Inconsistent Papal Approaches towards Problems of Conscience?

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In his consideration in *Humanae vitae* (HV) of the joys, difficulties, and responsibilities associated with the transmission of life, Pope Paul VI acknowledged that the fulfillment of this responsibility “has always posed problems to the conscience of married people,”* and the encyclical resolved unambiguously one particular problem of conscience concerning the regulation of births.2 Although the encyclical did not attempt to present all the anthropological, ethical, and theological reasons which supported its teaching, it stated clearly its rejection of some philosophical arguments which had been advanced by those who maintained that deliberately contraceptive sexual intercourse within marriage could be justified.

Nearly thirty years later Pope John Paul II considered a different “problem of conscience” in *Evangelium vitae* (EV):

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

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2A reviewer of an earlier draft of this article expressed a concern that my reference to “problems of conscience,” as indicated by the title, was inappropriate. The teaching of *Humanae vitae*, he suggested, provided authoritative guidance according to which married couples should form their consciences, but ultimately, those engaged in acts must act according to their consciences even if they are mistaken. My response is that the problems (or questions) of conscience considered in *Humanae vitae* and *Evangelium vitae* are whether X or Y can rightly be performed. As John Finnis says: “A says to his adviser B,
the number of authorized abortions, in place of a more permissive law already passed or ready to be voted on.3

What should pro-life, possibly Catholic, legislators do in such a situation, one which has arisen because pro-life legislators are in a minority and unable to enact legislation guaranteeing the right to life of all the unborn? Should they vote against all legislation which fails to uphold the right to life of each and every unborn child, or is it sometimes legitimate to vote for what might be regarded as the “best” or “least bad” option?

Robert George poses the question: “Can one legitimately judge, as a matter of prudence, that the imperfect, though more protective, proposal is a ‘lesser evil’?”4 He immediately answers his question: “Here the Pope says yes,”5 and quotes the teaching of John Paul II in EV 73:

> 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.6

Robert George is not alone in viewing this “problem of conscience” as one which can be resolved by choosing the “lesser evil.”7 Following a symposium held in 1994 by the Congregation for the Doctrine of the Faith (prior to the publication of Evangelium vitae) to discuss the case for “imperfect laws,” Réal Tremblay, C.S.S.R., provided a synthesis of the papers presented at the symposium and his conclusions began with the observation that the implementation of “imperfect laws” in itself evokes a form of (what he seems to regard as a legitimate) compromise with evil which has been traditionally expressed as a “choice of the lesser evil.” When the encyclical was published Theo Mayer-Maly referred to the teaching of EV 73 which states that

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5 Evangelium vitae, n. 73.
legislators may licitly support proposals aimed at limiting the harm done by a pro-
abortion law, and remarked: “This statement follows the tradition of the moral-
theological teaching of the malum minus, the lesser evil.”

Although other writers have also referred to the teaching of EV 73 in terms of
the “lesser evil,” some different arguments, notably that voting for such laws can be
justified as permissible material cooperation in evil, have come to the fore.9 It is
noteworthy, then, that a recently published paper by Archbishop Tarcisio Bertone,
S.D.B., should have brought the focus back to the “lesser evil” dimension. Arch-
bishop Bertone examines how cases might be resolved in the light of the Pope’s
teaching in EV 73, and he says that, if some specific conditions are met, it seems to
him that it would be morally licit for Catholics to become promoters of a new law on
abortion that is more restrictive than the one in force, but which legalizes or
depenalizes some cases of abortion.10 Bertone’s view of what a legislator might
licitly do in such a situation is in line with what most commentators regard as the
teaching of EV 73, and he attempts to develop an understanding of John Paul II’s
teaching by indicating the relevant ethical principles involved. His conclusion, which
clearly owes much to the view expressed in Real Tremblay’s paper, begins with the
statement that “the participation of lay Christians in the drafting of ‘imperfect laws’
necessarily conjures up a kind of compromise with evil, as expressed in the tradi-
tional expression ‘choice of the lesser evil’.”11 Although Bertone’s paper does not
discuss the problem merely in terms of “the lesser evil,” nevertheless this expression
figures prominently in his conclusion and in his remarks on each of the “three atti-
tudes” he suggests a lay Christian may have towards (what he labels as) “imperfect
laws.”12

John Paul II’s teaching in EV 73 is stated briefly and without an elaboration of
the philosophical reasons supporting it. Because Archbishop Bertone is the Secretary
of the Congregation for the Doctrine of the Faith (CDF) the philosophical perspec-

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9Theo Mayer-Maly: “Il diritto alla vita e la trasmissione della vita” in ‘Evangelium
Vitae’ and Law, edited by the Pontificium Consilium De Legum Textibus Interpretandis,
et al. (Vatican City: Libreria Editrice Vaticana, 1997), 77–97, at 82.

10Tarcisio Bertone, S.D.B., “Catholics and Pluralist Society: ‘Imperfect laws’ and
The Responsibility of Legislators,” in Juan de Dios Vial Correa and Elio Sgreccia, eds.,
Evangelium Vitae: Five Years of Confrontation with the Society; Proceedings of the
Sixth Annual Assembly of the Pontifical Academy for Life, 11–14 February 2000 (Vatican

11Ibid., 217–218.

12Ibid., 218–219.
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The personal character of Archbishop Bertone’s paper is bound to be regarded with particular interest by those seeking to understand the Pope’s teaching—even though Bertone’s paper is solely a personal view and not to be regarded as an official CDF elucidation of the Pope’s teaching. The surprising element of Bertone’s paper, therefore, lies not only in his consideration of the sorts of legislation which, in his view, could be supported, but in the reasons he gives for supporting such legislation. Why should the “lesser evil” argument, rejected in Humanae vitae as a justification for deliberately contraceptive practices, justify a deliberate vote for an unjust (even if it is a “lesser evil”) law?

The principal focus of this article is to consider the application of the “lesser evil” argument to the question of voting for laws to restrict abortion. It will also consider two other arguments—the so-called “principle of totality” and the “law of gradualness”—which have been rejected as invalid when applied to the question of contraceptive sexual intercourse, but which are appealed to by some philosophers as an explanation of the Pope’s teaching in EV 73. This article will attempt to highlight the inconsistency of rejecting these arguments when applied to the “problem of conscience” considered in Humanae vitae whilst accepting them with respect to the “problem of conscience” considered in Evangelium vitae. If it is legitimate for legislators to vote for laws which legalize or depenalize some cases of abortion in order to prevent a situation in which the law would legalize or penalize a greater number of abortions, and especially if EV 73 has taught that such an action is legitimate, it is appropriate to try to uncover the philosophical principles justifying this legislative action.

The Lesser Evil

All direct abortion is prohibited by the moral law, but must it always be prohibited by civil law? Evangelium vitae acknowledges that “the purpose of civil law is different and more limited in scope than that of the moral law,” yet it teaches unambiguously that “civil law must ensure that all members of society enjoy respect for fundamental rights which innately belong to the person, rights which every positive law must recognize and guarantee. First and fundamental among these is the inviolable right to life of every innocent human being.” A law need not, therefore, specifically “permit” abortion (i.e. “authorize” it or declare it to be a “right”) to be unjust and unacceptable; if it “tolerates” abortion (i.e., “decriminalizes” it or regards it as an “unpunishable crime” or does not pronounce on some abortions) it is also unjust and unacceptable.

Although there are distinctions between laws which “permit” and those which “tolerate” abortion, there is not a qualitative difference such that one sort may be justified and the other not. In this paper I shall tend to refer, for the sake of simplic-
ity, to laws “permitting” abortion, but the points I make would be equally applicable to laws “tolerating” abortion. A law which denies the inviolable right to life of any innocent human being lacks the goodness proper to law, such that it is not good—it is bad, unjust, or evil. A law “permitting” (or “tolerating”) abortion until, say, the twenty-fourth week of pregnancy can be regarded as an “evil law.” A law “permitting” (or “tolerating”) abortion until, say, the tenth week of pregnancy can also be regarded as an “evil law” though, when considered in relation to the former type of law, it tends to be viewed as a “lesser evil.” This “lesser evil” judgment seems to be made by many philosophers including George, Tremblay, Mayer-Maly, and Bertone, as noted above, and in the following discussion I shall assume that they are correct to identify the second type of law as a “lesser evil.”

“Doing” and “Tolerating” the Lesser Evil

Theo Mayer-Maly rightly acknowledges that within moral-theological teaching there is a legitimate consideration of the “lesser evil.” It has, however, a specific application, and the identification of a “lesser evil” does not in itself provide a justification for performing a chosen action. Thus, the identification of contraceptive sexual intercourse as a “lesser evil” in relation to another evil does not (as Humanae vitae teaches) provide a justification for its practice. The tradition, restated in Humanae vitae, notably makes the distinction between “doing a lesser evil” and “tolerating a lesser evil,” rejecting the former and approving (in some cases) the latter.

Doing (a lesser) evil refers to the performance of a chosen act which should not be performed; it is active. “Doing a lesser evil” is not morally distinguishable from “doing evil” and can never be sanctioned. St. Paul’s teaching that one cannot do evil as a means to achieving good (cf., Romans 3:8) has been constantly taught and is specifically reaffirmed by John Paul II in Veritatis splendor. Tolerating (a lesser) evil refers to a decision not to confront directly the evil actions of others (sometimes at the price of personal suffering), or to the acceptance of the experience of suffering; it is passive. The principle of toleration can, perhaps, be better understood by recognizing the distinction between “doing evil” and “tolerating evil,” rejecting the former and approving (in some cases) the latter.

16 John Finnis defines “doing evil” as “choosing an act that should not be chosen, making a choice that should not be made” (Fundamentals of Ethics, 112). His frequent focus on what is “chosen” (the choice) as opposed to what is “done” (the act) leads, I suggest, to a difficulty when determining whether some acts are intrinsically evil, a point which is relevant to the question at the heart of this paper. A notable critique of Finnis’ view is provided by Janet E. Smith, “Natural Law: Does It Evaluate Choices or Acts?” The American Journal of Jurisprudence 36 (1991): 177–201.

17 Cf., Veritatis splendor, n. 79, the heading for which is: “ ‘Intrinsic evil’: it is not licit to do evil that good may come of it (cf., Rom 3:8).”

18 The active-passive distinction that I am making should not be understood in too broad a sense, and some qualifications are called for. “Doing evil” can also apply to some so-called “passive” actions: for example someone who has a responsibility for a vulnerable person, and who purposefully omits to provide necessary nourishment or treatment, can be said to be “doing evil.” Also, although I am describing the experience of suffering as “passive,” I am not suggesting that suffering should be identified with an attitude of passivity. Given the Christian understanding of the salvific value of suffering the opposite is the case: suffering experienced by an individual can be transformed into a life-giving
stood as the principle of “non impedire” whereby one neither wills nor promotes the evil nor directly opposes it, but rather accepts its existence, just as God allows the existence of evil which He neither wills nor promotes, but which He does not impede. An example of tolerating the lesser evil is given by Leo XIII when he teaches that a workman, though he has a right to a just wage, may legitimately choose to work for a wage lower than justice rightly demands and accept the concomitant hardships, rather than refuse to be employed under such conditions and face “a worse evil” of even greater hardship and poverty for himself and his family. In accepting such employment conditions the worker himself is not doing any evil but is rather experiencing evil because his unjust employer is not providing his workers with a just wage. The worker can legitimately tolerate the (lesser) evil he experiences of not receiving a sufficient wage.

The distinction I am making between tolerating and doing (a lesser) evil, noting the licitness of the former and the illicitness of the latter, is clearly stated in *Humanae vitae*. Teaching that one cannot validly argue that a lesser evil is to be preferred to a greater one in order to justify deliberately contraceptive sexual intercourse, Paul VI makes the distinction:

Though it is true that sometimes it is lawful to tolerate a lesser moral evil [malum morale tolerare] in order to avoid a greater or in order to promote a greater good, it is never lawful, even for the gravest reasons, to do evil [facere mala] that good may come of it.

Assuming, then, that a law permitting abortion to ten weeks is a “lesser evil” in relation to a law permitting abortion to twenty-four weeks, can a legislator vote for this law on the basis of the principle of the “lesser evil”? In other words, by voting for this law is he doing or tolerating (a lesser) evil?

George Woodall considers some instances of “tolerating the lesser evil” and, with reference to the teaching of EV 73, says that “John Paul II’s teaching on voting for a less harmful piece of legislation is another example.” He goes on to say:

When there is a positive act of commending, drafting or voting for legislation with the view that a lesser evil will be tolerated in order either that a greater evil already operative will be restricted or that a greater evil already deter-
mined upon and morally certain to occur will be prevented, given the known opposition of those involved to what is (to be) practiced and their will only to save those who will be protected if the lesser evil is effected, toleration may be justified.

I have already noted the distinction between laws that “permit” and those that “tolerate” a moral evil, but that with respect to abortion both sorts of law can be judged to be unjust and, hence, “legal evils”; a legislator’s action of voting to enact a law tolerating the evil of abortion is not, in fact, “toleration of evil” but the performance of a bad action, i.e., “doing evil.” Woodall’s statement seems to indicate that he is confusing the (unjustified) legal “toleration” of abortion with the legislator’s legislative action as being one of “toleration.” As he acknowledges, the moral action that concerns us is the legislator’s “positive act of commending, drafting, or voting for [lesser evil] legislation,” whereas the traditional application of the “lesser evil” principle applies to the extent that one is not choosing a (lesser) evil action, but rather is not impeding, i.e., is tolerating, the lesser evil. Woodall’s view is to be criticized for its failure to recognize, generally, what precisely is meant by “toleration,” and, specifically, that a vote to enact a law tolerating (let alone permitting) abortion does not, in fact, constitute “toleration.”

**Forced to Choose the Lesser Evil?**

But surely, one might say, there are times when one’s choices are so limited that evil is present in whichever choice is made, and in such instances is it not better to choose the lesser evil? Of course, if this point is legitimate it might appear to apply in the case of a woman who feels “forced” to resort to the evil of contraception as a “lesser evil” compared with the evil of the breakup of her marriage (and the loss of their father for her children) if she is unwilling to engage in contraceptive intercourse. Germain Grisez presents such a “forced choice” scenario with respect to legislative decisions on abortion:

There are, of course, cases in which there is literally no choice but that between two evils. For example, if a legislative body has directed a committee to consider various proposals for relaxing existing abortion laws and to report one of them, a member of that committee may be forced to vote on which of the proposals should be considered. In such a situation, there is obviously no compromise in preferring the less unjust alternative.

Leaving aside the abortion legislation scenario, let us consider an appropriate illustration, provided by Bartholomew Kiely, S.J., of a “forced choice” in which one might legitimately make a decision based on lesser-evil reasoning:

In situations of forced choice between courses of action, each of which involves some evil, and when even with the best of efforts one can find no further possibility, one chooses the course of action involving the lesser evil. Thus, if an airplane must crash in either a densely populated or a thinly popu-

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24Ibid.

Kiely’s pilot does make a reasonable choice to direct the plane towards the thinly populated area, and this is a valid illustration of the application of the principle of “the lesser of two evils.” It is not, however (and Kiely does not suggest that it is), an illustration of doing the lesser evil. A moral action is one which is chosen, and the pilot has not chosen to crash the plane. The laws of mechanical malfunction and gravity have determined that the plane is going to crash and the pilot is merely trying to limit the evil consequences of the plane crashing. The pilot is not responsible for doing any evil, and cannot therefore be said to be doing the lesser evil.

Janet Smith provides a similar illustration, saying that if a car’s brakes suddenly fail the driver may legitimately choose to steer the car to avoid five pedestrians on his right, even if in so doing, he is likely to hit a single pedestrian on his left:

Clearly one should make the choice that results in the “lesser evil” of risking the life of the one pedestrian rather than risking the life of the five. But obviously no moral evil has been done; one is not choosing to kill the one pedestrian; one is choosing to avoid killing the five. Nor is one choosing the death of the one pedestrian as a means of saving the life of the five, for the death of the one is a consequence of one’s choice to avoid killing the five, not a means to one’s end [my emphasis].

Smith recognizes rightly that the principle of the lesser evil “does not refer to doing evil so that good may come of it, but to tolerating evil in order to promote a greater good.”

Some proponents of the case for legislation to restrict abortion, such as Joseph Joblin, S.J., who speaks of the “inescapable choice which legislators must make between two evils,” present the issue as though the situation were comparable to the examples given by Kiely and Smith. But are legislators really faced with an inescapable, or necessary, or forced choice similar to those experienced by pilots or car drivers about to crash? Joblin presents the issue as though legislators have to choose either (i) an (existing) abortion law permitting many abortions; or (ii) a proposed law permitting fewer abortions. (This is also the sort of example that Grisez presents.) Although one can see why the situation seems to approximate to the decisions faced in Kiely’s and Smith’s illustrations, these are not, in fact, the two options with which legislators are faced. The presentation of a bill which permits abortion up to ten weeks, thereby replacing legislation permitting abortion up to twenty-four weeks, does not require legislators to choose either a ten week or a twenty-four week limit, but presents them with three possible choices: a) to vote for the bill permitting abortion up to ten weeks; or b) to vote against the bill permitting

28Ibid., 94. Emphasis in original text.
abortion up to ten weeks; or c) to abstain from voting. If pro-life legislators judge (correctly in my view) that they cannot vote for the bill permitting abortion up to ten weeks, they can justly vote against it or abstain from voting. Although a consequence of their action may be that the previous legislation permitting abortion up to twenty-four weeks remains in force, abstaining or voting against a ten-week limit bill does not constitute a vote in favor of the existing twenty-four-week limit law.

The key difference between the situation of voting for the ten-week limit legislation and the illustrations provided by Kiely and Smith is that the pilot and car-driver were unable to avoid crashing; the legislators, however, can choose from the options—two of which are legitimate and one of which is illegitimate—which confront them. By voting against the bill or by abstaining they are supporting neither the previous law (the “greater evil”) nor the proposed law (the “lesser evil”). They are, in fact, avoiding evil. If they could do good and vote for a law which prohibited all abortions they would do so, but they are not culpable for being in a position of being unable to do good, a point to which John Paul II refers in Veritatis splendor:

It is always possible that man, as the result of coercion or other circumstances, can be hindered from doing certain good actions; but he can never be hindered from not doing certain actions, especially if he is prepared to die rather than do evil.30

The fundamental principle of the moral law is that good is to be done and pursued and evil is to be avoided.31 The positive aspect of this precept—doing good actions—is conditional on the opportunities present at a given time; the negative aspect—avoiding evil actions—is unconditional. Legislators can and must always avoid doing evil; they cannot freely choose to do the (lesser) evil of voting to enact an unjust (albeit more restrictive) abortion law. By voting, in the illustration above, to enact a ten-week upper-limit bill legislators are choosing to do the (lesser) evil of enacting an intrinsically unjust law. Legislators voting against the bill are not doing evil, but rather impeding the (lesser) evil of the enactment of an intrinsically unjust law. Legislators abstaining from voting in this instance are also not doing evil; however, they are not impeding the (lesser) evil of the enactment of the intrinsically unjust law. It is precisely this abstention from voting (i.e., from acting)—the non-impeding of (a lesser) evil—which, in the context of legislative votes on abortion, constitutes toleration of the lesser evil.

Archbishop Bertone’s Consideration of the Lesser Evil

In the conclusion of his paper on the responsibility of legislators when faced with “imperfect laws,” Archbishop Bertone suggests three possible attitudes. The first is “prophetic resistance”: Bertone says that when some fundamental values are undermined by laws this attitude may be justified “if a lay Christian prefers to opt for the value placed in question by the law rather than opt for the lesser evil.”32 However, Bertone suggests that a second attitude of “collaboration” is also legitimate:

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30 Veritatis splendor, n. 52.
31 St. Thomas Aquinas, Summa theologiae I-II, 94.2.
A less radical attitude, or one of greater collaboration, is permitted by the Church if it is possible to promote a lesser evil than that proposed by the law. We may remark here that it is not the evil as such that is at issue here, but the good, more specifically the good necessary to defuse or reduce the evil that the evil in question may produce. In Christianity it is never permitted to do evil or use evil means to produce a good end; nonetheless, each value, by the very fact that it belongs to what is good or what is true, asks to be respected. This attitude, that aims at what is good, within a situation characterized by what is evil, may be difficult to understand for those not directly involved in the political experience and unfamiliar with its very complex ramifications. Just for this reason, this choice of what is good, in a situation characterized by what is evil, must be publicly explained by those who take such a decision on grounds of conscience.33

Thirdly, Bertone considers the attitude of “tolerance.”

The third attitude is the tolerance of the evil expressed through an unjust law. Such tolerance can only be possible if resistance to the evil would involve a yet greater evil. Here too, the object taken into consideration by the act of tolerance, is not the evil as such, but the good necessary to impede a greater evil.34

Bertone acknowledges the point I have been making that one can never do evil: “In Christianity it is never permitted to do evil or use evil means to produce a good end.” His remarks about the third attitude of “tolerance” also seem to indicate that he is viewing tolerance, in accordance with the way I have described it above, in terms of inaction or nonconfrontation with evil, i.e., as the principle of “non-impedire.” Yet he suggests that it is possible to collaborate “to promote a lesser evil than that proposed by [a previous] law.” So, what does he mean by promoting a lesser evil? Unlike the inaction or non-confrontation that constitutes tolerance (or toleration), a specific action is involved in the very notion of promoting anything. Although Bertone states that one cannot “do evil” (a statement which in the context would also seem to encompass “doing a lesser evil”), this principle seems to be contradicted by his remarks about “promoting” a lesser evil, the “promoting” in question being such aspects of the legislative process as the drafting of legislative measures, or voting to enact such measures.

Bertone’s remarks call for careful analysis. With respect to “promot[ing] a lesser evil than that proposed by the law” he emphasizes that “it is not the evil as such that is at issue here, but the good, more specifically the good necessary to defuse or reduce the evil that the evil in question may produce.” What does he mean by that? At the heart of the problem seems to be a possible confusion as to which “evil” we are considering. Is it the evil of abortion? Or the evil of a law—an intrinsically unjust law—which permits abortion? If one focuses on the evil of abortion, without a consideration of (or perhaps an incorrect judgment concerning) the goodness or badness of a law to restrict abortion, it is possible that one might think that a legislator was voting for a good law (i.e., doing good) which resulted in the “lesser

33Ibid., 219. Emphasis in original text.
34Ibid.
evil" of fewer abortions. If this is what Bertone has in mind he escapes the charge of saying that legislators can wilfully "do evil" or "use evil means to produce a good end." But he may still have incorrectly judged not to be evil what is in fact evil.

Let us consider legislation which overcomes the charge of being in itself unjust (i.e., evil) and which might result in the good of fewer abortions. I have in mind legislation which states such things as "Public money [e.g., money raised by taxes] cannot be used to fund abortions." Perhaps this sort of legislation would fall within the category of measures proposed by Bertone to "promote a lesser evil." Those who could afford to pay for an abortion would still be able to obtain one if abortions were not legally prohibited, but it is likely that the "lesser evil" of fewer abortions would be a consequence of a law which prevented women getting financial assistance.

We should be attentive to the subject matter of the legislation which, contrary to what one might think, is not in fact abortion, the permissibility of which is not affected by this legislation. Rather, its subject matter is public funding, and an absolute prohibition of public funding for abortion is entirely just (albeit somewhat irregular given that law should properly prohibit all abortions so the question of public funding should not normally arise). The legislation, then, can be judged to be good, and be expected to have as a consequence the "lesser evil" of fewer abortions. But by voting for it, are pro-life legislators in fact "promoting a lesser evil"? Are they not, rather, promoting a "good" (ensuring that public money is not spent on facilitating intrinsically immoral actions) with a view to a further good end (that babies, whose deaths would be otherwise facilitated, will not be killed).

Because the good end might register statistically in terms of fewer abortions one might view the consequences as effecting a "lesser evil" in comparison with what might have been the case prior to its enactment. But is this really saying anything pertinent about "lesser evils"? All actions have consequences, and what might be regarded on one scale as achieving a "greater good" can on another be rated as achieving a "lesser evil." The relevant moral analysis is not in fact whether this sort of legislation results in the "lesser evil" of fewer abortions; what counts, rather, is whether the action giving rise to the consequences is good or evil. (One notes that although the legislation might achieve the good end—or "lesser evil"—of fewer abortions, it might alternatively have no impact at all on the abortion rate and be regarded merely as an inconvenience to women who would in any case manage to self-fund or get assistance from another source to obtain an abortion; in terms of its effect on abortion it might not produce a "lesser evil" at all.) All things considered a legislator voting for this sort of just legislation could be judged to be performing a good act, the goodness of the act being in no way determined by the "lesser evil" principle. If this were the sort of legislation that Archbishop Bertone had in mind, one's disagreement with him would be merely that his explanation for a justified moral action was unsatisfactory. The problem with his argument, however, lies at a deeper level.

The illustration I have given of good legislation which might be viewed (albeit inappropriately) as achieving a "lesser evil" (in terms of the number of abortions performed) has as its subject matter the use of public funds. Abortion is not the subject matter, and this sort of public funding legislation, which is legitimately
restricted to a consideration of whether specified activities may or may not receive public funding, in no way permits or tolerates abortions; such public funding legislation is entirely separate from other legislation which may (or may not) permit or tolerate abortion. (This point may not be readily comprehended, but is crucial to an understanding of why this sort of legislation, which has an effect of restricting abortion, can be judged to be just whereas other legislation which also has an effect of restricting abortion can be judged to be unjust.) By contrast, the sort of legislation Archbishop Bertone is considering in terms of the “lesser evil” does have abortion for its subject matter. His “lesser evil” arguments must be considered within the context of his view that “it would be morally licit to become promoters of a new law on abortion that is more restrictive than the one in force, but that legalizes or depenalizes some cases of abortion.”35 In other words, he is considering the licitness of supporting, for example, legislation of the form “Abortion is permitted up to ten weeks” as a replacement for legislation stating “Abortion is permitted up to twenty-four weeks.” Let us consider his remarks in the light of this sort of scenario.

As I have already indicated, a particular question must be answered. If a legislator votes for the measure “Abortion is permitted up to ten weeks” which “lesser evil” is he “promoting”? Is it the “lesser evil” in terms of the evil of abortion? Or is it the “lesser evil” in terms of the law about abortion? I suggested, above, that Bertone’s remarks, though unsatisfactory, were less objectionable if he had in mind the lesser evil with reference to the practice of abortion. He might, then, think that a legislator supporting this measure was seeking the good represented by fewer abortions (otherwise labelled as a “lesser evil”) rather than the evil itself. However, even if, contrary to my view, Bertone is correct to suggest this, one factor remains—a factor which Bertone himself acknowledges: “it is never permitted to do evil or use evil means to produce a good end.”36 The good end would appear to be that of preventing some abortions (a good end which might also be regarded, it seems, as the “lesser evil”) and the means to that end involves, precisely, the law for which the legislator is voting. So the crucial question is whether the means to that end—the act of voting for a specific law—can be judged to be a good action.

Laws may, as I have already noted, justly tolerate (without “permitting”) some moral evils; thus, a law may “tolerate” some immoral behavior such as sexual acts between unmarried consenting adults. Consider, then, the actions of a morally upright legislator in a society which has a (just) law tolerating immoral sexual behavior between unmarried adults aged twenty-one years or over. (The law is of the form: “It is a criminal offense for anyone under the age of twenty-one to engage in nonmarital sexual intercourse.”) Changes in that society’s sexual mores have lead to the introduction of a bill which would tolerate sexual behavior for those aged fourteen years or over. An alternative option specifying “eighteen years” is also proposed. Although the morally upright legislator would prefer the current legislation’s “twenty-one” years age specification, he is willing to support a bill to lower the age to “eighteen” if this prevents the option of “fourteen” from being enacted. He may think that chang-

36Ibid., 219.
ing the law to “eighteen” is undesirable, because it might result in more immoral sexual behavior among teenagers, but that a further reduction to “fourteen” would probably lead to even more immoral behavior and that this option will be passed unless he and other like-minded legislators concede to the “eighteen” option.

I maintain that the legislator can justly vote for the “eighteen” option, and that he could do so arguing that this law would “tolerate a lesser evil” than the “fourteen” option. However, the law itself would not be evil and accordingly the morally upright legislator voting for it would not be doing evil, but voting for a legitimate law which would tolerate evil. If, however, the “eighteen” option “permitted” sexual behavior outside marriage (e.g., the law was of the form: “Those over the age of eighteen have a right to engage in consensual sexual intercourse irrespective of their marital status”) the law itself would contradict the natural (moral) law and be unjust and “not a law.” In this situation legislators would not be dealing with the (just) legal toleration of an evil, but with the enactment of a legal evil. A legislator could not claim that the act of voting for a law permitting sexual acts outside of marriage for those over the age of eighteen, as a means of preventing the enactment of a law permitting such acts for those over fourteen, constituted “toleration of a lesser evil” because the action involves the choice to vote for what can be judged to be, in itself, a “legal evil.”

Let us return, then, to Archbishop Bertone’s acknowledgement that “it is never permitted to do evil or use evil means to produce a good end.” Is he not overlooking the possibility that by voting for legislation which though “more restrictive ... legalizes or depenalizes some cases of abortion,”37 he is, in fact, using evil means—a “legal evil”—to produce a good end? Richard McCormick, S.J., readily acknowledges that in “choosing the lesser evil” in such a context one is making a choice in favor of a “legal evil.”38 One would assume that in deliberations on the application of “the lesser evil” Bertone would tend not to see eye to eye with McCormick’s argumentation, an observation which makes their apparent agreement on this point quite remarkable. If restrictive abortion legislation can be identified as “evil” (a point which is generally conceded by those who refer to the act of voting for the “lesser evil”) a legislator voting for it is clearly “using evil means” to produce the good end of fewer abortions. This in itself seems to counter Bertone’s acceptance of voting for such legislation. An analysis of the moral act of voting for legislation shows that the act of voting to enact any intrinsically unjust legislation (such as a law permitting or tolerating abortion) can be judged to be an evil act, and therefore that a legislator choosing to vote to enact any intrinsically unjust restrictive abortion legislation can be judged

37Ibid., 215.
38“In designing present legislation we are confronted at the present time with a choice of two legal evils. No choice is going to be very satisfactory, because the underlying conditions for truly good legislation are lacking. What is to be done when one is dealing with evils? Clearly the lesser evil should be chosen while attempts are made to alter the circumstances that allow only such a destructive choice.” Richard McCormick, S.J., “Notes on Moral Theology: The Abortion Dossier,” Theological Studies 35 (1974): 312–359, at 357–358.
to be *doing evil.* Archbishop Bertone’s support for restrictive abortion legislation with respect to “lesser evil” arguments seems to contradict the principles he acknowledges. Furthermore, he seems to be losing sight of the distinction between what is “aimed at” (the legal protection of, at least, some unborn children) and what is “chosen” (an unjust law to achieve that protection).

In his section on “collaboration,” quoted above, he refers to the attitude “which aims at what is good” and identifies this with “a choice of what is good.” Insofar as the choice refers primarily to *the legislation* for which a legislator votes to achieve the good of saving some lives (a “good” which might be regarded as a “lesser evil” because it is only a partial good; it saves only some lives in a legislative context which calls for the legal protection of all human beings) and insofar as the legislation is not (irrespective of some possible good consequences) good in itself, but “unjust” and “evil,” Bertone has made a fundamental error in his judgment of the goodness of the choice. Applied to the “problem of conscience” considered in *Humanae vitae,* Bertone’s remarks could be cited to justify the “lesser evil” of contraception, a couple claiming that their action was “aiming at” the good of the unity of their marriage and family life (which might be threatened by noncontraceptive intercourse) and that their “choice” should be identified in terms of what is “aimed at” rather than the concrete actions which effect what is “aimed at.”

Once a chosen action—whether it be that of contraceptive sexual intercourse or that of voting for an intrinsically unjust law—is identified as “evil,” a further specification of it as a “greater evil” or “lesser evil” adds nothing to the determination that it is an unworthy and immoral choice.

**Supporting the Lesser Evil in Particularly Grave Situations?**

But is it not, perhaps, legitimate to choose to do the lesser evil in particularly grave situations, not least when the inestimable good of human life is at stake, and when the consequences of one’s vote may make the difference between life and death for hundreds, thousands, or possibly even hundreds of thousands of unborn children every year? Consider, for example, the situation confronting pro-life Polish legislators in the early 1990s when they sought to prohibit the two hundred thousand or so abortions performed annually. Unable to prohibit all abortions they had the opportunity of voting to enact legislation which would prohibit about 199,000 abortions; the legislation would affirm the “right to life” yet (somewhat incongruously) abortion would not be prohibited if pregnancy constituted a danger to the life of the mother, or a serious danger to the health of the mother, or if pregnancy resulted from a criminal act (i.e., rape), or if the unborn child would be born with a serious and permanent disability. In fact, the legislation—for which pro-life legislators voted, and which President Lech Walesa ratified in 1993—unjustly denied some unborn children the right to life, and the enacted law can be judged to be intrinsically un-

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just. Some might think it perverse not to vote in favor of such legislation, given its far-reaching consequences in terms of saving lives, thus contributing profoundly to the lives of families, communities, and even the nation as a whole. Perhaps those who objected to the actions of these pro-life legislators would be accused, in a manner not dissimilar to the hearers of Caiaphas—whose words are often cited as a particular example of favoring the lesser evil—of not grasping the gravity of the situation, and of failing to see that it is better for a limited number of babies to be aborted than for the multitude of Poland’s unborn children to be denied legal protection (cf., John 11:49).

It is worth returning to the passage, quoted above, in which Paul VI made the distinction between “doing” and “tolerating” a lesser evil, taking note of the remarks (not quoted above) which follow it. An awareness of the most far-reaching consequences of one’s action (or inaction) does not justify doing evil, even if it is judged to be a “lesser evil”:

Though it is true that sometimes it is lawful to tolerate a lesser moral evil in order to avoid a greater or in order to promote a greater good, it is never licit, even for the gravest reasons, to do evil that good may come of it (cf., Romans 3:8)—in other words, to intend positively [in id voluntatem conferre] something which intrinsically contradicts the moral order, and which must therefore be judged unworthy of man, even though the intention [quamvis eo consilio fiat] is to protect or promote the welfare of an individual, of a family or of society in general [my emphasis].

This teaching, explicitly reaffirmed by John Paul II in Veritatis splendor, took into account that the gravity of particular situations—such as that of Poland in 1992–93—still does not justify “doing a lesser evil.”

The Principle of Totality

Humanae vitae considered whether “the so-called principle of totality” could be applied to justify deliberately contraceptive intercourse. “Could it be admitted” Paul VI asked, “that procreative finality applies to the totality of married life rather than to each single act?” Although the “principle of totality” has not been invoked by name (at least, in print) to justify voting for restrictive abortion legislation, an argument based on this principle has been advanced. Could not a vote in favor of restrictive legislation be justified, it is suggested, if it is known that the overall orient-
ation of the legislator is in favor of life, particular votes for (admittedly, unjust) restrictive legislation being justified as part of a strategy which in its totality seeks the right to life of all the unborn?

Applied properly in medical ethics the principle of totality provides a justification for such actions as the excision of a bodily organ or member, something which would ordinarily be regarded as illicit mutilation, if this were required for the good of the whole body. Pius XII teaches that an individual organ or member of the human body “can be sacrificed if it puts the whole organism in danger, a danger which cannot in any other way be averted”\textsuperscript{46}; this subordination in cases of conflict of a particular organ to the body as a whole is founded on what he calls “the principle of totality.”\textsuperscript{47} The principle does not apply merely to the removal of diseased parts of the body but even to healthy parts which, if not removed, could harm other parts.\textsuperscript{48} Pius XII cautions against erroneous applications of the principle even when it is used in the limited context of somatic matters,\textsuperscript{49} and even the completeness of the “principle” when correctly applied is open to question.\textsuperscript{50}

Let us consider, first, the way in which “the principle of totality” was invoked to justify contraceptive intercourse. The Majority Report of what came to be regarded as the “Papal Birth Control Commission” argued, prior to the publication of \textit{Humanae Vitae}, that the use of contraceptives within marriage should be approved:

The morality of sexual acts between married people takes its meaning first of all and specifically from the ordering of their actions in a fruitful married life, that is, one which is practiced with responsible, generous and prudent parenthood. It does not then depend on the direct fecundity of each and every particular act.\textsuperscript{51}

The Report’s argument that one must bear in mind the totality of the fruitfulness of a married couple’s life was countered by Paul VI’s teaching that it was not valid to


\textsuperscript{47}Pius XII, “Address to the Delegates at the 26th Congress of Urology,” October 8, 1953, in \textit{The Human Body}, 277–281, at 278.

\textsuperscript{48}Ibid.

\textsuperscript{49}Ibid., 278–279. In particular he rejects an appeal to “the principle of totality” to justify sterilization procedures, even if the sterilization is performed because future pregnancies might jeopardize the woman’s health.

\textsuperscript{50}Although the principle of totality may be cited as justification for removing an organ for the overall good of the body, the possibility of removing a healthy organ from one person in order to donate it to another poses the question whether the principle of totality suffices as a philosophical tool. See George V. Lobo, S.J., \textit{Guide to Christian Living} (Maryland: Christian Classics Inc., 1991), 353.

argue "that such [contraceptive] intercourse would merge with the normal relations of past and future to form a single entity;"52 his principal concern was that the full "meaning" of each act of sexual intercourse, with respect to its unitive and procreative dimensions, be always respected, a key point at which he diverged from the view of "meaning" presented by the Majority Report as quoted above.53 Failure to respect the unitive and procreative meaning or signification of each sexual act constitutes a falsification of the sexual act. John Paul II later described it as "a falsification of the inner truth of conjugal love,"54 or as it may be expressed simply, "a lie."55

Although the question of voting for restrictive abortion laws is specifically different, the "principle of totality" would appear to apply to it in a similar way. The teaching of Evangelium vitae 73 clearly permits legislators to vote for some sorts of "proposals" which are "aimed at limiting the harm done" by an abortion law; furthermore, the encyclical gives permission to vote for such "proposals" only to those legislators "whose absolute personal opposition to procurred abortion was well known."56 The teaching appears to justify the view of some commentators that voting for a law to restrict abortion—even if it is an unjust law which permits abortions (albeit fewer abortions)—is licit provided that it is "one which is performed in the context of an anti-abortion politics."57 In other words, the goodness of the action can be determined by considering the action in its overall context and the "principle of totality" would appear to be invoked, in all but name, to justify the action.

Let us return to the teaching of Humanae vitae. Janet Smith identifies as its "most controversial line" the statement that "each conjugal act [must] remain ordered in itself to the procreating of human life" (HV11). She notes:

If the word "each" did not appear in this phrase, the document would be rendered relatively innocuous. Many accept the connection between sexual intercourse and procreation but fail to see why each act of sexual intercourse must remain ordained to procreation.58 If each act of sexual intercourse must be properly ordered, can the same be said for each act of voting for legislation? Does, for example, the view that "where the laws are just (and expedient) authorities serve their communities well; where they are unjust (or inexpedient), they serve their communities badly,"59 mean that each law must be just and expedient, and that the properties of both (legal) justness and (social) expedience must be contained within each act of voting for legislation? Im-

52Humanae vitae, n. 14.
53Ibid., n. 12.
55Cf., Smith, Why Humanae Vitae Was Right, 17.
56The quotes in this sentence are from EV 73.
57See the discussion of this point in my paper "Good Acts By Bad Acts?" at sections 8.1 and 8.2.
58Smith, Why Humanae Vitae Was Right, 327.
mediately before the consideration of the “problem of conscience” facing legislators with the prospect of voting for a more restrictive abortion law (EV 73.3) is a short paragraph stating that “in the case of an intrinsically unjust law, such as a law permitting abortion or euthanasia, it is ... never licit ... to ... vote for it” (EV 73.2).60 If such votes are never licit, this would seem to suggest that all laws must be “just” and that one can never vote to enact a law that can be judged to be “intrinsically unjust.” If EV 73.2 does have this specific meaning (as it would seem to do), one cannot invoke the principle of totality to justify the single act of voting for unjust restrictive measures; an appeal to justify such a vote in the overall “context of an anti-abortion politics” would appear to be as illegitimate as an attempt to justify a single act of contraceptive intercourse by appealing to the overall context of a fruitful marriage. The “meaning” of voting for legislation requires a more complete treatment than can be given in this article.61 but if justness is an essential property of law, and if the goodness of the act of voting for any law depends principally on the justness of the law for which one is voting, it would seem that a single act of voting for unjust restrictive legislation would be a falsification of the true meaning of the act of voting for legislation; i.e., it would be, like the act of contraceptive intercourse, “a lie.”

The Law of Gradualness

Living a Christian life is rightly regarded as a journey, a process of gradual development towards a perfection which is never fully achieved in this life. We sin and fail and need to be “continually converted” to God, living “in statu conversionis.”62 This gradual growth towards holiness can be regarded as a “law of gradual growth” or a “law of gradualness.”63 Because of the imperfection of our wills there can be an inconsistency between what we acknowledge to be the norm to be lived, and how we act, not least perhaps in sexual matters. Bartholomew Kiely, S.J., identifies how “the law of gradualness” is acknowledged, for example, in the Catechism’s teaching on homosexuality:

Homosexual persons are called to chastity. By the virtues of self-mastery ..., by prayer and sacramental grace, they can and should gradually and resolutely approach Christian perfection.64

In his elucidation of the teaching of *Humanae vitae*, John Paul II acknowledged that “man ... knows, loves, and accomplishes moral goods by stages of growth” and that

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60 The short paragraph reads in full: “In the case of an intrinsically unjust law [de lege ..., suapte natura iniqua] such as a law permitting abortion or euthanasia, it is therefore never licit to obey it [eodem se accommodare] or to take part in a propaganda campaign in favor of such a law, or vote for it” (EV 73.2).

61 Some aspects of this question are discussed in my paper “Good Acts by Bad Acts?” sect. 7.


married people are called upon to “progress unceasingly in their moral life,” a step-by-step advance which he referred to as “the law of gradualness.” The “law” would appear to apply mainly in the pastoral context of encouragement to those who fail to live up to the standards of the moral law, and so its extension to the question of voting for abortion legislation seems, at first glance, somewhat surprising.

It must be admitted that supporters of restrictive abortion legislation do not appeal, by name, to “the law of gradualness” to justify their arguments, and arguments related to the “law” are expressed in different ways. For example Pedro Rodriguez suggests that voting for restrictive laws could be regarded as a cooperation in the redemptive work (which would occur gradually) of healing society. The factor of “cooperation in evil” present in supporting a law which is not in itself acceptable could be transformed, he suggests, into a “cooperation in healing” (“cooperatio ad sanationem”).

M. Cathleen Kaveny argues that (what she claims to be) a Thomistic approach to human (civil) law justifies an incremental approach towards gaining legal protection for the unborn. She maintains that, according to St Thomas Aquinas, “the central function of law is pedagogical: to lead persons to a state of virtue” and that law should be formulated “that will gradually lead persons to virtue” [emphasis in original text]. Kaveny seems to be suggesting that restrictive legislation, which in the course of time will gradually lead to even more restrictive legislation, is an illustration of the way Aquinas envisages people being gradually led to virtue by law.

Aquinas appears to lend support to Kaveny’s view in his statement that “the purpose of human law is to lead men to virtue, not suddenly, but gradually.” However, one citation taken out of context does not seem to be a sufficient basis for constructing a theory, and other writers advance the view that Aquinas teaches that the purpose of human law is not to promote individual virtue, but to establish temporal peacefulness in society. In support of their view they quote Aquinas:

65 Familiaris consortio, n. 34.

66 Its particular applicability to a pastoral context is demonstrated by its being labelled “the pastoral ‘law of gradualness’” in the document from the Pontifical Council for the Family, Vademecum for Confessors concerning Some Aspects of the Morality of Conjugal Life, n. 9 (London: CTS, 1997, Vatican translation).


70 Summa theologiae, I-II, 96.2, ad 2.

For the purpose of human law is the temporal tranquility of society, a purpose which the law attains by coercively prohibiting external acts to the extent that they are evils which can disturb the peaceful condition of society. It is instead the concern of divine law to lead men to eternal happiness.\textsuperscript{72}

Whether the primary focus of human law is to promote individual virtue or temporal peacefulness is not the concern of this article.\textsuperscript{73} But even if Kaveny were right to focus on the law’s capacity to inculcate virtue, would she be right to think that voting for restrictive abortion legislation accords with Aquinas’ view of promoting virtue (gradually) through law? This question could be considered at length but for the purpose of this article it suffices merely to draw attention to an essential property of law—its justness. As Kaveny acknowledges, in the quote from Aquinas with which she begins her paper considering the connection between the limits of ordinary virtue and the limits of the criminal law: “Law should be virtuous, just, possible to nature ...”\textsuperscript{74} Any attempt to promote virtue \textit{gradually} by law cannot be achieved if the “law” enacted is not, in itself, just.

One can attempt, with respect to law, to inculcate the virtues \textit{gradually}, by refraining from the enactment of laws requiring the exercise of the virtues. Hence human law need not \textit{require} the practice of religion, or acts of faith, hope and charity, or require total patience, continence, kindness, etc. However a law which contradicts the moral law by authorizing, permitting, or tolerating specific acts that seriously undermine the well-being of others—e.g., murder, theft, and such things\textsuperscript{75}—can be judged to be unjust. The moral law prohibits all abortions; restrictive abortion legislation that specifically \textit{permits} some abortions, or \textit{tolerates} them by failing to grant legal protection to some categories of unborn children, can be judged to be unjust.

\textsuperscript{72} \textit{Summa theologiae}, I-II, 98.1.

\textsuperscript{73} It seems to me that Kaveny’s view is clearly opposed by the teaching of \textit{Evangelium vitae}: “The real purpose of civil law is to guarantee an ordered social coexistence in true justice, so that all may ‘lead a quiet and reasonable life, godly and respectful in every way’ (1 Tim 2:2). Precisely for this reason, 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. First and fundamental among these is the inviolable right to life of every innocent human being” [my emphasis] (EV 71). In a response to Kaveny’s paper Kevin P. Quinn, S.J., questions whether she is “deconstructing \textit{Evangelium vitae} in search of an alternative moral theory, one that would play better in pluralistic America” and he asks whether Kaveny’s paper should be viewed as a synopsis of the encyclical she thinks John Paul II should have written. See “Whose Virtue? Which Morality? The Limits of Law as a Teacher of Virtue—A Comment on Cathleen Kaveny,” in \textit{Choosing Life}, 150–155, at 154.

\textsuperscript{74} \textit{Summa theologiae}, I-II, 95.5, ob. 1. Aquinas considers and rejects the objections to Isidore of Seville’s description of positive law: “Law should be virtuous, just, possible to nature ...” etc. Aquinas distinguishes between that which is “virtuous” (i.e., “it fosters religion”) and that which is “just” (i.e., in accord with “the order of reason”).

\textsuperscript{75} Cf., \textit{Summa theologiae}, I-II, 96.2.
unjust. Kaveny’s suggestion that Aquinas’ teaching on promoting virtue could be applied to restrictive abortion legislation is implausible because it would require the enactment of legislation which, being unjust, violates what Aquinas (and, apparently, Kaveny herself) acknowledges to be an essential property of law.

Returning to John Paul II’s consideration of the ‘law of gradualness’, with respect to the question of contraception we find a noteworthy distinction:

Married people ... cannot however look on the law as merely an ideal to be achieved in the future .... And so what is known as the ‘law of gradualness’ or step-by-step advance cannot be identified with ‘gradualness of the law’ as if there were different degrees or forms of precept in God’s law for different individuals and situations.76

Recalling the pastoral application of the ‘law of gradualness’, the distinction John Paul II is making would seem to be as follows. Someone who is finding difficulty in observing the moral law should not be encouraged to aim for a standard which falls short of the moral law, and then progressively to aim for higher and higher standards until he or she attains the standard of the moral law. For example, a priest hearing the confession of a penitent who has committed the same sinful act five times each month for the past two years should not suggest that the penitent aim at committing that sinful act just four times in the coming month, three times the following month, and so on until (perhaps) he or she avoids this act completely. If a priest gave such advice he would be undermining the requirements of the moral law and suggesting that there was a “gradualness of the law,” or as John Paul II describes it, “different degrees or forms of precept in God’s law for different individuals and situations.” Rather, a priest should commend the efforts a penitent has made to turn away from sin, even though there may still be instances of failure, and encourage him or her constantly to a full observance of the moral law.

If the distinction between “the law of gradualness” and “the gradualness of the law” applies to acts (such as contraceptive or homosexual acts as already mentioned) with respect to which, because of the weakness of the flesh, the moral law may be particularly hard to observe, the relevance of the distinction when considering abortion legislation is even more apparent. If the moral law says that “all direct abortion is prohibited” and if a human law permitting or tolerating any abortion constitutes an unjust law which violates the moral law, then the act of voting for a law which prohibits some but not other abortions is an act which violates the moral law. The act of voting for such legislation cannot be justified with reference to “the law of gradualness” because (as is evident) the law itself no longer conforms with the moral norm and has become “gradualized.” Voting for restrictive abortion legislation manifestly requires embracing the unacceptable notion of “the gradualness of the law.”

**Is There Really an Inconsistency?**

This article has attempted to demonstrate that the application of arguments based on the lesser evil, the principle of totality, and the law of gradualness to the question of contraceptive sexual intercourse, is not dissimilar to their application to

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76Familiaris consortio, n. 34.
the question of voting for restrictive abortion legislation. If any one of these arguments can justify a legislator’s act of voting for a restrictive abortion law, it would seem that the argument should similarly, contrary to the teaching of Humanae vitae, justify contraceptive intercourse. Am I therefore suggesting that the teachings of Humanae vitae and Evangelium vitae are inconsistent in their application of ethical principles? Or that the teaching of either Humanae vitae or Evangelium vitae (if not both) needs to be revised?

My point of departure in this article was a consideration of the “lesser evil” argument, especially in the light of Archbishop Bertone’s examination of the teaching of Evangelium vitae 73. For the purpose of discussing his argument I did not question the assumption that a law permitting a small number of abortions is a “lesser evil” in relation to a law permitting a larger number. But can it be regarded as a “lesser evil”? If a single human being can be said to have an infinite or incomparable or incomparable or inestimable or priceless or sacred value,77 the evil of the direct act of killing even a single human being must surely be an unquantifiable evil such that it cannot be rated as a “lesser evil” in relation to the killing of a greater number. Similarly, a law permitting even one (or a few) abortion(s) cannot be rated as a “lesser evil” in relation to a law permitting more abortions. Francesco Compagnoni, O.P., would appear to interpret EV 73 as teaching that a legislator can vote for the sort of restrictive legislation suggested by Archbishop Bertone. He has, however, a noteworthy perspective because he says one cannot invoke “lesser evil” reasoning when one is referring to human persons, each of whom has, in Christian (and, as he notes, in Kantian) thinking, an “incomparable value.”78 He thus views a legislator’s act of voting for restrictive legislation in terms of favoring the “lesser good.”78 My purpose here is not to defend Compagnoni’s “lesser good” reasoning, but to draw attention to the possibility that the identification of restrictive abortion laws as a “lesser evil” is not only contested, but may be fundamentally flawed.

To return, then, to my questions. By suggesting a parallel in some of the philosophical principles employed in resolving the two different “problems of conscience” considered in Humanae vitae and Evangelium vitae, am I claiming that one encyclical has adopted a line of reasoning rejected by the other, and if so, should the

77These different expressions of value are frequently found in the teachings of the magisterium. In Evangelium vitae the expressions used include that of “incomparable [incomparabilis] value” (EV 2); “sacred [sacrum] value” (EV 2); “priceless [inaestimabile] value” (EV 25); “incomparable [immense, also meaning ‘incommensurate’ or ‘infinite’] worth” (EV 96). John Paul II has spoken of “the inestimable [or infinite/incommensurate] value of the person” [immensa ‘valoris’ personae] in his Apostolic Exhortation Pastores dabo vobis, n. 9. Our understanding of the value of human beings is informed by our faith: “With the eyes of faith we can see with particular clarity the infinite value [nieskośczone wartości] of every human being” (John Paul II, Homily at Kalisz, Poland, June 4, 1997).

78Francesco Compagnoni, O.P., “La responsabilità dei politici nella Evangelium Vi­
teaching of either *Humanae vitae* or *Evangelium vitae* be reconsidered? This article has, admittedly, addressed only some of the arguments to support the act of voting for restrictive abortion legislation, and the justification for casting such votes might be found in considerations other than those that I have focused on.

But am I simply objecting to the arguments highlighted in this article or to all arguments in favor of voting for restrictive abortion legislation? I think the attentive reader will have noted my fundamental objection to voting for a law which can be judged to be intrinsically unjust—a “legal evil” which may be technically “a law” but is, morally, “not a law.” In a forthcoming paper—“Good Acts by Bad Acts?”—I consider (and reject) some of the more significant arguments, notably John Finnis’ claim that a legislator’s vote for restrictive legislation can be accepted as permissible material cooperation in evil. The paper analyzes the moral act, particularly with respect to the teaching of *Veritatis splendor* on the moral object, and provides a philosophical justification for my view that legislators act unethically if they vote to enact any restrictive legislation which can be judged to be intrinsically unjust, i.e., if they vote to enact the sort of legislation deemed worthy of support by Archbishop Bertone according to his understanding of the teaching of *Evangelium vitae*.

Do I, then, disagree fundamentally with the teaching of *Evangelium vitae*? I shall begin to answer this by reconsidering the question posed and then answered by Robert George which I quoted in the introduction of this paper: “Can one legitimately judge, as a matter of prudence, that the imperfect, though more protective, proposal is a ‘lesser evil’? Here [in EV73] the Pope says yes.” If, as this article has argued, the “lesser evil” argument advanced by Robert George, Archbishop Bertone, and others is flawed, then those commentators who have adopted this argument are necessarily explaining the teaching of EV73 incorrectly. Contrary to George’s assertion, the Pope did not say “yes” to the view that one can judge a “more protective” legislative proposal to be a “lesser evil,” a point which is readily evident to anyone who reads the text. George has thus not only explained, but has even stated, the teaching incorrectly.

In fact, misinterpretations and even incorrect statements of the Pope’s teaching abound in the commentaries on EV73, and far from disagreeing with John Paul II’s teaching I maintain that he has not taught—not least, I suggest, because it cannot be taught—that a legislator may vote to enact (unjust) restrictive abortion legislation. For nearly seven years many reputable commentators have been attempting to ex-

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79Cf., St. Thomas Aquinas, *Summa theologiae*, I-II, 95.2, and its citation at *Evangelium vitae*, n. 72. The questions of to what extent an unjust law may be said to be “not a law,” and of the responsibilities of legislators in a situation where the enactment of unjust laws is a potential or actual reality, require a treatment which is beyond the scope of this paper.


plain a “teaching” which, as I have demonstrated elsewhere, has not in fact been taught.82 Instead of attempting to explain a nonexistent teaching which cannot be satisfactorily explained, it would be more profitable to establish the true teaching of EV 73. Until this is done, however, it is likely that the approaches of *Humanae vitae* and *Evangelium vitae* towards their respective problems of conscience will continue to appear inconsistent.

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