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Catholics and  
Abortion Law

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# Catholics and Abortion Law

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The issue of abortion law has been troubling us all for many years. It has become even more urgent lately with the emergence of the policy of excommunicating politicians who vote for abortion laws that is mandated by the Congregation for the Doctrine of the Faith and Pope St John Paul II and being applied by some Bishops in the United States. During the run-up to the Irish referendum to repeal the Eighth Amendment and permit abortion in Irish law, in a radio interview a Bishop was asked the question: ‘Can a Catholic in good conscience vote Yes?’ The Bishop’s reply was: ‘Our responsibility is to teach the moral doctrine of the Church, not to tell people how to vote.’ The Bishop’s reply was in contradiction to the policy of the CDF and Pope St John Paul II which lays down that a Catholic is not free to vote for an abortion law. It is my opinion, however, that the Bishop was *correct* and it is the official policy that is mistaken.

## THE FUNDAMENTAL PRINCIPLE

The fundamental principle underlying the discussion about abortion law is the intrinsic evil of the act of abortion, the taking of the life of an unborn child. Pope St John Paul II affirmed the principle, with the full authority of his office, in *Evangelium Vitae*. In §§ 61-62, he gives a comprehensive review of the tradition from Scripture to the Second Vatican Council and *Humanae vitae*, and concludes:

Therefore, by the authority which Christ conferred upon Peter and his Successors, in communion with the Bishops—who on various occasions have condemned abortion and who in the aforementioned consultation, albeit dispersed throughout the world, have shown unanimous agreement concerning this doctrine – I declare that direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human

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being. This doctrine is based upon the natural law and upon the written Word of God, is transmitted by the Church's Tradition and taught by the ordinary and universal Magisterium. No circumstance, no purpose, no law whatsoever can ever make licit an act which is intrinsically illicit, since it is contrary to the Law of God which is written in every human heart, knowable by reason itself, and proclaimed by the Church (EV 62).

No Catholic can dissent from this teaching and one Bishop made the point strongly:

Some say that Catholics who conscientiously disagree with the Church's teaching on the sanctity of life may, in good conscience, support legal abortion or abortion funding. ... Catholics who publicly dissent from the Church's teaching on the right to life of all unborn children should recognize that they have freely chosen by their own actions to separate themselves from what the Catholic Church believes and teaches.<sup>1</sup>

This is quite correct and taken for granted here. The right to life of the unborn child must be the foundation of any Catholic's approach to this issue. The whole question is what the implications of this absolute moral norm must be for the criminal law, and whether or not support for any possible abortion law must inevitably be in contradiction with this fundamental truth.

## THE EXCOMMUNICATION POLICY

This doctrine that abortion is an intrinsic moral evil has been gestating in the Church from the beginning and has now come to definitive judgment after twenty centuries. The judgment that permitting abortion in certain circumstances in the criminal law is also an intrinsic moral evil, because of its close association with the intrinsic moral evil of abortion itself, is a comparative novelty in the Church.

The teaching that abortion is wrong is a long-standing tradition in the Church; the policy of excommunicating Catholic politicians who support an abortion law, on the other hand, is quite *new*. The prohibition was first promulgated by the Congregation for the Doctrine of the Faith in the *Declaration on Procured Abortion* of 1974, and the text runs:

One can never obey a law which is in itself immoral, and such is the case of a law which would admit in principle the liceity

1 'The Obligations of Catholics and the Rights of Unborn Children,' A Pastoral Statement by Most Reverend John J. Myers, Bishop of Peoria, June 1990, VI. Conscience and Dissent.

of abortion. Nor can one take part in a propaganda campaign in favour of such a law, or vote for it (§ 22).

The prohibition is repeated in the encyclical *Evangelium Vitae* (EV), which says that:

In the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it, or to “take part in a propaganda campaign in favour of such a law, or vote for it”. (CDF (1974), § 22) (EV 73)<sup>2</sup>

The *excommunication* policy began in the United States, and Wikipedia tells the story:

The first instance of a pro-abortion rights politician being censured via denial of communion was in 1989. During a special election for the California Senate, Pro-abortion rights Catholic Lucy Killea was barred from communion by Leo Thomas Maher, then bishop of San Diego. She received communion in Sacramento with the consent of Bishop Francis Quinn. ... In January 2003, Bishop William Weigand of Sacramento said Governor of California Gray Davis, a Catholic who supported abortion rights, should stop receiving communion. In 2004, then-Archbishop Burke said he would not give communion to 2004 presidential candidate and Senator John Kerry, in part because of his position on abortion.<sup>3</sup>

The matter was referred to Rome, and in 2004, (the then) Cardinal Ratzinger, as Prefect of the CDF, wrote to the US Bishops in connection with this policy of refusing communion to Catholic politicians:

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.<sup>4</sup>

2 Repeated again by the CDF in the document *Doctrinal Note on some questions regarding The Participation of Catholics in Political Life*. (2002), § 4.

3 Wikipedia article, ‘Eucharistic denial to Catholic politicians over abortion’.

4 Cardinal Joseph Ratzinger, Prefect, Congregation for the Doctrine of the Faith (2004) ‘*Worthiness to Receive Holy Communion: General Principles*’, § 5.

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He also made it clear in the letter that the same policy applies to the Catholic voter as well, when he wrote that:

[a] Catholic would be guilty of formal cooperation in evil, and so unworthy to present himself for Holy Communion, if he were to deliberately vote for a candidate precisely because of the candidate's permissive stand on abortion and/or euthanasia.<sup>5</sup>

The reason given to justify the prohibition of voting for an abortion law is that this choice constitutes formal cooperation with the evil of abortion. It is my contention that that judgment is incorrect, and in support of my contention I offer an account of the traumatic experience that led me to that conclusion.

## THE X-CASE

There was a time when the logic that leads directly from the intrinsic evil of abortion to the intrinsic injustice of any abortion law, and that underlies the excommunication policy, seemed obvious to me. I was aware of the distinction between law and morality in other areas, such as contraception and divorce, but abortion was more serious because of the other human life involved and the distinction was more difficult to apply. The change came about as a result of a traumatic event in recent Irish history known as the 'X-case'. The experience of that event changed everything in this area for me, and the whole story needs to be told. In 1979 the 'Women's Right to Choose' campaign began and in 1981, the Pro-Life Amendment Campaign was formed to lobby for an amendment to the Constitution that would rule out the possibility of a ruling in Ireland along the lines of *Roe v. Wade*, the judgment of the United States Supreme Court of 1973, so that abortion could not be introduced into Ireland without the whole people being involved in the decision. The campaign was successful and, in 1983, on a 54% turnout, the pro-life amendment was passed 67% to 33%. The amendment became Article 40.3.3<sup>0</sup> of the Constitution that said:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate that right.

5 At the end of Cardinal Joseph Ratzinger, Prefect, Congregation for the Doctrine of the Faith (2004) *'Worthiness to Receive Holy Communion: General Principles'*.

I personally supported the campaign at the time and I still consider that this is an excellent statement of any State's obligations in this matter. The amendment fit easily into the Irish jurisprudence of the time, which was fully committed then to the role of the natural law in the interpretation of the Constitution. There were judges who said that the amendment was unnecessary, since the right to life of the unborn child was already enshrined in Irish constitutional law as a natural right that did not need to be formulated. That situation was to change, however, with the X-case in 1992.

In early December 1991, a fourteen-year-old middle-class convent schoolgirl (known in the case as Miss X) was raped by her friend's father. The two families knew each other well and the girl was a regular visitor to her friend's house. The friend's father had begun molesting her in June 1990, a month before her thirteenth birthday. In August 1990, while she was staying with her friend's family when her parents were in Lourdes, he raped her for the first time. The abuse had been getting worse in the year leading up to the December 1991 rape. The girl did not tell anyone of the abuse she was suffering until 27 January 1992. She had been unwell for a number of days and on that day it emerged that she was in the early stages of pregnancy. She told her parents everything that had been happening. Later, the girl confided in her mother that when she found out she was pregnant she had wanted to kill herself by throwing herself downstairs. The girl was referred to a hospital, and on 30 January the crime was reported to the gardai (the Irish police). The distraught girl and her family were in a harrowing situation. After discussing it together they decided the best course was for her to have an abortion. Given the Irish legal ban, that meant leaving the country. They opted for England. As the garda investigation got under way, the parents told a member of the force that they were considering travelling for an abortion and raised the possibility that someone could be present with them in England to carry out a DNA test on the foetus so that the identity of the father could be confirmed.<sup>6</sup>

The police investigation led to the matter coming to the attention of the Attorney General who sought a High Court injunction to prevent the girl from travelling for the abortion on the basis of the right to life of the unborn child. The parents were informed of the injunction so the family cancelled the arrangements for the abortion and returned to Ireland. When they returned from

6 Ruadhán Mac Cormaic, *The Supreme Court: The judges, the decisions, the rifts and the rivalries that have shaped Ireland* (Penguin Ireland, 2016), 284-85.

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London, Miss X's parents brought her to a clinical psychologist who diagnosed her to be 'in shock and coping with the appalling crisis she faced "by a denial of her emotions"'. A full High Court hearing was held and in the judge's summary of the psychologist's evidence, he noted:

She did not seem depressed but he said that she 'coldly expressed a desire to solve matters by ending her life'. In his opinion, in her withdrawn state 'she was capable of such an act, not so much because she is depressed but because she could calculatingly reach the conclusion that death is the best solution'. He considered that the psychological damage to her of carrying the child would be considerable and that the damage to her mental health would be devastating. His report was supplemented by oral testimony. He explained that in the course of his consultation with the defendant she had said to him: 'It is hard at fourteen to go through the nine months,' and that she said: 'It's better to end it now than in nine month's time.' The psychologist understood this to mean that by ending her life she would end the problem through which she was putting her parents, with whom she has a very strong and loving relationship.

At the end of the hearing, the judge 'felt he was left with no option but to make the injunction permanent. Miss X was legally barred from leaving the country.'<sup>7</sup> The injunction against the young girl travelling to England for an abortion seemed to the High Court judge to be demanded by the logic of Ireland's strict abortion law, but the decision provoked outrage in Ireland. 'Within hours of Costello's judgment, 700 people marched to Government Buildings ... In the Dail (the Irish parliament) and on the airwaves the controversy was the only topic of discussion. ... Further afield, marches and vigils took place at Irish embassies and consulates in Britain and the United States.'<sup>8</sup> The Supreme Court met in emergency session and lifted the injunction by finding that the girl had a right to an abortion in Irish law on the grounds that her threat to kill herself constituted a risk to her own right to life, so that she was free to travel to England and this judgment restored calm in the country. I shared deeply in the trauma of those days and have never been the same since.

## THE RESTRAINING ORDER

The aspect of the case that impacted most strongly on me and on the people in general was the imposition of a restraining order on

<sup>7</sup> *Ibid.*, 287.

<sup>8</sup> *Ibid.*, 288.

the young girl; the fact that she was to be interned for the period of her pregnancy until the child was born. The High Court judge felt that he was obliged to take this action for the protection of the life of the unborn child, and one of the Supreme Court judges, who dissented from the majority opinion, made the case for the necessity of the restraining order.

The State's obligation is to do all that is reasonably possible having regard to the importance of preserving life.<sup>9</sup> ... The State therefore can be obliged to take positive action to intervene to prevent an imminent destruction of life and one obvious way is by a restraining order directed to any person who is threatening the destruction of the unborn life where known to the State. That can include restraint of the mother of the child where she is the person or one of the persons threatening the continued survival of the life. ... If that involves restraint upon the removal of the protected life from the jurisdiction it necessarily involves the restraint of the movement of the pregnant woman. A restraint upon leaving the territory of the jurisdiction of the courts would in the ordinary way be a restraint upon the exercise of the constitutional right to travel but the competing right is the preservation of life and of the two the preservation of life must be deemed to be paramount and to be sufficient to suspend for at least the period of gestation of the unborn life the right to travel.<sup>10</sup>

There were many who were not convinced that her threat of suicide constituted a real and substantial threat to her life justifying an abortion under the terms of the Eighth Amendment. Whatever view one takes on that issue, there can be no doubt that Miss X was undergoing a very real trauma in the circumstances. It can also be said that her awareness of the gravity of the decision she was making was weak. She was 14 years old and her parents supported her decision. All these considerations cannot be completely overlooked. There can be no doubt, in any event, that the Irish people wanted the restraining order to be lifted. They did not want the civil authorities of the State to restrain her in this way. The Irish people saw what is involved in practice when the criminal law is used to protect the life of an unborn child according to the strict abortion law that they had chosen by referendum nine years earlier, and they did not like what they saw. And neither did I.

How is one to evaluate this decision to lift the restraining order? Was it formal cooperation in the act of abortion and, therefore, an

9 Attorney General v X, [1992] IESC 1; [1992] 1 IR 1, 72.

10 Ibid., 73.



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intrinsically evil action itself that would merit excommunication? *Evangelium vitae* explains that '(formal) cooperation occurs when an action, either by its very nature or by the form it takes in a concrete situation, can be defined as a direct participation in an act against innocent human life or a sharing in the immoral intention of the person committing it.' (EV 74) The decision not to keep the girl under a restraining order throughout the duration of her pregnancy was neither a direct participation in her act of abortion, nor a share in her immoral intention. It permitted her to travel for her abortion, but did not will it in any way whatever, and is not, therefore, an act of formal cooperation in the act of abortion.

The Irish people clearly made the *prudential judgment*, which I shared, that putting the girl under a restraining order until her child was born was excessive and wrong. I do not consider that this prudential judgment was an objectively evil act of cooperation in the act of abortion. I fully adhere to the right to life of the unborn child, but its protection in this case involved an excessive interference in the *freedom* of the young girl involved. And that was the seed that led me to the position being presented here. It seemed so to me personally, and it was quite clear to me that the people were simply not going to stand for it. And this even though the life of an unborn child would be forfeit as a result. The fact of the matter is that there is a *limit* to what the criminal law can do to protect a child in its mother's womb, or what the people will tolerate or want to be done in their name. Due to the mitigating factors affecting her choice it is quite possible that she was free of grave sin in what she did. Be that as it may I consider that the prudential judgment I made at the time, and would repeat again today, does not constitute an objectively evil act of cooperation in the death of her unborn child. That judgment changed everything for me personally and, I believe, for the Irish electorate, and it prepared the way for what has happened subsequently. The Irish electorate changed their minds about abortion law, and so did I. I joined the majority of the Irish people in making the prudential judgment that the restraining order imposed on Miss X was excessive and wrong. It was not the only possible judgment in the circumstances, but I believe that it was a legitimate one and does not represent reprehensible formal cooperation in the act of abortion. That judgment changed everything for me and is the lynch-pin of the argument being made here, that supporting an abortion law is *not*, ipso facto, formal cooperation in the evil of abortion.

### 'PERMITTING' NOT 'CONDONING' ABORTION

The lesson of the X-case, that a mother could be permitted to abort her unborn child without formal cooperation in the act, needs to be

applied more generally. Crucial here is the important distinction that arises between a law that ‘condones’ or ‘approves’ an act and one that simply ‘permits’ it. The distinction was made by St Thomas, when he said that

human law is said to permit certain things, not as approving of them, but as being unable to direct them. ... It would be different, were human law to approve what the eternal law condemns. ... human law cannot follow the eternal law perfectly.<sup>11</sup>

Cathleen Kaveny develops this point and concludes that ‘there is a vast difference between a legal regime that declares such practices to be fundamental constitutional rights, on the one hand, and one that simply leaves such activities *unpunished*,’<sup>12</sup> holding that certain extenuating circumstances can render it *inappropriate to punish* a woman who obtains an objectively unjustified abortion.<sup>13</sup> Does such a law that permits an abortion constitute formal cooperation in the act of abortion? Formal cooperation involves either ‘direct participation’ in the act or ‘sharing in the immoral intention’ of the person performing it. One can support a law that ‘permits’ abortion without doing either of those things. Permitting an act clearly does not constitute ‘direct participation’ in it, and one can also permit the act without ‘sharing in the immoral intention’ of the person performing it. A person can be ‘personally opposed’ to abortion, but support permitting it in certain circumstances. Such a one, like a Catholic politician, does not ‘formally cooperate’ in the abortion. It is the ‘permitting’ *without* ‘condoning’ that makes the difference. A judgment in favour of a given abortion law may, indeed, be wrong, but it is not intrinsically evil. And so, Catholic politicians who actively support abortion laws, can certainly be criticized, on legal and moral grounds, but they should *not* be excommunicated, for they are not guilty of formal cooperation in the act of abortion. For the reasons given I find that the teaching on excommunication is not persuasive and would respectfully ask for a revision.

#### CONCLUSION

This article has argued the case for the proposition that a Catholic who fully adheres to the teaching of the Church regarding the right

11 I<sup>a</sup>-IIae q. 93 a. 3 ad 3.

12 Cathleen Kaveny, ‘The Limits of Ordinary Virtue: The Limits of the Criminal Law in Implementing *Evangelium Vitae*,’ in *Choosing Life: A Dialogue on Evangelium Vitae*, eds. Kevin Wm. Wilders, S.J., Alan C. Mitchell (Washington, D.C.: Georgetown University Press, 1997), 132-49 at 145. (Emphasis in the original.)

13 M. Cathleen Kaveny, ‘Toward a Thomistic Perspective on Abortion and the Law in Contemporary America,’ *Thomist* 55 (1991), 343-96 at 378-79.

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to life of the unborn child and the consequent moral evil of abortion can still support and vote for a law that does not condone abortion but permits it, in the sense of leaving it unpunished, for good prudential reasons. An overly permissive abortion law is a serious dereliction of the State's duty to protect the fundamental right to life of unborn children, and any politician who supports such a law is making a terrible mistake. But they are not *necessarily* guilty of formal cooperation with the act of abortion itself. They are not 'directly participating' in it and they may not be 'sharing in the intention' of the person committing it. Some politicians do share in that intention. They think that the abortion is morally justified and support it willingly; they are indeed 'pro-abortion'. A Catholic politician, on the other hand, does not 'share in the intention.' They believe that abortion *is* morally wrong, but they consider that the woman should not be restrained by criminal means, and they can do this without 'sharing in the intention' of the act of abortion. Their error is not in their faith but in their prudential judgment of the law that is appropriate in the circumstances, and that is where the argument should be focussed. They are guilty of a serious error in judgment, but they are not guilty of formal cooperation in the act of abortion and should not, therefore, be excommunicated. Instead of excommunicating them, the Bishops should be working closely with them to try to change their minds. In 2004, the Pontifical Council for Culture affirmed that when addressing non-believers

the most appropriate pathway is the dialogue which is personal, patient, respectful, loving, sustained by prayer, and which has at its heart the proposition of the truth in appropriate ways, at the just time, and in the firm belief that the truth is only imposed on its own terms.<sup>14</sup>

This is the approach that the Church should be taking with the secular world around us, especially with fellow-members of the Church with whom we disagree.

To return then to the situation from which we began. The context was the recent referendum in Ireland that repealed the Eighth Amendment of the Constitution. An Irish Bishop affirmed then that it is the responsibility of the Bishops to teach the moral doctrine of the Church and not to tell people how to vote. The argument had been made to support the Bishop's view. The contention is that a Catholic, while fully accepting the Church's teaching that abortion is intrinsically evil, can make the prudential judgment that

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14 Where is Your God?: *Responding to the Challenge of Unbelief and Religious Indifference Today*, Concluding Document of the Plenary Assembly of the Pontifical Council for Culture, 2004, II. 1.

abortion can be permitted in certain circumstances, as the Supreme Court did in the X-case. That would imply that the abortion law in Ireland, under the Eighth Amendment, was too strict and that repealing the amendment was a legitimate option for a Catholic in good conscience.

**Discretion.** To the men and women he was guiding along a spiritual path John of the Cross occasionally gave *apophthegmata* (wisdom sayings) for them to ponder prayerfully and make their own. The practice had a long history in the monastic tradition, inspired by the sayings of the desert fathers. At some point he gathered together about eighty of his apophthegms, and wrote them out in a manuscript (*el manuscrito de Andújar*) that survives to this day. He also penned a short prologue to explain his purpose. Many people, he observed, wished to follow in the footsteps of Christ and thought they were doing so, when in fact they were stumbling on the path and going astray. They lacked discretion, a proper understanding of what it means to become like Jesus ‘in one’s life, conditions and virtues and in the form of nakedness and purity of one’s spirit’ He prayed that his sayings might help them: ‘You, Lord, love discretion, you love light, you love love more than the other operations of the soul; these sayings, therefore, will provide discretion for the journey, light for the road journeyed, and love in the journeying.’

- SAINT JOHN OF THE CROSS, *Wisdom Sayings*, Translated by Terence O’Reilly (Cambridge: Iona) p.viii.