

## **Understandable but Mistaken Law, Morality and the Catholic Church in Canada 1966-1969**

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The 'sixties and 'seventies show an astonishing development in the field of morality and law. In Canada, in 1967, contraceptives and homosexual acts were still forbidden; divorce was granted only for adultery; abortion was outlawed. Today, in 1982, in Canada as elsewhere laws have been "liberalized" and all four have become almost as natural as cereal for breakfast, looked upon by many as a kind of birthright which if not always necessarily desirable for everyone, must certainly be granted as a right freely available to anyone.

This extraordinary development was accompanied in its early stage by new permissive laws which at once reflected and then, in turn, stimulated this development.<sup>1</sup> In Canada such laws were prepared and passed during the years 1966-1969, being among the earliest in the post-war Western world, following closely upon those of Great Britain. This paper examines the role of Canadian Catholics in this development especially as expressed in the Brief of the Canadian Conference of Catholic Bishops (CCC) of October 11, 1966, with respect to the legal prohibition of contraceptives.<sup>2</sup>

This paper argues that the reasoning used to explain the changeover by the bishops from opposition to accommodation of legal contraceptives was defective; that Catholics in general had come to doubt the continued legitimacy of their opposition to more "liberal" legislation; and that the combined consequence of this change in attitude with respect to the legalization of contraceptives and the widening of the grounds for divorce (in 1967) was the undermining of resistance, of Catholics as well as that of others, to the legalization of abortion which followed directly upon the other

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<sup>1</sup> I do not want to discuss the question of the chicken and the egg. I premise my remarks on the view that the 1968-1969 legislative acts reflected changes in society which had taken place already, as well as accelerated these changes by giving them a stamp of approval and legitimation.

<sup>2</sup> The CCC is the national organization of the Catholic Bishops of Canada. In 1968 it numbered 101 episcopal members with a general secretariate divided into various departments in Ottawa. In 1980 it was renamed CCCB, Canadian Catholic Conference of Bishops.

two. Like the other legal changes, the legalization of abortion in 1969 was to be supported by a large bloc of Catholic politicians even though the bishops had rejected it. Another paper will have to deal with less immediate but equally important consequences such as weakening the opposition of Catholics to the contraceptive mentality.<sup>3</sup>

## HISTORY

Before examining the 1966 Brief it is necessary to recall two sets of historical events. The first concerns the spirit among Catholics at the end of the Vatican Council which can only be mentioned here in the briefest of summaries. It was a spirit of optimism, even exhilaration at the fresh wind blowing in the Church, a spirit marked by a desire to turn over a new leaf and abandon old ways, to seek harmony both within the Church and without, especially with the newly discovered 'separated brethren', a spirit marked by a willingness on the part of Catholics to sacrifice or temporarily forego legitimate points of their own in order to meet others more than half way, not only in Church affairs but also in political-legal affairs.

The second series of events concerns the history of contraception. Christians had opposed contraception since the beginning of the Church.<sup>4</sup> Yet it was not until the spread of Malthusian Societies actively promoting birth control in the latter part of the nineteenth century, that legislative action was taken in a number of countries. In the United States a federal law was passed in 1873, forbidding the sending through the mails of "any drug or medicine or any article whatever for the prevention of conception" and also their manufacture, importation, advertisement, sale or possession, on a penalty of up to ten years imprisonment. This law was due to the efforts of Protestants, more particularly to a young Protestant moral reformer, Anthony Comstock, secretary for the New York Society for the Suppression of Vice. Elsewhere legislation on contraception was passed through the combined efforts of Protestants and Catholics, namely in Switzerland, Canada and the Netherlands. Catholics alone passed legislation in Belgium (1923), Spain (1928) and Ireland (1929). In other countries nationalists passed legislation because they were worried about loss of national stature due to a falling birth rate as in France (1920), Italy (1926) and Germany under Hitler.<sup>5</sup>

The law in Canada had been enacted in 1892.<sup>6</sup> It punished with imprisonment of two years anyone advertising or selling "any means or instructions or any medicine, drug, or article intended or represented as a

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<sup>3</sup> This paper is scheduled for the 1983 Learned Societies in Vancouver. "Morality, Politics and the Canadian Catholic Church, 1969-1982."

<sup>4</sup> See John T. Noonan, *Contraception. A History of its Treatment by the Catholic Theologians and Canonists*, Harvard, 1966, p 72 + +

<sup>5</sup> *Ibid*, pp 410-412.

<sup>6</sup> Noonan, *op. cit*, incorrectly states 1909 (p. 412).

means of preventing conception.” Yet, the crime was only a crime when acting “without lawful justification or excuse.” In 1937 an employee of the Parents Information Bureau visiting women to give them instructions on birth control was judged as having acted for the public good and the court dismissed the case against him.<sup>7</sup>

By 1966 the prohibition against contraceptives was to be found under Article 150 of the Criminal Code. In the USA by that time only one state, Massachusetts, still had a law similar to the one in Canada.

While within the Catholic Church opposition to contraceptives had grown stronger during the first half of the twentieth century, opinion within the Church had begun to shift towards acceptance, especially from the 1930's onwards. Among Christian communities outside the Catholic Church the Anglicans took the lead in approving contraception at the Lambeth Conference of August 1930, followed over the next two decades by a number of Protestant denominations. In contrast, Pope Pius XI provided Catholics with a new summary of Catholic teaching on Christian Marriage in his encyclical *Casti Connubii* of 1930. The Pope reiterated the traditional defense of ancient and modern Catholic teaching and condemned contraception as “intrinsically immoral.” As the years went by science continued to provide more and more information about biological aspects of human nature. Thus Catholics, too, found themselves facing increasingly complex questions about disputed and permitted means of controlling conception such as the use of the sterile period which came to be approved by the Church as legitimate in the planning of a family.

At the beginning of the 'sixties the birth control pill made its appearance. Was it a contraceptive or could it be used for medical purposes? If the pill could be judged noncontraceptive, it would not fall under the Church's general ban. Early advisory groups and the Commission set up by Pope Paul VI in 1964 to study this matter seemed to be divided. The debate began to expand about the legitimacy of contraceptives in general. In the spring of 1967 the press published secret reports of two opposing groups within the Commission. But Pope Paul VI felt obliged in conscience to resist the enormous pressure from throughout the Western world to come to a quick decision and was to withhold his answer until the summer of 1968.

In the meantime, during this period of a few years the traditional clear understanding on the part of Catholics of the essential purposes of marriage, the moral laws regulating marital relations and the use of sex outside of marriage, seemed to be replaced by questions and doubts.<sup>8</sup> The media were in full battle array against the Church. In the Council three bishops,

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<sup>7</sup> Rex vs Palmer, 3, *Dominion Law Reports* 493, affirming to D.L.R. 609 (1937), quoted in Noonan, *op. cit.*, p. 412.

<sup>8</sup> With respect to the unity of thought on contraception until the early 'sixties, see Noonan, *op. cit.*, p. 6, or Chapter VI “The Birth Control Battle” in M<sup>rs</sup> George Kelly, *The Battle for the American Church*, New York, 1979.

including Cardinal Léger of Montreal, spoke about a need for doctrinal re-examination, which in turn was proclaimed highly significant and meaningful by *Time* and *Newsweek*.<sup>9</sup> Under increasing pressure from the media and Planned Parenthood groups, theologians, priests and laity found reasons to justify change without waiting for the Pope. Some did so after much soul searching; others without any thought whatever, accepting the pill and other contraceptives as a way of changing their life-style. In general, from 1964 onwards there was a sudden spate of articles and books with arguments in favour of a change.

Among Canadian theologians who declared contraceptives acceptable was Father Gregory Baum, O.S.A. of St. Michael's College at the University of Toronto, at the Council a personal *peritus* of Archbishop Pocock of Toronto. Father Baum was to be a leader in this respect in all of North America.<sup>10</sup> At the end of 1964 when the Council was still discussing the draft *Gaudium et Spes* (Church in the World) Gregory Baum stated in the American Catholic lay weekly *Commonweal* (November 20) that the Council fathers "did not pretend that the Church knew the answers to the urgent questions which married people all over the world ask." Hence Catholics were mistaken in thinking that the Church had made up its mind on contraception – if it could be questioned in Council, it was obviously not infallible. As an historian recently summed it up,

"warming to a theme which would be increasingly dominant in his work in the years ahead, he asserted that the real issue was one's attitude to the world – it should not be regarded as an enemy. The next year, writing in the same journal, (December 24), he formulated the position which came to be adopted by all those who sought to appropriate the Council's authority as the basis for change since the Council had not adopted the traditional terminology of the primary and secondary ends of marriage, it could be assumed to be leaving open the possibility of birth control, and the official teaching was therefore in doubt."<sup>11</sup>

On April 9, 1966, the *Globe Magazine* carried Father Baum's article "Catholics may use contraceptives now." This led to a considerable exchange of letters in the *Globe and Mail*. While Mgr Vincent Foy, presiding judge of the Toronto Matrimonial Tribunal was opposed, most letter writers supported Father Baum claiming that few people disagreed with the view that the moral

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<sup>9</sup> James Hitchcock "The American Press and birth control: Preparing the ground for dissent," *Homiletic and Pastoral Review*, July 1980, p. 18.

<sup>10</sup> [Note 9a in the printed version. All subsequent notes in this version are one numeral higher than in the print version.] In November 1976 Gregory Baum announced that he would no longer continue his priestly work.

<sup>11</sup> *ibid.*, p. 18-19. In Europe theologians such as Bernard Haring and Edward Schillebeeckx had been saying similar things. For Schillebeeckx, see H. Bronkhorst "Dutch Theologians and Doctors Differ on Pill," *Boston Pilot*, March 14, 1964.

decision to use or not to use contraceptives belonged to the individual married couple. In the United States, meanwhile, Baum had been joined by Richard McCormick, S.J., Father Charles Curran and others, including the Jesuit Magazine *America* which ceased to support the papal view from 1966 onwards.

Again, at about the same time as the Baum article, an international petition to the Vatican signed by 527 Catholic laymen warned against maintaining the old directives on contraceptives. Dr. John Rock, a coinventor of the pill, was one who signed. Among the 129 Canadians who signed were Torontonians Professors Larry Lynch, Leslie Dewart, and Mark MacGuigan, P.J. Hunt, social worker with the Catholic Childrens' Aid Society, and R.C.O. Arnold, librarian of York University; forty-seven were French-speaking.<sup>12</sup> Earlier, several contributors to the 1965 book *Brief to the Bishops* had taken a similar stand.<sup>13</sup> Such was the background to the 1966 deliberations of the Standing Committee on Health and Welfare on whether or not the existing prohibition of contraception should be maintained. Clearly, pressure was being exerted on the Bishops from all sides and this at a time when they themselves, together with the Church at large, were puzzled about the moral status of certain aspects of birth control.

#### STANDING COMMITTEE ON HEALTH AND WELFARE

Early in 1966 Prime Minister Pearson decided that the House of Commons Standing Committee on Health and Welfare should hold hearings on the subject of contraceptives. The Committee held public hearings on eleven days from March 1 till April 28, 1966, during which delegates from national or local organizations appeared before it. In going through the Proceedings today one is struck by several features of these hearings.<sup>14</sup> One is the basic unity among most of the submitted briefs and letters and witnesses' testimony. A close examination reveals a fact not generally known at the time, if at all, namely that this testimony came from like-minded groups centred around the closely interlocked Family Planning and the Planned Parenthood Federations of Canada. For example, the United Church Brief, submitted on April 5, was drafted mainly by the Rev. Dr. Frank Fidler, secretary of the Church's Marriage Guidance Council. The same person had appeared already as the chief spokesman for the March 24 presentation of the

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<sup>12</sup> *Globe and Mail*, June 11, 1966.

<sup>13</sup> See J. Wilson, "The Pill and the Conjugal Concept" pp. 174-178, in Harris, Paul (ed), *Brief to the Bishops*, Canadian Catholic Laymen Speak Their Minds, Toronto, Longmans, 1965. Mr. Wilson's opening sentence read: "In recent articles, Father Bernard Haring has used the phrase "responsible parenthood" to describe a conjugal concept that only twenty years ago might have linked his name with Margaret Sanger's..."

<sup>14</sup> *Minutes of Proceedings and Evidence*. Standing Committee of Health and Welfare, House of Commons, first session; twenty-seventh Parliament 1966, pp. 609.

Family Planning Federation of Canada of which he was the President. On April 21 one of the two spokesmen for the Unitarian Church was a Mr. John McNab who had appeared earlier also as a witness for the Family Planning Federation of Canada. At the end of the Unitarian Church hearing he indicated that he was President of Planned Parenthood of Ottawa. The Brief presented on March 24, 1966 by the Family Planning Federation of Canada was not only on behalf of half-a-dozen local Planned Parenthood groups from cities across Canada but also on behalf of the Department of Christian Social Service of the Anglican Church of Canada and the Board of Christian Education of the Presbyterian Church in Canada.<sup>15</sup> When the Anglicans appeared before the Committee three of its four spokesmen proved to be executive members of the above mentioned Christian Social Service Council while the fourth one, the Rt. Rev. Henry Hunt, Suffragan Bishop of Toronto, was chairman of the Clergy Advisory Committee of Planned Parenthood of Toronto. The chief spokesman for the Canadian Welfare Council, Mr. Norman Knight, an official with the Department of Health and Welfare, acknowledged himself to be a member of the Family Planning Association.<sup>16</sup> I did not examine the matter exhaustively but it is quite probable that counting other direct or indirect links with such organizations as the Department of Health and Welfare and the Vanier Institute of the Family, perhaps 80% of all submissions to the Standing Committee may have originated with persons influenced by the Planned Parenthood-Family Planning organizations.<sup>17</sup>

Like-minded groups naturally emphasized similar themes. One standard theme was that the law was being broken, a claim mentioned at once by the very first witness, M.P. Robert Prittie, whose own bill was one of four before the Committee, and who quoted an April 24, 1965 Toronto *Star* editorial "Canada's 3,000,000 lawbreakers" as proof.<sup>18</sup> This charge was repeated throughout the hearings despite the caution of another member whose bill was before the Committee, M. P. , Robert Stanbury, that there had been "a great deal of exaggeration of the extent to which the law has been broken."<sup>19</sup>

A second recurrent theme was overpopulation, almost an obsession with delegates. Dr. Ernest Howse, Moderator of the United Church, went as far

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<sup>15</sup> *Ibid*, p. 120.

<sup>16</sup> *Ibid*, p. 256.

<sup>17</sup> See references on pages 306 and 307 with respect to the Vanier Institute. At this stage the Family Planning Federation was essentially "a lobby group to have the criminal code amended to allow for the dissemination of family planning information," Barbara Bishop, *Activities of the Family Planning Federation of Canada*, Speech delivered at St. John's, Newfoundland, May 11, 1973. By 1966 the FPP had begun lobbying for legal abortions as well. *Western Catholic Reporter*, Editorial, April 21, 1966.

<sup>18</sup> *Ibid*, p. 10.

<sup>19</sup> *Ibid*, p. 41.

as to project a world population of 48 billion for the near future.<sup>20</sup> In the eyes of the witnesses the population crisis made family planning not merely desirable but urgent and absolutely necessary. Consequently, spokesmen were at pain to present the use of contraceptives as the only “responsible” way of parenting. A third, related, theme or rather a cluster of themes was that every child must be a wanted child, that battered children were obviously unwanted children, that the existing law did not permit family planning and that the poor were being discriminated against by not having legal access to contraceptives as a consequence of which they were forced to have children.

All of the above arguments were well received by the Standing Committee, of whose 24 members only three M.P.’s, O’Keefe, Rock and Cowan, proved at all critical. Because of the questions posed by these members at that time a critical reading of the evidence today shows that for many witnesses family planning meant basically planning not to have a family. Also, while many demanded removal of the existing law on the ground that birth control was a private matter, those most committed to birth control indicated clearly enough that they were really hoping and planning for public intervention. There was much talk about “war on poverty,” through preventing the poor from having children. In this respect the worst submission was that of the Welfare Council of Canada which interpreted “responsible parenthood” to mean “the principle that parents *should voluntarily* (my underlining) limit their families to the number of children they can properly support,” something which was to be done with the aid of government intervention on all levels.<sup>21</sup>

When the briefs and witnesses are viewed as a whole, the most striking note is the absence of any discussion on possible social implications of legalizing contraceptives. Only Ralph Cowan, a Presbyterian, persisted in raising questions about the impact of free and legal contraceptives on the destruction of traditional moral standards and on such threats as venereal disease. Almost everyone ignored him and his questions.<sup>22</sup> Instead, just about every discussion of the three-month-long hearings concerned the question of advertising: Whether controls on advertising were necessary or not and if so, whether they were possible. By the end of the hearings evidence had been presented that contraceptives were already being advertised openly and that effective controls would prove virtually impossible.

During the three months of hearings from mid-February to the middle of May several references had been made to the position of Catholics, although by the end of April the Bishops had let it be known that they would be unable to adjust to the Committee’s timetable. They needed considerable

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<sup>20</sup> April 5, 1966, p. 186.

<sup>21</sup> *Ibid.*, p. 250.

<sup>22</sup> Mr. Ralph Cowan was to be the only member of the Committee who disassociated himself from its final report. Later on he was also to be one of the few Liberals to oppose abortion.

more time to circulate their draft to bishops across the country and to seek further approval of any amendments which might come from this consultation.<sup>23</sup> Eventually the Bishops' Brief arrived in October, six months after the close of the hearings. It indicated that the Bishops would not oppose the legalization of contraceptives. Shortly thereafter, in November, the Committee sat twice more to approve its final report and to receive a delegation from the Pentecostal Church of Canada which proved to be the only body in the country opposed to a change in legislation on the grounds that "such permissive amendments... will tend to increase immorality among the youth of our nation, with resultant increases in social disorders."<sup>24</sup>

During the earlier hearings the Committee had heard from two Catholic sources, namely two priest-professors and two groups closely associated with Catholics, the natural family planning organization Serena and the L'Association des Médecins de Langue Française, whose spokesman, Dr. Jacques Baillargeon, was also associated with Serena. These two sources revealed that the opposition of Canadian Catholics to the continuation of a restrictive law against contraceptives was disintegrating. Aside from that everyone was aware, because frequent references were made to it, that the acceptance of the rhythm method proved that the Catholic Church was not opposed to family planning or birth control as such. But almost no one seemed to distinguish between birth control as such and the use of contraceptives. Only the latter was forbidden by law.

The views of the two priests were introduced during the hearing of March 22 when Jean Paul Matte (L. Champlain) read into the Committee's record a letter from them explaining that in their view Catholics would not do morally wrong if they favoured proposed changes in the Criminal Code.<sup>25</sup> They offered the opinion that because the Church's marriage preparation courses mentioned the Church-approved rhythm method, they must be illegal.<sup>26</sup> They referred to the preamble of another of the Bills before the Committee, that of Ian Wahn which stated that:

"The purpose of this bill is to exclude criminal liability, in circumstances where there is no serious danger to the public interest, in respect of acts of birth control which more properly should be left to the individual conscience and to ecclesiastical and moral laws and not made the subject

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<sup>23</sup> *Proceedings, op. cit.*, pp. 288-9.

<sup>24</sup> *Proceedings*, November 11, 1966, p. 588.

<sup>25</sup> The priests were Rev. Louis P. Vezina, O.M.I., superior of the Oblate Fathers' centre for ecclesiastical studies in Ottawa and Director of the Institute of Pastoral Studies, St. Paul's University; and Jean Guy Lemarier, O.M.I., moral theologian. See "Vote favoring changes in Code on birth control not immoral" *Prairie Messenger*, March 30, 1966, p. 1. Also *Proceedings*, March 22, 1966, p. 84.

<sup>26</sup> This notion had been suggested by the *Globe and Mail* several years earlier in one of its several editorial attacks on the Catholic Church and is further proof of the confusion about birth control (in general) and contraceptives as specific means.

of criminal legislation.”<sup>27</sup>

The priests agreed with this preamble, stating that the ‘function of law is not exactly that of morality and that human law is not meant to forbid or punish all evil actions.’ A spokesman for the Voice of Women quickly pointed out to the Committee that in the book *Brief to the Bishops*, Toronto Catholic lawyer John O’Driscoll had taken a position “exactly as set out here” by Father Vezina.<sup>28</sup>

The submissions of Dr. Laurent Potvin for Serena of Ottawa and that of Dr. Baillargeon for the Quebec doctors were similar in nature. Both assumed that their specialty, natural family planning, could not be promoted unless there was freedom for contraceptives. Hence they spoke in favour of that, though they also expressed their uneasiness about methods of contraception as such. Dr. Baillargeon even pointed out that some contraceptives might, in fact, be forms of abortion, a fact erroneously but hotly disputed by Committee member Dr. Brand of Saskatoon.<sup>29</sup> Both doctors pleaded for extensive counselling and controls on the distribution and advertising of contraceptives.

As noted, the Committee discussions ignored the issue of harmfulness. What qualified the preamble’s statement that criminal liability should be removed, was the phrase “in circumstances where there is no serious danger to the public interest.” It was certainly true by traditional Catholic teaching that “human law is not meant to forbid all evil actions,” but whether human law should or should not forbid a particular action depends on whether or not such an action constitutes “a serious danger to the public interest.” Yet this crucial matter was entirely bypassed by the priests while the submissions of the Serena doctors touched upon it only fleetingly and indirectly. The latter’s position was summed up by Dr. Potvin when he stated that “our movement does not wish to impose any personal or religious restrictions by law. Even if we do not recommend the use of such means of contraception, we do not wish to impose our views on those who consider themselves morally justified in using them.”<sup>30</sup>

These two submissions together foreshadowed the October position of the Bishops. The October Brief was to announce the withdrawal of the Bishops’ opposition to the legal prohibition of contraceptives. The Brief based this withdrawal on a double argument. First, that matters of politics belonged to the jurisdiction of the laity and not the bishops and that the laity

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<sup>27</sup> Bill C-40 sponsored by Ian Wahn (L. St. Paul’s, Toronto).

<sup>28</sup> John G. O’Driscoll, “Divorce, Abortion and Birth Control,” pp. 30-40 in Harris, Paul, *op. cit.*

<sup>29</sup> The Serena presentation took place on March 31, 1966; that of the Quebec doctors on April 19. Dr. Potvin’s presentation was recorded in the *Globe and Mail*, April 1, 1966 under the heading “Birth Control Prohibition Outmoded: Catholic M.D.”

<sup>30</sup> *Proceedings*, p. 172.

could decide the question of public law without the knowledge whether the use of contraceptives was morally right or wrong. Second, that the Bishops themselves held the existing law to be contrary to the common good. As will become clear, this position was to consolidate the view that opposition to contraceptives should be regarded in Dr. Potvin's words, as something essentially "personal and religious," something one cannot "impose" on others, something which for others of different persuasion might well be "morally justified."

#### OCTOBER 1966 BRIEF

According to its authors, the Brief of October 1966 had a twofold purpose.<sup>31</sup> First, the Bishops wanted to discuss "how one should conceive the role of a Christian legislator faced with any controversial moral issue." Second, they wanted to present *their* views on the proposed changes in the Criminal Code. The overall theme of the Brief was "that which the Church teaches to be morally reprehensible should not necessarily be considered as indictable by the criminal code of a country."<sup>32</sup>

The Bishops devoted almost four pages of their Brief to the Council's teaching on the role of the laity in general and the Christian legislator in particular. They showed that civil legislation is a task entrusted to the laity, not to the hierarchy; that not everything forbidden by the Church should be forbidden by civil law; that though Christians in public life must be guided by a well informed Christian conscience, they should, nevertheless, "act in their own name as citizens." The Bishops pointed especially to the *Dogmatic Constitution of the Church*, quoting the sentence -

"the faithful should learn to distinguish carefully between those rights and duties which are theirs as members of the Church, and those which they have as members of society... In our time it is most urgent that this distinction ... should shine forth as radiantly as possible in the practice of the faithful, so that the mission of the Church may correspond more adequately to the special conditions of the world today" (No. 36)

Finally, quoting from the *Decree on the Apostolate of the Laity*, (Section 7) the Bishops emphasized once more that the laity acting as citizens "must cooperate with other citizens, using their own particular skills and acting on their own responsibility."

The teaching on the autonomy of the laity was immediately followed by the bishops' position vis-à-vis the existing prohibition of contraceptives. In order to turn a wrongful act into a statutory crime punishable by law they

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<sup>31</sup> Page 13 in C.C.C., *Contraception, Divorce, Abortion*. Three statements by (the) Canadian Catholic Conference. (Discussion outline by CCC Family Life Bureau), Ottawa, August 1968. pp. 64.

<sup>32</sup> *Ibid*, page 6.

said at least four conditions should be fulfilled:

1. It should first of all be clear that the wrongful act notably injures the common good;
2. The law forbidding the wrongful act should be capable of enforcement, because it is not in the interest of the common good to pass a law which cannot be enforced;
3. The law should be equitable in its incidence, i.e., its burden should not fall on one group in society alone;
4. It should not give rise to evils greater than those it was designed to suppress.

The Bishops at once declared the existing law inadequate and deficient “independently of the morality or immorality of various methods of birth prevention.” “A large number of our fellow citizens,” they said,

“believe that this law violates their right to be informed and helped towards responsible parenthood in accordance with their personal beliefs.”

Hence, in their opinion, legislation on contraceptives was an example where it did “not serve the common good to translate moral law into civil laws.” Thus they declared that they would not oppose changes in the legislation on contraceptives if “safeguards against irresponsible sales and advertising... were provided” and if personal freedom was protected. Indeed they went on to say,

“we could easily envisage an active cooperation and even leadership on the part of lay Catholics to change a law which under present conditions they might well judge to be harmful to public order and to the common good.”<sup>33</sup>

Finally, the Bishops warned that the application of these principles would be quite different in regard to that part of the Code which had to do with abortion.

The Brief was the product of team work and extensive dialogue between bishops, priests and laity, the first such endeavour in the history of the Church in Canada.<sup>34</sup>

It did not create a public stir, at least not among English Canadian Catholics due in part, perhaps, to their lack of journals and other national means of communication. However, Bishop Alexander Carter, president of the CCC, did receive criticism by private correspondence, enough to warrant

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<sup>33</sup> See Contraception... *op. cit.* p 17-19. See also *Prairie Messenger*, Oct. 19, 1966, p. 1; *West. Cath. Reporter*, Oct. 13, 1966, pp. 1, 5, 15; *Proceedings Birth Control*, Oct. 11, 1966, pp 466ff. “RC bishops won’t fight legislation making contraceptive sales legal,” *Globe and Mail*, Oct. 12, 1966, p. 12.

<sup>34</sup> *Contraception, op. cit.*, p. 7-8.

a press release a few months later re-iterating the basic points.<sup>35</sup> According to the Bishop many correspondents were “confused.”<sup>36</sup>

## ANALYSIS

The novelty of the Brief consisted above all in the Bishops withdrawing their opposition to the existing law which they considered “inadequate and deficient” because it did not meet all four conditions needed for a proper law; hence, they declared it an example of where it does “not serve the common good to translate moral laws into civil laws.”

Now when a law is declared “deficient,” it is normal for those who make the statement to bring proof. Yet, except for condition 2, the Brief did not contain proofs. Condition 2 stated that a law, in order to be effective, should be enforceable. In 1966 it was public knowledge that contraceptives were being sold under the counter and that some public institutions were not observing the law. That was an awkward situation and an important deficiency. Condition 2, therefore, could be used as an argument to support those who favoured change. This is what the Bishops did when, immediately after having declared Article 150 to be deficient, they stated “The law is not in fact enforced, and the good of public peace might well be lost by attempts to enforce it.”

This is the only proof offered in the Brief. The non-enforcement was indeed a fact. It was the *only* fact. And even this fact was a modest one because the harm which supposedly might come from attempts to enforce the law, could only be speculation. One could just as well project some good coming from enforcement.

The Brief did not offer opinions on the other three conditions. Number 3, stating that the law must apply equally to all, was being fulfilled. This left conditions 1 and 4, both concerned with the supposed but unspecified harmfulness of what was being prohibited. The Brief did not investigate what evils the existing law was designed to suppress. It did not speculate what might happen if the law were to be removed. It did so for the good reason that conditions 1 and 4 were by their very nature beyond proof acceptable to modern society, that is, in the form of verifiable empirical sociological data. Scientific data about what effects a law will have after it has been changed are not available until sufficient time has lapsed after the change has been made. This difficulty was shared by both advocates and opponents of a change. Neither side could bring demonstrable evidence to shore up their case about the possible harmful or non-harmful effects of contraceptives. But what was about to happen in Canada was that the views of those who still *feared* ill consequences for the common good but who had no so-called

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<sup>35</sup> Press-release was dated December 1966. Re-printed in *Newsletter*, Catholic Charities Council of Canada, March 1967, pp. 12-13.

<sup>36</sup> Preface to CCC, *Contraception.... op. cit.*, p. 6.

scientific data to back them up, were dismissed for lack of proof; while those who confidently projected *no* ill effects for the common good had their views accepted, without proof being given or required. The Bishops' Brief belongs to the latter category, insofar as it refused to say anything about possible harm resulting from the law's removal from the Criminal Code.

One other point should be considered. The argument that a law must be changed because it cannot be enforced was very popular at the time, especially with the *Toronto Globe*. But it is not quite as strong an argument as might appear. As one member of the Standing Committee commented, by that token the Ten Commandments should be abolished.<sup>37</sup> The point was that sometimes the value of law consists as much in its teaching as in its enforcement. Moreover, a law may only be partially observed and yet serve a useful function.

The analysis may be summarized as follows. The Brief's argument was the law's inadequacy. Yet, of the four conditions by which to measure whether a law is adequate or not, some kind of proof had been provided for one condition only and even that could be interpreted variously. Hence a preliminary conclusion seems to indicate that in exchange for peace and harmony on the issue of contraception, the Bishops were prepared to sacrifice the law as teacher and take their chances about future ill effects, the latter remaining unexamined and with the surmise of no ill effects presented as self-evident common sense.

What about the second part of the Brief, the argument about the autonomy of the laity in political and social affairs taken from the Second Vatican Council? It is well put and stands on its merits. Unfortunately, it came to be linked to an extraordinary idea expressed in the Brief several times, namely that approval (an by implication, disapproval) of contraception was "an entirely different question" from voting on the law at hand. As the Brief put it: a judgement on the existing law could be made "quite independently of the morality or immorality of various methods of birth prevention."<sup>38</sup> The same idea was emphasized in the press release:

"the question that may come before Parliament is not whether the use of contraceptives is morally right or morally wrong. It is not up to Parliament to decide such a question."

To my mind this view is incomprehensible. I fail to see how a legislator could vote conscientiously on contraceptives without first deciding whether they were good or bad for society, a decision which in itself must surely be related to whether contraceptives were judged to be morally right, wrong or neutral. After all, the Bishops themselves had pointed to the moral character

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<sup>37</sup> March 7, 1966, Stanley Knowles, (NDP, Winnipeg). Knowles favoured legalization nevertheless.

<sup>38</sup> *Contraception.... op. cit.*, pp. 16 and 17.

of the law in question when they stated that this was an example where it does “not serve the common good to translate moral laws into civil laws.” If the Bishops were correct in their view that the moral question of contraceptives was “not up to Parliament to decide,” then they should have asked Parliament to defer its decision until the proper authorities, that is, they themselves as guardians of faith and morality, had decided this issue. As it was, they now left the impression that morality was not involved at all.

Another possible interpretation of the Bishops’ view that law and morality were two radically different things in the case of Article 150, was the idea that the Bishops’ believed the issue had moral overtones for Catholics but not for the public in general. Such an interpretation could be based on the language employed by the Bishops with respect to those who favoured removing the law. The Bishops spoke of helping them towards “responsible” parenthood. They noted that if the law were to be maintained it might well be a case of “violating their right to be informed.” As for Catholic legislators, the Bishops encouraged them to bring about “appropriate” changes. They even envisaged “active cooperation and even leadership” in changing a law, which they said, the laity “might well judge to be harmful to public order and the common good.”<sup>39</sup> Thus the very choice of words seemed to indicate the Bishops’ belief that if contraceptives were not acceptable for Catholics, they might well be so for non-Catholics.

The Brief has some other problems. Even as a procedure, a way of doing things, it raises questions. It was addressed to a public body, a standing committee of the House of Commons, yet it deals mainly with Catholic teaching meant for the Catholic legislator. Moreover, despite its insistence on the laity’s autonomy, it practically pre-empted the freedom of choice of Catholic legislators *not* to go along with the “liberalizing” tendencies. The Brief could have been addressed to the faithful, seeking and encouraging public discussion; instead, it came to the legislators as a final and definitive word.<sup>39</sup> As for the question on everyone’s mind, the one which the Bishops as religious leaders were expected to answer, – that is, the question of the morality or immorality of contraception – to this the Bishops were in conscience unable to respond.

#### SUMMARY

In final analysis the contents of the Brief appear to this author as follows: While retaining the right to speak out on matters of public morality, the Bishops indicated that as a general rule politics pertains to the laity and that the Catholic legislator must essentially follow his/her own conscience in respect to public law.

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<sup>39</sup> This contradiction was noted at the time by the *Catholic Register*, Editorial, October 22, 1966. (See A. de Valk, *Morality and Law in Canadian Politics: The Abortion Controversy*, Montreal, 1974, p. 90).

With respect to the specific problem of Article 150 of the Criminal Code, the Bishops indicated that the general rule should apply. They advised the laity that they could make the decision without further enquiry about the morality or immorality of the use of contraceptives. Despite the general rule just enunciated, the Bishops then presented their own political view of Article 150, presumably as an example how the decision could be made. They declared the continued existence of this Article contrary to the common good of society. They did not do so in virtue of their right to judge whether the use of contraceptives was right or wrong. Rather, they based their stand on the fact that one of four general rules necessary for the proper operation of law seemed inoperative. As for the other three rules, especially the two pertaining to the possible harmfulness to society of permissive legislation, the Bishops remained silent.

It is the view of this author that the Brief's argumentation is unfortunate and that it would have been better if the Bishops had remained silent. As it was, the Brief declared the prohibition of contraceptives to be a purely political matter, soluble by the laity, following their own conscience, basing their decision on the pragmatic rule of whether or not the law could be enforced. In reality, in my view, the political decision on contraceptives could not be separated from its inherent character of being right or wrong as a human act. This rightness or wrongness would also determine whether legalization would prove in the long run harmful or harmless to society, a point of key concern to the propriety or impropriety of passing new legislation.

As for the immediate, short term, consequences, through their withdrawal of opposition against permissive legislation on contraceptives, the Bishops, however unwittingly, were to give further credence to the idea already abroad that law and morality are unrelated and that the law should be neutral in questions of marital or family morality. Contraception was part of family morality. By speaking out against Article 150 the Brief strengthened the opinion of those who argued that the only reasons for opposition to birth control were emotion and religion. Religion, many argued, is purely private and personal and should therefore have no place in legislation.

#### GOVERNMENT'S RESPONSE

In their Brief on contraceptives the Bishops had spoken of certain safeguards "without which," they said, "the common good would certainly suffer." These safeguards were never implemented. With respect to the Bishops' request for protection of juveniles, the parliamentary committee itself already proved lukewarm about preventing advertising and sales to minors. When the Bill was enacted in March 1969, sales and distribution were placed under the Food and Drug Act, hence only for possible checks on the nature and quality of the contraceptive, not as a check on its availability.

By the mid-seventies Planned Parenthood spokesmen were demanding the availability of contraceptives for everyone, including their placement in high school washrooms.

With respect to the Bishops' request for safeguards against coercion and abuse of personal freedom, no such safeguards were added to the Act. Since 1969 the Bishops' apprehension about possible abuses has been justified on a number of occasions by such actions as the forced sterilization of mentally handicapped in Ontario and the secret sterilization of Indian and Eskimo women in Saskatchewan and Manitoba.

While the government's non-compliance with these warnings cannot be held against the Bishops' Brief, it nevertheless throws an adverse light on the Bishops' practical political wisdom. A similar distressing development appeared when, in April 1967, the Bishops applied the distinction between civil and moral law to divorce. While Catholics would continue to reject divorce for themselves, the Bishops stated, they would not insist on having these views imposed on others. However, they added, "we cannot overemphasize that an indiscriminate broadening of the grounds for divorce is not the solution to the problem of unhappy marriages." Hence they suggested "extensive rethinking" of the entire marriage legislation and important changes in divorce procedures with comprehensive counselling services.

In time divorce was made easy, but the Bishops recommendations for counselling and revised divorce procedures came to nothing. The committee, and later the Ministry of Justice, Mr. Trudeau, dealt only with the extension of grounds and refused to accept marriage reconciliation as a government task. In spite of a joint ecumenical protest signed by various church representatives in the fall of 1967, the Minister of Justice refused to go beyond the purely negative role of the law in dissolving marriage unions. The protest was filed and nothing was ever heard of it again. Other sources made it abundantly clear that they considered the moral proposals of the Churches completely unrealistic for law courts based on the adversary system.<sup>40</sup>

## ABORTION

The most important of the short-range consequences of the Brief was that the politicians ignored the Bishops' warning attached to their distinction between civil and moral law, namely

"that the modification of the law in question is not to extend to that part of it which has to do with abortion. For our conclusion would be quite different were there question of such direct destruction of life."

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<sup>40</sup> See for example the editorial "Grounds for Divorce" in the *Winnipeg Free Press*, December 20, 1967.

Two days after the Bishops published the separation of civil and moral law theory and its application to the sale of contraceptives, the Toronto *Globe and Mail* hailed it as something which would apply equally well to divorce and abortion.<sup>41</sup> At the beginning of December 1967 the Minister of Justice, Mr. Trudeau, announced his Omnibus reform of the Criminal Code, including the legalization of abortion. Already on his appointment as Justice Minister on April 3, 1967 it had been noted that he had “strong views on laws governing divorce, birth control and abortion. His views are liberal.”<sup>42</sup> On December 15, 1967 speaking at the second reading of the Bill to widen grounds for divorce he said in Parliament:

“We are now living in a social climate in which people are beginning to realize, perhaps for the first time, that we are not entitled to impose the concepts which belong to a sacred society upon a civil or profane society. The concepts of the Civil society in which we live, are pluralistic and I think this Parliament realizes it would be a mistake for us to try to legislate into the society, concepts which belong to a theological or sacred order. These are very important concepts no doubt, but they should not by themselves be considered as the sole guide for government.”

The boldness of Mr. Trudeau’s move on abortion vis-à-vis the Catholic Bishops and the Catholic community is best appreciated by recalling that the announcement came on December 21, 1967 when the combined House of Commons-Senate Committee-hearings on abortion had not yet reached their half-way mark, when the promised statement from the Catholic Bishops had not yet been received, and after the Committee’s halfway report had been doctored up first so as to approve abortion, while most of its members had left already for their Christmas holidays.<sup>43</sup>

While the Bishops clearly disapproved of legalizing abortion, they did not change their attitude towards the political process. The Bishops issued a pastoral letter in opposition to abortion in January 1968, rather than a Brief to the government, but this slight was noticed by nobody. A CCC delegation headed by Bishop De Roo eventually did appear before the Parliamentary Committee in March to explain this pastoral letter. For all practical purposes, its presentation was self-defeating. It began with: We are not here to impose our view...” and concluded with: “we do not believe that our moral principle must be enshrined in Criminal Law.”<sup>44</sup> Needless to say, with such an attitude it wasn’t.

There followed a year's delay. Yet during it there was no concerted effort

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<sup>41</sup> “Recipe for Workable Laws,” *Globe and Mail*, October 14, 1966 Editorial.

<sup>42</sup> Martin O’Malley, “RC Bishops preparing fight on abortion,” *Globe*, April 7, 1967.

<sup>43</sup> See A. de Valk, *op. cit.*, pp. 72-80.

<sup>44</sup> *Ibid.* page 79. The opening statement was by Bishop De Roo, the closing one by Fr. Sheridan. S.J.

to inform and educate the legislators, no attempt to counter false arguments; no prophetic stand. The post-Vatican II spirit mentioned at the beginning of this paper, the spirit of optimism, harmony and goodwill, of being the first to make concessions wherever possible, of being the first to make a gesture of reconciliation, was too pervasive and too dominant even for the issue of abortion to disturb it.

On July 29, 1968 Pope Paul VI published his long awaited answer on the birth control question. It rejected contraception unequivocally. A month later Bishop Alexander Carter, in his preface to the CCC booklet with the three statements on contraception, divorce and abortion wrote:

“The fact that this booklet is being published subsequent to the promulgation of *Humanae Vitae* adds to its interest. Nothing in the encyclical, to my mind, is in conflict with the position of the Canadian Bishops.”<sup>45</sup>

Yet, the Toronto *Globe and Mail* had noticed the day after the encyclical’s date of publication that the Pope’s stand was the opposite of that of the Canadian Bishops. Instead of *withdrawing* opposition to changes in the law such as contraceptives and divorce, the Pope appealed to public authorities to *resist* “that by legal means practices contrary to the natural and divine law be introduced into that fundamental cell, the family.”<sup>46</sup> Happily for the *Globe*, it was able to report right away that the Pope’s “dangerous” appeal would have no effect whatever on the newly elected government of Prime Minister Trudeau; its plans to proceed with birth control and abortion legislation had not been changed. The Prime Minister and the new Minister of Justice, the reporter observed, were both Catholics who knew how to separate “private religion and public business.”<sup>47</sup>

Thus it came about that the legalization of abortion was introduced, defended and pushed through by a heavily Catholic Party, thereby making Canada the only country in the world where Catholics bear this responsibility. Fortunately for the reputation of the Canadian Catholic community, some individuals as well as delegates from various groups and from the Catholic Hospital Association had vigorously spoken out against legalization.<sup>48</sup> Moreover, at the time of the vote not all Catholic legislators

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<sup>45</sup> *Contraception... op. cit.*, p. 6.

<sup>46</sup> *Humanae Vitae*, Section 23.

<sup>47</sup> See A. de Valk, *op. cit.*, p. 99 The new Minister of Justice was John Turner.

<sup>48</sup> When the CCC office even refused to react to a Canadian Press report that the Bishops were not opposed to the legislation, the Director of the Catholic Hospital Association, Fr. J.W. Mole, omi, issued a statement condemning the legislation as well as denouncing it from the pulpit in Ottawa’s Resurrection Church. This brought sufficient publicity to postpone any plans to introduce the legislation immediately after Christmas. Officials at the CCC were influenced by the views of Fr. Robert

allowed the desire for harmony and conformity to overwhelm their sense of justice and right. Under the leadership of Real Caouette a handful of Cr ditistes from Quebec, Catholic to the core, fought the legalization tooth and nail much to the annoyance and ridicule of the English Canadian press, but without a public word of support from the Canadian Catholic Conference of Bishops.

#### POSTSCRIPT

The October 1966 Brief of the Bishops was inspired by honest sentiments. “Our willingness to distinguish,” said the Bishops, is “the surest pledge of our desire to join with all men of goodwill.”<sup>49</sup> This paper does not imply that these sentiments were untimely, or not needed, or dishonorable. Rather the purpose of this paper has been to explain that the Brief, honorable as its motives may have been, contained major flaws. Because this flawed thinking still exercises its influence in 1982, I want to return to it once more.

Let us ask once more: why did the Bishops withdraw their opposition to legalizing contraceptives and widening the grounds for divorce, and why did many Catholics do the same to abortion? Answer because they had come to accept, willingly or unwillingly, consciously or subconsciously, what was being hammered into their heads by the secular media and a wide variety of spokesmen and women for the new ethic, namely, that opposition in these matters was purely theological and denominational, in short, for Catholics only. More and more people came to believe that opposition to birth control was a Catholic thing. Wrote Toronto lawyer John O’Driscoll in his article for the book *Brief to the Bishops* published in 1965: “As a product of the separate school system, a Catholic high school and a Catholic College I was always taught that birth control was morally wrong.” Noting a number of practical questions were being raised, he thought the Church should speak out quickly though not in a document on marriage issued by celibates. Meanwhile, he said, let us be free to repeal Article 150 of the Criminal Code.

With respect to divorce Mr. O’Driscoll undoubtedly also represented the thinking of many when he wrote the following:

“We might as well face reality – no amount of education or preaching by Catholics is going to miraculously and overnight convince our non-Catholic brethren that divorce is wrong and contrary to Christ’s teachings. Am I entitled in charity to force my views on a non-believer until such time as he accepts my belief?”<sup>50</sup>

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Drinan, S.J., Law Dean at Boston College, who thought that all laws on abortion should be repealed. Drinan’s views had been reported in the *Globe*, Sept. 8, 1967. Interview with Fr. Mole, Oct. 16, 1981.

<sup>49</sup> CCC. *Contraception...* p. 16.

<sup>50</sup> O’Driscoll, in Harris, *op. cit.*, p. 37.

Mr. O'Driscoll then continued in the light hearted, almost flippant tone, of one who does want to mention a rather exotic but harmless idea:

“It is argued that if the grounds of divorce were widened the incidence of divorce would skyrocket and the whole fibre of our society would be shaken. This I do not believe.”<sup>51</sup>

Neither, apparently, did many other Canadians, including the Bishops. The questions of contraception, divorce and even abortion had become privatized into a sectarian issue and, hence, trivialized into something of little or no importance. Catholics themselves had forgotten that the traditional teaching of the Church in these matters had been and still was rooted in the idea that changes in these areas would inevitably deeply affect the common good and the social fabric.<sup>52</sup>

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<sup>51</sup> *Ibid*, p. 32.

<sup>52</sup> By 1980 there was no doubt whatever that the 1966-1969 changes had done tremendous harm to the common good under all the traditional aspects of injury to society, injury to self, injury to nature and offense to God. This harm includes the physically harmful effects of contraceptives, but above all the spread of the contraceptive mentality with its direct effects on dramatic increases in extra-marital relationships, teenage pregnancies, contraceptive sterilizations, skyrocketing divorce rates, the venereal disease epidemic, teenage suicides and other related disorders. As for abortion, the killing of incredible numbers of the unborn has become a veritable holocaust.