

Bioethics in the Public Forum

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I HAVE BEEN ASKED TO ADDRESS THE FOLLOWING question: How does a bioethicist think and act when he/she abandons the ivory tower of academe and becomes a public policy consultant? Furthermore, I have been asked to make this a personal account or reflection. Behind this latter request, I presume, lies the fact that I was a member of the Ethics Advisory Board of the former Department of Health, Education, and Welfare under Joseph Califano. In the pages that follow, therefore, I shall try to outline how I proceeded in this singular instance. The mischievous implication, of course, is the modest suggestion that this is the way it ought to be done.

Two introductory remarks are in order. First, an advisory board on public policy in the bioethical sphere can deal with a wide range of subjects: abortion, definition of death, treatment of newborns, experimentation on a variety of subjects (e.g., fetuses, children, prisoners), care of the aging, etc. The list is virtually endless because public policy is and ought to be concerned with the welfare of human beings across a broad spectrum of circumstances and conditions. I shall limit my reflections to a single subject: *in vitro* fertilization with embryo transfer. This was an issue to which the Ethics Advisory Board devoted a great deal of time.

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Second, the term “bioethicist” is a broad one. It includes both moral philosophers and moral theologians. I am a moral theologian and a Catholic one at that. What does that mean? In a very general way, it means that I approach concrete moral problems with the conviction that our world is God’s world, that He is its creator and providential overseer, that there are such things as “divine design” and “divine purpose.” Our ethical task is to shape our lives and our world to accord with these purposes and designs.

More specifically, I approach this matter as a Catholic moral theologian. That is not to say that this continuing tradition is the sole proprietor of enlightening perspectives in bioethics, nor that it has not enjoyed its share of distorted perspectives. Nor is it to say that one is or ought to be a slave to papal formulations of conciliar documents. Nor is it to say that one is or ought to be constantly constrained to appeal to explicitly theological warrants for everything one says. Still less does it suggest that all Catholics will or ought to agree with the analyses attempted or the conclusions drawn.

To say that I approach these questions as a Catholic moral theologian means to suggest three things above all: 1) Religious faith stamps one at a profound and not totally recoverable depth; 2) This stamping affects one’s instincts, imagination, etc., and hence influences one’s perspectives, analyses, and judgments; 3) Analyses and judgments of such a kind are vitally important in our communal deliberation about bioethics. Thus, the more precise question is: How does a moral theologian (in the sense explained) play a role in the formation of public policy?

There are probably many identifiable views on this question. Let me mention just a few I have heard.

1. Ethicists, especially religious ethicists, have no place in public policy. Public policy is the precipitate of the pragmatic art of balancing competing secular interests. This balancing is only confused by ethics. Ethics is, in this sense, an abstract academic exercise.
2. Ethics has very little if anything to contribute to public policy. After all, ethics is concerned with values. There is an impenetrable and intractable pluralism on values and the meaning of the good life. The role of public policy is simply to guarantee the freedom of the individual to do his/her own thing, short, of course, of

harming others. The introduction of ethics represents the intrusion of a value system on others, a kind of imposition. A view similar to this is seen in the response by the *New York Times* to the *Wade* and *Bolton* abortion decisions of 1973 (*Roe v. Wade*, 410 U.S. 113, 1973; *Doe v. Bolton*, 410 U.S. 179, 1973). It stated: "Nothing in the Court's approach ought to give affront to persons who oppose all abortion for reasons of religion or individual conviction. They can stand as firmly as ever for those principles, provided they do not seek to impede the freedom of those with an opposite view" (*New York Times* 1973).

3. In a democracy, public policy is a majority determination, a workable consensus. It is crafted by *discovering* the value system of its constituents, not by *changing* their value systems. Since ethics is a normative discipline, one of its tasks is to identify what is wrong with various value systems. Thus, it is unavoidably involved in changing value systems—a task which only complicates and pollutes public policy discussion.
4. There is a place for ethics in public policy, but its place is minimal and prophetic in character. Religious ethics is the ethics of a people, distilled from its story. This story (e.g., the Christian story) is necessarily circumscribed and not shared by all, or even a majority of members of a religiously pluralistic society. In public policy discussions members of a religious (storied) tradition can only bear witness to their story, as they should. But they can hardly expect that in its particularism it would contribute substantially to public policy.
5. Public policy and sound morality are identified. If some action is morally wrong, a healthy community should reflect this in its public policy, for public policy has not only a penal dimension but a pedagogical one. In the mouths of the unsophisticated, this attitude frequently translates its outrage into the stark imperative: "There oughta be a law." In this perspective, ethicists not only contribute to public policy; they really are its principal drafters—especially if they agree with one's own moral convictions.

There are probably a number of other views on the relation of moral theology to public policy, and probably a whole spectrum of shadings of the ones suggested here. I disagree with all five of these postures as described. Different as they are, these attitudes reveal two common

denominators: a particular point of view about the nature of ethics, especially religious ethics; a particular point of view about the relation of morality to public policy. I find myself in disagreement with both of these denominators in the described positions. Before turning to *in vitro* fertilization it is necessary to give the broad outlines of my own position, for it is that position that constituted the premise of my own participation in public policy discussions.

Morality and Public Policy

There is some relationship between morality and public policy. The statement that "you cannot and should not legislate morality" is a very dangerous half-truth. As Daniel Callahan, director of the Hastings Center, has repeatedly observed, we do it all the time. Thus, every civilized state has laws on homicide. The only question is: *What* morality ought we to legislate?

Thus, I take it as obvious and for granted that what is good public policy depends to some extent on morality. For example, if fetal life is to be regarded as disposable tissue (the moral evaluation), then clearly abortion ought not to be in the penal code at all, except to protect against irresponsible and dangerous tissue-scrappers. If, however, fetal life is to be regarded as human life, then there is the *possibility* that taking such life should be in the penal code and prohibited.

I say "possibility" because morality and public policy are both related and distinct. In what sense are they related? As follows. Morality includes a concern for the moral rightness and wrongness of human conduct. Public policy has an inherently moral character due to its rootage in existential human ends or goods. The welfare of the community—the proper concern of law—cannot be unrelated to what is judged promotive or destructive to its individual members, to what is, therefore, morally right and wrong.

However, morality and public policy are distinct because public policy is concerned with the common good—the welfare of the community. Only when individual acts have ascertainable consequences on the maintenance and stability of society (welfare of the community) are they the proper concern of public policy.

What immoral or morally wrongful actions affect the welfare of the community in a way that demands legislation? The famous Wolfenden

report (1957) distinguished sin and crime, the private act and its public manifestation. (Parenthetically, the 1973 *Wade* and *Bolton* abortion decisions reflect this when they see abortion as a private matter, as an exercise of privacy.) Nearly every commentator of my acquaintance views the Wolfenden distinction as inadequate.

Why? Briefly, because all actions that have ascertainable public consequences on the maintenance and stability of society are proper concerns of public policy—whether the actions are private or public, right or wrong, etc. Let duelling be an example. Duelling should not be in the penal code for the simple reason that its legal proscription is unnecessary. There is no need for such a policy. But were duelling a common way of settling disputes—as some have suggested it ought to be for all Texans!—then it ought to be in the penal code. Why? Because it erodes the public level of respect for life in a society, an ascertainable public consequence. The libertarian who defends duelling as a private matter has confused privacy with individualism, and become individualistic in the process. The fact that no person is an island means that even private actions can produce ripples on other shores.

If the private act—public manifestation distinction is an inadequate basis for deciding appropriate matters for public policy, what is the criterion? I believe it is what I shall call “feasibility.” This refers to “that quality whereby a proposed course of action is not merely possible but practicable, adaptable, depending on the circumstances, cultural ways, attitudes, traditions of a people, etc. . . . Any proposal of social legislation which is not feasible in terms of the people who are to adopt it is simply not a plan that fits man’s nature as concretely experienced” (Micallef 1972).

Another word for feasibility is “possibility.” John Courtney Murray, S.J. (1969, 166–67), puts it as follows:

A moral condemnation regards only the evil itself, in itself. A legal ban on an evil must consider what St. Thomas calls its own “possibility.” That is, will the ban be obeyed, at least by the generality? Is it enforceable against the disobedient? Is it prudent to undertake the enforcement of this or that ban, in view of the possibility of harmful effects in other areas of social life? Is the instrumentality of coercive law a good means for the eradication of this or that social vice? And since a means is not a good means if it fails to work in most cases, what are the lessons of experience in this matter?

In summary, then, as a moral theologian I enter public policy discussions convinced of two things: 1) Only those actions with ascertainable effects on the public welfare are apt matter for public policy; 2) Public policy should ban only those activities whose legal proscription is feasible or possible as explained. These are my bridges between morality and public policy.

Ideally, it could be argued, where we are concerned with the rights of others—especially the most basic right (to life), that morality should more easily translate into law. And indeed it does, many times. But in some sense the easier the translation, the less necessary the law. In other words, if an easy translation from law to public policy represents the ideal, it also supposes it. *That* we do not always have, especially in an area such as *in vitro* technology where a central issue is evaluation of early (preimplanted) human life. I will return to this later.

Nature of Religious Ethics

I raise this issue because many persons regard moral theology—occurring as it does within and out of a religious tradition, a storied community—as inherently particularistic or sectarian. If that is the case and if a country comprises various distinct religious communities, it would seem that public policy discussion is stalemated in the standoff of conflicting particularistic stories. In this view, religious ethicists, far from contributing to disciplined public discourse, only complicate it and were better advised to withdraw.

I have no doubt that certain religious ethicists actually fuel this fire by an increasingly isolated sectarian manner of using ethics. But the Catholic tradition from which I come will have no part in this sectarianism. Let a few citations from Vatican II introduce my point: “Faith throws a new light on everything, manifests God’s design for man’s total vocation, and thus directs the mind to solutions which are *fully human*” (Abbott 1966,209). “But only God, who created man to His own image and ransoms him from sin, provides a fully adequate answer to these questions. This He does through what He has revealed in Christ His Son, who became man. Whoever follows after Christ, the perfect man, *becomes himself more of a man*” (Abbott 1966,240).

The Catholic tradition, in dealing with concrete moral problems, has encapsulated the way faith "directs the mind to solutions" in the phrase "reason informed by faith." "Reason informed by faith" is neither reason replaced by faith, nor reason without faith. It is reason shaped by faith and, in my judgment, this shaping takes the form of perspectives, themes, insights associated with the Christian story, that aid us to construe the world theologically.

Let a single example of such a theme suffice here. The fact that we are (in the Christian story) pilgrims, that Christ has overcome death and lives, that we will also live with Him, yields a general value judgment on the meaning and value of life as we now live it. It can be formulated as follows: Life is a basic good but not an absolute one. It is basic because it is the necessary source and condition of every human activity and of all society. It is not absolute because there are higher goods for which life can be sacrificed. Thus, in John 15:13: "There is no greater love than this: to lay down one's life for one's friends." Therefore laying down one's life cannot be contrary to the faith or story or meaning of human persons.

This value judgment (theme) has immediate relevance for care of the ill and dying. It ushers in a basic attitude or policy: not all means must be used to preserve life. Thus, in bioethics, the Catholic tradition has moved between two extremes: medico-moral optimism (which preserves life with all means, at any cost, no matter what its condition) and medico-moral pessimism (which actively kills when life becomes onerous, dysfunctional, boring). Merely technological judgments could fall prey to either of these two traps.

Thus, we are guided by theology. It yields a value judgment and a general policy or attitude. It provides the framework for subsequent moral reasoning. It tells us that life is a gift with a purpose and destiny. At this point moral reasoning (reason informed by faith) must assume its proper responsibilities to answer questions: 1) What means ought to be used, what need not be?; 2) What shall we call such means?; 3) Who enjoys the prerogative and/or duty of decision-making?; 4) What is to be done with the now incompetent, the always incompetent? The sources of faith do not, in the Catholic Christian tradition, provide direct answers to these questions.

The influence of general themes (such as the one described) on biomedical ethics was rendered in the phrase "reason informed by faith." Practically, that means that such themes or perspectives do

not immediately solve the moral rightfulness or wrongfulness of every individual action. That is the task of moral reason when faced with desperate conflict situations—but moral reason *so informed*. James Gustafson (1975) has something similar in mind when he refers to “theological themes” that form the basis of more concrete action guides. He refers to “points of reference to determine conduct.” Similarly, Franz Böckle (1976) of the University of Bonn argues that faith and its sources have a *direct* influence on “morally relevant insights,” not on “concrete moral judgments.”

The question naturally arises: What about those who do not share the story, or even have a different story? If the theological contribution to medical ethics must be derived from a particularistic story, is not that contribution inherently isolating? Those who do not agree with the themes that can be disengaged from the Christian story need only say: “Sorry, I do not share your story.” There the conversation stops. Public policy discussion is paralyzed in the irreconcilable standoff of competing stories and worldviews.

That would be a serious, perhaps insuperable problem if the themes I have disengaged from the Christian story were thought to be mysterious—that is, utterly impervious to human insight without the story. In the Catholic reading of the Christian story, that is not the case. The themes I have lifted out are thought to be inherently intelligible and recommendable—difficult as it might be practically for a sinful people to maintain a sure grasp on these perspectives without the nourishing support of the story. Thus, for example, the Christian story is not the only cognitive source for the radical sociability of persons, for the immorality of infanticide and abortion, etc., even though historically these insights may be strongly attached to the story. In this epistemological sense, these insights are not specific to Christians. They can be and are shared by others.

Roger Shinn (1969) is very close to what I am attempting to formulate when he notes that the ethical awareness given to Christians in Christ “meets some similar intimations or signs of confirmation in wider human experience.” Christians believe, as Shinn notes, that the Logos made fresh in Christ is the identical Logos through which the world was created. He concludes: “They (Christians) do not expect the Christian faith and insight to be confirmed by unanimous agreement of all people, even all decent and idealistic people. But they do expect

the fundamental Christian motifs to have some persuasiveness in general experience."

Since these insights can be shared by others, I would judge that the Christian warrants are confirmatory rather than originating. I have suggested elsewhere (on abortion) that "these evaluations can be and have been shared by others than Christians, of course. But Christians have particular warrants for resisting any cultural callousing of them." Particular warrants might be the most accurate and acceptable way of specifying the meaning of "reason informed by faith." If it is, it makes it possible for the Christian to share fully in discussions in the public forum without annexing non-Christians into a story not their own.

For many years there has been discussion framed in terms of how Athens relates to Jerusalem. Jerusalem, it is argued, tells stories but has no theology, properly so called. Athens analyzes and rationalizes, without need of a story, in lofty independence of all particular stories. Thus, and in stark contrast, if you belong to Jerusalem, you have no need of reason. If you are of Athens you have no need of a story.

The Catholic Christian tradition, as I understand it, refuses to accept the desperate exclusivity of these alternatives. Briefly, it reasons about its story. In the process, it hopes to, and claims to disclose surprising and delightful insights about the human condition as such. These insights are not, therefore, eccentric refractions limited in application to a particular historical community. For instance, the sacredness of nascent life is not an insight that applies only to Catholic babies—as if it were wrong to abort Catholic babies, but perfectly all right to do so with Muslim, Protestant, or Jewish babies. Quite the contrary. Reasoning about the Christian story makes a bolder claim. It claims to reveal the deeper dimensions of the universally human. Since Christian ethics is the objectification in Jesus Christ of what every person experiences of him/herself in his/her subjectivity, "it does not and cannot add to human ethical self-understanding as such any material content that is, in principle, 'strange' or 'foreign' to man as he exists and experiences himself in this world" (Bresnahan 1970). However, a person within the Christian community has access to a privileged articulation, in objective form, of this experience of subjectivity. Precisely because the resources of Scripture, dogma, and Christian life (the "storied community") are the fullest available objectifications of

the common human experience, "the articulation of man's image of his moral good that is possible within historical Christian communities remains privileged in its access to enlarged perspectives on man" (Bresnahan 1970).

That is a bold claim, and even an arrogant one unless it is clearly remembered that Christian communities have, more frequently than it is comforting to recall, botched the job. But it is a claim entertained neither by Jerusalem nor Athens—but one which offers hope of overcoming the partialities of either alternative.

In summary, then, two assumptions or presupposed positions provide the background for my entry into public policy discussions. One concerns the nature of concrete religious ethics (not impervious to insight and reasoning; inherently intelligible and communicable). Another touches on the bridge between morality and public policy (the feasibility test). It is against this background that I now turn to *in vitro* fertilization.

In 1977 the Department of Health, Education, and Welfare (HEW) received an application for support of *in vitro* fertilization. Current regulations of HEW prohibit the support of such research until the Ethics Advisory Board has advised the secretary as to its ethical acceptability. Hence, in 1978 Secretary Joseph Califano asked the Ethics Advisory Board to review the procedure as to its "acceptability from an ethical standpoint."

In the process of our deliberations we discussed many aspects of the procedure (scientific, legal, social, ethical). From the ethical perspective some of the key concerns were: 1) the unnaturalness of the procedure, its artificiality, seen by some members of the public as "tampering with God's plan," "intruding into the mysterious life process," etc.; 2) the status of the embryo in the preimplantation period, the stage at which zygote loss and prior (to clinical application) research would occur; 3) the safety (especially for the prospective child) of the procedure; 4) potentially abusive extensions of the technology.

Concerning several of these points, there was in place a rather firm official Roman Catholic position. For instance, on three occasions Pius XII had condemned (as to be "absolutely excluded") artificial insemination by husband (AIH). The Pontiff viewed AIH as morally inappropriate because the child so conceived is not the fruit of an act *of itself* the expression of personal love. For the good of marriage and the child, conception ought (so he argued) to occur in this way. Pius XII viewed

the conjugal act as having a natural and God-given design which joins inseparably (i.e., ought not be separated) the life-giving and love-making dimensions. Then, he excluded both contraception and AIH. Clearly, the exclusion of AIH provides an *a fortiori* argument against *in vitro* procedure.

Obviously, I was aware of this official position of the Catholic church. However, I was also aware of the corpus of theological writing since that time (Häring, Rahner, Troisfontaines, Curran, Lobo, and many others) modifying the official position. The Catholic tradition is rooted in the conviction that concrete moral problems are not inherently mysterious. They must be approached in terms of the best available arguments and analyses. And these analyses do not yield, in my judgment, the "absolute exclusion" stated by Pius XII.

Pius XII was working with a theology (Roman) that believes it possible to pass a judgment on the "external act alone." This is rooted in the contention that the intention of nature was inscribed in the organs and their functions. In contrast to this, modern theologians—following Vatican II—argue that the criterion of moral rightfulness and wrongfulness is the person *integrally and adequately considered*, not some isolated aspect of the person. I agree with this, and therefore argued that the mere artificiality of *in vitro* procedures was not morally conclusive. Needless to say, I received a fair share of criticism, especially from very conservative Catholic groups. But theologically, integrity demanded of me such an analysis.

One of the most difficult problems we faced on the Ethics Advisory Board was that of the status of the embryo. In the early stages of the work of Steptoe and Edwards (1980), there was considerable zygote loss in the attempt to achieve a "uterine fix." Steptoe estimated that they failed to achieve embryo transfer with about 200 fertilized ova before succeeding. Furthermore, in some places hyperovulation was apparently practiced, only one fertilized ovum being chosen for implantation, the rest being discarded. Are these miniabortions? What are they? Finally, the physician-researchers on the Ethics Advisory Board insisted that prior to clinical application (actual transfer), research is necessary. Without prior research, clinical application would be irresponsible. Is such research a manipulative violation of embryonic integrity? Is it compatible with fundamental respect? This was probably the most difficult ethical problem we faced.

There are two facets to this problem that made it especially interesting

and fascinating, not to say very delicate. First, there is a long Catholic tradition which regards human life as inviolate from *the moment of conception*. This formulation has been used frequently by popes, bishops, and Roman congregations. Second, it is clear that the question of the status of the preimplanted embryo is an evaluative question, not a scientific one. Hence, official Catholic statements about the moment of conception must be seen as evaluative judgments. Whether they are sound evaluations will depend on the convergence of evidence.

One cannot, of course, prove evaluations one way or another. One can, however, assemble information that leads to or suggests an evaluation. I believe that there are significant phenomena in the preimplantation period that suggest a different evaluation of human life at this stage from that made of an established pregnancy (spontaneous wastage, twinning, recombination of fertilized ova, hydatidiform mole, appearance [or not] of primary organizer, etc.). Therefore, I do not believe that nascent life makes the same demands for respect at this stage that it does later. On this basis, I was able to approve—not without fear and trembling—preliminary research aimed at eventual safe embryo transfer. Furthermore, I was able to countenance the loss of embryos in attempted clinical application of *in vitro* fertilization.

However, I was aware that other conscientious persons would hold a different evaluation. Evaluations cannot be decreed. The Supreme Court and its *Wade* and *Bolton* decisions for all practical purposes decreed its own evaluation of nascent life as the morality and law of the land. The Ethics Advisory Board, while unanimously sharing the evaluation I describe above as my own, was aware of the fact that it could not simply decide an evaluation and make it public policy. That would be to repeat a mistake of the Supreme Court and to shortcircuit the feasibility dimension of public policy.

Faced with this problem, the board, at my insistence (a minority report of one would otherwise have been made), inserted language in its report to reflect this problem. We insisted that the phrase “acceptable from an ethical standpoint” be understood to be “ethically defensible but still legitimately controverted.” We wanted to show that at the heart of the problem was an evaluation and that it was inappropriate for a board such as ours to declare the evaluative dispute finished. This leaves the matter inherently open for reconsideration, for revision, etc. But it does provide a sufficient basis for departmental decision for the present.

Dr. Donald Chalkley, formerly Director of the Institutional Relations Branch, Division of Research Grants at the National Institutes of Health, was reported to me as having said (I quote loosely): "McCormick is good at public policy discussion because he leaves his personal religious convictions out of it." Much as I respect Dr. Chalkley, I must reject that interpretation of what I do—and more importantly, what it is appropriate to do. I definitely bring my ethical and religious convictions to public policy debate. However, these convictions are formed within a tradition that maintains that, in perspective, its more basic themes only inform reason and do not replace it. Furthermore, such themes are inherently intelligible and recommendable across religious and cultural traditions because they claim to illuminate the universally human. Therefore, such themes suggest that the task of the ethicist as public policy consultant is one of elucidation, invitation, and persuasion (not enforcement). Moreover, even when reason informed by faith has grappled with concrete problems, there remains the task of determining at various times and in varying circumstances the feasibility of translating reasoned conclusions into public policy.

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