

## Protecting unborn life: human law and God's law

Douglas W. Kmiec | Feb. 10, 2009

It is argued by some that President Obama's approach of using social and economic support to bolster the protection of unborn life is inadequate without a legal effort to reverse *Roe v. Wade*. As it is generally appreciated now, however, reversing *Roe* in itself does not necessarily secure legal protection for life -- indeed, it could invite the opposite.

Freed of the uniform Supreme Court ruling, the federal government could enact the overbroad Freedom of Choice Act, known as FOCA, and a majority of the 50 states could end up pro-abortion as well.

But let's assume the best, and that reversing *Roe* would trigger a pro-life response in federal or state statute, or both; what would that mean? Professor Vincent Rougeau writing in *America* recently speculated that this would largely amount to telling women that "more of them need to be prosecuted as criminals."

No doubt it will be claimed that jailing women who get abortions is not a "fair representation" of the pro-life argument, but if not, we need to understand why not. If the answer is because doctors or clinics -- not expectant mothers -- would be "punished," doesn't that make the distorted or corrupt anti-life nature of human law under *Roe* just differently corrupt? How is it principled to treat those who secondarily aid and abet the death of another person worse than the principal or primary instigator? That stands criminal law on its head.

Of course, when it comes to human law, as Catholics in a pluralistic society, there are other perspectives. Many citizens -- especially non-Catholics -- would contend that we have already arrived at a type of abortion common ground in terms of human law, especially since *Roe* as moderated by the subsequent opinion in *Planned Parenthood v. Casey* upheld a battery of limits on abortion. The general body politic seems willing to have abortion restricted by human law, but not prohibited, and since as noted above, even overturning these cases would not necessarily have human law coincide with God's, what more from human law should the church require?

At one time, the church fathers taught that the Constitution should be interpreted in light of the "unalienable right to life" in the Declaration of Independence, though it is not apparent that this would be the legal posture of the American church today except in aspiration and prayer. To this end, there are post card campaigns against FOCA in our parishes but none calling upon Congress to propose an amendment to the Constitution to eliminate any doubt that the unborn child is a person both scientifically and legally.

Should the bishops take up this bolder calling? In times past, as I say, this was the message of the church, as it testified alongside such towering Notre Dame scholars of the natural law as Charles E. Rice and the late Edward J. Murphy. For these men of faith, the message was quite simply: "no exceptions" (which is the title of a book by Dr. Rice explaining why even exceptions for the life of the mother could contradict church teaching -- absent some fancy ethical footwork under the "principle of double-effect?"). When it came to having human law and God's law coincide, the church stood for the Human Life Amendment.

Today the church has strategically (might it be said, prudentially in light of the perspectives of other faiths?)

chosen to take incremental steps to conform human law to God's, and perhaps that means that all of us -- the church included -- need to more charitably assess efforts to promote the choice for life premised upon social and economic support. Such support, at a minimum, should physically and materially strengthen the community, and perhaps an economically recovered America will also be spiritually revived such that the Supreme Court will once again describe us, as it did pre-*Roe*, as a "religious people whose institutions presuppose the existence of a Supreme Being."

One thing for certain, as Professor Murphy once wrote: "In a sense this is a very "religious" society. There are all sorts of gods. . . . [T]he question for all of us is not whether we will be guided by an ultimate authority, but who or what that authority will be. Is it to be God? Or is it to be ourselves? Or the state? Or a political party? Or a race? Or an economic class? Or the stars? Or Satan? Or what? Clearly, each of us will choose, and the choice will be consequential."

Consequential, indeed -- under God's law, whether or not human law is made to coincide.

(Douglas W. Kmiec, chair and Professor of Constitutional Law, Pepperdine University, wrote *Can a Catholic Support Him? Asking the Big Question about Barack Obama* , Overlook/Penguin Press.)

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