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Should Catholics Support Laws Prohibiting Abortion?

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Abstract

It has been a teaching of the Catholic Church for many centuries that the fact that an act is immoral is not itself a sufficient reason for acts of that kind to be punishable under the law. Therefore, before American Catholics or their bishops actively support laws making abortion illegal and punishable, they must carefully examine such laws to determine whether they are consistent with the common good and thus morally justifiable. This article first turns to the three conditions that Thomas Aquinas offers in the *Treatise on Law* (*Summa Theologica*, I-II, QQ. 90-105) that a law must fulfill in order for it to be consistent with the common good. Serious reasons are identified for doubting that laws prohibiting and punishing abortion can fulfill Aquinas's three conditions. There are also serious reasons based on Catholic teaching, i.e., that we are always obliged to follow our conscience, for concluding that, contrary to the common good, many conscientious persons would be mistakenly punished by such laws. For these reasons, the article proposes that American Catholics and their bishops should reexamine their support for laws punishing abortion and should consider instead actively opposing such laws.

Keywords: abortion; common good; conscience; deterrence; imputability/responsibility; law; punishment; unintentional ignorance

1. Introduction

It is the teaching of the Catholic Church that a human embryo, zygote, blastocyst, and fetus are to be considered a full human person from the moment of conception. *The Catechism of the Catholic Church* expresses this belief in this way: 'Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life'.¹

¹United States Conference of Catholic Bishops, *The Catechism of the Catholic Church* (hereafter *Catechism*), Official English Translation revised in accordance with the official Latin text promulgated by Pope John

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For this reason, many American Catholics, following the lead of many American bishops, welcomed the U.S. Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*² because it meant that state legislatures could pass laws making acts of abortion illegal and punishable under the law.³

But it has been a teaching of the Catholic Church for many centuries, going back at least to St. Augustine,⁴ that the fact that an act is immoral is not itself a sufficient reason for acts of that kind to be punishable under the law. For many laws achieve their purpose by threatening and exacting punishment and thus by impacting people's freedom. So whether a particular kind of act should be punishable under the law is a question that must be considered in its own right. This means that there is a prior question that Catholics, and anyone who holds that abortion should be illegal, ought to be addressing before supporting laws punishing abortion: *Is abortion, even if clearly immoral, something our society's laws should punish?* Even *The Catechism of the Catholic Church*, when proposing an affirmative answer to this question, qualifies its answer by saying that the punishment must be appropriate: 'As a consequence of the respect and protection which must be ensured for the unborn child from the moment of conception, the law must provide appropriate penal sanctions for every deliberate violation of the child's rights'.⁵

It might seem to some readers that this 'appropriate' only means that, since deliberate abortion is a very serious immoral act, then the punishment should be comparably severe. But the *Catechism* is also very clear, in the sections on human societies' need for government and laws, that a society's laws need to pass the test of being moral themselves before they are to be obeyed. The *Catechism* expresses this in these words: 'Authority is exercised legitimately only when it seeks the common good of the group concerned and it employs morally licit means to attain it. If rulers were to enact unjust laws or take measures contrary to the moral order, such arrangements would not be binding in conscience. In such a case, "authority breaks down completely and results in shameful abuse"'.⁶ And similarly, 'Authority is exercised legitimately if it is committed to the common good of the society. To attain this it must employ morally acceptable means'.⁷ Therefore, before anyone proposes that there should be laws making abortion punishable, and certainly before American Catholics or their bishops actively support such laws, they must carefully determine whether laws punishing abortion can themselves be morally justified and are consistent with the

Paul II, Second Edition (Rome: Libreria Editrice Vaticana, 2019), #2270. <<https://www.usccb.org/sites/default/files/flipbooks/Catechism/VI/>> [accessed 26 January 2024].

²Supreme Court of the United States, October Term, 2021, *Dobbs, State Health Officer of the Mississippi Department of Health, et al. v. Jackson Women's Health Organization et al.*, (hereafter *Dobbs*). <https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf> [accessed on 26 January 2024].

³The term 'law' is used in many contexts. We can speak correctly of 'Divine Law', of 'natural law' and of 'the laws of science'. But throughout this essay, unless explicitly stated otherwise, the term 'law' will always refer exclusively to the laws of civil societies.

⁴Augustine of Hippo, *On Free Choice of the Will*, I.4-6 (Indianapolis: Bobbs-Merrill, 1964), pp. 8-15.

⁵*Catechism*, #2273; emphasis added.

⁶*Catechism* #1903, emphasis added, and quoting Thomas Aquinas, *Summa Theologiae, Prima Secundae* (hereafter *S.T.I-II*), q. 93, a.3, ad 2.

⁷*Catechism*, #1903, emphasis added, citing Pope John XXIII, *Pacem in Terris* 5.1; see also *Catechism*, #1921 and *Catechism* #2256.

common good.⁸ If such laws cannot be morally justified in accord with Catholic teaching, then Catholics should conclude that deliberate abortion, even if clearly immoral, is not something our society's laws should punish.

Unfortunately, the public discussion leading up to and following the Supreme Court's decision in *Dobbs* contained little evidence that this important question was being carefully considered. The same seems to be true in the many states where, following the Supreme Court's decision in *Dobbs*, legislatures have passed various laws to prohibit abortions and punish physicians who perform or assist in abortions. It is true that some of these laws are being challenged in the courts, but these challenges ask only legal questions. They do not address the more basic moral question whether our society, or any society, ought to have laws that prohibit and punish abortion. It is probably not surprising, given the current environment, that some people seem to have looked on the Supreme Court's deliberations in *Dobbs* as if the Court's decision could determine the immorality of abortion and/or the morality of laws punishing it. But the Supreme Court did not address either of these moral questions and in fact it has no authority to address important moral questions like these. In overturning *Roe v Wade*, the Supreme Court's opinion in *Dobbs* settled only a legal question; namely, whether state laws punishing abortion violate the U.S. Constitution. Whether such laws are morally justified and support the well-being of society is a different question.

2. Can laws prohibiting and punishing abortion be morally justified?

Philosophers and political thinkers have long written of a society's need to ask, of any proposed law, whether that law can be morally justified. The reason for this concern, as Aquinas explains in his *Treatise on Law*,⁹ is that one of the principal ways a society's laws achieve their goals is precisely by threatening harm to those who do not conform to the law and then harming them if they do so; that is, by using coercion as a deterrent. Harming people, as punishment or in any other circumstances, is always morally problematic and so is threatening to harm. Therefore, proposed laws always need to be carefully examined to be sure they are morally justified. This is why Aquinas explicitly asks, 'Does It Belong to Human Law to Repress All Vices?' and why Aquinas's answer is 'No'. 'Human law', he explains, 'is framed for a number of human beings, the majority of whom are not perfect in virtue ... (Since human) laws imposed on persons should be in keeping with their condition ... many things are (legally) permissible to persons not perfect in virtue which would be intolerable in a virtuous person'.¹⁰

In fact, there are many kinds of actions that humans ought not perform which should not be punished by their society's laws. Most people believe, for example, that deliberate lies that harm the person lied to or harm other people violate moral standards about how humans should treat each other. But for obvious reasons it would certainly not be a benefit to a society, that is, not serve 'the common good' as the well-being of a society is described by the *Catechism* and by Aquinas before it, if every kind of lie was punishable under the law. Instead, only certain narrowly defined classes of

⁸For Catholic teaching, as for Aquinas, the common good is not merely the aggregate of individual interests alone, but instead is 'the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily'. *Catechism*, #1906.

⁹Thomas Aquinas, *S.T.I-II*, q.95, art.1 and *passim*.

¹⁰Thomas Aquinas, *S.T. I-II*, q.96, art.2, resp. and *passim*. See also Augustine, *op.cit*.

deliberate and harmful lies are considered punishable by law. Similarly, deliberately breaking a sincerely made promise is another class of actions that, when they produce harm, are considered by most people to be immoral. But again, only formal contracts and certain other narrowly defined classes of promise-breaking are considered appropriate to be punished under our society's laws. So then with regard to abortion, even if a person sincerely believes it is always profoundly immoral to deliberately abort a human embryo, zygote, blastocyst, or fetus, this conviction about the morality of abortion does not answer the question whether laws prohibiting and punishing acts of abortion can be morally justified.

How are we to determine whether a proposed law serves the common good and is therefore morally justifiable? In the same *Treatise on Law* referred to by the *Catechism*, Aquinas provides directions about how to answer this question. At the end of Question 95, Article 3 of his *Summa Theologiae*, Aquinas identifies three conditions that every human law must fulfill in order to further the common good and thus be a morally defensible law. Every proposed law, he explains, must be examined to be sure that it will dependably: (1) remove the evil the law is intended to remove; (2) further the good the law is intended to further; and (3) prevent 'any harm ensuing from the law itself'.¹¹ How dependably would laws prohibiting and punishing acts of abortion fulfill these three conditions? Answering this question carefully is not a simple task. There are many kinds of good and evil, of benefit and harm, both to individual members of the society and for the society as a whole, that must be carefully identified and then carefully balanced to maximize the common good. The first of Aquinas's conditions is that the law removes the evil that the law is intended to remove. The relevant evil is the deliberate ending of the lives of fetuses.¹² The second condition is that the law further the good the law is intended to further. The good that laws punishing abortion would be intended to further is surely fetuses' lives and health and by doing so to also further the life and health of these children once born. The third condition is that the law prevent 'any harm ensuing from the law itself', which means that proposed laws must be examined to determine if they produce harm to any individuals or detract from the common good in other ways that are distinct from the evil, i.e., the threat of punishment and the punishment itself, that the law directly produces, and that, if there are such harms, these harms must be carefully weighed in comparison to the good the law is intended to produce.

When laws that prohibit and punish abortion are carefully examined, it will be seen that there are serious reasons for questioning whether such laws would significantly eliminate the deliberate ending of fetuses' lives (Condition 1), that there are serious reasons for asking whether such laws would dependably further the life and health of these children once born (Condition 2), and serious reasons for thinking that the

¹¹'ad remotionem malorum; ... ad consecutionem bonorum, ... ad cavendum nocumentum quod ex ipsa lege posset provenire'. S. Tomas Aquinatis, *Summa Theologiae*, Pars I-II, Q. 95, a.3 (Rome, Marietti, 1950), p. 433; the translation is from *Saint Thomas Aquinas: On Law, Morality, and Politics*, ed. by William P. Baumgarth and Richard J. Regan (Indianapolis: Hackett, 1988), p. 62; other translations are similar.

¹²Henceforth the term 'fetus' will ordinarily be used in such contexts even though, given the *Catechism's* teaching, these contexts should always be understood to refer to embryos, zygotes, blastocysts as well; see *Catechism* #2274. In addition, throughout this essay, the term 'fetus' will always mean a living fetus because procedures involving already dead fetuses are not acts of abortion.

threats of punishment, the enforcement of these laws and other effects of these laws would bring about additional serious harms to many individual members of our society and to the society as a whole (Condition 3). Given the fallible nature of human law, those who believe the Catholic teaching that ‘From the first moment of his existence, a human being must be recognized as having the rights of a person’¹³ are nevertheless required by Catholic teaching to ask whether laws punishing abortion fulfill Aquinas’s three conditions.

3. Punishing physicians who perform abortions

While much of the anti-abortion rhetoric often seems to be aimed at women who choose to have an abortion, none of the state laws banning or severely limiting abortion that have come into being after the U.S. Supreme Court’s decision in *Dobbs* prescribe punishment for women who have had an abortion or are seeking to do so. In fact, a number of these laws explicitly state that a woman who has had an abortion is not guilty of a crime and is not to be punished in relation to these laws. Instead, all of these laws specify that it is physicians who perform or assist in abortions or provide women with abortifacients who are to be punished. So it is laws punishing physicians that need to be examined first.¹⁴

Do laws punishing physicians who perform abortions fulfill the three conditions identified by Aquinas for determining if these laws further the common good and are thus morally defensible laws? The mechanism by which such laws aim to eliminate abortions is by terminating the physician’s state medical license and/or via prison terms and/or severe financial penalties. These are clearly severe penalties from the point of view of any physician and are understandably expected to deter physicians from performing abortions. Moreover, the effectiveness of these laws as deterrents is reinforced in practice by provisions in these laws or in state medical practice acts requiring abortions to be reported to the state and providing punishments for failures to report.

Laws punishing physicians for abortions already performed, like those that have been passed in many states since *Dobbs*, do nothing to further the life or future well-being of the aborted fetuses, and therefore they further Aquinas’s Condition 2 only by effectively deterring physicians from performing abortions in the future, i.e., Aquinas’s Condition 1 that the law dependably remove the evil the law is intended to remove. Given the severity of the punishments for physicians in these laws, it might appear that laws punishing physicians who perform abortions would fulfill Condition 1. But even if the number of physician-assisted abortions were to decrease in states having such laws, it is well known that women have been successful in ending suspected or known pregnancies without the aid of physicians and, in fact, without public knowledge, for many hundreds of years. Their actions have often involved significant

¹³*Catechism*, #2270.

¹⁴Some states have or are considering laws that would limit women’s access to abortifacients in other ways besides punishing physicians who prescribe them. A full examination of these laws’ ability to serve the common good would be out of place here. But for the same reasons that will be explained in the text, it is doubtful that such laws will dependably prevent women seeking them from obtaining them (Aquinas’s Condition 1), and since one of these drugs is an important cancer drug, such laws would clearly produce harms ‘ensuing from the law itself’ (Aquinas’s Condition 3).

risk of harm to themselves; but even so, women have had and still can have abortions independently of any laws affecting physicians' actions. This reason for doubting the effectiveness of efforts at eliminating abortions by punishing physicians is made even stronger, in the contemporary world, by the widespread availability of biological abortifacients and the ways in which women can obtain these drugs without involving physicians within their own state.

Another reason for doubting the effectiveness of these laws is the ability of many women to travel to other states within the United States or to other countries in order to obtain an abortion where seeking an abortion and access to medically appropriate performing of abortions is legally protected.¹⁵ Statistics about the increased number of abortions in states where access to abortion is legally protected already indicate significant increases since *Dobbs* in the number of women traveling to these states from states where physicians performing abortions are punished, thus further reducing the effectiveness of laws punishing physicians as a deterrent.¹⁶

In addition, these laws' effectiveness as deterrents is directly dependent on the ability of legal authorities to know when and by whom the relevant actions have been performed. Even though, as noted above, states typically require that abortions be reported to the state, enforcing these laws and thus enforcing laws punishing physicians for performing abortions will require effective mechanisms of discovery. Would it not be necessary, for example, for law enforcement authorities to investigate every incident labeled a miscarriage or, at the extreme, to determine the content of every visit to a physician by a pregnancy-capable female? The reach of law enforcement into people's private lives is, for good reasons, necessarily limited in any democratic society; and it is very doubtful that our society would tolerate routine invasions of very private spaces in the lives of pregnancy-capable females. But absent such invasive mechanisms of enforcement, laws punishing physicians who perform abortions would be even less likely to dependably eliminate future abortions.¹⁷

As noted above, Aquinas's Condition 2, that a proposed law dependably attain the good the law is intended to further – which is the well-being of fetuses and of these children once born, which is surely the whole purpose of having such a law in the first place – is only attainable by means of dependably fulfilling Condition 1.¹⁸

¹⁵Some states, Texas and Alabama, for example, have passed laws aimed at deterring women from traveling to another state where they can have a legal abortion. Constitutional questions aside, it is very doubtful that laws of this sort fulfill Aquinas's three conditions. For such laws are of doubtful effectiveness in deterring women who have the means to travel to obtain an abortion (Condition 1). Such laws do nothing to further the well-being of fetuses in other ways or of these children once born (Condition 2); and they arguably entail significant intrusions into people's personal lives and other forms of 'harm ensuing from the law itself', including, given the unequal distribution of resources in the United States, arguably discriminating unjustly against women who lack resources to travel. (Condition 3). See also Footnote #62.

¹⁶See, for example, 'Abortion in Illinois Surged as Roe Fell: Nearly 17,00 Patients Came From Other States During 2022 – a 49% Increase', *Chicago Tribune*, 11 January 2024, p. 1.

¹⁷The fact that there are many other First World nations that have much lower abortion rates than the United States, even though these nations do not have laws prohibiting and punishing abortions, suggests that there are much more effective ways to reduce the number of abortions. See also Footnote #58 below.

¹⁸Nor is there any reason for thinking laws punishing physicians who perform abortions will result in any additional benefit to children who survive an abortion, which does occur in 0.21% of abortions. For physicians already have a legal duty and professional duty to take appropriate medical actions to preserve the life and assist the further development of any 'abortion survivor'. See, for

But there are serious reasons for questioning whether punishing physicians who perform abortions will dependably fulfill Aquinas's Condition 1, i.e., that the law remove the evil the law is intended to remove. Thus both of Aquinas's first two conditions for a law to be supportive of the common good raise serious questions about whether laws punishing physicians who perform abortions can be morally justified.

In addition, there are serious reasons relevant to Aquinas's Condition 3, i.e., that the law prevent 'any harm ensuing from the law itself', for doubting that laws punishing physicians for abortions serve the common good. For one effect of laws punishing physicians for performing abortions is that laws of this sort can prompt and have already prompted physicians in states having such laws, out of their fear of legal punishment because the laws fail to clearly articulate exceptions, to decline to provide care for pregnant women whose fetuses cannot survive or can survive only briefly and possibly painfully outside the womb, whose fetuses are growing outside of their wombs ('ectopic pregnancies'), or who are experiencing other medically complex pregnancies.¹⁹ As a consequence of such laws, women who are in these kinds of medical situations have been unable to obtain medically appropriate and timely care and in some cases life-saving care. While some women have means and opportunity to travel to another state where abortions are legal, having this as one's last recourse to obtain adequate health care itself involves genuine harm to the woman involved as well as to other family members, and possibly to the fetus or child when born.

It might seem possible for laws governing medically complex cases to be worded precisely enough that obstetricians would not be in doubt about whether a particular procedure that would compromise or end a fetus's life is medically necessary for the sake of the mother or legally permitted for other reasons so that laws punishing physicians for abortions would not result in pregnant women not having dependable access to genuinely needed medical care. But this problem has proven very difficult to solve in practice and, until this is done, the relevant 'harm ensuing from the law itself' remains.

example, The Born-Alive Infants Protection Act of 2002, a federal law which, however, did not create civil or criminal penalties for violations, as well as relevant laws in at least 30 states. Sourced from *PolitiFact*, 28 February 2019, <<https://www.politifact.com/factchecks/2019/feb/28/donald-trump/fact-checking-donald-trumps-tweet-saying-democrats/>> [accessed 9 January 2024]. The statistic of 0.21% is sourced from Abortion Survivors Network, <<https://abortion survivors.org/estimated-number-of-abortion-survivors/>> [accessed 9 January 2024].

¹⁹In a Texas case, for example, the woman's physician believed her situation fell under the exception in the law and a judge agreed; but the Texas attorney general and Supreme court disagreed. 'The Texas law says there are exceptions for a "life-threatening physical condition ... or a serious risk of substantial impairment of a major bodily function.".... The problem is, no one knows what that means Surely (future) fertility would count as a major bodily function. But there's no clarity about this', Molly Duane, J.D., a lawyer in the case quoted in 'Texas Mother Kate Cox on the Outcome of her Legal Fight for an Abortion: "It was Crushing"', *CBS News*, 14 January 2024, <<https://www.cbsnews.com/news/kate-cox-on-her-legal-fight-for-abortion-trisomy-18/>> [accessed 26 January 2024]. See a report on another Texas case, <<https://www.washingtonpost.com/nation/2023/03/07/texas-abortion-ban-lawsuit-women-health/>> [accessed on 26 January 2024] and Ellen Wright Clayton, JD, MD, 'Cold Comfort for Texas Obstetricians', *Hasting Bioethics Forum*, 26 January 2024, <<https://us15.campaign-archive.com/?e=c70f31acf3&u=040b74da78731d913e883748f&id=2ecf5b9da8>> [accessed 26 January 2024].

From all these considerations it follows that, since there are serious reasons for doubting that laws punishing physicians for performing abortions can fulfill Aquinas's Condition 1 when this is the only means by which they could fulfill Conditions 2, and since, in addition, there are significant harms that 'ensue from the law itself' (Condition 3), then there are good reasons for saying such laws do not support the common good and are not morally justifiable. If this is so, it would also mean that punishments of this kind would not be 'appropriate', to use the words of *Catechism* # 2273. For all these reasons, then, Catholics should seriously reconsider their support for such laws.²⁰

4. Acting conscientiously and mistaken legal punishment

In addition to these reasons for thinking that laws punishing physicians who perform abortions do not serve the common good, there is another set of reasons drawn from Catholic teaching that provides an equally important reason for saying that abortion is not something that should be punished by the law. For, in spite of its great complexity, law in any society is still and unavoidably a very blunt instrument when what is required is a determination of a person's intentions in order to justify punishing them.²¹ Certainly, if an abortion happened because the woman was physically forced to submit to it, laws punishing abortions would not hold the woman guilty; and there might be other forms of coercion or lack of personal freedom that such laws might recognize as well.²² This is surely one reason why the *Catechism's* proposal in favor of laws punishing abortion is careful to specify that the relevant abortions must be deliberate: 'As a consequence of the respect and protection which must be ensured for the unborn child from the moment of conception, the law must provide appropriate penal sanctions for every deliberate violation of the child's rights'.²³

This is important because, when the word 'deliberate' and its companion word, 'direct', are used in Catholic teaching, these words refer to far more subtle things than just the possibility of physical force or other forms of coercion. Thus, in another place, the *Catechism* speaks of 'direct abortion, that is to say abortion willed either as an

²⁰While no state laws currently punish women who have or who seek to have an abortion, such laws have been proposed and it is important ask if such laws would fulfill Aquinas's three conditions for a law to serve the common good and be morally justified. As with laws punishing physicians, laws punishing women can only fulfill Condition 2, that the law further fetuses' lives and health and by doing so to also further the life and health of these children once born, by deterring future abortions, i.e., Condition 1. But the reasons offered in Section Three for doubting that laws punishing physicians would significantly prevent future abortions are equally relevant for laws punishing women. In addition, punishing women who have or seek an abortion, either by imprisonment or with financial penalties significant enough to be deterrents, will also require severe mechanisms of enforcement arguably violating Condition 3, that the law prevent 'any harm ensuing from the law itself', and will almost certainly have adverse health and/or financial effects on the woman and their fetus during any current or future pregnancy and very possibly on the any children they might bear as well (Condition 2 and Condition 3). See also Footnote #49 below.

²¹A classic book on this subject and the perplexities it causes in the law is H. L. A. Hart's, *Punishment and Responsibility* (New York and Oxford UK: Oxford University Press, 1968). See also 'Intention', in the *Stanford Encyclopedia of Philosophy*, <<https://plato.stanford.edu/entries/intention/>> [accessed 26 January 2024].

²²See *Catechism* #1735 and #1746 for similar Catholic teaching.

²³*Catechism* #2273; emphasis added.

end or a means'²⁴ and the *Ethical and Religious Directives for Catholic Health Care Services* describes abortion as 'the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus'.²⁵

For in Catholic teaching about morality, when an action has multiple effects, Catholic teaching holds that there can be circumstances in which the action taken is not direct in the relevant sense and therefore may be morally performed, i.e., provided that the evil effects are not a means to the good effects and provided the actor genuinely intends the action's good effects and genuinely does not intend its evil effects.²⁶ This is why the *USCCB-ERD* can say that 'Operations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child'.²⁷ That is, according to Catholic teaching, there are situations in which a pregnancy is ended by human intervention which are not deliberate abortions because the relevant human actions are not directly intended.

This is a much subtler distinction about the relationship between human actions and human intentions than is commonly found in our society's laws, even though there are some legal situations in which a person's intention is legally relevant. Therefore, if the reason Catholics might consider supporting laws punishing abortions is that the grave immorality of having a deliberate abortion ought to be mirrored in the law's response to such actions, then it would clearly be wrong for such laws to punish persons who are not morally guilty of a grave wrong according to Catholic teaching because their actions were not deliberate in the technical sense. Punishing someone under such circumstances would obviously be a serious failure of such laws to fulfill Aquinas's Condition 3, i.e., that they prevent 'harm ensuing from the law itself'. This is therefore another reason why Catholics should be very hesitant to trust the law to deal correctly with physicians who perform abortions. Some Catholics may sincerely challenge the reasoning provided in Section Three for believing there are serious reasons for doubting that laws punishing physicians who perform abortions can dependably fulfill Aquinas's three conditions for a law to serve the common good and thus be morally justified. But even so, they are surely required to scrutinize proposed laws of this type extremely carefully to be sure that they conform to Catholic teaching about when the termination of a pregnancy is not deliberate or not direct and is therefore not gravely immoral.

Moreover, if Catholic teaching about choices based on conscience is taken seriously, it becomes even more likely that laws punishing abortion will convict and punish physicians who have not acted in a gravely immoral manner from the point of view of Catholic teaching. For it is a central tenant of Catholic morality that 'A human being

²⁴Catechism #2271, emphasis added.

²⁵United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, 6th edn (Washington DC: United States Conference of Catholic Bishops, 2016) (hereafter: *USCCB-ERD*), #45, emphasis added, <https://www.usccb.org/resources/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06_3.pdf> [accessed 26 January 2024].

²⁶See *Catechism* at #1737.

²⁷*USCCB-ERD*, #47.

must always obey the certain judgments of his conscience',²⁸ where 'certain' means that the person has carefully examined the morality of relevant courses of action and made a conscientious determination about what ought to be done.

In Catholic teaching, as the *Catechism* explains, 'Conscience is a judgment of reason whereby the human person recognizes the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed. In all he says and does, man is obliged to follow faithfully what he knows to be just and right. It is by the judgment of his conscience that man perceives and recognizes the prescriptions of the divine law ...'²⁹ This is why, when a person has carefully formed their conscience regarding what morality requires, 'Man has the right to act in conscience and in freedom so as personally to make moral decisions. He must not be forced to act contrary to his conscience nor must he be prevented from acting according to his conscience, especially in religious matters'.³⁰

Of course, a person can act conscientiously and still act immorally because human conscience is not infallible about morality. It is also true that in Catholic teaching abortion is always considered a very serious, i.e., 'grave', matter. But even in the case of grave matter, if the person's intention is properly formed, i.e., if the person has formed their conscience carefully after examining 'what he knows to be just and right'³¹ and is choosing the action because they believe it is the moral thing to do, the *Catechism* is clear that this is a forgivable failing. Such an act is a lesser evil, i.e., what in Catholic teaching is called a 'venial sin', because it is based on unintentional ignorance. 'One commits a venial sin when, in a less serious matter, he does not observe the standard prescribed by the moral law, or when he disobeys the moral law in a grave matter, but without full knowledge or without complete consent'.³² On this point, the *Catechism* states very clearly: '*Unintentional ignorance* can diminish or even remove the imputability (i.e., responsibility) of a grave offence'.³³

The reason for mentioning this aspect of Catholic teaching in the present context is that, according to Catholic teaching, in order justifiably punish a physician who has performed an abortion, the law would have to determine whether the physician has done so by a deliberate choice of evil in the Church's technical sense of 'deliberate', which excludes unintentional ignorance. However, this would clearly require such detailed knowledge of the physician's thinking that even very intrusive efforts at legal enforcement could not dependably provide it. In addition, to be in accord with Catholic teaching, the law would also need to take careful account of any 'feelings and passions' that 'can also diminish the voluntary and free character' of the action.³⁴

Catholic teaching is very clear that it is only deliberate violation of the child's rights that could justify legal punishment of abortion.³⁵ But taking careful account of what Catholic teaching means by 'deliberate' and attending to the many circumstances in which conscientious, but fallible, humans might terminate pregnancies, it seems clear

²⁸ *Catechism*, #1800.

²⁹ *Catechism*, #1779.

³⁰ *Catechism*, #1782.

³¹ *Catechism*, #1779.

³² *Catechism*, #1862.

³³ *Catechism*, #1860; emphasis in the original.

³⁴ *Ibid.*, see also *Catechism* #1735.

³⁵ *Catechism*, #2273, emphasis added.

that laws punishing physicians who perform abortions would almost certainly punish and criminalize many physicians who have acted conscientiously and thus done what, according to Catholic teaching, was morally correct for them, in their particular circumstances, to do.

Section #1862 of the *Catechism*, quoted above regarding unintentional ignorance, does also state clearly the Catholic teaching that ‘no one is deemed to be ignorant of the principles of the moral law, which are written in the conscience of every man’.³⁶ For Catholic teaching has long held that human reason is capable of correctly discerning what morality requires, and this is one of the reasons for its emphasis on the importance of conscience. It has also held that Catholic teaching about the morality of abortion and many other moral questions should be a guide for persons to attend to when forming their conscience. But it is important to note in this connection that Catholic teaching about the moral status of fetuses is a theological teaching. This is very clear from the explanations for this teaching that are to be found in numerous passages in the *Catechism*: ‘Every human life, from the moment of conception until death, is sacred because the human person has been willed for its own sake in the image and likeness of the living and holy God’.³⁷ See also the *Catechism*’s description of each human being as created ‘in the image and likeness of God’: ‘The human person participates in the light and power of the divine Spirit. By his reason he can understand the order of things established by the Creator. By free will, he is capable of directing himself toward his true good. He finds his perfection “in seeking and loving what is true and good”’.³⁸ And similarly, ‘By virtue of his soul and spiritual powers of intellect and will, man is endowed with freedom, an “outstanding manifestation of the divine image”’.³⁹ And also in the *Catechism*’s Glossary: ‘PERSON, HUMAN: The human individual made in the image of God; not some thing but some one; a unity of spirit and matter, soul and body, capable of knowledge, self-possession, and freedom, who can enter into communion with other persons – and with God’.⁴⁰

It is on the basis of this theological belief in the inherent dignity of every human from the moment of conception that the *Catechism* understandably concludes, as stated above: ‘From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life’.⁴¹ But there are many physicians who would be directly affected by laws punishing physicians for performing abortions who are not Catholic and who, after careful thought about it, do not share the view that embryos, blastocysts, zygotes, or fetuses at other stages of their development are to be considered morally identical to fully developed human persons with full human rights. For many such persons, one important reason for this difference in belief is the fact that the capacities attributed to all humans from the moment of conception in Catholic teaching, e.g., knowledge and understanding, freedom, and self-possession, communion with other persons – and

³⁶*Catechism*, #1862. The term ‘man’ is used generically here and is intended to refer to all humans.

³⁷*Catechism*, #2319.

³⁸*Catechism*, #1700 and 1704.

³⁹*Catechism*, #1705, quoting The Second Vatican Council, *Gaudium et Spes*, 17.

⁴⁰*Catechism*, Glossary, p. 893.

⁴¹*Catechism*, #2270.

with God, are not among the capacities of embryos, blastocysts, zygotes, or early fetuses of which we have any ordinary evidence.

These capacities, or at least full human dignity, may certainly be attributed to fetuses as a theological teaching and thus as an important part of Catholic teaching. It may indeed be viewed as a prophetic statement by the Catholic Church that needs to be offered to a world in which human lives are too often viewed as means to some end rather than as valuable in themselves. But the Catholic teaching on this is not a belief that human reason on its own, without the aid of Revelation and theological reflection, easily supports. In fact, there is a large philosophical and lay literature that has tried, as yet unsuccessfully, to bring about a reasoned consensus about the moral status of humans who are not yet born or who for other reasons do not have the relevant capacities.⁴² And even though many people, including many physicians, attribute human rights not only to full developed adults, but also to children from the moment of birth, there is similarly no consensus as yet about which are the characteristics of humans that justify us in attributing such rights to one another. The *Catechism*, for its part, lists many specific rights in its Index and states, without further explanation, that natural law is the basis of rights.⁴³ But from the point of view of human understanding unaided by Catholic theological teaching, explaining the basis of human rights in general and especially establishing the truth of specific kinds of rights are very complex processes.⁴⁴

While non-theological answers to such ultimate questions are still being debated, there certainly are important reasons for valuing the life of a human fetus that are available to human reason without the aid of Revelation and theological reflection. Among these are the fact that every fetus is a member of the human family and thus that a human life is at stake, the importance of loved children in the life of a family, and that this particular fetus may have the potential to become a full human person with full human rights.⁴⁵ There may be some physicians who perform abortions without

⁴²In fact, other religious traditions have beliefs about fetal lives that differ significantly from Catholic theological teaching. In most sources of Jewish moral teaching, for example, the fetus is not considered to be a full human person until live birth. See Abraham Steinberg, MD, *Encyclopedia of Jewish Medical Ethics*, Vol. 2 (Jerusalem: Feldheim, 2003), pp. 424–29. See also, Judith Rubin, ‘Yet Another Lawsuit Shows How Abortion Bans Violate Religious Freedom’, *Washington Post*, 9 October 2022, <<https://www.washingtonpost.com/opinions/2022/10/09/kentucky-abortion-lawsuit-jewish-religious-freedom/>> [accessed 26 January 2024].

⁴³See *Catechism* #1956 & #1958.

⁴⁴David T. Ozar, ‘Rights: What They Are and Where They Come From’, in *Philosophical Issues in Human Rights: Theories and Applications*, ed. by Patricia H. Werhane, A. R. Gini, and David T. Ozar (New York: Random House, 1985), pp. 3–25; republished in *Philosophical Problems: An Annotated Anthology*, ed. by Laurence Bonjour and Ann Baker, 1st edn (New York: Pearson/Longman, 2005), pp. 640–55 and 2nd edn (New York: Pearson Education, 2008), pp. 375–84. See also *Stanford Encyclopedia of Philosophy*, under ‘Rights’, ‘Dignity’, ‘Human Rights’, and ‘Childrens’ ‘Rights’, <<https://plato.stanford.edu/contents.html>> [accessed 26 January 2024].

⁴⁵Some people hold that every product of conception should be viewed as having the potential to develop the capacities of a fully developed adult human person. But some products of conception do not implant in the womb and some that do implant do not develop the capacity to be viable outside of the womb and some who are born are able to live only briefly and some who grow and begin to mature are not able to develop the capacities of a fully developed adult human person even though they may be wonderfully valuable members of the human family in other ways. But these facts mean that the wording in the text, that ‘this particular fetus may have the potential’ is appropriate.

much thought about the value of a human fetus. But it is far more often the case that physicians who perform abortions genuinely value all human life, including the lives of human fetuses, and believe they have an obligation as a physician and as a fellow human being to protect the lives of fetuses, even though they also believe, after careful consideration, that the reasons for performing an abortion in this particular situation morally outweigh these considerations.⁴⁶

So a physician, or any person, who sincerely and carefully considers these questions and whose conscientious conclusion is different from Catholics' theological belief in the full human dignity and rights of every fetus, could therefore also conclude in good conscience that terminating a pregnancy is morally permissible because of other relevant considerations⁴⁷ and their conscientious conviction that, though the fetus is human and valued, such an act is not the killing of a full human person or a violation of the rights of a full human person.

It is therefore important for Catholics who might otherwise support laws punishing physicians who perform abortions to acknowledge that many abortions are performed in which the physician conscientiously believes that, taking everything that is morally important into account, performing the abortion is morally acceptable. For, again, Catholic teaching says clearly that every person is to obey the carefully formed judgments of his or her conscience, that every person 'has the right to act in conscience and in freedom', and that no person may 'be forced to act contrary to his conscience nor must he be prevented from acting according to his conscience'.⁴⁸ Moreover, in light of this, it is very important for Catholics to recognize that laws punishing physicians for performing abortions will almost certainly punish physicians who have acted conscientiously and who therefore are not guilty of the deliberate killing of a fetus from the point of view of Catholic teaching. But laws that would punish significant numbers of people by mistake in this way surely fail to fulfill Aquinas's Condition 3, that they prevent 'any harm ensuing from the law itself'.⁴⁹

5. Additional harms to the common good

The focus up to this point has been on laws punishing physicians because this is the focus of the laws prohibiting abortion that are currently on the books in the United States. But with special attention to Aquinas's Condition 3, that a law prevent 'any

⁴⁶There are voices in the anti-abortion movement claiming that every abortion is the result of the woman being coerced and/or lied to by the physician or others in order to get her to agree to the abortion. While there may be individual instances of such grossly unethical medical practice, there is no evidence that such things are common. Physicians are duty-bound by their commitments as professionals, as well as by law, to perform medical procedures only for patients who freely consent to them and who do so on the basis of adequate information.

⁴⁷In this essay, whenever the expression, 'other relevant considerations' is used in regard to decisions about abortion, it should always be understood to refer to life-related values.

⁴⁸*Catechism*, §§1800 & 1782.

⁴⁹It has also been proposed that laws prohibiting abortion punish the women who choose an abortion or seek one although, as mentioned in Footnote #20, no such laws currently exist in the United States. But if such laws were to be passed, it is also very likely that such laws would mistakenly punish many women whose choices about abortion have been made conscientiously and who therefore, according to Catholic teaching, would not be guilty of deliberately (in the relevant sense) ending a fetus's life. Therefore, in addition to their other defects, such laws would also violate Aquinas Condition 3 in this way.

harm ensuing from the law itself', other kinds of harms produced by laws prohibiting and punishing abortion need to be considered.

In this connection, it is important to stress that the priority that Catholic teaching places on following one's carefully formed conscience applies equally to pregnant women considering abortion, to women who have had an abortion, to those persons who are women's partners in matters of pregnancy and child-rearing, and to all those women and men on whom women capable of pregnancy rely for support. It applies equally as well to all those women and men who have opposed laws prohibiting and punishing abortion in the states that have these laws and all those who have supported laws protecting access to abortion in the states that have laws of this kind. As Section Four has explained, if these persons have formed their consciences carefully and acted accordingly, Catholic teaching holds that they have acted as they should. Therefore, if laws prohibiting and punishing abortion interfere with, rather than supporting or enhancing, these persons' ability to properly form their consciences, this effect of such laws must be viewed as an additional kind of harm 'ensuing from the law itself'.

Consider first women who become pregnant in states that have laws prohibiting abortion and punishing physicians who perform or assist in abortions. While such states' laws do not establish punishments for women who have had or seek to have an abortion, it is almost always the woman who initiates the relevant conversation with a physician or other healthcare professional or who seeks out an abortifacient. There probably are some women who choose to have an abortion without much thought. But especially in a state where abortion is prohibited and punished, most women will consider this a matter about which they themselves have a choice to make and therefore that they need to determine if having an abortion is what they ought to do.

There certainly are women in the states where abortion is prohibited and punished who accept the view that the fetus is to be considered as having the dignity and rights of a full human person and is to be protected accordingly. These women will typically form their consciences in light of this belief and will therefore reject the possibility of abortion, and they would do so whether there were laws prohibiting and punishing abortion or not. But as was explained in Section Four, there are many people who genuinely value the lives of human fetuses and who consider choosing abortion to be a morally important matter, but who do not believe fetuses have the dignity and rights of full human persons because they do not believe there is significant evidence that fetuses have the capacities usually attributed to full human persons.⁵⁰

For these persons, whether pregnant women⁵¹ or persons who are their partners in matters of pregnancy and child-rearing or other persons who may support them and aid them in decision-making, living in a state that prohibits and punishes abortion adds significantly to the difficulty of determining what ought to be done. Deciding whether other relevant considerations outweigh the value of a fetus's life ought never to be easy. But also having to decide whether to break a law, even when doing so is believed

⁵⁰For example, knowledge and understanding, freedom, self-possession, and communion with other persons. See *Catechism*, Glossary, p. 893.

⁵¹In addition to the reasons mentioned in Section Four, such woman may also value fetuses' lives because of their desire to be mothers and to care for their offspring and rejoice in their development and possibly also because they believe that it is their actions that have brought the fetus into being and they believe they are responsible for the consequences of their actions.

to be morally justified,⁵² is always hard as well, and is made even harder when there is someone else, e.g., a physician, who may be seriously harmed as a consequence.⁵³ It might be objected that, since these laws have in fact been passed in the relevant states and are supported by large numbers of voters in those states, these laws deserve the benefit of the doubt and should be treated by women in those states, even if they are adversely affected by them, as valid and morally binding law. But Catholic teaching denies this, as was explained above: ‘Authority is exercised legitimately only when it seeks the common good of the group concerned and it employs morally licit means to attain it’.⁵⁴

It might also be objected at this point that the reasons that have been offered in Section Three and Section Four are not absolutely conclusive. These reasons – reasons offered for doubting that laws punishing physicians for abortion will dependably fulfill Aquinas’s condition 2 and therefore also Condition 1, and for believing these laws will also cause harms ‘ensuing from the law itself’ (Condition 3), especially in punishing physicians by mistake who have not done grave moral wrong (because they have not ended a fetus’s life deliberately, as this word is understood in Catholic teaching) – these reasons are, it might be argued, at most claims about what is probable. But the basis of laws prohibiting and punishing abortion, it would be argued, is the belief that ‘From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life’.⁵⁵

However, while this belief is indeed the basis of such persons’ support for laws prohibiting and punishing abortion, this belief is, as was explained in Section Four, a theological belief rather than a belief that is readily available to human reason unaided by Revelation and theological reflection. In addition and more importantly, even those who accept this belief are also required by Catholic teaching to ask if the laws they propose serve the common good and are thus morally justifiable. This is why, in articulating Catholic teaching on the matter, the word ‘appropriate’ has been included in *Catechism* #2273: ‘the law must provide appropriate penal sanctions for every deliberate violation of the child’s rights’.⁵⁶ Therefore, it is reasonable and in accord with Catholic teaching that the kinds of reasons offered in Section Three and Section Four should receive serious attention not only by persons who do not believe fetuses should be viewed as equal in dignity to full human persons, but also and perhaps especially by those who believe the fetus has the dignity and rights of a full human person. For there is, in fact, no good reason why these two groups should not be engaged in respectful dialogue to determine together whether there are any kinds of laws regarding abortion could serve the common good and be morally justifiable.

⁵²‘If rulers were to enact unjust laws or take measures contrary to the moral order, such arrangements would not be binding in conscience’, *Catechism* #1903.

⁵³The efforts at conscientious decision-making by physicians practicing in states having laws punishing abortion are likely to be burdened in similar ways by the prospect of not providing professionally appropriate medical assistance to one’s patients.

⁵⁴*Catechism* #1903, emphasis added.

⁵⁵*Catechism* #2270.

⁵⁶*Catechism* #2273, emphasis added.

In light of these considerations, it is also reasonable to propose that the burden that passed laws adds to the efforts of persons who are trying to make a conscientious decision—about a possible abortion in a state that has laws prohibiting and punishing abortion is another example of ‘harm ensuing from the law itself’, and thus another reason for proposing that such laws are inconsistent with the common good.

It is also very likely that there are women in states prohibiting and punishing abortions who become pregnant and who choose not to have an abortion even though, while valuing the life of the fetus and believing abortion is a significant moral matter, they believe after careful reflection that there are other relevant considerations that outweigh the life of the fetus in the particular situation that they are facing. If a pregnant woman chooses not to have an abortion in a state that has laws prohibiting and punishing abortions, and if the woman’s choice is made chiefly or solely to avoid the coercive consequences of these laws, for example the likelihood of a physician being punished for the abortion, or the personal or social burden of having initiated something prohibited by law, or in any other way, then the woman would be making that choice specifically because of the law’s coercive consequences rather than for other reasons not related to coercion.

In such a case, it would almost certainly be a harm that coercion would enter into this woman’s decision-making process, especially when the woman could reasonably believe the relevant laws are not morally justified on the basis, for example, of a conscientious belief that the law’s view of the fetus is incorrect. But in addition, it is likely that such women, in choosing to give birth in order to avoid such laws’ coercive consequences, would associate their pregnancy and possibly the birth and rearing of the child as being the result of personally experienced coercion rather than the positive motivations ordinarily associated with pregnancy and childbirth. That this would be a serious loss for such women themselves is obvious, but it could also negatively impact a child who is born under such circumstances, as well as the families involved and arguably our society as a whole if it were to become a social pattern significantly associated with pregnancy and childbirth in states that have laws prohibiting and punishing abortion. The coercive impact of such laws even on women who conform to the law, then, is another way in which such laws fail to support the common good by producing ‘harm ensuing from the law itself’.

The harms just described for pregnant women, those persons who are women’s partners in matters of pregnancy and child-rearing, and all those women and men on whom women capable of pregnancy rely for support in states having laws prohibiting and punishing abortion are also well known to many people, both in the states that have these laws and in other states, who, although they are not directly affected by these laws, have thought carefully about these laws and have come to believe that such laws are immoral. For these people, the fact that there are important laws in our country that they believe are immoral is a source of moral suffering by itself, and many of these people also suffer sympathetically for the persons who they believe are being directly harmed by immoral laws. For they believe that these are the kind of situations about which the *Catechism*, quoting Aquinas, writes: ‘In such a case, “authority breaks down completely and results in shameful abuse”’.⁵⁷ The suffering that laws prohibiting

⁵⁷*Catechism* #1903, quoting Thomas Aquinas, *S.T. I-II*, q.93, a.3, ad 2.

and punishing abortion can cause in this way is another potential ‘harm ensuing for the law itself’ that deserves consideration.

In addition to the negative consequences of laws prohibiting and punishing abortion for persons directly affected by them and those mentioned in the previous paragraph, the passing of such laws can also harm the common good in broader ways. First of all, it is often overlooked that the laws of civil societies can further the common good in two ways. One is by establishing means that are aimed at producing the intended good concretely or by threatening harm, and carrying out the threat out if warranted, to deter persons who directly violate the intended good. The other way that laws can further the common good is by communicating a message to that society’s people that the intended good is a component of the common good and is worth the effort and resources it takes to further it in that society, along with the message that actions inconsistent with this good should be avoided and, when appropriate, deterred. It is therefore important to ask what message is communicated to our society by laws punishing physicians for performing or assisting in abortions. The good that these laws are intended to further is surely the value of fetuses’ lives and the life and health of these children once born. Is this the message that these laws communicate?

Unfortunately, it is an inherent weakness of laws focused on coercion as a means of deterrence that they can be very ineffective in communicating a positive message. In our nation today, although the supporters of laws prohibiting and punishing abortion may say the intended message is a positive one about the value of fetuses’ lives and the laws’ preambles may state this, the most obvious message of these laws for many people in our society is the coercive impact of the fear that their penalties are intended to instill and of the potential freedom-reducing mechanisms of enforcement that might be used to support this fear. This is clearly the message received by the many persons in the relevant states who are most directly affected by these laws. But this message is also the cause of a significant public outcry on the part of the many persons who are beyond these laws’ reach but are opposed to them because, after careful consideration, do not believe the value of a fetus’s life is the same as that of a full human person.⁵⁸

There are probably women who have abortions without any thought about the possible value of fetal lives, and there are women and men more generally who treat these

⁵⁸There certainly are laws whose message is that fetuses’ lives have value and so also the well-being of these children then born; namely, laws providing readily accessible prenatal and perinatal care as well as the psychological and economic support that many pregnant women often lack; laws making sure that there will be adequate food, housing, income, skilled childcare, and dependable education as these and all children grow and develop, and continuing psychological and social support that will enable pregnant women and all mothers to believe that their children will enter a world eager to receive and support them. Such measures would also lessen the number of women whose circumstances are such that they cannot see any realistic way for them to successfully complete a pregnancy and raise a healthy and properly supported child, and who seek an abortion because of this. See, for example, ‘Reproductive Freedom Doesn’t Give Marginalized Women a Real Choice to Determine Their Future’, *America Media*, The Gloria Purvis Podcast, 3 May 2022, <https://www.americamagazine.org/politics-society/2022/05/03/abortion-california-242921?utm_source=piano&utm_medium=email&utm_campaign=2928&pnespid=t75sFn4dbapC3P3fpTipFpCH4AyiS59yIermme96pUxm0_wbEzkTyoqlhnyZvYcRY4dYGSXd> [accessed 26 January 2024]. There can also be little doubt that laws of this sort will serve the common good by dependably fulfilling Aquinas’s three conditions. See also Footnote #17 above.

issues as having no significance for their lives in spite of their moral importance and relation to the common good. Unfortunately, however, there is little reason to think that the current laws prohibiting and punishing are making positive contributions to these people's thinking about the value of fetuses' lives either in the states that have these laws or in the larger society. By thus drawing attention away from what should be the central concern of laws about fetuses' lives, laws prohibiting and punishing abortion actually fail in an additional way to fulfill Criterion 2, that the law further the good the law is intended to further.

Another broader harm to the common good lies in the fact that, once a law is passed, many people assume that its morality and service to the common good has been carefully evaluated and that the law is therefore morally correct.⁵⁹ Unfortunately, from this conviction some people can easily arrive at a mindset in which they believe that anyone who violates the law is therefore acting immorally and deserves condemnation, and anyone who opposes the law is making an obvious moral mistake and should not be listened to. The possibility that the people being criticized may have carefully formed their consciences and are acting in accord with their consciences when they choose to act contrary to these laws or challenge these laws as being not morally justified is simply set aside. Sadly, this mindset seems to be characteristic of many supporters of laws prohibiting and punishing abortion in the United States today.⁶⁰

If one examines this mindset from the perspective of Catholic teaching, it is not only mistaken in failing to employ Aquinas's three conditions or some similar test to determine whether the relevant laws serve the common good. But a far worse harm is being done to the many people in the United States who do value fetuses' lives and consider abortion to be a moral matter, but who after careful consideration do not believe that fetuses should be considered the moral equivalent of full human persons. For in condemning these persons and failing to listen to their conscientiously considered views, persons with this mindset are not only acting contrary to Catholic teaching about the primacy of conscience and ignoring the commonsense fact that we humans are rarely able to 'discern the consciences' of one another,⁶¹ but they are devaluing fellow human beings in ways clearly contrary to Catholic and New Testament requirements of charity toward one another.

These effects of the laws prohibiting and punishing abortion are another instance of harm 'ensuing from the law itself' (Criterion 3).⁶² But an even greater danger from this state of affairs is the fact that such views cut off an openness to dialogue,

⁵⁹Aquinas notes the positive value of laws becoming customary in this way, 'custom avails much for the observance of laws', but adds that, even so, laws must be changed when 'either the existing law is clearly unjust or its observance extremely harmful'. *S.T.I-II*, q.97, a.2, in Baumgarth and Regan, *op.cit.*, pp. 78–79.

⁶⁰See, for example, 'We Live Among Barbarians ... who do not care about human life in the womb', Msgr. Richard C. Antall, *Crisis Magazine*, 9 November 2023, <<https://crisismagazine.com/opinion/we-live-among-barbarians>> [accessed on 26 January 2024].

⁶¹See Augustine of Hippo, *The City of God*, Bk. XIX, Ch.6, on condemning the innocent: 'the judges are men who cannot discern the consciences of those at their bar', quoted in *St. Thomas Aquinas on Politics and Ethics*, ed. by Paul E. Sigmund (New York: Norton, 1988), p. 104.

⁶²The harms 'ensuing from the law itself' described in Sections Three, Four, and Five raise very serious issues of justice, whether justice is understood as a virtue, a deontic principle, or a human relationship to be maximized. But also treating these issues from the point of view of justice is beyond the scope of this essay.

not only dialogue about the moral justifiability of these laws themselves but also and more importantly respectful dialogue about the possibility of laws concerning fetuses' lives and abortion that could serve the common good and be morally justifiable. For in a democratic society, it is by dialogue that the common good is served, dialogue that attends seriously to the reasons on all sides; and persons with the mindset just described can easily prevent such dialogue from happening. Catherine Kaveny writes, 'In the heated battles of the American public square, it is all too tempting for practitioners of prophetic rhetoric to let their condemnation mutate into contempt. They – we – must resist this temptation ... To treat one's political interlocutors as vile or worthless is to risk undermining their equal status as participants in our political community. It is to treat them as unworthy of citizenship, as people who must be "pruned" from our common political endeavors'.⁶³

It will be objected at this point that the rhetoric of persons defending women's access to abortion is equally extreme, focused as it often is on securing unqualified access to abortion. But there is an important difference between the two most vocal positions on this issue, a difference that would be more clear if the rhetoric about abortion were quieted and the moral status of the fetus, which is the issue at the heart of these matters, were made the focus of consideration. For the persons who believe that fetuses should be considered morally equal to full human persons and protected accordingly are able to follow their consciences and to refuse to have abortions whether there are laws prohibiting and punishing abortions or not. But for women in states having laws prohibiting and punishing abortion who do value fetuses lives and consider abortion a moral matter, but who after careful consideration believe, for the reasons examined in Section Four, that fetuses are not morally equivalent to full human persons, these laws prevent them from following their consciences and in fact coerce them, to do otherwise.⁶⁴ And similarly, for the many other women and men in our country who also, after careful consideration, believe that, while the lives of fetuses are valuable and abortion is a moral matter, fetuses are not morally equivalent to full human persons, they are frequently derided and devalued and called barbarians⁶⁵ by persons with this mindset, even though they are following their consciences in what they say and do on the matter.

Catherine Kaveny explains why it is reasonable to say that it is the laws prohibiting and punishing abortion, and the defenders of these laws who have the mindset described above, that are most responsible for preventing the dialogue that our society dearly needs today. She offers these reflections on the case of the ten-year-old rape victim who was denied an abortion in her home state of Ohio, forcing her and her family to travel across state lines to obtain the procedure. 'We judge whether people have the moral capacity to handle difficult cases by first assessing how they handle easy ones. And for most people, allowing this little girl to obtain an abortion is an easy

⁶³Catherine Kaveny, *Prophecy Without Contempt: Religious Discourse in the Public Square* (Cambridge MA: Harvard University Press, 2016), Preface, p. x. See also Part Four of this book, 'Toward an Ethic of Prophetic Rhetoric: Compassionate and Humble Truth-Telling'.

⁶⁴'Man has the right to act in conscience and in freedom so as personally to make moral decisions. He must not be forced to act contrary to his conscience nor must he be prevented from acting according to his conscience'. *Catechism* #1782.

⁶⁵See Footnote #60.

case. If politicians do not see that forcing her to continue this pregnancy is morally outrageous, how can they be trusted to approach more difficult cases with prudence? If applicable laws, and those who interpret them, do not clearly allow this abortion, how can they be relied upon to deal justly in other cases? And if pro-life activists are patently indifferent to the well-being of a ten-year-old rape victim, then how can anyone view their slogan “Protect Women Ohio” as anything but a cynical ploy?

Kaveny continues, ‘How then do people respond when they don’t trust their law-makers or the activists that purport to influence law on their behalf? There are two fundamental responses. First, they take as many decisions as possible away from those they deem untrustworthy, placing them in the hands of those they think will deal more appropriately with relevant moral complexities. In (Ohio), voters (on a state amendment) overwhelmingly indicated that they trusted doctors and pregnant women more than politicians.

‘Second, they operate out of fear, not hope. When people lack basic trust, they pass laws that protect themselves from the abuses they most dread. In this case, wary of pro-life deception and legislative chicanery, the voters of Ohio placed nearly all abortion decisions beyond legislative interference. It is very true that the constitutional amendment that Ohioans passed gives broad and blunt protection to abortion. I suspect that many people who voted for it had significant misgivings about its breadth. But the only thing they feared more than passing the amendment was *not* passing it’.⁶⁶

In the United States today, it certainly can seem that there are only two positions worth considering regarding laws about abortion. But this is because the ‘middle position’ has not been given a voice; namely the view of a great many people, both women and men, who believe that fetuses have value but have concluded after careful consideration that fetuses do not have the dignity and rights of full human persons, and who believe that abortion is a morally important matter but that laws prohibiting and punishing abortion are not morally justifiable and are not the appropriate way for a society to deal with this issue.

That the laws that have been passed prohibiting and punishing abortion have fostered and supported a mindset among many of the supporters of these laws that is preventing respectful dialogue in our society about an issue that is so important to moral health of our society and to many components of the common good is another and very important instance of these laws producing ‘harm ensuing from the law itself’ (Aquinas’s Criterion 3).

6. Conclusion

Readers who accept the Catholic Church’s theological teaching that every product of human conception should be treated as a full human person with corresponding rights may be troubled by what they have read here, but the reasoning offered in this essay is not intended in any way to challenge their convictions about the moral worth of a human fetus. Instead, the purpose of this essay is to propose that those who do hold

⁶⁶Cathleen Kaveny, ‘Who Trusts the Pro-Life Movement?’ *Commonweal*, 27 November 2023, <https://www.commonwealmagazine.org/abortion-ohio-kaveny-women-GOP-rape?utm_source=Main+Reader+List&utm_campaign=c5c95c6a5c-EMAIL_CAMPAIGN_2017_03_16_COPY_01&utm_medium=email&utm_term=0_407bf353a2-c5c95c6a5c-92567111> [accessed 26 January 2024].

these convictions should also be responsive to Catholic teaching about the fallibility of human law and therefore be carefully asking whether the laws prohibiting and punishing abortion that have been passed in many states fulfill Aquinas's three conditions for a morally acceptable law. If these laws fail this test in many ways, as has been proposed here, then broad respectful dialogue is needed in our nation to determine what kinds of laws our society should have regarding fetuses' lives and abortion. At the very minimum, Catholics and their episcopal leaders should carefully reconsider whether it is morally correct to support these laws prohibiting and punishing abortion or whether Catholics, in light of many aspects of Catholic teaching, should in fact be actively opposing them.

Some people may still argue that deliberate abortion is such a serious wrong that the imposition of significant suffering is deserved independently of whether laws aimed at doing this would fail to serve the common good and would punish people who do not morally deserve it. Anyone who views the abortion issue in this way should certainly examine themselves very carefully to make certain that their views are not expressions of their anger or of a desire for revenge. For Catholic teaching does not support the view that every immoral action should be punished by law and Catholic teaching about the proper role of conscience raises serious doubts about who can correctly judge how morally or immorally another person has acted in these matters. Instead, Catholic teaching strongly supports and actively counsels forgiveness and reconciliation as the proper Christian attitude toward those whose actions we judge may be immoral. For there is a great difference between condemning a particular kind of act, i.e., the deliberate killing of a fetus (understood as Catholic teaching understands 'deliberate'), and condemning persons whose reasons, intentions, and circumstances we cannot possibly know. This is why broad condemnation of groups of people, even about the abortion issue, are rarely morally justified and are far more likely to drive people away from Catholic teaching than draw them to it. It was Jesus who said we must forgive seventy times seven times⁶⁷ and 'If there is one of you who has not sinned, let him be the first to throw a stone'.⁶⁸

This essay has argued that the Catholic teaching that deliberate abortions are immoral should not lead Catholics to support laws prohibiting and punishing abortion. If laws prohibiting and punishing abortion cannot fulfill the three tests Aquinas offers us to determine if a law is morally acceptable, and if such laws would likely punish and criminalize persons who are conscientiously trying to act morally, then we should not have such laws. For all these reasons, Catholics should seriously reconsider their support for laws prohibiting and punishing abortion and should consider instead actively opposing such laws.⁶⁹

⁶⁷*Gospel of Matthew*, 18:22, as translated in the *The New English Bible* (Oxford & Cambridge: University Press, 1970).

⁶⁸*Gospel of John*, 8:7, as translated in *The Jerusalem Bible* (New York: Doubleday, 1966). See also Pope Francis, *The Joy of the Gospel-Evangelii Gaudium* (Washington DC: United States Conference of Catholic Bishops, 2013), #114, p.58.

⁶⁹This essay has benefitted greatly from assistance provided by two anonymous *New Blackfriars* reviewers. Any remaining errors are the author's.