Abortion, Prudence, and Solidarity

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ABSTRACT

In attempting to "moderate" abortion laws that allow for the killing of the unborn, I argue that we must stand in solidarity with the innocent and most vulnerable. Protecting innocent human life, moreover, is foundational for a system of law. But if a "reform" proposal excludes some human beings from protection, it is intrinsically unjust and attacks the law's very foundation. A law that excludes the disabled from protection is such a proposal. If such a law is proposed, it is wrong to support it. Therefore, it is wrong to vote for such a law. A Thomist understanding of law, prudence, and mercy informs this line of argument. The recent debate between Colin Harte and John Finnis, which I explore, affords an introduction to the sources of my argument and its implications.

WHAT IS THE VALUE of a human life? It is enough to judge the intentional taking of innocent life as murder. Or does today's practice of abortion show that my claim is too strong? Ronald Dworkin thinks so. "Some [conservatives]," he writes, "believe that abortion is morally permissible not only to save the mother's life but also when pregnancy is the result of rape or incest. The more such exceptions are allowed, the clearer it becomes that conservative opposition to abortion does not presume that a fetus is a person with a right to live."[1] On Dworkin's view, we achieve moral–and legal–consistency only when we realize that the value of a life is a function of the effort invested in it and the return which might be expected.[2]

COLIN HARTE'S SOLIDARITY ARGUMENT

In his challenging book *Changing Unjust Laws Justly: Pro-Life Solidarity*

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[1] Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (London UK: HarperCollins, 1993), p. 32.

[2] Dworkin, pp. 82-84.

with "the Last and Least" Colin Harte argues that in changing abortion laws that protect the intentional killing of the innocent, we must stand in solidarity with the most vulnerable.[3] Such solidarity shows "a firm and persevering determination to the good of all and of each unborn child."[4] To fix our attention, he asks us to consider two proposed laws that restrict late term abortions but leave some preborn babies unprotected.

The first proposal is before the voters in the dystopian State of Tyrannia. It exempts from protection the preborn babies of one of more Jewish parents.[5] This proposal is grotesque but imaginable. After all, James Watson, of DNA fame, argues that the State ought not to protect babies identified in utero as homosexual.[6] The second proposal exempts from protection pre-born babies who "would suffer from such physical or mental abnormalities as to be seriously handicapped," and so recycles the language of the UK Abortion Act of 1967.[7]

Colin Harte's focus is not Tyrannia. He notes its grotesquerie only to alert us to the range of human malice. His focus, rather, is the ameliorations of the second proposal and others like it that restrict some late abortions but not those of the badly disabled. Such proposals, he argues, deny the most vulnerable what is their due: the protection of their lives. He asks that we examine what follows from this breach of solidarity.

One way to do so appeals to empathy. Imagine a pro-life legislator with a teenage daughter who suffers from spina bifida. How would he

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[3] Matthew 25: 37-46 calls for this sort of solidarity.

[4] Colin Harte, *Changing Unjust Laws Justly: Pro-Life Solidarity with "the Last and Least"* (Washington, D.C.: The Catholic University of America Press, 2005), p. 16. He follows John Paul II's definition of solidarity as "a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual" *(Sollicitudo rei socialis* §39).

[5] Colin Harte, "Problems of Principle in Voting for Unjust Legislation" in *Cooperation, Complicity and Conscience: Problems in healthcare, science,lLaw and public policy*, ed. Helen Watt (London UK: Linacre Centre, 2005), p. 184.

[6] See Jeronimo Teixeira's interview with him in *New Perspectives Quarterly* 22/4 (Fall 2005).

[7] Harte, *Changing Unjust Law*, p. 345.

explain voting to limit abortions after 24 weeks of pregnancy, unless the preborn child had been diagnosed to have such a condition? How, indeed? Harte gives us, though, the words of one such teenager: "How...do you think it feels when you're a teenager who's disabled? You're trying to cope with all the normal teenage problems and being disabled–and you see these two factions literally at war over abortion and the only thing they seem to agree on is that...your life is not worthwhile. You tell me how you think that feels!"[8]

Another way is to show the force of the principle that protecting human life is central to the law. The following argument helps us do so.[9]

1. Protecting human life is foundational for a system of law.
2. If a proposal excludes some human beings from protection, it is intrinsically unjust and attacks the law's foundation.
3. But a law that excludes the disabled from protection is such a proposal.
4. If such a law is proposed, it is wrong to support it.
5. Therefore it is wrong to vote for such a law.

What are we to make of his argument? It affirms the value of life, even the lives of "the last and the least." Restrictive legislation must not abandon them.[10] Nor will it do to defend a law that does so by appealing to its anticipated reduction of abortions. For the legislator's object in voting includes tolerating the denial of protection to the least little ones, and it is the object in acting that chiefly decides the morality of an act.[11]

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[8] Harte, *Changing Unjust Laws*, p. 52. Disability might, to be sure, prompt some to file a wrongful life suit. But if one were not alive, one could not do so. Nor would one, were there no value in one's life to enhance.

[9] See Harte, *Changing Unjust Laws*, pp. 137, 158, 175, and 210 for the elements of this argument.

[10] If we overlook this breach of solidarity, we misread "the radical obligation to respect the right to life of every human being," contends Harte, *Changing Unjust Laws*, p. 313.

[11] Harte cites *Veritatis splendor* §78: "The morality of the human act depends primarily and fundamentally on the 'object' rationally chosen by the deliberate will.... The reason why a good intention is not itself sufficient, but a correct

Yet John Finnis contends that Colin Harte's argument fails. It does so because it depends on the following invalid "kernel" argument.

1. "[A] law which permits abortion is unjust and
2. therefore a statute which prohibits some currently permitted abortions while in some way stating or indicating or revealing by its own formulation that others remain permitted is unjust."[12]

Finnis affirms the premise; but it does not, he says, support the conclusion. Harte's case, indeed, shows that he is mistaken on four points:

(1) the nature of law,
(2) the grounds for its validity,
(3) the distinction between a statement and a proposition, and
(4) how a legislator treats law as dynamic.

While I do not find Finnis persuasive, his charges merit review.

Harte refers us to Thomas Aquinas's classic definition of law: "an ordinance of reason [*rationis ordinatio*] for the common good, made by him who has care of the community, and promulgated."[13] Finnis finds a need to offer more: "A law," he says, "is a proposition of law which is valid because, and for as long as, it has the validating kinds of relationship to sources of law such as enactments, customs, judicial application and interpretation.... The law of the land is the whole set of such propositions of law."[14]

Mischief is afoot, Finnis continues, when Harte confuses an ordinance with a mere statement and thus falls into a positivist reading of the law. Finnis reminds us of the distinction between a proposition as a meaning and

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choice of actions is also needed, is that the human act depends on its object."

[12] Finnis, "A Vote Decisive for…a More Restrictive Law" in *Cooperation, Complicity and Conscience*, p. 285.

[13] Harte, *Changing Unjust Laws*, p. 155.

[14] Finnis, "A Vote," p. 283.

a statement as a verbal formulation expressing that meaning. Aquinas, he adds, grasps this distinction. "When Aquinas says that law is in the practical reason..., he is certainly using the term proposition...to signify something that obtains at the level of understood meaning rather than at the level of text, work, expression, and so forth."[15]

On Finnis's view, Harte's "confusion" worsens when he infers that to vote for more restrictive abortion legislation, albeit with language excluding the disabled, is to endorse a law that does so. The well-intentioned legislator is changing the meaning of the existing abortion license without endorsing remaining legislation that excludes the disabled. What Harte fails to grasp is that "[w]hat a reforming bill/statute says does not settle what it does."[16] But the informed legislator sees this distinction. Thus "in looking to see what change is made by the bill or new statute" he or she recognizes that the meaning of a law is dynamic.[17]

In sum, Harte's solidarity argument is muddled. It is a case of purity run amok. In that politics is the art of the possible, Harte is impossibly imprudent. To be sure, Finnis and Harte both distinguish between political compromise, on the one hand, and moral complicity, on the other hand.[18] They disagree about where one should draw the line between the two.

A Thomist Interlude

Since both Harte and Finnis appeal to Aquinas, we might well consult the source. What does he tell us about prudence? About the gift of counsel which corresponds to it? What does he teach about solidarity in relation to the common good? Lastly, what might he say about abortion as a refusal to love?

Thomas's discussion of prudence underscores three points. First,

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[15] Finnis, ,"A Vote," p. 224 n30.

[16] Finnis, "A Vote," p. 283.

[17] Finnis, "Restricting Legalized Abortion Is Not Intrinsically Unjust," in Watt, p. 218.

[18] On this distinction see Harte, *Changing Unjust Laws*, pp. 134-35 and Finnis, "Restricting...," pp. 242-43.

prudence, i.e., right reason in acting, brings the harmony of reason to our acts, whether ordered to a private good or to the common good.[19] Second, one cannot act well unless one acts prudently.[20] Third, prudence is perfect insofar as it looks to the final end of one's "whole life."[21]

And how does counsel come into play? It is a gift of the Holy Spirit.[22] Without it, our prudence reaches no further than our own limited vision; with it, we are open to the Spirit.[23] To this, Thomas adds a coda. The beatitude of mercy corresponds to the gift of counsel, since counsel directs us to what is helpful for our end, and in this quest our need of mercy is paramount.[24]

With these points in mind, how should we understand Harte's appeal to solidarity? If solidarity is a virtue, then prudence will coordinate it. And prudence will do so perfectly if conjoined with counsel and mercy. Aquinas does not use the term "solidarity."[25] But the Thomistic common good incorporates its meaning. Here Jacques Maritain offers an instructive gloss. "[I]n so far as persons are engaged in the social order, the common good by its essence must flow back over or redistribute itself to them," and Maritain calls this dynamic "the principle of redistribution."[26] As individuals, we are each a part of the common good. But as persons who transcend the material, the common good embraces the good of each of us. Thus Aquinas writes, "Man is not ordained to the body politic according to all

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[19] Thomas Aquinas, *Summa theologiae* II-II, q. 47, a. 10.

[20] Aquinas, *Summa theologiae* II-II, q. 47, a. 14.

[21] Aquinas, *Summa theologiae* II-II, q. 47, a. 13.

[22] Aquinas, *Summa theologiae* II-II, q. 52, a. 2.

[23] Aquinas, *Summa theologiae* II-II, q. 52, a. 1.

[24] Aquinas, *Summa theologiae* II-II, q.52, a. 4.

[25] As Catholic social thought uses the term, we must first look to Heinrich Pesch, S.J. See especially Andreas Wildt, "Solidarity: Its History and Contemporary Definition" in *Solidarity*, ed. Kurt Bayertz (Berlin: Springer, 1999), p. 213.

[26] Jacques Maritain, *The Person and the Common Good*, trans. John J. Fitzgerald. (Notre Dame IN: Univ. of Notre Dame Press, 1966), p. 76.

that he is and has."[27] Nor could he be, since "all that man is, and can, and has, must be referred to God."[28]

Lastly, what does Aquinas say about a parent's refusal to love? A parent is the natural principle of a child's life, just as God is our Father.[29] He adds that "Charity conforms man to God proportionately, by making man comport himself towards what is his, as God does towards what is His."[30] Since abortion is a refusal of one's child, it is a refusal, as well, to form oneself to the principle of one's own life. As such, it becomes a kind of anti-creation.[31]

Our Thomistic interlude makes clear that the Harte vs. Finnis debate leads into deep currents. Further Thomistic reflection, though, awaits our return to that debate.

John Finnis: Sed Contra

In returning to that debate, I have four objections to Finnis's position.

First, his account of law is elusive. It is elusive in that it traces validity to "validating kinds of relationship" that are linked to the various sources of law, including "custom" and "judicial interpretation."[32] Such elusiveness is perplexing, there is no end to custom and interpretation. It also invites judicial arbitrariness. Yes, the legal system is evolving. But sooner rather than later, we must determine whether what is before us is a law or only the corruption of law.

Second, when we make this determination, we must address a statement of the law. Whatever the law's propositional content and capacity, we must look to statements for its public expression. Finnis says

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[27] Maritain cites *Summa theologiae* I-II, q. 21, a. 4 ad 3.

[28] Ibid.

[29] Aquinas, *Summa theologiae* II-II, q. 26, a. 7 ad 2.

[30] Aquinas, *Summa theologiae* II-II, q. 26, a. 9 ad 3.

[31]The analogy between creating and giving birth is intriguing. See *Summa theologiae* I, q. 21, a. 4 ad 4; here Thomas argues that in Creation God shows mercy "in the change of creatures from non-existence to existence."

[32] See n14 above.

that "a proposition of law may be true even though there is no statement in the lawbooks which expresses or states it...."[33] But suppose statement after statement in the lawbooks contradicts a supposed proposition of law? There is more to law than the letter thereof, but this "more" does not coexist with its insistent denial in public statements of law. To insist on the role of the public statement is the mark, not of the positivist, but of the plain man who holds that words mean something and that this meaning be put in words.[34]

Third, in most jurisdictions the abortion license is expanding. Limits are minimal. At some point a restrictive law restricts so little that it becomes a sop. Should one, for example, endorse a bill because it removes a cleft-palate or a club foot as a ground for abortion while standing pat on other disabilities? The status quo is loathsome; yet perhaps worse is acquiescence to an abortion license with an allegedly human, but smirking, face.

My fourth worry is that Finnis puts legislators at risk for moral blackmail. Consider the web that they might pliantly weave. One legislative group seeks pro-life support for Proposal A by pointing out that without their support another group will pass Proposal B. While Proposal B extends the abortion license, so does Proposal A–though not so far. In time, another legislative group seeks the same pro-life support for Proposal C by pointing out that without their support a competing group will pass Proposal D. Sadly, Proposal C is worse than Proposal B although more restrictive than Proposal D. And so it goes. What breaks the slide on so slippery a slope?

Of Argument and Analogy

When arguments collide, they often confound. If we are confounded, might we not turn from argument to analogy? Perhaps the right analogy will lead to a new and plainly sound argument. Perhaps a restrictive abortion bill

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[33] Finnis, "Restricting," p. 224 n30.

[34] For the charge of positivism, see Finnis, "Restricting," p. 235. In response, see Harte in Watt, p. 255 n36.

that withholds protection from the disabled is like a rescue mission which can save some, but not all, members of an endangered group. In the latter case, ought we not to save as many as we can? If so, doesn't it follow that legislators ought to vote to protect as many pre-born babies as they can? Thus "the emergency argument" comes to mind.

1. In an emergency, one ought to save as many lives as possible.
2. The abortion license is an emergency.
3. So legislators ought to vote in a way that saves as many pre-born babies as possible.
4. Sometimes a restrictive proposal that excludes the disabled from protection is a means for saving as many pre-born babies as possible.
5. So legislators ought to vote for such a proposal.

Indeed, John Finnis holds that there is a duty to do so.[35]

But is "the emergency argument" sound? Colin Harte reminds us of the old axiom "Women and children first!"[36] Look first to the vulnerable. But the most vulnerable in our context are the disabled, expressly excluded because some hold them of less value. (Britain, for example, aborts over 90 percent of its unborn babies with spina bifida or Down syndrome.[37])

There is also a distinction between rescuing lives in an emergency for which one is not responsible and rescuing lives in an emergency for which one is wholly or in part responsible. Natural disasters give rise to emergencies, but rescuers can neither enact nor repeal the laws of nature. Protest is pointless. Nor are rescuers responsible for emergencies which others, with whom they have no bond, cause by negligence or with malice. Yet democratic legislatures, acting in concert, do enact and repeal laws. To protest legislative wrongs can be efficacious, sometimes more so than reform from within. Sustained resistance and civil disobedience can overturn a regime that forsakes those for whom it has the greatest responsibility. Lawmakers, thus, bear a continuing responsibility for the

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[35] Finnis, "A Vote," p. 292.

[36] Harte, *Changing Unjust Laws*, pp. 3-4.

[37] Harte, *Changing Unjust Laws*, p. 43 n68.

abortion license.[38]

The best legislative response to the state-supported killing of the innocent is to end it or, at least, to refuse recognition of it. A legislature can't divert an earthquake. But it can protect the least little ones, including the disabled among them. Not to do so is to betray the solidarity required by the law's *raison d'être*: to secure the common good. How, then, can one take part in a legislative act that is in contempt of the law's purpose? It is better to reject the legislative options at hand as incoherent, better to deny the established disorder.[39]

"The emergency argument" is not sound. It does not distinguish between, on the one hand, the emergencies for which nature or the negligence or malice of others is responsible and, on the other hand, the emergencies for which we ourselves, at least in part, are responsible. But perhaps it takes an analogy to dispel an analogy. Consider a sampler of cases in which one makes oneself responsible. Is one a liar? One cannot resolve the problem by lying less, or less than others, while letting past lies stand. Rather, one must speak only the truth. Am I a fraud? I cannot licitly sell two houses that I falsely claim because in the past I claimed three. Nor

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[38] Referencing Nazi and Marxist atrocities, John Paul II notes that "there remains the legal extermination of human beings conceived yet unborn," one that is "decreed by democratically elected parliaments, which invoke the notion of civil progress...for all humanity. See his *Memory and Identity: Conversations at the Dawn of a Millennium* (New York NY: Rizzoli, 2005), p. 11.

[39] On this moral coherence, see Tadeusz Stycen et al., "For Legislation that Expresses Solidarity with Each and Every Human Person," trans. Dorota Chabrajska in *Unvollkommene oder Ungerechte Gesetze? Für eine kohärente und ethisch eindeutige Interpretation von Nr. 73 der Enzyklika "Evangelium vitae"* (Lublin, Poland: Johannes-Paul-II Institut der Katholischen Universitat Lublin, 2005), pp. 13-17.

Reflecting on the established disorder, G.K. Chesterton notes how whole peoples come to accept it: "When they give birth to a fantastic fashion or a foolish law, they do not start or stare at the monster they have brought forth. They have grown used to their own unreason; chaos is their cosmos; and the whirlwind is the breath of their nostrils." G. K. Chesterton, "The Mad Official" in *On Lying in Bed and Other Essays*, ed. Alberto Manguel (Calgary, Alberta: Bayeaux Arts, 2000), p. 496.

could any court enforce a contract to do so. Is one a polygamist? One who is thrice "wed" cannot remedy matters by renouncing the third wife, nor can a court authorize a second "marriage" on this condition. Yet "limiting one's lies" in such forms is closer to voting for a restrictive bill that abandons the disabled than is a merely generic emergency. Indeed, a once plausible analogy and its "emergency argument" turn out to beg the chief question at issue between Harte and Finnis. How does prudence shape solidarity? Not by forsaking it.

THOMAS, AGAIN

Here we might re-visit Thomas on prudence in the light of counsel and counsel in the light of mercy. He teaches that our prudence does not reach beyond its vision. But counsel opens prudence to the Spirit. With counsel, we recognize that it is mercy that is most important to us in reaching our final end. Our pursuit of this end is inseparable from justice. Thomas also teaches that "of all the virtues which relate to our neighbor, mercy is the greatest."[40] It is in God's mercy to us that His "omnipotence is […] chiefly shown," and, in turn, our mercy to others "likens us to God."[41]

But what does this reflection suggest for the Christian legislator? For the lawmaker who faces a proposal that restricts some abortions yet excludes the disabled from protection? Any law has its first authority, its moral power, from God. If God's power is chiefly manifest in mercy, might not the legislator think that his or her authority, i.e., moral power, is also chiefly manifest in mercy? Some distinctions are in order. What is at issue is not a mercy shown to the guilty. The disabled victims of abortion are innocent. It is rather a mercy shown to those whose lives others have wrongly made forfeit; and at the legislative level, public mercy stands vigilant against private breeches of solidarity.

Incrementalism seldom lacks support. But the Christian legislator might well think that when both innocent life and the foundation of law are

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[40] Aquinas, *Summa theologiae* II-II, q. 30, a. 4.

[41] Aquinas, *Summa theologiae* II-II, q. 30, a. 4 ad 3.

at stake, what we most need are actions which look to the final end itself.[42] Yet no act is wiser, or more powerful, than an act of mercy. None is more ordered to the common good. Might not the Christian legislator, committed to the common good, best show mercy by insisting that restrictive abortion bills do not exclude from protection the least little ones, those who are disabled or the victims of a special malice?[43]

Revisiting St. Thomas shows us that Colin Harte highlights a legislative dilemma that calls for theological consideration. John Finnis would surely concur. But lawmakers will be told that theology has no place in the legislative arena. John Rawls, notoriously, says that it must not.[44] Aquinas says no such thing.

Yes, Aquinas was a stranger to modernity, but Jacques Maritain was not. Indeed, he helped draft the United Nation's Declaration of Human Rights. If his principle of redistribution is critical for understanding the range of the common good, his principle of transcendence is critical for understanding its trajectory. "[I]n so far as persons transcend the social order and are directly ordained to the transcendent Whole, the common good by its essence must favor their progress toward the absolute goods which transcend political society."[45] To reject the theological dimension of mercy is to undermine the common good.[46] A polity that does so under

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[42] In linking counsel to mercy via goodness, Aquinas comments that "[f]ruit denotes something ultimate" and that "the ultimate in practical matters consists not in knowledge but in an action which is the end." S.T. II-II, q. 52, a. 4 ad 3.

[43] It is noteworthy that Dorothy Day was an activist whose program was the spiritual and corporal works of mercy. She declined to vote, however, in the context of what she called "this dirty rotten system." See Kate Hennessy in "Dorothy Day's Granddaughters Write about Canonization," *Houston Catholic Worker*, March–April, 2006, p. 1.

[44] See John Rawls, *Political Liberalism* (New York NY: Columbia Univ. Press, 1993), pp. 247-54.

[45] Maritain, p. 76.

[46] With regard to the theological dimension of the political debate, John Paul II discusses, without precluding more than one interpretation of his view, whether pro-life legislators can vote for an incompletely restrictive abortion proposal (*Evangelium vitae* §73). In any case, the development of doctrine here seems

mines its legitimacy. One needn't be Jeremiah to suppose that if we persist *etsi Deus non daretur*, we might soon find ourselves looking in vain for the sign of the rainbow.[47]

possible. Germain Grisez, citing slavery, sees development as often moving toward "seeing the unacceptability of something previously considered permissible." Germain Grisez, *The Way of the Lord Jesus*, Volume One: *Christian Moral Principles* (Chicago IL: Franciscan Herald Press, 1983), p. 220.

[47] Margaret Atkins, John Cahalan, and especially Damien P. Fedoryka and Colin Harte helped me to clarify this essay.