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HELPING ENACT UNJUST LAWS WITHOUT COMPLICITY IN INJUSTICE

JOHN FINNIS

Summary. The form of enactments must be distinguished from their legal meaning (their “juridical effect”), that is, from the propositions of law which those enactments, properly interpreted, *make* legally valid. This distinction makes it possible, and rationally necessary, to conclude that, in certain contexts, a certain statute which declares or textually implies that some abortions are legally permitted (but others prohibited) is not a *permissive law* within the meaning of the principle, assumed in this article to be true, that permissive abortion laws are intrinsically unjust and may never be voted for. A permissive statute, in that sense, is one which has the legal meaning (juridical effect) of *reducing* the state’s legal protection of the unborn.

I

The Objection

Legislators¹ typically take it as common sense that if you can help enact a legislative proposal that would reduce the injustice of some existing law, you should regard it as morally permissible (and in some cases obligatory) to do so, notwithstanding that the restriction will leave intact some of the existing law’s unjust elements. This common sense position is entirely sound. But it faces an objection which also seems plausible. Call it the Objection: You should never vote for² a proposition or proposal that will insert into the law a morally wrong and unjust rule; so you must never vote for a proposal which does the injustice of protecting some people from the existing law’s injustice while openly leaving some other people still subject to that injustice; and this is particularly obviously impermissible when the proposal to be voted upon ratifies or restates part of existing law’s unjust provisions. The present article argues that, despite its plausibility, the Objection is mistaken.

1. By “legislator” I will always mean a voting member of a legislative body. There is a morally significant difference between the legislative acts of a person who can change the law by his or her own individual legislative act and the acts of legislators in the sense I have just defined: see part VI below.

2. It is accepted on all sides in this debate that “vote for” refers to substantive votes, and not to votes that are “procedural” in the sense that they might be cast “in favor” of a bill in (say) committee in order to get the bill or the voting legislator into a position where a decisive, “substantive” vote can be cast against it.

This article traverses ground I traversed in 1994/6³ and 1997/9.⁴ But this article treats as primary a line of thought that was present in the earlier papers, but only in a rather unclear and unexplored form. The present article treats as secondary the line of thought that in the earlier essays was primary. The proper exposition of what will here be called the Primary argument shows the utility of jurisprudential reflection and analysis. But it only makes explicit what is already part of the common sense of lawyers, from fairly early in their study of *the law* through the reading of cases, statutes, and other legal materials.

Some statements made by ecclesiastical authorities and sources appear in this article, but only as illustrations. The line of thought pertains to natural law (natural reason), indeed to common sense articulated in a jurisprudential reflection on what laws really are. Many but not all the ecclesiastical statements concern laws relating to abortion, and this article's focus on that matter is for its convenience as an example of issues that can and do arise in relation to many other matters.

II

The Principle

The Objection condemns voting for proposals (bills or laws) that aim to prohibit some but not all seriously unjust acts of a certain kind, and to eliminate some but not all unjust elements of the existing law relating to that kind of act. Call all such proposals, bills and resultant laws *restrictive laws*. One reasonable way of putting and arguing for the Objection is to point to the statement of principle in the encyclical *Evangelium Vitae* (1995) sec. 73.2:

In the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it, or to "take part in a propaganda campaign in favour of such a law, or vote for it."⁵

3. John Finnis, "Unjust Laws in a Democratic Society: Some Philosophical and Theological Reflections," *Notre Dame Law Review* 71 (1996) 595-604, a revised version of the paper earlier published in Joseph Joblin and Réal Tremblay (eds.), *I cattolici e la società pluralista: il caso delle leggi imperfette: atti del I Colloquio sui cattolici nella società pluralista: Roma, 9-12 Novembre 1994* (Bologna: Edizioni Studio Domenicano, 1996).

4. John Finnis, "The Catholic Church and public policy debates in Western liberal societies: the basis and limits of intellectual engagement" in *Issues for a Catholic Bioethic*, ed. Luke Gormally, 261-73 (London: The Linacre Centre, 1999).

5. The internal quotation is from sec. 22 of the Declaration on Procured Abortion, made by the Congregation for the Doctrine of the Faith [CDF] in November 1974: *Acta Apostolicae Sedis* 66 (1974) 730-47.

Call it the Principle: it is never licit to vote for an intrinsically unjust law.⁶ To say that something is *intrinsically* unjust is to say that it is unjust under all circumstances. So, if it would not be morally acceptable⁷ to vote for a proposed abortion⁸ law that replaced a complete prohibition with some

6. "Intrinsically unjust" replaces the term "intrinsically immoral" predicated of such laws in the Declaration on Procured Abortion made by the Congregation for the Doctrine of the Faith in November 1974. Neither term, as predicated of a kind of law, is traditional, and there are problems with the notion which I shall ignore in this paper. As the encyclicals *Veritatis Splendor* (1993) and *Evangelium Vitae* (1995) each teach, *intrinsece mala* (intrinsically evil [acts]) are those kinds of acts which are picked out in the exceptionless *negative* moral norms of Christian teaching about the content of the natural moral law. See generally John Finnis, *Moral Absolutes* (Washington, D.C.: Catholic University of America Press, 1991). The obligation to legally prohibit murder or abortion is the content, however, not of a negative moral norm, but an affirmative or positive one, prescribing that a certain kind of act (in this case, legislation or its equivalent) be done. Moreover, justice and injustice are predicated of laws only by an analogy (of attribution), for justice is "the steady and undeflected will [*of a person*] to give to others what they are entitled to." These facts create significant strains in extending the traditional and sound idea of intrinsically immoral acts to categories of *laws* and to the positive obligation to make laws against murder and abortion. But I shall ignore those problems in this paper, though they cannot be overlooked in real life. More positively, I suggest that the newly articulated category, properly understood, picks out three types of law: those that permit the violation of a fundamental human right (e.g. abortion), laws which establish a public policy violating such a right (e.g. licensing and funding human embryo production and or experimentation), and laws which institutionalise an intrinsically evil type of act (e.g. ratifying "homosexual marriage").

7. The question thus is whether such a vote is *intrinsically* wrong. Even if the answer to that question is that such a vote is not intrinsically wrong (i.e. that it is acceptable/permissible, i.e. can be licit), there is in all actual cases the further question whether it is right in all the circumstances to cast such a vote. The answer to that further, always relevant question is given by moral norms which are situation-relative in a way that the question of *intrinsic* wrongness is not.

8. By "abortion(s)" throughout this paper I shall mean all and only those terminations of pregnancy which, because they *intend* the death of the unborn baby, or *intend* the cessation of its development, are intrinsically wrong and have been judged wrong in the Christian tradition. It follows that the term as I use it does not include those kinds of termination of pregnancy (some or all of which may be conventionally described as types of "therapeutic abortion") that cause the death of the child only as a side effect (some of which may, however, be unjust albeit not instances of *intrinsece malum*). See e.g. John Finnis, Germain Grisez and Joseph Boyle, "'Direct' and 'Indirect': A Reply to Critics of Our Action Theory," *The Thomist* 65 (2001) 1-44. The terms "termination of pregnancy" and "abortion" in state legislation may in many cases not be so precise, and if used without explicit qualifications or exceptions would entail the legal condemnation of actions which Christian tradition and sound moral analysis would not condemn. This is a serious problem for Catholic and other prolife efforts at restrictive reform, and needs much more attention than it received in *Evangelium Vitae* and other such documents. In this paper I take for granted that *all abortions should be legally prohibited*, even though this proposition is not true if "abortion" is understood in a different sense, perhaps closer to legal and everyday usage. This paper is not the right context for going deeper into this important practical and theoretical issue.

permission (say, of abortion up to 14 weeks of pregnancy), how can it be acceptable to vote for the very same proposal when it would replace a more permissive law (say, permitting abortion up to 24 weeks)? If voting for a law that leaves abortion permitted up to 14 weeks is *intrinsically* unjust, must not the circumstance that this law will be more restrictive than existing law be incapable of rendering the vote morally acceptable?

An answer to those challenges can begin by noticing the tight parallel drawn in *EV* 73.2 between the question of obedience to a permissive abortion law and the question of voting for it: "it is . . . never licit to obey it or . . . vote for it." Suppose that a law⁹ is *restrictive*, that is, is partly permissive and partly prohibitive.¹⁰ It expressly or tacitly permits some abortions but prohibits others. It ought, I shall assume, to prohibit all abortions.¹¹ So we might be tempted to say: this whole law is simply intrinsically unjust. But the temptation should be resisted. For if the whole law is simply unjust, then it "is never licit to obey it,"¹² and so no police officer or judge could rightly obey the law's directive to prevent and punish the abortions it prohibits. *EV* 73.2 cannot have meant that. So, instead of saying that the restrictive law, taken as a whole, is permissive and therefore simply unjust, one should say that this restrictive law is unjust *insofar as* it is permissive but is just (and fit to be obeyed) *insofar as* it is prohibitive.

But the point can be put more precisely, and the primary argument of this article given a first airing. What is commonly and acceptably called a "law restricting abortion" must actually comprise two (or more) distinct *propositions of law*—indeed, two (or more) *laws* in a strict sense of the word. One is a proposition of law that certain abortions are prohibited. The other—which may be articulated in the same statute or judgment, or may be implied in the constitution, or in the general legal principle that what is not prohibited is permitted—is the proposition of law that other abortions are permitted. Only

9. At this stage of the argument, I am still speaking in the broad terms normally used (and used in *Evangelium Vitae*). So "a law" here could refer to a whole statute, a set of Code provisions, or even a single Code provision or one-clause statute or rule; and sometimes it will refer to a proposal or bill which would be law if enacted.

10. Such a law could also be called "incompletely restrictive" or "incompletely prohibitive." I shall use "restrictive" to mean "incompletely prohibitive." I shall use "prohibitive" and "prohibition" to include both complete and incomplete prohibition, and let the context make clear whether the prohibition I am referring to is complete or incomplete. So: restrictive laws are prohibitive, but only incompletely prohibitive. In virtually all instances, I use "restrictive" as shorthand for "prohibitive but less prohibitive than reason (justice) requires."

11. See, *supra*, note 8.

12. I am not here considering the complexities that arise in considering different kinds of injustice in law (as to which see John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 352-62), but only the interpretation and effect of *EV* 73.2.

by keeping in mind this kind of distinction can we make sense of *EV 73.2*'s reference to obedience. And since that reference is in strict parallel to its reference to voting, it follows that *EV 73.2*—even before we reach *EV 73.3*—opens up the possibility and indeed the necessity of distinguishing, and dealing separately with, (i) rules or elements or propositions of a state's law which permit abortion (and are therefore¹³ intrinsically unjust) and (ii) rules, elements, or propositions of the state's law which prohibit abortion, and therefore can rightly (and should) be obeyed *and can rightly be voted for*.

It will turn out that the key to understanding the relation between *EV 73.2* and *73.3*, and thus to understanding *73.2* itself, and dissolving the Objection, is to recognise that the decisive phrase, "*a law permitting abortion or euthanasia*," needs interpretation, and is referring to a measure which either *introduces* a permission (where hitherto there was a prohibition), or continues in force a permission *which would otherwise have expired* (on its own terms, or by repeal or override).

III

How to Understand the Principle: EV 73.3

EV 73.2 ratified nearly two decades of episcopal teachings embracing comparative analyses of the circumstances and potential object of a legislator's vote in more or less concrete historical contingencies in Italy,¹⁴

13. See, *supra*, note 8.

14. "On 28 March 1980, the Italian Radical Party began collecting signatures for a referendum in favour of the modification of Law 194/78 in order to make it more completely and openly favourable to abortion. Faced with the prospect of having to choose between the existing law 194/78 and one which would be worse, the Italian Pro-Life Movement began collecting signatures for two referenda: one giving maximum protection to human life by eliminating every possibility for abortion, except in the case of conflict with the life of the mother, and another which represented the minimal position: it condemned abortion in general terms, but allowed legal abortion in two cases: grave threat to the life of the mother and verified pathologies which constitute a grave risk to her physical health. As expected, on 4 February 1981, the Constitutional Court of Italy declared that the minimum referendum of the Pro-Life Movement was admissible, but the one giving maximum protection was not, since it contradicted an earlier decision of the Court of 18 February 1975 (n. 27). The question of conscience then arose regarding whether someone who was absolutely opposed to abortion could vote in favour of the minimal referendum as drafted by the Pro-Life Movement. The Italian Conference of Bishops offered an important clarification on 11 February 1981: 'The referendum proposed by the Pro-Life Movement is morally acceptable and binding for the consciences of Christians since it seeks, by *overturning some elements in the current abortion law, to restrict, as much as possible, its extent and to reduce its negative effects*.'

Britain,¹⁵ the United States,¹⁶ and Ireland.¹⁷ When *EV* 73.3 takes up a

It does not follow, however, that the remaining elements in the civil law in favour of abortion may be seen as morally licit and may be followed.”

Angel Rodriguez Luño, “*Evangelium vitae* 73: The Catholic lawmaker and the problem of a seriously unjust law,” *L’Osservatore Romano* English ed. 18 September 2002, 3-5 at 3 (emphasis added). This article closely parallels the article by the prelate who was Secretary of the Congregation for the Doctrine of the Faith at the time when *EV* 73 was drafted, Archbishop Tarcisio Bertone SDB, “Catholics and Pluralist Society: ‘Imperfect laws’ and the Responsibility of Legislators,” in *Evangelium Vitae: Five Years of Confrontation with the Society*, eds. Juan de Dios Vial Correa and Elio Sgreccia, 206-22 [Proceedings of the Sixth Annual Assembly of the Pontifical Academy for Life, 11-14 February 2000] (Vatican City: Libreria Editrice Vaticana, 2001). The Bishop of Rome is represented in the Italian Conference of Bishops; it is no surprise that this statement is echoed in *EV* 73.3’s response by the Pope to the “problem of conscience” of which the Italian issue of early 1981 was one kind of instance.

15. In 1989 the Bishops’ Conferences of Great Britain published a statement by the Catholic Bishops’ [of England, Wales, Scotland and Ireland] Joint Committee on Bio-Ethical Issues, addressed to the question “How far may I support a bill which *inadequately* protects human rights or other important aspects of the common good,” taking, “for simplicity,” the example of abortion. The statement declared that a legislator faced with “a law or a bill for weakening restraints on abortion” could never vote for it on the ground that killing an unborn child or stopping its development is sometimes needed, or on tactical grounds such as to preserve one’s career even for the sake of doing “greater good in the future.” But in a society where securing for the unborn the equal protection of the law is or seems practically impossible for the foreseeable future,

Catholics may support and vote for a bill or other proposal which would *strengthen the law’s protection* for the unborn, even when the bill fails to extend such protection to the full extent that justice truly requires. ... Catholics who are publicly lending their support to such imperfect legislation should not disguise their view that all procuring abortion is unacceptable.

Thus the statement treated as decisive the same criterion as the Italian Bishops: Does the amending proposal, bill, or law *change* the existing law by making it *more restrictive*? In the next paragraph this criterion was restated: “a measure of protection which is less than complete but which is greater than that accorded by today’s unjust law” and is judged to have “a better prospect of being enacted and brought into force” than any proposal to extend to the unborn what they are entitled to—“fully equal protection” by the law. And this broad and common-sense criterion, stateable in many different but equivalent forms of words, was to be the criterion adopted in *EV* 73.3.

16. The British/Irish statement of 1989 was warmly endorsed by Cardinal O’Connor, then chairman of the Committee on Pro-Life Activities of the National Conference of Catholic Bishops: Cardinal John O’Connor, “Abortion: Questions and Answers,” *Origins* 20, no. 7 (1990). In this statement, later included along with the British/Irish statement in the small CDF dossier running up to the CDF conference preparatory to *EV* 73.3, the Cardinal offered his own version of the dynamic and comparative explanation later found in *EV* 73.3:

The conflict over imperfect law has definitely been divisive to the pro-life movement. It seems to me that our goal must always be to advance protection for the unborn child to the maximum degree possible. It certainly seems to me, however, that in cases in which perfect legislation is clearly impossible, it is morally acceptable to support a pro-life bill, however reluctantly, that contains exceptions if the following conditions prevail:

“particular problem of conscience,” it is alluding to a kind of problem that arose constantly, and was extensively debated, during the two decades preceding the Encyclical. Making a key part of *EV* 73.2 a quotation from the Holy See’s own statement of principle in 1974 is an indication, or hint, that in 73.3 judgment will be passed on a matter that by 1995 had been disputed for more than two decades among people opposed to abortion and permissive abortion laws. The judgment is, in purpose and effect, a clarification of the Principle stated in 73.2. In particular, 73.3 is a clarification of what 73.2 means by “law permitting x.”

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- A) There is *no other feasible bill restricting* existing permissive abortion laws *to a greater degree* than the proposed bill.
 - B) The proposed bill is *more restrictive than existing law*, that is, the bill *does not weaken the current law’s restraints* on abortion. And,
 - C) The proposed bill does not negate the responsibility [*sic: scil.* possibility] of future, *more restrictive* laws.

In addition, it would have to be made clear that we do not believe that a bill which contains exceptions is ideal and that we would continue to urge future legislation which would more fully protect human life.

(*Ibid.*)

17. In November 1992 the Irish bishops themselves had to confront the very immediate and politically fraught problem of conscience which had arisen since in March 1992 a Supreme Court judgment had made abortion legal in what the bishops termed “a potentially wide range of circumstances.” “The Referenda: Statement by the Irish Bishops’ Conference,” 5 November 1992, para. 10 (on file with the author). The Irish government and legislature, in response to that judgment, were promoting amendments to the Constitution. In the opinion of the bishops, the principal amendment, while it “would improve the constitutional protection of the unborn as this now stands in the light of the Supreme Court judgment,” would “give constitutional support to a principle which is morally false and unjust . . . that it can be legitimate to deliberately destroy a human life.” (*Ibid.*) They then outlined “two contrary conclusions” which “can be drawn by people, all of whom are equally opposed to abortion.” (*Ibid.*) Some consider themselves bound to vote NO, “whatever the legal and political consequences.” (*Ibid.*) But others

who view abortion with total abhorrence see the Amendment as a means of curtailing the worst features of the Supreme Court judgment. They have no confidence that any more satisfactory opportunity of doing so will be presented to them. They do not see a YES vote as bringing about the introduction of abortion. *Abortion, with potentially wide availability, has already been introduced by the Supreme Court judgment.* They consider that the passing of the Amendment would substantially mitigate that totally unacceptable legal position. Their desire is *to improve the situation as best they can*, but they do not intend to endorse the flaws in the Amendment. They believe that they are restoring, insofar as is open to them at present, the constitutional guarantee of the right to life of the unborn child. (*Ibid.* emphasis added).

The Bishops’ Conference then gave its “considered opinion that from a moral point of view both of these stances are tenable insofar as each is intended to reflect a total abhorrence of abortion and the determination to make that abhorrence clear.” (*Ibid.*)

The most immediate historical precursor to *EV 73* was the reform of the Polish law on abortion, introducing very extensive prohibitions of abortion but leaving intact the existing permission of abortion in a small number of cases specified by excepting from the new law's prohibitions certain cases involving serious threats to health or life of the mother, rape, or serious and permanent disability of the child. This legislation was adopted early in 1993. But before the end of 1992, the Holy See¹⁸ began direct preparations for a conference to be focused entirely on the question what judgment might properly be made, at a level transcending the national, on "the delicate problem of the collaboration of Catholics with imperfect laws (for example, laws which permit abortion in certain cases, but are *more restrictive* compared with existing laws)."¹⁹ This conference was held in the Vatican in early October 1994, and all the participants were invited to reflect on a sheet of paper articulating (in less than 150 words of Italian) a "possible official position on the problem of imperfect laws." What was articulated on that sheet of paper is what now, reordered and partially reworded but in substance identical, was to be found in March 1995 as *EV 73.3*, which reads:

[73.3] 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 [It: *volta cioè a*] 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. It is a fact that while in some parts of the world there continue to be campaigns to introduce laws favouring abortion, often supported by powerful international organizations, in other 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 [Lat: *suffragari*]²⁰ proposals aimed at [Lat: *velint*] *limiting the harm* done by such a law and at 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 rather a legitimate and proper attempt to limit its evil aspects.

18. The Congregation for the Doctrine of the Faith was doubtless acting within the framework of the preparations for the encyclical *Evangelium Vitae* which were launched by the special consistory of cardinals summoned by the Pope on 4-7 April 1991 and the papal letter to the episcopate "*De Evangelio Vitae*" dated 19 May 1991 (see *EV 5*).

19. From the President of the Congregation's invitation of 1 July 1993 to the conference (emphasis added).

20. This word picks up the Latin *suffragiis sustinere* used to translate "vote for" in *EV 73.2*. The Latin is official and normative, but it is a translation of a document conceived from beginning to end (and in all probability approved and signed off by the Pope) in Italian; the Italian version thus has an authority not shared by translations (such as the English).

Like all the preceding episcopal statements, this paragraph expresses the judgment that casting a vote for a bill that will leave the state's laws inadequately restrictive of abortions and thus unjust can be acceptable and right because, and only because, the new law which the passing of the bill will enact will itself *make* the state's law *more restrictive*. Like each of its predecessors, the statement made in 73.3 focuses upon the new law's (the bill's or referendum proposal's) *object*, most essentially upon the *immediate legal effect* it is to have on the state's laws. If that object and juridical effect is in itself simply prohibitive, the bill or referendum proposal is just (so the statement implies), and voting for it can be an act of justice because the legislative proposal, and the amending law enacted if the bill is passed, is a just one.²¹ It will be a just law because the difference it makes to the state's whole law regarding abortion is just. The new statute's *juridical* meaning and effect is simply prohibitive. The statute *does* nothing but prohibit abortions. Of course, the state's laws, even as amended, will remain unjust because incompletely prohibitive (= partly permissive). The analysis, in every case, looks to see what *change* is made by the bill or new statute, and *compares* the statute about to be made (and the state's law as altered by the new statute) with the existing law. The existing law is taken as a *baseline* for this essential comparison.²² If the change made by the new statute is restrictive, the fact that the statute does not prohibit everything that might and should be prohibited does not entail that the partial prohibition—the new restriction(s) created by bill/statute—is an unjust act of legislating: the amending statute so enacted should not be regarded as an intrinsically unjust statute or, in itself, an unjust law.²³

Baselines may differ while the wording of a proposal or bill or law remains the same. One and the same bill may have to be compared with a more

21. As always, this is an over-simplification. "Just" here as almost everywhere in this paper, means "not intrinsically unjust." In reality, a law is not truly just unless it is not only not intrinsically unjust, but also does not violate any of the situation-relative moral norms bearing upon the relation between persons which is under consideration. (See, *supra*, note 7.) This is another complexity which I usually ignore in order not to clutter up the discussion.

22. It goes without saying that the *standard* of, or *measure* for, the comparison is not the baseline but the *moral norm* constantly upheld by the Church and reaffirmed in *Evangelium Vitae*, which demands that the protection of the law of the state against homicide include the unborn with the born. That moral norm entails that a bill whose effect is to permit abortion is unjust and cannot be supported. Whether a bill has that effect, however, can only be determined by comparing it with the baseline, the existing law. (Cf. note 24 below.)

23. Of course, a vote for it *can* be described as a vote for an unjust law—a vote, that is, for the state's law remaining unjustly permissive after its amendment. But that description is too broad and indiscriminating to be a proper basis for an analysis of the justice or injustice of voting for the amending bill/law.

permissive law (baseline A), or, in a different time or place, with a less permissive law (baseline B). Depending on the baseline, the necessary comparative analysis differs in result. Against baseline A, the bill can be judged supportable. Against baseline B it will necessarily be unjust and insupportable.²⁴ That was the gist of all the statements referred to above.

There seem to have been no episcopal or similarly significant ecclesiastical statements repudiating this kind of comparative or baseline analysis. However, it met with incomprehension and/or outright opposition from some people, who reasoned that any bill or new statute which leaves some abortions permitted is intrinsically (i.e. by its nature)—whatever the good intentions and difficult circumstances of any who vote for it—an unjust proposal or law, and therefore incapable of being justly supported or voted for. After 1974 these people could point to the CDF's *Declaration on Procured Abortion* sec. 22:

man can never obey a law which is in itself (*intrinsece*) immoral, and such is the case of a law which would *admit in principle the liceity of abortion*. Nor can he take part in a propaganda campaign in favor of such a law, *or vote for it*.

These objectors could and did object that any bill or new statute which selects for prohibition some but not all classes of abortions is either tacitly or explicitly—but in either case objectionably—“admitting in principle the liceity of abortion” by failing to simply repeal the existing laws’ permission(s).²⁵ A vote for such a proposal is therefore ruled out, according to the objectors, by the *Declaration* sec. 22. How can what is intrinsically wrong be made acceptable by the circumstances? Isn’t any comparison between the proposed law and the existing baseline law a reference to the circumstances of the proposal? How can the circumstance that the proposal is “more restrictive” make right what is intrinsically wrong?

As mentioned above, many episcopal statements made between 1974 and 1995 presuppose the error of this way of interpreting the *Declaration* and of this objection to the view that such amending bills and new laws need not be unjust and voting for them can be acceptable and indeed desirable. *Evangelium Vitae* 73.3 was clearly intended to ratify the *comparative* analysis of

24. There are other, more complex baselines, e.g. where the existing law is a dead letter, and is about to be replaced by one or other of two specific proposals, “ready to be voted on.” In such a situation, as *EV* 73.3 plainly implies, it is possible that the real baseline is the more permissive of the two proposals.

25. The fact is that “would admit in principle the liceity of abortion [ammettesse, in linea di principio, la liceità dell’aborto]” is ambiguous between (1) affirm the proposition that abortion is permissible; (2) not deny the proposition that abortion is permissible; (3) introduce a new permission of abortion; and (4) not repeal an existing permission.

an amending bill or law against the existing law (or some other relevant baseline). Phrase after phrase keeps that analysis in the foreground. Proposals of the kind in question are acceptable insofar as they propose “a *more restrictive* law, *aimed at limiting* the number of authorized abortions, *in place of* a more permissive law.” Acceptable proposals are “*aimed at limiting* the harm done by” the state’s permissive, pro-abortion law. They represent “a legitimate and proper *attempt to limit* [the] evil aspects” of the law they (only partially) supplant. The attempt to enact a new law that will have such an (incomplete) effect can be legitimate and proper provided that “it is not possible to overturn or *completely abrogate* [the] pro-abortion law” whose place the new law will *incompletely* take. In such cases, therefore, so 73.3 plainly affirms, voting for such a bill or new law need not be regarded—and indeed, provided the intentions and circumstances indicated in 73.3 are present, should not be regarded—as an instance of the kind of act declared by 73.2 to be always impermissible: voting for a permissive and therefore intrinsically unjust law. In what they juridically *do*—immediately, as a matter of law—such proposals, and the bills and new laws (statutes) giving effect to them, are (precisely speaking) *not permissive but prohibitive*.

That is how 73.3 and 73.2 must be understood if they are to be regarded as consistent with each other.²⁶ While it is logically possible, it is interpretatively absurd to take 73.3 as intended to state an *exception* to the principle stated in 73.2 to be exceptionless.²⁷ Proportionalist theologians (situation ethicists) commonly imagine that the Church’s specific moral teachings are wholly or

26. This reading also treats them as consistent with the straightforward dynamic and comparative analysis used by responsible episcopal teachers and pastors in all the cases mentioned in sec. III (and others). It is fanciful to think that the Pope would have left sec. 73 of his encyclical bare of any hint of a correction of that analysis (and its practical conclusion) if he had thought that such analyses, and the many acts of Catholic legislators done in reliance upon them—extending most recently to his own much loved homeland, under the guidance of Catholic statesmen very well known to him—were actually misguided attempts to justify the unjustifiable, the intrinsically immoral act of voting for a bill or law unjust by its very nature.

27. That interpretation is, however, proposed by Leslie C. Griffin, “*Evangelium Vitae*: Abortion,” in *Choosing Life: A Dialogue on Evangelium Vitae*, ed. Kevin Wm. Wildes, SJ and Alan C. Mitchell, 159–73 at 170 (Georgetown University Press, 1997). The quality of Griffin’s discussion can be seen from the following excerpts from her conclusions about EV 73 (ibid., 171). Her exposition of the encyclical’s teaching: “*Evangelium Vitae* forsakes the natural law and asks Catholic politicians to enact a theological teaching into law . . . [and] impose the Church’s teaching on non-Catholics. For pragmatic reasons, Catholics may vote for less restrictive abortion laws when their absolute ban on abortion cannot be passed. Catholics may vote only to restrict abortion rights or to ban abortion altogether . . . Moral error has no rights.” (Ibid.) Her own position: “*Evangelium Vitae* imposes a theological doctrine upon the Church’s faithful, but theological doctrine should not be imposed on non-Catholics by the state and politicians, not even by Catholic politicians.” (Ibid.) And so forth.

largely a matter of ecclesiastical legislation (“rules,” “prohibitions,” “bans,” which we are “supposed to” follow) to which Church “rulings” can make exceptions. But that is opposed to the moral doctrine reiterated vigorously two years before *Evangelium Vitae*.²⁸ It would be outlandish to think that EV 73.2, teaching that one may *never* support or vote for intrinsically unjust laws (including laws permitting abortion), might be immediately followed in 73.3 by an *exception* (= not never). So 73.3 must be taken to be, or to imply, an interpretation of 73.2’s phrase “law permitting abortion,” such that laws (proposals/bills/enactments) of the kind delineated in 73.3 (restricting but not completely²⁹ prohibiting abortion) are precisely a subset of the class “laws that do NOT permit abortion”.

IV

The Restrictive View of EV 73.3

It is sometimes suggested (a) that EV 73.3 has a more limited meaning and application than it appears to have, and (b) that, in any event, the principle recognised and affirmed in EV 73.2 is incompatible with all but a few ways of reforming a permissive legal abortion regime.

(a) The readings of EV 73.3 that would restrict its application to non-substantive amendments—such as the introduction of a clause declaring that medical personnel with a conscientious objection to abortion are under no obligation to participate in it—rely on treating the ruling given in the last sentence of 73.3 as completely separate from the statement of the “particular problem of conscience” in the first sentence. In this way, the category of “more restrictive law, aimed at limiting the number of abortions” is shuffled off the table, as if it were an idle, throat-clearing warm-up to the real business of the paragraph, which is to declare the legitimacy of proposals “aimed at limiting the harm done by [pro-abortion] law” subject to a proviso not hinted at in 73.3 but read in from 73.2, viz. that these proposals cannot be legitimate if they in any way treat abortion as permitted.³⁰ As interpretations of 73.3, these seem improbable, or even perverse.

(b) Another implausibly restrictive reading of 73.3 is that it allows substantive changes to abortion law, provided that neither the bill or statute

28. See John Paul II, Encyclical *Veritatis Splendor* (1993), condemning proportionalist moral theologies, and reaffirming the exceptionlessness of certain moral norms such as those against intentionally killing the innocent.

29. Recall note 10 *supra*.

30. See Colin Harte, “Challenging a Consensus,” in *Culture of Life—Culture of Death*, ed. Luke Gormally, 322 at 329 (London: The Linacre Centre, 2002).

making the change nor the law it changes, when read after the change, permits abortion. This proviso could only be satisfied by a codified set of abortion provisions in which each abortion-related article of the code is a complete law independently of any other abortion-related article.

On this restrictive reading of 73.3, which I shall call the Restrictive View, it is intrinsically unjust to support a bill which leaves an abortion-permitting clause less permissive. Even if the amending bill/statute does not mention permission, it is argued that it must be understood as *ratifying* and *continuing* some (though not all) of the permission that was previously included in the clause. On this view the Italian bishops, and implicitly the Holy See, were wrong to advise that voters could licitly support the 1981 prolife referendum proposal to *amend* art. 6 of Italy's abortion law by repealing some but not all of the permissive phrases in that article.³¹ Similarly (so the argument goes), suppose the existing law (the Abortion Act) were in the following form:

Legislative Form A

1. Abortion is permitted up to the 24th week of pregnancy, and thereafter is prohibited.

Then it would never be acceptable (they say) to support a bill of the form:

Reform R1

Clause 1 of the Abortion Act is repealed and replaced by "1. Abortion is permitted up to the 14th week of pregnancy, and thereafter is prohibited".

Nor would it be acceptable (they say) to support the following:

Reform R2

In clause 1 of the Abortion Act, substitute "14" for "24".

But (they say) the same effect might be licitly achieved if, instead, the existing law relating to abortion comprised a series of independent articles, one or

31. The prolife referendum would have repealed art. 4 which extensively permits abortion during the first 90 days, and then would have repealed in art. 6 the phrases here italicised: "6. L'interruzione volontaria della gravidanza, *dopo i primi novanta giorni*, può essere praticata: (a) quando la gravidanza o il parto comportino un grave pericolo per la vita della donna; (b) quando siano accertati processi patologici, *tra cui quelli relativi e rilevanti anomalie o malformazioni del nascituro*, che determinano un grave pericolo per la salute fisica o psichica della donna." Those "remaining elements" of Italy's abortion law which are said by the Italian Bishops' Conference to be not morally licit can only be found in art. 6 itself, as amended.

more of which could be simply repealed without referring to the other articles. Imagine a criminal code were in the following (improbable) form:

Legislative Form B

- 273. Abortion from 1 to 14 weeks is permitted if two doctors agree.
- 274. Abortion from 14 to 24 weeks is permitted if one doctor agrees.
- 275. Abortion for handicap is always permitted.
- 276. Abortion of a fetus of gypsy parentage is always permitted.
- 277. Subject to arts. 275 and 276, abortion after 24 weeks is prohibited.

Then, according to supporters of the Restrictive View, a reform bill/statute of the form:

Reform R3:

“Art. 274 is repealed.”

would not be unjust, and supporting it would be acceptable: for from that enactment, read by itself, you cannot tell whether any abortions remain permitted. Act R3, despite leaving articles 273 and 275 (not to mention 276) untouched, neither permits nor even tolerates abortion (they say). Indeed, they say, the legislature itself, that approves R3 *and leaves articles 273, 275 and 276 untouched*, does not choose to tolerate abortion.

Test this a little further. Suppose that a (different) Criminal Code has the form:

Legislative Form C

- 354. Abortion is permitted
 - (a) from 1 to 14 weeks if two doctors agree;
 - (b) from 14 to 24 weeks if one doctor agrees;
 and otherwise is prohibited.

It is unclear what, on the Restrictive View, should be said about the justice or intrinsic injustice of:

Reform R4

“Art. 354 is amended by deleting (repealing) sub-clause (b)”

or:

Reform R5

“In art. 354 sub-clause (b) is repealed.”

Neither of these reforming statutes *mentions* that clause (a) remains in force.³² But nor does R2 *mention* that abortion is permitted—it mentions nothing but two numerals. But R2 is to be rejected (they say) because it has a “juridical meaning” which refers to abortion being permitted up to 14 weeks, not 24. So by parity of analysis, the “juridical meaning” of R4 or R5 presumably refers to abortion being permitted up to 14 weeks. It would follow that (on this theory) R4 and R5, like R1 and R2, are intrinsically unjust, but R3 is not.³³

But that result is absurd. There is no significant difference, either in legal analysis or common sense, between R3 and R4 or R5. Indeed R3, too, could be analysed into its “juridical meaning,” as follows: the Code provisions on abortion are amended by repealing the article permitting abortion from 14 to 24 weeks, leaving abortion permitted up to 14 weeks under art. 273, and in all cases of handicap or gypsy parentage under arts. 275 and 276. The truth is that there is no legally significant distinction between these five enumerated reform provisions. There are differences between them that might have some relevance to their cultural side effects among a population in the grip of words. But a moral analysis that judges some but not others of them *intrinsically* unjust is deeply mistaken.

V

The Primary Argument

The confusions about the nature of a law that underpin both the Restrictive View and the Objection can now be seen at their core.

A law is a “proposition of practical reason,”³⁴ that is, a proposition that by being (legally) true/valid is ready to direct and change the course of a

32. Would it make a difference, on the Restrictive View, if the statute repealing sub-clause (b) also stated that sub-clause (a) is no longer numbered “(a)”?

33. The examples are adapted from the papers in which the Restrictive View is pertinaciously articulated by Colin Harte: “Problems of Principle in Voting for Unjust Legislation,” and “The Opening Up of a Discussion: A Response to John Finnis,” each in *Proceedings of the Linacre Centre Conference 2003*, ed. Helen Watt (London: Linacre Centre, forthcoming).

34. Aquinas, on the first page of his classic discussion of *lex* (law), states that laws are essentially “*propositiones universales rationis practicae ordinatae ad actiones*,” universal propositions of practical reason directed to actions: *Summa Theologiae* I-II q. 90 a. 1 ad 2. “Universal” here is used in the logician’s sense, to signify the picking out of a *kind* of action, however specific that kind (short of the pure particularity of e.g. a command directed to a single person, to do or abstain from a particular act on a particular occasion). Hence, as he goes on to say, a law “is simply a prescription of practical reason *in the ruler* governing a complete community” [and not, essentially, in statute-books or other documents, even though promulgation is essential to its validity]: I-II q. 91 a. 1c; also q. 92 a. 1c; both passages look back to q. 90 a. 1 ad 2.

subject's practical reasoning and deliberation towards choice and action. The state's law is the whole set of such propositions. No enactment or other pronouncement has juridical relevance unless it *introduces* into that set some proposition(s) not formerly part of the set, or *prevents* the elimination of some proposition which would otherwise have ceased to be part of the set, or *eliminates* from the set some proposition(s) formerly part of it. The concept of "ratification" has no juridical relevance except in special contexts where the very existence of a rule of law is in doubt (e.g. because of uncertainty about whether proper procedures were followed in enacting it). Except in such special contexts, a statute "ratifying" another statute *does nothing* juridically. That is, it leaves the state's law exactly as it was; the set of propositions of law (legally) applicable in that community remains unaffected. Ratification's only meaning and significance (the special contexts aside) are "political" effects e.g. on public opinion, party morale, or suchlike. These are important, and are one concern of the kind of restrictive reforms approved by *EV 73.3*, but they are not the concern of the Principle in *EV 73.2*.

Equally misconceived is the notion that an amending provision such as R2—"In clause 1 of the Abortion Act, substitute '14' for '24'"—*continues* (while restricting) the existing statute's unjust permission. The truth is that the amending statute, in such a case, *does nothing* except prohibit abortion from the fourteenth week onwards. The amending statute introduces into the state's law the new proposition that abortion is prohibited between 14 and 24 weeks, to supplement the already (legally) true proposition that abortion is prohibited from 24 weeks to the end of pregnancy. The already existing proposition that abortion is permitted up to 14 weeks remains (legally) true. It continues to be true, but not because of the amending statute. Juridically, the amending statute does *not* continue the existing permission. "Continue" has a juridical meaning and relevance if, and only if, some proposition of law *would cease* to be true *but for* the effect of the statute that continues it. And that is not the case in any of these examples.

The Restrictive View's deep confusion is this. It treats words and statements (e.g. in an amending statute) as identical with or equivalent to propositions. Supporters of the view might, for example, object to what I say in the previous paragraph along the following lines. Before the amending statute there was, they might object, no proposition of law, *no law*, that abortion is permitted up to 14 weeks; the only relevant proposition was in section 1 of the Abortion Act, namely that abortion is permitted up to 24 weeks. To which the relevant reply is: the *statements* in section 1 of the Abortion Act, and in the articles of the code are one thing, but the relevant propositions of law are another. The law on a subject matter is not what is stated in some relevant statute or code but rather, what is stated in the relevant code or statute

interpreted or understood in the light of all relevant legal principles, written and unwritten, and all other relevant provisions of codes and statutes and the opinions of judges and other learned authorities. There are as many true propositions of law as there are legally answerable questions that might be raised about the subject-matter. The following are at all relevant times (legally) true propositions of law in the imaginary state(s) we are considering: "Abortion is lawful at 10 days," "Abortion is lawful at 4 weeks," and so on, indefinitely.

Lawyerly common sense, whether in a "codified" system or a "UK-type" (partially) uncoded system, understands the state's law as a vast sea of (legally) true propositions: "Abortion is permitted at 10 days," "Abortion is permitted at 12 days," "Abortion is permitted at 7 weeks," "Abortion is permitted at 8 weeks," "Abortion is permitted at 13 weeks," "Abortion is permitted at 14 weeks," "Abortion is prohibited at 15 weeks," and so forth.³⁵ It is, legally/juridically, entirely irrelevant whether you amend this set (i) by assigning arbitrary numbers to the propositions permitting abortion between 14 and 24 weeks and then declaring that all the propositions so numbered are hereby repealed, or (ii) by enacting that abortion is prohibited from 14 weeks on, or (iii) by enacting that in the code provision or statutory clause permitting abortions, "24" shall be replaced by "14" . . . : there are many other ways of making one and the same change in the law.

The whole matter is too serious to turn on distinctions which are purely verbal or formalistic, in the worst sense—unhinged from reality and the relevant truths about a state's law. The Restrictive View focuses upon what bills and statutes *say*, rather than on whether those bills and statutes *make* (legally) true any (and if so which) proposition(s) of law not already true independently of them.³⁶ This focus results in a series of distinctions devoid of moral significance (and unknown to *EV* 73): for example, between codified and uncoded systems, between repealing a statute (but substituting an only partially changed alternative) and amending it (= partially repealing it), and between statutes that (supposedly) do and statutes that do not constitute "the whole abortion law" of the state.

No statute, indeed no code, could constitute the whole of a state's law on

35. Despite their relative specificity, these are all "universal propositions" within the meaning of Aquinas's essential characterisation of a law as a universal proposition of practical reason. So they are all rules. This is not to say that there is much of importance in the distinction between, on the one hand, relatively specific universals (= rules) and, on the other hand, propositions about particulars (= applications of rules in particular propositions such as that Jane's abortion of her baby this week is/was/would be lawful/unlawful).

36. Or, of course, on whether the statute will *prevent* the ceasing to be true of some proposition of law which would otherwise cease to be true.

abortion (or any other topic). The law on any issue is the proposition about that issue that is made legally true by the interaction of relevant statutory provisions with constitutional and other statutory provisions, with judgments of superior courts, and with the general principles of law presupposed by all juristic thought. Among these general principles is that what is not prohibited is permitted, and that what is permitted is a legal right unless, though not criminally or civilly prohibited, it (as English lawyers would say) is "contrary to [a judicially cognisable] public policy."³⁷

Permission is the default position. This is not a matter of logic³⁸ but of one of the "general principles of law recognised by civilized nations"³⁹ Trying to create a legal permission is redundant and futile (juridically, but perhaps not politically) unless the matter in issue is already prohibited or contrary to a legally recognised "public policy."⁴⁰ At least in the eyes of the law, prohibitions exist like artificial islands in a boundless ocean of permission. In any modern state the default to permission is greatly strengthened, in the case of abortion, by constitutional principles protecting and enforcing the right to bodily or personal security, the right to privacy, equal protection of women, and so forth. It is a mistake to think that a short code or statute could comprise "the whole of a country's abortion law."

So, whether in R2 in which a statutory provision is amended by replacing "24" with "14," or in R1 in which a statutory provision "Abortion is permitted up to 24 weeks [and prohibited thereafter]" is amended (or repealed and substituted for) so as to read "Abortion is permitted up to 14 weeks [and prohibited thereafter]," the effect of the change (repeal, partial repeal, amendment—draft it as you please and call it what you will) is the same. A set of pro-

37. As supporters of the Restrictive View contend, any distinction between legal permission and legal toleration can reasonably be assumed to be beside the point in relation to a matter of fundamental rights like abortion. The point is taken for granted in *EV 73*, and in all my papers on the subject; it may have been obscured somewhat in the CDF's Declaration of 1974, with deleterious effects on the decisions of the (West) German Constitutional Court thereafter.

38. Logic is open to Aristotle's position that the default position is prohibition.

39. This is the phrase used in the Statute of the International Court of Justice, art. 38, to pick out one of the principal elements in law, alongside law established by those instruments that establish laws (in the international context conventions, in the sense of agreements or treaties; in the intra-state context statutes and other enactments) and law existing by virtue of custom.

40. Properly interpreted, laws prohibiting murder, manslaughter or, in general, homicide should be interpreted as extending their protection to the unborn. But to say that the law's default position is permission does not contradict that. In countries without explicit prohibitions on abortion, it is today universally true that the homicide laws are *not* interpreted as prohibiting abortion, and so such countries exemplify the default permission: what is not prohibited is permitted.

positions (indefinite in number but bounded in meaning and effect) affirming abortion's legal permissibility cease to be (legally) true, and a new set of propositions *become* (are *made to be*) legally true, prohibiting abortion. The words of the amending statute(s) speak of permitting abortions up to 14 weeks, but their legal effect on the permissibility of abortion is nil. So the restrictive line of argument entails that, except in the exotic and unheard of case of a statute or code which conveniently frames a set of complete one-by-one permissions repealable one-by-one, all abortion statutes are intrinsically unjust—and no reforming abortion statute can ever under any circumstances be voted for in a decisive ballot—unless they are entirely prohibitive. *All or nothing* is the essence of this position.

EV 73's position is radically and rightly different. Abortion statutes creating prohibitions which otherwise would not exist are just (in the sense of: not intrinsically unjust) in all that they juridically do. What they juridically do or effect is make true a set of propositions of law, indefinite in number but bounded in meaning and effect. *Every* proposition of law that these amending or partially repealing statutes bring into being or make true is *nothing but prohibitive*. The state's law remains unjust to the extent that its permission of certain abortions remains in place and legally true. But that is not the result of anything in the amending statute. Appearances are misleading.

Still, someone may say it is "self-evident" that legislators cannot rightly vote for a reforming bill which replaces a law permitting abortion up to 24 weeks with a law permitting it up to 14 weeks (or 6 weeks, or 2 weeks, or 2 days). For all such proposals "*specifically permit* abortion"! But, as Justinian's *Digest* observes at the outset (I, 3, 17), "Knowing the law is not a matter of clinging to the wording [*verba*] of laws but of understanding their force and impact [*vim et potestatem*]"—what can be called their juridical meaning and juridical effect (logically prior to and distinct from any empirical effect they may have on the human behaviour they address). *The fact that a statute says that abortion is permitted does not entail that that is the statute's juridical effect*. And in fact—that is, in legal truth—the reforming bill or statute's only effect is prohibitive. So far from it being self-evident that the statute *permits*, i.e. makes permitted, some abortions, it is juridically and strictly speaking not true that a reforming statute of the kind just described permits any abortion, even one. What the Objection takes to be self-evidently true is in legal reality false.

It is evident that such legal realities are the concern of EV 73. And, as it happens, there is an important element in EV 73.3 which makes doubly clear the document's indifference to all appearances and appearance-based distinctions of the kind that the Restrictive View relies upon. This element concerns the baseline against which any bill or amending statute is to be com-

pared when assessing whether the amendment (or partial repeal) is permissive (and thus intrinsically unjust), or prohibitive and thus capable of being voted for by a Catholic or other prolife legislator. In my own writings prior to *Evangelium Vitae*, I treated the baseline as the law in force at the time of the putting of the proposal (bill) to the decisive vote. But the encyclical takes the robustly common-sense approach that for the essential and crucial comparison there can also be another baseline, namely, the law that *will* be in force, not in some speculative future, but imminently—paradigmatically, “tomorrow”—if the prolife restrictive bill is not enacted. For, according to *EV* 73.3, the baseline may be “a . . . law already passed” or “[a . . . law [technically a bill]] *ready to be voted on.*” If this baseline law (legal position), already in force *or* virtually certain to be in force unless defeated by a prolife alternative, is more permissive than that prolife alternative, then the latter should be regarded, not as introducing into the state’s law permissions, but rather as making valid certain prohibitions which would otherwise have been absent from the law tomorrow. As prohibitive, it is essentially just. True, it is conspicuously permissive by comparison with the old law. But the old law is no longer a relevant baseline for comparison; in situations of the kind the document is here considering the old law is doomed and practically speaking defunct. If the prolife bill under consideration is not enacted, the state’s law will tomorrow be completely or highly permissive. So: enacting the prolife bill/statute introduces into (or maintains in) the law certain propositions which tomorrow would have been excluded from the law, propositions which all prohibit what would otherwise, tomorrow, have ceased to be prohibited. Despite the incompleteness of its prohibitions, the prolife bill/statute is thus not a “permissive law” within the true meaning of *EV* 73.2’s principle that one must never vote for a permissive law.

In short, not every statute that declares some abortions permitted is a permissive law in the sense intended by *EV* 73.2. For some such statutes *permit*—*make permitted*—nothing, but only prohibit. In these cases, the reforming statute’s stipulation that abortion is permitted up to 14 weeks (or that it is prohibited only as from 14 weeks, or that “14” is substituted for “24”—the differences of formulation do not matter) is not the cause of the (legally) true proposition of law that abortion is permitted up to 14 weeks. Despite its wording, the reform permits nothing, but prohibits abortions from 14 to 24 weeks. It withdraws no part of the law’s (= the state’s laws’) protection of unborn babies, but simply extends it. And this is the case not only as a matter of legal technicality. It is the common sense of the matter.

VI

Other Mistakes Contributing to the Objection

Prohibition and permission are not symmetrical, for (as recalled above) the law's default position is always permission, never prohibition. So it is a mistake to claim, with one supporter of the Objection and Restrictive Position, that "a proposal to repeal intrinsically unjust law can never be intrinsically unjust."⁴¹ This claim is false if the Objection is true, namely that a statute which states that some or all abortions are permitted is an intrinsically unjust law. For simple repeal of a statute prohibiting abortion after 24 weeks will leave the state with *no prohibition of any abortion at all*⁴²—law intrinsically even more unjust. Such a repeal will be an intrinsically unjust measure. A real-life instance of such unjust action is the Canadian Supreme Court's invalidation of the Canadian abortion statute which had a few years earlier been unjustly amended so as to permit a wide range of abortions.⁴³ This invalidation—in substance though not in form a repeal—has left Canada with a law on abortion which is certainly intrinsically unjust but can be given alternative descriptions, each of them correct and, despite appearances, consistent with the other: "no law at all," or: "a completely permissive law."⁴⁴

But two other important mistakes at the root of the Objection have yet to be mentioned. The first is the assumption that "intrinsically unjust" means unjust regardless of context and circumstances, and intentions of any acting person. In truth, however, when a certain kind of action is called "intrinsically" wrongful, what is meant is that it is wrongful independently of context, circumstances and intentions *other than those circumstances and intentions* which are part of the "object" or "matter" by reference to which this kind of action is identifiable (defined) as always wrong. So: as *EV 74* recalls, theft is intrinsically unjust, but theft is highly contextual and intention-relative: it is only those takings of another's property that are carried out without urgent necessity, and without a claim to be entitled to this property, and without a belief that the owner would consent, and so forth. No definition of lying is sound unless it includes the speaker's intent to assert, not merely state, a proposition, and the speaker's belief that what is being asserted is false. And

41. Harte, "Problems of Principle in Voting for Unjust Legislation," *supra*, note 33, section 3.3.

42. See note 40.

43. *R v Morgenthaler* [1988] 1 SCR 30.

44. The fact that each of these *verbally* contradictory descriptions is correct should have warned Harte that simple theorems such as "if a law is intrinsically unjust you can never vote for it" need very careful handling—as *EV 73.3* in effect warns readers of 73.2.

so forth. So, similarly, it is one of the evident purposes of *EV 73.3* to make clear that a statute or other law-making statement does not fall within the class of “intrinsically unjust” laws mentioned in *EV 73.2* unless the context or circumstances are such that it *renders* (makes) non-prohibited what was or would otherwise tomorrow have been prohibited. These are matters of context and circumstance and intention (“aim”) that enter into the very meaning of “permissive” as that term is used in *EV 73.2* to identify a class of intrinsically unjust laws.

The second important mistake sometimes made by defenders of the Objection is the assumption that it makes no difference whether the legislator whose action we are considering is a member of a group (a legislature, a court, a referendum electorate . . .) or is a *sole ruler* with authority to make whatever law(s) he or she chooses. But the difference is important in understanding the very meaning of a proposal to restrict abortion. In the case of a sole ruler who has the opportunity to choose⁴⁵ what propositions of law shall be (legally) true in relation to abortion, the ruler’s proposal to restrict abortions but not completely prohibit them is a choice that here prohibition shall end and permission shall begin. It cannot fail to be the expression of the unjust judgment that unborn children of a certain immaturity, or race, or condition of handicap are not entitled to the protection of the law. But in the case of statutes enacted by a group legislature, the very same bill and statute need not, and in many circumstances does not, express any such judgment.

This can be understood by reference to an analogy. Suppose a group of twenty stalwarts travelling in a desert region come upon a fortified camp. Observing it from outside its fence they discover that inside are hundreds of children being tortured to death, one by one, by the camp’s guards. The group outside have no competing responsibilities capable of affecting their obvious responsibility to rescue the children if they can. And (they judge) they can, provided that *all twenty* cooperate in a coordinated assault on the camp while the evil guards are mostly asleep. All but five of the group are determined to rescue every child. But those five insist that they are not willing to participate in the rescue, and indeed will positively block the rescue of any children at all, unless children of a race that (they say) persecuted the five’s parents are left behind. There are three of these children, and they are the occupants of hut P. The fifteen protest at this unjust limitation on the rescue, but to no avail. The recalcitrant five veto all plans that include hut P. Reluctantly, but with all

45. Here I leave aside considerations that would complicate such a ruler’s deliberations, and responsibility and culpability, if the ruler’s decisions on these matters were likely to be *rejected* and passively or actively *resisted* and rendered *ineffectual* or clearly *counterproductive* by popular opposition or corruption and indifference.

necessary vigour, the fifteen then carry out a rescue, together with the discriminatory five whose assistance proves, indeed, to be as vital as was anticipated. Hundreds of children are rescued, but the five discriminatory rescuers block every attempt to go beyond the plan and liberate hut P.

The willingness of the fifteen non-discriminatory rescuers to carry out the rescue in no way expresses a judgment that the three children in hut P were not as fully entitled as the others to be rescued. That unjust judgment is made by the small minority of rescuers, whose judgments and willingness overlap and converge with but partially differ radically from the just judgments and will of the majority. The resultant rescue itself can be described as a group act, and that group act can be described as unjust—indeed, intrinsically unjust—insofar as from the outset it excluded three rescuable children. But more accurately the event can be described as two converging and overlapping but partially diverging group acts. One is the act of the fifteen just rescuers. The other is the act of the five unjust rescuers (whose act includes manifesting readiness to block any attempt by the fifteen to rescue the last three children). The accurate description of the fifteen's group act is: "an attempt to rescue *every child* that it is within our power to rescue." That is a completely just kind of choice and act. The accurate description of the group act of the five is: "an attempt to rescue all the children within our power except three whom we choose to leave to certain death and to prevent others from rescuing." That is an unjust act.

The Objection's most tireless defender has said that when a restrictive abortion law is enacted there is just one group act, "the act of the legislature." That is a common way of talking which, though widely sensed to be something of a fiction, is accurate enough for many practical purposes—start with the name: statutes are appropriately called Acts of Congress, not Acts of a 51:49 majority of each House. But it ceases to be accurate, or even reasonable, in the kind of context, and in relation to the kind of question, that we are considering. There should be no need to labour through a statement of the detailed applicability of the desert rescue analogy to situations of the kind dealt with in *EV* 73.2/3 and the present debate. Suffice it to say that if the fifteen were capable of carrying out the rescue without the cooperation of the five, their position would be like that of a single law-maker with sovereign powers (unshackled by any court or constitution), or like that of a *fully united controlling majority* in a legislature with authority to make what law "it chooses" in relation to abortion. And that is simply not the kind of situation under discussion.

It is not irrelevant to bear in mind the effect of these various mistakes. With a few ungrounded exceptions (based on an unsound notion of codification), defenders of the Objection rule out all attempts to rescue the unborn through

law unless all are to be rescued, even though the limitations on the rescue result entirely from the unjust will of a subgroup within the larger group willing and able to mount a rescue, a subgroup who block the efforts of the prolife subgroup who are willing and ready and *otherwise* able to rescue all. The Objection meets a particular nemesis in situations, such as Canada (and in substantive respects, the United States), where the existing law on the permissibility of abortion is essentially, one may say, *no law*. For here there are, for all practical purposes, no statutory words validly declaring abortion sometimes prohibited and sometimes not.⁴⁶ The Restrictive View's candidate for acceptable restrictive abortion reform ("pure" repeal of neatly separate existing items of articulated permission)—a solution rarely if ever available in the real world—is out of the question in such a situation. Yet supporters of the Objection are content to think that the Principle obviously means (and that the Catholic Church *obviously* teaches—just read the words of EV 73.2!) that in such countries nothing can be done, under any circumstances, to introduce any legal prohibition, however extensive and beneficial, unless it is a prohibition as fully complete as justice demands.

VII

Inadequate Formulations of the Primary Argument

In my previous treatments of this whole issue I failed to analyse it with all the precision that it calls for. As a result, my earlier discussions gave too much prominence to the distinction between intention and side effect, and too little attention to the ambiguities in the phrase "unjust law" and "permissive law," ambiguities which the foregoing sections of the present article try to bring to light.

My principal earlier treatment was written for the CDF's conference preparatory to EV 73.3; its main passage is perhaps this:

The question *what* one is choosing to support (or not support, or oppose) is also conditioned by context, namely by the existing legal situation. For example: a *law* of the form 'Abortion is lawful up to 16 weeks' is an unjust law. But a *bill* of the form 'Abortion is lawful up to 16 weeks' might either (i) be proposed precisely as introducing a permission of abortions hitherto prohibited, or (ii) be proposed precisely as prohibiting abortions hitherto permitted between 16 and 24 weeks. The choice to support the bill in situation (i) is a substantially different choice from the choice to support the bill in situation (ii). For what is being chosen—the object of the act of supporting the bill—is different in the two

46. This is not to say that there are in these jurisdictions no laws at all regulating the practice and circumstances of abortion.

cases. In case (i) it is supporting the permission of abortion. In case (ii) it is supporting the prohibition of abortions, indeed of all the abortions (let us suppose) that legislator at that moment has the opportunity of effectively helping to prohibit.

To say this is not to embrace 'situation ethics' or proportionalism or any other theory which denies that there are intrinsically evil acts incapable of being justified by circumstances and/or intentions or ends. On the contrary, I take for granted that *supporting the making of legal permission of abortion (at any stage of pregnancy) a part of the law and supporting the retaining of such permission as part of the law* are intrinsically evil acts incapable of being justified by circumstances and/or intentions or ends or 'proportionate reasons,' even 'to reduce the total number of abortions.'⁴⁷ I have been addressing the prior questions: What is *support*? What is *making permission a part of the law (or retaining it as part of the law)*?⁴⁸

My discussion in the article unpacks the answer to that last question, which even as it stood made clear that a primary question—in the present context, the primary question—is: What is it for a law to be—“objectively”, if you like—“permissive”? Is that question settled by looking to see what a document, the bill or statute, *says*, regardless of the legal context or circumstances which may and usually will profoundly affect what *law* is brought into being or maintained in being by this bill or statute? But the rest of my discussion in that 1994/1996 essay in fact focused upon the intentions of the voting legislator, and I loosely spoke, a couple of paragraphs later, of the restrictive reforming bill “continu[ing]” the unjust existing law. That way of putting it failed to keep in view the distinction between what the statute says and what

47. In his recent papers (see note 33 above) Harte alleges that voting for restrictive reforming legislation of the kind under debate is an unethical moral compromise. He provides no argument for this assertion save his general fallacious argument that every restrictive statute permits (= makes permissible) what it does not prohibit. And his distinction between the political and the moral is an unacceptable way of speaking. But he is right that the matter in debate excludes compromise. As I wrote to the Secretary of the CDF on 15 January 1995, “Permissible *obiecta* [for choice] do *not* include ‘compromising with evil’ or participating in the promotion of unjust or wrongful legislation. The only relevant *obiectum* which is permissible is *eliminating, or preventing, a wrongful law as far as concretely possible*. . . . Support [for a restrictive reforming bill of the kind in debate] is not, in truth, a compromise with those seeking to maintain or introduce wrongful elements [of law]. There is a *material coincidence* between the upright Catholic legislator’s or citizen’s project and the wrongful project of those seeking to maintain or introduce wrongful elements. But this material coincidence is not appropriately describable as compromise, even if it is accompanied by certain agreements which the Catholic legislator may enter into in order to facilitate his project (e.g. the agreement to hold the vote at a specific time, or to ‘pair’ supporters and opponents who wish to be absent from the vote on legitimate business elsewhere).” (Emphases in original.)

48. Finnis, “Unjust Laws,” *supra*, note 3, 599-600; Joblin and Tremblay, *I Cattolici e la società pluralistica*, 99-114 at 106-8.

it juridically means and does, a distinction I have spelled out above. The same failure is to be found in a 1997/1998 address of mine, where I spoke at one point of the restrictive reforming statute as “a law which does in fact permit abortion”,⁴⁹ even though the case I was discussing was of a statute which would neither create any permission nor keep in being any permission that would otherwise have ceased to be part of the state’s laws.

The ambiguity that I was failing to keep steadily in mind is in substance the ambiguity (or one key aspect of the ambiguity) which has caused an interpretative problem for readers of Aquinas. Here is how I sketched that problem in 1991:

Aquinas sometimes says that God can dispense from the Decalogue and sometimes (in the same works [works from both his early and his late writings]) says that God cannot.⁵⁰

Interpretative methods like the restrictive approach to *EV 73* and to the juridical meaning of statutes would here yield the confident conclusion that, self-evidently, one or other of these sets of texts should be abandoned, and that Aquinas was a bungler. But in fact, as I went on, the contradiction is only apparent, for:

Insofar as the Commandments consist of *formulations* which can be taken as dealing with behaviour which is *conventionally* defined as murder, adultery, and so on, or which is behaviourally (physically) the same as murder or adultery defined *ex objecto* (i.e. in terms of intentions and choices), they *can* be dispensed from by God, since his special mandate so changes the circumstances that the chooser’s [proximate] intention, the *object* of the act, can be different from what it is in all other cases to which the behaviourally *or conventionally* specified norm applies: cf. *In Sent.* I d. 47 q. 1 a. 4; *In Sent.* 4 d. 33 q. 1 a. 2; *De Malo* q. 3 a. 1 ad 17. But when the Commandments are considered as they should be, as *propositions* bearing on human acts understood in terms of their precise [and proximate] intentionality (*ex objecto*), they are altogether exceptionless and cannot be dispensed from by God: *In Sent.* 3. d. 37 a. 4; *Summa Theol.* I-II q. 100 a. 8.⁵¹

The preceding sections of the present article show how talk of a “permissive” (and therefore unjust) abortion “law” has a similar systematic ambiguity. This ambiguity must be identified and cleared up before the true principle that one must never vote for a permissive abortion law can be rightly understood and applied so as to do justice, rather than the injustices that the restrictive

49. Finnis, “The Catholic Church and Public Policy Debates,” *supra*, note 4, 269.

50. Finnis, *Moral Absolutes*, *supra*, note 6, 39.

51. *Ibid.* (emphases adjusted). I added: “For this interpretation, see Patrick Lee, ‘Permanence of the Ten Commandments: St Thomas and His Modern Commentators,’ *Theological Studies* 42 (1981) 422-43.” See also *Moral Absolutes*, *supra*, note 6, 91.

(mis)understanding of it (in all innocence) would often cause.

VIII

The Secondary Argument

Even though the intention/side effect distinction should not have had the prominence it did in my former discussions of this issue, it is relevant and necessary for a correct understanding of two points. One is an element in the enactment of all restrictive abortion laws. The other is a special issue that may arise from time to time.

The general point is this. A restrictive bill or statute does in a political and public-relations sense publicly “ratify” and “continue” some of the existing unjust permission of abortion. It *appears* to do what the Restrictive View mistakenly thinks it legally or juridically does, and this appearance conveys the false and corrupting message that some babies are not morally entitled to the protection of law. And, more fundamentally, it does leave some babies without the protection of law to which they have an urgent and overriding entitlement. Neither of these two broad classes of “effects” makes the statute a permissive law in the sense of the Principle or EV 73.2. But both are very bad aspects of the enactment of the restrictive statute. Still, neither aspect is intended by a prolife legislator. As EV 73.3 says, these legislators have a strict responsibility to make their “absolute opposition”⁵² to abortion “well-known.” If they can prevent or avoid the formulation of the restrictive statute in terms such as “abortion is permitted up to . . .,” they ought to.⁵³ But the bad effects

52. The encyclical uses the unfortunate phrase “absolute personal opposition,” unconscious of the way this sounds in the ear of English speakers who have heard politicians profess their “personal opposition” to abortion while in word and deed articulating and acting upon the view that legal prohibition of abortion is more or less improper or at least not a moral responsibility.

53. In my paper prepared for the CDF conference and republished as “Unjust Laws in a Democratic Society,” *supra*, note 3, I took as my stock example a bill of that form. I was dealing with the issue proposed to the symposium by its organisers—the very same “problem of conscience” as is articulated in EV 73—and I was deliberately framing it in a form *unusually difficult* for the Catholic or other prolife legislator. The same problem of conscience can arise in forms which have all the appearance of being easier, and I could have made my argument rhetorically easier by using one of these. For example: if the existing permissive legislation read “Clause 1: Abortion is freely permissible up to 24 weeks of pregnancy,” the reforming bill might simply read: “In Section 1, replace the word 24 with the word 16.” Such a bill would *say* nothing about permitting abortion. Or the reforming bill might read: “Notwithstanding section 1, abortion after the end of the 15th week is absolutely prohibited.” Such a bill would *say* nothing about permission and would articulate only a prohibition entirely appropriate and just in what it prohibited. But it was clear to me that the relevant problem of conscience does not turn on drafting formalities and differences. So, avoiding rhetorical advantages, I envisaged and

of seeming to withdraw legal protection from some of the unborn are *praeter intentionem*, side effects, for prolife legislators whose intention in voting for the bill/statute is to prohibit all the abortions they can. As for the “leaving unprotected,” this is not really an effect at all, but rather the absence of a desirable effect. It is like a fireman who can carry only two persons leaving behind a third in a burning building. It is true that the firemen have a strong obligation to rescue each and every person in the building. But they are not at fault, and are not “choosing the lesser evil” or “compromising,” when they rescue everyone they can, leaving behind those they cannot. That leaving behind is an important part of the story. Like its sequel or outcome, it is deeply regrettable, albeit in no sense culpable. If it is an effect at all it is certainly a side effect, notwithstanding the certainty with which it can be foreseen. Common sense has little difficulty in reaching all these judgments.

The special point is this. Sometimes it will happen that pro-lifers who have initiated or supported a restrictive reforming bill whose only juridical effect would be prohibitive are confronted with an amendment to it which will make it in (say) one respect permissive. Imagine a one-clause prolife bill to extend the prohibition of abortion from 24 weeks to three weeks⁵⁴—thus saving 99% of all who would otherwise be aborted—onto which is tacked at the last minute (over the total but unavailing opposition of the prolife legislators) a new clause B cancelling the existing legal prohibition of abortion sought on grounds of forcible rape. The bill thus amended is put to a final vote, and if it is not carried there will be no reform of abortion law for many years if ever (so far as human foresight goes). The bill is now, in one part (clause B), permissive within the meaning of *EV* 73.2 and the true principle that paragraph of the encyclical articulates. When asked by the Speaker to vote Aye or Nay, can the prolife legislators vote Aye? Surely.

But, the objector may say, legislators voting for proposals are willing and choosing to enact precisely what is contained within those proposals. What the legislature “does” (in willing that certain permissions, tolerations, prohibitions, etc. be enacted as law) is indistinguishable from what an individual legislator “does” (in willing that the proposal with those very permissions, tolerations, prohibitions, etc. be enacted). Voting for the whole of the proposal which is presented as the matter of the vote is *the act of the*

discussed a bill whose *form(ulation)* was of the most unpromising and repellent kind: “Abortion is lawful up to 16 weeks.” Even when those formalities and differences have a public impact which the draftsman ought to avoid if possible, failure to live up to this obligation is not an intrinsic wrong.

54. The prolife legislators have floated a bill to extend the prohibition to 0 weeks (= from conception), but find that this has no support from those compromising legislators whose support is indispensable if there is to be any reform at all.

legislator just as the enactment of the whole of the proposal is *the act of the legislature*. This objection sounds plausible, if one is in the grip of one's society's conventions, but as an action-description fit for moral analysis it is false. The prolife legislators each say "Aye" or walk through the "Yes" lobby. An effect of that behaviour is that, if enough others do likewise, the whole bill, and each of its parts, will be enacted. But what these prolife legislators intend, both the proximate intention that each of them have—the precise object of their voting acts—and any further intention(s) or motive they have, is settled not by what other people or social conventions make of their behaviour but by their own course of deliberation, their own authentic practical reasoning (not to be confused with some inauthentic inner or outer story they might tell themselves or others to rationalise their real purposes). And it is their object, "the proximate end of a deliberate decision which determines the act of willing on the part of the acting person,"⁵⁵ that settles the question *what they are doing*, the act(ion) which, thus accurately described, can then be subjected to moral analysis.⁵⁶ Their object in voting Aye is the enactment of clause A. By virtue of the conventions (rules) of the legislature and the morally bad will and actions of the prochoice and centrist legislators who secured the addition of clause B, the effect of their *voting for clause A* will be that the whole bill, including clause B, will be enacted. This effect is certain and inevitable, but (like many other certain and inevitable effects of what we choose to do) it is not part of what they intend or choose or do, in the senses of those words which are necessary for a true analysis (and for a Catholic analysis). The enactment of clause B is for these legislators a side effect. (For others, of course, it is an important part of what these others intend and do.)

As argued in earlier sections, a law is essentially a proposition of law, and one bill/statute can thus, whatever its verbal structure, contain many distinct laws. It follows that, in a case like this, the legislator who votes for the law made (legally) true by clause A does not *vote for* the unjust law made (legally) true by clause B. In the true principle articulated in *EV* 73.2, not only the phrase "permissive law," but also the phrase "vote for" must be understood with precision. One does not, precisely speaking, vote for what one does not intend to vote for.

But it also remains true that, in the broader sense that counts for

55. Encyclical *Veritatis Splendor* (1993), 78.

56. "The morality of the human act depends primarily and fundamentally on the 'object' rationally chosen by the deliberate will, as is borne out by the insightful analysis, still valid today, made by Saint Thomas [fn. Summa Theol. I-II q. 18 a. 6]": *Veritatis Splendor* 78. Harte has sometimes suggested that the citation of q. 18 a. 6 somehow qualifies the obvious sense of *VS* 78. It does not. See note 59 below, and Finnis, *Moral Absolutes*, supra, note 6, 65-74.

parliamentary procedure and its outcomes, one votes for the whole bill and all its parts. The enactment of the whole bill including its unjust part(s), here clause B, is a side effect for which the prolife legislators are morally responsible, as one is always responsible for side-effects that one can or should foresee and could avoid. But the norms that govern the moral assessment of their willingness to cause that side effect are not the strict and exceptionless negative moral norms which apply to what one intends, chooses and in that strict sense does. They are norms of fairness, commitment, role-responsibility, which are situation-relative,⁵⁷ and which allow for the judgment that *for these legislators*, who do not intend the enactment of clause B, the willingness to do what foreseeably and certainly has the effect of enacting clause B (and is conventionally *counted as* “intentionally voting for” and enacting the whole bill including clause B) is not unjust to the babies who will unjustly perish because of clause B’s enactment.

This is a special and perhaps rather unusual kind of case; the more usual case is the kind discussed above, in which the reforming bill is nothing but restrictive. But the truth that precisely what a voter is doing in voting is settled by his or her actual course of deliberation, not by what is deemed in law or convention to be the effect of so behaving, is a general truth. So too is the truth that, whatever its verbal structure or drafting formalities, a bill/statute has the logical structure of a list of distinct propositions of law, rather like the Restrictive View’s imaginary code,⁵⁸ each of whose articles could be eliminated without affecting the other articles—with the consequence that the object and intent of legislators in going through the “Aye” lobby can rationally be to enact some of these propositions of law, accepting the enactment of the others as a side effect for which they are morally responsible but not in the uniquely stringent way that one is morally responsible for what one intends and chooses as an end or as a means. Thus the emphasis on the distinction between intention and side effect in my earlier analyses of the *general* problem of voting for restrictive abortion legislation was not so much mistaken as unnecessary and therefore misleading.

IX

Concluding Note on Intentions (Motives)

It follows from the Secondary Argument that though they are voting for the same legislation, at the same time, and within the same context, for some

57. See *supra*, note 7.

58. Form B in sec. IV above.

legislators the action is evil, and for others the action is good. And there should be no surprise. The real possibility of identical behaviour being different descriptive species and different moral species of human acts is an immediate implication of a sound act-analysis. One finds such an analysis, for example, in Aquinas—not least in, amongst many other passages, *Summa Theologiae* I-II q. 18 a. 6, recalled in *Veritatis Splendor* 78. As that passage puts it,⁵⁹ one's actually (interiorly) willed end or end—purpose(s), non-proximate intention(s)—stand(s) to the object (the proximate end) of one's exterior act as decisively characterising, *formale*, that is, as form stands to matter, namely as *making the thing what it is*. So, in the context of action, it is the ends and intentions of the acting person that make *the act*—what is *done*—what it is.⁶⁰ And they thus can make immoral what would otherwise be morally right. Two soldiers on a mission to rescue people from an extermination camp are alongside one another, returning the rifle fire of the camp guards. One soldier intends his potentially lethal return fire to disable the guards from blocking the rescue mission. The other soldier intends to satisfy

59. S.T. I-II q. 18 a. 6c: "So, just as one's external act gets its species or character from the object which it concerns, so one's internal act of will gets its species from one's end(s), as if that were its own object. But [or: And thus] *whatever pertains to one's will stands as shaping and characterising in relation to whatever pertains to one's external act*. For one's will employs one's members as its instrument in one's acting, and *one's external acts only have moral significance insofar as they are willed*. And so the species or character of a human act is formally [essentially] analysed by reference to one's end(s), and is analysed in terms of its matter by reference to the object of one's external act. Thus as Aristotle says in *Nicomachean Ethics* V, if one steals in order to commit adultery, one is, strictly speaking, more an adulterer than a thief." {Sicut igitur actus exterior accipit speciem ab obiecto circa quod est, ita actus interior voluntatis accipit speciem a fine sicut a proprio obiecto. *Id* [or: *ita*] *autem quod est ex parte voluntatis se habet ut formale ad id quod est ex parte exterioris actus*, quia voluntas utitur membris ad agendum sicut instrumentis, *neque actus exteriores habent rationem moralitatis nisi inquantum sunt voluntarii*. Et ideo actus humani *species formaliter consideratur secundum finem*, materialiter autem secundum obiectum exterioris actus. Unde Philosophus dicit, in V Eth., ut ille qui furatur ut committit adulterium est, per se loquendo, magis adulter quam fur.} In Aquinas's philosophy, "form" and *formale* refer to what is most essential to something being what it is—almost the opposite meaning from the modern idiomatic English "(mere) formality" etc. On what Aquinas means by speaking of an act's "matter," see Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford University Press, 1998), 142 nn. 43-44 with the citations especially to *De Malo*: in short, in this context "matter" and "object" and "close-in intention" are interchangeable.

60. Elsewhere, and pervasively, Aquinas will remind us that good and bad are not symmetrical: good (further) intentions cannot make good an act made bad by its matter = object = proximately intended behavioural characteristics, but bad intentions (and/or inappropriate circumstances) make bad an act despite its being in its matter/object a good or not-bad kind of behaviour such as almsgiving or walking. See S.T. I-II q. 18 a. 4 ad 3; Finnis, *Aquinas*, supra, note 59, 148.

his lust to see or hear and gloat over hated men dying in agony. The first's acts are acts of just defence of self and others, the second's identical *behaviour* is "materially" the same but formally (i.e., more really) and primarily (according to the teaching of Aquinas, following Aristotle) an act or set of acts of immoral lust or hatred.⁶¹ At any rate, they are substantially different *acts*, as that term is used in moral reflection.

The same can and often holds true of two legislators going through the voting lobby together: their behaviour is identical, their acts different, and one is acting uprightly, the other immorally. In neither this case nor the extermination camp rescue need this make the cooperation between the rescuers or legislators morally unacceptable. Legislators whose intention is to do justice so far as is possible for them in the legislative situation are not complicit in the bad intentions or motives of those whose bad will prevents them doing all that justice requires.

61. Ibid.