

Prudence as Attentive Love and the Sophistry of Abortion Abolitionism

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How does a red state like Ohio solidly approve an amendment to its constitution enshrining a right to abortion?¹ There was fearmongering and misinformation from the pro-choice side to be sure, but the pro-life movement needs first to deal with the disorders in our own house—not least the increasingly noisy public presence of pro-life extremists. Much of this essay will analyze the imprudence of those often referred to as abortion abolitionists, but it is also meant as an occasion for a more general examination of conscience by pro-lifers. What outcomes are we working for, short- and long-term? A national ban on abortion, or a state-by-state deliberation? In our internal conversations, are we fixated on the “hard cases”? Is there any whiff of us about wanting to do away, eventually, with “exceptions” for the sake of the mother’s life? Which is a way of asking, have we allowed the peculiar temptations of moral theology to divorce us from reality? What should our game plan be? What change should we pursue after *Dobbs*? How are we to change?

I. What We Must Change

Last September, my wife suffered premature preterm rupture of membranes (PPROM): the amniotic sac broke (almost certainly because of a Lyme infection that was repeatedly missed) at 19 weeks plus 4.

Ten days later, our little Lucia was born alive. I baptized her quickly before she was placed on my wife’s chest, to live her few minutes outside in the world, held and kissed by her mother. Between her water breaking and the birth and death of our daughter, my wife had to endure repeated coercion by various OB/GYNs when it was discovered that PPROM had occurred: the script was the same; the greatest possible pressure was exerted on my wife to get her to abort our child right away. The threat: infection could set in. There was no concern at all for our child. It seems the thought there was that our child was already ruined, imperfect, even if we could somehow delay spontaneous delivery for a few more weeks until her lungs had

¹ Julie Carr Smyth, “Ohio Voters Enshrine Abortion Access in Constitution in Latest Statewide Win for Reproductive Rights,” AP (November 7, 2023): <https://apnews.com/article/ohio-abortion-amendment-election-2023-fe3e06747b616507d8ca21ea26485270>.

developed sufficiently to give her a chance to survive. Strongly pro-life in principle, my wife heroically resisted these grotesque assaults.

I would like to present Julia's account here:

What's happening in obstetrics to high-risk women: it's been infiltrated and corrupted by eugenics, the Margaret Sanger seeds of the pro-choice movement. In a poll in the PPRM Facebook group I'm in, 40% of women who delivered live children after PPRM were told their babies would be profoundly disabled if they continued with the pregnancy and 0% of those 40% of women's babies were disabled. The problem is it's nearly impossible to get data on how often the doctors are wrong because so many women are terrified into inducing/terminating—so we'll never know what those babies' quality of life would've been had the women continued with their pregnancies. In my experience, within the span of one conversation (where *three* doctors at Beth Israel, including the lead obstetrician, came into my room as a last-ditch attempt to try to intimidate me into inducing), their warnings went from 1) baby will be born a vegetable if I continue with the pregnancy (I said I'm still not going to let you induce) to 2) there's a good chance you will lose limbs from sepsis (I still said no) to 3) you will likely won't be able to have more children (I still said no) to all of a sudden (and you could hear the annoyance in the doctor's voice at this point) 4) you will likely die from infection—are you ready to leave your son without a mother? (They said this in front of Quinn.) I had to sit there and say, yes I was willing to accept that outcome, and look like a monster. None of what they said ended up being true. It was so much like my experience with my PCP when she wanted me (as a single mother) to abort Quinn. When I said no, she said adoption would be harder than termination and then withheld any prenatal care info from me and just had me leave her office. Just as at the hospital and with all these women in the PPRM group, the doctors withheld antibiotics from us and any resources on how we could maximize our chances of carrying the baby longer, especially when so many of us were close to viability. They actively refused to provide us and our babies care because they were disgusted we wouldn't let them get rid of the baby.²

² Julia continues: “A theme I see in the pro-choice movement, and what I experienced when being pressured to terminate, is the pitting of mothers against their babies. This is something that's been pretty consistent in my PPRM group—baby is dehumanized/essentially deemed incompatible

Unless you have gone through such an experience, it is hard to credit that a medical specialty supposedly devoted to maternal-fetal health could have become so ideologized as to pressure for abortion with so little thought, so little care, and so little humanity. But obstetrics has indeed become thoroughly divorced from the basic obligations of medical care over which it should stand sentinel.

After *Dobbs*, if pro-lifers want to save lives and prevent vast and untold heartache, we must encourage generations of pro-life young people to enter medicine, especially obstetrics, and transform that corrupted art from the inside. They will face morally ambiguous, indeed impossible, situations, but they will do so always trying to care for two patients, to the greatest extent possible.

There is no adequate legislative fix for these breathtaking abuses. Medicine *is* an expertise, with its own prudence. Legislation is not the appropriate way to correct OB/GYNs when they have gone astray. It is in fact an ideological move to insert oneself into a complex arena from the outside and micromanage hard cases. One reason the pro-life movement has suffered reverses in red states since *Dobbs* has been the conjuring of the bogeyman of pro-life zealots criminalizing doctors (and mothers) who perform (or consent) to medical procedures in fact necessary to save the life of the mother or to save her from grievous and permanent bodily injury.

Surely it is a bogeyman. And yet, as we will see below, there are pro-lifers who play the ghoul in a pharisaical and ideological fever not to offend the supposed strictures of moral philosophy and theology. We must do what we can: set our own house in order by being thoughtful about the truly necessary medical actions that sometimes, tragically, do arise and repudiating those voices that would usurp authentic medical judgment concerning what is infelicitously, but unavoidably, termed “therapeutic abortion.”

with life, and the doctors told us we needed to get rid of it or it would kill us. Either that or we’d be damning the baby to a miserable life if we kept it. We all felt so alone because we were pitted against our babies, and no one would fight for both them and us. We still saw the babies and ourselves as a team, a unit, but the doctors attempted to pit us against each other—one of you has to die. Margaret Sanger has won in terms of the dominating mentality in high-risk obstetrics: ‘the greatest sin people can commit’ is ‘bringing children into the world...that have no chance to be a human being, practically.’ And what better way to convince a woman to allow OBs to weed out the unfit than to tell her she’ll die if she doesn’t follow their advice? That’s the ultimate tool they have at their disposal! To threaten death. They threaten the mother with death in order to allow them to bring about the death of her child. Then deny the mother basics such as antibiotics that would decrease her chances of actually having life-threatening complications! I asked the doctors why wouldn’t they keep me in the hospital if they were so worried about an infection quickly coming on? The very doctors doing the fearmongering are not actually interested in preserving the health of the mom.”

We know that *Roe v. Wade*'s companion case, *Doe v. Bolton*, defined the "health exception" to possible state regulation of abortion (beginning with the second trimester) to include "all factors—physical, emotional, psychological, familial, and the women's age—relevant to the well-being of the patient." That exception basically nullified every state's ability to regulate abortion in favor of women's health starting with the second trimester and in favor of the unborn child's life starting with the third trimester. *Doe* destroyed any line separating "therapeutic" from "elective" abortion.

All kinds of things can in fact go wrong in a pregnancy, serious threats to a mother's health and life do sometimes arise, and society needs obstetricians who are both medically competent and ethically sane to help confront those situations. Obstetrics is not now medically competent or ethically sane; it has been thoroughly corrupted by eugenic and pro-abortion ideology. The only remedy is to transform that field from the inside. And that should be at the top of the movement's agenda: to encourage our young to consider going into medicine and recovering that art so essential for the flourishing of life.

II. How are We to Change

There was a transition buried in those last paragraphs, for the rest of this essay will concentrate on the things we must do as pro-lifers to become more credible witnesses to the gospel of life. On the one hand, we cannot play into the hands of those who want to caricature us as unfeeling ideologues committed more to abstract norms than to flesh-and-blood human beings. The easiest way to play into their hands is to become that caricature.

On the other hand, we must reassess the scope of what the movement should be pursuing politically.

A. How Not to Become a Caricature

A self-styled "abortion abolitionist," T. Russell Hunter opposes all abortions, without exception: "You can't say, 'Life begins at conception...but we're going to allow abortion in the first five weeks,'" Hunter says. 'If life begins at conception, and you believe that human life must be protected, well, you're stuck

logically.’ ...He argues that patients who seek abortions and anyone who helps them should be charged with murder.”³

In the same article, we meet another interesting character:

Kristine Harhoef...has been talking with lawmakers in Texas and neighboring states, trying to promote legislation that would treat abortion identical to homicide. “And the penalty could be anything from nothing at all, if she was truly innocent, truly forced into that abortion, to a fine or community service, to, yes, some jail time and possibly even the death penalty.”

For old hands in the pro-life movement, these will be familiar characters, derived from the “personhood” faction who have only disdain for mainstream pro-lifers and their incrementalist political strategy. The more press the “abolitionists” receive, the more impossible becomes our task to foster actual legal change in a pro-life direction.

They are ready at hand for the media to conjure the bogeyman: pro-life logic means rejection of common sense; mothers seeking abortion must be punished, perhaps even executed.

Another recent news story features one Jason Storms, leader of something called Operation Save America. The reporter notes that these “abolitionists” “oppose all abortions without exceptions and promote legislation that would pave the way for women to be investigated and prosecuted for ending pregnancies.” The reporter correctly notes that imposing legal penalties on mothers seeking abortion has always been rejected by the mainstream pro-life movement in America. Storms replies, “You are intentionally killing a human being. That’s the definition of murder.”⁴

Their increasing prominence in post-*Dobbs* America, and the damage they are doing to the cause of life, require that their arguments be confronted again. But even more of a concern is if more mainstream pro-lifers themselves become tempted by such extremist logic in this time after the de-constitutionalization of abortion.

Many of us remember the old pro-life bumper sticker stating that “Abortion is murder.” One understands the identity politics driving people to place that on their

³ Sarah McCammon, “Anti-abortion hardliners want restrictions to go farther. It could cost Republicans,” *Consider This* from NPR (May 23, 2024): <https://www.npr.org/2024/05/23/1198912380/abortion-abolition-republicans-rights-elections-roe-wade-2024-trump-biden>.

⁴ Chloe Atkins, “The Rise of ‘Abortion Abolitionists’ Targeting Women, Doctors, and Donald Trump,” NBC News (May 26, 2024): <https://www.nbcnews.com/news/amp/rcna147187>.

vehicles. But given the stakes of our political moment, it is important to go beyond the almost-inevitable lack of nuance of bumper-sticker assertions and make the distinctions which prudence morally requires us to make. What I have personally witnessed in my own pro-life work is an increasing fixation on the “hard cases,” when that is wildly inappropriate given our political moment. Fixating in imprudent ways on matters that take our eyes off the big picture (to find effective strategies, within each state, for realizing more and more fully the basic American proposition: that all humans are created equal) will result in the miscarriage of the pro-life movement.

To foster achievement of a new birth of freedom in our fraying republic, I feel compelled to mount, again, an argument against “abolitionist” anti-incrementalism and to forestall a temptation *within* the mainstream movement to fall into a “logic”-driven ideological extremism.

1. Prudence Listens

The Kills have a song in which we hear the refrain, “My passion is accurate,” which neatly links the question of *akribeia*, or accuracy, to the desiring affectivity which constitutes the material substance of ethical, and therefore of political, life. In his *Nicomachean Ethics*, Aristotle notes that political questions, questions of justice and of the beautiful and fine, should not be treated as if they were susceptible of exact answers. We should rather expect answers that are “so for the most part” (1094b20-23).

Aristotle’s ethical inquiry about the *telos* of human life in the *Ethics* is, somewhat surprisingly, revealed to be a matter of politics: the concern is the structure of the human good, in the individual and in the community. And for this kind of inquiry, which I take to be carried out by *phronēsis* or prudence, the appropriate accuracy is not apodictic but dialectical: in pursuit of truth, the inquiry must proceed through a reasoning with others and on the basis of communal understandings. This allows for the movement of history within tradition.

This prudential character must suffuse the pursuit of justice. For Aristotle, justice seems to sit somewhere between intellect and sense appetite, the two principles of action. (The differentiation of will as rational appetite happens much later, with Saint Thomas Aquinas, who thereby provides a clear seat in the soul for the virtue of justice.)

Justice must be pursued through the virtue of prudence, or the practical wisdom that deliberates and judges concerning which actions effectively conduce to individual happiness and to the common good. Prudence knows what is truly good or bad for us, and it bears on the means necessary for attaining personal and communal

flourishing—the good life. Our orientation towards those ends is provided by our desires or appetite, and prudence in turn shapes those desires into the moral virtues of courage, temperance, and justice.

If my passion, including my passion for justice, is to be accurate, it must be prudent. It must be patient, humble, attentive, dialogical, docile, measured, non-fanatical...

2. The Vice of Imprudence

I will devote most of the rest of this essay to a consideration of perhaps the most comprehensive defense of the “no-compromise” position: Colin Harte’s 2005 book, *Changing Unjust Laws Justly: Pro-Life Solidarity with “The Last and Least.”*⁵

We do not find the accurate passion of prudence in this book. Though more reticent than the abortion abolitionists quoted above, Harte places himself well outside the pro-life mainstream in his punitive musings on mothers who have suffered abortion:⁶

I am also undecided as to who, precisely, must be punished. It seems reasonable to punish those who perform, assist in, or facilitate an abortion. I am undecided whether women undergoing an abortion should also be liable for prosecution and punishment. This may be required if the law is to give adequate protection to the unborn, in which case it seems reasonable to take into account, when establishing the punishment, the emotional and psychological pressures that might lead some desperate women to abort.⁷

I suggest a truly prudent approach to this question would involve listening to the reasons why those who have served in the pro-life movement for decades do not wish to prosecute aborted mothers. In any case, those belonging to the incrementalist mainstream need to think through those reasons once again, in this

⁵ Colin Harte, *Changing Unjust Laws Justly: Pro-Life Solidarity with “The Last and Least,”* (Washington, D.C.: CUA Press, 2005). Hereafter, *CULJ*.

⁶ From the Chloe Atkins article above, “The Rise of ‘Abortion Abolitionists’ Targeting Women, Doctors, and Donald Trump”: “GOP state lawmakers around the country have introduced at least 26 so-called ‘abortion abolition’ bills from 2022 to 2024, according to If/When/How, a national legal advocacy nonprofit group. The bills often repeal provisions that prevent women from being investigated and prosecuted over abortions or don’t include explicit language that exempts them from being charged. When asked if he believed that women should face the death penalty in places that have capital murder statutes, Storms didn’t hesitate. ‘Absolutely,’ he said.”

⁷ *CULJ*, p. 260.

political moment. We hold that, in some obvious sense, abortion is indeed murder: it is the deliberate taking of an innocent human life. Then are we being inconsistent in treating abortion differently from other kinds of murder?

There are several reasons this kind of deliberate taking of an innocent human life needs to be treated differently. For one thing, we must resist the androgynous, atomistic-adult anthropology attending much modern state-of-nature theorizing: a mother simply *is* more vulnerable than other humans. The burden she bears is as profound and weighty as any natural burden a human assumes. It is certainly a moral obscenity for any man to condemn a female for struggling with a condition he will never be able to take on. An Aristotelian prudence will recognize the common sense of this without thereby falling into the fallacy of “her body, her choice.”⁸

Yes, each human life has equal dignity. But this powerless human is not a life just anywhere: the mother is constrained in a radical way that no outside observer ought ignore. Working to protect that vulnerable human should never entail a failure of empathy for the other vulnerable human in the situation.

Another reason incrementalists repudiate the punishment of mothers who undergo abortion: we acknowledge how often they feel they have no other choice.⁹

Before turning from this aspect of Harte’s position, we should note one other resonance with his latter-day successors amongst the abolitionists, but here Harte is more clearly thoughtful than they:

The relevant question is whether it necessarily follows that the punishment for abortion must be the same as the punishment for other killings. On this point I am undecided. It would seem to be reasonable to argue that the punishment for abortion should be the same as the punishment for killing someone after birth. However, it would also seem to be reasonable to argue that all killings need not have an identical punishment, and that the main concern should be whether the specified punishment is a sufficient deterrent for the

⁸ This seems to me an insuperable difficulty for the strategy of declaring the unborn child a person under the Fourteenth Amendment, quite apart from whether that is a legitimate constitutional construction. Yes, the unborn child is a person according to a sound accounting of the biological, ethical, political, and philosophical facts involved, but legal declaration of that reality could cause disallowance of true distinctions, and the appropriate accuracy, attending the unique maternal burden.

⁹ See, for example, David Reardon, “Only a Minority of Abortions are for Unwanted Pregnancies, New Study,” Charlotte Lozier Institute (April 15, 2021): <https://lozierinstitute.org/only-a-minority-of-abortions-are-for-unwanted-pregnancies-new-study/>.

law to be accepted as one providing appropriate protection to those whose lives might otherwise be at risk.¹⁰

Hear, hear to the latter.

Let us now turn to the beginning of Harte's book. He makes clear his opposition to incrementalism from the start: "support for restrictive abortion legislation violates the requirements of solidarity."¹¹

With respect to restrictive abortion legislation, however, one sees that the principle of "women and children first" is inverted. It is true that all the unborn who are threatened by abortion are vulnerable (just as all—men, women, and children alike—are vulnerable in a burning building), but some are more vulnerable than others. Laws to restrict abortion do not even protect unborn children randomly, but give priority to those who, because they have favorable characteristics, can be judged to be less vulnerable. ...those with the unfavorable characteristics of being disabled, younger, conceived after rape, etc., tend not to be included in laws to restrict abortions. If the existence of an abortion law were truly an emergency situation in which the maxim "women and children first" were applied, the most vulnerable of the unborn would be given first place, not last, in attempts to save some lives.¹²

We have already seen Harte's willingness to countenance the prosecution of mothers for abortion, and we will later see that he thinks "intrinsically unjust" making an "exception" for abortion when the mother's life is threatened, so it is a strange experience to witness his riffing off of that old chivalric cry, "Women and children first!" He means, it seems, always the unborn children first, their mothers second. Incrementalists have always insisted, "Love them both."

But there is a serious argument here. Catholic social doctrine contains a crucial criterion of solidarity: the preferential option for the poor, which can and should be understood as a preferential option for the most powerless. That is, yes, the more powerless one is, the more one has a claim on our care—an essential and urgent ethical and political precept. But Harte parses it tendentiously. He splits the "unborn" into sub-classes, and sets those against each other. If we took Harte's rigid, falsely

¹⁰ *CULJ*, p. 260.

¹¹ *CULJ*, p. 5.

¹² *CULJ*, p. 4.

precise misreading of the preferential option in dead earnest, would we not have to turn the world upside down so that no human zygote passes away?

Be that as it may, surely it is so that we cannot save some lives *by* sacrificing others. But imposition of, say, bans on abortion after 12- or 15- or 18-weeks gestation are not bought at the cost of younger babies' lives. The younger should be saved if they can be. If they cannot be, the ones who can be saved should be saved.

But true to the “personhood” hermeneutic, Harte insists on all or nothing—which would mean all the babies die. That seems supremely rational to him; it seems the opposite to me.

Harte communicates his anguish over having participated as a student in a campaign of the Society for the Protection of Unborn Children (SPUC), Britain's main incrementalist pro-life group, an effort to pass, in Britain, the 1987 Alton Bill, which would have banned abortions after 18 weeks. Harte scores some good points against that incrementalist legislation. He asks, why 18 weeks? Fair enough. There needs to be a rationale; there needs to be thinking, and reasons. Much more troubling, though, is that the bill states: “A woman's pregnancy may be terminated...up to the beginning of the 18th week of gestation.” No pro-lifer should draft a bill that explicitly authorizes abortion. One easily concedes the point to Harte. And most troubling of all, as Harte recounts it, is that disabled babies were eventually excluded from the 18-week limit. He cites anguished testimonies from persons with disabilities who felt this as a betrayal by the pro-life movement—and well he should.

In America, the standard exceptions are to save the mother's life and rape and incest.¹³ There is no popular pressure here to carve out a eugenic exception to abortion bans, and the American pro-life movement should resist whatever pressure is applied.

Harte's plea on behalf of persons with disabilities should be heeded, but he has taken his personal involvement in this case and incorrectly amplified it, in his own words, into a “paradigm of the denial of solidarity,” somehow exposing all incrementalist legislation as unjust.¹⁴ It was the impact this eugenic maneuver had on a friend of his that caused Harte to sour on incrementalism. Alison Davis, who has spina bifida, was the coordinator of a division within SPUC focused on persons with disabilities.

¹³ Incest has always seemed to me redundant if there is a rape exception. Here is a roundup of abortion-ban “exceptions,” which generally seem to be handled well:

<https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html>.

¹⁴ *CULJ*, p. 47.

Although she supported the Alton Bill in its early stages, she considered the exclusion of disabled babies unacceptable. Alton and SPUC argued that if the concept of an incremental approach to overturning abortion laws was justified as a means of saving lives, then the disability exclusion clause was justified—by the same logic—in order to save lives. Davis rejected the view that an exclusion could be made for disabled babies, and the logic of her position led her to reject exclusions for any baby, thus challenging the incremental approach SPUC had supported since the 1967 Abortion Act. During the passage of the Alton Bill I was aware of Davis’s concerns but, like others, I overlooked them in the midst of the frenetic atmosphere that prevailed as the pro-life movement hovered on the threshold of its first major legislative “success” in twenty years. Given the logic of Davis’s view, the exclusion of disabled babies from the Alton Bill... can be presented as a paradigm of the unsatisfactory nature of all legislation that grants the right to life to some unborn children but not to others.¹⁵

But “the logic of Davis’s view” does not prove what Harte thinks it does. These eloquent pages of his book can be summed up in the experience of a woman with cerebral palsy: “The salient aspect of Rafferty’s statement is that she identifies exclusion and rejection of unborn disabled children with exclusion and rejection of herself.”¹⁶ That is perfectly intelligible. But that is not the case with other babies we are not yet able to protect in law.

Note, from the long quote above, the tendentious redescription of what incrementalists are doing, a constant strategy in this book: “legislation that grants the right to life to some unborn children but not to others.” This sounds as if incrementalists, from some sovereign seat, perhaps in a Colosseum, are pointing to some children and saying, “You may live,” while pointing to others, saying, “You must die.” What incrementalist legislation is doing in fact is securing the right to life for all the unborn children we can. That great good is not purchased at the cost of the younger babies we cannot yet save—*unless* after passing, say, a 15-week ban an incrementalist group ceases to pursue ways of further advancing the cause of life. Harte does hit on one possible problem: “What sort of pedagogy does this sort of legislation provide?” Fair enough. In pursuing these post-*Dobbs* bans of abortions after the first trimester, pro-lifers must make clear during the political campaign that the reason for not insisting on a complete ban is the constraint of political reality.

¹⁵ *CULJ*, p. 47-48.

¹⁶ *CULJ*, p. 53.

Harte seems sure of the correctness of his absolutism and his interpretation of the work of those whom he opposes. At one point, he simply calls incrementalists dishonest: “A commendable effort to engage in respectful and fruitful dialogue with those who do not share the pro-life view requires an honesty that is lacking in the suggestion that compromise legislation, which fails to protect some (possibly many) unborn children, is consistent with either reason or morality.”¹⁷

Harte goes on to perform a rhetorical sleight of hand. In his second chapter, Harte expends much energy in trying to distinguish between legal “permission” and legal “toleration.” That is fine, though a word that would have served him much better than permission is “validation,” and his discussion is not pellucid. He wants to be exegeting Saint Thomas Aquinas, and yet Thomas elides the terms Harte wants to distinguish. But then Harte turns around and criticizes Robert George for eliding the terms...¹⁸

In any case, it is at this point that Harte contends with Thomas’s recognition that not all evil need be prohibited by human law—some evils may have to be tolerated. Harte rightly asks, “Can the moral evil of abortion be tolerated in human law?”¹⁹ There will be no question, to fix Harte’s language, of pro-lifers legally validating abortion. Right reason cannot allow that.

So the question before us is whether pro-lifers might *tolerate* abortion. Perforce, we must—until the scope of abortion is limited in some way. To render this less trivial, one could note that the person whose measure is right reason would never rest from trying to secure the conditions for the peace of all. Thomas sets the limit to toleration: “Human laws do not forbid all vices from which the virtuous abstain, but only the more grievous vices from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft, and such like.”²⁰ Or, we could take Saint John Paul’s formulation: “civil law must ensure that all members of society enjoy respect for certain fundamental rights which innately belong to the person, rights which every positive law must recognize and guarantee.”²¹

So, we must distinguish. On the one hand, the private killing of the most powerless human life should not be tolerated: it is contrary to the very reason a polity exists—to secure the conditions of flourishing of each and all. On the other hand, this is not

¹⁷ *CULJ*, p. 69.

¹⁸ *CULJ*, p. 80.

¹⁹ *CULJ*, p. 83.

²⁰ *Summa theologiae* I-II, q. 96, a. 2, c.

²¹ *CULJ*, p. 85: *EV* 71.

the question Harte is asking. He wants to know whether it is morally possible to support a law that restricts the scope of abortion.

But in dealing with *Evangelium vitae* 68-74, Harte wants John Paul to make the same distinction he is trying to make between “permitting” and “tolerating,” and he laments again, as with Thomas, that the distinction is not clearly made. This is a symptom of Harte’s anti-dialectical tendency. Instead of trying to understand why these minds greater than either of ours make or do not make the distinctions he makes, Harte rides his hobby horse through the field—and, behold, finds what he thought he would find all along. Though the end of chapter two is quite muddled, Harte reveals his bottom line a few pages before the end:

John Paul II’s rejection of laws that either permit or tolerate abortion (or support it in any other way) is evident, above all, in his unequivocal affirmation of “the dignity of every human person, respect for inviolable and inalienable human rights [that are] certainly fundamental and not to be ignored.” The notion of a “right to life,” expressed within the encyclical and consistently in John Paul II’s other teachings, is incompatible with the acceptance of laws either permitting *or* tolerating abortion.²²

This is the conclusion Harte wants: that laws *tolerating* abortion are simply unjust. All of that verbiage about “permitting” is a smokescreen, because no pro-lifer is in the business of backing laws that validate or authorize abortion. The only question is whether an incrementalist law, which *de facto* tolerates some abortions (though fewer than before), is *per se* unjust. Every pro-lifer acknowledges the right to life of each human being, recognizes the dignity of every human—that is what makes one a pro-lifer. Yet mainstream pro-lifers obviously do not concede that equal dignity means we cannot support incrementalist legislation. Harte simply asserts his interpretation.

On to chapter three, where Harte wants to prove that incrementalist legislation is “intrinsically unjust.” I am not convinced that “intrinsically” is helpful language here: a law is just or unjust, it harmonizes with the wisdom of God’s providential shepherding of the human good through time—or it does not.²³ Harte tries to introduce an intrinsic/extrinsic distinction into Thomas’s analysis—though this is alien to what Thomas writes.

Harte’s gloss on *Summa theologiae* I-II, q. 4, c.: “The unjustness of a law distributing burdens unfairly is discerned...not so much by that single law as by

²² *CULJ*, p. 86.

²³ *Summa theologiae* I-II, q. 4, c.: “Laws framed by man are either just or unjust.” That said, might it make some sense to speak of imperfect laws? Perhaps.

that law in the context of other laws and social conditions, i.e., by extrinsic factors. All laws within this category judged to be unjust are not unjust per se but always with respect to extrinsic factors.”²⁴

But this is what Thomas writes:

On the other hand laws may be unjust in two ways: first, by being contrary to human good, through being opposed to the things mentioned above—either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory—or in respect of the author, as when a man makes a law that goes beyond the power committed to him—or in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good. The like are acts of violence rather than laws...

Thomas maintains that laws are just from three perspectives: from their end, from their authority, and from their form. These all go to essence. Then, in the passage quoted above, he shows how a law may be unjust (concerning the human good), and it is with respect to the same three essential aspects. These are not “extrinsic” considerations: they are essential—or, if you want, intrinsic. So much is this so, that defect with regard to these aspects renders these putative laws “acts of violence rather than laws.”

Why does Harte want to see a distinction in Thomas that is not there? He helps us understand. If, as Harte notes in his gloss, what Thomas commits us to in evaluating the justice or injustice of a law is an understanding of how that law fits into “the context of other laws and social conditions,” and such (“extrinsic”) context in fact goes to essence, then an incrementalist can correctly claim that any given piece of restrictive abortion legislation must be understood in “the context of other laws and social conditions.” *If* the incrementalist legislation in fact advances the human good according to the prudentially grasped constraints of a certain time and place, then that law would be just.

In Harte’s favor, he begins chapter 3 with a telling anecdote about how thoughtless some incrementalists can be about the specific formulation of their proposed

²⁴ *CULJ*, p. 100.

legislation.²⁵ He is completely correct that more than pro-life consequences matter: we must think through the legal norms involved.

Nevertheless, Harte simply asserts what he wants to be true: “It would appear that those who are actively engaged in attempting to promote the right to life are also losing sight of the very concept of law: the essence of law is its justness, and the unjustness of restrictive abortion laws is a factor that must be acknowledged and considered further.”²⁶

Again, I stress how profoundly anti-dialectical, and therefore how contrary to prudence, Harte’s performance is. At no point has he provided an argument for the “unjustness of restrictive abortion laws”—this is a naked assertion. It is also slipped in. If he wanted to know our reasons for thinking incrementalist laws just, we might respond that they are in accord with right reason given the exigencies of community and history: to strain for as much of the human good as possible in this time and this place is exactly what prudence bends its energy towards and what rightly ordered inclination yearns to be about.

Harte proceeds with his unargued, anti-dialogical assertions: “*Evangelium vitae* teaches that a law violating the right to life of an innocent person (e.g., a law that tolerates, permits, or obligates abortion) is ‘unjust’ and ‘not valid as a law’ (*EV* 90). A just law on abortion must prohibit all abortions...”²⁷

Slipped in, parenthetically: a law that tolerates abortion “a law violating the right to life of an innocent person.”

Here we reach the extremity of Harte’s position: he really does believe that it is **unjust** even to ban all abortions *if* an exception is made to save the life of the mother. Beyond sophistic and anti-dialectic and misogynistic, this seems to me a species of moral insanity. What would an average American citizen think of a movement who could send up fellows who think like this?

Both Finnis and Drinan include, within the option of laws prohibiting all abortions, an exception when abortion is performed to save the life of the pregnant woman. It is not entirely clear why this exception should apply [!], though it is, of course, true that many people might consider a law that prevented an abortion in such circumstances unduly burdensome for the woman.

²⁵ *CULJ*, pp.90-91.

²⁶ *CULJ*, p. 95.

²⁷ *CULJ*, pp.105-106.

This seems like the ghastliest gallows humor: a law that forestalled efforts to save the life of the mother might be “unduly burdensome” for that woman who will die! What is going on here?

If such abortions can be judged to be morally permissible, as Finnis (with Germain Grisez and Joseph Boyle) seems to suggest, because they are unintended (or “indirect”), then the category of “prohibitive law” would be absolute insofar as it would refer to all abortions considered to be immoral choices. If abortions to save the mother’s life were truly performed in accordance with the double-effect principle (as Finnis et al. suggest), there would be no need to establish in law that this category of abortion be allowed because the action giving rise to the death of the child would not focus directly on “abortion” so much as on what would be regarded as a legitimate medical life-saving action. Thus, such indirect abortions—if they are truly such—would not be exceptions to a general prohibition of abortion. If, however, they are *direct* abortions, and contrary to the moral law’s prohibition of all direct abortions, then it would seem more appropriate to include them within the category of “compromise” legislation.²⁸ [Which, we remind ourselves, Harte deems “intrinsically” unjust.]

It is one of the great hazards of moral theology to tempt its practitioners to entertain such brutal abstractions as whether it would be better to have mother and child both die rather than find a way to think through to save human life. America does not want to be ruled by moral theologians, and America should not want to be so ruled—and I speak from the guild.

Before leaving Harte, it is worth noting that he devotes a whole chapter to an attempt to read around the plain sense of *Evangelium vitae* 73, which clearly authorizes the pursuit of incremental legislation²⁹: “...when it is not possible to overturn or completely abrogate a pro-abortion law, an elected official, whose absolute personal opposition to procured abortion was well known, could licitly support proposals aimed at *limiting the harm* done by such a law and 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.”

²⁸ *CULJ*, p. 61.

²⁹ Joe Kral always exegetes this passage well, most recently in “St. John Paul II’s Incrementalism in the Dobbs Era,” *Journal of Bioethics in Law and Culture Quarterly* Vol. 2, Issue 2 (Spring 2019).

<https://www.societyofstsebastian.org/summer2023-increments-dobbs-era-kral>.

Harte's gloss: "It does not say that legislators can vote for a 'law' (i.e., an 'abortion law' or 'restrictive abortion law') that prohibits some categories of abortion while tolerating or permitting or obligating others."³⁰ One of the most annoying things about this book is how often Harte repeats this triplet: tolerating, permitting, obligating. No pro-lifer would ever sign onto a law *obligating* abortion in any case! Pro-lifers do not seek to *permit* (meaning *validate*, in Harte's idiosyncratic usage) abortion at all. The mantra is wearying because the only thing he needs to prove has to do with the *toleration* of abortion in certain cases, and the triple formula muddies the water—and distracts from the sleight of hand.

He continues, "And *given that* such a law would be intrinsically unjust, *EV 73.3* could hardly permit legislators to vote for such laws without contradicting the preceding paragraph, *EV 73.2*, which teaches that it is never licit to vote for such a law" (emphasis added). This is not a reading of John Paul—it is Harte reasserting what he never proves and then reading his conclusion back into *Evangelium vitae*. Harte displays once more how anti-dialectical, and therefore imprudent, he is. If he could suspend his self-certainty for a time, John Paul might find his voice for Harte...who might learn that, in fact, legislation restricting abortion is not unjust—but just.

Instead, Harte involves everyone in a *reductio ad absurdum*: "*EV 73* teaches that legislators can vote for 'proposals' and these are, necessarily, *just* proposals—the sorts of proposal that can be introduced, as I have shown, as separate items of legislation or during the passage of legislation."³¹

The *reductio*? Why in the world would John Paul have to reassure faithful Catholics that it is just to do an obviously just thing? Perhaps, instead, he was trying to say something non-trivial? Something such as this: a thing that perhaps might seem unjust (especially given the absolutisms of moral theologians), such as incremental legislation restricting the scope of an evil practice, is in fact just. John Paul is trying to cultivate political prudence in a population not thoroughly republican in its habits.

Conclusion

Rather than shocking the conscience of the country with the ravings of imprudence, we pro-lifers must shock our fellow-citizens by the limitlessness of our love. No more partisan alliances. No more playing to ideological type. If we are in dead earnest about coaxing Americans into seeing the feasibility of living without abortion, then we must become conspicuous in our advocacy of robust social welfare programs that make parenthood economically viable. We must show

³⁰ *CULJ*, p. 300.

³¹ *Ibid.*

ourselves devoted to the common good by repudiating politicians who make excuses for any attempted *coups d'état*. We must listen, listen, listen—for that is what prudence does.

Saint Thomas says that “love moves to the act of prudence.”³² My passion for justice must be love throughout, and therefore it will thirst for the truth which is beyond me. By prudence we fly between heaven and earth, lit by the love above for all that is small below. By prudence, we hope to set a few rungs on that ladder of incarnational commerce for those who come after us. By prudence we well attend the ones right before us, our neighbors, in their thirst for God.

The Word of Life becomes flesh, under the heart of Mary, so that every human might have life, and have it to the full. Our high calling as pro-lifers is to make that icon of Mother and Child more and more credible to the souls and souls who just need us to serve as our Lord serves: emptied of self, so that we might listen—and then speak...a word of provident love.

³² *Summa theologiae* II-II, q. 47, a. 1, ad 1.