

# STUDIES

IN LAW, MEDICINE & SOCIETY

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## The Limits of the Law: Reflections on the Abortion Debate

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*By*

James Tunstead Burtchaell, C.S.C.

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An Educational Publication of  
Americans United for Life, Inc.

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AMERICANS UNITED FOR LIFE is a non-profit, non-sectarian public interest law firm serving as the legal arm of the pro-life movement. The oldest national pro-life organization in America, AUL has been committed to defending human life through vigorous judicial, legislative, and educational efforts since its inception in 1971.

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## Preface

22 January 1987

We now mark the fourteenth anniversary of the most fundamentally flawed and tragic Supreme Court decision in American history. Since that infamous day in 1973, *Roe v. Wade* has given license to the taking of nearly 20 million unborn lives in America, in the name of an absolute and untrammelled "right to privacy."

As Americans commemorate this dubious occasion we should reflect not only on the failure of our judicial system to protect the right to life, but also on the social, moral decay from which *Roe* was an inevitable consequence.

The reversal of *Roe v. Wade* would indeed be a great victory for those who revere human life and its constitutional protection. American law would then be empowered to protect the most fundamental of all civil rights, the right to life. Then the task would focus on enforcement of the law, and herein lies perhaps the greatest challenge.

For years, the focus in the volatile abortion debate has centered on the matter of law which indeed, from a public policy perspective, it should. However, will the law itself adequately deter abortion in America?

In the following pages, James Tunstead Burtchaell answers this poignant question. The paper, which was first presented to AUL Forum 1986, a pro-life leadership conference in Chicago, eloquently draws from Christian-Judeo history, classic literature and practical contemporary observation to argue that the abortion issue will not be ultimately resolved by civil law alone because the law is only effective when motivated by moral conviction, a "transformation of minds" and a "somersault of values."

Those who value human life and uphold the civil right to life have twin responsibilities which must be simultaneously executed in order to truly be effective — to reform the law itself and generate a revival of conscience in the hearts of men and women who will uphold the law.

It is only when both tasks are accomplished that America will harbor a society that truly protects human life at all stages.

Laurie Anne Ramsey  
Director of Education  
Americans United for Life

**\*The Limits of the Law:  
Reflections on the Abortion Debate**

**James Tunstead Burtchaell, C.S.C.**

Most people are aware that the highly antagonized debate over abortion in America has found its principal focus on a question of law: shall we have legal barriers that protect the unborn by restraining their mothers' freedom to abort? Both parties to the debate have turned their sharpest attention to this as a matter of law. Partisans of free choice considered their struggle largely successful when *Roe v. Wade* and *Doe v. Bolton* in 1973 legitimated abortion on demand at any time during pregnancy. Pro-life advocates have been laboring mightily ever since to overturn those enactments. The course of the conflict has been punctuated by the passage of various new laws and regulations and the handing down of a series of court decisions.

I want to argue that many on both sides may be seriously misled. Abortion is one of those issues that will never be resolved by law.

Pro-life people ought to ask themselves what one stands to gain from a satisfactory change in the law. They have been reminded from all sides that a practice which is presently engaged in each year by a million and a half women is not likely to be stopped by a statute. Indeed, in the days before 1973 when our laws made abortion under most circumstances a criminal act, those laws led to relatively few prosecutions. Frequent comparisons have been made to the Constitutional Amendment which forbade the manufacture, possession and use of alcoholic beverages, and which eventually was repealed because the support which brought it into being was not strong enough to sustain it against the long tide of popular rejection. All of this raises the question: would it really be possible to restrain abortion by the force of law?

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\*Presented at AUL Forum, 19 October 1986, Chicago.

But first one should review what criminal laws are all about. The common and statutory traditions of law in our culture owe much to the tradition of law in the Bible. Not so much to the New Testament, which offers very little support for a system of law, and raises strong doubts about whether lawmaking ought ever be an enterprise of Christians. Christian statesmen of later ages, however, overleapt the New Testament and took much comfort in the Jewish scriptures, a large part of which presents codes of law.

The Hebrews, whether they were enjoying their own independence, or (as was more often the case) when they were living under the sovereignty of some superior power, virtually always operated as a unit unto themselves. Even when the Assyrians, Babylonians, Persians or Romans governed them, they were not assimilated into a general citizenry any more than were most other ethnic groups. Instead they were expected to discipline their own social and public and religious life, provided only that they remitted their taxes on time. The ruling power would reach into their legal affairs only to control certain acts considered to affect the imperial security.

Many Christians today quite fail to realize that what we have preserved for us in books like Exodus and Deuteronomy is not what we would understand as religious law. It was, of course, taken as standing on God's authority, but it was not a religious law as distinct from civil law. Neither was it a merely civil law. It was the only law the Hebrews had, and it treated in a unitary fashion of all matters of their public and private welfare.

In ancient Israel, and later in Judah and Judaea, the function of the law was not so much to redress damages or to assure justice, but to protect the peace. The chief of clan, tribe or nation had the maintenance of that peace as his or her principal responsibility. When someone rode down the street and trampled your young daughter, it was not understood to be simply her injury, or even yours. It was a grievance between your two families or clans or tribes. What began as a personal injury in a single household might quickly fester into a blood feud between two whole peoples. The ruler's knack — which came to be called wisdom — was to devise and impose a solution that did not merely punish offenders, but managed to send all parties home with the sense that their dignity and claims had been adequately honored. There was no distinction between crime and tort, or between criminal and civil proceedings, for every unresolved personal conflict was also a potential menace to the public peace.

This talent of the ruler was exemplified in Solomon. The story of his judgment between the two ladies of the night quarreling over a single infant was often told as an example of a dispute that he had kept from escalating into a feud.

The purpose, then, of the national law and of its application through judgment was that this nation of rival tribes and proud families could survive its normal traffic of dispute and outrage and still hold together in a confederation of loyalty and kinship.

The law's purpose went even beyond social tranquillity, for it was also Israel's way of maintaining peace with the Lord. Since the law was God's command, to violate it was to incur his wrath and his punishment. And God, like one's neighbor, was understood at first to deal with whole families and clans, not just individuals. Thus if one person's crime was an outrageous enormity, God might well retaliate with a broad swipe and exterminate an entire village or tribe in order to cleanse his land. Capital punishment among the Hebrews was intended, therefore, less as a deterrent or punishment for grave crime, than as a measure of self-defense for the entire people, who were put at risk for a single person's sin. It was in everyone's interest that individuals abide by God's law, and it was also in everyone's interest to eliminate serious offenders before God's wrath began to scourge the entire countryside.

The earliest Christian communities, like the Jewish synagogue communities they imitated, had a single law for all purposes. It was when the Christians surprised even themselves by taking Gentile members into their midst that they could no longer continue as a unitary society under a unitary law. The new Christians did not see their loyalties combined in the same way the old believers had: one God meaning one religious fellowship, one circle of companionship, one ethnic identity, one residential society, one law governing all obligations. The newcomers looked to their church for their religion but did not always choose to reidentify themselves in the civic order as totally absorbed into a minority enclave.

This Christian arrangement did not turn against their Jewish tradition, for the prophets had insisted loudly that any settlement of a dispute that was not a just settlement yielded a worthless and fragile peace. By claiming the right to criticize and even to reject unfaithful kings and their unjust enactments of either self-aggrandizement or favoritism in light of a higher law, the Hebrew prophets were implying that national law and legitimacy must always face a higher moral scrutiny.

Christians followed that view, and accepted a dual loyalty: to civil law and to moral duty. And the two claims could be at odds. The function of the civil law was still to keep them at peace. It kept them at peace with the civil power and with their fellow countrymen of every belief and none, but without offering them peace with God or with their consciences.

Within the church they now encountered, not a law, but a wisdom about God's claims on them and what they needed to do in order to enhance their own personal lives. They occasionally called these new claims "law": the law of Christ, the law of love, the law of the church. But in fact this new society had no right or ambition to enforce among them anything similar to what they had understood as law. The risk of flaunting this Christian claim was not to encounter God's wrath — for their God was now understood to have no wrath — but to incur their own spiritual self-destruction.

This was a "law" that could not be enforced, for it operated by conversion instead of by coercion. The moral "law" kept them at peace with their



fellow-believers and with their God. Indeed, they came to realize that they must defy civil rulers and civil laws which they understood to violate God's claim. As a Christian community they codified for themselves what they understood as a new "law". And while they were at it, they moved some distance away from the traditional strictures of their ancestral Jewish scriptures, to frame a code of conduct that was understood to represent God's newer and more stringent claims on them through Jesus and the apostles.

This is the tradition which has largely shaped classical Western political thought. We would misunderstand it entirely were we to suppose that it envisions two spheres of law: one public, civic and secular; the other private, ecclesiastical and sacred; each sovereign in its own territory. There is a rule of law in the hands of those who govern. There is as well a community of moral discourse in the hands of all who wish to share in it: a discourse to which religious teaching makes a constant contribution. Those who frame and enforce the law will achieve their purpose, an enduring and endurable public peace, only if their laws are just. Violence may be quelled briefly by measures that are unjust, but the enduring peace will not be fostered except by equitable laws equitably enforced. Thus, though the power to levy the law belongs to those who govern, the power to judge the law belongs to all who share in the public forum. Those who wield the sword have the prerogative of rule, but also the onus of answering to those who wield moral truth.

## II

The claims of the criminal law and of moral preaching, as two contributions to peace-keeping, are well portrayed before our imaginations by that most improbable source of jurisprudence, Shakespeare's *Romeo and Juliet*. The two main characters in the play are usually taken to be the idiot teenagers who, like a pair of adolescent Clouseaux, stumble from tragedy to tragedy until both are dead. I am much more taken by two other characters: the duke of Verona and Friar Lawrence. They represent in parable the state and the church, the law of the state and the wisdom of faith.

They are both responsible for the peace of Verona, which as we enter the play is an exceedingly unpeaceable city. The duke arrives in the opening scene with the militia to put down one of the periodic riots between the Capulets and the Montagues. Out of patience amid the wreckage that pride and blood-lust have strewn upon his streets, the duke loses his temper and reviles both families — the leading aristocrats of Verona — because they have made it unsafe now for citizens to walk the streets. He lowers a solemn threat on them all: who next riots in Verona will pay with his own life.

Only a few scenes later the duke must call out the troops once more, for the same demonic rioting has erupted all over again. As he arrives in wrath and armored might, outraged and ready to levy heavy justice, he is stopped by the discovery that the prime surviving offender is Romeo, scion of the Montagues. Here the duke flinches at his own threat. Having galloped up,

frothing with indignation and the sentiments of a hanging judge, in one instant he diminishes to a wimp. Instead of carrying through with his threat, he banishes Romeo indefinitely to nearby Mantua. It is at this point that the Montagues and the Capulets can wink across the piazza at one another. They know what kind of duke they have. They know there will be more deaths, there will be no peace, because their ruler has no nerve to use the weapon he possesses to keep Verona at peace: his power to coerce. The only strength behind the duke's law is armed might, and he has not got the nerve to use it. Instead, he lectures the populace. And he is a failure as a preacher.

The other character, the friar, is a mendicant of no identified order, but I take him to be a follower of Dominic, of the Order of Preachers. It is his vocation to stand in the pulpit and berate the great families as sinful, riotous villains who victimize the entire town with their arrogant hatred. His calling is to rebuke them, to appeal to them, to transform their hearts. Yet, instead of preaching Christ's message incessantly, the friar sets about scheming and politicking. He is an amateur pharmacologist, and also an amateur at statecraft. When the two adolescents reveal to him their passionate and flighty love, he agrees — *sans* banns, *sans* premarital counseling, *sans* license — to marry them. He then conspires in a scheme that is intended eventually to corner the families and coerce them into acquiescing in what they would never otherwise accept. Instead of preaching conversion, he tries to force the families to accept his will without any real change of their character.

In the end both peacekeepers must confess that they have failed. The interesting thing is that each has failed precisely by shrinking from his own duty and resorting instead to its opposite. The statesman gives sermons when he should be using force. The churchman uses political stratagems when he should be using moral confrontation.

Consider for a moment the inadequacy of either task . . . on its own. Even had the duke been faithful to his mission, he would have suppressed violence, but not uprooted it, for he himself could succeed only by the use of force. People would be afraid to riot: but only afraid, not unwilling. He would be obligated to unrelenting vigilance because the same smoldering hatred would have abided in those two noble homes and hearts and it would flare up again once his back was turned. The friar, on the other hand, had a more trying task because it is far easier to punish violence than it is to purge it from people's minds and characters. His task was much less likely of success than that of the duke, but his goal was a peace more ambitious and more enduring. The statesman was to protect the peace by stopping violent acts; the churchman's mode of peacemaking was to stop violent wishes.

Now I take these two figures as a parable of the diverse callings of the church and of the state, and also of the difference between the criminal law and religious obligation. The law has as its purpose the preservation of minimal peace: not so much by changing people's character or conscience or motivation, but simply by suppressing their more destructive forms of behavior. It is the mission of the church, and of those who hold prophetic office within the church, to appeal to people's innermost commitments and, in the

precious instances when they succeed, to turn them from violence to benevolence.

All too often, however, we witness the same malfeasance as in Verona. The two public services are confused with one another. Those who are meant to govern lack nerve, and those who are called to preach lack nerve as well. The tasks of coercion and of conversion are so very different. Yet both require the same courage, and both aim at the same peace.

### III

The goals of both citizenship and faith converge, in that each one hopes for our common peace. And though each of us may have different responsibilities in the civil or the religious establishments, we all have a stake in the courageous and authentic pursuit of the respective contributions of both, coercion and conversion. But I want to dwell now on the grave frustrations that are usually visited upon any conscientious person who accepts responsibility for the formulation and enforcement of the civil law.

*The first frustration of the lawperson is that law cannot reach the roots of civil disorder.* What is it that causes larceny? Greed. What draws people to abuse their children? That is more complex and puzzling. We are increasingly anxious to understand what twist in the spirit would lead men and women to exploit the young. Whatever it is, it lies deep: well beyond the reach of the law to set it right. What spawns rape, that pathetic and predatory act of violence? Who knows? We know only that the sanctions of criminal justice cannot remedy those deep troubles within the human character, nor would we wish our civil officers to be able to mess with people at that level of deepest derangement. The law gives access only to symptoms of disorder, not to the sickness. One's most urgent efforts in the field of criminal law must be sandbag levees against the flood, always likely to wash away at the next mighty surge.

*The enforcer will also be stymied when the law itself is calculated to protect some socially accepted form of exploitation.* The latest decision on abortion by the Supreme Court, *Thornburgh*, illustrates this problem. Pennsylvania was forbidden to require abortion providers to supply a mother with information about pregnancy development, or medical and psychological risks associated with abortion, or her legal entitlements to financial support. The Court feared that such information would "serve only to confuse and punish her and heighten her anxiety." This enactment of law treats abortion without parallel or precedent among surgical procedures, in that any information which could lead a client to reconsider submitting herself and her offspring to surgery is to be withheld, rather than shared. The real interest being protected here, of course, is that of the medical fraternity. Absolutely no higher scrutiny or advocacy of third-party rights must be permitted to interfere with the "privacy of the informed consent-dialogue between the woman and her physician." Yet as anyone in the know is aware,

the typical mother going to an abortion never goes to "her physician" but to an unknown abortionist who has forfeited his obstetrical practice; she has no "dialogue" with him because she never even sees him until she is on the surgical table; and there is no "professional judgment" because he has left the career of healing and chosen that of a technician. The irony rises to the surface of the law when Justice Blackmun, whose own career included long paid advocacy of the medical establishment, describes in awed respect the decision to be made by a woman "with the guidance of her physician," — intensely "personal," "intimate," "private" — and then declares it a violation of the United States Constitution to require anyone even to tell her his name.

*A third frustration for the law is that even when effectively enforced, its power to deter is so limited.* The statistics for crime enforcement in our country are notoriously inadequate. I shall try, however, to use them cautiously enough to give at least a fair impression of the measure in which crimes in our land fail to be resolved by conviction under law.

Interestingly, one of the crimes that most often leads to the sentencing of an offender is murder. About 25% of all reported murders in the U.S. actually lead to the conviction of an adult offender (statistics for juveniles are more elusive). The statistics go down from there. The figure for forceable rape is 16%. For theft it is 6%.

Consider further the crime of rape. In America, 66% of reported rapes eventuated in an arrest, yet only 16% subsequently yielded a conviction. More significant still — and more discouraging — is the estimate that perhaps two to three-and-a-half times as many rapes occur as are reported to the police at all. If accurate, this would imply that possibly only about 5% — one out of every 20 rape offenses — leads to the conviction of the guilty party.

Surely no one would want to plead this as an instance of an effective law. Therefore, to the responsible administrator behind the law, it must be disheartening to see that despite responsible efforts, one cannot claim that this particular form of human violence is actually being repressed.

*A fourth frustration for law enforcers is that sometimes the very people who support the existence of a law are among its violators.* When I was a newly ordained priest some 27 years ago, my first summer assignment was to a parish in Killeen, Texas. The older priest to whom I was apprenticed had the custom of reciting his daily prayers from the breviary while driving across the flatlands of the parish at 90 miles-an-hour. It was my view that anyone who drove that fast should be praying, but not that he should be reading his prayers from a book. Now I am quite certain that this good priest supported the state laws against speeding. It's just that he did not observe them. Imagine the trooper in hot pursuit who pulled him to the side of the road, only to find a beaming and amiable clergyman, all smiles and support of him in the courageous and regular performance of his duties. What really can be said of the power of the law to curb behavior when some of its regular violators would never want the statute repealed?

Some observers admit that the law is ineffectual as a deterrent, yet they

argue for its power to punish after the fact. *But a fifth problem for anyone applying the force of the law is that its actual power to punish may be quite superficial.* What does it mean to punish? If you throw your wife down a flight of stairs, what can anyone do to punish you? You have already morally disabled yourself. What can one do to a person who defrauds widows of their savings? You could put that person in jail. You could take the person's own money away. You could give the person a whipping as North Carolina, I believe, was the last state to do. You could execute him. But is that a truly significant punishment, when the crime itself has already done far more damage to the criminal than society itself could then impose?

If a woman is a liar, what can you do to her that is more hurtful than what she has already done to herself? If a man is a tyrant, and thus is morally maimed, does this not dwarf the significance of any pain you might want to inflict on him as punishment?

That is a fifth frustration of the enforcer. A sixth is peculiar to our form of government. *Our form of democracy presumes selfishness, yet it requires altruism without being able to provide it.* We cannot live together in a free community unless we are willing to inconvenience ourselves for the common good, for our neighbors. There can be no peace if we merely coexist as aloof strangers, each one out for his or her own survival. There will be times when each of us could not survive without the readiness of our neighbor to extend himself or herself and help us, to sustain us when we falter, to hold us up to standards when we would otherwise defect. And yet everything about our laws seems to assume that the average citizen cannot really be relied upon to forfeit much of his or her own convenience if a neighbor is in the lurch. Merely to observe the criminal law one must be possessed of generosity and social responsibility; yet the law, if it has the bite necessary to do much good, cannot assume good will. It must relentlessly demand minimal performance, whatever one's disposition to care for others.

*Seventh, and lastly, the law seems to require religious conviction as its nearest ally, yet in our democratic tradition the law has turned its back on faith and faith's commitments as none of its concern.* It is only when people's hearts and minds are touched and they undergo moral conversion that they can find the motivation to observe the law. And the major force for moral conversion is usually the example and the appeal of a religious community.

Take, for instance, the progress of commitment to civil rights in our country. What were the major milestones of our faltering journey towards justice for blacks? First there was the Constitution, and then its Bill of Rights, the first Ten Amendments. Later, after our Civil War, there were what I call the Amendments Greater Still: the Thirteenth, Fourteenth and Fifteenth, which brought an end to chattel slavery. Then one must scan across a period of many years, perhaps to 1954: *Brown v. Board of Education*, the court decision which made segregation unlawful. Lastly one remembers the Civil Rights Acts of 1964 and 1971, which went further to prevent discrimination.

But is it not truer to say that the great markers along that road were moral and religious ones? The Quakers and the Christian abolitionists in the early 19th century accomplished what Jefferson and Madison had not the nerve to do. Martin Luther King, Jr., had an effect upon the nation that went beyond what Abraham Lincoln achieved (and Lincoln's voice as a believer had perhaps stirred Americans even more than his obstinacy as a statesman). I expect that there must be religious people still to come who will bring to fruition the legal changes sponsored by Lyndon Johnson. The freeing of the blacks, still incomplete, is more truly a series of religious events than one of legal procedures. Sometimes the conscience moves before the law does. Sometimes the conscience is slow to keep up with the law. But without conscience, justice will never be a plentiful yield from just laws. Law does not produce law's own purpose, which is peace through justice. For justice is a disposition of character, and the law cannot govern character.

#### IV

I have mentioned these incapacities of the law, not because law isn't worth the effort, but because it is important that those who sponsor and enforce just laws do so with full awareness of the limits of their work. On the one hand they must strive with the full effort of their endurance to secure laws that are fair. On the other hand, they must often admit that many laws are simply paper.

In 1967 the President's Commission on Law Enforcement and Administration of Justice cited the observations of a jurist:

If we are deeply disturbed by something which we know to be happening, and feel that we ought to be doing something to prevent it, this feeling can be partly relieved by prohibiting it on paper.

A national law enforcement officer was quoted in a similar vein:

The criminal code of any jurisdiction tends to make a crime of everything that people are against, without regard to enforceability, changing social concepts, etc. The result is that the criminal code becomes society's trash bin . . . [S]ociety legislates one way and acts another way.

The Commission concluded: "There is surely some truth in [the] comment that these laws 'survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals.'"

Is it thinkable, though, that we should dispense with laws which criminalize acts we regard as severely unjust, even when those laws fail of their purpose? The President's Commission was arguing that laws in certain



matters were particularly unenforceable: drunkenness, gambling, abortion and extramarital sexual behavior. (The Commission adds the astonishing observation: "The absence of a complaining victim appears to mark many ineffective criminal laws." One is stupefied by the supposition that alcoholism, gambling, abortion and sexual promiscuity damage none but their agents.) Even if one accepts the premises of the Commission, one would have to ask whether these are matters any less successfully controlled by law than are drug abuse, auto theft or rape. Would we dispense with criminal sanctions against these actions simply because the law has not been a success in eradicating them?

What of other instances where full and effective enforcement may be lacking, not because the law is unsupported, but because even when it is supported, law is not enough? Think of our laws on purity of food and drugs, on the rights of workers to bargain collectively, on seating restraints for babies in automobiles, on regulating bankruptcy, or on licensing physicians. These are not thoroughly effective laws, but they have a purpose even beyond effectiveness. They are part of our public profession of justice. They are what we, as a people, are willing to state out loud as what we require of one another.

The law will always fail if it is unsustained by the common conscience. But that is no reason for repealing the unsuccessful law. When the laws had finally been passed for the enforcement of civil rights in our country, were blacks then assured of fair or friendly treatment? Certainly not. Are they today? Not near the point of satisfaction. The struggle for such freedoms as Abraham Lincoln may or may not have wildly imagined is only underway; it has not been brought to the completion of its purposes. Yet, is it thinkable that any of our laws for fair employment practices, for fair access to public facilities, for fair access to education, for the freedom to marry whom one chooses — is it thinkable that because these laws have as yet not changed human hearts, we should therefore abrogate them? Is it thinkable that because only one rapist in 20 is brought to justice, we ought to repeal the laws which declare this to be a harsh and dreadful crime? I think this is not thinkable.

Why? Because the law has a further purpose: not to transform people, but to declare and disavow publicly what we commonly believe to be unfair or damaging. You probably cannot tell the moral character of a people by reading their laws. But you can learn something about a people's character by finding what laws they lack.

If one accepts this view, then one would be willing to condone the readiness of the duke in *Romeo and Juliet* to preach to the people, but he would still fail because his reticence to act deprived his words of their rightful force, just as the unwillingness of the friar to speak deprived his stratagems of their moral integrity. The duke and the friar were meant to be allies, though each had a distinct priority among his public duties.

Now all this can be illustrated by a particular public issue in our country today. There is at present a fierce conflict underway between those who support abortion as a freely available alternative and those who support the right of the unborn to survive. There is in our country today, despite the attempts — sometimes ignorant and sometimes purposeful — of the press and broadcasting media to conceal the fact, an ongoing consensus which holds that most abortions which are legal are nevertheless unjust. Professionally administered public opinion polls on this subject have surveyed the mind of the American nation from the early 1960s until the present. By a decisive majority the adult American public has persistently believed that abortion should be a crime for all except two reasons: to protect a mother from death or severe injury to her physical health, and when pregnancy has resulted from criminal intercourse, i.e., incest or rape. A recent round of such surveys seems to be showing that the present law, which has never enjoyed the agreement of more than about one-fourth of the public, is presently unacceptable to the views of 79% of those surveyed.

I take it that in the long run the law will run along the rails of the public consensus. The present law (or, more precisely, the present prohibition on laws) will give way. If and when the matter of abortion is once again released to the political process, if the law conforms to public opinion as it has been expressed consistently since the early 1960s, then abortion will be legally permissible in only about one or two percent of the millions of cases recorded each year in the United States.

But what, I then ask, will be the benefit of that? What would be the effect of such a change in the law? There would surely be a reduction in the body count. Estimates vary enormously about how many abortions were performed before legalization. My own estimate after repeated study of the documentation is that abortions have increased approximately three to five times over since *Wade-and-Bolton* in 1973. The coercive force of a restored law would persuade some women to carry their children to term. Also, the public debate has now raised the issue in people's consciences as it had not been raised before, and this could deter some women who previously might have sought abortions. On the other hand, the effect of public permissibility during the years since legalization, and the easy availability of abortion during that time, plus the technical and medical developments that make it a brief and relatively safe procedure for the mother, would all pull in a contrary direction and combine to motivate more women than before 1973 to resist the law and have an abortion anyway. The factors pull both ways. Still, I would reckon that the net result of recriminalization might imaginably be the salvage of nearly one million American infants each year. And that is a result of formidable proportions.

But is it enough? A restoration of legal protection for the unborn might do very little to reach the sources which motivate so many women and men today to eliminate their unborn offspring.

What are the motives that lead women and their male partners and abortion personnel to be willing to destroy unborn children?

A first motive has been highlighted by California social scientist Kristin Luker. She conducted a series of lengthy interviews with committed activists on either side of the controversy. She discerned a different profile in the people who gave so tirelessly to the struggle for abortion freedom and those who worked as generously for the survival of the unborn. One of the most salient differences she observed was that prochoice activists expected that life should not deal them an unjust hand, and that they must not be expected to carry unwanted burdens too long or too heavily. The prolife people, by contrast, understood some hardship as written into the script of life. They saw suffering — even chronic suffering — as something we have no right to expect by choice to avoid or to evade.

One of the sources of the widespread readiness to relieve oneself of an unwanted child is precisely an anger at being trapped. The attitude reaches out much more broadly than to the issue of childbearing. Americans today are tending to believe that suffering is something we should not have to endure, whether it be a migraine headache or Parkinson's disease or an unsatisfactory school board. We expect, more and more, the right to get our way. It may be no coincidence that the profession we turn to for surest relief is the same profession that staffs abortion clinics.

Christians should respond in a characteristic way to this suggestion that the burdensome be eliminated, for it has been our traditional belief that the more helpless someone is, the more we need to be helping her. The worst crimes or sins are the ones with the most helpless victims. That, however, is not the perspective of the growing readiness today to terminate the lives of the chronically ill or to extinguish the lives of handicapped infants. The argument is being made consistently for all three of these victim groups — not on their own behalf but on behalf of those who would eliminate them — that they count for little and that the taxpayer ought mourn their passing with short sorrow. This, I would argue, is an attitude of soul that the law, by itself, can do little to heal.

Another motivating attitude associated with the willingness to abort is a readiness to set aside kinship loyalty. The Christian tradition has invited men and women to cleave to one another, for better or for worse, until death. The bond between spouses has been understood as similar to that between parents and children: a tenacious attachment that would forfeit self-satisfaction for the benefit of one's kinfolk. My perception is that many abortion decisions represent a backing away from — and, in quite a few instances, a renunciation of — that kinship bond.

A change in the law would do little to touch those sources, those motivations, those deep roots of rejection of the unborn child.

We have nothing better to do with our lives than to foster life. This is no stud-farm theology. It is a persuasion that we grow precisely by enhancing

the growth of others: in particular, those who have most need of us. Everything in our tradition has nourished in us a belief which the law could hardly have produced: that we mature by raising others. Yet ours is an era and a culture that will not be known for its welcome to children.

When a man and a woman preside over a household peopled by children, every time you visit them you are struck by how the children have grown. One is tempted to annoy the children by remarking, "Oh, Rachel, how tall you are!" or, "How Bobby has grown!" The fact, however, is that that their parents are growing at an even faster rate than the youngsters. We grow by affording growth to others. We have a need to be burdened by people we did not want: boat people, children, ethnic strangers. Our life is drawn out to full measure precisely by having to accommodate ourselves to the uncontrollable needs of others to whom we are committed. The prochoice movement has echoed the agenda item of our culture: that one has a right to freedom of choice. Our own tradition, which fastens its attention more on needs than on choice, finds it amusing that anyone should identify freedom of choice with parenting. What could be a worse warrant for child-rearing than an insistence on getting just what you want? What could set you up for a bigger fall than to expect your child to satisfy your roster of hopes? Children exist to destroy hopes . . . and then to replace them with enhanced hopes.

The attitudes of character that cause us to be so reluctant to open our lives to risk and jeopardy by welcoming children, who by their nature arrive without our knowing in advance what claims they will put upon us with their needs — these attitudes are what give us life and growth. Children are the quintessential strangers. When I preside at weddings, I like to use a ritual I learned from a priest working in the inner city of Detroit. Before witnessing the marriage promises of a couple, he puts to them a series of questions in the hearing of the congregation. One of those questions is: "Are you prepared to create a home that has a welcome for strangers; and in particular, for those strangers who will arrive as your own children?" If he were to give them time enough to think about it, they might not give their assent. But child-welcoming, like marriage, is something you can grow into.

I doubt, however, that we are doing much to invite men and women into the generosity of character that would induce them to offer a sacrificial welcome for children. Yet it is, I would argue, a quality of character without which we may not find it possible to grow out of our native selfishness into love.

Those who have argued and worked strenuously for freedom of abortion choice share one attitude in common with those who work and argue just as strenuously for the protection of the life of the unborn. Both have had their attention fixated upon legal and constitutional remedies. I think that is



illusory. The supporters of abortion freedom have been told by some of their most astute allies that they took excessive comfort from enactments which enjoyed the support of only a minority of public opinion and which affronted an ancient moral conviction in the Anglo-American consensus. On the other hand, many allies have reminded those in the prolife movement that they are far too ready to direct the full force of their energies exclusively to a change in the law . . . and they may wind up with too little to show for all their struggle.

Would a change in the law actually reduce the present incidence of abortion? Yes, to some extent. Would it make a moral difference? Would it affect the mind and conscience of the nation? Yes, to a considerable extent. By taking away any protection of law whatever from the unborn, by deleting any of the benefit of doubt that humans traditionally enjoy before the law when their survival is at stake, the U.S. Supreme Court did in effect imply what its moral position was. The unborn were now negligible.

The law, both common and statutory, is understandably the product of prevailing political, economic and social forces. But constitutional principles are and ought be more removed from that ebb and flow. They follow such basic moral courses that their articulation has a different function in aligning the moral commitments of a community. Thus, when the Supreme Court struck down all legal restraint of abortion by invoking the supremacy of personal maternal privacy, its claim that it was not involved in moral discourse was frivolous. Large portions of the national public drew the conclusion that if abortion was now so openly acceptable, by constitutional right, then it must be moral. Reverse that ruling, and the public would be invited to reconsider its moral assumption. People would no longer be as free to assume that they have the moral encouragement of the public culture in the destruction of their unborn children. That would be a change, a moral change, a powerful moral change. And I am deeply persuaded that our country can have no conscientious or enduring peace until we have laws that protect unwanted, unborn children: laws that do their feeble best to allow them life.

But a change in the law will only be an overture towards a real welcome for the young. For that we need an insurrection of consciences. For that we need the startling example of fathers and mothers who nourish their young at high cost, and show that thus they themselves grow. For that we need a religiously inspired alliance of women and men who know that love of the helpless cannot be coerced.

True justice is guaranteed by law only in a nation whose people have undergone changes of heart. Those who accept the obligation to protect the unborn should be the first to ensure for them the further shelter of conversion. The appeal to law imposes on us an appeal to conscience, rather than relieving us of that further and more arduous duty.

## Conclusion

We have grounds for believing that the perpetrators of this crime are themselves its most costly victims.

How often it is that some helpless group is savaged by aggressors who have themselves become victims. They are survivors of outrage, and they now seek to relieve their stress and suffering by turning on others who are weaker still. Victims exploiting victims.

Who are those who want to close our gates against impoverished and threatened refugees? Those groups who have long been trampled underfoot by our economy, and who fear new rivals just as they see for themselves a hope for betterment and security at last. Victims pushing aside victims. What is the background of parents who abuse and batter their children? A childhood of violence, incest, contempt. Victims lashing out at victims. And who are aborting their daughters and sons today? Women and men who are alienated, abused, poor, who are at a loss to manage their own lives or intimacies. Victims destroyed, destroying victims.

Hate them — hate any of these victimizers — and you are simply cheering on the cycle of abuse and violence. Suppress your rage well enough to look closely and humanely at drug dealers, at rapists, at pathological prison guards, and you may see it there too: the same pathetic look of the battered spirit, preying on others wantonly.

Women who are desperate or autistic enough to destroy their children are among society's most abused victims. We owe them every help. But a truly compassionate support could never invite them to assuage their own anger by exterminating those more helpless still. It is by breaking the savage cycle of violence that victimization is laid to rest.

When you grasp the uplifted hand to prevent one injured person from striking out at another, you must do so in love, not in anger, for you are asking that person to absorb suffering rather than pass it on to another. And, to be a peacemaker, you must be as ready to sustain as you are to restrain. This, as you must see, far exceeds the work of law and the warrant of justice. You must be more than just to accept injustice, yet deal out justice.

So, while we should be be resolute allies of those who advocate the reversal of *Wade-and-Bolton*, one should also expect them to be the creators of a far more intelligent and far more profound moral discourse than our country has yet enjoyed, and to transform the level of debate as it is carried on in the public forum — a level probably less worthy of the gravity of this issue than is the quality of discourse given to any other single major justice issue of our time.

The law by itself is unable to accomplish what the lawmakers have in mind. A transformation of minds, a somersault of values, is needed. The prospect, for those of us who fear we shall destroy ourselves if we stand by and acquiesce in the extermination of the young, is daunting. We must support the just and dutiful application of coercive power by those who rule. But our firmest reliance must fasten upon the courageous appeal of those

whose duty it is to preach. And it is the duty of us all, without exception, to preach a welcome for the helpless.

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