

CATHOLICS FOR A FREE CHOICE

CATHOLICS AND ABORTION

NOTES ON
CANON LAW
NO. 1

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INTRODUCTION

Canon law, the Catholic church's internal law, is a subject most Catholics think they will never need to study. However, the hotly debated and politically polarized issue of abortion has resulted in substantial public assertions about canon law and abortion, both in the case of women who have had abortions and Catholic legislators and activists who have favored legal abortion. Everyone is an expert, claiming that prochoice Catholics are "heretics" or have been "excommunicated" because they have had an abortion or have supported legal abortion. Such finger pointing may be politically useful, but it is not an honest way to deal with differences of belief about abortion.

What does the church's law really say about abortion? We have produced this pamphlet to explain the basics of canon law as it relates to abortion and to clarify what church punishments apply and when they apply. Whether you are a woman who has had an abortion, a doctor who has performed an abortion, a clinic escort, a prochoice legislator, or an interested "person in the pew," we hope this publication will help you. While we can present these diverse situations in general, our most important message is that neither we nor anyone else can make a blanket statement about entire groups of people being excommunicated for abortion.

To help clear up confusion or misinformation about canon law and abortion, this pamphlet presents some fundamental concepts about canon law itself, about the law on abortion in particular, about how the church goes about imposing penalties on its members, about how and when those penalties end, and to whom these laws apply.

We respect the church's law. We respect, too, the law's emphasis on the protection of people's rights—collectively and individually—and hope that a greater and more widely accessible knowledge of the law will only bring more people to share this respect.

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CANON LAW

Canon law is the body of laws that governs the Catholic church. When people refer to canon law, they mean the *Code of Canon Law*, the book containing many of the laws that govern Catholics who celebrate according to the Latin Rite. There are other church laws, though. There are liturgical laws, local laws, international treaties, and even laws for just one or a few people.

The law provides order to the external life of the church. It cannot be a substitute for faith; rather, it should be a reflection of that faith. It is not permanent or set in stone, like the Ten Commandments. It changes as the church changes. The code that we have today was released in 1983, and it is a legal expression of the values and faith that were articulated in the Second Vatican Council.

While this law is closely tied to theology, morals, and faith, its purpose is not to tell Catholics how or what to think. It is designed, by and large, to tell people how to act. Once you are a Catholic, these laws apply to you. As we live our lives as Catholics, these laws influence us in many ways. They prescribe who can celebrate the Eucharist and how it must be celebrated. They tell us what we must do to get married in the church, to baptize our children, and to bury our dead. In addition to the laws for these and other religious events, there are three areas where canon law often impacts the life and work of prochoice Catholics specifically:

- Having an abortion yourself
- Participating directly in a specific abortion
- Holding and advocating prochoice beliefs

These issues are important for prochoice Catholics because they are directly and indirectly addressed in the church’s criminal law. Canon law requires that we interpret its criminal laws very narrowly, focusing only on the case at hand and not making broad generalizations.¹ Canon law urges authorities not to rush to judgment and to use every other means of instructing or admonishing a member of the church before resorting to outright punishment—especially when that punishment involves the restriction of a Catholic’s rights, including the right to the sacraments.²

A great part of what concerns prochoice Catholics when they talk about canon law is the much-touted “automatic excommunication” that some people say applies to almost all prochoice Catholics. These people say that excommunication applies to women who have abortions; people who assist women who have abortions; people who support a woman’s right to safe, legal abortion; politicians who support legalized abortion; and even to people who vote for women’s reproductive rights.

Simply put, no one can rightly state that *everyone* who falls into any of these categories is automatically excommunicated. Furthermore, the law’s “automatic excommunication” provision doesn’t apply to many of these categories of people.

As with all legal questions, one must consider the words used in the law and the context of that law.³ Therefore, to understand the canon law about abortion, we must look at the law itself and investigate what that law means before deciding whether anybody has been “automatically excommunicated.”

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THE *CODE OF CANON LAW* AND ABORTION

There are two laws in the *Code of Canon Law* that relate to abortion. The first is canon 1398, which states, “A person who procures a completed abortion incurs a *latae sententiae* [automatic] excommunication.”⁴ This is the only canon that refers specifically to abortion.

The second canon that comes into play is canon 1329§2, “Accomplices who are not named in the law...incur a *latae sententiae* penalty attached to an offense if it would not have been committed without their efforts and the penalty is of such a nature that it can punish them....”⁵ While not specifically about abortion, this is a general principle in canon law that could be applied to the case of abortion in some specific, limited circumstances.

Canon 1398

“A person who procures a completed abortion incurs a *latae sententiae* excommunication.”

WHAT DOES IT MEAN?

A Person

To decide whether punishment under this canon is available or appropriate, one must consider many legal questions. Was the person capable of committing a crime? Is she eligible for sanctions? Were there mitigating factors?

The law says, “no one is punished unless the external violation of a law committed by the person is seriously imputable to that person by reason of malice or negligence.”⁶

This means that church's criminal law is not to be applied indiscriminately; normally, only someone who made a conscious, deliberate, free choice to violate the law should be punished.

There are characteristics that make a person incapable of committing a crime, or ineligible for punishment under the law, or eligible only for a lesser punishment than the law allows. One has to address these concerns for each alleged crime. Considerations include:

- Canon law recognizes that people who habitually lack the use of reason are not capable of committing a crime.⁷ This is like our common law concept of “incompetence” or “insanity.” These people not only do not understand the law, but neither are they able to make a deliberate choice to violate a specific law, nor to consider the many factors that must go into such a decision.
- Everyone else is considered at least capable of committing a crime by violating canon law, but not all of them are subject to penalty. For example, people under the age of seventeen; those who were unaware that they were violating a law; and those who acted in self-defense with due moderation, among others—though they may have committed a crime—are not subject to canonical penalties.⁸

Consider the case of a person who has committed a crime, who knew it was a crime, who was seventeen or older, and who wasn't physically forced to commit the act. Does this person receive whatever punishment the *Code of Canon Law* prescribes? Not necessarily.

- The law considers a host of mitigating factors before meting out punishment. These are familiar concepts we use in our secular legal systems. People who should receive a lesser penalty include those who act in the heat of passion, those under the influence of drugs or alcohol, those who act with immoderate

force in self-defense, and even in the most serious cases, those forced through fear or necessity or serious inconvenience.⁹

- Canon law tempers penalties for those persons who did not knowingly and freely violate its precepts. It has also been argued that people should not be punished, or should be punished less severely, who in conscience believe that their act in a specific case was justified.

Who procures a completed abortion

An unsuccessful or incomplete abortion is not punishable under this law.

Incurs an excommunication

Excommunication is a penalty that is designed to encourage the reform of the person who is being punished. As a result, once a person has reconciled himself or herself to the community, the punishment must cease.

The general rule is that an excommunicated person cannot, under ordinary circumstances, receive or celebrate the sacraments, perform liturgical ministries or functions, or hold an ecclesiastical office.¹⁰ It does not mean that the person is no longer a Catholic.

Latae sententiae

This is the phrase that many people translate as “automatic.” It doesn’t really mean automatic in the sense that we normally use it to explain something that happens independently and instantly. In canon law, it is used to describe the way a person receives punishment without an investigation or trial by another person or people.

In cases of *latae sententiae* punishments, the person who committed the act is, at first, responsible for judging himself or herself according to the law's provisions. Most women who have abortions would probably not find themselves guilty under the law. With few exceptions, we would expect her to judge the mitigating circumstances explained above sufficient to exempt her from the penalty. Indeed, should she find even one mitigating circumstance, the law itself states that she is not bound by the penalty.¹¹

Arguably, it is possible to construct a scenario where a woman could be excommunicated *latae sententiae* for procuring a successful abortion, but within the parameters outlined in canon law the penalty is hardly as “automatic” as popularly believed. Furthermore, and contrary to the general rules about the effects of excommunication outlined above, there is a special situation for people who are excommunicated *latae sententiae*. When the observation of a *latae sententiae* excommunication would cause scandal in the community or would seriously harm a person's reputation, he or she is excused from observing it, unless a bishop has investigated the case and made a public declaration of the excommunication.¹²

CANON 1329§2

“Accomplices who are not named in the law...incur a *latae sententiae* penalty attached to an offense if it would not have been committed without their efforts and the penalty is of such a nature that it can punish them....”

WHAT DOES IT MEAN?

Canon law allows punishment of accomplices to crimes. This is not a novel concept, but in cases where it is difficult to argue that the primary actor incurs a penalty, it would also be very difficult to justify punishing accomplices.

Accomplices who are not named in the law

Some canon laws do name accomplices, but the law on abortion does not. People can be considered accomplices only if they directly participated in a specific, successful abortion.¹³

Incur a latae sententiae penalty attached to an offense

These accomplices would be subject to the same penalty of excommunication that we find in canon 1398.

If it would not have been committed without their efforts

As the criminal law of the church must be interpreted narrowly and precisely on a case-by-case basis, this is the key element in canon 1329§2. The penalty applies, after all other requirements of capability and eligibility have been met, if and only if another person's participation was truly necessary. If in a specific case there is an "accomplice," one must follow the same line of inquiry as for the woman getting an abortion before the accomplice can be said to be excommunicated.

Doctors, when they perform abortions, are the persons most likely to be included as possible accomplices under this canon. We note again that where it is difficult to argue that the woman who had an abortion incurs the penalty, it is also difficult to argue that others, even "accomplices," are punished.

Most people who are threatened with punishment under this canon do not do things that are "truly necessary" for a specific successful abortion, they are not "accomplices," and so this law does not apply to them. The routine activity of hospital administrators, directors of abortion clinics, clinic escorts, and pro-choice politicians does not make them eligible for punishment under this canon.¹⁴

ENDING AN EXCOMMUNICATION

Despite all the conditions and circumstances excusing or limiting the times when having an abortion or being an accomplice to an abortion results in an excommunication, there will be people who decide that their actions have resulted in automatic excommunication. However, the penalty of excommunication is not designed to last forever. If a person thinks he or she has incurred this penalty, he or she can take action to end it.

A person who thinks he or she is excommunicated as a result of participating in a specific abortion can go and discuss the situation with a priest in the privacy and anonymity of the confessional. In confession, bishops can “remit” or end the penalty of excommunication for abortion. In the United States, and in some other countries, diocesan bishops have given priests the permission to remit the penalty when they hear confessions, too. If a priest does not have this permission, he should be able to explain the local procedure and assist the person in fulfilling it.

THE *CODE OF CANON LAW* AND PROCHOICE CATHOLICS

What does the law have to say specifically about punishments for being a prochoice Catholic?

The law says nothing on this subject. Regardless, some people are afraid that they will be punished if their prochoice beliefs are publicly known. Just as often, this fear is supported by statements from vocal and well-funded anti-abortion groups, as well as by some priests and bishops. There are four common concerns in relation to this topic:

- *Excommunication as an accomplice in canon law.*
To be punished as an accomplice in canon law, one's participation in a specific and successful abortion must have been direct, deliberate, purposeful, and necessary. Canon law's criminal punishments are restricted so that one cannot be punished for just thinking about committing a crime, or for merely attempting it, or for failing to complete it. The penalty is for participation in a specific abortion, not for what you think, say, or do to protect or promote safe, legal abortion.
- *Excommunication as a heretic.*
This too is a *latae sententiae* penalty, and so it is investigated and applied in the same way as the excommunication for abortion. But is a prochoice belief heretical? Heresy is a strictly construed concept in both theology and law and is not a term that should be tossed around indiscriminately. Many theologians and canonists agree that while the issue of abortion is worthy of serious discussion in the church, a person who is "prochoice" is not automatically a heretic.
- *Individual threats of punishment by the bishop.*
Bishops can and do make laws in their dioceses, but the law limits the power of the diocesan bishop in some respects when it comes to criminal law. The law states that punishments are only to be meted out as a last resort and when three conditions have been met, namely, scandal resulting from the criminal act cannot be repaired, justice cannot be restored, and the accused cannot be reformed in any other manner.¹⁵ The bishop cannot punish a person with an excommunication without first issuing at least one formal warning.¹⁶

Bishops are expected to strive for unity in penal laws within cities and regions because there should not be a great disparity in the church with regard to what is punished and how it is punished.¹⁷ Penalties should be established, the law says, “only to the extent that they are truly necessary for ecclesiastical discipline.”¹⁸ Even when they are necessary, bishops are generally cautioned against threatening automatic penalties and are not to establish penalties of excommunication “except with the greatest moderation and only for more serious offenses.”¹⁹

However, some bishops have penalized prochoice Catholics. Over the last fifteen years, for example, Bishop Samuel Ruiz Garcia threatened excommunication of prochoice legislators in Chiapas, Mexico; Bishop Rene H. Gracida punished Catholics who worked at clinics where abortions were performed in Corpus Christi, Texas; and Bishop Leo T. Maher denied the sacraments to a politician in San Diego, California, who was running as a prochoice candidate for the California Senate.

- *An ad hoc restriction of rights.*

This category includes questions such as: can the parish priest refuse me communion, or refuse my marriage in the church, or my child’s baptism or enrollment in school, because of where I work, or who I support politically, or for what I think or write about abortion? Unfortunately, the answer is discouraging. While a parish priest should not do that and usually does not have the right to do so, it does happen, and many people feel—and are—powerless to stand up for their rights. Certainly, one who encounters this injustice can appeal to the bishop—there’s even a process in canon law for defending one’s rights against those who abuse or deny them—but dioceses rarely make resources available for lay people to do so.

CONCLUSION

Although getting an abortion is against the church's law, the law itself is quite different from what many think it is. It sometimes feels like any prochoice Catholic is destined for excommunication, mainly due to some bishops' actions and the vocal campaigns of anti-choice Catholics who call for the excommunication of prochoice national and state legislators.

Abortion is a serious matter—physically, morally, religiously, and politically. Church law deals with abortion seriously, but canon law is not a stand-alone field of study. The church's other teachings can be found in scripture; the teaching of church councils, such as Vatican II; as well as teachings of the popes throughout history and from our bishops and theologians.

Changes over the years to theology and law underscore the responsibility of Catholics to form their consciences through inquiry and study, not just by simple reliance on one priest or bishop's teaching or the memorization of a current catechism or through simplistic and generalized interpretations of canon law. The law should be used to teach and inform, not to exclude.

ENDNOTES

The *Code of Canon Law*: Auctoritate Ioannis Pauli PP. II promulgatus. *Codex Iuris Canonici*. Vatican City: Libreria Editrice Vaticana, 1983. Reprinted in *Code of Canon Law, Latin–English Edition*. Washington, DC: Canon Law Society of America, 1983.

English translations of the *Code of Canon Law* from Beal, John P., James A. Coriden, and Thomas J. Green, eds. *New Commentary on the Code of Canon Law*. New York: Paulist Press, 2000.

- ¹ Canon 18.
- ² Canons 213, 221§3, 912, and 1341.
- ³ Canon 17.
- ⁴ Qui abortum procurat, effectu secuto, in excommunicationem latae sententiae incurrit.
- ⁵ In poenam latae sententiae delicto adnexam incurrunt complices, qui in lege vel praecepto non nominantur, si sine eorum opera delictum patratum non esset, et poena sit talis naturae, ut ipsos afficere possit; secus poenis ferendae sententiae puniri possunt.
- ⁶ Canon 1321§1: Nemo punitur, nisi externa legis vel praecepti violatio, ab eo commissa, sit graviter imputabilis ex dolo vel ex culpa.
- ⁷ Canon 1322.
- ⁸ Canon 1323.
- ⁹ Canon 1324.
- ¹⁰ Canon 1331.
- ¹¹ Canon 1324§3.
- ¹² Canon 1352.
- ¹³ Canons 1329§2 and 1398.
- ¹⁴ Coriden, James A. “The Canonical Penalty for Abortion as Applicable to Administrators of Clinics and Hospitals.” *Jurist* 46 (1986) 652-658.
- ¹⁵ Canon 1341.
- ¹⁶ Canon 1347.
- ¹⁷ Canon 1316.
- ¹⁸ Canon 1317: Poenae eatenus constituentur, quatenus vere necessariae sint ad aptius providendum ecclesiasticae disciplinae.
- ¹⁹ Canon 1318: Latae sententiae poenas ne comminetur legislator, nisi forte in singularia quaedam delicta dolosa, quae vel graviori esse possint scandalo vel efficaciter puniri poenis ferendae sententiae non possint; censuras autem, praesertim excommunicationem, ne constituat, nisi maxima cum moderationis et in sola delicta graviora.

CATHOLICS AND ABORTION NOTES ON CANON LAW NO. 1

Catholics for a Free Choice shapes and advances sexual and reproductive ethics that are based on justice, reflect a commitment to women's well being, and respect and affirm the moral capacity of women and men to make sound decisions about their lives. Through discourse, education, and advocacy, CFFC works in the United States and internationally to infuse these values into public policy, community life, feminist analysis, and Catholic social thinking and teaching.

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