

Abortion and the Legislation of Morality

By Damian P. Fedoryka, Ph.D.

Our country seems to be in the grip of a curious consensus. At a time when pluralism is the inevitable consequence of radical differences of opinion, one “slogan” seems to have a unifying power: it is the supposed principle that *not all of morality can be legislated*.

A famous, one might even say, notorious “Catholic” Senator was quoted at one time by the *New York Times* to the effect that not all of morality can be legislated. Subsequently, another public figure, a “Catholic” governor, also proclaimed that not all moral laws can be incorporated into civil law. He did this even as he chided Catholics for asking the state to legislate against a sin that they themselves could not refrain from doing.

In parentheses I have to note that I put the term “Catholic” into quotation marks in both cases, not because I question their Catholicity or inner condition of soul, but because I simply do not know what the term “Catholic” can mean when applied to or claimed by individuals in positions of public authority who use that authority to defend and sanction a “right to abortion.” Common sense indicates that when a man deliberately and with sober calculation kills or helps kill an innocent human person, he separates himself from the human community. One would think that anyone who on this account separates himself from the human community would also separate himself from the ecclesial community of the Catholic Church. This is an area where the faithful stand in desperate need of help from the hierarchical authorities, lest common sense and the loss of the true meaning of the word dictate that the term “Catholic” be permanently marked by the quotation marks.

The interesting and significant thing is that the two above shared their position with a Catholic Cardinal and a Catholic Archbishop. Both the Cardinal and the Archbishop stated that not all of the moral law could be translated into civil law. They were joined by a Catholic political theorist who invoked the authority of St. Thomas, who also maintained that not all of the moral law could be legislated by civil authority.

Each of the individuals above were, each in his own way, addressing the pro-life movement and the demand for a legal protection for all abortions. And each, in his own way contributed to the support of a "compromise" on abortion legislation by helping shape and articulate what appears to be a "Catholic" position.

A curious "consensus" begins to emerge and to exert a powerful political influence. On the one hand we have the pro-choice, in fact, the pro-abortion position which claims that morality cannot be legislated. Whatever the disagreement about the morality that one thinks could be legislated, the pro-abortion side and the "Catholic" side seem to come together at least in their rejection of "restrictive" abortion laws. The pro-abortion position and the "Catholic" position may differ in many respects, but they intersect on common ground.

When this happens, the "Catholics" have lost all ground. Why?

If the "Catholics" concede that in some cases there are serious enough reasons for the state to protect a woman's decision to abort, they have conceded that an innocent human person does not have an unconditional right to life. If any woman has the right to have an abortion in the "serious" cases, who is to decide what is "serious" and what is "frivolous" if not the woman herself?

Let us consider the alternatives. If the State decides which abortions will be allowed and which will not, it obviously can't do this on the basis of the child's right. It can be

only on the basis of *the child's usefulness to the state or the community*. But if the child's usefulness decides whether it is to live or to die, the woman's pregnancy must also be only a matter of usefulness. And the feminists win. For they refuse to be used for the benefit of any state, community or man whatsoever. The power of their position rests on an implicit moral principle, namely, no human person should be used as a means. It remains implicit because if it were stated clearly it would open the feminist to the charge of legislating morality. And if it were stated clearly, it would open the question about using unborn human persons.

But let us return to the "Catholic" position which rejects exceptionless abortion restriction on the grounds that we cannot expect all of the moral law to be translated into civil law. If the position demands any restrictions at all, short of an absolute prohibition of abortions, it cannot do so on the grounds of the child's right to life. Because if the child has a right to life, it has it unconditionally, that is, without exception. Restriction of abortions would have to be done on other grounds, not for the sake of the child. Thus, some have invoked abortion legislation in the name of "public order." Others have asked, "What next, euthanasia?" In other words, they have invoked the *consequences* of abortion other than the consequences for the innocent child. Typical is the "argument" that suggests that the discoverer of the cure for AIDS already was or might be the victim of abortion.

In this "Catholic" position the operative "principle" is that not all of the moral law can, or even should be legislated. Is this a valid principle? The answer is, Yes. Indeed, the answer must be formulated in an even more radical way: we must say that *morality as such cannot and should not be legislated*, not simply that only some morality can't be legislated.

We appear to be saying the same thing as the pro-abortionists. Lest I be ranged with the liberals, the abortionists and the theological dissidents, let me hasten to note that it *does not*

follow from the above that one cannot demand exceptionless legislation against abortion. Let me explain.

The *pro-abortion position* is this: "No legislative restriction on abortion." They claim, against the Catholic opponents, that this position follows from the principle that morality cannot be legislated, even if one holds that abortion is immoral. They will then point out, "Your own people, Catholics, agree that not all of morality can be legislated. Even St. Thomas."

The opposite, and the true "pro-life," or more correctly, the *right to life position* is this: "No legislative sanction for any abortion whatsoever." This position does not follow from the immorality of abortion. It *follows from the injustice of abortion*. In other words, *the right to life position demands the legislation of justice, not the legislation of morality*.

To see this clearly, let us consider a traffic law. The requirement to stop at a red traffic signal does not include the injunction to love, have compassion for or to "want" the child that is crossing the street under the protection of the red light. Imagine a driver running a red light, killing a child and then saying, "I don't love children. I hate them." Obviously, the intent of the law was not to stop hatred and other similar immoral acts. Its only interest is to protect the child.

This example illustrates two things. First, civil authority cannot do anything, it is helpless when it comes to immorality and morality. No amount of force or threats can bring a person to become morally good. In this sense, the state cannot deal with the *sinner*. And it cannot legislate morality. The state, if it is interested in the sinner, can do nothing but leave him to God and the Church, who has the authority to deal with him in the confessional. The state, for its part, cannot absolve the sinner before the act, allowing him to abort. The reason for this is the second point: the state's "interest"

is, or should be, the protection of the rights of the child. It's mission is justice. It must protect the *victim* against the sinner. And in protecting the child against an aggressor, the *state or its representatives do not first have to change the opinion of the aggressor; they do not have to convert him.*

It should be clear that the demand for exceptionless prohibitions of abortion follows not from some demand of morality. Rather, it is a demand of justice. The legislative protection, without exception, of the innocent unborn is a legislation of justice. It falls within the scope of the state's mission of justice. When a *state* formally and officially abdicates from its duty of justice with regard to the foundation of all other rights, it *loses its legitimacy* and sovereignty, even if retains power. But this is another topic. Let us return to the legislation of morality and to St. Thomas, who is so frequently invoked in this matter.

No civil authority can legislate anything dealing with the inner moral condition of the soul. It would be impotent, even if it tried to do so. Yet one frequently talks of some of the moral law being legislated. St. Thomas is invoked as saying that a part of the moral sphere cannot be legislated, and a part can. But it is important to note that when St. Thomas talks of that part of the "moral Law" that *can* be legislated he talks about those "immoral" acts which hurt others.

In other words, St. Thomas means the exact opposite of what some would have him say. When *they* say that not all moral law can be legislated, they want to *leave out of legislation* precisely those actions which hurt the unborn child. But *St. Thomas* selects *for legislation* not all the moral law, but precisely that part of it which forbids us to hurt others and to steal from them. Although St. Thomas does not use the term "justice" at that point, he is in fact referring to that part of morality which deals with justice.

The liberals should understand this. Not everything that is

immoral is also unjust. For example, fornication between mutually consenting adults is immoral, but there is no direct violation of rights. This is what the liberals meant when they pushed for the decriminalization of "victimless crimes." The Catholic should understand this all the more. In the case of abortion we also have an immorality, but abortion is immoral because it involves an innocent victim. Abortion is immoral because it is unjust. But in the public order, we and the state should be concerned with its injustice, namely, with the victim.

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