is objectively unjustified and is therefore strongly to be discouraged. Secondly, any acknowledgment of the objective wrongness of abortion must have as its counterpoint utmost sensitivity to the difficulties facing women who confront unplanned pregnancy and parenthood in this society. These difficulties often seem insuperable because our society does not treat with gentleness the weak or vulnerable at any stage in life.¹⁸

Kaveny goes on to draw a threefold distinction concerning what one's stance — in this case the stance of civil law — toward abortion may be: a) it is, in itself, morally acceptable or at least neutral — simply a matter of personal choice; b) it is morally justified in some exceptional circumstances, and hence is legally

appropriate in those circumstances; c) where it is morally unjustified, it may still be inappropriate or impossible to punish someone.

Certainly, "a" is not an option for law: law cannot be indifferent to the rights of helpless human beings. But given this, it seems plausible at the present juncture that public policy should allow the following classes of abortion, based on "b" and "c". First, when the mother's life is directly at stake. This falls under category "b", and the consensus in Roman Catholic moral theology is that the death of the unborn in these cases is not direct abortion at all, but only indirect.¹⁹ Second, if "there is a serious threat to her physical health and to the length of her life."²⁰ Some would argue that these would also fall under category "b" and could be understood to involve only indirect abortion. At very least, however, they would fall under category "c", where punishment would be inappropriate. Third, in cases of rape or incest abortions are not morally justified, but should fit under category "c" which again recognizes that extraordinary circumstances preclude punishment: political prudence is not individual prudence, and the state cannot practically legislate in such exceptional and tragic cases where values conflict and there is no real possibility of a consensus being formed. Fourth, as Richard McCormick says, "where fetal deformity is of such magnitude that life-supporting efforts would not be considered obligatory after birth."²¹ Some theologians would put this under category "b" and understand the termination of the pregnancy to simply be justified withdrawal of life support. Even if this argument is recognized as being shaky (as it probably is), such an abortion arguably may still fall under category "c".

Three. In the case of other classes of abortion that might be allowed (under category "c") such as abortions early in the first trimester of unwed teenagers, the law's pedagogical purpose should dictate informed consent, which would be obtained by mandating a short waiting period before the abortion coupled with counselling and the dissemination of information about fetal development and alternatives to the abortion. There could also be a public campaign designed to discourage abortions. Provision should also be made so that the unborn have an advocate to argue against the abortion. This position assumes the unassailable: that the fetus is a human being and most probably a human person from very early on in the pregnancy, and yet cannot speak for itself.

Four. No matter what the legal status of abortion may be, public funding for abortion is constitutionally as well as morally intolerable: it interferes with the free practice of religion by demanding that one's tax money be used for a practice directly contrary to the public beliefs of one's faith. In other words, it violates the civil liberties guaranteed by the constitution, most notably those touching on the free and uncoerced exercise of religion. Also, as David Carlin points out, "A constitutional right does not necessarily entail a right to public funding for the exercise of that right. In rare cases it does"²² (the right to counsel). Just because I have a right to freedom of speech does not mean that the government must provide me with a right to freedom of speech does not mean that the government must provide me with a printing press.

Five. The "pro-life" strategy of giving the states more freedom to regulate abortion is highly questionable. The result of such a strategy would be a situation

in which different, perhaps adjoining states, would have radically different abortion laws. The constant cat-and-dog fights that would take place in the fifty states would result in permanent instability of abortion, with the ensuing deleterious effects noted above. The strategy should rather be to begin building a consensus in our society over at least the most morally unacceptable cases of abortion — and one does that through debate and dialogue, not confrontation. When such a consensus is reached, Congress should make the legislative policy, not the courts, and not the states. This is the only way to ensure both consistency and stability in abortion law. At the same time “pro-life” efforts should be expended on making abortion unnecessary for as many women as possible.

Six. In regard to civil disobedience, the main criterion that the “pro-life” movement must consider is one of effectiveness, that is, what types of actions in the long run will save more unborn life? And I would argue that there is no question that only when a consensus is reached in our society as a whole with regard to the most morally objectionable types of abortion can large numbers of young human lives be saved, many more than are saved by acts of civil disobedience. If blocking abortion clinics or harassing abortionists or those having abortions only has the effect of increasing the polarization of our society, such consensus becomes ever more of an impossibility.

Conclusion

These reflections are meant to point out the complexities of the relation between civil law and moral issues, complexities that are particularly acute in the case of abortion. Perhaps if the distinction developed in this article can be seen as cogent by both “pro-life” and “pro-choice” advocates, the beginnings of a consensus on public policy can be reached. This may be a first step to the deeper moral consensus that we all desire.

References

1. “General” or “legal” justice roughly corresponds to contemporary meanings of “social” justice. It should also be noted that realm of law is generally not recognized as valid in the Enlightenment tradition of liberal individualism.

2. Charles Curran, *Toward an American Catholic Moral Theology*. Notre Dame, IN: University of Notre Dame Press, 1987, p. 198. This is Curran’s interpretation of paragraph seven of the document.

3. Jeremiah Newman, *Foundations of Justice*. Dublin: Cork University Press, 1954, pp. 72-75. This is a much different view than that of modern liberal individualism, in which the state has no concern with the moral life of its citizens, nor directly with the realization of the common good. Indeed, the purpose of the state in the typical liberal view is primarily to enforce contracts and restrain people from harming each other, in such a way that free and unrestrained competition is assured. And it is the “invisible hand” of those market forces that will realize the common good, and the ability to pay of those who are successful in the market that will assure participation of those who are worthy in the common good.

4. Joseph Dolan, “Natural Law and Legislation.” *Laval theologique et philosophique* 17 (1961), p. 53.

5. Joseph Dolan, “Natural Law and Modern Jurisprudence.” *Laval theologique et philosophique* 15 (1959), p. 253.

6. *Ibid.* Italics added.

7. St. Thomas Aquinas, *Treatise on Law (Summa Theologica, Questions 90-97)*, with an Introduction by Stanley Perry. Chicago: Henry Regnery Company, 1969, I-II 93.3 ad 3.

8. It is ironic that two great saints would permit something that our own secularized and somewhat licentious society does not.

9. Human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, . . . but only the more grievous [ones], from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained.

Human law, Aquinas continues,

does not lay upon the multitude of imperfect men the burdens of those who are already virtuous, namely, that they should abstain from all evil. Otherwise these imperfect ones, being unable to bear such precepts, would break out into yet greater evils. (Aquinas, *Treatise on Law*, I-II 96.2 and ad 2.

10. Dolan, "Natural Law and Legislation," p. 256.

11. Dolan, "Natural Law and Legislation," p. 260. Italics added.

12. Cathleen M. Kaveny, "Abortion and the Law: A Thomistic Perspective." *Thomist* 55 (1991), p. 380.

13. Aquinas, *Treatise on Law*, I-II 95.1.

14. Aquinas, *Treatise on Law*, I-II 97.2.

15. Aquinas, *Treatise on Law*, I-II 96.4.

16. Richard Gula, *Reason Informed by Faith: Foundations of Catholic Morality*. New York: Paulist Press, 1989, pp. 259-61.

17. Aquinas, *Treatise on Law*, I-II 95.3 obj. 1.

18. Kaveny, pp. 361-2.

19. See, for instance, Germain Grisez, *Abortion: the Myths, the Realities*. New York: Corpus Books, 1970, p. 340. Richard McCormick, *How Brave a New World? Dilemmas in Bioethics*. Washington, D.C.: Georgetown University Press, 1985, pp. 160-1. Benedict Ashly and Kevin O'Rourke, *Healthcare Ethics*, 3rd edition. St. Louis: The Catholic Health Association of the United States, 1989, pp. 184-8.

20. Richard McCormick, *How Brave a New World: Dilemmas in Bioethics*. Washington, D.C.: Georgetown University Press, 1981, p. 200.

21. *Ibid.*

22. David Carlin, "Abortion, Gay Rights, and the Social Contract." *America* 168 (February 27, 1993), p. 10.