

Thoughts towards a Clarification of *Evangelium vitae* #73

Damian P. Fedoryka

CONFUSION IN INTERPRETATION seems to continue in the matter of section #73 of *Evangelium vitae*. To be more precise, one passage, the third paragraph within section #73, is the focus of a radical misinterpretation which ignores the rest of that section. The text in question reads as follows:

A particular problem of conscience can arise in cases where a legislative vote would be decisive for the passage of a more restrictive law aimed at limiting the number of authorized abortions in place of a more permissive law already passed or ready to be voted on. Such cases are not infrequent in [some] nations—particularly those which have already experienced the bitter fruits of such permissive legislation—there are growing signs of a rethinking in this matter.

In a case like the one just mentioned, when it is not possible to overturn or completely abrogate a pro-abortion law, an elected official whose absolute personal opposition to procured abortion was well known could licitly support proposals aimed at *limiting the harm* done by such a law and lessening its negative consequences at the level of general opinion and public morality. This does not in fact represent an illicit cooperation with an unjust law, but a legitimate and proper attempt to limit its evil aspects.

Read in context, the third paragraph of the section, beginning with the words “A particular problem of conscience can arise...” cannot possibly be interpreted as allowing a legislator to vote for an intrinsically unjust law even if he does so with the intention of restricting abortion and at the same time does not personally intend any of the abortions authorized by this law. The claim is that as long as the legislator did not personally intend the abortions protected by such a law, these abortions intended by the law were not a part of his act of voting for the law.

An imperfect law that forbids abortions but does not forbid all abortions is not *as such* unjust. But it can occasion the “problem of conscience” in a public context because it does not forbid all abortions

and because a [moderate] “pro-choice” legislator could also vote for such a law. Both (especially the fact that a pro-life legislator is seen as cooperating with a “pro-choice” legislator) could cause scandal. Thus, the “problem of conscience.” This is why the encyclical proposes the solution to the difficulty by cautioning the pro-life legislator to make his personal opposition to abortion well known.

This difficulty is entirely distinct and different from the difficulty in the question of cooperating in an intrinsically unjust law: can cooperation with an unjust law be licit if the legislator intends to limit its evil consequences? The encyclical does treat this second difficulty and gives a clear negative answer. The failure to distinguish these entirely different difficulties has led some to interpret the encyclical as holding cooperation with an unjust law to be licit if the legislator intends to reduce the number of abortions. This raises an insuperable internal conflict within the encyclical. For one passage explicitly affirms that it is never licit to vote for an intrinsically unjust law. The word “never” would indicate an unconditional wrong. But under the above reading, another passage would allow a licit cooperation in an unjust law under the condition of intending to limit its evil aspects.

The misreading has simply misunderstood and misidentified the “problem of conscience” addressed by the encyclical. It has taken a practical problem of conscience to be a theoretical problem of ethics. A problem of conscience can never involve an intrinsically evil act. Rather it deals with an act that is morally neutral or even just but becomes problematic because of some negative or evil consequences. A problem of ethics deals with questions such as “Is abortion intrinsically evil?” and “Is the act of supporting an unjust law itself an unjust act?” The misreading has solved the ethical problem by misidentifying the problem of conscience and by assuming the ethical problem to be the problem of conscience. Simple logic now tells us that since problems of conscience presuppose that the act in question is morally neutral or just, the “problem of conscience” about whether the act of supporting an unjust law is legitimate is solved by restating the definition: the act of supporting an unjust law is not itself an unjust act.

The above and other similar misinterpretations of a single paragraph

in the encyclical have a wide currency among pro-lifers. One reason for this is a certain level of theoretical difficulty in the issue itself. But the extent and the gravity of the misinterpretation at the hands of reputable and competent theoretical thinkers cannot be justified by the intrinsic difficulty of the problem. One may point to a hidden premise that may be operative in the misinterpretation, namely, the zeal of the commitment to protect the innocent unborn, a zeal whose proportions could even be characterized as unconditional. But my interest here is not so much to outline the genesis of the misinterpretation as to identify its nature.

My thesis is the following: in the section under consideration, *Evangelium vitae* is speaking of two distinct *kinds* of law: one an unjust “permissive” law, the other a just “restrictive” law. The misinterpretation is rooted in the assumption that in the present section the encyclical is speaking of one *kind* of law, namely, an unjust law in two particular versions, one more permissive, the other less permissive.

PERMISSIVE AND RESTRICTIVE LAWS

First, let us note a distinction within the third paragraph of the section in question. The problem of conscience that may arise for a legislator rests in part on the alternatives with which he is confronted: either a “more restrictive law” proposed for his vote or “a more permissive law” already passed or ready to be voted on.

(1) A *permissive* law, as the term clearly indicates, is one that legally protects an abortion. In some countries, one might say, it gives a “right” to abortion. Such a law may be more or less permissive. The encyclical also refers to such a law as a “pro-abortion law.” At this point, we note what the larger context also makes unequivocally clear: a legislator may not vote for a permissive law under any circumstances. In our context, we can add that a legislator may never vote for a permissive law, even if the particular permissive law reduces the number of abortions.

(2) A *restrictive* law, in contrast, prohibits abortions. It may prohibit a greater or lesser range of abortions. It may prohibit all abortions. Or it may prohibit only some abortions. In principle, a legislator may vote for such a law but always under one general condition: such a law may never introduce fewer restrictions than actually exist. (For example, a law

forbidding last trimester abortions may not replace a law forbidding all abortions.) The encyclical, in the paragraph in question, happens to be addressing a situation in which permissive legislation already exists. It mentions but does not address another situation in those parts of the world where there are “campaigns to introduce laws favoring abortion.” This is already covered by a principle affirmed in the encyclical, as late as the immediately preceding paragraph where it is unequivocally stated that it is never licit to vote for intrinsically unjust laws. In these situations there would be no problem of conscience.

Evidently, the problem of conscience arises because one of the signs of a “rethinking of the matter” of abortion is precisely the willingness and the opportunity of “limiting the harm” of *already* existing permissive abortion laws as well as of lessening their negative consequences on the level of general opinion and public morality.

It is important, therefore, to recognize the situation addressed in the paragraph. It is a situation in which permissive laws and attitudes towards abortion already exist. The direct occasion for the problem of conscience is thus the intention of “limiting the number of authorized abortions.”

The misinterpretation also hangs upon the understanding of the *limitation of the number* of abortions as if it were an end unconditionally justified. One would then read the final sentence of the paragraph as if the participation in a *less permissive* law did not represent an “illicit cooperation in an unjust law.” We will return to the limitation of abortions below.

REJECTING COOPERATION WITH UNJUST PERMISSIVE LAWS

ALLOWING COOPERATION WITH JUST RESTRICTIVE LAWS

If we distinguish between (more or less) *permissive* laws that authorize abortions and (more or less) *restrictive* laws that do not authorize any abortions but prohibit some abortions (in greater or lesser numbers), and if we follow the line of the encyclical’s argument that speaks of the restrictive proposal to be passed “*in place* of a more permissive law already passed or ready to be voted upon,” then we understand that the cooperation with a “more restrictive” law is not an illicit cooperation with an unjust law because such a law is not unjust in the first place. The

problem facing conscience is not whether one is allowed to participate in an unjust law. Much rather it is a problem of participating in a law that limits but does not abolish all abortions authorized by another, pro-abortion or permissive law [actual or proposed]. But conscience presupposes the objective norm proposed as unconditional by the encyclical: it is never licit to vote for an intrinsically unjust law.

We solve the misinterpretation by distinguishing between an unjust permissive law and an imperfectly restrictive but just law. Another solution would be to deny that a law that authorizes abortions but at the same time restricts the authorized number by a series of regulations is an intrinsically unjust law. We will return to this solution later. First, we turn to the text.

THERE IS NO LICIT COOPERATION WITH INTRINSICALLY UNJUST LAWS

In fact the first and second paragraphs of #73 as well as #74, not to mention other critical passages of the encyclical, do not allow us to hold that the intention of “limiting the number of abortions” permits a legislator to participate licitly in a law which is in fact unjust.

I have already alluded to the reading that mistakenly takes the encyclical’s reference to the “more restrictive law” to be understood as an *unjust* law that at the same time limits the number of abortions. Under this assumption, it then becomes reasonable to understand it as saying that cooperation in an unjust law is licit as long as that law also limits the number of abortions. Accordingly, in reading of the last sentence of the third paragraph of #73 (“This does not in fact represent an illicit cooperation with an unjust law, but rather a legitimate and proper attempt to limit its evil aspects”), the phrase “its evil aspects” would seem to refer to the law that the legislator is cooperating in, the unjust law in its evil aspects.

But this is a misreading of the text. The second paragraph of the section explicitly warns against voting for intrinsically unjust laws. Also, #74 recalls the principle that it is a grave obligation in conscience not to cooperate formally in unjust laws. The proper understanding of the last sentence of #73, third paragraph, is the following: the activity in question is the support of a *distinct proposed law* aimed at limiting the harm of an

already existing pro-abortion law that could not be overturned or completely abrogated. The *new* proposal aims at “limiting the harm done by such a law.” Here, “such a law” is the (more or less *permissive*) pro-abortion law. That is the law whose evil aspects the legislator intends to limit by the new (more *restrictive*) law. The situation outlined in this paragraph clearly identifies the proposals a legislator is allowed to support (“could licitly support proposals aimed at limiting the harm of such a[n already existing unjust] law”) as proposals distinct from “such a law,” i.e., that unjust pro-abortion law that it is not possible to overturn or completely abrogate. (I will return below to the question of “pro-life” law as one that “limits the number of abortions.”)

If we are to take into account the inner unity of the encyclical and its unambiguous identification of permissive abortion laws as intrinsically unjust, it is clear the encyclical cannot mean that a legislator’s support of an unjust law can be licit if he only intends to limit its evil aspects.

In reality, the encyclical means that the cooperation in a “more restrictive law” (one that in no way permits any abortions but simply restricts the number of abortions) is not an illicit cooperation in an unjust law because the law in fact is not unjust.

MATERIAL BUT NOT FORMAL COOPERATION?

One could propose that in view of the points raised in #74 the encyclical is saying that the cooperation with an unjust law is a material but not a formal cooperation as long as one intends to limit the harm of such a law.

We need not go into a detailed discussion of formal and material cooperation. It is enough to note that here we are dealing with an act or law that authorizes an intrinsically unjust act. Such an authorization is intrinsically unjust. The question of permissible material cooperation arises with the performance of acts or actions ancillary to the unjust act at issue. Such ancillary acts do not directly make the unjust act itself possible, but they do produce some good. Such ancillary actions, therefore, are not causally related to the evil.

A law that *regulates* but does not prohibit abortions simply establishes the conditions under which an abortion, an act unconditionally prohibited from the moral point of view, is authorized. The listing of

the regulating conditions does not causally produce the good intended. Nor is it even an indirect cause of the good intended. The positive fulfillment of these conditions secures protection for a right to abortion. The failure to fulfill them is neither intended by the law nor a result of the law and is quite incidental to it.

Because of this, voting for a permissive law that authorizes abortions, however regulated, is by its very nature a formal cooperation with the injustice of the law. It is an act that directly authorizes the evil. The regulations simply mitigate the extent of the evil. It is an evasion to say that one does not intend the evil that one authorizes by appealing to the fact that one authorizes the evil in a limited form.

Moreover, a closer analysis will show that the intention to limit the number of abortions in an unjust and permissive law does not and can not have the right to life as its motive.

LIMITING THE NUMBER OF ABORTIONS AS THE “END” OF A LAW

We must return to the notion of “limiting the number of abortions” and identify it as a difficulty inasmuch as it is a common term that may be found in both a just law and an unjust law. This is an important notion since some, including at least one member of the hierarchy, have stated that in America we cannot tolerate a million and a half abortions a year and that the number has to be reduced. Furthermore, a brief discussion of the motive of reducing the number of abortions is a precondition for dealing with the problem of an intrinsically unjust law.

(1) An *unjust law* permitting abortions may still limit the number of abortions. It can do this by *regulating* the abortions, that is, by legislatively establishing *the conditions for a legally sanctioned abortion*. Among such conditions proposed by a legislator could be the requirement of a twenty-four-hour waiting period, or the requirement of informing the father of the unborn child, or that of parental notification for abortions performed on a minor. An example of an unjust law that limited the number of abortions was the *Casey* law of Pennsylvania, struck down by the U.S. Supreme Court. The four justices dissenting in that ruling clearly and correctly identified the *Casey* law as one that “simply regulates, and does not prohibit, abortion.” Unfortunately, the *Casey* law was widely

considered “pro-life” by virtue of the regulations, which would have effectively reduced the number of abortions.

(2) An imperfect law that restricts or limits the number of abortions without itself authorizing any abortions is a just law. It may, for example, simply forbid abortions in the third trimester. Or, it may forbid abortions in military hospitals.

THE INTENT OF THE LAW AND THE INTENTION OF THE LEGISLATOR

If one rests simply on the recognition that both an unjust law and a just law may objectively restrict the number of abortions, it will be difficult to avoid errors in interpretation of the encyclical. Nor will it be easy to see the error of calling “pro-life” concrete proposals that objectively are “pro-abortion” because they in fact authorize abortions.

It is not enough to say that one intends the reduction of the number of abortions as the end of a restrictive law. The question “Why?” remains, and this on two levels. (1) Why does the *legislator* intend the reduction of the number of abortions? And (2) why does the *law* intend the reduction of abortions? The first is the subjective intent of the legislator, the second the objective intent of the law.

THE JUST LAW AND THE RIGHT TO LIFE

If we begin with a *just* law, we note that the legislator *can* subjectively intend a protection of the right to life. Note, we are not simply saying “reduction of the number of abortions.” Much rather, we are noting the reason why an individual would want to achieve a reduction in the number of abortions. This distinction is important because we are dealing with the legislator as a rational agent who has reasons for his actions. We are, of course, assuming a reduction of the number of abortions to be good as such. But it is not enough to say that the agent intends this good. The critical question bears on the liceity of his participation in a law that promotes this good. He may have subjective reasons that are not grounded in the right to life and the dignity of the unborn human being. For example, a liberal legislator who approves abortion in principle but does not affirm a right to life may think that in most cases abortions should not be allowed. What is important in the context of our

discussion is the fact that in a just law that does not permit any abortion but simply restricts them, even if imperfectly, the participating legislator *can* intend the right to life of the unborn.

The objective *intent of a law* is a different matter, depending on the larger context of the law. In the legal context of countries such as Germany or Austria, the right to life of the unborn is still recognized and constitutionally affirmed. But in what amounts to an unjust legislative act, the *sanction of punishment* has been lifted from abortions performed under certain conditions. This means that individuals can perform an abortion that is still illegal under criminal legislation and not be punished. A new law may be proposed reinstating punishment, but not for all abortions. The intent of such a law can and should evidently be the protection of the right to life of the unborn. The effective implementation of the law would reduce the number of abortions.

The situation is radically different in the United States. Under the current state of affairs, it simply does not appear possible that a law that has the intent to protect the right to life of the unborn can be passed or, if passed, that it will stand the judicial test. For the dominant judicial interpretation is that a woman has a constitutional right to abort, that is, that the unborn do not have a right to life.

This means that the American situation allows for a just law that restricts the number of abortions but whose intent is not the protection of the right to life. Much rather, it would have to be *some other right* whose safeguarding allows the restriction of abortions. For example, a law could prohibit the performance of abortions in hospitals enjoying federal or state funding. But in the present American situation, such a prohibition would have to be grounded *not* in a right to life, but rather in the rights of the citizens not to be coerced into participation, through taxes, in acts forbidden by their religion or conscience. Or a law could simply require the notification of parents in the case of any medical procedure performed on a minor. Here it is the right of parents that is the intent of the law, *not* the right to life of the unborn human beings.

In the above situation, the *subjective* intent of the legislator could be the right to life, but due to the circumstances, he cannot translate it into the intent of the law. The intent of the law would have to be the

protection of some objective right other than the right to life. And the restriction of abortion would have to be a restriction by law, not simply a practical consequence of it. Thus, a law prohibiting abortions in a federally funded facility is a positive prohibition. The abortion is *what* is prohibited.

THE UNJUST LAW AND THE RIGHT TO LIFE

We now turn to an unjust law or proposed law that permits and authorizes abortions but regulates them in such a way that in practice it reduces the number of abortions. Here we make explicit what was implied heretofore. A “less permissive” law that heavily regulates abortions does not reduce the number of abortions by law. The reduction is a likely practical consequence. Should it happen that everybody fulfills the legally prescribed conditions, there would be no reduction of the number of abortions that would have occurred under a permissive law with no regulations.

What can the possible intentions of a legislator be in dealing with such a law? Can he intend a reduction of abortions? Can he intend the protection of the right to life?

In answer to the first question, he can subjectively intend the reduction of the number of abortions. But this is not a sufficient justification for a positive legislative vote. The reduction is *what* he proposes to achieve. *Why* he proposes the reduction is another matter. The question again arises: Why does he intend the reduction of the number of abortions? Is it possible that, as in the immediately preceding case of the just law, he has a subjective intention of protecting the right to life of the unborn but simply cannot translate it into the proposed law?

It should quickly become apparent, even as we raise the question, that the right to life of the unborn cannot possibly be the *intent of a law* that permits abortions under specific regulations. Such a law would be self-contradictory. But at the same time, it becomes apparent that neither can the right to life be the subjective *intention of the legislator* who votes for such a law. No, we do not question his intention to reduce the number of abortions. We inquire simply into the reasons for his intending the reduction. And whatever they are, they cannot include the intention to

protect the right to life of the unborn if he supports a law that denies this right to life.

The fact that he intends the good that may result from the law, namely, the reduction of the number of abortions does not and cannot mean, in the case of the above law, that he also intends the protection of the right to life as the *reason why* he intends the reduction of abortions.

What is the reason for his voting for an unjust law that also reduces the number of abortions? The question is difficult not because of its nature but because of its answer. Yet, it must be answered. Any legislator who votes for an unjust permissive law may indeed intend the restriction of abortions and the good this restriction represents. But in this case, the good intended is simply the *object*. The motive or *reason* is an assumed sovereignty over the good. This assumed sovereignty over the good proves itself to be such precisely by the will to do good unconditionally, even at the cost of authorizing the evil of abortions. On this account, the vote for “such a law” is already intrinsically evil.

If we take into account that a law that permits abortions even as it regulates them is an unjust law because it positively affirms or assumes a right to abortion, we have also to recognize that support for such an unjust law is a support of the right to abortion. Any verbal assurance to the contrary is just that, a verbal assurance that does not reflect the inner subjective state of the legislator at the time he supports such a law.

The claim that cooperation with such a law is licit fails to take into account the inner unity and integrity of a rational act. It may in fact be the case that a legislator does not understand the nature of an intrinsically unjust act. In that case, only his personal guilt comes into play, not the liceity of the act.

REASONS FOR LIMITING THE NUMBER OF ABORTIONS

The reduction or even the complete stopping of abortions could be the matter of “substance” of a law. This “matter” must be properly grounded. The prescribed or proscribed behavior must have a reason outside of itself. This is one of the formal prerequisites for the legitimacy of a law. And the reason must in turn be grounded in a legitimate authority or a legitimate right.

What is the proper justifying ground for a law prohibiting abortion?

It is a right to life. A law that simply limits the number of abortions by regulating them is not yet a “pro-life” law. Nor is a law “pro-life” because it reduces the number of abortions by prohibiting some, thereby allowing “pro-life legislators” to vote for them. Only when the intent of the law is to protect the right to life is it a “pro-life law.” Permissive abortion legislation is pro-abortion legislation and it is intrinsically unjust.

The problematic third paragraph of #73 must be read in the context of the preceding paragraphs of that same section. The second paragraph, as we have already seen, prohibits obeying, supporting or voting for an intrinsically unjust law.

But it is the first paragraph of #73 that establishes the proper context. It draws a contrast between *God's sovereignty* and unjust human laws. With the notion of God's sovereignty it affirms a truth repeated constantly in the encyclical: God is the owner of human life, a human life which is first, a gift to the individual himself and second, to each and every one of us. Therefore, none of us is justified in mimicking Cain when God inquires “What have you done?” Each of us is our brother's keeper.

There are two principles at issue here. The first is negative and absolute: no one is permitted to take his brother's life. This injunction is grounded in God's sovereignty over men, that is, his ownership of each human being. The taking of innocent life is primarily a violation of divine ownership of human life. Only secondarily is it a violation of the victim's ownership of his own life, that is, of his right to life.

The second principle at issue is positive but not absolute. It is the injunction to accept the life of each and every individual as a gift given to each of us. It commands us to do good to and for the other. But this command, unlike the command not to do evil, is conditional. If doing good involves too great a cost to us, we are not bound to do it. In our context, if the positive protection of innocent lives would involve the death of many others, we are not bound to do it. Toleration of the evil is in order. Or, if doing good involves violating the first injunction, we are forbidden to do good. We are never allowed to take innocent human life, and here we add, nor are we allowed to authorize the taking of innocent

life if that is the cost of saving other innocent lives.

THE ROLE OF CONSEQUENCES IN THE CALCULUS OF COST

The encyclical *Veritatis splendor* addressed the error of consequentialist or teleological ethics. These two terms refer to basically the same error in ethical thinking. An ethics is consequentialist when it claims that an act is morally justified when the good consequences of that act outweigh any evil ones. Another way of putting it is that, according to teleological ethics, an act is morally justified even if it involves evil consequences when the good is the intended end (*telos*) of the act.

The misinterpretation under discussion has a consequentialist or teleological character. It holds that the participation in an unjust law is licit when the legislator intends to limit its evil effects. This limitation of abortions is the good that is the end (*telos*) intended by him. It is presumed, of course, that the good end intended outweighs the evil which comes from the law but which is not intended.

There are two connected sources of the consequentialist or teleological error. One we have already mentioned. It is the failure to recognize the sovereignty of the good. One does not take it and the imperative grounded in it seriously. Thus, the claim that there is *an unconditional prohibition* against doing evil, namely, of intending evil as end or as means, is not taken seriously. One characterizes such a claim as a legalism and as a failure of love for those that could have benefitted from the good achieved by means of the evil. One is willing to do evil as a means for doing the good.

The second source was also alluded to but bears explicit notice in this context. It is closely connected to the above. In failing to take seriously the *unconditional* imperative *not to do evil* one also fails to understand the *conditional* character of the imperative *to do good*. The conditional nature of the latter demands first, that we refrain from doing good at the cost of doing evil. The good should not be achieved by means of the evil. And second, it allows us to refrain from doing the good when the cost of it to others and us is a great enough extra-moral evil. *The consequentialist or teleological position reverses the imperatives: it seeks to do the good unconditionally, even at the cost of evil and hence is*

willing to do evil on the condition that the consequences are good.

The consequentialist position recognizes the evil of an action that may bring about good, but it denies that participation in such an action is evil from the *moral* point of view if the agent intends the good end. And hence it *denies that there can be any action intrinsically evil from the moral point of view*. From this perspective the consequentialist or teleological position can recognize the evil of an *unjust* permissive law, but it claims, for example, that the action of supporting such a law is not morally evil as long as it intends the good consequences of the law and not the evil ones. It looks at the evil of such a law simply as one of its consequences and therefore something that can be separated from the act of voting that intends the good consequences.

Such an interpretation fails to understand the nature of an act intrinsically evil from the moral point of view. It fails, specifically, to understand why the authorization to perform an abortion, albeit under limiting conditions, is an intrinsically evil act.

THE INTRINSIC INJUSTICE OF PERMISSIVE ABORTION LAWS

The authorization for taking innocent life is intrinsically evil, even if it brings about the saving of many others. The reasons for this should be clear, but it needs to be articulated in the context of the above. In the case of an unjust permissive law that regulates abortion, the legislator who participates in such a law legislates conditions authorizing what is unconditionally unjust regardless of any *personal* desire to reduce the number of abortions. The taking of innocent human life is unjust and unconditionally forbidden. But here the legislator enumerates conditions under which it will be legislatively permitted. This is a permissive law. And it is intrinsically unjust. Will it reduce the number of abortions? Yes. Yet the traditional teachings of the Church in the matter of intrinsic evil do not reject it because the evil does not or cannot bring good consequences. In the matter of intrinsic evil, she teaches that it is categorically proscribed even if it brings enormous good consequences. The Church rejects consequentialism because consequentialism rejects the *sovereignty* of the good and of God in its intention to do good unconditionally.

The permissive law that authorizes regulated abortions is intrinsically unjust on two grounds. First, it is a rational act that goes against the sovereignty of God by taking possession of the life of the human being that belongs to God. Second, it authorizes an unjust dispossession of the human being of the life that has been given to him by God.

REGULATED ABORTIONS ARE NOT SIMPLY UNINTENDED CONSEQUENCES

Legislation that regulates abortions cannot be construed as an act that simply has evil consequences, namely, the killing of unborn human beings, which becomes possible because of the law but is *not intended* by the legislator who votes for the law. One cannot validly argue that the law did not mandate (but only permitted) the abortions that are then construed as free acts not forced upon individuals. For the evil is in the act of authorizing abortion. The act remains evil even if no abortions are performed under the authority of the act. The actual abortions may indeed be spoken of as consequences of the law to the extent that the law authorizes and legitimates them. That is a new and additional evil. But the evil at issue is the abuse of public authority in the legislative authorization of an intrinsic injustice. The actual performance of abortions as well as their number simply increases the specific gravity of the evil and injustice, as does an accidental killing committed in the course of a robbery.

Nor can one validly argue that an unjust permissive law is an act of toleration of acts that would happen anyway. For it is not toleration but an active authorization of the injustice. It is a fundamental error and misunderstanding that invokes toleration as a justification of permissive laws that regulate and lessen the number of abortions. The error operates with a formal and external similarity between a justified toleration and a permissive law that restricts the number of abortions. True toleration involves, in part, the refraining from action against some evil. It never includes authorization of the evil that one does not act against. But more importantly, it respects the second positive but conditional principle mentioned above: if the cost of doing good (prohibiting and enforcing the prohibition of some evil behavior) would bring about an evil greater than the one is trying to prevent, then toleration is justified. Thus, the

avoidance of a *greater evil* by refraining from action against a *lesser evil* is morally justified.

NOT A LICIT AVOIDANCE OF THE “GREATER EVIL”

In the case of unjust permissive laws, one would argue, one *avoids a greater evil*, the greater number of abortions, by accepting or *allowing the lesser evil*, the lesser number of abortions resulting from regulation. This is what #73 allows, one would claim. But the argument rests on an abstraction that ignores the nature of the act of legislation constituted by the votes that enact it. For the legislative act authorizes the injustice and evil of abortions even as it restricts them. It does not simply tolerate or allow or passively permit them. And in voting for the law, the legislator cannot claim that the authorization is an act that he does not participate in but only tolerates, something willed by the other legislators who may happen to be pro-abortion but are willing to accept regulations.

Given the nature of the legislative act and his participation in it, the *legislator formally wills what the law intends*. Outside of the legislative arena, it is quite possible to perform an evil act and claim that one did not intend the evil as an end, but only as a means. Thus, in actually performing or demanding an abortion a man may say that he sees its evil, that he regrets it, but that is the only way of achieving the good that he intends as an end: saving his wife. So also, the legislator voting for a less permissive but regulative abortion law could say that he did not intend as his end the abortions that are performed under regulations. That indeed may be the case. It may also be the case that no abortions at all are performed under the law in question. But the evil at issue, as we have seen, is still there. It is the evil of *authorizing* intrinsically unjust acts. In *voting for an unjust permissive abortion law, the legislator must necessarily take responsibility for the intentions included in the law*. The unjust permissive law is a pro-abortion law *no matter how heavily it regulates abortions*. And the legislator’s cooperation in its enactment is a pro-abortion act, even if he intends the good of reducing the number of abortions. The “pro-choice” politicians who want “fewer abortions” in America would have to be construed as “pro-life” politicians on the contrary assumption.

INTRINSICALLY EVIL ACTS AND THE SUPREMACY OF THE GOOD

One possible argument remains. The argument rests on a peculiar understanding of intrinsic evil from the moral point of view. This understanding would admit that having the destruction of a good as the intended end is intrinsically evil. But, one argues as long as the evil is not intended as an end but only used as a means, it is not intrinsically evil from the moral point of view.

We have already discussed the disregard of the sovereignty of good which is necessarily contained in the use of evil to do good. At this point, I wish to touch upon another side of man's assumption of sovereignty over good. This side remains invisible, or at least is hard to perceive as long as we allow ourselves to be restricted by the terminology of "doing good." How can we fault an argument as long as it invokes "doing good" as a supreme and unconditional principle?

We must distinguish two things in "doing the good." (1) First, we have an act of willing which aims at *realizing* the good in question, in our case a reduction of the number of abortions. (2) Second, if such a "doing the good" is to be a morally good act it must be preceded by an entirely different kind of willing, an act of willing which is possible even if one cannot raise a finger to "do" something in the world.

If any act which "does good" in the external world is to be morally good, the person must first give a volitional response to an *already existing good* as the reason of motive for his "doing the good." It is the good, which in a sovereign fashion *demand*s of each person an affirmation of the good, a submission to the good, and a participation in the good. The *response* to this demand is an act of will, which must contain all three of these moments. It is an essential characteristic of this act of the will that it is "directed" towards a *good that is already fully actual* or whose actuality does not depend on the will. The good that demands the response cannot be "done" by the subject. It can only be given a response. On the other hand, what is to be "done" is the proper response: the actualization of the tripartite act of affirmation, submission, and participation, the actualization of something within the soul. In this sense, the soul is the object of the will, as Karol Wojty_a has pointed out.

The good standing before us in its actuality can be the reason or *motive* for my actions in the external world, such as saving the unborn or reducing the number of abortions. But before it can become the reason or motive, I must affirm, submit to and participate in the good in question, in this case, the good of the unborn child. Saving unborn children or reducing the number of abortions cannot be morally good, much less justified unless I first, in an act of will, affirm the good of the child, submit to the good of the child and participate in the good of the child. Only then can the realization of some good for the child be morally good.

In our context, it is impossible to claim that one affirms the good of the child, much less the good as such when one performs or legislatively authorizes abortions. The authorization or performance of an evil act such as abortions (even though heavily regulated) indicates that I have not submitted to the imperative of the good, which prescribes the fitting or proper response that is due to it. In performing or authorizing an evil act as a means to some good, I have *subordinated to myself* both the evil act as well as the good effects I intend. This is evidence that I have not affirmed the good in its sovereignty, which demands *that I submit to it*. And finally, I do not “take part” in the good of the child, I do not *commit* myself to it and *enter into it*, even if I save it at the cost of authorizing or performing some abortions. In one word, I neither accept the child who has been entrusted by God to me, nor do I give myself to the child to whom God has given me—all this although I “do” and “intend” the good of reduced abortion, a good *for* some children. When I authorize or perform an abortion with the “end” of reducing abortions, my act lacks any connection to a motive or reason which would give it positive moral worth. On the contrary, the rational structure of the act of authorizing or performing an abortion necessarily and intrinsically includes a negation, not affirmation, of the sovereign good of the child. It includes a subordination of good (and evil) to myself, not a submission to the imperatives grounded in them. And finally, rather than implying any participation in the goodness of the child, it is a callous rejection of it as a gift to me and a sovereign refusal to give myself to it.

What makes an act intrinsically evil is not some legalistic prescription originating in the Vatican or in the mind of some moral theologian.

An act is intrinsically evil because by its inner structure it goes against the demand that a personal subject volitionally affirm, submit to and participate in the good. And actions in the external world, such as legislative authorization of abortion or the performance of abortion are by their very rational structure, if performed rationally and consciously, such that they go *against the good*. And they go against the fullness of good, God himself. And this means that their motive cannot be the good, any good.

THE GIFT OF LIFE

A single paragraph of a powerful and profound encyclical has been interpreted in a fashion contrary to the encyclical as well as the whole moral tradition of the Church. This appears to be evidence of an unfortunate pervasiveness of the culture of death even within the Christian communities themselves. The misinterpretation of #73 indicates a fascination with and a commitment to a political process and system that has disenfranchised the Christian citizen. The political culture rejects God as the source of all civil authority and as the Lord of all life. Human life belongs to Him. It is His *property*. He gave it as a *gift* to each and every human being he created. Moreover, as the encyclical *Evangelium vitae* stresses, the life given to each individual is also a gift given to all of us. Your existence is a gift for me. The existence of every human being, to include the unborn, is a gift to each and every one of us. They belong to us. And we belong to the unborn.

Abortion is a perversion of this “belonging” of human beings to each other. Abortion is a theft that intercepts the gift of life, given to the individual about to be aborted and to all of us. The abortionist takes human life, he appropriates it, but he refuses to receive it.

The term “culture of death” has become well know and widely used since *Evangelium vitae*. One often hears a listing of the *evidence* of the culture of death: abortion, euthanasia, abuse of women and children, wars, etc. But it is sadly significant that one rarely notes John Paul II’s identification of the *essence*, not merely the symptoms of the culture of death. He himself identifies it as the *failure and refusal to accept the gift of life*. If we grasped the significance of the wonderful mysteries that

human life is not merely created but also given as a gift to every individual, and that each is a gift to each from God, we would not take seriously a proposal that institutionalizes the authorization of abortions, even if heavily regulated. The proposal itself has as its intrinsic condition of possibility the refusal to accept the gift of life together with the rejection of giving ourselves to and for the unborn. *The Gospel of Life* has as one of its central premises the principle that we are to be *with* and *for* others. With the acceptance of unjust permissive laws that regulate abortions and thus reduce their number, we have abandoned the unborn as gifts and are *neither with nor for them*.

God gives the gift of life to each and every created person. But if given, it must be accepted and taken possession of. We are to take possession of what we have received. But for one reason and one reason only. One cannot give what one does not possess. We are created by God and given to ourselves so that we can render a gift of self in return. We are subject to the “law of reciprocity,” as *Evangelium vitae* puts it.

The culture of death rejects the law of reciprocity and affirms the law of appropriation. Man is to take his life and keep it for himself. “My body, my life, my fetus, my decision.” Mine. But then, nothing but power prevents him from taking the life of others. By cooperating with permissive abortion laws, even with the intention of reducing the number of abortions, we enshrine the taking of human life as evidence of our powerlessness or lack of courage. In either case we abandon the unborn and subject them to the “undue burden” in the form of regulations placed on their pregnant mothers. The law of appropriation as written by the culture of death now proclaims, “It’s her fetus. Let her bear the burden.” It is an intrinsic evil to participate in such a law.

APPENDIX

An edited restatement of # 73, paragraph 3

[The original text of *Evangelium Vitae* is in italics;
the remainder is offered as an editorial clarification.]

A particular problem of conscience can arise in cases where a legislative vote would be decisive for the passage of [A] a more restrictive law aimed at limiting the number of authorized abortions

- (a) a law which is imperfect because it restricts abortions by prohibiting some but not all abortions
- (b) but a law which is still just in as much as it does not authorize any abortions
- (c) but restricts them in order to protect some right other than a right to life

in place of [B] a more permissive law already passed or ready to be voted on. Such a permissive law is intrinsically unjust because it authorizes abortions. The authorization of abortions under more or less permissive regulations does not change the intrinsic injustice of such a law, even though an accidental consequence of such a law may be a limitation of the number of abortions, a limitation which is not the intent of such a law.

The problem of conscience arises for the following reasons:

(1) because the legislator is presented with the possibility of voting for a just law [A] which does not authorize abortions but limits those already authorized by a pro-abortion law [B] and (2) because the proposed law [A] prohibits only some but not all abortions in order to protect some right other than a right to life; (3) because a pro-abortion legislator can for pragmatic reasons support such a law limiting abortions in order to protect some right other than the right to life.

Since an imperfect restrictive law [A] which is still just, but does not have as its intent the protection of a right to life and because it may have the support of legislators who are pro-abortion, scandal could be given, with negative consequences on the level of culture and public morality. Therefore, the legislator supporting a more restrictive and just law [A], which is imperfect and does not protect the right to life, should make his support of the right to life and therefore unconditional opposition to procured abortion well known.

Such cases are not infrequent...

Such a possibility of proposing and passing of “more restrictive” laws [A] which are just but imperfect in order to limit the harm of pro-abortion laws [B] is seen more frequently because

...in [some] nations—particularly those which have already experienced the bitter fruits of such permissive legislation [B]—there are growing signs of a rethinking in this matter.

In a case like the one just mentioned, when it is not possible to overturn or completely abrogate a pro-abortion law [B], an elected official, whose affirmation of the right to life and therefore absolute personal opposition to procured abortion was well known, could licitly support just restrictive though imperfect proposals [A] aimed, (in his subjective intention) at limiting the harm done by such a law [B] and lessening its [B] negative consequences at the level of general opinion and public morality. This [support of proposals [A] aimed at limiting the harm done by such a pro-abortion law [B]] does not in fact represent an illicit cooperation with an unjust law [B] because it is not at all a cooperation with it [B], but rather an opposition to it [B], and thus a legitimate and proper attempt to limit its [B] evil aspects by passing a more restrictive and just, though imperfect law [A].