

## John Courtney Murray and the Abortion Debate

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### Introduction

John Courtney Murray has been called “the most significant Catholic theologian the church in the United States has ever produced,” uniquely “bringing the Catholic tradition to America’s academic, political and cultural leadership.”<sup>1</sup> In the mid-1960s, Murray was invited to share with Cardinal Richard Cushing of Boston his recommendations regarding how Catholics should respond to a proposal to amend Massachusetts law to decriminalize the supplying of artificial contraception devices. In response, Murray wrote a memo (the “Contraception Memorandum”) arguing against Catholic opposition to the law, despite his view that artificial contraception was immoral.<sup>2</sup>

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<sup>1</sup> Msgr. Robert W. McElroy, *He Held These Truths*, AMERICA, Feb. 7, 2005, at 8. See Thomas Hughson, *Fidelity in Context*, 43 THE WAY 95, 97 (Oct. 2004) (observing that by the time Vatican II was convened, Murray was “the foremost US Catholic theorist on religious liberty”). Murray sought “an interpretation of liberalism that is compatible with the fullness of Catholic truth.” Richard Neuhaus, *The Very Liberal John Paul II*, NATIONAL REVIEW, Apr. 11, 1997, at 32.

<sup>2</sup> John Courtney Murray, S.J., *Memo to Cardinal Cushing on Contraception Legislation* (1965), available at [www.georgetown.edu/users/jlh3/Murray/1954f.htm](http://www.georgetown.edu/users/jlh3/Murray/1954f.htm) [hereinafter, “Contraception Memorandum”].

Although Murray never directly spoke on the question of abortion,<sup>3</sup> his distinctions between morality and civil law and between matters of public and private morality, addressed in the Contraception Memorandum and elsewhere, have potential implications for thinking about the abortion question. Indeed, Murray's views on how the Church should respond to legislative efforts to decriminalize contraception, as well as his statements generally about religious freedom, the separation of law and morality and the distinction between public and private morality have been influential in forming arguments concerning the abortion controversy.<sup>4</sup> Several people have attempted to use his arguments to justify a pro-choice position, although others have disagreed with attempts to so argue from Murray's positions.<sup>5</sup>

For many years, abortion has been a controversial and divisive issue in this country. In the last few years, nearly 1.3 million abortions per year were performed in the United States and nearly 42 million were performed between 1973 and 2002.<sup>6</sup> The

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<sup>3</sup> Todd David Whitmore, *What Would John Courtney Murray Say? On Abortion and Euthanasia*, COMMONWEAL, Oct. 7, 1994, at 16. That Murray never spoke on the subject of abortion is not surprising; Murray died in 1967, six years before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>4</sup> In addition to the uses of Murray cited later in this piece, *see, e.g.*, Mario M. Cuomo, *Persuade or Coerce?*, COMMONWEAL, Sept. 24, 2004, at 13 (noting that Cuomo's famous Notre Dame speech on abortion "echoed the teaching of great American theologians like John Courtney Murray").

<sup>5</sup> Some of these uses are criticized in Todd David Whitmore, *What Would John Courtney Murray Say? On Abortion and Euthanasia*, COMMONWEAL, Oct. 7, 1994, at p. 116-17 and in *John Courtney Murray, Contraception, and the 'Liberal Catholic' Justification for Abortion*, Church & The Liberal Tradition, available at [http://www.ratzingerfanclub.com/liberalism/murray\\_contraception\\_abortion.html](http://www.ratzingerfanclub.com/liberalism/murray_contraception_abortion.html). *See also* Robert P. Hunt, *Moral Orthodoxy and the Procedural Republic*, in ROBERT P. HUNT & KENNETH L. GRASSO (eds.), *JOHN COURTNEY MURRAY AND THE AMERICAN CIVIL CONVERSATION* 228 (1992) (discussing and criticizing attempts to invoke Murray's name for various political purposes).

<sup>6</sup> *See* Alan Guttmacher Institute, *Facts in Brief: Induced Abortions in the United States* (May 2005); National Right to Life, *Abortion in the United States: Statistics and Trends* (2005) (citing Guttmacher and CDC statistics), available at <http://www.nrlc.org/abortion/facts/abortionstats.html>. "The abortion rate in the United States is higher than rates in most other Western industrialized countries, but lower than rates in eastern Europe and many developing areas." Alan Guttmacher Institute, *An Overview of Abortion in the United States*, Slide and Lecture Presentation (June 2005), available at [http://www.agi-usa.org/presentations/ab\\_slides.html](http://www.agi-usa.org/presentations/ab_slides.html). Although it is difficult to obtain comprehensive data (in part because of the difficulty of obtaining accurate figures regarding abortions performed in China), it is estimated that approximately 15 million legal abortions occur annually. UNITED NATIONS DEPARTMENT OF ECONOMIC

view of a candidate for political office or Supreme Court justice<sup>7</sup> on abortion has become the decisive measure of that candidate for many people. Yet until recently,<sup>8</sup> there has been little effort to try to find a common ground between pro-choice and pro-life forces, each of which has demonized the other<sup>9</sup> and hardened into positions from which no real debate has been possible.<sup>10</sup> As Martin E. Marty once observed that “[i]n America we do

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AND SOCIAL AFFAIRS, POPULATION DIVISION, POPULATION, REPRODUCTIVE RIGHTS AND REPRODUCTIVE HEALTH WITH SPECIAL REFERENCE TO HIV/AIDS 35 (2004).

Of the approximately 1.3 million abortions performed in the United States each year, 1.4% occur at 21 weeks or later. Denise Grady, *Study Finds 29-Week Fetuses Probably Feel No Pain and Need no Abortion Anesthesia*, N.Y. TIMES, Aug. 24, 2005, at p. 10.

<sup>7</sup> The retirement of Justice Sandra Day O’Connor and subsequent nomination by President Bush of John Roberts as her replacement. See, e.g., Stephanie Desmon, *Abortion Stance Becomes Subject of Speculation*, BALTIMORE SUN, Jul. 22, 2005, at p.9A (discussing fact that abortion issue “charges the atmosphere” surrounding the nomination of Roberts); Scot Lehigh, *Smearing John Roberts*, BOSTON GLOBE, Aug. 12, 2005, at p.A17 (noting that “the abortion rights groups have been spoiling for a fight,” from the moment Roberts was nominated); Coleen McCain Nelson, *A World Without Roe?*, DALLAS MORNING NEWS, Jul. 31, 2005, at p.1A (discussing Roberts nomination and observing that “abortion has, in many ways, become the litmus test for judicial nominees”); See Keith Perine and Seth Stern, *Roe v. Wade a Chief Concern in Roberts Supreme Court Confirmation Hearings*, CQ TODAY, Sept. 2, 2005 (discussing fact that “abortion will be a major narrative thread running through the confirmation hearing”). The recent death of Chief Justice William Rehnquist, and President Bush’s decision to name Roberts to the Chief Justice spot, added to the salience of the issue. See Richard W. Stevenson, *President Names Roberts as Choice for Chief Justice*, N.Y. TIMES, Sept. 6, 2005, at p. 1.

<sup>8</sup> In January, Senator Hillary Clinton suggested in a statement to New York state family planning providers that there was “an opportunity for people of good faith to find common ground in this debate.” Ellen Goodman, *Whose Common Ground?*, BOSTON GLOBE, Jan. 30, 2005, at p. K11; Patrick D. Healy, *Senator Clinton Seeking Common Ground Over Abortion*, N.Y. TIMES, Jan. 24, 2005, at p.A17. Even this effort is very little; some have criticized Clinton as not being seriously interested in pursuing a more nuanced position. See Healy, *supra* (noting that, although Clinton appeared to be reaching out beyond core Democrats, many were skeptical of Clinton’s statement given her “outspoken support for abortion rights over the years”); Todd David Whitmore, *Arms Unfolded: The Search for Common Ground on Abortion*, NOTRE DAME MAGAZINE, Summer 2005 (citing negative reactions to Clinton’s comments by pro-life groups).

Despite criticism by each side of the other, there seem to be some attempt on both sides to move the “once-stale abortion debate.” Joe Feuerherd, *The Elusive Search for Common Ground*, NCR ONLINE, Jan. 27, 2005, available at <http://www.nationalcatholicreporter.org/washington/wnb012705.htm>. Others have suggested that the search for common ground will require a shift from the current focus on preventing unintended pregnancies to supporting women who are already pregnant. See Whitmore, *supra*.

<sup>9</sup> The opposing sides of the abortion debate “regularly resort to civil rights and Nazi images to affirm the virtue of their side and reveal the villainy of the other.” ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* 9-10 (1993)

<sup>10</sup> As one writer criticized, each of the pro-choice and the pro-life forces “deliberately erases the merits of the other side’s arguments and suggests that any nuanced consideration of reality at the margin is tantamount to betrayal of the cause.” Sherry F. Colb, *Sending Out Partial Birth Announcements*;

not have an abortion debate; we have...a confusion, because the antiabortion and pro-choice factions, interests and sects express incommensurable universes of discourse, and they both result from and produce several histories and different views and kinds of people.”<sup>11</sup>

Out of a conviction that the writings of John Courtney Murray help us to move from confusion to debate, this paper will explore the contribution of Murray to our thinking about the issue of abortion. It will consider to what extent Murray’s statements about how the Church should respond to contraception<sup>12</sup> carry over into the development of a workable position regarding abortion and will evaluate arguments that have been made based on his writings. In so doing, it will also address Murray’s concept of consensus and the role of public consensus in distinguishing between issues of public or private morality. As the discussion will make clear, Murray has something to say to both public policymakers and the Catholic Church about their approach to abortion. I will argue that abortion is a matter of public morality,<sup>13</sup> making it a matter that the state is justified in regulating, but also that prudential considerations must be taken into account in deciding whether and how the law should intervene. Separating the questions of

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*Symbolism and Deception by Pro-Life Legislators*, FindLaw’s Legal Commentary, Jun. 18, 2003, available at <http://writ.news.findlaw.com/scripts/printer-Firently.pl?page=/colb/20030618.html>.

<sup>11</sup> Martin E. Marty, *When My Virtue Does’t Match Your Virtue*, CHRISTIAN CENTURY, Nov. 30, 1988, at p.1094.

<sup>12</sup> I recognize there is a certain danger in using statements about contraception to further a discussion of the abortion question. On the one hand, contraception is different from abortion to the extent that the prevention of conception is different from terminating a pregnancy, a difference that makes it easier to view contraception as a private matter between two consenting adults. On the other hand, technological advances make for a certain blurring of the line between contraception and abortion, an issue I discuss in Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J. L. & PUB. POL’Y 741, 764-767 (2005).

<sup>13</sup> As will be clear from the discussion in Section II.C., abortion is also a matter of justice and human rights, which independently makes it a “fit” subject for regulation. See *infra* text accompanying notes 99-102.

whether abortion is a proper subject for the law to address and what constitutes a good law with respect to abortion is a necessary step in moving from confusion to productive debate.

### I. What Murray Believed

The Contraception Memorandum is a useful starting point for considering what Murray may add to the debate over abortion.<sup>14</sup> Murray was asked by Richard Cardinal Cushing to recommend how Catholics and the Catholic Church should respond to proposed Massachusetts legislation that would decriminalize the supplying of artificial contraception devices. The Contraception Memorandum explains why Murray believed that Catholics should not oppose the Massachusetts legislation, notwithstanding the Church's (and his personal) belief that contraception was immoral. Murray advanced two lines of arguments that are the product of his belief that Christianity had introduced a "radical distinction" between politics and religion.<sup>15</sup>

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<sup>14</sup> The Contraception Memorandum was not the only time Murray discussed the issue of contraception at length. Some of his thoughts on the question were revealed prior to his having written the Contraception Memorandum in JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 157-158 (1960), where Murray discusses the Connecticut birth control statute.

Murray addressed the issue of contraception again, shortly before his death. In contrast to the belief expressed in the Contraception Memorandum that contraception was immoral, his later comments reflect some shift. In a talk in Toledo, he suggested that the Church's position on the subject "reached for too much certainty too soon." See Toledo Talk, May 5, 1967, available at <http://www.georgetown.edu/users/jlh3/Murray/1967g.htm>. See also J. Leon Hooper, S.J., *Citizen Murray*, BOSTON COLLEGE MAGAZINE, Winter 1995 (suggesting that Murray endorsed the Majority Report of Pope Paul VI's commission studying contraception, which recommended that the church lift its ban on some forms of artificial birth control because of his belief that "in the absence of an understanding of marriage, there was [in the church] an inadequate understanding of the marital act and an inadequate understanding of the total situation of the problem of reproduction") (quoting Murray).

<sup>15</sup> MURRAY, *WE HOLD THESE TRUTHS*, *supra* note 14, at 202. See Hughson, *supra* note 1, at 99 (discussing Murray's view that the "pluralist democracy of the United States, with its lack of an established Church and its protection of the free exercise of religion, implicitly rested on such a dualism").

The first argument “is based on the differential character of law and morality and on the distinction between public and private morality.”<sup>16</sup> For Murray, “the power inherent in the coercive discipline of public law” was properly wielded to advance public peace, *public morality* and justice.<sup>17</sup> For the law to regulate in the name of morality, the object must be to maintain and protect public morality; matters of private morality are not appropriate subjects of law, but rather are to be left to personal conscience. The distinction, for Murray, was crucial. He once suggested that “unless this distinction [between private and public morality], like that between morality and law, is grasped, the result is a fiasco of all morality.”<sup>18</sup>

Murray view of what constitutes an issue of public morality is related to his views of social freedom and the need to strike the appropriate balance between freedom and restraint.<sup>19</sup> Murray considered an issue to be a matter of public morality when it threatens to “seriously undermine the foundations of society or gravely damage the moral life of the community.”<sup>20</sup> The determination is based on “moral standards commonly accepted

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<sup>16</sup> Contraception Memorandum, at p.1.

<sup>17</sup> John Courtney Murray, *The Problem of Religious Freedom*, 25 *Theological Studies* 521 (1964). In Section II.C., I also discuss the question of abortion as a matter of justice. While the two grounds for lawmaking may be viewed as distinct, many of the arguments for considering abortion as an issue of public morality also make the case for viewing abortion in terms of justice and human rights.

<sup>18</sup> MURRAY, WE HOLD THESE TRUTHS, *supra* note 14, at 158. Murray argued that “[f]rom the foolish position that all sins ought to be made crimes, it is only a step to the knavish position that, since certain acts (like the private use of contraceptives) are obviously not crimes, they are not even sins. Upon a foolish disregard of the distinction between private and public morality there ensues a knavish denial that there is any such thing as public morality.” *Id.* For Murray, separation of spheres of church and state was essential to religious liberty and to the preservation of Church’s own being. See, e.g., Hughson, *supra* note 1, at 99-100; John Courtney Murray, S.J., *On the Structure of the Church-State Problem*, in WALDEMAR GURIAN AND M. A. FITZSIMONS (EDS.), *THE CATHOLIC CHURCH IN WORLD AFFAIRS* 11 (Univ. of Notre Dame Press 1954).

<sup>19</sup> MURRAY, WE HOLD THESE TRUTHS, *supra* note 14, at 160.

<sup>20</sup> Contraception Memorandum, at p.1.

among the people.”<sup>21</sup> To express it a different way, public morality “has to do with society’s estimation of what is right and wrong, just and unjust, fair and unfair, in sum, of what is beneficial or harmful to the public good.”<sup>22</sup>

It is important to understand what Murray was and was not saying in with this argument. Murray clearly understood the distinction in spheres between the church and the state and believed that it is not the function of government to promote religious truth.<sup>23</sup> However, while the government ought not prefer one religion over another, Murray did not believe that government either could or should be morally neutral. As to whether it could, he suggested that “the political and legal action of the state is inevitably in some moral direction, inescapably on the side either of good or evil.”<sup>24</sup> As to the normative question, he believed the state has an important function in the battle between right and wrong.<sup>25</sup> He rejected any notion that the government should be completely neutral, believing instead that the government had a role in protecting “the human

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<sup>21</sup> Murray, *The Problem of Religious Freedom*, *supra* note 17, at 521.

<sup>22</sup> Richard P. O’Brien, *Revisiting Caesar’s Coin: Religion and Public Policy Today*, 8 PUBLIC OPINION (2001), available at <http://www.parkridgecenter.org/Page1542.html>.

<sup>23</sup> John Courtney Murray, S.J., *The Issue of Church and State at Vatican Council II*, 27 THEOLOGICAL STUDIES 580 (Dec. 1966) (discussing *Dignitatis Humanae* and *Gaudium et Spes* and disavowal in Vatican II of the “view of government as sacral in function, that is, as invested with the function of defending and promoting religious truth as such”).

<sup>24</sup> John Courtney Murray, S.J., *The Problem of Free Speech*, 1 PHILIPPINE STUDIES 107 (Sept. 1953), available at <http://www.georgetown.edu/useres/jlh3/Murray/1953E.htm>. See John Courtney Murray, *Leo XIII: Government and the Order of Culture*, 15 THEOLOGICAL STUDIES 12 (1954) (observing that “all governments have stood in the service of some truth, some morality, indeed some God, even though the god may have been an idol....The political and legal action of government is inevitably in some moral direction.”).

<sup>25</sup> Murray, *The Problem of Free Speech*, *supra* note 24. In the context of free speech, for example, Murray was not a relativist; he did not believe that all ideas are free and equal and believed “there must be some official attitude of patronage and favor toward the ideas that form the moral basis of society.” *Id.* In the context of atheism, Murray similarly argued that the State ought not be indifferent between “the public movement in favor of religion and morality and the public movement which work to destroy them,” believing strongly that religion and morality are relevant to the common good. See John Courtney Murray, S.J., *Le Droit à L’Incroyance (The Right to Unbelief)*, RELATIONS (MONTREAL) 22 (1962), available at [www.georgetown.edu/users/jlh3/Murray/1962a.htm](http://www.georgetown.edu/users/jlh3/Murray/1962a.htm).

heritage against those who would dissipate it by the corrosion of doubt, denial or cynicism.”<sup>26</sup> This is an important distinction, and one ignored by “those who would appropriate Murray as a principled or practical defender of the ‘neutral’ state.”<sup>27</sup>

For Murray, a determination that an issue is a proper subject for the law to address, that is, that it involves a matter of public peace, public morality and justice, is a necessary, but not sufficient condition, for government action. That an issue is labeled a matter of public morality does not necessarily mean that legal action is called for.

Murray cautions first that because the law is coercive, it ought to impose “relatively minimal standards of public morality,” since one can be coerced into observing only minimal standards.<sup>28</sup> He advises second that the enforcement of even matters of public morality ought be a matter of public judgment. In one of his writings, Murray further explains that “only practical wisdom and political prudence, which take close cognizance of the needs, the sensitivities, and the cultural level of the body politic, will be able to translate [the general principle that the state has a function regarding morality] into specific laws and procedures that will further the common good.”<sup>29</sup> Among other things

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<sup>26</sup> See John Courtney Murray, *Leo XIII: Government and the Order of Culture*, 15 THEOLOGICAL STUDIES 12 (1954). Murray similarly believed that society must have a “spiritual substance.” John Courtney Murray, *The Return to Tribalism*, 60 THE CATHOLIC MIND 8 (1962), quoted in ROBERT W. MCELROY, *THE SEARCH FOR AN AMERICAN PUBLIC THEOLOGY: THE CONTRIBUTION OF JOHN COURTNEY MURRAY* 36 (1989).

<sup>27</sup> Hunt, *supra* note 5, at 252 (arguing that such persons “fail to consider seriously Murray’s commitment to the American polity as an inevitably moral enterprise”).

<sup>28</sup> Contraception Memorandum, at p.1. See also Murray, *The Problem of Free Speech*, *supra* note 24 (observing that the sole functions of the governments is “the protection of individual and social freedom to seek the truth and to teach it, and secondly, the protection of public order, including an order of minimal public morality, against abuses of freedom”). See also MURRAY, *WE HOLD THESE TRUTHS*, *supra* note 14, at 166 (observing that “the moral aspirations of the law are minimal. Law seeks to establish and maintain only that minimum of actualized morality that is necessary for the healthy functioning of the social order).

<sup>29</sup> Murray, *The Problem of Free Speech*, *supra* note 24. See also Hunt, *supra* note 5, at 264 (observing that the question for Murray was not whether the government had a right to legislate morality, but under what circumstances it may do so, a question that for Murray is “answered not through assumptions about moral

this means for Murray a requirement that there “be a reasonable correspondence between the moral standards generally recognized by the conscience of the community and the legal statutes concerning public morality,” absent which laws will be unenforceable, ineffective and resented.<sup>30</sup>

In the context of contraception, Murray never needed to get to questions of “practical wisdom and political prudence.” That is because as to the question whether contraception is an issue of public or private morality, he believed it “conclusive” that contraception was a matter of private morality. Murray observed that

[i]t is not merely that the practice is in fact widespread, or that so many people do not consider it to be wrong. The more decisive reason is that the practice, undertaken in the interests of “responsible parenthood,” has received official sanction by many religious groups within the community. It is difficult to see how the state can forbid, as contrary to public morality, a practice that numerous religious leaders approve as morally right. The stand taken by these religious groups may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of law and jurisprudence, for which the norm of “generally accepted standards” is controlling.<sup>31</sup>

The Contraception Memorandum also contains a secondary line of argument, one based on religious freedom.<sup>32</sup> It was Murray’s belief that government should not seek to

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autonomy or self-definition but through the use of prudential reasoning grounded in the natural law tradition”).

<sup>30</sup> Contraception Memorandum, at p.1-2. Murray does acknowledge that there may be some cases where the law may be “‘ahead’ of the public conscience.” *Id.* at 2. See *infra* note 110 an accompanying text. See also MURRAY, WE HOLD THESE TRUTHS, *supra* note 14, at 167 (suggesting there may be truth to the notion that “American society is ‘technically insane in the matter of sex.’ If so, it cannot be coerced into sanity by the force of law.”)

<sup>31</sup> Contraception Memorandum, at p.2. Murray acknowledged that contraception has public consequences, but did not believe those public consequences transformed the issue from one of private morality to public morality; the public consequences cannot be controlled by law and efforts at legal control result in other social evils. *Id.*

<sup>32</sup> Contraception Memorandum, at p.2. Murray called this a secondary argument in that it supports the claim that contraception is a matter of private morality.

restrict or impose religious faith upon its citizens.<sup>33</sup> Rather religious freedom implies both that one may not be constrained to act against one's conscience and that one may not be restrained from acting according to one's conscience unless that action involves a civil offense in that it is against public peace, public morality or the rights of others. Because contraception involves no such civil offense, Murray concludes that "laws in restraint of the practice are in restraint of religious freedom."<sup>34</sup>

Thus, Murray concluded that Catholics could support the Massachusetts legislation. However, Murray believed strongly that the Church was free to express its moral judgment on political affairs<sup>35</sup> and none of his arguments regarding the response to the Massachusetts legislation minimize the Church's obligation to "preach the faith with true freedom, teach her doctrine about society, exercise her function among men without hindrance, and pass moral judgment even on affairs that belong to the political order."<sup>36</sup> Thus, he recommended in the Contraception Memorandum that, in order to avoid confusion and uncertainty of conscience, the Church should make a public statement to make clear:

(1) that from the standpoint of morality Catholics maintain contraception to be morally wrong; and (2) that out of their understanding of the distinction between morality and law and between public and private morality, and out their understanding of religious freedom, Catholics repudiate in principle a resort to the

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<sup>33</sup> McElroy, *supra* note 1, at 9. Murray also believed that "[r]eligious liberty was a freedom not only of individual conscience, but of religious action and religious communities in action." *Id.* at 11.

<sup>34</sup> Contraception Memorandum, at p.2.

<sup>35</sup> John Courtney Murray, S.J., *The Issue of Church and State at Vatican Council II*, 27 *Theological Studies* 580 (Dec. 1966).

<sup>36</sup> John Courtney Murray, S.J., *The Issue of Church and State at Vatican Council II*, 27 *Theological Studies* 580 (Dec. 1966) (quoting *Gaudium et Spes*, ¶ 76 and also observing that to speak of the Church's obligation to express moral judgment on political affairs says nothing "about the execution of these moral judgments in terms of law, public policy, social action, etc.").

coercive instrument of law to enforce upon a whole community moral standards that the community itself does not commonly accept.<sup>37</sup>

In much of Murray's writings, one sees expressed the view that no "minority group in a pluralist society" has the right to impose its morality through force or coercion and a corresponding recognition of the distinction between the use of the coercive function of the law and the principle of voluntary reform "to be accomplished on the basis of social cooperation."<sup>38</sup> Thus, for Murray there was an important distinction between the Church expressing moral judgment about "matters of the temporal order" and translating those judgments into legislative and other public policies.<sup>39</sup>

## **II. Abortion: A Matter of Public or Private Morality?**

Because of his view of the distinction between morality and law, the crucial first question for Murray here, as it was with contraception, is whether abortion is a matter of public or private morality. Only if one concludes that it is the former do questions of "practical wisdom and political prudence" arise; if abortion is a matter of private morality, there is clearly no role for the government under Murray's framework.

As discussed earlier, Murray concludes in the Contraception Memorandum that it is "conclusive" that contraception was a matter of private morality because, not only did many people not consider it wrong, but, more decisively, the practice had the official

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<sup>37</sup> Contraception Memorandum, at p.3.

<sup>38</sup> See, e.g., John Courtney Murray, *The Bad Arguments Intelligent Men Made*, AMERICA, Nov. 3, 1956, at 120. He makes clear that he has no difficulty with campaigns to persuade voluntary changes in behavior. *Id.* (discussing how private agencies "can perform an indispensable public function in the promotion of public morality" so long as they understand their role "is not to supplant the coercive function of the agencies of public law").

<sup>39</sup> See John Courtney Murray, S.J., *We Hold These Truths*, NATIONAL CATHOLIC REPORTER, Aug. 23, 1967, at 3 (also published as *A Will to Community*, in STEPHEN F. BAYNE JR., THEOLOGICAL FREEDOM AND SOCIAL RESPONSIBILITY 116 (1967)) (discussing two different senses of "social criticism"). See also Hughson, *supra* note 1, at 107-08 (discussing implication of Murray's thought and observing that "one cannot make a simple jump from Christian faith to prudential decisions on specific laws or policies").

sanction of many religious groups in the community, who approve it as “morally right.”<sup>40</sup>

Based on the Contraception Memorandum, some have argued that abortion is similarly a matter of private morality. For example, in *Murray, American Pluralism, and the Abortion Controversy*,<sup>41</sup> Mary C. Segers explores Murray’s rationale for concluding that contraception was a matter of private morality, finding them persuasive support for a similar conclusion regarding abortion. She argues that

[t]he “same criteria apply to the issue of abortion: (1) the practice is widespread now and was widely practiced before 1973, when it was illegal; (2) many people do not consider it to be wrong; and (3) numerous groups approve it as legally permissible and morally acceptable in many instances as part of a moral duty to responsible parenthood.”<sup>42</sup>

However, Murray’s reasoning does not lead to the conclusion that abortion is a matter of private morality. First, neither public opinion nor the view of religious groups is as accepting of abortion as it is of contraception. Second, the notion of “moral standards commonly accepted among the people,” of public consensus, central to defining public morality for Murray,<sup>43</sup> is more complicated than simply a matter of counting up the number of persons in favor of the practice.

### **A. Public Opinion**

Public opinion is much more mixed (and complicated) regarding abortion than was public opinion regarding contraception at the time Murray wrote the Contraception Memorandum. According to the 2003 annual Gallup survey on abortion, a majority of Americans believe that abortion is morally wrong (which is an increase from 45% in

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<sup>40</sup> See *supra* text accompanying note 20-21, 31.

<sup>41</sup> Mary C. Segers, *Murray, American Pluralism, and the Abortion Controversy*, in ROBERT P. HUNT & KENNETH L. GRASSO (eds.), *JOHN COURTNEY MURRAY AND THE AMERICAN CIVIL CONVERSATION* 228 (1992).

<sup>42</sup> *Id.* at 246.

<sup>43</sup> See *supra* text accompanying notes 20-22.

2001) and only 37% believe that abortion is morally acceptable.<sup>44</sup> The same poll finds that 48% of Americans label themselves as “pro-choice” and 45% as “pro-life,” a finding that does not speak directly to the question of views on the morality of abortion.

The labels “pro-choice” and “pro-life” labels do not give a full picture. The Gallup survey found that only 23% of those surveyed believe abortion should be legal under all circumstances and that 42% believed it should be legal only in limited circumstances,<sup>45</sup> a finding consistent with 2005 findings of the Pew Research Center.<sup>46</sup> The Pew survey found that, although 65% of Americans oppose overturning *Roe v. Wade*,<sup>47</sup> a significant number are in favor of some legal restrictions on abortion. For example, 73% are in favor of requiring parental consent in the case of an abortion sought by someone under age 18, and 31% favor making abortion illegal except in cases of rape, incest or where necessary to save the life of the woman.<sup>48</sup>

These findings make it impossible to use public opinion as a means of arguing that abortion should be viewed as an issue of private morality. “In fact, there has long been a moral consensus regarding abortion that, if anything, now tilts toward the prolife position. Indeed, if there were no such current running counter to *Roe v. Wade*, abortion

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<sup>44</sup> See Lydia Saad, *Abortion Views Hold Steady Over Past Year*, Gallup Poll News Service, June 2, 2003, available at, <http://www.gallup.com/poll/releases/pr030602.asp>.

<sup>45</sup> *Id.* 15% believed abortion should be legal under some circumstances.

<sup>46</sup> Pew Research Center, *Abortion and Rights of Terror Suspects Top Court Issues*, Aug. 3, 2005, available at <http://pewforum.org/docs/print.php?DocID=91>.

<sup>47</sup> On the other side, 9% believe that abortion should never be permitted. *Id.*

<sup>48</sup> *Id.* American Catholics are also not uniform in their view. While many believe abortion is wrong and would support limits on abortion, a large number do not believe that abortion should be illegal in all circumstances. A history of the efforts of pro-choice Catholic groups can be found at Mary C. Segers, *The Loyal Opposition: Catholics for a Free Choice*, in TIMOTHY A. BYRNES & MARY C. SEGERS, *THE CATHOLIC CHURCH AND THE POLITICS OF ABORTION* 169 (1992).

would no longer be a political issue.”<sup>49</sup> Although it is true that not all of those who believe that abortion is immoral believe that the law should regulate abortion, the latter inquiry does not speak directly to the distinction between public and private morality (and therefore to the question of whether abortion is a proper subject for the law to address). Moreover, a substantial number do favor some role for the law in regulating abortion. This is in sharp contrast to the state of public opinion that contributed to Murray’s view that contraception was a matter of private morality.

## **B. The Views of Religious Groups**

More important for Murray than public opinion was the views of religious groups. At the time he considered the issue, “numerous religious leaders approve[d] contraception] as morally right.”<sup>50</sup> The same cannot be said for abortion.

As with contraception, there is no ambiguity regarding the official Catholic Church position on abortion. The *Catechism of the Catholic Church* states that “[h]uman life must be respected and protected absolutely from the moment of conception.”<sup>51</sup> The Catechism characterizes it as an “unchangeable” teaching that every “procured abortion” is a “moral evil.”<sup>52</sup> The position of the Church is that this is not just a matter of individual conscience and sin. The Catechism goes on to state that “[t]he inalienable right to life of every innocent human individual is a constitutive element of a civil society and its legislation,”<sup>53</sup> thus leaving no room for a posture that accepts that abortion is a

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<sup>49</sup> Kenneth L. Woodward, *Catholics, Politics & Abortion*, COMMONWEAL, Sept. 24, 2004, at p.11, 12.

<sup>50</sup> Contraception Memorandum, at p.2. I take Murray to mean “morally acceptable” when he uses the term “morally right.”

<sup>51</sup> CATECHISM OF THE CATHOLIC CHURCH ¶2270 (2d ed. 1997).

<sup>52</sup> *Id.* at ¶ 2271.

<sup>53</sup> *Id.* at ¶ 2273.

wrong but that the matter is one of individual choice. The same notion is expressed in the 1984 papal *Charter on the Rights of the Family*, which provides that “[h]uman life must be respected and protected absolutely from the moment of conception,” and that “[a]bortion is a direct violation of the fundamental right to life of the human being.”<sup>54</sup> In his 1995 encyclical, *Evangelium Vitae*, Pope John Paul II characterized laws permitting abortion as “radically opposed not only to the good of the individual but also to the common good” and as “intrinsically unjust.”<sup>55</sup> The Church has been vocal and consistent in both its opposition to abortion and to legal efforts in any country to permit or expand access to abortion.<sup>56</sup>

In contrast to the question of contraception, where many priests, theologians and Catholic intellectuals disagreed with the official church position,<sup>57</sup> there appears to be

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<sup>54</sup> *Charter on the Rights of the Family*, article 4 (Oct. 22, 1983).

<sup>55</sup> John Paul II, *Evangelium Vitae*, ¶¶ 72, 73 (1995). The Compendium of the Social Doctrine of the Church terms abortion “a horrendous crime” that “constitutes a particularly serious moral disorder.” PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶233, at p.137 (2004). The *Compendium* further laments that “far from being a right, [abortion] is a sad phenomenon that contributes seriously to spreading a mentality against life, representing a dangerous threat to a just and democratic social coexistence”).

This opposition is not a creature of the modern Church. The Didache, a first century teaching document of the early Christian community says, “Do not murder a child by abortion or kill a newborn infant.” *Standing for the Unborn: A Statement of the Society of Jesus in the United States on Abortion* (Mar. 2003), in AMERICA 19, 21 (May 26-June 2, 2003) [hereinafter Jesuit Statement on Abortion] (citing Didache and noting that Catholic tradition has consistently been opposed to abortion).

<sup>56</sup> For example, the Church has expressed firm opposition to a proposed law to legalize abortion in Slovakia in the case of genetic malformations. See *Slovakian President Vetoes Law Over Abortion*, ZENIT DAILY DISPATCH, July 23, 2003, available at zenit.org (ZE030723). And the Peruvian bishops’ conference recently issued a strongly worded statement against efforts by Peru’s Minister of Health to legalize the “morning-after” pill, which causes early abortions. See *Peru’s Push for the Morning-After Pill Is Criticized*, ZENIT DAILY DISPATCH, Aug. 26, 2003, available at zenit/org (ZE030826).

So strong is the Church’s position on this matter that under Canon Law, a person who has or assists willingly in the procurement of an abortion is automatically excommunicated, a penalty that bars her from church community and from receipt of the Sacraments. See 1983 Code of Canon Law, Canon c.1398 (“A person who procures a successful abortion incurs an automatic (*latae sententiae*) excommunication.”).

<sup>57</sup> A survey conducted within months after the publication of *Humanae Vitae* showed that about half of American diocesan priests disagreed with the Pope’s condemnation of birth control. NORMAN ST. JOHN-STEVAS, THE AGONIZING CHOICE: BIRTH CONTROL, RELIGION AND THE LAW 187 (Indiana Univ. Press 1971). Historically, the disagreement figures have been much higher among younger clergy. See ANDREW

markedly less dissent on the abortion question. No data suggest that large numbers of priests or theologians disagree with the position that a procured abortion is immoral.<sup>58</sup>

More importantly than the consistency of the Catholic Church in its opposition to abortion, in contrast to the approval by many non-Catholic religious leaders of contraception as morally right, an approval that Murray found “decisive from the point of view of law and jurisprudence,”<sup>59</sup> no such widespread official sanction of abortion exists among other religions.

Protestant criticism of abortion historically sounded very much like statements issued by the Vatican and other Catholic sources. Protestant reformer John Calvin wrote that the fetus “is already a human being” and that it is “more atrocious to destroy a fetus in the womb before it has come to light” than after birth.<sup>60</sup> Protestant theologians Karl Barth<sup>61</sup> and Dietrich Bonhoeffer<sup>62</sup> also equated abortion with murder. However, more

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M. GREELEY, *AMERICAN CATHOLICS SINCE THE COUNCIL: AN UNAUTHORIZED REPORT* 90 (Thomas More Press 1985). The same is true of a number of American bishops. See Bishop Kenneth E. Untener, *Humanae Vitae: What Has it Done to Us?*, COMMONWEAL, June 18, 1993, at 14.

Numerous Catholic theologians have also expressed their disagreement with *Humanae Vitae*. See RICHARD A. MCCORMICK, *THE CRITICAL CALLING: REFLECTIONS ON MORAL DILEMMAS SINCE VATICAN II* 116 (Georgetown Univ. Press 1989); CHARLES E. CURRAN, *TENSIONS IN MORAL THEOLOGY* 29, 59 (Univ. of Notre Dame Press). Over 600 theologians signed a public statement criticizing *Humanae Vitae*. Patrick McCormick, *Catholicism & Sexuality: The Sounds of Silence*, Sept. 9, 2002, available at <http://guweb2.gonzaga.edu/faculty/alfino/McCormickSilence.htm>.

<sup>58</sup> I don’t mean to suggest that there is unanimity in view. There is a Religious Coalition for Reproductive Choice, with members from Catholic as well as other faiths. And theologians from the Catholic, Protestant and Jewish traditions have written an “Open Letter to Religious Leaders on Abortion as a Moral Decision,” that suggests that a woman’s choice to have an abortion may be morally justifiable. See Religious Institute on Sexual Morality, Justice and Healing, *Open Letter to Religious Leaders on Abortion as Moral Decision*, available at [http://www.religiousinstitute.org/Abortion\\_OpenLetter.pdf](http://www.religiousinstitute.org/Abortion_OpenLetter.pdf). See also Joseph F. Donceel, S.J., *A Liberal Catholic’s View*, in PATRICIA BEATTIE JUNG & THOMAS A. SHANNON, *ABORTION & CATHOLICISM: THE AMERICAN DEBATE* 48 (1998) (discussing the minority Catholic view that there is “no human being at the early stages of pregnancy, before twinning and recombination take place”).

<sup>59</sup> Contraception Memorandum, at p.2.

<sup>60</sup> JOHN CALVIN, COMMENTARY ON PENTATEUCH.

<sup>61</sup> KARL BARTH, 3 CHURCH DOGMATICS 415, 418 (Geoffrey Bromiley ed. 1961).

<sup>62</sup> DIETRICH BONHOEFFER, ETHICS 131 (Macmillan 1955).

recently, a number of Protestant statements are less unequivocal; they continue to express criticism of abortion because it involves the taking of a human life, but regard abortion as “legitimate in certain circumstances.”<sup>63</sup>

Among Protestants there are also proponents of both a narrower and a broader view regarding abortion. A “more radical Protestant position....endorse[s] abortion’s legitimacy and [does] not consider the fetus or embryo a human being.”<sup>64</sup> At the other end of the spectrum, conservative evangelical Protestants align with the Catholic Church on its view of abortion.<sup>65</sup>

The Koran does not address abortion directly<sup>66</sup> and Islamic perspectives concerning abortion vary. Of the major Islamic schools of law some oppose abortion entirely,<sup>67</sup> while others believe that there are circumstances in which abortion is acceptable.<sup>68</sup> All schools agree that having an abortion after 120 days of pregnancy goes against the teaching of the Koran, because it is at that stage in the gestation period when

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<sup>63</sup> Mark Ellingsen, *The Church and Abortion: Signs of Consensus*, CHRISTIAN CENTURY, Jan. 1990, at p.12 (expressing criticism of such statements on the ground that they accept that life begins at conception, and that therefore abortion involves the taking of a human life, yet they “countenanced murder in certain extraordinary circumstances without offering any theological or philosophical warrants”).

<sup>64</sup> Ellingsen, *supra* note 63.

<sup>65</sup> See, e.g., Fred Barnes, *How a Cause was Born*, WSJ.COM OPINION JOURNAL, Nov. 6, 2003, available at <http://www.opinionjournal.com/ac/?id=110004264>; John Fea, *Protestant America’s Selective Embrace of the Pope’s Teachings*, HISTORY NEWS SERVICE, Apr. 18, 2005, available at <http://hnn.us/articles/11351.html>.

<sup>66</sup> *Improved Information Urged to Reduce Abortion*, THE JAKARTA POST, July 14, 1997, at 2.

<sup>67</sup> Those who oppose abortion regardless of the circumstances base their view on writing of the text Surah:6: At-Talaqa:2-3. The text states “Do not kill your children for fear of poverty for it is We who shall provide sustenance for you as well as for them.” See Daniel C. Mcquire, *Contraception and abortion in Islam*, available at [http://www.religiousconsultation.org/islam\\_contraception\\_abortion\\_in\\_SacredChoiced.htm](http://www.religiousconsultation.org/islam_contraception_abortion_in_SacredChoiced.htm). While the language does not conclusively establish that abortion is forbidden, it does condemn the practice of killing your living children and thereby implies that abortion is likewise prohibited. *Id.*

<sup>68</sup> Examples of permissible abortion include those situations in which the mother’s life is at risk, see Heather Boonstra, *The Power of Law for Every Woman*, Center of Reproductive Rights, The Guttmacher Report, Volume 4, Number 6, (Dec 2001), or when there is a considerable probability that the child will be born with defects, see Mcquire, *Contraception and abortion in Islam*.

the fetus has developed a soul.<sup>69</sup> Thus, abortion after 120 days is always *haram* (forbidden). The disagreement among those willing to consider some abortions permissible relates to the time period before the 120 days of the pregnancy: ulemas<sup>70</sup> of the Mashab of Shafiite and Hanbali only find abortions within 40 days of conception permissible, whereas followers of the Hanafi and Zaydi schools of thought believe abortion is acceptable until 120 days after conception.<sup>71</sup>

Although the traditional Buddhist view is that abortion is wrong under all circumstances, the modern view admits of certain circumstances under which abortion may be permissible.<sup>72</sup> The First Precept of Buddhism is not to kill, or to refrain from taking life. The teachings of Buddha outline five conditions that must be present for an act to constitute a killing: (1) the thing must be a living being; (2) the killer must be aware of the fact that the thing is a living being; (3) the killer must have the intention to kill; (4) the killer must make an effort to kill; and (5) the being must be killed as the result of the act.<sup>73</sup> Since purposefully aborting a fetus meets the five criteria, it thereby is deemed a killing and thus in violation of the teachings of Buddha.<sup>74</sup> However, because of the value to the mother's life, Buddhist thought permits abortion in instances when the mother's life is in danger. Moreover, when the child is in danger of being born with severe medical conditions, some Buddhists would support abortion as morally

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<sup>69</sup> *Improved Information Urged to Reduce Abortion*, at 2.

<sup>70</sup> “[T]he body of Mullahs (Muslim scholars trained in Islam and Islamic law) who are the interpreters of Islam's sciences and doctrines and laws and the chief guarantors of continuity in the spiritual and intellectual history of the Islamic community.” Available at <http://wordnet.princeton.edu/perl/webwn>.

<sup>71</sup> *See Id*; see also *Religious Voices Worldwide Support Choice*, at [http://www.crpl.org/pub\\_fac\\_atkrel.html](http://www.crpl.org/pub_fac_atkrel.html)

<sup>72</sup> *Abortion: The Buddhist View*, available at [http://www.bbc.co.uk/print/religion/ethics/abortion/relig\\_buddhism3.shtml](http://www.bbc.co.uk/print/religion/ethics/abortion/relig_buddhism3.shtml).

<sup>73</sup> *See id*.

<sup>74</sup> Buddhists believe that the fetus becomes a life at the moment of conception. *See id*; see also, *World Religions on Abortion*, available at [http://www.beliefnet.com/features/0628\\_achart.html](http://www.beliefnet.com/features/0628_achart.html).

acceptable.<sup>75</sup> Even the Dalai Lama has qualified that while “[o]f course, abortion, from a Buddhist viewpoint, is an act of killing and is negative. . . . it depends on the circumstances.”<sup>76</sup>

The Jewish tradition appears to be somewhat more liberal on the question of abortion. While Jewish view does hold that life is sacred, it generally does not perceive the fetus to unequivocally be a human life but rather merely a part of the woman’s body until birth.<sup>77</sup> The operative text of the Hebrew Scriptures that guides Jewish thinking on abortion tells the story of a pregnant women who was hit in the course of a quarrel resulting in the death of her unborn child: “When, in the course of a brawl, a man knocks against a pregnant women so that she has a miscarriage but suffers no further hurt, then the offender must pay whatever fine the woman’s husband demands after assessment.”<sup>78</sup> However if the woman is killed, the offenders are subject to the “eye for an eye” punishment.<sup>79</sup> The attitude of the Jewish tradition that the mother’s life is more sacred than that of the fetus embodied by the language of this text translates into the acceptance of abortions when the mother’s health or life is at risk.<sup>80</sup> Some rabbis have also suggested

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<sup>75</sup> See *Abortion: The Buddhist View*, available at [http://www.bbc.co.uk/print/religion/ethics/abortion/relig\\_buddhism3.shtml](http://www.bbc.co.uk/print/religion/ethics/abortion/relig_buddhism3.shtml).

<sup>76</sup> *Id.*

<sup>77</sup> *Jews Disagree on Abortion*, NEWS AND OBSERVER, December 17, 1999, F1.

<sup>78</sup> Exodus 21:22

<sup>79</sup> *Id.* at 21: 22-25

<sup>80</sup> Rabbis have suggested that the health of the mother rules what Jews believe about abortion. Rabbi Raymond A. Zwerin and Rabbi Richard Shapiro stated that “the fetus is not considered a full human being, and has no individual rights, but rather, according to many sources, is a part of a woman’s body. And just as any person may not voluntarily do harm to his or her body, a woman may not voluntarily abort a fetus. However, just as a portion of the body may be sacrificed to save a person’s life, an abortion may be performed for the woman’s overall well-being, and an existing life takes precedence over a potential life, if there must be a choice between them.” *World Religions on Abortion*, available at [http://www.beliefnet.com/features/0628\\_achart.html](http://www.beliefnet.com/features/0628_achart.html). See also Netty C. Gross, *Carriers Can Marry, with Helekhic Help*, JERUSALEM REPORT, Apr. 4, 2005, at p.6 (reporting rabbinic view or permissibility of

that abortion is permissible in the case of a fetus with a serious defect.<sup>81</sup> However, “abortion-on-demand” is not practiced, nor accepted, by most members of the Jewish faith on religious grounds.<sup>82</sup>

The foregoing suggests that, while other world religions may not take as restrictive position on the immorality of abortion as does the Catholic Church, it is impossible to argue that abortion is approved as morally acceptable by any major religion. Thus, what Murray labeled a “more decisive reason” for concluding that contraception was a matter of private morality is not present in the abortion context. If anything, the weight of opinion of other religions supports a view that abortion is morally wrong at least in most circumstances, if not all.

### **C. Murray’s Concept of Consensus**

Even if public opinion and the views of other religions about abortion more closely mirrored those with respect to contraception, Murray’s writings would still not support a conclusion that abortion is a matter of private morality. As discussed earlier, Murray believed that public morality is determined with reference to commonly accepted moral standards. When Murray speaks of this norm of “generally accepted standards,”<sup>83</sup> or what he often refers to as public consensus, he is talking about more than merely what the majority of people think at a given time.<sup>84</sup> As Gregory Kalscheur has observed, public consensus is Murray’s “way of talking about the ‘truths we hold in common;’

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terminating pregnancy where mother’s emotional health is compromised, based on Jewish law, “which permits abortion if continued pregnancy or birth physically endangers the mother’s health”).

<sup>81</sup> See Gross, *supra* note 80.

<sup>82</sup> *Judaism and Abortion*, CHICAGO DAILY HERALD, August 30, 2000, at 12.

<sup>83</sup> Contraception Memorandum, at p.2.

<sup>84</sup> In *We Hold These Truths*, Murray explicitly rejects the common assumption that consensus means simply majority opinion. MURRAY, *WE HOLD THESE TRUTHS*, *supra* note 14, at 97-98.

truths rooted in ‘a natural law *that makes known to all of us* the structure of the moral universe in such wise that all of use are bound to it by a common obedience.’”<sup>85</sup>

Thus, “[w]hat is at the core of Murray’s concept of consensus, with its reference to ‘truths,’ is a realist epistemology: moral truths are grounded in the structure of reality itself.”<sup>86</sup> As a result, public opinion and the views of religious leaders are “indicator[s] of what the truth might be on a particular matter,”<sup>87</sup> but are not themselves the determinants of the truth. With this understanding of consensus one cannot make the claim that there is a consensus that abortion is morally acceptable; the more persuasive claim is that there is consensus that it is morally wrong.

Murray argued that our democracy rests on “a religiously informed vision of the dignity of the human person and the role of the community in enhancing that dignity.”<sup>88</sup> He also recognized “that in every age new threats would emerge to the identity and dignity of the human persons, and that human dignity could be protected only if society recognized that that dignity was inviolate because it was rooted in God.”<sup>89</sup>

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<sup>85</sup> Gregory A. Kalscheur, S.J., *John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, 1 J. OF CATHOLIC LEGAL THOUGHT 231 (2001) (quoting Murray, *We Hold These Truths*). See Whitmore, *supra* note 3, at 17.

The ideas that constitute the American public consensus according to Murray include

the idea that government has a moral basis; that the universal moral law is the foundation of society; that the legal order of society – that is, that state – is subject to judgment by a law that is not statistical but inherent in the nature of man; that the eternal reason of God is the ultimate origin of all law; that this nation in all its aspects – as a society, a state, an ordered and free relationship between governors and governed – is under God.

MURRAY, *WE HOLD THESE TRUTHS*, *supra* note 14, at 53.

<sup>86</sup> Whitmore, *supra* note 3, at 17.

<sup>87</sup> *Id.*

<sup>88</sup> McElroy, *supra* note 1, at 10 (arguing that each generation must “recognize more fully the nature and scope of these rights and renew the moral consensus by acknowledging the transcendent identity both of human rights and the human community”).

<sup>89</sup> McElroy, *supra* note 1, at 11.

Flowing directly from the dignity of the human person is the right to life, the idea that every person, regardless of their stage or state of life, has a right to life consistent with their human dignity.<sup>90</sup> This inviolable right to human life is not limited to Catholicism; our Declaration of Independence enshrines the notion of a right to life.<sup>91</sup> Thus, no one would deny that there is an American public consensus that taking an innocent human life is a moral wrong.

From the perspective of Catholic thought, life begins at conception.<sup>92</sup> The understanding that life begins at conception, however, is not simply a matter of Catholic dogma; rather, the belief that the fetus is a human life extends beyond Catholicism to other religions.<sup>93</sup> Furthermore, the religious belief that life begins at conception is supported by the fact that “at conception the new being receives the genetic code. It is this genetic information which determines his characteristics, which is the biological carrier of the possibility of human wisdom, which makes him a self-evolving being. A

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<sup>90</sup> See CATECHISM OF THE CATHOLIC CHURCH ¶ 2258, 2261 (2d ed. 1997); John Paul II, *Evangelium Vitae* ¶ 57, 71 (1995).

<sup>91</sup> Murray once observed that the “Bill of Rights is not a piece of rationalistic theory; it is the product of Christian history. Behind it one can see, not the philosophy of the Enlightenment, but the faith of Christianity. The ‘man’ to whom America extends a Bill of Rights is, whether he knows it or not, the Christian man.” John Courtney Murray, *The American Proposition*, The John Courtney Murray Papers, quoted in MCELROY, *supra* note 26, at 102.

<sup>92</sup> From a scriptural standpoint, there is no question that the fetus is an object of God’s love and protection. See, e.g., Luke 1:44 (“For at the moment the sound of your greeting reached my ears, the infant in my womb leaped for joy.”); Jeremiah 1:5 (“Before I formed you in the womb, I knew you, and before you were born, I consecrated you.”); Psalm 139:13-15 (“You formed my inmost being; you knit me in my mother’s womb. My very self you knew; my bones were not hidden from you, when I was being made in secret, fashioned as in the depths of the earth.”).

<sup>93</sup> See, e.g., Pastor Art Kohl, *Abortion: Perhaps the Most Selfish Sin!?!*, Faith Bible Baptist Church, at <http://www.fbbs.com/messages/Abortionselfish.htm>, cited in 64 Ohio St. 1.j. 957, 998 n.147 (proclaiming that according to God’s word in the Bible, “life begins before conception”). See discussion of views of other religions in Section B, *supra*.

being with a genetic code is man.”<sup>94</sup> More recent DNA evidence about pre-natal biology supports this view of the fetus as a “living, unique human being.”<sup>95</sup>

There are obviously those who would disagree on the question of when life begins.<sup>96</sup> Indeed, Segers does in her essay arguing that Murray would view abortion as a matter of private morality.<sup>97</sup> However, Murray is certainly no ammunition for supporting such a position and one can hardly claim a consensus supporting that view.

If abortion involves the taking of human life, it violates a moral norm as to which there is public consensus – that of protecting human life. More than that, even if it is only the case that “the embryo-fetus is, *in all probability*, a human person, then the presumption must be that it is also morally true that one ought not to take its life.”<sup>98</sup> That means abortion cannot be viewed other than an issue of public morality.

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<sup>94</sup> John T. Noonan, Jr., *An Almost Absolute Value in History*, in CONTEMPORARY ISSUES IN BIOETHICS 281 (Tom L. Beauchamp & LeRoy Walters ed., 4<sup>th</sup> ed. 1994). See also Bradford William Short, *The Healing Philosopher: John Locke’s Medical Ethics*, 20 ISSUES IN LAW & MEDICINE 103 (2004) (“Human embryos possess the epigenetic primordial for self-directed growth into adulthood, with their determinateness and identity fully intact. The adult human being that is now you or me is the same human being who, at an earlier stage of his or her life, was an adolescent, and before that a child, an infant, a fetus, and an embryo. Even in the embryonic stages, you and I were undeniably whole, living members of the species homo sapiens.”) (quoting Robert George). Interestingly, Short quotes various early versions of the Hippocratic Oath, all of which prohibit abortion. *Id.*

<sup>95</sup> Jesuit Statement on Abortion, *supra* note 55, at 19-20. A medical view of life beginning at conception is not new. A Boston Medical Surgical Journal editorial in 1864 stated that “[i]t should be taught in every school book of physiology, and every public print should reiterate it, that the child is alive from the moment of conception, and that every interference with its being is as much a sin at one period of its existence as at another.” *Editorial*, 1986 BOSTON MEDICAL SURGICAL JOURNAL 66-67, quoted in John Clapper, M.D., *The Sanctity of Human Life and Abortion*, 5 WRS J. 31 (1998). Clapper also quotes a 1938 Obstetrics textbook that terms abortion murder and a 1906 statement of another doctor that “[a]ll physicians, as well as other biologists, must regard the child in the womb as much a human being while still in the womb as after its expulsion.” *Id.*

<sup>96</sup> See, e.g., Segers, *supra* note 41, at 243.

<sup>97</sup> See *id.* at 244-247.

<sup>98</sup> See Whitmore, *supra* note 3, at 18 (emphasis added).

It also means that the Church’s argument against abortion is not an attempt to argue on the basis of revelation or magisterial teaching. Cardinal O’Connor once observed that “[t]hose who accuse the Church of imposing its beliefs on others assume that the Church’s teaching on human life has been created by the Church. Not so...Abortion is..forbidden by Natural Moral Law, which governs all people, of all religions.” John Cardinal O’Connor, *Abortion: Questions and Answers*, July 1990, Q&A 17, available at

Recall that, in Murray’s terms, the law may justifiably be used to advance not only public morality, but also peace and justice. Although my focus here has been on the public morality basis for concluding that abortion is a proper subject for the law under Murray’s framework, the taking of human life implicates not only an issue of public morality, but one of justice as well.<sup>99</sup> *Evangelium Vitae* similarly speaks of laws permitting abortion as “intrinsically unjust.”<sup>100</sup> George Weigel has observed, abortion “is a question of public justice, not sexual morals...[because] abortion involves taking the life of an indisputably human creature, endowed with an inalienable right to life.”<sup>101</sup> Charles Curran, although using different terminology comes to the same conclusion, arguing that legal regulation of abortion has a proper “political purpose” (rather than an improper religious one) because it involves the defense of human rights and human life.<sup>102</sup>

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<http://www.priestsforlife.org/magisterium/cardocqanda.html#qa6> (also observing that the “Declaration of Independence was declared, not on the basis of a particular religion, but on the basis of Natural Moral Law”).

<sup>99</sup> In discussing Murray’s framework of law being justified on the basis of public peace, public morality and justice, Todd Whitmore argues that “[i]f the embryo-fetus is in all probability a person, then abortion possibly goes beyond the first limit, probably transgresses the second, and almost certainly violates the third.” Whitmore, *supra* note 3, at 18.

<sup>100</sup> John Paul II, *Evangelium Vitae* ¶ 73 (1995).

<sup>101</sup> George Weigel, *Catholic Confusions in the Congress*, THE CATHOLIC DIFFERENCE, June. 23, 2004, available at [http://www.eppc.org/programs/catholicstudies/publications/pubID.2130,programID.16/pub\\_detail.asp](http://www.eppc.org/programs/catholicstudies/publications/pubID.2130,programID.16/pub_detail.asp) (also observing that abortion is a “serious public matter, not a private choice, [as] protecting innocent life is one of the first requirements of justice in any decent society”). The title of Weigel’s piece refers to his criticism of the *Letter from 48 Democratic Congressmen to Cardinal McCarrick*, discussed *infra* at text accompanying notes 145-146. Weigel agrees that while Murray “was dubious about the wisdom of the Church defending state laws that criminalized the sale of contraception, he would view abortion differently, seeing the former as a “matter of conjugal morality” and the latter one of “public justice and the fifth amendment.” Weigel, *Catholic Confusions in the Congress*, *supra*.

<sup>102</sup> CHARLES E. CURRAN, THE CHURCH AND MORALITY: AN ECUMENICAL AND CATHOLIC APPROACH 71 (1993). Curran argues that everyone “should admit that the defense of human rights is a truly political purpose. If one believes that the fetus is a truly human being, then from the viewpoint of the role of the church and the believer in a pluralistic society, one has every right to work for a law to protect that human life. Defense of human life constitutes a truly political purpose...Any individual or group in the United States has the right to work for legislation to defend basic human rights.” *Id.* at 71-72. Although Curran

None of the foregoing discussion compels any judgment about what the law ought or ought not do regarding abortion. The issue here is simply whether a necessary condition for the law acting has been satisfied. On that issue, abortion is a proper subject for the law to address because it is an issue of public rather than private morality. Moreover, that abortion implicates an issue of basic justice similarly compels a conclusion that it is an appropriate subject of governmental regulation.

#### **D. Interlude: Law and Minimal Public Morality**

The foregoing discussion suggests that there are many circumstances where one may have a moral position on a matter without necessarily believing the law should have any involvement in the matter. This is not a position unique to Murray; in *Evangelium Vitae*, Pope John Paul II recognized that “the purpose of the civil law is different and more limited in scope than that of the moral [natural] law”<sup>103</sup> and that the purpose of civil law is limited to “ensuring the common good of people through the recognition and defense of their fundamental rights, and the promotion of peace and public morality.”<sup>104</sup>

Nonetheless, the question arises whether Murray is correct in arguing that the role of law is limited to maintaining “only that minimum of actualized morality that is necessary for the healthy functioning of the social order.”<sup>105</sup> Before I turn to the question

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believes abortion to be a proper subject for legislation, like Murray, he also believes the matter to involve serious prudential considerations as to which people may have differing views. *Id.* at 72-75. *See also* CHARLES E. CURRAN, DIRECTIONS IN CATHOLIC SOCIAL ETHICS 132-34 (1985) (discussing opposition to abortion as involving protection of human life and thus implicating “the most basic right in society”).

<sup>103</sup> John Paul II, *Evangelium Vitae*, ¶ 71 (1995).

<sup>104</sup> *Id.*

<sup>105</sup> MURRAY, WE HOLD THESE TRUTHS, *supra* note 14, at 164.

of the exercise of public judgment regarding the law and abortion, let me digress from the abortion question to say a few words on that subject.<sup>106</sup>

In part, Murray's belief that the law should only promote minimal public morality is based on a concern that if law were to "moralize excessively," its would "bring[] itself into contempt," thus defeating its aims.<sup>107</sup> In a different vein, Gregory Kalscheur suggests that Murray's insistence on the limited role of law was also based on a respect for the crucial roles of other mediating institutions. He explains:

If society wishes to elevate and maintain moral standards above this minimum level of social necessity, it must look to institutions other than the law. This contention highlights Murray's view of the crucial role played by voluntary mediating institutions – for example, the church, the family, the school – in working to build up the common good through efforts to raise the level of public morality. All of these institutions have a legitimate role to play with respect to the issue of public morality."<sup>108</sup>

Without minimizing the concern for creating disrespect for the law or the important role played by other mediating institutions, one has to ask whether the law ought to have some role in raising the level of public morality, rather than in merely maintaining that level of "actualized morality" necessary for society to function. That is, the question is whether law need always follow moral consensus or whether there is a role for the law in helping lead to the development of a new moral consensus, of higher moral standards?<sup>109</sup>

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<sup>106</sup> I call this a digression because even if the law only protects minimal levels of public morality, there is no question that protection of life would fall into the category of things to be protected.

<sup>107</sup> MURRAY, WE HOLD THESE TRUTHS, *supra* note 14, at 166.

<sup>108</sup> Gregory A. Kalscheur, S.J., *John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, 1 J. OF CATHOLIC SOCIAL THOUGHT 231, \_\_ (2004). *See also* John Courtney Murray, *The Problem of State Religion*, 12 THEOLOGICAL STUDIES 158 (1951) (discussing social pluralism and role cooperative association of elements of civil society).

<sup>109</sup> In *Evangelium Vitae*, Pope John Paul II spoke of a "necessary conformity of civil law with moral law." In *Evangelium Vitae*, Pope John Paul II spoke of a "necessary conformity of civil law with moral law."

A full answer to that question is beyond the scope of this Article, but it is an important question to surface. There clearly have been times when the law has led public morality rather than the other way around – for example, with respect to the issue of racial equality. Murray acknowledges in the Contraception Memorandum that there are such areas where it is appropriate for the law to so lead the way.<sup>110</sup>

The recognition that there are some occasions when the law may do more than promote minimal levels of morality means that concerns for contempt of the law and for the promotion of subsidiarity should be viewed as cautions, not as complete answers. The relevant question becomes, under what circumstances should the law do more than promote minimal standards of public morality. Framed in that way, the determination is arguably subsumed in the prudential analysis explored in the next section of this Article.

### **III. Exercising Public Judgment in a Democratic Society**

Understanding that there is a distinction between moral and civil law means understanding that morality and public policy are distinct. Even if something is a matter of public morality, Murray firmly believed that it was a matter of public judgment the extent to which the matter ought to be legislated. Moreover, Murray also understood that even if one believes something is a matter of public morality and that there is some role for the law, the question of means is an important one – how can the law best promote the moral position.

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*Evangelium Vitae*, ¶ 72. Should we be trying to do that at more than a minimal level? In the words of one commentator, “On the one hand, the law needs to draw upon our widely held values. On the other, it needs to promote the evolution of those values. Jeffrey Nesteruk, *The Limits of Law as a Moral Arbiter*, Chronicle of Higher Education, Sept. 16, 2005, at p.B14.

<sup>110</sup> Contraception Memorandum, at p.2. See also MCELROY, *supra* note 26, at 72-72 (discussing Murray view of the historical role of lawyers in “elaborating and renewing the public consensus,” and in communicating the natural law).

This is an important distinction. The morality of abortion is clearly not something on which individuals in the Catholic tradition are free to make their own judgment; Catholic teaching is that all procured abortions are moral evils. However, the question of whether and how the law should intervene is not at all answered by the clarity of the Church's position or the conclusion that abortion is an issue of public morality or of justice.<sup>111</sup> Prudential judgments still have to be made about the best way to reduce or eliminate abortions. Moral condemnation of abortion does not necessarily mean that the law should criminally prosecute someone who has one.

While some steeped in the Catholic tradition object to the injection of prudential inquiry into the abortion debate,<sup>112</sup> Murray clearly would not. Not only did he possess a “general reluctance to deduce particular political options from Christian sources,”<sup>113</sup> but the prudential questions raised in the Contraception Memorandum indicate that Murray would have felt it important to explore, for example the questions “whether repeal [of *Roe v. Wade*] would be effective (would it eliminate abortions), counterproductive (would it make the problem worse) or even immoral (would there be moral consequences of repeal that would be repugnant).”<sup>114</sup> Murray believed that the foundation of a

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<sup>111</sup> See Rev. Richard P. McBrien, *The Bishops and Catholic Politicians*, THE TIDINGS, Apr. 23, 2004, available at [http://www.the-tidings.com/2004/0423/essays\\_text.htm](http://www.the-tidings.com/2004/0423/essays_text.htm) (alluding to Murray's distinction between moral law and civil law and observing that “[t]o have made the moral argument against abortion... is not necessarily to have made the legal argument as well”).

<sup>112</sup> In some contexts, the Church clearly recognizes that it provides principles rather than clear rules of public policy. For example, many conservatives find the distinction easy to make when addressing issues such as poverty and social welfare, but eschew it when it comes to the abortion question.

Once one understands the distinction between the moral position and the question of how to advance it, the labels “pro-life” and “pro-choice” are often too simplistic.

<sup>113</sup> Hughson, *supra* note 1, at 98.

<sup>114</sup> Dennis O'Brien, *No to Abortion: Posture, Not Policy*, AMERICA, May 30, 2005, at 7. See also McBrien, *supra* note 111 (observing that an unenforceable law is worse than no law). Fr. McBrien reminds of the insistence of St. Thomas Aquinas that the law “laid too heavy a burden on the ‘multitude of imperfect

democratic society was the “reasonable disposition to argue our many disagreements in intelligent and temperate fashion, ...and endeavoring to define issues with precision in the light of all the relevant principles and facts.”<sup>115</sup> He thus would have been suspicious of attempts to cut off discussion and consideration of such factors.

Since we are working here within Murray’s framework, it is worthwhile to hazard some brief observations about how Murray might respond to particular legal measures relating to abortion that are or have been the subject of public discussion.

The first question is how Murray would respond to suggestions that the law affirmatively prohibit abortions.<sup>116</sup> Would Murray support such laws or would he say, as he did in the contraception context: I believe abortion is morally wrong, but I do not believe the law should criminalize abortion. Notwithstanding my arguments that Murray’s reasoning leads to the conclusion that abortion is an issue of public morality, he clearly would have been concerned with the lack of enforceability of a ban on abortions.

The simple reality, as the period prior to the Supreme Court’s decision in *Roe v. Wade* made abundantly clear, is that “[l]aws against abortion are...unenforceable, because there would still be a large number of abortions if abortion were to be

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people,’ it would be impossible for such laws to be obeyed and this, in turn, could lead eventually to a disregard for all law.” *Id.*

<sup>115</sup> John Courtney Murray, S.J., *The Bad Arguments People Make*, AMERICA, Nov. 3, 1956, at p.120 (also observing that “whatever corrupts rational public argument corrupts democracy”). Robert Hunt observes that Murray “admits that he has not provide a detailed legal code for society. He leaves the application of moral principles to concrete circumstances ‘to the prudence of the legislator and the [reasoned] will of the people.’” Hunt, *supra* note 5, at 264-65 (quoting Murray, *Leo XIII on Church and State*). See also Gregory A. Kalscheur, S.J., *American Catholics and the State*, AMERICA, Aug. 2, 2004, at \_\_\_ (observing that Murrays’ writings reflect his “deep concern to promote genuine dialoge at the heart of common life in a pluralistic society”).

<sup>116</sup> Presumably that is the aim of those who see, to overturn *Roe v. Wade*; the overturning of the Supreme Court’s decision would pave the way for states to legislate against abortion, either prohibiting it in all cases or only allowing abortion in limited circumstances.

criminalized.”<sup>117</sup> A ban on abortion (either via a constitutional amendment or via a reversal of *Roe* followed by the passage of state laws criminalizing abortion) is likely to do little more than return the United States to a situation where wealthier women find safe means of attaining abortions and poorer women resort to self-induced abortion<sup>118</sup> or other unsafe means of securing one,<sup>119</sup> both of which create serious risks to the health of the woman.<sup>120</sup> The experience of Latin America and other countries where abortion is illegal but where the abortion rate is substantially higher than it is in the United States<sup>121</sup>

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<sup>117</sup> Robert E. Doud, *Moral Law and Civil Law in a Secular Society*, THE TIDINGS, May 21, 2004, available at [http://www.the-tidings.com/2004/0521/doud\\_text.htm](http://www.the-tidings.com/2004/0521/doud_text.htm). Doud also argues that “abortions required proper medical attention [and our] society does not want to take away the legal right to proper medical attention for women choosing to have abortions.” *Id.*

Part of the rationale expressed in the famous Mario Cuomo Notre Dame speech for opposing the proposal of American bishops for a constitutional amendment banning abortion was that such “legal interdicting of all abortions...would be a Prohibition revisited, legislating what couldn’t be enforced and in the process creating a disrespect for laws in general.” Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor’s Perspective*, Sept. 13, 1984.

<sup>118</sup> Self-induced abortion creates a great risk of infection, sepsis, septic shock and may also result in infertility. See Benjamin Honigman et al, *Reemergence of Self-Induced Abortion*, 11 J. Emergency Med. 105, 106-108 (1993) (discussing dangers posed by self-induced abortions).

<sup>119</sup> See News Release: *More Countries Legalize or Ease Restrictions on Abortion*, 1998, available at <http://www.agi-usa.org/pubs/archives/newsrelease2402.html> (reporting findings that maternal morbidity and mortality are lower in countries where abortion is legal). The World Health Organization estimates that about 115,000-204,000 of the 500,000 maternal deaths that occur worldwide result from complications from illegal abortions performed by unqualified persons. E. Rotston and S. Armstrong (eds) *Preventing maternal deaths*. Geneva, WHO 1989.

<sup>120</sup> The World Health Organization defines unsafe abortion as “a procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking the minimal medical standards or both. It is estimated that between 10 and 50 percent of all women who undergo unsafe abortions need medical care for complications.” UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, POPULATION DIVISION, *POPULATION, REPRODUCTIVE RIGHTS AND REPRODUCTIVE HEALTH WITH SPECIAL REFERENCE TO HIV/AIDS 41* (2004) (citing WHO estimates that for period 1995-2000, unsafe abortions resulted “in an estimated annual 78,000 maternal deaths, and hundreds of thousands of disabilities”).

<sup>121</sup> See Stephen D. Mumford, *Why the Pope Can’t Change the Church’s Position on Birth Control: Implications for Americans*, Center for Research on Population and Security, at [www.population-security.org/STLouis99.html](http://www.population-security.org/STLouis99.html) (Jan. 27, 1999) (“[I]n Latin America, where abortion is illegal, abortion rates are two or three times as high as those seen in the United States.”). There is little apparent effort on the part of the Catholic bishops in Latin America to address illegal abortions. See *id.* (“Only legal abortion and legal family planning threaten the Church. It has shown very little interest in illegal abortion. . . . [A]bortion is essentially ignored by the bishops [in Latin America]. Illegal abortion poses no threat to papal authority.”).

suggests the likelihood of that scenario. Murray would believe this reality to be relevant to a decision how to address a desire to reduce abortions. It speaks both to the enforceability (and thus effectiveness of the law) and to whether there would be other adverse consequences flowing from the legal action. Thus, Murray's thought does not inexorably lead to the promotion of laws making abortion illegal.

On the other side, Murray's reasoning clearly can do nothing to provide support for legislation that would affirmatively facilitate abortion. I include in this category laws such as those that would force pharmacists to fill prescriptions for emergency contraception,<sup>122</sup> those that would force hospitals to provide abortions or abortive contraceptives<sup>123</sup> and those that provide government funding for abortions.<sup>124</sup> As I have

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Pakistan is another example of a country which has a high rate of abortion despite the fact that abortion is illegal. See *Making Abortions Safe*, GLOBAL NEWS WIRE – ASIA AFRICA INTELLIGENCE WIRE, Sept. 2, 2005 (also observing that there is a high level of post-abortion complications in Pakistan due to the “resort to unsafe abortions by unskilled health providers”). Similarly, it is estimated that 200,000 illegal abortions are performed each year in Poland, which has very restrictive abortion laws. See Tristana Moore, *On Board Poland's Abortion Ship*, BBC NEWS, Jul. 7, 2003, available at <http://news.bbc.co.uk/1/hi/world/europe/3051436.stm>. The UN Human Rights Committee has expressed concern that Poland's abortion laws lead to a large number of unsafe abortions. See United Nations Population Fund, *The State of World Population 2000*, at Chapter 6, available at <http://www.unfpa.org/swp/2000/english/ch06.html>.

<sup>122</sup> In response to an Illinois pharmacist's refusal to fill a prescription for emergency contraception in February 2005, Illinois Governor Blagojevich issued an emergency rule by executive order that requires pharmacists to immediately dispense FDA approved contraception. See Pharmacy Practice Act, Emergency Action, available at <http://www.idfpr.com/DPR/WHO/ar/emergpharmacy.asp>; Press Release, Office of the Governor, Gov. Blagojevich Moves to Make Emergency Contraceptives Rules Permanent, Apr. 18, 2005, available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=3862>. On August 16, 2005, the Illinois Joint Committee on Administrative Rules voted to make the temporary rule permanent. See *Illinois: Rule Requiring Pharmacists to Fill EC Prescriptions to Become State Law*, FEMINIST DAILY NEWS WIRE, Aug. 17, 2005, available at <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=9224>.

Four states (Arkansas, Georgia, Mississippi, and South Dakota) have enacted legislation allowing pharmacists to refuse to provide such services and a number of others have introduced legislation that would provide such protection. See *Pharmacist Conscience Clauses: Laws and Legislation*, National Conference of State Legislatures, June 2005, available at <http://www.ncsl.org/programs/health/conscienceclauses.htm>.

<sup>123</sup> In November 2004, Congress enacted the Hyde-Weldon Amendment, as part of the Consolidated Appropriations Act of 2005. See P.L. 108-447, 108<sup>th</sup> Cong. The Amendment provides that no government program that receives federal funds may discriminate against a health provider based on the provider's

already discussed, Murray would have not only viewed abortion to be immoral, but would have viewed it as raising an issue of public morality and of justice. Thus, he would not view abortion under the rubric of a right to privacy and would express no support for the Supreme Court's decision in *Roe*.<sup>125</sup> While prudential concerns might cause him to argue that the government ought to refrain from legislating against abortion despite its immorality, he would certainly not support government efforts to positively facilitate a moral evil.<sup>126</sup> He would thus reject the claim that women have any "right" to

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refusal to provide or cover abortions. See Hyde-Weldon Conscience Protection Amendment. The statute was passed to protect providers from the effect of state laws that mandated the provision of abortions by hospitals and lawsuits seeking to force Catholic hospitals to provide abortions.. A lawsuit was filed by the state of California seeking a declaration that the Amendment was invalid. See *California v. U.S.*, No. 05-00323 (N.D. Cal. Filed Jan. 25, 2005).

Congress has gone back and forth on this issue. At one point in the early 1990s, it considered requiring that all hospitals receiving federal funds must provide all reproductive medical services, including abortion, a proposal that led to major opposition by the United States Conference of Catholic Bishops. See U.S. Catholic Bishops' Conference, *Resolution on Health Care Reform*, 23 ORIGINS 97 (1993); see also Peter Steinfelds, *Bishops Plot Stance if Health Plan Covers Abortion*, N.Y. TIMES, May. 12, 1003, at A14.

A not unrelated question is that of forcing religious employers to provide contraceptive coverage to their employees, an issue I discuss at Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J. L. & PUB. POL'Y 741 (2005).

<sup>124</sup> The federal Hyde Amendment restrictions on government funding for abortions were upheld by the Supreme Court in *Harris v. McRae*, 448 U.S. 297 (1980).

In his Notre Dame speech, Mario Cuomo expressed opposition to denying federal funding of abortions, arguing that "it would be nothing more than an attempt to do indirectly what the law says cannot be done directly; worse, it would do it in a way that would burden only the already disadvantaged. Removing funding from the Medicaid program would not prevent the rich and middle class from having abortions. It would not even assure that the disadvantaged wouldn't have them; it would only impose financial burdens on poor women who want abortions." Cuomo, *supra* note 117. As the following textual discussion suggests, I believe Murray would not come to the same conclusion on the funding question.

<sup>125</sup> The harder question is whether Murray would support the Supreme Court's overturning *Roe*. He clearly would not support the Supreme Court's original decision in that case given his view of the morality of abortion and would be concerned that speaking of abortion in rights terms corrodes the value of life. But whether, given concern for the rule of law and precedent, he would favor overturning the decision is less clear.

<sup>126</sup> This is not simply a question of distinguishing between a negative freedom and a positive freedom. Because he would believe abortion to be fundamentally immoral, Murray would not argue in favor of a "right" to be free from government interference. Once abortion is labeled an issue of public morality, the government has the power to act. That it may choose not to do so on prudential grounds does not give anyone a "right" that it not so interfere.

an abortion, either in the sense of a positive right or even a negative right to be free from governmental interference.

The remaining question is: how might Murray react to various legislative enactments that impose restrictions on abortion, such as statutes requiring parental notification,<sup>127</sup> mandatory counseling,<sup>128</sup> or waiting periods<sup>129</sup> or statutory bans on partial-birth abortion?<sup>130</sup> First, since Murray would not acknowledge any right to abortion, he would not analyze such laws the way they are currently analyzed, that is, in terms of whether they unduly burden a woman's exercise of the right to choose. As to prudential judgments, I think it is fair to say that Murray would have been much less troubled by laws of this type than by laws that would ban abortions. For one thing, they don't raise the same concerns about lack of enforceability and therefore risk of contempt

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<sup>127</sup> A number of states have statutes requiring the consent of one or both parents in the case of a minor. *See, e.g.*, Ga. Code Ann. § 15-11-111 et seq.; Ind. Code. Ann. § 16-18-2-267, § 16-34-2-4; Mass. Gen. Laws, Ch. 112, § 12S; N.H. Stat. Ann. § 132.25, 132.26. California voters will vote in November 2005 on Proposition 73, which would amend that state's constitution to require parental notification. *See* [http://www.ss.ca.gov/elections/elections\\_j.htm#2005Special](http://www.ss.ca.gov/elections/elections_j.htm#2005Special). The Supreme Court has agreed to hear an appeal of a First Circuit decision ruling that the New Hampshire parental consent statute was unconstitutional because it failed to provide for an exception to parental consent in the case of a threat to the minor's health. *See* *Planned Parenthood v. Heed*, 390 F.3d 53 (1<sup>st</sup> Cir. 2004), *cert. granted sub nom.* *Ayotte v. Planned Parenthood*, 125 S.Ct. 2294 (2005).

Congress has several times considered legislation that would make it a crime to attempt to bypass state parental notification statutes by transporting a minor across state lines to have an abortion in a state without such a statute, and is expected to consider the question again. *See* Kate Schuler, *Fall Agenda: Parental Notification of Abortion*, CQ WEEKLY, Sept. 5, 2005, at p.2311.

<sup>128</sup> Some states, such as Texas and Mississippi, for example, requires that women be informed of the risk that having an abortion increases the chance of breast cancer. *See* TEX. HEALTH & SAFETY CODE § 171.012 (2003); MISS. CODE ANN. § 41-41-33 (1996).

<sup>129</sup> Tennessee, for example, has a 48-hour waiting period, as well as physician-only counseling and a requirement that women be informed of the risks associated with abortion. *See* TENN. CODE ANN. § 39-15-202 (1978).

<sup>130</sup> Prior to 2000, a number of state statutes imposed a ban on partial-birth abortions. Such bans were struck down by the Supreme Court in *Stenberg v. Carhart*, 530 U.S. 914 (2000). In 2003, the federal government enacted a ban on partial-birth abortions. Partial Ban Abortion Act of 2003, 18 U.S.C. § 1531 (2003). At least three federal courts have held the federal law unconstitutional. *See* *National Abortion Federation v. Ashcrofe*, 330 F. Supp. 2d 436 (2004); *Planned Parenthood v. Ashcroft*, 320 F. Supp. 2d 957 (2004); *Carhart v. Ashcroft*, 413 F.3d 791 (2005).

of the law. For another, while they don't eliminate abortions, such legislative enactments signal the gravity of the abortion decision and clearly will prevent some from occurring.

Nonetheless, Murray would want to ask hard questions about whether such laws created any unforeseen negative consequences. For example, Colin Harte argues in a recently published book<sup>131</sup> that all restrictive abortion legislation – a category which would include legislation requiring counseling, waiting periods and parental consent, but not partial-birth abortion<sup>132</sup> – is intrinsically unjust and violates the principle of solidarity.<sup>133</sup> I suspect Murray might find that particular argument a stretch in reasoning. Nonetheless, he would pay serious attention to arguments about unforeseen adverse consequences.

### **III. The Church's Role in a Pluralist Society**

It is clear that law and morality are not co-extensive. From a Christian perspective, the belief that something is morally wrong should not necessarily lead to the view it should be banned. Jesus relied on the force of his moral authority, not law; Jesus invites people to follow, He does not force. Essential to human dignity is the ability freely to make moral choices, freely to choose God.<sup>134</sup> As expressed in *Dignitatis Humanae*, the inquiry into truth must be free, “carried on with the aid of teaching or instruction, communication and dialogue, in the course of which men explain to one another the truth they have discovered, or think they have discovered, in order thus to

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<sup>131</sup> COLIN HARTE, *CHANGING UNJUST LAWS JUSTLY: PRO-LIFE SOLIDARITY WITH ‘THE LAST AND LEAST,’* (2005).

<sup>132</sup> Harte believes that legislation banning partial-birth abortions does not make an illicit distinction and is not unjust. *See id.* at 237-38.

<sup>133</sup> *See id.* at 239-40.

<sup>134</sup> *See* Richard John Neuhaus, *The Persistence of the Catholic Moment*, 52 CATH. U. L. REV. 269, 279 (2003) (“Man’s dignity therefore requires him to act out of conscious and free choice, as moved and drawn in a personal way from within, and not by blind impulses in himself or by mere external constraint”).

assist one another in the quest for truth. ....[I]t is by personal assent that men are to adhere to [truth].”<sup>135</sup>

Although Murray believed that “[i]n a pluralist society no minority group has the right to impose its own religious or moral views on other groups, through the use of methods of force, coercion, or violence,”<sup>136</sup> he also believed that “[a]ny minority group has the right to work toward the elevation of standards of public morality in a pluralist society, through the use of the methods of persuasion and pacific argument.”<sup>137</sup> That is, the appropriate path is that of proposing rather than imposing.<sup>138</sup> As discussed earlier, in the Contraception Memorandum he was quite clear that the Church ought to be vocal about its position on the morality of contraception.

During the last presidential campaign, several bishops issued statements to the effect that public officials who publicly supported abortion rights should not present themselves for communion.<sup>139</sup> Shortly thereafter, the Vatican Congregation for Divine

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<sup>135</sup>Second Vatican Council, *Dignitatis Humanae* (On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious), ¶ 3 (Dec. 7, 1965). It is the “very dignity of the human person as this dignity is known through the revealed word of God and by reason itself,” *see id.* at ¶ 2, that makes persuasion rather than coercion the appropriate course.

Some of the more recent statement coming out of Rome arguably represent a retreat from the notion of liberty of thought and democratic means espoused in *Dignitatis Humanae*. *See, e.g.*, Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* (July 31, 2003).

<sup>136</sup> MURRAY, WE HOLD THESE TRUTHS, *supra* note 14, at 168.

<sup>137</sup> *Id.*

<sup>138</sup> Jesuit Statement on Abortion, *supra* note 55, at 26 (quoting Murray).

<sup>139</sup> *See, e.g.*, Archbishop Raymond Burke, *Catholics and Political Responsibility*, 33 ORIGINS 557 (JAN. 29, 2004) (Catholic legislators who support procured abortions, “after knowing the teaching of the church, commit[] a manifestly grave sin which is a cause of most serious scandal to others” and “are not to be admitted to holy communion” (quoting Canon 915); Archbishop Alfred Hughes, *Catholics, the Common Good, and Public Policy*, 33 ORIGINS 562, 563 (JAN. 14, 2004) (“When Catholic officials openly support the taking of human life in abortion...they are no longer faithful members in the church and should not partake of holy communion”); Bishop David Zubik, *Catholics in Public Office*, 33 ORIGINS 564 (JAN. 9, 2004) (“Any Catholic legislator who supports and even more so advocates for abortion...can be a contraction to their faith and can be a scandal to others”).

Worship and Discipline of the Sacraments released *Redemptionis Sacramentum*, which contained the admonition that “anyone who is conscious of grave sin should not celebrate or receive the body of the Lord without prior sacramental confession.”<sup>140</sup> In and of itself, the statement only reaffirms what has always been part of Church doctrine. However, “[w]hen asked at the press conference whether a politician who supports abortion should be denied communion, head of the Congregation for Divine Worship and the Discipline of the Sacraments, Francis Cardinal Arinze responded, ‘Yes.’”<sup>141</sup>

Around the same time, then Cardinal Ratzinger, in his capacity as head of the Congregation for the Propagation of the Faith, sent a letter to U.S. Bishops that suggested that certain politicians “must” be refused communion. The letter stated:

Regarding the grave sin of abortion or euthanasia, when a person's formal cooperation becomes manifest (understood, in the case of a Catholic politician, as his consistently campaigning and voting for permissive abortion and euthanasia laws), his Pastor should meet with him, instructing him about the Church's teaching, informing him that he is not to present himself for Holy Communion until he brings to an end the objective situation of sin, and warning him that he will otherwise be denied the Eucharist... When "these precautionary measures have not had their effect or in which they were not possible," and the person in question, with obstinate persistence, still presents himself to receive the Holy Eucharist, "the minister of Holy Communion must refuse to distribute it." This decision, properly speaking, is not a sanction or a penalty. Nor is the minister of Holy Communion passing judgment on the person's subjective guilt, but rather is

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This was hardly the beginning of “the Communion controversy.” For many years, “Bishops have bared [pro-choice Catholic politicians] from speaking at Catholic functions, denied them Holy Communion, raised the possibility of excommunicating them, and even warned them that they ran the risk of going to hell for their support of abortion rights.” Timothy A. Byrnes, *How “Seamless a Garment? The Catholic Bishops and the Politics of Abortion*, 33 J. OF CHURCH AND STATE 17, 17 (1991). Byrnes gives a good historical account of the response of the American bishops to *Roe v. Wade*. See *id.* at 18-31; Timothy A. Byrnes, *The Politics of Abortion: The Catholic Bishops*, in TIMOTHY A. BYRNES & MARY C. SEGERS (EDS.), *THE CATHOLIC CHURCH AND THE POLITICS OF ABORTION* 14 (1992).

<sup>140</sup> Congregation for Divine Worship and the Discipline of the Sacrament, *Redemptionis Sacramentum*, ¶ 81 (Mar. 25, 2004).

<sup>141</sup> See *Vatican Cardinal Fuels Religious Dispute*, CNN.Com, Apr. 23, 2004, available at <http://www.cnn.com/2004/WORLD/eurpoe/04/23/vatican.kerry>; Amelia J. Uelman, *The Spirituality of Communion: A Resource for Dialogue with Catholics in Public Life*, 43 THE CATHOLIC LAWYER, 289, 291 (2004).

reacting to the person's public unworthiness to receive Holy Communion due to an objective situation of sin.<sup>142</sup>

Abortion, “unlike many other policy issues, is not a matter on which individual national Episcopal conferences are free to apply church doctrine to their own political and social circumstances. ...The Church...is opposed to all direct abortions, plain and simple, and American bishops must teach, advocate, and reinforce that position.”<sup>143</sup>

Denying the Eucharist to politicians on the basis of their voting record is not something that is supported by most Catholics.<sup>144</sup> What about Murray? How would he react to the denial by Bishops of communion to legislators who support abortion rights? Some have offered suggestions as to what his response might be.

In May of 2004, forty-eight Democratic congressmen wrote a letter to Cardinal McCarrick expressing their concern about statements made by members of the Catholic hierarchy indicating that communion should be withheld from certain legislators.<sup>145</sup> The letter references Murray’s distinction between public and private morality and expressed the need for those who represent constituents to “at times, separate our public actions,

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<sup>142</sup> Joseph Cardinal Ratzinger, *Worthiness to Receive Holy Communion: General Principles*, ¶ 5-6, available at <http://www.priestsforlife.org/magisterium/bishops/04-07ratzingerommunion.htm>. Notwithstanding the “must,” Cardinal Theodore Edward McCarrick, head of the “domestic policy” commission of the U.S. Conference of Catholic Bishops, suggested that conversations and other correspondence between the Bishops and Rome make clear that the denial is not mandatory and the ultimate decision to deny is up to individual bishops. See Alan Cooperman, *Bishops Avoid Abortion Showdown*, WASH. POST, NOV. 18, 2004, at p.A12.

<sup>143</sup> Byrnes, *supra* note 139, at 34.

<sup>144</sup> “Catholics are generally supportive of having religion influence politics, but they strongly disapprove of church endorsement of candidates and 72% of Catholics said it was improper to deny communion to voters.” *Religion, Law & Politics’ Generates Lively Discussion*, INITIATIVE REPORT, Mar. 2005, at 1, 2. For scholarly discussions of the issue, see Gregory C. Sick & Charles J. Reid, Jr., *Abortion, Bishops, Eucharist, and Politicians: A Question of Communion*, 43 THE CATHOLIC LAWYER 255 (2004); Uelman, *supra* note 141.

<sup>145</sup> *Letter from 48 Democratic Congressmen to Cardinal McCarrick*, May 10, 2004, available at [www.wf-f.org](http://www.wf-f.org).

from our personal beliefs.”<sup>146</sup> However, if one accepts my arguments above that abortion is appropriately viewed as a matter of public and not private morality, an appeal to Murray based on the distinction between public and private morality is not persuasive.

In *My Conscience, My Vote*,<sup>147</sup> David R. Obey appealed to Murray’s arguments in responding to the decision of Bishop Raymond L. Burke of La Crosse, Wisconsin, to deny him communion based on his legislative voting record on abortion.<sup>148</sup> Obey suggested that “the basic problem” was that he was “a John Courtney Murray kind of Catholic, while Archbishop Burke is not” and that Murray’s thinking, as expressed both in the Contraception Memorandum and in other writings, supported Obey’s decision to “decline to force [his] views into laws that, if adopted, would be unenforceable and would tear this society apart.”<sup>149</sup> Obey had no quarrel with the Church attempting to win arguments through persuasion; indeed, he “applaud[ed] the actions of the Catholic hierarchy in trying to win the public debate about the morality of abortion.” However, he believed Bishop Burke’s attempt to “use his interpretation of theology to coerce [him] into taking specific positions on matters...of constitutional law” was illegitimate.<sup>150</sup>

Murray certainly recognized that Vatican II signaled an acceptance of individuals’ growing consciousness of their dignity of persons, which requires that “[they] act on

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<sup>146</sup> *Id.*

<sup>147</sup> America Aug. 16, 2004, at 11-12.

<sup>148</sup> Over a period of a year, Bishop Burke and Obey exchanged private letters concerning the bishop’s unhappiness with Obey’s votes on several issues, in particular the question of placing limits on access for military hospitals for abortions for female military personnel. Subsequently, Burke send Obey a letter threatening “to use his ecclesiastical authority to punish [Obey] if [he] did not conform his voting record to [the Bishop’s] views of what Catholic dogma required.” *Id.* at 10.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 12.

[their] own on [their] own responsibility and therefore in freedom.”<sup>151</sup> In other words the dignity of the human person cannot be satisfied by forcing submission of the will.

However, he also understood and accepted the “corrective or punitive” function of Church authority, although he believed it had to be performed with regard to due process<sup>152</sup>

However, I believe Murray’s reaction to the denial of the Eucharist to politicians would depend on the basis for the denial. He would not view denial of Eucharist based on a politician’s voting record on particular pieces of abortion regulation as an appropriate exercise of Church authority. As to that, he would have been sympathetic to Obey’s characterization of Bishop Burke’s actions as an attempt to “use his interpretation of theology to coerce [him] into taking specific positions on matters...of constitutional law.”<sup>153</sup>

It is one thing for the Church to exercise its corrective or punitive function on an issue of morality; Murray would clearly not dispute such use. The discussion of the need for prudential judgments regarding how to effectuate the demands of morality,<sup>154</sup>

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<sup>151</sup> John Courtney Murray, S.J., *Freedom, Authority, Community*, AMERICA, Dec. 3, 196, at p.115. *See also* Hughson, *supra* note 1, at 101-02 (discussing centrality of individual conscience to religious liberty and the dignity of the human person). Hughson discusses Murray’s role in *Dignitatis humanae*, which he argues signals the Church’s “recovery of a sense of Christian freedom.” *Id.* at 102. *See also* William R. Luckey, *The Contribution of John Courtney Murray, S.J.: A Catholic Perspective*, in ROBERT P. HUNT & KENNETH L. GRASSO (EDS.), *JOHN COURTNEY MURRAY AND THE AMERICAN CIVIL CONVERSATION* 19, 20 (1992) (observing that Murray was “the moving force behind, and the intellectual architect of, the document *Dignitate Humanae*”).

<sup>152</sup> *See, e.g.*, John Courtney Murray, S.J., *Freedom, Authority, Community*, AMERICA, Dec. 3, 196, at p.115. Murray viewed the corrective or punitive function of authority as “an accidental function, in the sense that it is necessary only because the People of God, on its pilgrim way through history, is a sinful People.” *Id.*

<sup>153</sup> Obey, *supra* note 147, at 12.

<sup>154</sup> *See supra* text accompanying notes 111-133; *see also* Gregory A. Kalscheur, S.J., *American Catholics and the State*, AMERICA, Aug. 2, 2004, at 15, 18 (observing that “[a]n official who fully accepts the church’s teaching on abortion as a grave moral evil still must make a judgment in conscience as to how the law can most effectively deal with that particular evil within the wider context of concern for the common good”).

however, indicates that it is quite another to use it the Church's corrective or punitive function to attempt to force a particular legal action.<sup>155</sup> Murray's acceptance of the need for such judgments and his understanding of individual freedom of conscience suggest that he would agree that "ecclesiastical authority cannot legitimately intervene in a Catholic citizen's conscience by imposing a command to perform or act on a particular political judgment. Prudential judgment, rather, is an inalienable function of the believer's own conscience, formed but not determined by Catholic faith and morality."<sup>156</sup>

I deliberately speak in terms of the illegitimacy of the Church attempting to compel politicians to take particular legal actions. I believe Murray might have a very different reaction to the denial of Eucharist based on a Catholic politician's consistent and vocal support of abortion and refusal to recognize it as an immoral act. If a Bishop's repeated efforts to persuade the Catholic politician that her public actions were inconsistent with essential Church teachings, Murray would arguably be more sympathetic to the use of the Church's corrective action.<sup>157</sup>

## Conclusion

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<sup>155</sup> George Weigel would disagree with this characterization. In an article critical of the *Letter from 48 Democratic Congressmen*, he argued that "the purpose of canonical penalties is remedial; even medicinal; imposing a penalty is intended, not so much as a punishment, but as a prod to conversion. The aim is not retribution, but change of heart and mind." Weigel, *supra* note 101. Although he does not in the letter explicitly conclude that the Bishops' action is correct, his language suggests that he would not view their act as a matter of coercion.

<sup>156</sup> Hughson, *supra* note 1, at 107 (drawing a distinction between the Church's legitimate authority to "preach and teach the gospel in such a way as to bring out its implications for public life and for the political order of society, and therefore to imply judgments on the morality or otherwise of specific public policies" and an illegitimate attempt to "replace or determine juridically the prudential judgment which the individual believer has to make." *Id.*

<sup>157</sup> The letter from Cardinal Ratzinger quoted *supra* at text accompanying note 142 speaks of a politician "consistently campaigning and voting for permissive abortion laws," and continuing to do so after the Bishop takes "precautionary measures." I don't think Murray would be troubled by this formulation.

It was once observed that Murray, as one of the 20<sup>th</sup> Century's foremost exponents of Catholic Social Thought, "was distinguished at all times for his unique grasp of the subject, for his wisdom, his nobility of mind, his loyalty to the Church, and his love of truth."<sup>158</sup> The foregoing discussion suggests that the inclination to look to Murray's thought for guidance on the abortion question is a sound one. Murray has something to say both to the Catholic Church and to policymakers about their approach to the issue.

The Church is not only free to, but must, express its moral judgment about abortion. That is part of its obligation to "preach the faith...teach her doctrine...and pass moral judgment."<sup>159</sup> In doing so, it should use all of its powers of persuasion to promote the sanctity of life and the immorality of taking any life, and the understanding that such protected life begins at conception. Its actions must also effectively and consistently witness the value of life. That means not only focusing pastoral and social ministries on providing services and support for pregnant women but also on protection of the flourishing of human life at all stages.<sup>160</sup>

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<sup>158</sup> Msgr. Pietro Pavan, *Ecumenism and Vatican II's Declaration on Religious Freedom*, quoted in WILLIAM MADGES & MICHAEL J. DALEY, *VATICAN II: FORTY PERSONAL STORIES* 169 (2003).

<sup>159</sup> See supra note 36.

<sup>160</sup> Its effectiveness in persuading of the immorality of abortion may require returning to something like the seamless garment notion, promoting a consistent ethic of life. It has been suggested that promoting a consistent ethic of life "may ultimately persuade a vast, skeptical and largely non-Catholic public that opposition to abortion does not rest upon opposition to women's quality. See John McGreevy, *Catholic and Civic Engagement in the United States*, Paper presented at Spring 2000 Joint Consultation: Commonweal Foundation Faith & Reason Institute, June 2-4, 2000, at n.2, available at <http://www.catholicsinpublicsquare.org/papers/spring2000joint/mcgreevy/mcgreevyfull/mcgreeveypaper1.htm>. (suggesting the "placing single issues in a more systematic framework" has been "[t]he most effective Catholic witness to Christian values in the public sphere"). Those who rejected the seamless garment idea in the past were concerned with making the point that at the level of morality, abortion was a graver evil than other social issues. However, here we are not talking about the issue of morality but of the means to achieve the desired moral goal. One may, for example, believe that abortion is a greater moral evil than society's failure to provide medical care to the impoverished. However, it may be that providing such care is one of the better ways to achieve the goal of reducing or eliminating abortions.

One who understood this broader moral obligation is Joseph Cardinal Bernardin, who espoused the need for a “consistent life ethic.”<sup>161</sup> In the abortion context Bernardin argued that it was necessary to consider the circumstances of conception, the reality that many women wanting to bear children not only lacked the necessary social and economic resources to do so, but also often were left to face the prospect alone.<sup>162</sup> Thus, Bernardin sought to offer prospective mothers emotional and medical support both during and after pregnancy.<sup>163</sup>

Murray’s writings and thought also suggest that the Church should leave the political judgment about how the law should address abortion to others. While it is appropriate for the Church to address the morality of abortion even in its discussions with policymakers, and perhaps even appropriate for the Church to weigh in with its own views on different strategies, it should refrain from demanding particular legislative and judicial responses to abortion as the price of allegiance to the faith, recognizing that the question of means is one on which well-meaning people (even those of faith) may differ.

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In a related vein, there is also some question whether the approach of the Church to issues of sex generally contributes to abortions, which would also suggest that a broader pastoral change may be necessary. One study of reasons women have abortions shows that Catholic women were more likely than non-Catholics to have abortions based on the fear that others would find out that they had sex. “This raises the serious question of whether a punitive atmosphere in matters of sexual morality actually increases the incidence of abortion, leading women to commit a worse act because of fear of retribution for a lesser one.” Whitmore, *supra* note 8 (reporting findings of study done under auspices of Alan Guttmacher Institute).

<sup>161</sup> See, e.g., *The Consistent Ethic, An Interview with Joseph Cardinal Bernardin*, SECOND OPINION 8, Feb. 1988, at 104-05 (quoted in Byrnes & Segers) (“We believe the life is a gift from God and therefore must be protected and nourished at every stage of development...[I]t is the obligation of society to protect life and provide the things needed to enhance that life. This is the theological basis and the starting point of the consistent ethic.”). Even if one accepts that abortion is more central than other life issues, that does not change the reality that the best approach to reducing or eliminating abortions includes taking care of a broader set of human needs.

<sup>162</sup> Bernardin’s “consistent life ethic is discussed by him in many places. See, e.g., THOMAS H. FUECHTMANN, *CONSISTENT ETHIC OF LIFE* (1998); JOSEPH CARDINAL BERNARDIN, *A MORAL VISION OF AMERICA*, ed. John P. Langan (1998).

<sup>163</sup> MaryAnne Borrelli, *The Consistent Life Ethic in State Politics: Joseph Cardinal Bernardin and the Abortion Issue in Illinois*, in TIMOTHY A. BYRNES & MARY C. SEGERS (EDS.), *THE CATHOLIC CHURCH AND THE POLITICS OF ABORTION* 71, 73 (1992).

Murray's message is not limited to the Church. Murray's writings on public and private morality suggest that legislatures would do well to admit that abortion is a matter of public morality, acknowledging that the majority of the American public views abortion to be a moral evil, but to be clear that the question of morality is separate from the judgment of whether and how the law should intervene. Then, rather than debating at the level of public vs. private morality, legislatures could then rationally seek ways to minimize abortion. Heeding Bernardin's admonition on the need to consider the circumstances of pregnancy and the needs of pregnant women, rather than seeking to force a choice on pregnant women, legislatures should focus their efforts on, for example, the promotion of both family planning services<sup>164</sup> and of programs that provide resources for women to bring their pregnancies to term and to care for their children afterwards. By moving the focus on debate and discussion, there may be some hope for moving to a less polarizing atmosphere within which the issue of abortion can be more effectively addressed.

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<sup>164</sup> Such efforts have not found favor with most Republicans. For example, "Republican leaders have by and large ignored" proposals designed to make family planning clinics and contraceptives more available. Whitmore, *supra* note 8.