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## Proposed Abortion Laws "Slaughter of the Innocents"

John B. Gest

We are at war—a war in which Catholic laymen are called on to join in the defense of the City of God against the City of this world and the forces of evil. One of the principal attacks we must meet is the attack on life and on the divine positive law and the natural law for its protection.

The attack has drawn up its lines in the form of proposed laws for "justifiable" abortion, liberalized divorce, euthanasia, artificial insemination, birth control and eugenic sterilization of the unfit. The particular salient in the line of battle with which we are now concerned as Catholic laymen is in the field of abortion, in which the proposed laws have been dramatically and justly characterized by one writer as authorizing "the slaughter of the innocents."

Abortion is the directly intended termination of pregnancy otherwise than by a live birth. It has always been recognized as a crime in civil law, and almost all of our states have for years had laws making abortion a crime. (In

many of the statutes there is an exception where the abortion is to save the life of the mother. This will be discussed later).

### MODEL PENAL CODE

The movement for so-called "liberalized" abortion laws, or 'justifiable abortion,' springs largely from the work of the American Law Institute, a research organization of considerable influence. In 1962 it promulgated its "Model Penal Code" for consideration by all states, containing provisions for "Justifiable Abortion." Organized propaganda for such provisions stems from various groups all over the nation and indeed, the world. (See "Abortion on Trial" by Russell Shaw, Pflaum Press, 1968).

The American Medical Association House of Delegates, the 242-member policy-making body of the 216,000-member association, at their convention in Atlantic City in 1967 approved a number of broad exceptions to their long standing opposition to abortion. Liberalized

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*From an address to the Serra Club of Philadelphia, published in The Catholic Standard and Times, Philadelphia, July 3, 1968.*

abortion laws have been adopted within the last two years in Colorado, California, North Carolina, Georgia and Maryland. The new laws are to a considerable extent modelled after the ALI provisions, which provide as follows:

“(b) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect; or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of sixteen (16) years shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable.”

“(c) Physicians' Certificates; Presumption from Noncompliance. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this subsection gives rise to a presumption that the abortion was unjustified.” Sec. 2303 (1) and (2), “Model Penal Code.”

These drastic and unprecedented provisions can best be viewed in the light of the moral law which we are called on to defend.

## THE MORAL LAW

The moral principle we are called on to defend is “Thou shalt not kill,” or to express it in other words, the protection of the right to life of the unborn child.

Vatican II, in the Pastoral Constitution on the Church in the Modern World, says:

“That which is opposed to life itself, such as any type of murder, genocide, abortion, euthanasia, willful self-destruction, whatever violates the integrity of the human person — all these things and others of their like are infamies indeed.”

The application of the moral principle most frequently discussed by theologians concerns the situation where continuance of pregnancy is considered a grave danger to the life or health of the mother. The answer is stated by Pope Pius XI in “Casti Connubii”:

“We have already said how deeply we feel for the mother whose fulfillment of her natural duty involves her in grave danger to health and even to life itself. But can any reason ever avail to excuse the direct killing of the innocent? For this is what is at stake. The infliction of death whether upon mother or upon child is against the commandment of God and the voice of nature: ‘Thou shalt not kill.’ The lives of both are equally sacred, and no one, even the public authority, can ever have the right to destroy them.”

The same teaching is affirmed by Pope Pius XII in his address to the midwives:

“Thus, for example, to save the life of the mother is a very noble one; but the direct killing of the child as

a means to that end is not lawful. The life of the one who is innocent is untouchable, and any direct attempt or aggression against it is a violation of one of the fundamental laws without which secure human society is impossible.”

Actually, abortion to save the life of the mother is, under modern conditions, hardly ever considered necessary. Even such an advocate of liberalized abortion laws as Dr. Alan F. Guttmacher, states in an article in *McCall's* (April, 1968) that “With the rapid strides of modern medicine, few women today require abortion to preserve life.”

It is important, also, to bear in mind the moral principle applicable to “indirect” abortion. As stated by one of the leading Catholic moral theologians “Catholic teaching admits what is called *indirect* abortion (not to be confused with therapeutic abortion). Here medical or surgical means are employed to remedy some pathological condition of the mother, but this procedure incidentally and secondarily involves the expulsion or removal of the fetus. Here it is the disease, not the pregnancy, which necessitates the medical and surgical intervention; an identical or similar procedure would be required in the case of a non-pregnant woman.” Rev. Denis F. O’Callaghan, “The Unborn Child and the Law,” *Irish Ecclesiastic Record*, CVI, 1966.

The principle of the “double effect” has, of course, no room for so-called “therapeutic” abortion, involving, as it does, the directly intended termination of pregnancy to preserve the life or health of the mother.

As with many theological principles, the application of this principle may

present some very perplexing questions for theologians and moralists where there seems to be no clear answer. But these questions are not relevant in discussing proposed abortion laws. Indeed, the principle of the double effect seems adequately protected under existing state laws which do not have a “therapeutic” exception, because criminal intent is the issue in a prosecution for crime, and any court would say that means direct intent. No one could be convicted of an abortion where it was not the directly intended result of treatment or surgery.

## HUMAN BEING FROM CONCEPTION

A field in which a few Catholic writers like to speculate is that of so-called “mediate animation”; that the spiritual soul becomes present only some time after conception.

Certainly no one can point to any qualitative change at any time in the continuing life of the fetus from the time of conception until birth to justify a different treatment so far as concerns respect for human life. Indeed, all clinical explorations have established a qualitative continuum of fetal life back to a very early stage. X-rays show a beating heart at four weeks of pregnancy, at eight weeks a central nervous system, digestive and excretory system; brain cells, ears, eyes, nose, toes, fingers, arms and even sweat glands; motion of head and body; and sensitivity to touch. A recent television display showing the living fetus back to a very early stage was a spectacular presentation to the same effect.

The whole thrust of science points to the formation of a human being at the moment of conception. A

professor at Glasgow University recently broadcast by radio a tape recording of a child's heartbeat three weeks after conception.

The Catholic Bishops of California said in a statement in 1966, "Contemporary biology confirms that there is no qualitative difference between the embryo at conception and the moment of quickening; life is fully present." And Cardinal Shehan and Cardinal O'Boyle, in a statement opposing the proposed Maryland law, stated: "Modern microbiology has shown that there is no qualitative or essential difference between the fetus at the time of conception and the adult human person. To fix a point after conception for attributing the dignity of humanity to a human fetus is both arbitrary and without scientific foundation."

#### MEDIEVAL IDEAS

The writers who suggest mediate animation are not avant garde, or as progressive as they would like to appear. They are, rather, trying to open up medieval paths of exploration long since closed by science and theology. Furthermore, even if one did believe in "mediate" or delayed infusion of the spiritual soul, neither science nor theology could say at what time in a particular case the divine act of creation took place; and one is not free to act in cases of life or death on a probable opinion. You could not shoot a moving object in the woods in doubt whether it was a bear or a man; and you could not destroy a fetus on the ground that the spiritual soul might not be present. So we leave these writers to sport around in philosophical back eddies, away from the mainstream of Catholic thought.

To quote again from Vatican II's

"The Constitution of the Church in the Modern World":

"From the moment of its conception, life must be guarded with the greatest care, while abortion and infanticide are unspeakable crimes."

Many leading Protestant and Jewish writers are staunch supporters of the same doctrine, and the International Code of Medical Ethics, adopted by the World Medical Association at its third General Assembly in 1949, provides:

"A doctor must always bear in mind the importance of preserving human life from the moment of conception until death."

#### THE 'ALI' PROVISIONS

We come now to a consideration of the ALI provisions for so-called "justifiable abortion" (quoted above), which are being urged for passage in many states. We may note the passing that the term "liberalized" so often used with respect to abortion laws, is an ambivalent term. We think of "liberal" as related to "freedom". Now the proposed "liberalized" laws would give freedom or liberty to the mother to dispose of the unwanted child, which, however, is the opposite of liberty so far as concerns the child who is being deprived of the right to live.

It should be observed at the start that the ALI provisions include not only "therapeutic" abortion (for the life or health of the mother) but also something new, "eugenic" abortion, predicated on a risk that the child would be born with "grave physical or mental defect."

The wording of the proposed provisions reveals how defective they

are from the point of view of criminal law principles (aside from contravention of the moral law).

Any licensed physician may terminate pregnancy, if he believes there is substantial risk that continuance would gravely impair the physical or mental health of the mother.

There is no way to determine the meaning of substantial risk or gravely impair. So far as concerns impairing the physical or mental health of the mother, the terms are vague and indeterminate. Does it mean impairing permanently or for a time? Does not child bearing naturally involve "risk" of a temporary "impairment of health"?

#### NO TEST OF VALIDITY OF BELIEF

The ALI provisions do not require any test of the validity of the belief of the physician in these vague facts — only that he "believes" them. All he has to do is to get another doctor to agree with him. Then they certify the circumstances which they believe justify the abortion and submit this to the hospital where the abortion is to be performed. There is no provision for any review of their certification or determination of the circumstances they recite as justifying the abortion. And one of these two doctors can be the one to perform the abortion, and receives a fee from the mother for killing the child. As one writer said, "The mother's doctor becomes the child's executioner!"

"Substantial risk" could mean almost anything and is too vague to justify the drastic result of extinguishing life. Actually there is a risk of impairing the mental or physical health of the mother in normal pregnancies. No one would suggest taking the life of a born person

for a substantial risk that he might impair the physical or mental health of another.

Many normal pregnancies could be said to impair temporarily the mental health of the mother, and the remedy under the proposed law of killing the child may impair the mental health of the mother more severely by the consequent remorse and sense of guilt on the part of the mother.

With respect to the provisions relating to the child — so called "eugenic" abortion — they would justify the prenatal destruction of the unborn child on a prognosis "of a risk that he would be born with grave physical or mental defect." If killing the unborn child could be legalized for eugenic reasons, then why might it not be only a small step further to justify killing a defective child born alive? So "justifiable abortion" contains potential "justifiable infanticide."

The prognosis of birth with grave physical or mental defect would be a speculative opinion of the doctors, not subject to any court test, and on this opinion would depend the decision of life or death for the child.

The provisions of the proposed law for the case of alleged rape are violative of sound principles of law, since they would justify intentional destruction of innocent life on the unsupported statement of the pregnant mother, who may have a motive in characterizing as rape a relationship that involved consent. All that is required to support the death sentence for the unborn child is the doctors' certificate as to "the circumstances they believe to justify the abortion". No court would convict an alleged rapist on such a statement.

Actually doctors of high repute have

said that cases of pregnancy from rape are rare. In the case of clearly established rape, there can naturally be a conflict between a strong emotional appeal on the one hand and on the other the ineluctable eternal law, "Thou shalt not kill". Of course all measures should be made available by social and governmental agencies, where indicated, for the care and comfort of the mother during and after pregnancy and for the maintenance of the child after birth, because the mother has no legal obligation in this respect.

### VIOLATION OF FUNDAMENTAL PRINCIPLES OF LAW

So we may say that, quite aside from the moral principle, the ALI provisions are an exhibit of faulty draftsmanship, in violation of fundamental principles of law for the protection of life.

It is pertinent and shocking to compare the casual treatment of human life under the proposed abortion laws, with the legal protection afforded those guilty, or suspected, of crime for which the law imposes the penalty of imprisonment or death.

The Supreme Court of the United States, in a series of decisions within the last few years, gives protection to one who is accused or suspected of crime. From the moment of being taken into the custody of the police, the services of an attorney must be supplied. He is advised of his legal rights. If indicted, he has a right to appear in court with his lawyer, to have a jury, to test the qualifications of the jury, to be confronted by his accusers, and to cross examine witnesses himself or through his

attorney. In the case of any error in the trial he has the right of appeal. And the rights proclaimed by the court in these cases also apply to minors.

In the case of the unborn child, however, with striking contrast, the innocent child is afforded no protection of the right to life — no attorney to advise him, no guardian to appear and plead his case before this bizarre court composed of two doctors, one of whom can become the paid executioner, no one to appeal the decision of this court.

### RESPONSIBILITY OF LAWYERS AND DOCTORS

In joining in the defense of the City of God against the attack on the life of the unborn, we will be saving the lives of children as truly as if we were rescuing them from drowning or fire. Our position must be maintained unflinchingly, that intentional abortion is an "infamy" and an "unspeakable crime." This is not *exclusively* the Catholic position for it should be joined in by all those who believe in God as the Creator of life and who respect the moral law. Some Catholic laymen, unfortunately, including doctors, lawyers and legislators (some clergy, indeed!) evade their responsibility by failing to speak out publicly. They seem to take the attitude that, "This is a pluralistic society and if the majority want it, let them have it" or, "Why should we impress our morality on others." This is all wrong, of course. Catholic doctors and lawyers have a special responsibility to present the defense on behalf of unborn children, and to oppose any concessions in "liberalization" of the abortion laws.