What Happens to the Victims of Compromise Abortion Laws?

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ABSTRACT: The essay addresses the problem of the so-called "compromise laws" that are favored by a large and respectable segment of the pro-life community. The notion of toleration operative here is problematic since it implicitly includes acts of murder that are legislatively affirmed as rights even though heavily regulated to reduce their incidence. The author argues that one reason for this form of "toleration" is the failure to distinguish in every abortion the moment of morality from the moment of justice. The difference between the finality of moral and legal prohibitions establishes the basis for determining whether or not the state has the competence to legislate morality. The immorality of a behavior that has moral consequences for the agent of the act is irrelevant and an improper reason for legislation. Of direct relevance is the right to or the legitimate ownership of one's life. It is not something that can be regulated or restricted. Compromise laws do precisely that and are therefore intrinsically unjust. Their appeal lies in the fact that a larger number of unborn lives could be saved due to the regulation of abortion. But exchanging the lives of the few in order to gain an advantage for the "more" is intrinsically unjust since the legislator has no right to give up in a compromise law what belongs not to him but to the victim of injustice. Any "compromise law" that regulates abortions and thereby achieves a reduction in their number is intrinsically unjust even though it effects a greater good.

THE PRESENT POLITICAL REALITIES make impossible the passage of an exceptionless prohibition of abortion. Various discussions center on the feasibility and propriety of "imperfect" laws against abortion. The discussions would be fruitful if the present political reality allowed even the most imperfect of "pro-life" laws. In fact it does not. In that context some pro-life

activists are willing to support and pass "imperfect laws" that would "save" more babies than would have been the case without the imperfect law. In doing this they are willing to accept and even vote for intrinsically unjust laws. Indeed, from within Church circles we are reminded "that for each person there exists *hic et nunc* the specific moral duty to do all the good that is practically possible, and one cannot deny that reducing or eliminating evil is itself a good."[1] This is supposed to ground the liceity of participating in intrinsically unjust laws as long as the legislator publicly dissociates himself from the unjust elements of such a law. This is a patently utilitarian or proportionalist argument that is incompatible with the Church's teaching. As a matter of fact, *Evangelium Vitae* #73 explicitly affirms that the contrary is the teaching of the Catholic tradition.

It is my judgment that those who defend participation in intrinsically unjust laws in order to reduce or eliminate evil do so because they focus on the moment of "morality" in the agent as opposed to the moment of injustice committed against the victim. To develop my point, I will turn to an essay by Christopher Wolfe that retains it relevance though written twelve years ago.[2] It is in many respects an excellent political study in the art of the possible. He makes a very persuasive case against a "no exceptions" pro-life position in the area of legislation in the context of the current political situation. One cannot argue with his evaluation of the empirical situation of fact. Given today's cultural circumstances, there exists no realistic possibility of passing a "no exception" legislation prohibiting abortion. Wolfe argues that the uncompromising insistence on a "no exceptions" legislation will in all probability result in the death of more innocent lives than would be the case if the pro-life movement were willing to accept compromise legislation.

The thrust of Wolfe's article is to show that compromise legislation in the area of abortion does not compromise the moral principle involved in abortion. He holds that a legitimate compromise would *forbid abortion in general* but would *withhold criminal punishment* in certain exceptional cases, conventionally called the "hard cases."[3] Such a compromise would affirm principle while recognizing political reality.

Wolfe's position is important for two reasons. The first reason is that, in affirming the prohibition of abortion in general, it provides at least the beginning of a solution to the existential imperative to defend innocent life in circumstances where the political means are not readily available. His solution, however, would allow one to support legislation that does *not punish* abortion in certain exceptions.

The second reason is that his solution has an unfortunate flaw, if not in its formulation, then in its exposition. This flaw reintroduces the very doubt he tried to allay, namely, the doubt whether a political compromise can leave principles intact. In suspending by law (as opposed to the judicial process) punishment in certain cases, it implicitly challenges or at least ignores that the objective foundation for the prohibition of abortions in general is the unconditional injustice of abortion. The suspension of punishment for an act that is prohibited implies that it is not prohibited because it is an intrinsic injustice but because of the consequences that follow. The flaw in Wolfe's position is instructive because it points to and illustrates what in my judgment is a basic (though understandable) confusion in pro-life rhetoric between morality and justice. The pro-choice (pro-abortion) side also shares the same confusion.

THE FLAW IN CHRISTOPHER WOLFE'S COMPROMISE SOLUTION

Briefly, the flaw is this: in speaking of compromise—that is, of laws that do not completely prohibit abortions, or do not punish some of those prohibited—he leaves himself open to the implication that the compromise may include a "toleration" of abortion, as did Lincoln's compromise on slavery. Indeed, Wolfe explicitly concedes toleration to be the bottom line of compromise laws.[4] The nature of this toleration is unclear, however, especially since he lists as an example of tactical compromise, a Congressman's voting for a law that included funding for abortions, and as an example of strategic compromise he cites the Utah abortion law as an example of a compromise law. The ambiguity here arises in that toleration and compromise may also mean actually supporting a law that also *protects* a restricted right to abortion, that is, contains "exceptions." There is a real logical difference between an *exception to provided*

punishment and sanctions, and an *exception to a prohibition.* But Wolfe uses the logical difference in meaning to set up the construct of a law that prohibits acts but attaches no sanction of punishment for the infraction of these laws. This is the kind of legal fiction that exists in both Germany and Austria, where abortion remains in the criminal code but is exempted from punishment under certain conditions. Such a solution has a verbal appeal because one still forbids abortions in general and therefore gives the appearance of taking the issue of justice seriously. But to carry even this appearance of plausibility, Wolfe's solution would presuppose a prohibition of abortion "in general," a situation that does not obtain in the United States, where the current situation is such that even restrictive abortion laws invariably contain (or are presumed to contain) a "right to abortion" protected by the Constitution.

Rather than following the structure of Wolfe's essay, it would perhaps be more advantageous to step outside of it and to begin with a consideration of the confusion between morality and justice. What is it? We can then note how it flaws Wolfe's own position.

THE DISTINCTION BETWEEN MORALITY AND JUSTICE

In his Georgetown speech, Cardinal Bernardin spoke of abortion as a moral issue.[5] In this he did not differ from Governor Cuomo, who spoke of it at Notre Dame University as both a moral and a religious issue.[6] There seems to be nothing extraordinary about this. Closer to the time of Wolfe's article, Michael Novak also spoke of abortion as a moral issue in the March 1992 editorial of *Crisis*.[7] And so does Christopher Wolfe in the essay in question.

I have proposed elsewhere that abortion is a moral issue because it is first an issue of *justice*. In other words, abortion is immoral because it is first of all an injustice. There are immoral acts that do not involve any injustice to other human persons. Fornication between mutually consenting adults is one example. Apart from the objective distinction between immorality and injustice, the very question of the spheres of competence of Church and State demands an explicit differentiation between them. The relevance of this distinction can be initially noted by saying that it will show a

fundamental difference between (1) the whole question of whether "morality" can be legislated and (2) the question of whether "justice" can be legislated. The distinction between morality and justice will also establish entirely different reference points for the notion of compromise. Compromise will mean one thing when dealing with morality, but something entirely different when dealing with justice.

One commonly accepts that justice and morality are the same thing. Every injustice is immoral. And abortion is immoral. No further discussion seems necessary. It only remains to ask how much of the "moral law" can or should be incorporated into civil law. This position is understandable if we interpret "moral law" as prescribing what ought or ought not to be done in such a way that the doing or not doing will have moral consequences for the *agent.* Thus the moral prescriptions against fornication and abortion imply that failure to observe them will have moral consequences for the *agents*. Those who fornicate or commit abortions will become immoral or acquire a moral stain.

THE REASONS FOR "MORAL" AND "LEGAL" PROHIBITIONS ARE DISTINCT

An entirely different question deals not with *what* is morally proscribed or demanded but rather with *why* it is forbidden or demanded. In the case of fornication between mutually consenting adults, the "morality" or moral relevance is grounded in the *value* of each person as person and in the nature of the personal acts. Whatever the state of public debate about the morality of fornication, I think that all sides should agree that there is involved *no violation of* what we would call *"rights."* Whatever prior conditions the parties may have set on their mutual consent (which may have involved compromise), the consent to fornicate as such does not involve violation of any rights. Thus, regardless of the answer as to why fornication is immoral and therefore morally forbidden, we can say that the violation of a right, namely, an injustice, is *not* included in the reason for its immorality. The same could be said of drinking alcohol to excess. Drunkenness is immoral but does not, as such, violate any rights directly.

SHOULD THE STATE LEGISLATE AGAINST IMMORAL BEHAVIOR?

The question as to *why* something is immoral is crucial for another question, namely, whether the State should forbid fornication. The same question could be asked about drinking (if drinking) is assumed to be immoral: Should the State prohibit drinking alcohol? At the risk of being shocking, I would answer that the State ought not legislate, on account of their immorality, against either fornication or drinking, whatever its extent in any way. (I abstract here from an entirely new question whether a "sin tax" would be justified.) This position will not be so shocking for those who have urged the decriminalization of "victimless" crimes.

If one agrees that neither fornication nor drunkenness should be legislatively forbidden on account of their immorality, it still remains open for determination whether any *consequences* of fornication or drunkenness could violate rights or at least cause an undue burden on other members of society. But here again it is not the immorality of the agents that is the reason for legislation but rather the protection of the *rights* of possible victims.

Something interesting comes into focus at this point. If an immoral activity does not as such and directly violate anyone's rights and if legislation is aimed at it in view of its harmful *consequences* to others, then it stands to reason that the aim of this legislation is not the complete suppression of the immoral activity. In other words, *the law does not aim to stop the immoral activity without exceptions.* The law may itself allow for exceptions, or the executive branch may in practice make exception to enforcing the law, or the judiciary may dismiss cases under certain circumstances. In this area, the non-enforcement or non-application of the law will not have the consequence of engendering disrespect for the law. Let us elaborate briefly through examples.

Let us assume that in the State of Wetlands, statistics have shown that fatal and disabling automobile accidents have kept pace with the rise of drunkenness. This year, the accidents claim 25% of the population statewide. The state legislature passed a law prohibiting drunkenness, attaching stiff penalties to violations.

Surprisingly, in the town of Liquidity in the same state, where 95% percent of the adult population religiously gets stone drunk on every Friday evening of the week and 35% of the adults are drunk on any other day of the week, statistics have shown a dramatic decline in traffic accidents. It turns out that after the passage of the above law, civic-minded citizens have devised a system whereby those that drink do so in halls and cubicles equipped with special locking devices that will open only when all occupants are cold sober. The State Police have been put into a difficult position. They know the time, the place, and the identity of the violators of the law. Should they arrest and prosecute them for breaking the law? Or should they treat these cases in Liquidity, Wetlands as exceptions?

This far-fetched but not impossible scenario illustrates a principle. Laws are made for men, not men for laws. It would be a legalism of the worst sort to arrest the drunks of Liquidity even though the harmful *consequences* justifying prohibition were completely absent or even in practice excluded. The law was based on the intent to avoid a harm whose statistical incidence has become an unjust burden on society. Its prohibition of drunkenness is conditional, not absolute. And the reason that it cannot be absolute is that the harmful consequences of drunkenness, which are so frequent in the rest of the state, are *not necessary consequences,* as the ingenious citizens of Liquidity have demonstrated. The *immorality of drunkenness is completely beside the point*. It was never the reason for the legislation. Thus, the failure to enforce the law in Liquidity would not have as its consequence the loss of respect for the law as it would in the rest of the State. On the contrary, there would be a respect for the law and the civil authority that did not prosecute the "harmless" drunks of Liquidity.

With reference to the above scenario, we can use Christopher Wolfe's formula noted at the beginning of the essay, that in the State of Wetlands, *drunkenness is prohibited in general* but punishment or enforcement is withheld in certain particular cases that constitute exceptions to the prohibition. We have, in effect, a compromise. In exchange for reducing or even avoiding certain harmful *consequences* of drunkenness the civil authority allows the drunkenness to continue. Both sides have more of what they wanted than would be the case in a

strict "exceptionless" enforcement of the law.

THE IRRELEVANCE OF IMMORALITY TO PROHIBITIVE LEGISLATION

Much of the above can also be said of any immoral behavior that is legislatively prohibited by virtue of the harmful *consequences* that constitute an undue and unjust burden on the rest of society. It should be clear that the statistical frequency of the harmful behavior has to be high enough. There is no absolute quantitative level, yet one should be able to say reasonably "too much." And it should be clear that one does not target the behavior in itself but rather its production of these consequences. Thus, it should be also clear that the law aims at a *reduction* of the harmful consequences, not at an absolute and "exceptionless" cessation. It would be irrational and improper for the State of Wetlands to maintain and vigorously enforce laws against drunkenness if in fact the records showed only one automobile accident per year attributable to driving under the influence.

The most important point is that in the legislative prohibition of immoral behavior because of its unjust and harmful consequences to society, the *morality of the behavior is absolutely irrelevant to the legislation*. The identification of something as moral or immoral should not play any role in the discussion of its status in legislation. Unfortunately this is not the case. Both sides of the abortion debate, but especially the anti-abortion or pro-life side speaks of abortion as a *moral issue.* And the pro-life side does not consider the element of morality as irrelevant to the discussion of abortion's political status. It should. The failure to see that the immorality of abortion is irrelevant to the question of legislation leads to the misinterpretation of the frequently invoked passage of St. Thomas used by Wolfe in his argument. And it leads to the confusion of a merely logical point with a substantive point. Once we attach the term "immoral" to the term "drunkenness" in our model legislation, and once we affirm that the law aims at a "general" prohibition that allows for exceptions, then it becomes logically correct that an immoral behavior allows, at least legally, for *exceptions.* So, when abortion is identified as immoral, it can now be generally prohibited but we can allow for exceptions without compromising the moral principle, that is, without denying

that abortion is immoral anymore than we denied that drunkenness is immoral.

We saw what it means to say that the (immoral) acts of fornication or drunkenness can be prohibited in general while withholding punishment or enforcement of the prohibition in particular cases, that is, in exceptions. We also saw that the basis and justification for "exceptions" was the fact that a particular (immoral) behavior did not or even could not lead to the harmful *consequences*. In each case we have bracketed the moral issue and considered only the unjust consequences of these acts. It is clear that an exception can be allowed where the prohibited behavior does *not* have the harmful consequences. But this is entirely different from the situation where the behavior, legislatively *excepted* from prohibition or punishment, does in fact have harmful consequences, as in the case of abortion.

CAN THERE BE EXCEPTIONS TO A GENERAL PROHIBITION OF MURDER?

What does it mean, now, to say that abortion must be prohibited *in general*? What could it mean to say, as does Christopher Wolfe, that there can be laws against murder in general without punishing every single form of murder? We are not asking whether the state can prohibit some forms of murder, while failing to prohibit others. This is something possible, and even possibly legitimate. But Wolfe does not himself propose this, at least unambiguously, as indicated by the proposed exclusion of certain forms of murder from punishment. How can the exemption of some single form of murder from punishment be an exception that would constitute a compromise that is legitimate? This is not simply a matter of a contradiction. It would be a contradiction to say that murder is prohibited in general, that is, that all murder is prohibited, and then add an exception by saying that one form of murder is exempted from the prohibition. One would in effect be denying the original claim that all murder was forbidden. But even if this were logically possible and if "general" were to mean "most," does not such an exemption clearly imply that one form of murder is placed outside of the scope of the law? In placing one form of murder outside of the scope of punitive sanctions, one does not

commit a contradiction but one clearly implies that one does not ground the prohibition "in general" on the injustice of murder. The logical meaning of a "prohibition in general" does not as such imply that the prohibition is based on the injustice to the victim of murder. But the support of a prohibition of murder in general does give the impression of someone who is "personally opposed" to murder and therefore a politician to be trusted.

There is one very clear and evident instance of a form of "murder" that we know to be immoral and that one could construe as an exception to the general prohibition of murder. It would be found in all those instances of "murder" in which no harm occurred to anyone other than the agent of action. Just as drunkenness in a locked chamber in Liquidity would be exempted from the law because it did not and could not have the consequences targeted by the law. So too, a victimless "murder" would be an exception to the law against murder in general. But here the reason for the exception is not the nature of the objective reality of murder but rather the legislative and judicial exclusion of the unborn from the category of persons. This is why even pro-lifers will refuse to use the word "murder" in reference to abortion: it is not legally murder.

But, one might object, that is nonsense. Murder has a victim by definition. And that is why it is prohibited. It is simply absurd to use the word murder for something that is not murder and then to say that this something is an exception to the laws against murder in general. In other words, there is no instance of a form of murder that would be an "exception." We leave the further implications to the reader: one does not take abortion seriously as murder.

FROM ABORTION AS INJUSTICE TO ABORTION AS IMMORALITY

Wolfe does not face or even pose the question of what would be a particular instance of murder that would be the exception, which he claims need not be included in the punishment of murder in general. He simply turns to the general *consequences for society* of allowing or not allowing for exceptions. In other words, he treats abortion as if it were a case of drunkenness. But he switches the approach. It is a question no longer of exempting an action (such as drunkenness in

Liquidity) that does *not* have harmful consequences for society. He now proposes exempting *harmful* actions, such as abortion for reasons of rape or incest, because their prosecution might harm society. The primary harm, of course, would be the exclusion of more restrictive laws and thus the greater number of abortions that would then occur. He treats abortion as if it were an *immorality*, treats it *as if* it were an action that has no victims, but grounds his argument by the implicit appeal to the *greater number* of abortions that might occur had one not achieved the compromise of exempting some abortions from punishment. With this appeal to the lower number of abortions resulting from the proposed mode of compromise he hopes to avoid literally, not analogously, the same situation that accompanied prohibition: a thriving black market in abortions that would cause more deaths than would have been caused by compromise legislation on abortion.[8]

THE CONSEQUENCE OF ABORTION FOR THE VICTIM

Let us take a particular instance of what is objectively murder that would be exempted from a general law against murder. It is hard to think of one unless we take an example from the area of abortion. One reason for taking this as an example is that Wolfe would, I assume, consider exempting abortion for reasons of rape as a political compromise that would not compromise the "moral" principle. Another reason for taking this as an example is that the pro-choice side treats it precisely as if there were no victim—an act that does not harm any "other person." These instances of abortion fall outside of the category of "murder" by a simple definition as those that one does not want to sanction by punishment. The circular reasoning is evident. One suspends not only punishment but also principle.

What happens in an abortion for reason of rape or incest that would be legally permitted in the proposed compromise solution? Death. None would dispute that. We also do not dispute that "more deaths" would quite likely occur as a result of trying to pass restrictive laws. And we concede that "fewer deaths" would occur under compromise laws. We are in a situation begging for compromise. Each side wants "more" and will have to settle for

"less" if only to avoid risking getting less than it would have by being "rigid" and "uncompromising."

ARE THERE VICTIMS OF COMPROMISE ABORTION LAWS?

In discussing compromise, the pro-life movement risks losing sight of something very important. Arguments over a loaf of bread allow for the possibility of drawing the knife across any point on the loaf. Given the nature of the thing, there can always be more or less bread. So, faced with a million and a half abortion-killings a year, given the nature of quantity as quantity, there can always be more or fewer deaths. But all of this is distinct from the question as to where the scalpel is to cut so as to yield more or less life. Faced with the sheer horror of the quantity of death we may forget the simple fact of death. A very simple fact: death is death. It is not half-death. It is not half-life. Death does not allow us to speak of "more" or "less," as does slavery with respect to more or less freedom. Lincoln's compromise on the issue of slavery is not a proper analogy for discussing compromise on abortion.

Yet it is not simply death either. It is an *unjust* death. It is significant that in his essay Christopher Wolfe uses the terms "moral," "morality" or "immorality" thirty-four times; thirty-five if you consider the editorial note that the original title of the paper also included the term "moral." On the other hand, he refers to justice and injustice only four times, one of them in a quotation, in his criticism of Cuomo. Wolfe correctly says that abortion is not only a tragedy, "but a terrible injustice as well." He is absolutely correct in criticizing Cuomo for shifting responsibility for moral positions on the Church and using this as an excuse for not defending principles of justice. Again, Wolfe correctly affirms that anyone, whatever his religion, should be able to see that abortion is an unconscionable crime.

It is unfortunate and surprising that Wolfe comes to the theme of justice only at the end of the essay, almost in an incidental manner, in criticizing Cuomo. I am sure that he sees the injustice of abortion. But this intuition finds only mention rather than the use it should have in the argument.

If abortion is an unconscionable crime, that is, if it is unjust, this intuition would serve well in considering the proposed exceptions. As

noted, Wolfe does not give a particular instance of a murder that would be exempt from the punitive sanction of laws against murder "in general." But we must assume that whatever it is, it too would be unjust and a crime, as it also is in the proposal of abortion exceptions. Here too, as Wolfe says quoting the Church, we have "unconscionable crime," not merely death.

In discussing political compromises we surely have to take into account the legislative process and the question how much or how little the two "sides" can or are willing to give up. Let us say that the pro-life movement is willing to give up the "more" and settles for "less" in an abortion legislation that excepts abortions for rape or incest from prohibition. How does the compromise affect the *victim* of the "excepted" abortion? We saw that the victim cannot gain more than he otherwise would have if the prolifer were not so "uncompromising" and "rigid." He loses his life. The fact that there are fewer other victims makes no difference. He dies. But this is not all.

In an abortion the victim loses *his* or *her* life. The possessive pronoun is not simply a grammatical requirement. The victim loses what *belongs* to him or her. His or her life is a *possession* in the strict sense of the word. He or she has a *right* to it, in other words, a *just claim to his or her life*.

CAN WE VALIDLY INVOKE AQUINAS TO DEFEND COMPROMISE LAWS?

It is because Wolfe only mentions but does not use the reference to justice in his argument that he misunderstands and misinterprets the quoted passage from St. Thomas. Here is the passage: "Human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained; thus human law prohibits murder, theft, and suchlike."[9] It is clear that human law does not forbid everything that is immoral. Thus, from the broad general category of those things that are immoral, St. Thomas distinguishes or "takes out" those that are fit for human legislation. They are those that "hurt" either individuals or

society. And by "hurt" he must mean those that are *unjust.* Or one could also say that "excepted" from among immoral actions or vices prohibited by human law are those vices that do *not* hurt individuals or society. But there is no way that the quoted passage can be made to say, as Wolfe makes it say, that from among all those actions that are unjust or crimes against individuals and society and are prohibited by law in general, some particular crimes can be "exceptions" to the prohibition.

Thus there are two entirely distinct kinds of "exceptions." The first kind of exception arises in the question: Of *all* the *immoral* acts, which ones is civil authority to prohibit? The answer would be: Civil authority is to exempt from legislation all those immoral acts that do not hurt, that is, that are *not in themselves unjust or do not cause injustice*. In a general way one could formulate the principle thus: "Not all of the moral law is to be translated into or enacted in civil law." Governor Cuomo, Cardinal Bernardin, Senator Kennedy among others, and in the present context Christopher Wolfe avail themselves of this principle, which, as it stands, is logically correct. But it is too general because the broad category of the "moral" also covers actions that are immoral *but not* unjust as well as actions that are immoral *and* unjust. Before going on to the second kind of "exception," we simply note that one can maintain that immoral actions that are not directly or indirectly unjust *ought not to* be legislatively prohibited.

The second kind of exception arises in the answer to an entirely new question: Of *all* the *unjust* acts, which are to be exempted from effective legislative prohibition by civil authority? The question touches a complex area. The fact that there is the possibility of "greater" and "lesser" injustice is a factor for discussion. We can say initially that in principle the sphere of justice between humans in their behavior is the direct competence and duty of the State. Thus, a legislative exemption of unjust actions is itself unjust. If the state authority knows that an action is unjust, it does not have the prerogative of exempting it explicitly. Nor does it have the prerogative of "regulating" it. When it does, it gives *legal protection to the unjust behavior* of anyone who fulfills the prescribed regulations.

The fact that there is the possibility of a greater or lesser injustice

indicates the complexity of the question. Thus, to take slavery as an example, in two different systems of slavery one could find a difference in the degree of enslavement, a greater or lesser deprivation of freedom. Fortunately for our discussion, there is no comparable gradation in abortion. But even more importantly, the right to life is the foundation for any and every other right. Whereas civil authority can regulate other rights in their exercise in different degrees, it can only respect the right to life or, at most, fail to protect it, but it may never regulate a violation of it.

"... AND CHIEFLY THOSE THAT ARE TO THE HURT OF OTHERS..."

Let us return to the second form of "exemption." Of all the *unjust* acts, can civil authority exempt some from prohibition by legislative action? Restricting ourselves to abortion, the answer should be clear. Because abortion is a radical *injustice* admitting of no degrees, civil authority can never explicitly and formally exempt it from legislative prohibition.

Given its injustice, one can never include it among the "immoral" acts that could be exempted from "human laws." St. Thomas only refers to vices that hurt others. One might *logically* include abortion as part of the moral law that is not to be legislated. But for St. Thomas, given the examples of theft and murder that he explicitly cites, it is the *unjust* act that is to be prohibited by human law.

Thus the second kind of "exception" would refer to the exception of *unjust* acts from legislation. This is the exception that is in fact the topic under discussion but that is not clearly enough distinguished by Wolfe and others, from the first kind of exception of *immoral* behavior that is *not* unjust. The whole category of immoral acts includes two subcategories: one of immoral acts that are *not unjust*, the other of immoral acts that are *also unjust*. The first falls outside of legislation, the second does not. Wolfe has in effect shifted some of the second category into the first. He has not done so by proving that they are not unjust, but simply by arguing from the *consequences* of insisting on "strict" legislation. He has, in effect, ignored their injustice. In doing this, he has duplicated the positions of Governor

Cuomo, Cardinal Bernardin, Senator Kennedy and others who invoke the principle that "not all of the moral law can or should be translated into or embodied in civil law." Unwittingly he has added another knot to the Seamless Straight-jacket.

Wolfe seems to bracket at crucial points of his exposition the fact that particular instances of murder, including murder by abortion, are unjust. They unjustly deprive another of his life. The moment we recognize this we must also recognize that any legislative permission to deprive this other of his life in order to shift a point on the scale of "more" or "less" in a dispute between other parties is absolutely and unconditionally wrong. It is unjust to do so. It would be strictly analogous to the situation where a financial dispute between two parties were resolved by taking money from an uninvolved bystander so as to make "more" available to one party, avoiding the "less" that would have resulted for the other party.

COMPROMISE AND CONSEQUENTIALISM

Bracketing the question of the injustice of murder in discussing the permissibility of exempting from punishment *particular* acts of murder that fall under the scope of a law against murder *in general*, Wolfe introduces the calculus of goods and evils, in other words, a consideration of the proportion between good and evil *consequences* for society (to include other possible victims), not for the particular victim of the particular act exempted from punishment. He ignores the fact that such a consideration of consequences is legitimate only if there is no intrinsic evil or injustice present in the particular act. Once it has been determined that there is no intrinsic injustice, one can proceed to the question of the consequences for society of doing or not doing something.

In the context of his general argument, it comes down to this: a position that allows for no exceptions in a law against abortions will cause a greater amount of evil in comparison with a compromise position that will produces less evil than abortion-on-demand, even though this would be more evil than "ideally" or morally acceptable. In considering "more" or "less" with respect to the quantity of consequences, he brackets the injustice towards the victim of each or

any abortion permitted by a possible compromise.

There can be *no legitimate compromise that gives away what does not belong to any of the parties to the compromise.* No concrete, particular human being in the womb belongs to either the pro-life or the pro-choice side, to one political party or to the other. Thus, no law can give the life of the child to any of them. The awesome task and privilege of the state or the "law" is to *protect what belongs to the child*, and belongs to it in a unique and unconditional manner. Of course, we can be involved in a debate and even struggle in order to determine *how much we can do to help and protect* the child. And it may be concluded by some that we can do less, by others that we can do more to protect and help the child. But the criterion of legitimacy is here the appropriate response to the right of the child, to what he can claim in justice as his own.

Under no circumstances, even in the name of saving "more" lives, is it permissible to sponsor, promote, and vote[10] for legislation that actively sanctions and protects the unjust taking of some lives even if it also protects many others. Because when we do so we actively participate in the dispossession of lives, not in their protection and help.

RESOLVING THE AMBIGUITY OF "COMPROMISE"

The ambiguity of the notion of "compromise" or "toleration" that is contained in Wolfe's exposition can be resolved, therefore, by stressing the positive nature of his solution, as opposed to his exposition and argument. A legitimate and just "compromise" abortion law would be one that would be based on *the principle* that all abortions are unjust and ought to be prohibited, even though in fact, because of the political realities, it prohibits many but not all abortions. To remain just, it would, however, have to provide the sanction of punishment for all those in fact prohibited, as opposed to a legislative suspension of punishment for some of those prohibited by it. It is an entirely different question whether, in the present political and legal context, a law whose "intent" (as contrasted with the intention of the legislator) could stand a judicial challenge. A negative answer does not justify the cooperation with intrinsically unjust laws.

Thus a just "compromise" law can not *exempt* a particular act of murder from the general prohibition of murder. And a just "compromise" law cannot even implicitly give legal permission and therefore protection to any form of abortion. The "compromise" consists in this: the pro-lifer wants, and justifiably so, to have *all abortions prohibited*. He is willing to "settle" for having *"fewer" forbidden*, since his failure to compromise might mean no protection for the unborn. But neither the Utah law nor restricted funding bills are examples of such legitimate compromise laws.

The bottom line is that any "compromise" on abortion can never involve an active participation in any form of legislation that protects or subsidizes "some" abortion, however great may be the restrictions in other respects. I think that Christopher Wolfe would agree with me. He explicitly recognizes the moral principle that evil can not be done in order to accomplish good. The particular kind of evil at stake is the injustice against the right, or against the just claim to life. The flaw in Wolfe's process of thought is that his principle is restricted to the "prohibition of murder in general" without stating the foundation for this prohibition, namely, the intrinsic evil of murder and abortion. By continuing with the distinction between prohibition and punishment, he implicitly weakens or rejects this foundation, since the principle that one should prohibit intrinsic injustice by law is violated by the legislative suspension of punishment for an infraction of the law. It is no longer the principle of justice that is operative, but some other reason for passing such a law. The personal intent of the legislator may be to *"save"* as many babies as possible, his personal motive may be the *love* for "babies born and unborn," but in voting for such a law it certainly could *not* be the principle of *justice*.

THE STATE, THE "OUGHT NOT" AND JUSTICE

In formulating the moral principle in regard to abortion, it is not enough to say that one *ought not* take an innocent life. Formally it is similar to saying one "ought not" commit fornication or one "ought not" become drunk. All of these focus on the moral meaning of "ought not" as addressed to the *agent* and do not yet indicate the competence of the *state or third parties*. It is necessary to unfold, as it

were, the meaning of innocence. It indicates that the innocent has a *right* to life. And in having a right to life we mean that the innocent has a *just claim* to it and that it is an unconditional claim against those who would deprive him of it. In saying this we say more than just that some *agent* "ought not" take innocent life. We establish the just foundations for the innocent, and third parties, particularly for the state to *stop* the agent from taking innocent human life. The moral imperative, "ought not to take" is not synonymous with "ought to stop the taking." Justice is to be the ground for the latter. And this moral imperative can address itself to individuals other than the agent of the prohibited behavior.

THE MEANING OF COMPROMISE IN A STRICT SENSE

With the clear focus on the injustice of an abortion we can conclude with a terminological caution that will allow us to take the quotation marks from the word "compromise" used in the above paragraphs. There is a difference between compromise and toleration.

When a state does not prohibit all abortions, for example, but only some, it may be by way of toleration of those that it does not prohibit. Whatever its prudential reasons for doing so, it does not, strictly speaking, *accept* those abortions that it does not prohibit. In this situation it is not proper to speak of compromise, if we wish to use the word correctly.

Or again, when someone *accepts* less than he wants, we cannot automatically use the word compromise. Because I accept less money for my product than I wanted, I have not yet compromised.

Compromise also implies acceptance, but in a unique way, different from the above. First, although, as Wolfe's discussion indicates, it aims at getting "more" than would be the case if one did not compromise, what one gets in a compromise, and what one would have gotten without it are always less than one wants. So, one accepts less in the compromise. But in a compromise one also has to accept the conditions for it. *One has to accept the other side, not merely tolerate it.* We have an agreement that endorses both sides: one accepts not only the less than one wants but one also accepts that the other side gets what it is ready to accept. In a compromise in the strict

sense, one guarantees or backs what one has agreed to. Thus, *one may be personally or subjectively opposed to the claims of the other side*. But this is no valid excuse because in a compromise one objectively agrees with the other side, particularly when the agreement has the force of law.

This has radical implications for political compromise, especially for one involving legislation and legislators. When the legislator votes for a compromise law in the strict sense of the word, he extends the *full guarantee of the law* not only for his own position but also for the other position if it is included in the legislation. Thus, a law that forbids and punishes only certain forms of murder may be an imperfect law but it does not extend its legal authority to protect the forms of murder that it does not prohibit. The law is not a compromise law. On the other hand, if a legislator votes for a law that restricts abortions or funding for them but that also includes some abortion "rights" or funding, he participates in giving legislative authority and protection to an injustice. He is directly responsible for the injustice.

One can accept less than one wants without getting involved in compromise. But if accepting less than one wants is a part of the compromise, one cannot avoid the fact that one has also accepted what the other side wanted, one has agreed to it, and in voting for such compromise, one has given that agreement force in the public order.

Faced with a compromise law that includes any form of guarantees to abortion rights or funding, the legislator faces a categorically unconditional prohibition to vote for it. Is he obliged to vote against such a law? Not necessarily, if his abstention can, in any reasonable way, lead to the acceptance of a just law, even though incomplete or imperfect law. Is there any reasonable hope that refraining from a "no-exceptions" demand will lead to its acceptance? Is there any reasonable hope that demanding less from the opposition—the very opposite of compromise tactics—will encourage it to give up more? It would seem that the best "compromise strategy" is precisely a negotiating position that insists on the more. The paradox is that Christopher Wolfe's article, if taken seriously by the opposition, informs it that the pro-life party is exhorted to settle for

less. This might be an effective tactic in labor or contract or financial negotiations, where both sides have the prerogative of giving up what belongs to each.

IF NOT COMPROMISE, WHAT THEN?

Thus, it is imperative to end by addressing the other part of the issue dealt with by Wolfe, namely, the political dimension. After the above, one may still be left with the question of the political reality. It may be that one could never pass the just "compromise" law. One may be demanding more than the majority of the voters is able or willing to give. The majority is not naive and may insist on including a "right" to abortion even in its restrictive abortion laws. What then?

The question raises a new issue for discussion, an issue that is as provocative as it is important, the issue of democracy. Democracy involves the process of legislation, or the origin of positive or human laws. Aquinas's quotation of Isidore, used by Wolfe, to the effect that laws should be "possible both according to nature and to the customs of the country," refers to a different historical context. During the time of Isidore, the question as to which vices a community was able to abstain from did not have much bearing on the origins of law, namely, on the process of legislation, for the laws did not originate with "the people" subject to them. At stake were the question of enforcement and the prudent use of power on the part of the ruler or rulers.

Today we have a different situation. If indeed the majority of those who are at the origin of laws are not able to abstain from certain vices such as abortion, then perhaps it is an exercise in futility to talk of compromise laws on abortion. If the majority is not willing to give up a "vice," namely, the right to abortion in general, is it even logically possible to think of a just "compromise" law that denies any right to abortions?

If the majority of those who are in fact at the origin of laws are no longer concerned with justice, then the democratic process becomes one in which government is the result of the majority powers acting simply on behalf of subjective "interests." In such a situation the true nature and justification of civil authority is lost. "Politics"

and "government" become simply tools in service of the dominant interests. Karl Marx is confirmed and is no longer an alien immigrant in the West. In such a situation it becomes tempting to play the political game and to support even restrictive abortion laws that nevertheless give or protect even limited abortion rights. The fact remains that in yielding to this pragmatic temptation, even though the just state no longer exists, participation in this power actively protects some abortions. In other words, one participates in an injustice.

It may be that the same political reality that makes for the prudential judgment that "no exceptions" abortion legislation is politically impossible at this time also forces the judgment that those concerned with justice for the unborn can no longer participate in, or at least count on the "democratic process." It may be futile, if not imprudent to rely on that process while foregoing the formation of an extra-democratic power base. The very success of our democracy over the past two hundred years may have blinded us to both its weaknesses in the present conditions and to the fact that one ought not to reduce civic and social life to the prevailing political processes and structures of democracy. This is an urgent question, especially at a time when America's greatest exports, particularly to the Third World and to the former colonies of Communism, are population control and a faith in the identity of democracy and justice.

NOTES

1. See "The Dignity of Human Procreation and Reproductive Technologies," The Final Communiqué: Tenth General Assembly of the Pontifical Academy for Life, *Osservatore Romano* (March 31, 2004).

2 .Christopher Wolfe, "Abortion and Political Compromise," *First Things* 24 (June/July 1992): 22-29.

3. Ibid., p. 24. Wolfe interprets St. Thomas's position as allowing the argument "that the law would be prudent to withhold criminal punishment from certain forms of abortion (since the customs of our community clearly do make a total proscription of abortion impossible)."

4. Wolfe's argument proceeds by assuming the truth of St. Thomas's

premise that "not all vices" need be forbidden by laws. This allows for the use of the notion of toleration. One may tolerate a "part" or "some" of those acts that hurt others. He explains his "proof" passage from St. Thomas by saying that it "does not necessarily mean that any action involving serious harm to others should automatically be repressed" (p. 23). The problem becomes a different one, however, when he proposes to apply St. Thomas by saying that "there can be laws against murder in general without prohibiting every single form of murder." Such a transition now allows the inclusion of something that is in fact not a case of tolerance into the category of toleration. For a law against murder in general that does not prohibit every single form of murder could do so by *excepting* certain forms of murder by regulating them. Thus, a law that requires parental notification or even consent in the case of abortions for minors logically "does not prohibit" the form of murder that is performed on the unborn child of a minor when it is done with the parental notification of consent for that minor. Wolfe never faces the significance of his proposal of prohibiting murder *in general* in a legal system where certain *particular forms* of murder are legally sanctioned.

5. Cf. Joseph Cardinal Bernardin, *A Moral Vision for America*, ed. John P. Langan, S.J. (Washington, D.C.: Georgetown Univ. Press, 1988).

6. Cf. Mario Cuomo, "Religious Belief and Public Morality: A Catholic Governor's Perspective," delivered at the University of Notre Dame on September 13, 1984; *The Pew Forum on Religion and Public Life*: www.pewforum.org/docs.

7. Cf. Editorial, *Crisis* (March 1992).

8. Cf. Wolfe, op. cit., p. 23: "While the example is by now overdone, the case of Prohibition in the U.S. illustrates the danger vividly. It seems most likely that an abortion law with no exceptions would be widely disobeyed. What might be the greater evils to follow from this? One would be the development of a thriving black market in abortion—one that would take all comers (rather than limiting abortions to particular cases), thus resulting in more deaths."

9. Op. cit., p. 23. Wolfe introduces his discussion of St. Thomas's question "whether it belongs to the human law to repress all vices" with a parenthetical remark: "(Note that 'vices' here refers not to personal foibles but to clear moral evils. *Summa Theologica* I-II, q. 96, art. 4)." He makes his focus on moral evils an explicit one and contrasts these to personal foibles. My contention is that the relevant contrast is between moral evil as effects a stain on the soul of the agent and the injustice that harms the victim and is the basis for the immorality of the act.

10. Cf. John Paul II, *Evangelium Vitae* §73. In the case of an intrinsically

unjust law, such as a law permitting abortion or euthanasia, it is therefore never licit to obey it or to "take part in a propaganda campaign in favor of such a law, or vote for it." After the appearance of the encyclical, discussion concerning the liceity of "compromise" or "imperfect" laws ignored this paragraph and focused on the following one, which begins with the well-know phrase "A particular problem of conscience can arise...." Those who asserted that this paragraph allows the support of intrinsically unjust laws so long as one did not intend the injustice but the restriction of evil simply ignored the patent meaning of the preceding paragraph, which simply re-affirms the Church's traditional position on the unconditional non-liceity of supporting, promoting, or voting for intrinsically unjust or evil acts. The good consequence of limiting the number of abortions could never justify the performance of an intrinsically evil act even if one intended the possible good consequences of such an act. Specifically, such a position treats the immorality of abortion as something irrelevant to a piece of legislation that may allow or regulate an immoral act when good consequences follow from it. It ignores the injustice to the victim, a particularly grievous failure, since the primary intent of the law should be the prevention of injustice to innocent victims.