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ESSAY

THE CHURCH, AIDS AND PUBLIC POLICY

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One of the most significant challenges facing our society in recent times is the presence of the HIV virus and AIDS (Acquired Immunodeficiency Syndrome) in our midst. Much has been written and spoken about AIDS. There has been extensive debate as to what public policy at the federal, state and local level should do to respond to the needs of those persons with the virus or with AIDS as well as to prevent the spread of the disease. The Roman Catholic bishops of the United States have participated in this public policy discussion in a variety of ways. One of the most significant of which was the issuing of the statement of the Administrative Board of the United States Catholic Conference "The Many Faces of AIDS." Though the document was written in part to offer pastoral guidance for Roman Catholics, it also contained observations on matters of public policy.

In this essay I would like to reflect on the role of the Church's pastors in the development of public policy in the United States of America. In the context of those reflections I will then present "The Many Faces of AIDS" as an example of how the Bishops do participate in public policy development.

In order to discuss in a helpful manner the complex question of the role of church pastors in the development of public policy one must make certain distinctions. Without these distinctions the conversation can lose focus and become bogged down. A person who has been most significant in the development of such distinctions is the late Jesuit theologian John Courtney Murray. He proposed that one must distinguish between the manner in which the church and its pastors relates to the state and how it is that the church functions in society. Likewise, the difference between private morality and public

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morality is seen as significant for an understanding of the development of civil law.

A. *The Relation Between Church and State*

Before the establishment of the democratic state in the West there had been a different understanding of the relationship of church and state than presently exists. Religion and the civil order were seen as essentially intertwined, and a certain religion often was the established religion of the state. With the emergence of democratic, and, often times, secular states the older understanding was called into question. However, it was not until the Second Vatican Council and its Decree on Religious Liberty that the church formally accepted the reality of democratic and secular states. With that acceptance came a new understanding of the relationship between the state and society as well as the roles of church and state.

The first premise of this understanding was the recognition that the state (government) is only one aspect of society. As Archbishop Quinn of San Francisco said in his address to the Yale Club of San Francisco: "The state is only one component in society which includes such realities as the family, labor unions, universities, corporations and all sorts of various other associations.¹ It is this differentiation between the state and society that provides a theoretical foundation for the limits which democratic societies place on the state in their constitutional law. Further, it makes it possible to distinguish between the manner in which the church functions *vis-à-vis* the state and how it functions in society.

It is in this context that one can examine the relationship between church and state according to the principles of United States law. Those writing on this question from the Catholic perspective, rather than seeing the First Amendment to the Constitution as containing a "separation clause," suggest that it contains an "anti-establishment" clause. The meaning of this clause is that religious institutions are not to expect discrimination nor favoritism in the exercise of their ecclesial and societal life.

Though the constitution did not allow for the establishment of religion, it was not opposed to the practice of religion. On the contrary, the First Amendment ensures freedom for religion in the United States. While maintaining what some have described as the institutional distinctiveness and integrity

1. 14 ORIGINS 221 (1984).

of both church and state, the constitution's "free-exercise" clause guarantees religious freedom. Such freedom includes the right to free association, the right to freedom of expression, and the right to establish appropriate institutions and programs.

This view of the relationship between church and state found in United States constitutional law is strikingly similar to the teaching of the Second Vatican Council on religious liberty. That teaching is grounded in the dignity of the individual and asserts that the practice of religion should be protected from unjust intrusion by the state or others. All the church asks of the state is the freedom to fulfill its ministry.

It is true to say then that, unlike an earlier age, the church has accepted the reality of pluralistic society and a distinction between the role of the church and that of the state.

B. *Relationship Between Church and Society*

A second distinction proposed by Murray is that of the relationship of church and society. Most who discuss this distinction would not deny that the church has as legitimate a place in society as any other voluntary association. Such associations play an essential role in a free democracy and their right to exist is guaranteed by the constitution. But what is the role of the church as a voluntary association in society; and in particular, what is its role in the formulation of public policy?

For these questions to be answered some would suggest that there is need of another distinction: the difference between a secular state and a secularistic society. Father Bryan Hehir has noted that keeping the state secular is in the interest of pluralism and freedom. But such is not the case with society. If religion really does have the right to exist within society, then it has a right, as does any other voluntary association, to participate in public debate and in the formulation of the public agenda. This theme has been carried further by Cardinal Bernardin of Chicago who has noted that the church and its pastors has the disciplined capacity to analyze the moral-religious significance of public issues. And the influence of that participation in public life will be determined by the quality of the arguments which are offered.

The position of these religious leaders has been affirmed by some Catholic political leaders. For example, Congressman Henry Hyde argues that the distinction between church and state does not mean that there is no room for religious values in society. He would reject a secularistic notion of the state

that would preclude any religious participation in the life of society because of fear that such participation would violate the separation of church and state. In support of this rejection of a secularistic understanding of society he cites in his Notre Dame address of September 13, 1984, an excerpt from a Supreme Court decision of June 30, 1980, in *Harris v. McRae*,² that says "it does not follow that a statute violates the establishment clause because it happens to coincide or harmonize with the tenets of some or all religions. That the Judeo-Christian religions opposed stealing does not mean that a . . . government may not, consistent with the establishment clause, enact laws prohibiting larceny."³

There is then a Catholic perspective that sees the Church participating as a voluntary association in the process of dialogue and debate by which a society comes to agreement on its future course and thus influences the development of public policy.

C. *How Does the Church Act?*

If it is assumed that there is no established religion in the United States but that as a part of society religion can influence the development of public policy and laws, how do church pastors and bishops see themselves acting? The first thing that the bishops note in their 1984 statement "Political Responsibility: Choices for the 1980's" is that "it is the laity who are primarily responsible for activity in political affairs; for it is they who have the major responsibility for the renewal of the temporal order." In this context the role of bishops as pastors and teachers is "to provide norms for the formation of conscience to the faithful, support efforts to gain greater peace and justice and provide guidance and leadership on occasions when human rights are in jeopardy."

In providing this guidance the bishops are aware that their primary competency is not in the offering of concrete solutions in the areas of social and economic and political matters. For that reason the bishops' remarkable pastoral on war and peace noted a distinction between different levels of authority of which the bishops were speaking. But while admitting to a gradation in competency and therefore authority, the bishops know that theory or value must be translated into the concrete; and consequently, they are not afraid to offer their opinions

2. 448 U.S. 297 (1980).

3. 14 ORIGINS 286 (1984).

and suggestions as to how those values might best be achieved in the world of public policy.

D. *The Formulation of Public Policy: Public and Private Morality*

Having already made three distinctions it is necessary to make a fourth: the difference between public and private morality in a pluralistic society.

In a pluralistic society such as the United States where, as was argued above, the role of the state is seen as distinct from the life of the society and where the state is limited by constitutional law, there are limits placed on what the state can develop public policy about. Because of the rights of the individual it has been accepted that the state ought not to develop public policy in matters of private morality. But what is private morality? It is those aspects of human behavior that have ethical consequences or meaning but that primarily affect the life of the individual. Such personal matters in a pluralistic society are not apt matter for laws or regulations unless or until they interfere with the public order or with the public interests of society. For example, a person has a right to drive, to move from one part of the country to another. But a person does not have the right to drive in a way that will injure others on the road. Therefore, the state can legislate that someone wishing to drive must pass an eye test in order to insure that he or she has the ability to drive safely.

The state is able to develop public policy in matters that affect or relate to public morality. How does one define public morality? Here again Father Murray is most helpful. For him an issue is one of public morality if it affects the public order of society. And public order in turn is composed of three goods: public peace, essential protection of human rights, and commonly accepted standards of behavior in a community. In some instances it is obvious that something pertains to public morality. Most would agree that defense of the nation is a matter of public morality and that the state can establish public policy in this area.

In other cases, however, it is not that self-evident that something pertains to public morality. An example which some religious leaders have used in this regard is that of prohibition. At one time legislation was passed prohibiting the sale of alcohol. It was felt that such use was a matter of public morality and that it was proper for the state to legislate. Eventually it was decided that such was not the case. Whether one drinks or not is not a matter of public concern. Therefore,

there should be no law. How one drinks, that is if one becomes drunk and drives, is, however, a matter of public concern and subject to law making.

In light of this distinction it is possible to say that the church's pastors have a protected right under the constitution to address its members on matters that pertain to private morality but should bring that religious perspective to bear on society at large in a different way when it is a matter that interferes with the public order or with the public interests of society. Church leaders, along with other members of society, can bring their beliefs and values to the discussion of the development of public policy that pertains to matters of public morality.

E. *The Making of Public Policy*

With these four distinctions in mind it is now possible to discuss how public policy ought to be developed. At the basis of this discussion is an assumption about public policy and law that is relatively new to Catholic discourse. Historically it was understood that the purpose of civil law or public policy was the attainment of the common good, of that which was in the best interests of all and this best interest required the total incarnation of the moral law in civil law. Since the rise of the democratic, secular state that assumption has been challenged. Today, following on their understanding of the teaching of the Second Vatican Council, many Catholic theorists would argue that the common good is the end or purpose of society but that the end or purpose of the state and its public policy is the public order which was mentioned above. Obviously, public order is a more restricted category than the common good and becomes the criterion for justifying the need for public policy or civil law as well as whether public policy or law is good or not. Further, in a pluralistic society, guided by constitutional principles, intervention in this public order is determined by the norms of good law making. In this regard, when speaking of the making of laws and public policy, the Second Vatican Council's teaching on religious liberty affirmed that the freedom of the person is to be respected insofar as possible and curtailed only when and insofar as necessary.

In addition to these criteria for evaluating good law or public policy, Catholic theorists have adopted two others: law must be equitable and enforceable. If the law, in seeking to remedy one wrong were to bring about greater harm in another area of life, then it is bad law. An example would be in

the area of pornography. If in the process of controlling pornography the right to free speech were to be seriously compromised, then such a law would be bad law. Likewise, if public policy were not enforceable and would bring the entire order of law and public policy into disrepute, it would be bad law. This would not say that what was being legislated against was therefore acceptable, just that the law was not a good law. Prohibition was judged, in part, to be bad law because it was not enforceable. It lacked the requisite public consensus that it was a matter of public morality and therefore its violation undermined the entire order of proper public policy and just law. The decision whether a proposed matter of public policy is equitable and enforceable involves prudential judgments. It is possible that people of good will could disagree on such matters.

The prudential application of these four criteria of freedom of the individual, public order, equity and enforceability does not contradict the Catholic tradition regarding civil law which existed before the time of pluralistic and democratic societies. Though this tradition would have seen human law as ordered to the common good, it did recognize the need for laws to be applied according to the human condition. Similarly, the civil order was able to tolerate certain evils lest greater goods would be impeded or greater evils would occur. It was in this spirit that Augustine tolerated public prostitution. Such recognition of the need to account for the human condition and the possibility of permitting evil in certain situations, would suggest that the older tradition also recognized the importance of prudence in the making of law and at least implicitly accepted the possibility of disagreement about what would be proper public policy.

One example of the prudential application of the four criteria to the making of civil law would be the current position of the United States Catholic Conference with regard to abortion and public policy. Obviously the bishops of the United States as Roman Catholic pastors believe that all abortion, that is the direct taking of life in the womb, is immoral. It is contrary to the common good of society. When it comes to the matter of public policy of the state, however, they are in support of the so-called Hatch Amendment to the federal constitution. This amendment would give to Congress or to the individual states the power to limit or prohibit abortions. It also provides that a state law that was more prohibitive than a congressional law could prevail in that state. In supporting this amendment, the conference chose not to direct its public policy efforts solely

towards supporting a total ban of all abortions. In doing this it would seem to this writer that they were not compromising their moral teaching but seeking to find that which was possible and most effective in the civil arena. In other words, they had made their own the distinctions which have been developed to this point in this essay.

F. *The Many Faces of AIDS: An Analysis*

In this next part of the essay I would like to use "The Many Faces of AIDS" as an example of how the bishops, in an area of great importance approached the development of public policy.

Church and State: It is clear from the very beginning of the document that the document is written with a keen recognition of the fact that there is a distinction between church and state. The introduction to the statement addresses the document to "sisters and brothers in the Lord" as well as to "all people of good will."⁴ Throughout the rest of the text this distinction is maintained. There is no attempt to insist that the state must enforce Catholic doctrine or teaching.

Church and Society: The recognition of the difference between church and state has its foundation in the distinction between state and society. The document makes these distinctions its own in its very first lines:

In the life of society, as in the lives of individuals, there are events of significance and moments of decision. Today our society is experiencing a significant event and a decisive moment: the ominous presence of the disease known as AIDS (acquired immune-deficiency syndrome).⁵

A careful reading of the statement would suggest that a good deal of its attention is directed towards society in the United States. Language such as "as members of the Church and society" and "as a society we must develop educational and other programs to prevent the spread of the disease" can be found frequently. But the text also speaks to the church: "As members of the Church we must offer a clear presentation of Catholic moral teaching with respect to human intimacy and sexuality."⁶

4. 17 ORIGINS 481 (1987).

5. *Id.*

6. *Id.* at 483.

In developing its position the statement is obviously in a dialogical posture. The second section of the statement is entitled "The Facts About AIDS and a Commentary." This section begins with a listing of certain facts about AIDS "[b]ecause reasonable actions and attitudes are based on facts, not fiction."⁷ It is in light of those facts that the statement then offers a rather detailed commentary regarding public policy questions such as quarantining, health insurance, antibody testing, confidentiality, patient treatment, research, care of loved ones and prejudice. The specific conclusions contained in this section are offered in the hope that the quality of the reasoning with which they are developed will be convincing to people of good will. The pastors of the church are clearly engaged in a conversation with society. As they said, "We also speak as representatives of a religious tradition in a pluralistic society, as together with other persons of good will, we face the new and distinctive challenge of AIDS."⁸

How the Church Acts: In carrying on that conversation the statement reflects one modality of ecclesial action. But the document also reflects another modality: the forming of conscience. The text begins by telling stories, by revealing the many faces of AIDS. Using affective imagery it invites the mind and heart of the reader to reflect seriously on the meaning of AIDS. Having established this moral perspective the statement then turns to the Gospel and Christian tradition to inform the Christian conscience. For example, the statement says:

Jesus has revealed to us that God is compassionate, not vengeful. Made in God's image and likeness, every human person is of inestimable worth. All human life is sacred, and its dignity must be respected and protected.

The teaching of Jesus about human sexuality and the moral norms taught by the Church are not arbitrary impositions in human life but disclosures of its truth.⁹

And it is in light of these principles which should inform the conscience of the believer that the document proceeds to more specific application. It does that, however, realizing that there is a distinction between fundamental values and specific implementation.

In a brief statement like this, we cannot apply the church's teaching to all possible human behavior. Instead, in accord with the church's traditional wisdom

7. *Id.* at 484.

8. *Id.*

9. *Id.* at 483.

and moral teaching we offer some general principles and concrete guidelines.¹⁰

Public and Private Morality: It is when the statement turns its attention to the prevention of AIDS that it deals with the distinction between public and private morality. The document makes no apologies for what it proclaims as its moral vision. A moral vision which it offers as normative for those who believe and as an invitation to those who do not.

Consistent with the insights and values found in the Scriptures, our religious tradition and a philosophy of the human person that is consonant with both, we believe that the best source of prevention for individuals and society can only come from an authentic and fully integrated understanding of human personhood and sexuality and from efforts to address and eliminate the causes of intravenous drug abuse.¹¹

Later it says:

In light of this understanding of the human person, we are convinced that unless, as a society, we live in accord with an authentic human sexuality, on which our Catholic moral teaching is based, we will not address a major source of the spread of AIDS.¹²

It is evident then that the Administrative Board is using its freedom as representatives of a religious tradition to participate in a public discussion about a social issue to proclaim its belief that its moral vision, the private morality to which it invites people, is the best solution to the problem.

The bishops do not restrict themselves, however, to this hortatory language. And the reason they do not is because they have concluded that AIDS is not just a matter of private morality. On the contrary, it is a reality that has and will impact the public order of society. AIDS impacts public peace, the essential protection of human rights and commonly accepted standards of behavior. And insofar as AIDS involves matters of public morality the bishops feel they have the right and the responsibility to participate in the development of public policy that will preserve and protect the public order of society.

This is best exemplified in the document when the matter of education for the purpose of preventing the spread of the disease is discussed. The statement calls for legislation and

10. *Id.* at 485-86.

11. *Id.* at 486.

12. *Id.*

public guidelines to "encourage private and public institutions to go beyond mere biological information."¹³ In saying that the statement acknowledges,

. . . that this raises important questions because of existing constitutional restraints or interpretations of the separation of church and state. We are willing to join with other people of good will in dialogue about how such a fuller understanding of human sexuality might be communicated in our public schools and elsewhere. We believe that there are certain basic values present within our society which transcend religious or sectarian boundaries and which can constitute a common basis for these social efforts."¹⁴

In suggesting that there are such basic values the document clearly is seeking to bring religious conviction to bear on the development of public policy in a way that recognizes the difference between private and public morality within a secular state.

The Making of Public Policy: It would seem that the statement also made its own the contemporary understanding of the purpose of civil law or public policy: the preservation of public order and not necessarily the complete incarnation of that moral order that is the foundation of the common good. Again this is exemplified in the discussion of educational programs to prevent the spread of the disease:

Because we live in a pluralistic society, we acknowledge that some will not agree with our understanding of human sexuality. We recognize that public educational programs addressed to a wide audience will reflect that some people will not act as they can and they should.¹⁵

But what should such programs do to preserve the public order? Especially when it is a matter of providing education for those who have already contracted the disease?

The statement indicated that this is a complex issue. It argues, without compromising those values which it believes transcends religious or sectarian boundaries, that when it comes to the education of such persons "we have to face difficult and complex issues of public policy."¹⁶ For guidance in resolving these issues the statement suggests that,

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

The teaching of classical theologians might provide some assistance as we search for a way to bring into balance the need for a full and authentic understanding of human sexuality in our society and the issues of the common good associated with the spread of the disease.¹⁷

The statement goes no further than these general remarks. A careful reading of the citations found in the footnote which references this section reveals that the tradition to which they refer is the classical tradition mentioned earlier. A tradition which recognized that laws must be applied according to the human condition. It would seem that the text was arguing that this older tradition, which said that the civil order was able to tolerate certain evils lest greater goods would be impeded or greater evils would occur when the moral law and public policy were seen as being identical, certainly also should speak to the contemporary setting in which public order and morality were not necessarily identified.

Obviously such a conclusion is a prudential judgement. And as it turns out one that people of good will have disagreed with. For the purposes of this essay, however, the point is not whether that prudential decision was correct or not but to use it as an illustration of how "The Many Faces of AIDS" did utilize much of the contemporary reasoning on the role of the pastors of the church in the development of public policy.

CONCLUSION

This essay has outlined the elements of a contemporary understanding of the manner in which the pastors of the church participate in the development of public policy in the United States of America. Certain essential distinctions serve as guiding principles for this participation. If one disagrees with those principles, then one will not agree with their current approach to the formulation of public policy. Obviously the closer one comes to concrete prudential decisions the more room there is for disagreement. In particular, how one analyzes whether particular legislation or public policy would meet the criteria of freedom of the individual, public order, equity and enforceability will always be open to contention.

This complexity is exemplified in "The Many Faces of AIDS" which this essay argues reflects in its style and its theory the approach to the participation of the bishops in the development of public policy outlined in the first part. It is in many

17. *Id.* at 486-87.

ways a case study of the strengths of this approach as well as the challenges which will be faced in its implementation.

In light of the disagreement which surfaced over certain aspects of the statement there is need for scholarly and pastoral reflection on the manner in which the operative distinctions are brought to bear on the making of public policy. In particular it is necessary for there to be a full and informed discussion on how the church's responsibility to proclaim without reservation or hesitation the prophetic message of the Gospel can be reconciled with a participation in the creation of public policy in a pluralistic society. In other words can the church's pastors, its bishops, be prophets at the same time as they engage in a dialogue about public order that will result in legislation that tolerates certain evils? A fundamental question worthy of prayer and study.

