NEW CONSTITUTIONAL AND PENAL THEORY IN SPANISH ABORTION LAW*

Richard Stith**

The abortion debate in the United States is a clash of individualisms: the proponents of individual rights for putative unborn persons array themselves against the advocates of individual rights for women. Although the Left sides almost exclusively with the latter¹, it is hard to discern anything more than a tactical nexus of abortion-related issues with the socialist goal of community-based decisionmaking².

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1. Mark Tushnet, a former coordinator and still a frequent speaker for the Critical Legal Studies movement, has called the right to reproductive choice «a leftist sort of right which, it is said, leftists must recognize as *not* relative lest they lose their political credentials». Tushnet, «An Essay on Rights», 62 *Texas L. Rev.* 1363, 1365 (1984). Note, however, that Tushnet goes on to argue such a right would no longer make sense even to leftists in a society slightly different from our own. See also *infra* note 21.

2. Quintano Ripollés, in his historical analysis of abortion legislation, is puzzled by the fact that at the political level European socialists have long tended to favor more elective abortion, despite the «individualism» he sees represented by such a position. He theorizes that past explicit use of anti-abortion laws to increase the armies and labor forces of capitalist nations may have caused socialists to oppose such laws. I would add that Left commitments to sexual equality could also point in this direction. But neither demographic decline nor women's equality seems necessarily to further the development of socialism. 1 *Tratado de Derecho Penal*, Parte Especial, 504-05 (Madrid, 1962).

Not so in European law. The important 1975 West German decision mandated laws *against* abortion from a dramatically communitarian perspective³, as has been so ably pointed out by Donald Kommers⁴. The Spanish Constitutional Court decision of 11 April 1985⁵, which was strongly influenced by the German one⁶, is in many (but not all) ways even more communitarian than that prior opinion. Indeed, it may not be too much to say that social constitutional jurisprudence in the West may well find a landmark in this Spanish case. Socialism is relevant to abortion after all, but in a way quite different from that which might superficially have been expected.

The key point, to be developed below, is that the Spanish court considers the fetus neither a person possessing rights, as U.S. pro-life people argue, nor subject to a person possessing rights, as pro-choicers argue. Instead, unborn life is treated as a

3. Decision of 25 February 1975, [1975] 39 BVerfGE 1. Published as 39 *Entscheidungen des Bundesverfassungsgericht* 1 (Tuebingen: J. C. B. Mohr, 1975). Translated into English by Robert E. Jonas and John D. Gorby, «West German Abortion Decision: A Contrast to *Roe v. Wade* —with Commentaries,» 9 *John Marshall J. of Prac. and Proc.* 551 (1976).

4. Donald Kommers, «Abortion and Constitution: United States and West Germany», 25 *Amer. J. Comp. L.* 255, 280-284 (1977) and «Liberty and Community in Constitutional Law: The Abortion Cases in Constitutional Perspective» 1985 *Brigham Young U. L. Rev.* 371, 391-399. For a quite useful critique from an individualist perspective, see Hartmut Gerstein and David Lowry, «Abortion, Abstract Norms, and Social Control: The Decision of the West German Federal Constitutional Court» 25 *Emory L. J.* 849 (1976).

5. Decision of 11 April 1985, STC 53/1985 (Pleno). The official version was first published in 119 *Boletín Oficial del Estado* [hereinafter *BOE*] 10 (Suplemento, 18 mayo 1985) but I have hereinafter cited the clearer and perhaps more accessible 1985-49 *Boletín de Jurisprudencia Constitucional* [hereinafter *BJC*] 515.

6. I do not believe this assertion to be controversial. The Spanish decision refers repeatedly to the German one in summarizing arguments of counsel. *Id.* at 521, 523, 526, 527. In the Comisión de Justicia e Interior debates on 25 February 1983, opposition leader Ruiz Gallardón referred to the government's repeated statements that German law had been an inspiration for the present abortion depenalization proposal. The responding Justice Minister, Ledesma Bartret, did not dispute this assertion. *Cortes Generales, Sesiones del Congreso de los Diputados*, II Legislatura, Num. 18, 1983 at 6 ff. The Catholic newspaper *Ya* of 24 November 1984 referred in passing to German influence at the legislative and judicial levels. «El Tribunal podría exigir más garantías para proteger la vida en formación» (byline F. L. de P). According to Ernst Benda, former President of the Constitutional Court of West Germany, the Spanish Court itself has been modeled on the German one. See «Constitutional Jurisdiction in West Germany», 19 *Columbia J. Transnational L.* 1 (1981).

distinct constitutionally protected legal good. The nature of this Spanish status of the fetus as a public value will be elucidated in this commentary, and its status will be compared with that of unborn life according to the highest tribunals of Germany and the United States.

It will further be seen that the use of this value to require the prohibition of elective abortion is intimately linked in Spain, more explicitly than in Germany, with the communitarian ideal of the «Social State». U.S. constitutional doctrine, being much more individualist, might well not have required such a result even if the fetus had been recognized by our Supreme Court to have a very high public value.

Yet the Spanish and German decisions contain a surprise: At the same time that they base the protection of fetal life on the importance of public values, they withdraw that protection when continuation of a pregnancy is «too much to demand» or «non-demandable» («*inexigible*» and «*unzumutbar*», in the words of the Spanish and German courts respectively) of the individual pregnant woman. I will point out that abortion in such hardship cases may come under a paradoxical category of penal theory in which individuals are legally justified (not merely excused) in doing that which from the standpoint of public legal values remains unjustified. This individualist doctrinal counterthrust may be just as important as the communitarian expansion occurring in the same Spanish abortion case. References to Germany and to the U.S. will again make this clear.

Before turning to case analysis, however, it would be well to define with greater precision the basic categories I have been and will be using: To the degree to which a «community» (or «socialism») exists, shared public values are effectively pursued by all. As long as those values inhere in states of being rather than in conduct considered right in itself, rules are unimportant. For example, if neighbors were to gather to build a common barn, it would be silly to set down rules granting individual claim rights to hammers. There would no doubt be temporary rule-like guidelines provided, in order to aid coordination, but the common goal would be to use hammers wherever they are most needed. No individual would insist on getting his or her

prescribed turn with a hammer, if a neighbor could use it better for their shared purpose.

By contrast, to the degree to which a society is «individualist», there are no public values. All goals are personal and private, and human beings interact only insofar as necessary in order for each to achieve his or her private values. Consequently, rules are very important. For example, if a number of individuals are constructing their own separate barns, and there is a scarcity of tools, they will surely set down a set of rules for sharing hammers. These rules will differ from the temporary guidelines used by the neighbors above not only in their substance but also in their lack of flexibility. Private planning requires certainty about rules, requires *rights*. This is particularly so if the others involved are competitors or even enemies, so that one is disinclined to relinquish a turn at the hammer even if one happens to have run out of nails.

At a constitutional level, a court might impose one or the other of these models. It might insist that the State require all to work together for a common goal (e.g. life), or it might insist that the State refrain from coordinating common pursuits, in order to further the private values of individuals. Or, of course, it might do neither and let the whole matter remain in the hands of legislatures.

1. *Chronology and Summary of the Decision*

Prior to the bill here at issue, the Spanish penal code did not explicitly exempt any abortions from punishment⁷. However, the general defense of necessity includes an exemption for acts done to avoid harm equal to or greater than the harm caused⁸, which would make non-punishable at least those abortions necessary to preserve maternal life⁹.

7. Código Penal arts. 411-417. Published as *Código Penal y legislación complementaria* (Madrid: Civitas, 1984).

8. Código Penal art. 8 (7).

9. The supplemental brief of the anti-abortion petitioners (dated 3 January 1983 [sic]) further states that in practice abortion was never punished when done for any of the reasons listed in the government's abortion depenalization bill, found *infra* note 11 and accompanying text. Therefore, the brief argues,

Soon after the sweeping Partido Socialista Obrero Español (PSOE) electoral victory of 1982, which gave the party an absolute majority in the Spanish legislature, the new government proposed an addendum to prior abortion law¹⁰ declaring abortion unpunishable in certain circumstances. As approved by the Congress of Deputies on 6 October 1983, and by the Senate on 30 November 1983, the bill read:

«Abortion will not be punishable if performed by a physician, with the consent of the woman, when any one of the following circumstances is present:

1. That it is necessary in order to avoid a serious danger to the life or health of the pregnant woman.

2. That the pregnancy is the consequence of an act constituting the crime of rape under art. 429, provided that the abortion is performed within the first twelve weeks of gestation and that the aforementioned act has been reported.

3. That it is probable that the fetus will be born with serious physical or mental defects, provided that the abortion is performed within the first twenty-two weeks of gestation and that the unfavorable prognosis is registered in an opinion issued by two medical specialists other than the one operating on the pregnant woman»¹¹.

The post-Franco Spanish Constitution of 1978 established

statutory reform serves no purpose except to prepare the way for fully elective abortion.

10. The addendum was to be inserted at the end of the existing sections on abortion and numbered «417 bis».

11. This is a translation of the bill as it appears in the Constitutional Court's opinion STC 53/1985, de 11 de abril, as published in the *BJC*, *supra* note 5, at 531, which is slightly modified in capitalization and punctuation from the version earlier printed in the *BOE*, *supra* note 5. The Spanish is as follows:

«El aborto no será punible si se practica por un médico, con el consentimiento de la mujer, cuando concorra alguna de las circunstancias siguientes:

1. Que sea necesario para evitar un grave peligro para la vida o la salud de la embarazada.

2. Que el embarazo sea consecuencia de un hecho constitutivo de delito de violación del artículo 429, siempre que el aborto se practique dentro de las doce primeras semanas de gestación y que el mencionado hecho hubiere sido denunciado.

3. Que sea probable que el feto habrá de nacer con graves taras físicas o psíquicas, siempre que el aborto se practique dentro de las veintidós primeras semanas de gestación y que el pronóstico desfavorable conste en un dictamen emitido por dos médicos especialistas distintos del que intervenga a la embarazada».

for the first time a Constitutional Court with the power of judicial review of statutes¹². Consistent with the Kelsenian European tradition, a petition alleging unconstitutionality may be interposed by certain authorized persons, without the need to await a concrete injury¹³. A 1979 sub-constitutional law, repealed in 1985, further established the right of these same persons to insist that the Court hear such a petition before certain allegedly unconstitutional bills could enter into effect¹⁴.

On 2 December 1983, the latter sort of petition was filed in the name of fifty-four Deputies led by the conservative Alianza Popular party. After receiving a series of supplements and responses during the first half of 1984, the Constitutional Court finally announced its decision on 11 April 1985.

The abortion reform bill was declared in certain details to be an unconstitutional violation of article 15 of the Constitution, which reads «All have the right to life and to physical and moral integrity...» («Todos tienen derecho a la vida y a la integridad física y moral...»). Although the twelve members of the Court were evenly divided for and against this declaration, Spanish practice in effect permitted a second and tie-breaking vote to be cast by the President of the Court, Dr. Manuel García Pelayo y Alonso, and ex-soldier for the Spanish Republic who became an internationally-known scholar during his years outside of Spain¹⁵.

12. The Court is made up of twelve members (four chosen by three-fifths of the Congress, four by three-fifths of the Senate, two by the current government, and two by the General Council of the Judicial Power), as authorized by article 159 (1) of the Constitution of 1978 [as found in *Leyes políticas del Estado* (Madrid: Civitas, 1984)]. Members are elected for nine-year terms, which are staggered over three-year cycles. Article 159 (3).

13. Article 162 (1) (a) of the Constitution of 1978.

14. Organic Law of the Constitutional Court (Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional) article 79 (2). Repealed by Ley Orgánica 4/1985, de 7 de junio (BOE num. 137, de 8 de junio).

15. The vote was not exactly along socialist vs. conservative lines. Of the six members of the «majority», two were those nominated by the General Council of the Judicial Power. The Court's president had been approved by the PSOE. The remaining three were originally proposed by the old centrist party, the UCD, which virtually disappeared in the 1982 elections. The only woman on the court co-authored the resulting Court opinion. «El tribunal de los 12», *El País*, 12 April 1985, p. 13. Additional chronological and biographical details may be found on the same page. See also «Así votaron los doce magistrados», *Ya*, 12 April 1985, p. 5, and *Diario 16*, 12 April 1985, pp. 6-7.

After a lengthy development of the arguments presented by the petitioners and by the governmental respondent, the Court builds its position on twelve «Legal Foundations» («*Fundamentos Jurídicos*»), concluding with the holding of unconstitutionality. Five dissenting opinions, one of which is co-authored, follow.

The Court's argument in brief paraphrase is this: Human life is a superior constitutional value (Legal Foundation, hereinafter L. F., 3) and a Social State such as Spain has an affirmative duty to secure it by law (L.F. 4). This life is a reality distinct from the mother from the beginning of gestation and, therefore, the «one to be born» («*nasciturus*»)¹⁶ must be considered a «legal good» («*bien jurídico*») accorded protection by the Constitution. Legislative history indicates that the framers of the Constitution intended this result (L.F. 5), even though neither Spanish nor international law requires the conclusion that the one to be born possesses a personal subjective right to this protection (LL.FF. 5, 6, and 7). Such protection must be effective and, if necessary, include penal sanctions, although it need not be absolute (L.F. 7).

The Constitution also guarantees personal dignity, which includes rights such as free development of one's personality, physical and moral integrity, and personal and family intimacy (L.F. 8). When constitutional values collide, the legislator must weigh them and try to harmonize them or, if necessary, to specify the conditions under which one may prevail. He must also not forget the limits to what is reasonably demandable by the penal law. In carrying out his judgments, he need not turn only to the generalized exemptions from punishment found in article 8 of the Penal Code, but may use a different technique for certain crimes such as abortion (L.F. 9).

16. The Latin word «*nasciturus*» is here translated literally into English, despite the resultant oddity of speaking of the «one to be born» perhaps being aborted. «*Fetus*» would not be an acceptable alternative because the Spanish court had available, and elsewhere used, the equivalent «*feto*». Simply leaving the term untranslated would also not be appropriate, for the Latin word would not have the same feel in English as it would in Spanish. «*Nasciturus*» would connote a birth-related being to the educated Spanish reader, both because of its clear link to the Spanish «*nacer*» («to be born») and because of its most frequent use in civil law contexts where, in fact, the expectation of birth is uppermost in mind.

After disposing of statutory vagueness problems —by indicating, for example, that a «serious danger» is one which involves an important and permanent diminution of physical or mental health (L.F. 10)— the Court applies the foregoing principles to the bill in question. There is nothing unconstitutional in permitting the destruction of unborn life where the mother's life is at stake. Given a «serious danger» to her health, the mother's own right to life and to physical integrity is affected; not to punish abortion here is constitutional, especially in light of what is demandable by penal law. Rape violates personal dignity in the highest degree, and the law clearly cannot demand that the victim bear its consequences. As for the case of serious physical or mental fetal defects, recourse to penal sanctions against abortion would impose conduct beyond that which is normally demandable of a mother (L.F. 11).

The constitutionality of the non-punishment of abortion in such circumstances has thus been established, according to the Court. However, the State continues to have an obligation effectively to guarantee the life and health both of the woman and of the one to be born. It must, therefore, make sure that neither the former nor the latter is disprotected any more than may be required by those circumstances. For the protection of the woman, the State should provide that the abortion take place in public or private health centers authorized for this purpose. For the protection of the one to be born, in order to be certain that the first type of circumstance (serious maternal life or health danger) exists, the Constitution demands that the opinion of a medical specialist be obtained prior to the abortion. Similarly, the opinions of the two specialists regarding any fetal disabilities must be obtained in advance of any abortion. Such changes, without excluding other possible ones, would permit the bill finally to be enacted into law (L.F. 12)¹⁷.

17. The government did not delay in complying with the Court's demands. On 12 July 1985, a new enactment was published in the *Boletín Oficial del Estado*, number 166. (Ley Orgánica 9/1985, de 5 de julio, de reforma del artículo 417 bis del Código Penal). The significant changes are as follows: The new law contains a preliminary paragraph requiring abortions to be done in an accredited health center, and requires a prior second medical opinion confirming that an abortion is necessary to avoid a serious danger to the life or health (which now explicitly includes mental health) of the pregnant woman. The law, however, does not require the second opinion (nor the woman's

In the last two sections of its opinion, the Court declines to require paternal participation in the abortions decision (L.F. 13), or to enter into subsidiary civil law issues such as the relation of non-punishable abortion to social insurance. It does point out, though, that conscientious objection to abortion is protected by the Constitution (L.F. 14).

2. Prenatal Life as a Legal Value for the Community

The Constitutional Court of Spain finds that the one to be born has not been shown to possess any constitutional rights. At the same time, the fetus is protected by the Constitution, and indeed is protected by the sentence «All have the right to life...» Let us look more closely at the reasoning and results of these apparently contradictory findings by the Court.

The idea that our objective legal duties necessarily correspond to others' subjective rights is not universal¹⁸, being in the form we know it a development of late scholastic nominalism¹⁹ and Enlightenment individualism. Some cultures apparently have

express consent) in an emergency. A new section indicates, in accordance with a remark of the Court, that the pregnant woman will not be punished even when an (otherwise non-punishable) abortion occurs in violation of the requirements of a health center or of confirming medical opinions.

Regulations setting accreditation standards have become a focus of legal controversy under the new law.

18. See e. g. José Luis Lacruz Berdejo, «El Derecho Subjetivo», 3 *Elementos de Derecho Civil*, Parte General, 77-87 (Barcelona: Librería Bosch, 1984). See also Stanley I. Benn, «Rights», in 7 *Encyclopedia of Philosophy* 195 (New York: Macmillan, 1967), T. Benditt, *Rights* 3-8 (Rowman, 1982) and H. L. A. Hart, «Bentham on Legal Rights», *Oxford Essays on Jurisprudence* (second series), ed. A. W. B. Simpson, 171-202 (Oxford: The Clarendon Press, 1973). The best short histories in English of the idea of a right may be John Finnis, *Natural Law and Natural Rights* 205-210 (Oxford University Press, 1980) and Martin Golding, «The Concept of Rights: A Historical Sketch», *Bioethics and Human Rights*, ed. E. L. Bandman and B. Bandman, 44-50 (Boston: Little, Brown, 1978) and «Justice and Rights: A Study in Relationship», *Justice and Health Care*, ed. E. E. Shelp, 23-35 (Reidel, 1981).

19. Prof. Michel Villey has defended the thesis that William of Ockham was among the first fully to conceptualize subjective rights over property. Ockham did so, according to Villey, in order to permit the Franciscans more easily to renounce such rights and thus to fulfill their radical vows of poverty. At the same time as they renounced civil *claims* to property, they could continue to administer and to use it in a physical sense. See Michel Villey, «Droit subjectif», *Seize essais de philosophie du droit* 140 (Paris: Dalloz, 1969).

no need to reify the benefits of the legal order and ascribe the ownership of these abstract benefits (primarily, the power to choose to make claims) to individual actors or subjects (whence «subjective»). Even today, we ordinarily think of the criminal law as a set of duties which do not respond to individual claims. I certainly have a duty not to steal from my neighbor, but only the State, not my neighbor, has the right to insist that I not do so under pain of criminal sanction. Analytically, the idea that duties need not entail rights is defended by a number of philosophers today²⁰. The rise of socializing legal theory has also put pressure on the idea of individual claim rights as a foundation of the legal order²¹.

The received European legal protections accorded to the fetus cannot easily be squeezed into this modern subjective rights ideology²². Of the many nations following Continental traditions, apparently only Argentina has seen fit to acknow-

20. See e. g. the fine arguments and citations in Roslyn Weiss «The Perils of Personhood», 89 *Ethics* 66 (October, 1978), and in Stanley Hauerwas *Truthfulness and Tragedy* 174 ff and notes (University of Notre Dame Press, 1977). See also Joel Feinberg, *Rights, Justice and the Bounds of Liberty* 135-39, 144 (Princeton University Press, 1980).

The inverse proposition, that the absence of rights need not entail the absence of duties has been well and relevantly put in Montague, «Two Concepts of Rights», 9 *Phil. and Pub. Aff.* 372, 384 (1980):

I suppose there is a sense in which I would deny that those incapable of acting intentionally have rights, but I do not see that doing so has any morally objectionable consequences. It isn't as if, for example, that by denying that infants have a right to self-defense I am sanctioning infanticide; what I have said here implies only that the immorality of infanticide cannot be *grounded* on the rights of infants. Infanticide —as well as such things as cruelty to animals and non—therapeutic experimentation on the severely retarded— is immoral even if infants, animals, and the severely retarded have no (exercisable) rights.

21. Lacruz Berdejo, *supra* note 18, at 85. See e. g. Karl Marx, «On the Jewish Question», *Early Writings* 211, especially 230-231 (New York: Random House, 1975) and Michael Sandel, *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 1982). The socialist Mark Tushnet (*supra* note 1) and Louis M. Seidman have explicitly argued for the permissibility of fetal protection on a non-rights basis. «A Comment on Tooley's 'Abortion and Infanticide'», 96 *Ethics* 350 (January, 1986).

Mirjan Damaska's comprehensive new treatise contrasting the reactive and the activist state is a particularly rich theoretical context within which to understand the relative absence of rights in socialist law. See *The Faces of Justice and State Authority* 83 (New Haven: Yale University Press, 1986).

22. Lacruz Berdejo, *id.*, at 93-94.

ledge civil personality from the moment of conception²³. The image of the person as a bargainer and a litigator indeed does not seem applicable to unborn life. Of course, children after birth likewise possess these traits of legal personality only *in potentia*, yet they are accorded personhood (though the exercise thereof is necessarily by a representative), so that the exclusion of fetuses remains problematic²⁴. In any event, prior to 1985 many or most Spanish legal theorists granted the fetus a status lower than that of a person, perhaps even lower than that recognized in France or Italy²⁵.

Anti-abortion strategy during the constitutional debates if anything reenforced the non-personhood of the fetus. Fearful that the sentence «All persons have the right to life...» could be read to protect only those who under the civil code had personality, i. e. those who had been born and were able to survive twenty-four hours²⁶, opponents of abortion substituted the sentence «All have the right to life...», for the explicit purpose of protecting the unborn from abortion²⁷. It became difficult for a

23. Quintano Ripollés, *supra* note 2, at 477. But cf. Luis Jiménez de Asúa arguing that the fetus still does not count as a «visible person» under Argentine law. 6 *Tratado de derecho penal*, second edition, 988 n. 36 (Buenos Aires: Losada, 1962).

24. The existence of infant persons can support the assertion that potentiality is sufficient for personhood and therefore that the unborn are likewise Argersons. See *Enciclopedia Jurídica Española* 709. See also John Rawls, *A Theory of Justice* 509 (Cambridge, Mass.: Harvard, 1971). See *Enciclopedia Jurídica Española* 709. See also John Rawls, *A Theory of Justice* 509 (Cambridge, Mass.: Harvard, 1971) 45 and accompanying text for the German high court's argument. Contrary resolutions are possible. It is common today for abortion-related philosophizing to end in approval of infanticide. See e. g. the authors Tooley and Warren cited by Weiss, *supra* note 20.

25. Quintano Ripollés, *supra* note 2, at 471 ff. See also J. M. Rodríguez Devesa, *Derecho penal español*, seventh edition, Parte Especial, 100 n. 42 (Madrid, 1979), arguing that feticide has never been considered homicide. See generally E. Cuello Calón, 2 (2) *Derecho Penal*, thirteenth edition, 522 (Barcelona, 1972). Not all the juristic data is clear. For example, for civil purposes the prenatal child is conditionally considered born and the possessor of rights, provided that it eventually emerges viable from the womb. Código Civil art. 29. Published as *Código Civil*, eighth edition (Madrid: Civitas, 1984). In criminal law, the Penal Code prohibits consensual abortion under the title «Crimes against Persons» («Delitos contra las personas»), Código Penal, Título VIII.

26. Código Civil, arts. 29-30.

27. *Diario de Sesiones del Congreso*, Num. 105, 6 July 1978, at 3952 ff. See also the summary of these debates at L. F. 5 of the decision presently being considered.

court to say that a fetus is a constitutional person when the word «person» had been struck from the Constitution in order to ensure the inclusion of fetuses.

The Constitutional Court in fact does not argue the issue of legal personality as such. Instead, it considers the closely related (if not ultimately identical in modern law) issue of whether fetuses are «titulares», i. e. bearers or possessors, of a subjective constitutional right to life. It finds that they are not, a conclusion in accordance with the mainstream of Spanish legal tradition.

The Court nevertheless was faced with the apparently unanimous opinion of Spanish medical associations that the unborn child is a living human being²⁸. From the materials available, the government does not appear to have disputed the physical fact of human life prior to birth²⁹. Instead, it approached the issue wholly formalistically, arguing that legal norms are independent of non —legal facts³⁰ — a hard position to take when it comes to documents like constitutions which are meant to limit the legal order for the sake of a socially preferred physical reality. Moreover, the Court conceded that the substitution of «all» for «all persons» had been intended to protect nascent life. How could the Court conceptualize the legal status of living but unborn human beings?

28. The petitioners submitted statements from various medical associations to this effect, and the government submitted none to the contrary, or at least none the Court thought worth mentioning. See *BJC supra* note 5 at 525. See also *The Human Life Bill-S. 158, Report to the Committee on the Judiciary, United States Senate, Subcommittee on Separation of Powers, 97th Congress* (Washington: U. S. Government Printing Office, 1981) arguing that there is a scientific consensus concerning the fact that life begins at conception but not concerning the value to be accorded to that life. The U. S. report was cited by the Spanish petitioners in their brief of amplification, dated 3 January 1983 [sic], at 7.

29. As far as I have been able to determine, most of the government briefs in the case are not available and were not made available even to opposing counsel. But the Court's extensive summary of the government arguments makes no mention of any dispute concerning the factual existence of a living human organism prior to birth.

30. In the one government brief which I have been able to obtain, a purely formal argument was advanced in response to petitioners' request for scientific testimony on the facts of human development prior to birth. «Law presents itself to the jurist as a primary phenomenon, with the ability to elaborate its own concepts and categories», according to the government brief of 11 April 1984 at 4.

Traditional Spanish legal doctrine may have provided some help. Not all legal goods in Spanish law have to pertain to individuals, or even to the State, in the manner of property ownership. Goods in the public domain and communal goods have long been recognized³¹. It has been argued that society, rather than the fetus or the mother, is the «titular» of the protection accorded to the unborn child³². Anti-abortion spokespersons had argued that even without a subjective right, the fetus may be protectable by an objective norm, as a «social good»³³. The Spanish Supreme Court (which does not have the power of judicial review nor of authoritative constitutional interpretation given to the Constitutional Court) indeed asserted in its decision of 11 January 1984 that

Human life in formation is a good that constitutionally merits protection, is a constitutional legal good, a legal good of the community and not an individual legal good...³⁴.

Even spokespersons for the right to abortion were willing to concede that the unborn are a legal good of the community³⁵. Some interpreted such a concession to mean, however, that what the community possessed it could dispose of by its representatives in the legislature, and thus that the legislative depenalization of abortion was constitutionally permissible³⁶. Perhaps

31. Lacruz Berdejo, *supra* note 18, at 42ff, especially 51-55.

32. Quintano Ripollés, *supra* note 2, at 477, reports some support for all three possibilities.

33. Diaz Fuentes calls the fetus a «social good», in *Diario de Sesiones del Congreso*, Num. 105, 5 October 1983, at 2943. Oscar Alzaga is cited by J. Cerezo Mir, in note 46 of his essay «La regulación del aborto en el proyecto de nuevo Código Penal Español» in *La reforma penal* (Madrid, 1982) to the effect that the fetus is protected by an objective norm even without a subjective right.

34. TS 2ª Sala 15 octubre 1983, reported in *La Ley* 11 enero 1984 at 1. Reversed (in effect) on other grounds by the Constitutional Court. TC 2a Sala 75/1984, 27 de junio, reported in *La Ley* 24 octubre 1984 at 1.

35. Sotillo Martí stated his agreement with the German high court that life in the womb is a legal good protected by the Constitution. *Diario de Sesiones del Congreso de los Diputados*, Sesiones informativas de Comisiones, Num. 61, 7 septiembre 1983, at 2139.

36. The article by Arroyo Zapatero discussed below at note 71 develops the idea that what the community gives, the community can take away. Luis Arroyo Zapatero «Prohibición del aborto y Constitución», *Revista de la Facultad de Derecho de la Universidad Complutense*, num. 3, 195 (1980). The Constitutional Court's summary of the government arguments indicates that the latter admitted the existence of unborn life as a legal good, but claimed that the legislature had discretion over its protection. *BJC*, *supra* note 5 at 526-28.

for this reason, the anti-abortion briefs in this case resist the idea that the one to be born is only a legal good rather than a possessor of the right to life³⁷.

Like the Spanish Supreme Court in the quotation above, the Constitutional Court in effect takes the traditional concept of the unborn as a protected legal good and inserts it into the constitutional «system of values». (LL.FF. 3, 4, 9). Since the Constitution emanates from the community, it would seem (though the Constitutional Court does not use these precise words) that the unborn are a legal good or value «of the community». But because of the superiority of the Constitution to ordinary legislation, the community has in effect made a commitment to the value of unborn life such that it no longer retains a right freely to dispose of that life by legislation. The community could also be seen to be simply acknowledging a preexisting and binding inherent value in such life. In either case, one might say that the one to be born has become not so much a good «of» the community, in a proprietary sense, but a good «for» the community, a good at whose furtherance the community is aiming.

It is worth pointing out that the very idea that there exists an objective order of values in a constitution is communitarian rather than individualist, because it makes the Good at least in part public rather than private. Such an order (i. e. not only a list but also a *hierarchy*) of explicit and implicit values mandates not only a minimum set of formal rules which government and citizens must observe, but a set of goals they must aim at particularly when combined with the idea of the Social State discussed later in this commentary.

Within this value order, life is not just any value, according to the Spanish Court, but is a «superior value» (L.F. 3), a

Four of the dissenters to the final decision conceded that preborn life is or has some kind of legal value.

37. See e. g. the Court's summary, *BJC*, *id.* at 523, of petitioners' argument that life is a fundamental right or an absolute value rather than merely a legal good. Published antiabortionist opinion had already rejected arguments like those of Arroyo Zapatero. See Federico Trillo-Figueroa («La legalización del aborto en el derecho comparado», at 113) and Fernando Díez Moreno («El proyecto de Ley del Aborto desde la perspectiva constitucional», at 181-89) in *En defensa de la vida* (Madrid: Editorial Edilibro, 1983). See also note 71 *infra*.

«fundamental value» (L.F. 5), and a «central value» (L.F. 9). The Court reaches this conclusion by noting that life is a pre-supposition for all other rights, and by reflecting upon the placement of the right to life at the head of the list of constitutional protections (L.F. 3). The unborn are taken to «embody» (L.F. 5) this value, both because the framers of the Constitution apparently intended the unborn to be protected by the right to life clause of that document, and because of the fact, noted by the Court, that human life is a «reality from the beginning of gestation». (L.F. 5).

At the same time that the Court grants the fetus a high status as a «constitutionally protected legal good» (L.F. 7), it balances its conclusion by refusing to consider the unborn to «possess» the right to life, as discussed above, and by the curious and unexplained remark that at birth, not before or after, the fetus acquires «full human individuality» (L.F. 5). Moreover, a careful reading of the opinion will show that the Court never explicitly acknowledges that the fetus is among the «all» referred to in the protective phrase «All have the right to life...»

Let us try to understand this argument by means of an irreverent and slightly analogous hypothetical. Suppose the U.S. Constitution contained the following language: «All bald eagles, as the sacred symbol of the nation, have the right to life». Suppose further that the framers of this clause had inserted the word «all» for the precise purpose of protecting embryonic eagles as well as hatched eagles. Would we have to conclude that inside an egg is an eagle, or that a bird embryo has its own constitutional rights, in order to consider eagle eggs constitutionally protected? I think not. Such protection could be founded simply on our sense that an important meaning and purpose of the Constitution would be thwarted if eagle omelettes came into vogue.

The precise effect of the Court's elevation of fetal value is this: The Court affirms the superiority, or even the equality, of the mother's rights over the legal value of the fetus at most only in those situations covered in the first statutory depenalization, i. e. where the mother's life or health is seriously endangered, both of which values are found in the same Consti-

tutional article held to protect the unborn (L.F. 12). In order to uphold the other two depenalizations, the Court turns instead to the doctrine of non-demandability discussed at the end of this article.

Perhaps even more importantly, the Court implicitly holds that *elective abortion is unconstitutional*. It does so by indicating that the obligation to protect the fetus requires the State to make sure beforehand (by means of a second medical opinion) that no abortions are done except where the mother is truly threatened. The exact content of the Court requirement is unimportant here. The point is this: If elective abortion were permissible, there would be no constitutional life-related value infringed upon even where an abortion were done outside the statutory provisions. By insisting that these provisions be strictly enforced *in order to protect the unborn*, the Court has clearly held the complete depenalization of abortion to be unconstitutional³⁸. As a fundamental public value, developing human life cannot be converted into purely private property.

Not only did the Court manage to make this declaration in a case where elective abortion was not even an issue, but it did so in a manner highly likely to be acquiesced in by the government promoters of abortion depenalization. It asked only for tiny, technical additions to the bill, which were soon forthcoming. Had it done more, had it declared a broader right to life, the government might well have refused to go along, provoking a constitutional crisis³⁹.

38. The Spanish court may to a degree have been inspired by similar language in the 1975 Italian constitutional abortion decision, though the earlier phraseology would seem to appear in a procedural posture making it merely dictum: «[It] is the legislator's obligation... to forbid the procuring of an abortion without careful ascertainment of the reality and gravity of injury or danger which happen to the mother as a result of the continuation of pregnancy: Therefore the lawfulness of abortion must be anchored to a preceding evaluation of the existence of the conditions which justify it». *Carmosina et al.*, Corte Costituzionale. Decision of February 18, 1975, No. 27 [1975] 20 Giur. Const. 117, as translated in Mauro Cappelletti and William Cohen, *Comparative Constitutional Law* 612-14 (Indianapolis: Bobbs-Merrill, 1979).

39. Alfonso Guerra, vicepresidente of the PSOE government, on 26 March 1985 (sixteen days before the Court announced its decision) declared that if its law were ruled invalid, the government would be forced to set up a «machinery for pardons» for those obtaining abortions. The Court itself, he said, would be placed in «a socially difficult situation», and he expressed regret that twelve

One essential element in the Court's argument above has not yet been fully explored — the idea that in a Social State constitutional values form not only negative limits to governmental action but also mold the required affirmative content of that action. This element has been postponed in order to develop more clearly the idea that the fetus has constitutional value in the first place, that the Spanish Constitution contains common public values (here unborn life) rather than only the rights of individuals. After a much briefer look at how Germany and the U. S. conceive the fetus, and some critical remarks of my own, we shall return to this postponed discussion of the interaction of fetal value and the Social State.

The 1975 West German Constitutional Court decision on abortion bears a striking resemblance to the 1985 Spanish ruling —not surprisingly since, as mentioned previously, the former served in many ways as a model for the latter.

Focusing upon the constitutional language «Everyone has the right to life...», («Jeder hat das Recht auf Leben...»)⁴⁰ the German Court finds it unnecessary to hold the unborn child to be a person, or a «bearer» of a subjective right⁴¹, in order to include it within the protection of the Basic Law. Note, however, that the Court does not shy away from referring to the unborn's «right to life». It avoids only the question of whether the child is the «bearer» (or «possessor») of this right. Perhaps the Court is thinking of analogous positive constitutional welfare «rights» for adults which need not necessarily give rise to individual claims presentable in a court. To return to our hypothetical, a similar analysis would find that bald eagles need not have civil law personality with access to courts in order to receive constitutional protection. Both this right-to-life guarantee and the explicit constitutional value of «human dignity»⁴²

non-elected persons should impede the will of 350 elected ones. He went on to oppose the separation of powers, calling it a relic of the epoch of Montesquieu, and promised to reform the norms governing the Court. These statements placed the justices under «intolerable pressure» according to the opposition parties. *ABC* 12 abril 1985 at 53. The Court's elegant self-defense reminds one of *Marbury v. Madison* 5 U. S. (1 Cranch) 137 (1803).

40. Basic Law (*Grundgesetz*) Article 2, section 2, Sentence 1.

41. [1975] 39 BVerfGE 1, 41. See also the full translation of the German decision by Jonas and Gorby, *supra* note 3 at 641-42.

42. Basic Law, Article 1, Section 1, Sentence 1. Note that the Spanish

leads the Court to rule that all human life, including prenatal life, is part of the «objective ordering of values» of the Basic Law⁴³. Even the dissent agrees that the State has a constitutional duty to protect unborn life, and indeed states that the existence of this duty is «uncontested» («*unbestritten*»)⁴⁴ —arguing further, however, that the duty need not be implemented by criminal sanctions.

The German decision is somewhat more «pro-life» in its reasoning than the Spanish. Like the Spanish, it notes that human life is a continuum, but unlike the Spanish it does not see «full human individuality» occurring at birth. It states

The process of development... is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of the human life. The process does not end even with birth; the phenomena of consciousness which are specific to the human personality, for example, appear for the first time a rather long time after birth. Therefore, the protection... of the Basic Law cannot be limited either to the «completed» human being after birth or to the child about to be born which is independently capable of living⁴⁵.

Moreover, it specifically holds that the constitutional word «everyone» includes «everyone living»⁴⁶ and that no distinction can be made, with regard to the right to life, between unborn

constitutional equivalent here (Article 10, Section 1, Sentence 1) refers to «the dignity of the person» rather than to «human dignity» and played only a minor role in the Madrid decision.

43. [1975] 39 BVerfGE 1, 41; Jonas and Gorby translation, *supra* note 3 at 642. For discussion, see Gerstein and Lowry, *supra* note 4, at 862, 867 and materials there cited.

44. [1975] 39 BVerfGE 1, 68 (abweichende Meinung); Jonas and Gorby, *id.* at 663 (dissent).

45. [1975] 39 BVerfGE 1, 37; Jonas and Gorby, *id.* at 638. The Court appears to reason that as long as we protect newborn infants, whose human development is significantly incomplete, consistency requires protection prior to birth. Indeed, consistency requires a *theory* of protection which either values organic human life itself or else values the developing potentiality for higher «phenomena specific to the human personality» — for these are the only sources of inherent value which the infant possesses at birth. In other words, the Court argues that if we think newborns inherently worthy of protection, our normative theories require us also to protect life even in the early weeks of pregnancy. See further discussion *infra* text accompanying notes 66-74.

46. *Id.*

and born life⁴⁷. Thus it could be argued that in Germany the fetus is in all but name constitutionally a person with rights, and so is closer than in Spain to being a full legal bearer of subjective rights. Or, put another way, Germany is more individualist and Spain more communitarian in their respective rationales for deference to unborn life.

Another way to understand the two decisions, however, would be to note that both call the one to be born a «legal value» or a «legal good» («Rechtsgut», «*bien jurídico*») rather than an individual possessing rights, although the German language is stronger concerning the high rank of that objective legal value. In both nations, unborn human life is an object more than a subject of constitutional protection, is a public value of the community rather than a private claim of the fetus or of the mother⁴⁸. The German Court's further concern with government teaching and counseling in support of prenatal life also has a strongly communitarian ethos behind it⁴⁹. The Court clearly hopes to build a common value commitment rather than only a balance of individual interests.

The explicit result of such fetal value recognition in Germany, like that implicit in Spain, is a holding that elective abortion is unconstitutional, even in the first three months of gestation⁵⁰. New life, the next generation unborn, is the concern

47. *Id.*

48. But note that the German court, despite its use of value terminology, insists that such value cannot be aggregated, that each particular life must be protected — even if the sacrifice of some could lead to the preservation of a greater number. [1975] 39 BVerfGE 1, 58-59; Jonas and Gorby, *id.* at 655-56. The refusal to aggregate is a departure from ordinary valuing and is more at home in discourse informed by rights.

Are there ways to avoid the ruthlessness of valuing, its common callousness toward particulars, without appealing to the selfishness of rights? I believe there are, in the ideas of respect or reverence (which perhaps may be the deep grounds of the German decision). See my critique of valuing, «Toward Freedom from Value», 38 *The Jurist* 48 (1978), and my brief critique of rights in «Thinking about Ecology», XLV (1) *The Cresset* 7 (1981).

49. [1975] 39 BVerfGE 1, 50, 57-58, 61-64; Jonas and Gorby, *id.* at 649, 651-55, 657-60. For an excellent introduction to the German constitutional jurisprudence of values, see Ernst Benda, «New Tendencies in the Development of Fundamental Rights in the Federal Republic of Germany», 11 *John Marshall J. of Prac. and Proc.* 1, 6-9 (1977). Dr. Benda at that time was president of the Constitutional Court.

50. [1975] 39 BVerfGE 1, 68; Jonas and Gorby, *id.* at 662-63.

in some sense of the whole community, not only of individual pregnant women. Nevertheless, as in Madrid, the Court in Karlsruhe moderates the force of this conclusion by holding that there are limits to what the community can ask individuals to contribute to this common value, and that as a result laws may permit abortion in various situations of relative hardship⁵¹. This individualist counterthrust will be examined further below.

The 1973 U. S. Supreme Court abortion decision, *Roe v. Wade*, is in surprisingly many ways similar to the Spanish and German decisions. Like them, although much more strongly, it refuses to acknowledge constitutional personhood or rights possessed by the unborn⁵². And just after its finding of non-personhood, in a largely unnoticed portion of its decision, our Court creates a legal category very similar to that into which the fetus is placed in those European opinions: non-personal human life. That is, the U.S. court indicates that its conclusion of non-personhood does not yet dispose of the contention that there is a compelling state interest in protecting life from the moment of conception. It does not respond to this contention by arguing that there would be no decisive state interest in protecting such non-personal life, should it exist, but rather by indicating the Court's doubts as to whether the fetus is actually human and alive in an extraconstitutional sense⁵³. Presumably, had the Court been sure of the existence of a living human fetus, it would have found a strong public concern for fetal protection, similar to that found by the Spanish and German courts. In other words, the U. S. court creates the same category (non-personal life imbued with a high public value) brought forth by those other tribunals, but then fails to fill it.

It may well be this single difference, not a difference of

51. Very roughly speaking, the Court indicates that abortion need not be punished where the mother's life or health is at stake, or she has been raped, or the child will suffer from a serious health impairment, or she labors under some equivalent social hardship — inasmuch as each of these situations may make a continuation of pregnancy not demandable by means of the penal law. [1975] 39 BVerfGE 1, 48-50; Jonas and Gorby, *id.* at 647-49.

52. *Roe v. Wade* 410 U. S. 113, 156-58 (1973).

53. *Id.* at 159-62. See also note 55, *infra*.

constitutional categories but a disagreement about the fact of actual human life, which accounts for the tremendously disparate conclusions on abortion on the two sides of the Atlantic. For it is not only Spain and Germany which agree that human life exists prior to birth. The other four European constitutional courts which have considered the matter appear to have reached this same conclusion⁵⁴, and none has subsequently seen fit

54. The cryptic French opinion (permitting the legislature to leave most early abortions unpunished) contains the phrase «Considering that the law [permitting abortion] referred to this *Conseil Constitutionnel* does not authorize any violation of the principle of respect for every human being and none has subsequently seen fit to recognize a from the very commencement of life... except in case of necessity...» Decision of 15 January 1975, [1975] *A.J.D.A.* 134, as translated in Cappelletti and Cohen, *supra* note 38, at 577-78. For a different interpretation of the French decision, see H. Patrick Glenn, «The Constitutional Validity of Abortion Legislation: A Comparative Note», 21 *McGill L. J.* 673, 677 and accompanying notes (1975). The Italian decision referred to in note 38 *supra* observes that Article 2 of the Constitution guarantees the inviolable rights of man, «among which must be placed, although with the particular characteristics unique to it, the legal situation of the foetus ['concepito']», at 613 of the translation, and later emphasizes obligatory protection for «the life of the foetus ['feto']», at 614, even while declaring that an embryo is not yet a person, at 613, and that abortions for serious maternal health reasons must be permitted. Corte Costituzionale, Decision of 18 February 1978, n. 27 [1975] 98 *Foro It. I* (Giurisprudencia Costituzionale e Civile) 515, 516. Even the Austrian decision, which alone holds that fully elective abortion in the first three months of pregnancy is constitutional, seems to concede «that throughout the whole duration of the pregnancy both the mother's life and the nascent human life constitute constant life» («dass während der ganzen Dauer der Schwangerschaft sowohl das Leben der Mutter als auch das werdende menschliche Leben gleichbleibendes Leben darstellen»), stating that the legislature is constitutionally free to protect the fetus by making abortion punishable, and is required to do so after viability if post-natal infanticide is punishable. Decision of 11 October 1974, Constitutional Court, [1974] *Erklärungen des Verfassungsgerichtshofs* 221, 234-35 G 8/74, as translated by Cappelletti and Cohen, *supra* note 38, 615, 620-21. The Portuguese decision of 19 March 1984 unanimously holds that the constitutional principle of the inviolability of human life embraces «intrauterine human life», even though it goes on to declare a limited disprotection of that life to be constitutional. 344 *Boletim do Ministerio da Justica* 197, 216, 230 (March, 1985). Thus all four other European national decisions appear to recognize actual rather than only potential human life in the unborn and to permit and even to require some measure of constitutional protection for that life, with the precise degree of protection left largely up to the legislature. See generally H. Reis, *Das Lebensrecht des Ungeborenen Kindes als Verfassungsproblem* (Tübingen: J. C. B. Mohr, 1984).

Professor Mary Ann Glendon's forthcoming work *Abortion and Divorce in Western Law* (Harvard University Press, 1987) [formerly entitled «Story and Language in American Law»] surveys the abortion laws of twenty Western nations and finds them all to be more sympathetic than *Roe* to fetal life

to recognize a constitutional right to abortion in any way as sweeping as that of *Roe v. Wade*. By and large, abortion has been left by them in the legislative domain.

Yet although the *Roe* majority does not consider the unborn child to be human and alive, it holds that the fetus does have some public value, not as life but as «potential life»⁵⁵. One might say that Europe considers the unborn child to be a *living human being*, albeit only a *potential legal person*, while the United States treats it as only a *potential life*. Nevertheless, there is some functional similarity to these two concepts, in that both recognize the fetus to be a value worthy of public concern, as a «legal good» and as a «state interest» respectively.

But let us not forget that the Spanish and German decisions did not rest with the affirmation that the fetus is a «legal good». Those opinions tied unborn life to the order of constitutional values, while *Roe* did not. Perhaps the U. S. court could have done otherwise. While our constitutional doctrine does not acknowledge a full-blown hierarchy of values apparent or hidden in our Constitution⁵⁶, the Supreme Court has gone beyond literal application of a set of unconnected rules. It has discerned the value of «privacy», for example, albeit linking this value to individual rights. Could our Court have looked at the various direct and indirect references to life in our fundamental law in order to give at least some attenuated *constitutional* status to what it calls «potential life»? Or would such a communitarian commitment to values be too alien to our focus on rights? In any event, in portions of Europe prenatal life has become something the State *must* respect, whereas in America it is only

55. *Roe v. Wade* 410 U. S. 113 calls the fetus, e. g., «potential life» (at 150, 154), «prenatal life» (at 151, 155), «potential human life» (at 159), «only the potentiality of life» (at 162), «fetal life» (at 163), and «the potentiality of human life» (at 162, 164) — the last referring to the period *after* viability. It also states «We need not resolve the difficult question of when life begins» (at 159), and «... a legitimate state interest need not stand or fall on the acceptance of the belief that life begins at conception or at some other point prior to live birth» (at 150). Putting all this together, one gathers that the Court does not know whether «life» (in the sense of «human life») exists prior to birth, but its potentiality does in the form of «prenatal» or «fetal» life.

56. But cf. Walter Murphy's attempt to construct such a system around the idea of «human dignity». «An Ordering of Constitutional Values», 53 *S. Cal. L. Rev.* 703, 744ff (1980). Cf. also the works of Profs. Lawrence Tribe and Frank Michelman.

something the State *may* respect, even in the last moments before birth⁵⁷.

Roe, then, treats the unborn as the object of no community commitment at the constitutional level, and as only the optional object of such a commitment at the legislative level. And even the latter option is sharply limited. The state interest in potential life without constitutional status fails entirely prior to viability, when confronted with a pregnant woman's right to privacy⁵⁸. And even in the last period before birth, where the state's interest is nominally «compelling»⁵⁹, it cannot compel much. Abortions destructive of the fetus must be permitted, even just before birth, if they promote what the Court calls «health»⁶⁰ but which it defines broadly to include virtually every significant reason a woman might have for a third trimester abortion⁶¹. Donald Kommers, in contrasting the American and German cases, has well described the outcome in outcome in our country:

«A woman is thus entitled to separate herself from the community while the community is rendered powerless to act in its common defense for the purpose of safeguarding shared values»⁶².

57. Even after viability, the fetus need be protected by the State only «[if] the State is interested in protecting fetal life» *Roe* at 163, and «if it chooses» *id.* at 164-65.

58. Prior to viability, abortion can be limited only in the interest of maternal health, not in the interest of fetal life. *Id.* at 163-64.

59. *Id.*

60. *Id.* at 165. The recent Supreme Court decision of *Thornburgh v. A. C. O. G.* 106 S. Ct. 2169, 2183, 90 L. Ed. 2d 779, 799 (1986) [interim editions] reemphasizes that even after viability, there cannot be «any 'trade-off' between the woman's health and additional percentage points of fetal survival».

61. *Roe*'s companion case, which should be «read together» with the former (according to *Roe* at 165), defines «health» to be related to «all factors... relevant to the well-being of the patient». *Doe v. Bolton*, 410 U. S. 179, 192 (1973). The *Thornburgh* Supreme Court opinion, *id.*, does not refer to this definition, but the court of appeals did so in the decision under review. That decision states «It is clear from the Supreme Court cases that 'health' is to be broadly defined. As the Court stated in *Doe v. Bolton*, the factors relating to health include those that are 'physical, emotional, psychological, familial, [as well as] the woman's age' [quoting from *Doe*]». The court of appeals goes on to say that a law which punished postviability abortions which were done to avoid the «potential psychological or emotional impact on the mother of the unborn child's survival» would be clearly unconstitutional. 737 F.2d 283, 299 (1984).

62. Kommers, «Abortion and Constitution», *supra* note 4 at 282.

The *Roe* result mandating elective abortion virtually throughout pregnancy could hardly be more at odds with the Spanish and German decisions forbidding elective abortion even in early pregnancy. And that results is likewise far from that reached by other European nations which, given the very great but non-personal public value of prenatal life, leave the matter of abortion almost entirely up to the legislature⁶³.

How much likelihood is there that U. S. law on abortion might someday approach the mainstream of Western jurisprudence? Perhaps quite a bit. Justice O'Connor's dissent in the 1983 *Akron* case indicates a desire to find a compelling state interest in protecting the fetus *throughout* pregnancy, though there is no evidence she would recognize constitutional personhood prior to birth⁶⁴. If she were to ground her position not merely on justices' sense of the weight of potentiality but on the fact and value of *actual* life or of the *constitutional* dignity even of potential life, then the two sides of the Atlantic would draw much nearer to each other.

3. Critique of Prenatal Life as a Legal Value

Individual rights for fetuses are not the only alternative to individual rights for pregnant women. Community concern for unborn human life provides another way to look at the abortion problem, a way which I personally find superior⁶⁵. If you and I recognize someone's rights, we are not bound by love to him or her, nor do we feel between ourselves a bond of fellowship. By contrast, if we jointly commit ourselves to caring for another, the basis is laid both for affection for the object of our concern

63. See *supra* note 54.

64. *City of Akron v. Akron Center for Reproductive Health*, 462 U. S. 416, 459-466 (1983). She reaffirmed her position, again in dissent, in *Thornburgh*, 106 S. Ct. 2169 at 2214, 90 L. Ed. 2d 779 at 836-37.

65. So I have argued in «A Critique of Abortion Rights», 3 (4) *democracy* 60 (fall, 1983), and by implication in my broad attack on rights entitled «A Critique of Fairness», 16 *Valparaiso Univ. L. Rev.* 459 (1982). See also my «Generosity: A Duty without a Right», in which I further explore the nature of rightless relations among persons. Paper presented to the Conference on Law and the Ordering of our Life Together (New York, April 1987). But cf. my reservations concerning the «value» approach to human dignity in the article cited *supra* at the end of my note 48.

and for community among ourselves. The Spanish and German attitudes toward the unborn are much closer than the official rightsbased positions of U. S. pro-lifers or pro-choicers to the actual feelings of parents for very young children. Parents feel infants neither to be their private property nor to be individuals negotiating their rights at arms' length. Instead and for many years, a baby is the shared value of a common life.

Yet this new perspective does not answer the question of how great a weight the child has before and after birth, in ordinary experience or in the law. And here I submit there is an antinomy for which there may well be no solution.

On the one hand, in early pregnancy, often the fetus is not sensed to be present as a separate entity, and abortion is not felt to be a kind of homicide⁶⁶. On the other hand, a newborn infant is considered a human being, and so is felt to possess what the German decision calls «inherent» («*selbständigen*») worth⁶⁷. That is, the value of the newborn is perceived to be inherent in its being, and not in the eyes of the parental or juridical beholders.

How can these two perceptions be squared with each other? Obviously, by the assumption that the neonate is a different being from the preborn fetus. The change in being could be thought to come either from a qualitative biological leap or from the infusion of a spiritual soul, or from both.

Our modern quandary arises because we can no longer publicly affirm either basis for this assumption of discontinuity in being⁶⁸. Human life, according to modern science, is a continuum and, as the German court notes, those traits (e. g. self-consciousness) for which many especially value our species do not arise until quite some time after birth. Neither can religion

66. Quintano Ripollés, *supra* note 2 at 503, asserts that this is generally the case, at least as of 1962 (the year of that edition of his treatise).

67. [1975] 39 BVerfGE 1, 67; Jonas and Gorby, *supra* note 3 at 662.

68. Justice Stevens' recent «pro-choice» concurrence in the *Thornburgh* case, 106 S. Ct. 2169 at 2188, 90 L. Ed. 2d 779 at 805, demonstrates both the importance and the futility of such a claim of discontinuity. He there asserts that the permissibility of abortion hinges upon there being «a fundamental and wellrecognized difference between a fetus and a human being» but fails even to hint at any grounds for such a distinction.

be the ground of a presumed change of being, in a pluralistic or secular society.

Thus the belief in and commitment to the inherent value of life *after* birth requires in our day (but did not require in that of our great grandparents) significant protection for the child *before* birth⁶⁹ — because our law can no longer cogently proclaim that there is a difference in kind between the born and the unborn. To put the matter another way, if we as a legislating community permit relatively casual abortion we have rendered non-credible our commitment to the inherent value of every human being even after birth.

Yet at the same time, as private individuals involved with early pregnancies, we may continue not to *feel* the presence of another human life. Consequently, abortion may seem morally permissible, and our main concern with the law may be not getting caught.

There is one obvious way to cope with such dissonance: strong nominal legal protection for prenatal life coupled with large numbers of unlawful abortions⁷⁰. Other solutions, which grant the fetus some kind of intermediate or compromise status are trying to mix oil and water. They are in harmony neither with the intuition that the newborn's value is great and inherent nor with the intuition that early abortion concerns the pregnant woman alone.

A brilliant and influential article by Arroyo Zapatero⁷¹,

69. And indeed throughout pregnancy, according to the argument of the German court, *supra* note 45.

70. The model of nominal illegality can be seen as a version of «excuse» reasoning on abortion, which is discussed at greater length *infra* under the heading «The Doctrine of 'Too Much to Demand'». Guido Calabresi's works emphasize the frequent usefulness of a difference between the law as ideal and the law in practice, e. g. *Ideals, Beliefs, Attitudes, and the Law* 88 (Syracuse University Press, 1985) where he contrasts the official prohibition of euthanasia with actual jury practice.

71. Arroyo Zapatero, *supra* note 35. The abortion decision of the Audiencia de Bilbao of 24 March 1982 treats fetal life as a cultural value of the community. According to Santiago Mir Puig («Aborto, estado de necesidad y Constitución», 1982 *Revista Jurídica de Cataluña* 1043, 1048, n. 1), this foundations for fetal protection entered Spain with Arroyo Zapatero's article and was then picked up by the Bilbao court. (But cf. the very similar argument of F. Bueno Arius, published in «Una nota sobre el aborto», *Boletín de Información del Ministerio de Justicia*, num. 1.116, 15 December 1977). The arti-

which appeared in Spain in 1980, attempts to cut this Gordian Knot. There he proposes that concern for unborn life, wherever and to the extent it exists, be treated as a kind of cultural value of the community⁷². Such life would receive protection not for its own sake, but for the sake of the community which cares about it — in a manner reminiscent of Lord Devlin's prohibition of homosexual activity in order to promote community moral solidarity⁷³, and of the common suggestion that we prevent cruelty to animals not to protect them but to protect human society's sensibilities. In very early pregnancy, where such felt concern is minimal at best and important maternal rights are at stake, few if any prohibitions on abortion would be appropriate⁷⁴. Under Arroyo's approach, we need not seek to harmonize pre- and post- natal intuitions about life, because only those intuitions (and not life itself) are being valued.

Arroyo's solution fails because we as legislators, as scholars, and as judges are not ourselves outside the community. We are not simply concerned with promoting some ethnic solidarity or sensibility which we do not share. We are members of the community which values human life, and as such are concerned with *truly* protecting that which we value — not with affirming the value of our irrational valuing. Someone from Mars might like us enough to want to preserve us in all our contradictory splendor, but we ourselves feel compelled by honesty to find ways to resolve rather than to uphold our contradictions.

Our belief in inherent postnatal human worth cannot logically coexist with lawful elective or nearly elective abortion, but neither can logic alone induce women in distress to avoid abortion. Perhaps that belief will disappear someday, or be pushed back to some point where a qualitative change (rather than only a change in location, as at birth) takes place in young

cle was a focus of attack in the anti-abortion publication *En defensa de la vida*, in the articles by Federico Trillo-Figueroa and by Fernando Díez-Moreno, *supra* note 37. The latter attack on Arroyo Zapatero's thesis (though without the mention of his name) is repeated almost verbatim in the initial petitioners' brief of 2 December 1983 at 38ff.

72. *Supra* note 35 at 209ff.

73. See generally Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965).

74. *Supra* note 35 at 217ff.

human beings —say at self— consciousness, or at puberty. In that case, we could hold to the inherent value of the latter new kind of being but refuse to push that value forward to infantile or prenatal stages of life. Or technical developments such as ultrasound may in effect create windows in the womb, so that the intuition of inherent value can occur and have a moral effect on pregnant women even in the early months of pregnancy. But unless we evolve in one of these two ways, I cannot foresee a wholly satisfactory solutions to the law's abortion dilemma.

4. *The Court and the Social State*

This commentary is presently concerned to understand the contrasting degrees of public value recognized in prenatal life in Spain, Germany, and the United States. We have analyzed and critiqued the various attempts to conceptualize the fetus as something other than a constitutional person or private property. We now turn to another important way in which Spain and Germany are more communitarian than the U.S. in their treatment of fetal life as a constitutional value.

The classical conception of fundamental constitutional rights is that of rights against the State. A right to free speech would mean, for example, that the State cannot punish an individual for the content of what he or she has said. But that right alone would not, say, give an employee a right not to be punished for speaking by an employer. A constitutional right which were construed to protect an employee in this circumstance, possibly via a civil damage action, would have *Drittwirkung*, efficacy against third parties.

The right to free speech might, however, be construed still more broadly. It, and other related constitutional provisions, could be found to be simply specifications of a deeper affirmative vision of the good society. In this hypothetical case, that value could be taken to be free and open discussion. From that value, new specific rights could be derived, e. g. the right to read as well as to speak whatever one wished, with or without *Drittwirkung*.

Even more, a court could hold that neither the old nor the

new rights *qua* rules are what is essential. What really matters is that there be in the end an effective promotion of free and open discussion, that the whole community in all its legislation and activity work together for the sake of that shared ultimate value. So, for example, a state might be given the duty to subsidize small presses, or criminally to penalize private censorship, or to teach openmindedness, or otherwise to act affirmatively in ways which a constitutional court thought would be effective in promoting free and open discussion.

This latter communitarian visio is closely related in the Spanish decision to the constitutional demand for a «Social State»⁷⁵. Although the same ideas are clearly at work in the German court's insistence that the State affirmatively protect prenatal life, the Spanish opinion is noteworthy for the conciseness of its vision and the clarity of its «social» label and linkage. Legal Foundation 4 reads in part:

«It is also pertinent to make... some references to the scope, meaning and function of fundamental rights in the constitutionalism of our day inspired by the social State of Law... [F]undamental rights do not include only subjective defense rights of individuals against the State... but also positive duties on the part of the latter (see in this respect arts. 9.2, 17.4, 18.1 and 20.3 and 27 of the Constitution). But, in addition, fundamental rights... are the legal expression of a system of values that, by decision of the framers, has to inform the whole legal and political organization... Consequently, from the obligation of all powers to submit to the Constitution, one deduces not only the negative obligation of the State not to injure the individual or institutional sphere protected by these fundamental rights, but also the positive obligation to contribute to the effectiveness of such rights, and of the values that they represent, even when a subjective claim does not exist...»⁷⁶

75. Article 1.1. reads in part «Spain is constituted as a social and democratic State of Law...» («España se constituye en un Estado social y democrático de Derecho...») Other articles further this demand. Article 9.2 emphasizes *effectiveness* as a constitutional requirement.

76. The Spanish Legal Foundation 4, as found in *BJC*, *supra* note 5, at 532, reads in full:

4. Es también pertinente hacer, con carácter previo, algunas referencias al ámbito, significación y función de los derechos fundamentales en el constitucionalismo de nuestro tiempo inspirado en el Estado social de Derecho. En este sentido, la doctrina ha puesto de manifiesto —en coherencia con los contenidos y estructuras de los ordenamientos positivos— que los derechos fundamentales

Such a conception is socialist rather than individualist because in it the State must take responsibility for the societal results of its laws, rather than simply setting down minimum rules of conduct and letting the strong work within those rules to exploit the weak for the sake of private interests.

It should not be forgotten that the issue in Spain was whether or not abortion *must* be penalized. Affirming the high constitutional value of unborn life, indeed even affirming fetal personhood, might not be in itself sufficient to do more than forbid State-sponsored abortions and, of course, allow (rather than than *require*) anti-abortion legislation⁷⁷. The effective protection

no incluyen solamente derechos subjetivos de defensa de los individuos frente al Estado, y garantías institucionales, sino también deberes positivos por parte de éste (*vide* al respecto arts. 9.2, 17.4, 18.1 y 4, 20.3 y 27 de la Constitución). Pero, además, los derechos fundamentales son los componentes estructurales básicos, tanto del conjunto del orden jurídico objetivo como de cada una de las ramas que lo integran, en razón de que son la expresión jurídica de un sistema de valores que, por decisión del constituyente, ha de informar el conjunto de la organización jurídica y política; son, en fin, como dice el artículo 10 de la Constitución, el fundamento del orden jurídico y de la paz social. De la significación y finalidades de estos derechos dentro del orden constitucional se desprende que la garantía de su vigencia no puede limitarse a la posibilidad del ejercicio de pretensiones por parte de los individuos, sino que ha de ser asumida también por el Estado. Por consiguiente, de la obligación del sometimiento de todos los poderes a la Constitución no solamente se deduce la obligación negativa del Estado de no lesionar la esfera individual o institucional protegida por los derechos fundamentales, sino también de tales derechos, y de los valores que representan, aún cuando no exista una pretensión subjetiva por parte del ciudadano. Ello obliga especialmente al legislador, quien recibe de los derechos fundamentales los impulsos y líneas directivas, obligación que adquiere especial relevancia allí donde un derecho o valor fundamental quedaría vacío de no establecerse los supuestos para su defensa.

Despite the tenor of the Spanish opinion, and of this commentary, it should be noted that this new social vision is not universally shared in Europe. For example, the Austrian abortion decision rejects any duty of affirmative state protection of the unborn, reasoning that:

«the catalogue of fundamental rights of the National Basic Law of 21 December 1867, on the general rights of citizens, which according to Article 149 of the Constitution, has the force of a constitutional law, is imbued —as is understandable from its period of production— with the classical liberal idea of guaranteeing the individual protection against act of force by the state...

Nr. 7400-Erk. v. 11 Oktober 1974, G 8/74, 221, 224-25. Translation by Cappelletti and Cohen, *supra* note 38, at 617.

77. The Austrian decision, *id.*, continues:

[A] right to life could, according to the provisions contained in the National Basic Law for protecting the rights it incorporates, only have the effect of protecting the individual against attacks on his life by the state... If, however, the «constitutional law not based on international treaties» does not contain a right

this constitutional value had to become an affirmative duty of the State, and criminal sanctions had to be seen as an empirical fact to be relatively effective, in order for the constitutional challenge to the Spanish government's partial depenalization of abortion to succeed.

The anti-abortion briefs in this case did not neglect to promote the Social State doctrine almost as prominently as the value of unborn life⁷⁸. Somewhat amusingly, the briefs of the socialist government argued instead for the classical individualist idea of constitutional rights, in which such rights are only limits to state action and do not require coercive penal acts of the State⁷⁹.

Despite the latter «socialist» arguments, the Court affirmed a strong Social State doctrine in the abortion case and applied it to the fundamental constitutional value «embodied» in unborn life (L. F. 5), concluding:

«On the basis of the considerations brought forward in Legal Foundation 4, [the] protection which the Constitution confers on the one to be born implies for the State two obligations of general character: that of abstaining from interrupting or obstructing the natural process of gestation and that of establishing a legal system for the defense of life which involves an effective protection of the same and that, given the fundamental character of life, includes also, as an ultimate guarantee, penal norms». (L. F. 7)⁸⁰.

to life giving protection against other than state interference, then it is unnecessary to go into the arguments of the Salzburg provincial government as to whether such a right also applies to the unborn. For if the right does not exist, the question who is entitled to it does not arise.

78. Brief of 2 December 1983, at 9, 16-18. Violation of article 1.1, the Social State provision, is the second ground of unconstitutionality brought forward by petitioners, just after their discussion of article 15, the right to life provision. At page 17 they wisely appeal to the authority of the works of García Pelayo (now president of the Court) on the nature of the Social State. Cf., e. g., his *Las transformaciones del Estado contemporáneo* (Madrid: Alianza, 1977).

79. *BJC*, *supra* note 5, at 526. The government brief appeals *inter alia* to the clear rejection of the social idea of rights by the Austrian constitutional court, *supra* notes 76 and 77, and to the allegedly implicit rejection by the U. S. Supreme Court and the Italian Constitutional Court, at least with regard to any supposed positive duty to punish. (But cf., in regard to Italy, note 38 *supra*). The German decision is strongly criticized.

80. The Spanish here, as found in *BJC*, *id.* at 533, reads as follows:
Partiendo de las consideraciones efectuadas en el FJ-4, esta protección que

Notice the *finesse* required by the constitutional value of life. While abortions for certain reasons may be permitted, under the curiously individualist rationale discussed below, other abortions must be criminally punished. But *ex post facto* punishment is not enough, as discussed above in the «Chronology and Summary of the Decision». In order to give adequate protection to unborn life, the penal laws must also require *ex ante* that a specialist physician certify that a particular reason exists before the abortion may take place.

The dissents in Spain, as one would expect, object to the Court acting as a legislature. But none argues clearly that it is the Court's expansive concept of the Social State which is at fault. Most object to the Court announcing in advance the kind of statutory protections it wants, rather than waiting to strike or uphold whatever may be the legislative response to a finding of unconstitutionality. They also reject the alleged constitutional requirement to use penal sanctions here and to perfect the protection given the fetus. The Court's attempt to discover and apply binding principles or abstract values latent in constitutional rules comes in for some criticism, but not the use of values to spell out affirmative duties of the State rather than only defense rights against the State⁸¹.

The opinions of the German majority and dissent yield a fuller understanding of the interaction of the value of prenatal life and the ideas underlying the Social State. The Court there not only orders the government to punish elective abortion, in order to fulfill its affirmative duty effectively to protect the one to be born, but also requires that the State *teach* life's value in

la Constitución dispensa al *nasciturus* implica para el Estado con carácter general dos obligaciones: la de abstenerse de interrumpir o de obstaculizar el proceso natural de gestación, y la de establecer un sistema legal para la defensa de la vida que suponga una protección efectiva de la misma y que, dado el carácter fundamental de la vida, incluya también, como última garantía, las normas penales.

81. Francisco Rubio Llorente, in dissent, comes closest to objecting to a Social State based on values when he argues that «the interpreter of the Constitution cannot abstract from [its] precepts the value or values which... such precepts 'embody', in order to deduce from them... obligations of the legislator which are unsupported in any concrete constitutional text... The values that inspire a precept may serve... [only] for the interpretation of that precept...» *BJC*, *supra* note 5, at 541.

legislation and in individual counseling⁸². This pervasive emphasis on the pedagogical function of law is the most strikingly communitarian aspect of the German decision, while it is strangely absent from the Spanish. Surely public education is the ultimate difference between a communitarian law based on values and an individualist law based on rules. No matter how many constitutional or legislative rules are derived from public values, a community of shared values does not arise except to the extent that individuals come to aim at those values themselves rather than only at rule compliance. Otherwise even the most elaborate labyrinth of rules is only a complicated game played for the sake of the furtherance of private interests.

The German dissent well recognizes the difficulties inherent in court enforcement of constitutional values:

As defense rights the fundamental rights have a comparatively clear recognizable content; in their interpretation and application, the judicial opinions have developed practicable, the judicial opinions have developed practicable, generally recognized criteria for the control of state encroachments — for example, the principle of proportionality. On the other hand, it is regularly a most complex question, *how a value decision is to be realized through affirmative measures of the legislature*. The necessarily generally held value decisions can be perhaps characterized as constitutional mandates which, to be sure, are assigned to point the direction for all state dealings but are directed necessarily toward a transposition of binding regulations. Based upon the determination of the actual circumstances, of the concrete setting of goals and their priority and of the suitability of conceivable means and ways, very different solutions are possible. The decision, which frequently presupposes compromises and takes place in the course of trial and error, belongs, according to the principle of division of powers and to the democratic principle, to the responsibility of the legislature directly legitimized by the people⁸³.

The dissent's solutions seems, however, largely to restate rather than to solve the problems it has raised. It urges the Court to «confront the legislature only when the latter has com-

82. See citations *supra* note 49. Contrast *Thornburgh*, 106 S. Ct. 2169 at 2178-81, 90 L. Ed. 2d 779 at 793-96, where counseling discouraging abortion is forbidden to the State.

83. [1975] 39 BVerfGE 1, 71-72; Jonas and Gorby, *supra* note 3 at 665-66.

pletely disregarded a value decision or when the nature and manner of its realization is obviously faulty»⁸⁴.

This last language reminds one a bit of the U. S. Supreme Court's «rational basis» and «state interest» tests. But note this important difference: Except for a very limited number of impermissible goals (such as the promotion of racism), U. S. legislation may aim at any state interest. Or, where equal protection of fundamental rights are involved, it may aim at any «compelling» state interest. There is not, except very broadly and by negative implication, an order of constitutional values which government must affirmatively promote. Indeed, our states may sometimes aim at values *opposite* to those underlying the Constitution as interpreted by the Court.

A glance at the U. S. abortion decisions of the last ten years will make clear the contrast between American and European doctrine here. The original *Roe* decision proclaimed the value of private choice with regard to abortion, and saw in that value a prohibition on state action interfering with abortion. Yet the government is under no obligation to use its funds⁸⁵ or its hospitals⁸⁶ neutrally to promote choice. Instead, it may favor childbirth over abortion, even where its motives are the very value philosophies condemned by *Roe* as a basis for penalizing abortion⁸⁷. In later extrapolating upon this conclusion, the U. S. Court specifically appealed to the classic constitutionalism of defense rights only rather than the new communitarian emphasis on rights to affirmative state support⁸⁸. In that later case, the Court ruled that even health abortions need not be funded by the state, despite the fact that in *Roe* maternal health broadly construed had been held to be constitutionally more important than fetal even *after* viability⁸⁹. The value decisions of our Constitution do not in themselves bind legislatures, and *a fortiori* need not be taught to citizens.

All this is not to say that there would be no possible way way for an anti-abortion United States Supreme Court to

84. [1975] 39 BVerfGE 1, 73; Jonas and Gorby, *id.* at 666.

85. *Maher v. Roe* 432 U. S. 464, 474 (1977).

86. *Poelker v. Doe* 432 U. S. 519, 521 (1977).

87. *Id.*

88. *Harris v. McRae* 448 U. S. 297, 317-318 (1980).

89. *Id.*, at 316, 325-326.

require criminal laws against abortion. The Court could try to find some state action (e. g. financial) involved in depenalized private abortions, in order to forbid them. Or it could find state action in the enforcement of contracts related to abortion or of laws preventing sit-ins at abortion clinics, which would *de facto* make abortion unavailable. Or it could argue that equal protection, even if it were attenuated prior to birth, mandates some measure of protection for the unborn as long as the killing of neonates remains illegal. (Or it could go the other way and insist that infanticide be unpunished as long as abortion is unpunished). But it could not, without a deep ideological shift, appeal to the social duty of the government to promote the constitutional value of respect for life.

5. Critique of the Court and the Social State

Though I am sympathetic both to socialism and to the protection of unborn life, I cannot agree with the approach taken by the Spanish and German high courts.

My problem is not with the idea of an order of principles implicit in legal rules and usable in deriving new rules. Such analogical reasoning, however indeterminate it may be, seems to me a necessary part of the honest and thoughtful evolution of public order. It accounts for the greatest achievements both of Anglo-American common law and of European legal science. Nor do I object to the affirmative quality of these values. I think life together is much more meaningful if we hold some, though not all, aims in common. I would like to think that there are common goods, such as life, which many of our laws pursue and which are and ought to be taught to us all.

My problem is with the institution of judicial review. Even here I am less concerned where only defense rights are involved. As long as a high court can play only a negative role, it must at least work very hard to achieve institutional dominance. But when judicial review is combined with the vague values and affirmative duties of the Social State, then the power of judges may be overextended.

The rule of law (*Estado de Derecho*) itself may not survive,

as the Spanish government argued in its brief⁹⁰. The whole problem, in my view, lies in the word «effective» invoked both in Spain and in Germany. In order for values to be «effectively» promoted, empirical results rather than only rules must be scrutinized. Rules at the constitutional and at the legislative levels have to be changed whenever necessary in order to achieve results, even *ex post facto* in particular cases. That is how common barn builders would handle the rules for hammer use. It may even be unconstitutional *not* to change the rules whenever they produce results contrary to basic values⁹¹.

While I wish, with some trepidation, to affirm such ruleless community (or, better, communities) as an ideal to be pursued, I am deeply concerned about placing virtually unlimited power over the development and content of such community in the potentially arbitrary discretion of any very small number of persons.

Judicial review and the Social State should not be combined. Perhaps judicial review should not exist even for defense rights. Such review implies a hostility between the legislating community and the individual which ideally should be overcome by education and by more participatory forms of democracy, rather than accommodated. But in any event judicial review should not extend to the positive and programmatic social duties stated or implied in a constitution. Those principles should be the starting points for public reasoning by all citizens, not the privileged prerogative of a tiny group of jurists⁹².

90. *BJC*, *supra* note 5, at 527-528.

91. Rule utilitarianism has no adequate response here, for it contains an antinomy. Even if we need rigid rules in order to preserve our values, why should those rules be followed when they seem certain to produce disvalue? A legal system wholly concerned about consequences could not avoid constantly rethinking its rules. It might avoid anarchy by disabling individual citizens or judges from ignoring rules, but it would have to make centralized review available in every case where one could plausibly argue that a revised rule would more efficiently promote the values at stake. For an excellent review of the proposed solutions to this general moral and legal quandary, see Lawrence Alexander, «Pursuing the Good - Indirectly», 95 *Ethics* 315 (January, 1985).

92. I do not think one should belittle a judicially unenforced constitutional social duty or right as «merely a platform plank elevated to constitutional status». Cfr. the discussion of «programmatic» rather than «enforceable» constitutional provisions in Italy in Mauro Cappelletti, John Henry Merryman, and

6. *The Doctrine of «Too Much to Demand»*

Life is a «superior», «fundamental», and «central» constitutional value in Spain, and the fetus «embodies» this value. The government has an affirmative duty to protect unborn life by means of criminal penalties for its destruction. Yet the high court there goes on to permit abortion in all the circumstances listed in the bill under review: grave danger to maternal life or health, rape, and likelihood of severe disability in the child. How does the Court make such a turnaround?

One might have expected the Court, in line with its communitarian perspective elsewhere, to look to the common good and to argue that the protection of unborn life is not, or does not always result in, the highest constitutional value. But in nowhere asserts that other values are more important than fetal life. It mentions two theories by which the bill in question may be justified: legislative choice between conflicting values and the doctrine of non-demandability (L. F. 10). The latter, however, is the only clear referent in most of the situations considered. The Court appeals primarily to the idea that a continuation of pregnancy in such circumstances is just too much for the criminal law to demand of an individual. Even if such abortions do more harm than good to the values of the community, the State need not punish them because there is a limit to what individuals must sacrifice for constitutional values.

The doctrine of non-demandability in Spain has its origin in German legal thought, where it was originally conceived as an extrastatutory defense to crime from an individualist perspec-

Joseph Perillo, *The Italian Legal System* 58 (Stanford University Press, 1967). From the deliberations of juries to those of supreme courts we often rely upon nonenforceable good faith implementation of legally binding principles. I do not see why elected representatives should enjoy less confidence.

The Spanish constitution itself distinguishes between «rights» and «duties» (articles 14-38) and «guiding principles of social and economic politics» (articles 39-52), making the former «binding» (articles 53.1 and 53.2) and the latter only «informing» (article 53.3). Perhaps values (such as «life») latent in these rights and duties should be considered mere «guiding principles», though my own view is more that they should be considered binding in conscience upon the legislature but not enforceable by courts (at least not against statutes).

tive⁹³. It is felt in the Spanish Penal Code in various ways, particularly in Article 8, to which the Court specifically refers in its opinion⁹⁴. That article permits the defense of necessity when an otherwise illegal act is done in order to avoid a greater *or an equal* harm. The doctrine of nondemandability is thought by the dominant opinion in Spain to account for the latter situation⁹⁵: It is just too much to demand of a person that he or she sacrifice a personal interest simply for the sake of someone else's merely equal interest. A concrete example of the influence of this doctrine is found in Article 18 of the Penal Code, which exempts close family members from punishment for harboring a fugitive. Again, one might say that the penal law just cannot demand that a fugitive's spouse or parent refuse to take him or her in, despite the general prohibition of such an act⁹⁶.

93. One of the earliest uses of this concept in criminal law occurred in the famous 1897 *Leinenfanger* decision of the *Reichsgericht*. There the Court went beyond the penal code to reason that although the omission in question «considering the common good... could be demanded of the agent», one must also ask whether it could be demanded of the accused under the circumstances. 30 *Entscheidungen des Reichsgerichts in Strafsachen*, 25-28, as quoted in Jiménez de Asúa, *supra* note 23, at 935. Early reaction attacked this doctrine for its «individualist philosophy». Rodríguez Devesa, *supra* note 25, *Derecho Penal Español*, Parte General, 611 (Madrid: 1979).

94. Article 8 of the Spanish Penal Code exempts various persons from criminal responsibility, including the insane and infants. Section 4 adds an exemption for «one who acts in defense of a person or rights, his own or alien (*propios o ajenos*)» as long as there has been illegitimate aggression, rational choice of means, and lack of provocation. The key section 7 exempts «one who, impelled by a state of necessity, in order to avoid an evil of his own or one alien to him (*mal propio o ajeno*)», injures a legal good (*bien jurídico*) of another person...,» provided that the evil caused is not greater than that which he seeks to avoid, that he has not intentionally provoked the situation of necessity, and that he does not have a special obligation to sacrifice himself. Section 9 covers those who act under «irresistible force» and section 10 those who act out of insuperable fear «of an equal or greater evil». Article 8 thus incorporates ideas both of «excuse» (what might be called «necessity in the order of events») and of «justification» (what might be called «necessity in the order of ideas»).

Luis Jiménez de Asúa, 7 *Tratado de Derecho Penal*, second edition, 196 (Buenos Aires: Losada, 1962, 1977) considers fear and necessity under conflict of equal goods to be excuses originating in the non-demandability idea. He adds other examples from the Spanish Penal Code, including the harboring of a fugitive by near relations (art. 18) and the omission of non-demandable aid (art. 489). Some Spanish opinion also supports non-demandability as a judicial excuse existing outside the Penal Code, e. g. Ricardo de Angel Yáñez *et al.*, *Ley del aborto* 100-01 (Bilbao: Universidad de Deusto, 1985).

95. Rodríguez Devesa, *supra* note 93, at 556, 609-19.

96. The rationale for this defense is disputed, but the dominant opinion

As will become evident later, it is very important to understand whether this doctrine is one of justification or of excuse. That is, does the personal burden under which the defendant labors serve to make an otherwise wrong act right, or does it only mean that the defendant is not to be blamed (or even simply not to be punished) for the still wrongful act?⁹⁷

The dominant theory⁹⁸ in Spain appears to treat the non-

today appears to be that non-demandability is its basis. See Jiménez de Asúa, *supra* note 23, at 1014, and Rodríguez Devesa, *supra* note 93, at 618-19.

97. Note that the question posed here is one of the *normative appeal* of the non-demandability doctrine, not of the technical legal category used by the legislature to effectuate the doctrine. Thus, for example, if we as legislators feel an ordinarily criminal act (or omission) to be justified because to avoid it would be to incur a non-demandable sacrifice, we may still choose to effectuate our conclusion either by promulgating a new justificatory *defense* of sacrifice avoidance or by redefining the original criminal *offense* to include only non-sacrificial acts (or omissions). Only the former would be explicitly called a «justification» in subsequent legal theory, but the latter solution would have responded equally to our normative sense that previously criminalized conduct was justified.

Similarly, a normative sense that someone who commits a wrongful act (or omission) in order to avoid a sacrifice is excused could result statutorily either in a defense like duress which claims a kind of inability to act otherwise in a certain situation, or in a definition of persons in such a situation to be acting insanely or involuntarily, or in a kind of *ex ante* pardon of anyone who commits a crime in such a situation. Or it even could result in a redefinition of the original criminal offense to exclude those who act under certain pressures, though the latter might be read to put a stamp of approval on conduct which is merely excused. But none of these technical solutions would detract from our original normative judgement that intrinsically wrongful conduct should here be excused.

There are, of course, reasons other than justification or excuse for not punishing some acts — administrative convenience or diplomatic immunity, for example. But as I read the non-demandability doctrine, it has an ethical flavor not fully captured by other commonly accepted reasons for non-punishment, nor would analysis of those reasons significantly change the conclusions later reached in this article. Therefore, subsequent discussion seeks only to decide whether non-demandability is more appropriately viewed as a matter of justification or as a matter of excuse.

For the many technical categories and rationales for exemption from punishment available in Spanish and German law, see e. g. Jiménez de Asúa, *supra* note 94 at 193-97, and Walter Gropp, *Der straflose Schwangerschaftsabbruch* 138-39, 192 (Tuebingen: J. C. B. Mohr, 1981).

98. Both Jiménez de Asúa, *supra* note 23 at 932ff, and Rodríguez Devesa, *supra* note 93 at 609ff, treat non-demandability under the more general category of exculpation or non-blameworthiness, i. e. as a kind of excuse rather than of justification, and assert this to be the dominant view. Nevertheless, the former mentions some penalists who consider non-demandability to be a justification, at 967-69, and the latter seems to use the non-demandability notion as

demandability doctrine as one of excuse. Under such an approach, no one is justified in preferring his or her own values, or own spouse, to the values established by the community, but nevertheless such antisocial acts are not punished where the subject in some sense could not act otherwise. An act which is wrongful but nonpreventable, or at least not preventable by means of the criminal law, is not to be punished. Note that if a mere excuse for an act is involved, legitimate defense against the act remains possible⁹⁹, and there are a number of other significant legal consequences to be explored later.

On the other hand, there are some Spanish doctrinal considerations which point to calling the non-demandability idea a justification¹⁰⁰. And it can be argued that where no one, or no one except a hero, is in some sense able to comply with a certain legal command, then acts or omissions in violation of that norm lose their wrongful character even though they do not avoid more harm than they cause. Furthermore, there are places in Spanish law where a theory of non-demandability seems to have resulted in a full statutory justification, in the sense of a legal certification of the non-wrongfulness of the conduct in question. The penal law requirements to stop crime (Art. 338 bis), to rescue (Art. 489 bis), and to give assistance (Art. 586 (2)) apply only where they can be observed without risk to the actor or to a third party¹⁰¹. Note that the omission of risky acts is here justified, at least in the special sense that it is excluded

a general concept containing all justifications and exculpations, as well as a specific concept involving non-blameworthiness, at 609-11.

99. Rodríguez Devesa, *supra* note 93, at 557. Jiménez de Asúa, *supra* note 94, at 201-202.

100. See the discussion *supra* note 98. Note that the mere fact that an objective balancing of values may be involved is *not* necessarily a consideration leading us to classify non-demandability as justification. As George Fletcher has pointed out, *Rethinking Criminal Law* 804 (Boston: Little, Brown, 1978), we expect people to be *able* to make greater sacrifices when more is at stake. We may excuse someone who breaks another's leg under the threat of losing his own, but not someone who blows up a city under the same threat.

101. Rodríguez Devesa, *supra* note 93 at 611, lists these code provisions as examples of the impact of nondemandability upon the definition of offenses («tipos»). Similarly, Jiménez de Asúa classifies rescue in the face of personal risk as an example of what the law considers nondemandable. *Supra* note 23 at 1019-20.

from the definition (*tipo*) of these crimes¹⁰², although Article 8 would not even excuse it — for the actor is refusing to risk a slight personal interest at the cost of greater harm to others¹⁰³. This contradiction can perhaps be overcome if we cannot demand and expect public spirited actions to the degree to which we exact public spirited omissions.

Legislators supporting the enactment of the new abortion statute appealed frequently to the non-demandability notion — often as an excuse¹⁰⁴. Likewise the government brief in the constitutional case is written as though the issue of nondemandability is one of whether or not a woman having an abortion

102. I am here treating non-definition as equivalent to justification. Cf. *supra* note 97. This equivalence need not always obtain. For example, a revolutionary government may simply not have gotten around to defining all the conduct of which it disapproves, so that non-definition of a particular act as criminal implies no judgment that the act is legally acceptable. But where, as in these rescue provisions, the legislature has clearly considered the precise limits of liability it wishes to impose, and has exempted certain conduct (rather than persons), then I do not perceive either an intended or an objective substantive difference between the technique of non-definition and that of justification by means of a special defense — though there may be important procedural, burden of proof, and mistake-related differences in a particular legal system. If anything, the legislative decision to exclude a certain act from the definition of a crime would seem to give that act more official approval than if it had remained *prima facie* criminal but justified. Therefore, conscious non-definition would fall ordinarily on the justification side of our bipolar justification vs. excuse question. Cf. Fletcher, *supra* note 100, at 552-79. But note that Jiménez de Asúa, *supra* note 23 at 1019-20 and note 93 at 196, writes as though the non-definition of failure to rescue (in the face of risk) as a crime were based on the notion that such a refusal of aid is *excused*, with the nearly explicit consequence that *all* omissions of rescue remain somehow objectively unlawful. *Id.* at 201. If he is correct, then the case for considering non-punished abortion likewise to be merely excused becomes even stronger. See this article *infra* pp. 40-45.

103. Article 8 excuses an otherwise illegal act only if the benefit of such an act is equal to its cost. *Supra* note 94.

104. The socialist Minister of Justice, Ledesma Bartret, argued on 25 February 1983 that the nondemandability of continued pregnancy in certain circumstances is a cause of excuse («*inculpabilidad*») for abortion. *Supra* note 6 at 17. On 25 May that year, Saenz Cosculluela, speaking «in the name of the Socialist Group», argued that the abortion bill does not «legalize». Indeed, it expresses a «generic disapprobation» of abortion, while establishing an «excuse» («*excusa*») for therapeutic abortion, and refuses to blame («*inculpar*») abortions occurring where further pregnancy is not demandable. *Diario de sesiones del Congreso de los Diputados*, II Legislatura, Num. 40, at 1850. Again on 4 October 1983, the PSOE member Sotillo Martí argued, in favor of nonpunishment of some abortions, that where other conduct is not demandable, an act lacks blameworthiness, i. e. is excused. *Id.*, Num. 61 at 2888.

should be simply exculpated (i. e. excused) in the specified situations¹⁰⁵. The only dissents which mention the matter in some detail link the idea of non-demandability to that of legal excuse¹⁰⁶.

In some of the above arguments, however, there is an undercurrent of justificatory reasoning¹⁰⁷. And on at least one occasion, spokespersons, for the proposed legislation clearly insisted that the abortions at issue were to be treated as lawful, not simply unblameworthy¹⁰⁸.

The Constitutional Court's own opinion, unfortunately, is far from clear. Neither in its general discussion of non-demandability (L. F. 9) nor in its specific applications of that idea (L. F. 11) does the Court label the notion «excuse» or «justification». The opinion does not, however, explicitly treat *any* abortion as justified in the sense that it is the best solution, the one which maximizes net resultant value. Except in the Court's treatment of abortion to save the mother's life and perhaps to avoid grave danger to her health (where it may possibly be treating the child as an aggressor against whom the mother has a right of self-defense (L. F. 11 (a))), the Court looks overtly to the idea (and only to the idea) that some pregnancy continuations are too much to demand of a woman. In considering rape pregnancies, the Court lists the constitutionally recognized

105. *BJC*, *supra* note 5, at 529-30.

106. Francisco Tomás y Valiente insists that the abortion bill contains neither a legalization nor a depenalization of abortion, but simply a declaration of nonpunishment in certain situations, while maintaining intact the definition of the crime («manteniendo intacto el tipo delictivo»). A judge, not a physician, thus should decide when those situational requirements have been met, since the acts regulated by art. 417 continue being criminal («continúan siendo delictivas»). He adds, however, that the basic rule prohibiting abortion appears to him of doubtful constitutionality. *Id.* at 539. See also the less clear linkage of nonculpability and excuse in the opinion of Jerónimo Arozamena Sierra. *Id.* at 537.

107. Arozamena Sierra, *id.* Also Sotillo Martí *supra* note 104, and the government brief *supra* note 105.

108. So argued bill supporters López Riaño and Sotillo Martí on 7 September 1983, claiming that because of the nondemandability of other conduct, the abortions specified in the bill would no longer be simply not blameworthy. They would be not unlawful and would not any more be included in the definition («tipo») of the crime of abortion. *Supra* note 35 at 2121 and 2140-41. But cf. the latter's other arguments discussed in the same note and in note 104.

values of the woman which have been harmed by that act of violence. But it does not suggest that denying her an abortion would have a further overall negative effect on the values at stake. Instead, it reasons that obligating her to put up with the consequences of rape is not demandable (L. F. 11 (b)). In the case of abortion for probable grave disabilities in the child, the Court is even more straightforward. The basis for non-punishment of such abortions, according to the Court, is that to require continuation of pregnancy would be an imposition on the mother beyond that which is normally demandable. That parents put up with the inevitable insecurity attending such a pregnancy is too much to demand. It is hard even to imagine that avoiding such parental anxiety is constitutionally a fundamental value equal to life in Spanish law, so that the Court could in any event appeal only to non-demandability in order to uphold this portion of the law in question (L. F. 11 (c))¹⁰⁹.

Once again, the often unspoken background for all these Spanish arguments is German legal theory. It was in Germany that the idea of non-demandability first arose doctrinally¹¹⁰. It is there used to explain code-based «excusing necessity», which is structured differently from the necessity defense in Spain¹¹. The German abortion depenalization statute itself permitted

109. Despite the Constitutio's explicit directive, found in article 49, that the State protect the disabled, the Court does not discuss the possible repercussions which the legalization of such abortions may have on future public and parental attitudes and actions with regard to those born with severe handicaps — but then this point is likewise ignored in the briefs. For research indicating a negative impact, see John Fletcher, «Attitudes Toward Defective Newborns», 2 (1) *Hastings Center Studies* 21 (January 1974).

Nor does the Court anywhere suggest the now commonplace notion that life with severe disabilities may have relatively little value or even be a disvalue. Such a suggestion would obviously go a long way toward tipping the scales in favor of parental interests.

110. For a discussion of the nature and context of the German (and, indirectly, the Spanish) concept of «Unzumutbarkeit», see Fletcher, *supra* note 100 at 833ff, and Albin Eser, «Justification and Excuse», 24 *Amer. J. Comp. L.* 624 (1976). See also Jiménez de Asúa, *supra* note 23 at 930ff.

111. The German Penal Code separates necessity (*Notstand*) into two articles, 34 and 35, and titles the first «Justifying Necessity» and the second «Excusing Necessity». According to the latter, certain persons are excused when they must act illegally to avoid a danger to life, limb, or liberty, unless they could have been expected (demanded, «*zugemutet*») to accept the risk («*Gefahr*») involved. See e. g. Eduard Dreher and Herbert Trondle, *Strafgesetzbuch* 42d ed., 188, 196 (Munich: Beck, 1985).

post-twelve-week-gestation abortion where there was a danger to maternal life or health or of serious fetal defect such that no alternative to abortion could be demanded («*zumutbare*» and «*verlangt*» respectively)¹¹².

Not surprisingly, the West German Constitutional Court likewise uses the nondemandability doctrine to deal with abortion. The Court indeed appears to base its approval of hardship-case abortions *exclusively* upon this idea—even where continued pregnancy would threaten a woman's own life or health¹¹³. It applies the doctrine without further argument to the case of potentially grave disability abortions (which the Court calls «eugenic» abortions)¹¹⁴ and to «social» abortions involving equivalent hardship because of the woman's life context. Unfortunately, the Court sends mixed signals on the issue of whether non-demandability makes all these abortions justified or merely excused¹¹⁵.

Spanish commentary upon the German constitutional settlement, prior to Spain's own proposed law reform, was generally critical. Commentators both opposing¹¹⁶ and favoring¹¹⁷ extensive abortion rights had difficulty understanding how non-demandability could permit abortion in the face of the German high court's strong affirmation of the duty of the State to protect unborn life. At most, it was argued, the Court's reasoning

112. The actual statute was somewhat more complex than this summary. See [1975] 39 BVerfGE 1, 4-6, and Jonas and Gorby, *supra* note 3 at 611-12.

113. [1975] 39 BVerfGE 1, 48-50; Jonas and Gorby, *id.* at 647-48.

114. *Id.*, indicating approval of earlier governmental arguments in favor of non-punishment of disability- and rape-based abortions.

115. For example, the Court indicates that even where abortion is not punished, the State is expected to remind a woman of her «fundamental duty» («*Pflicht*») to respect the right to life of the unborn, to encourage her to continue the pregnancy». *Id.* Yet the Court later insists that the law distinguish the justified («*gerechtfertigten*») cases of abortion from the reprehensible («*verwerflichen*») ones. [1975] 39 BVerfGE 1, 58; Jonas and Gorby, *id.* at 654-55. Sorting out these remarks in light of the basic principles governing the decision, the Dreher and Trondle commentary concludes that the Constitutional Court's decision points in the direction of an excuse understanding. *Supra* note 111, prenote 9 to § 218, at 999-1000.

116. Rodríguez Devesa, *supra* note 25, at 99. Prof. Rodríguez Devesa later joined in the book *En Defensa de la vida*, *supra* note 37, opposing the abortion depenalization bill.

117. Arroyo Zapatero, *supra* note 36 at 205.

would lead to excusing such abortions, not to justifying them.

United States' criminal law does not contain an explicit defense of non-demandability. Our «duress» or «coercion» defense, which is generally considered an excuse, is perhaps its closest analogue, but that defense is more limited than the Spanish Article 8 or the German «excluding necessity»¹¹⁸. It could not apply to abortion because no one is threatening harm to the mother unless she ends her pregnancy. There exists for us no comprehensive penal or constitutional principle which ensures that no one is punished for doing an act whenever not doing the act is «too much to demand».

Despite our restricted theory of excuses, however, it could be argued that something like non-demandability pervades our law, and does so often in the form of justification. After all, except in Vermont, we do not require rescues of strangers in the first place, not even where they involve no risk whatsoever. It has been suggested that it is too restrictive to impose on everyone that they be good samaritans¹¹⁹. Again, we sometimes permit a violent response to aggression, even where retreat is possible, and especially where retreat would involve some risk¹²⁰. Are we perhaps saying that it is too much to ask of victims that they act against their own interests in order to protect the interests of aggressors, even when the net harm caused by resistance is much greater than that caused by retreat?

Roe v. Wade obviously did not need to draw upon anything like the above lines of reasoning; its denial of constitutional value in the unborn child meant that it did not have to search for a justification or excuse for abortion beyond the right of privacy. But there have been a number of scholars who have sought to justify the result in *Roe*, elective abortion, by appealing to our alleged tradition of «bad samaritanism»¹²¹. The

118. *Supra* note 111. The German penal article 35 is limited to excusing those who protect themselves or those near to them. But there remains some support for nondemandability as an extrastatutory defense.

119. Calabresi, *supra* note 70 at 102-03, reports and disagrees with this sentiment.

120. See e. g. the American Law Institute's Model Penal Code § 3.04 (2) (b) (ii).

121. See e. g. Donald H. Regan, «Rewriting *Roe v. Wade*» 77 *Mich. L.*

explicit thrust of these arguments is that even if it were seen to be a person possessing a constitutional right to life, elective abortion would be permissible because our law does not generally require individuals to aid others at substantial cost to themselves. Though I have not found these thoughts to coalesce around precisely the non-demandability doctrine of Europe, surely something similar is at work here. If elsewhere we are individualists believing in *laissez faire* and *laissez mourir*, it must seem to many of us «too much to demand» of a pregnant woman that she alone make great sacrifices — a point to which I return at the end of this commentary.

7. Critique of the «Too Much to Demand» Doctrine

There are three final points I would like to make at some length. The first is that the concept of non-demandability, even if accepted as a starting point for legal reasoning, is incapable of doing what its adherents want it to do, namely of giving at least some abortions the full support of the law. The second is that non-demandability is in fact unacceptable as a first principle of reason, for it obscures as much as it reveals. The third is that, despite its deficiencies, the doctrine remains extremely useful to show that the abortion dilemma is merely one manifestation of the tension between community and individual and that a solution to the dilemma depends, therefore, on a relaxation of the tension.

As we have seen, there are two ways to understand Spanish (and German) constitutional law on abortion — that the legislature may treat some abortions as excused or that it may treat them as justified. My argument is that under both hypotheses a tension results in the law, but only in the latter case does it approach a contradiction.

The first hypothesis —excuse— seems to me the most plausible interpretation of the Spanish court's opinion. The doctrine of non-demandability is ordinarily treated in Spain¹²² and in

Rev. 1569 (1979) and Judith Jarvis Thompson, «A Defense of Abortion», 1 *Philosophy and Public Affairs* 47 (1971).

122. *Supra* note 98.

Germany¹²³ as one involving excuse. Given both courts' refusal to affirm that the unborn child has substantially less legal value than the mother, it is hard to see how any abortion (except, perhaps, for the mother's life) could be justified without at least a great deal of argumentation, which is left unsupplied¹²⁴. Moreover, the Spanish law in question bears a stronger resemblance to Penal Code Article 18 (excusing family members who harbor a fugitive) than it does to Article 489 bis (declaring a duty to rescue only where there is no risk to oneself). Like the former and unlike the latter, the abortion depenalization law does not expressly alter the definition (type) of the crime but only precludes the imposition of punishment in certain cases. This difference, I think, should be understood to be one of excuse vs. justification, as has been argued¹²⁵.

As excuse, non-demandability can be given a fairly precise meaning. Penalties are set according to what is ordinarily necessary for deterrence and must not be excessive in proportion to ultimate culpability. But then persons having to make unusually high sacrifices in order to comply with the law cannot be compelled to do so. Such persons are arguably both less culpable (because the *net* harm caused by the excused offense is less than that caused by an ordinary offense where no harm is at the same time avoided) and less deterrable (because again of the unusual personal harm resulting from failure to commit the offense). Thus, within the limits set by proportionality [See L. F. 10], there may be no penalty adequate to deter individuals from acts necessary to avoid great personal hardship. Without an adequate deterrent motive, the «ideal type» rational self-interested individual may be literally unable to comply with the law. And where the threat of punishment can serve no purpose, it should not even be made. Acts involving great and unusual hardship cannot be exacted¹²⁶ by *ex post facto* penalties

123. Albin Eser, *supra* note 110 at 627, 637. This essay is also a useful introduction to the basic structure of German (and of much of Spanish) penal theory.

124. See generally the Dreher and Trondle discussion cited *supra* note 115.

125. But cf. the arguments of Jiménez de Asúa, discussed *supra* note 102.

126. «Exactability» is the word used by Jonas and Gorby, *supra* note 3, to translate «Zumutbarkeit». I have ordinarily preferred «demandability» because

and should, therefore, be excused by law — even if those acts have a net negative effect on public values.

Excuse fits better than justification into the communitarian ethos of the Spanish decision. It is perhaps not logically inconsistent, but it certainly would be a shift in ideology for a court one moment to emphasize duties to pursue common values and the next moment to declare individuals to be legally justified in destroying those values. By contrast, there would be nothing strange about a fully developed socialist jurisprudence recognizing that human beings are not (or at least not yet) so constituted as to be *able* in all circumstances to give the same weight to others' interests as they do to their own. Where this is the case, proportionate punishment may serve little purpose. The penal law, at least, should excuse such unjustified selfpreference.

But excuse thinking alone cannot fully legalize abortion, for a number of reasons. Excuse is considered to apply only to the person so burdened that he or she is unable to act rightly toward the fetus. It is not thought to apply to third parties. Specifically, it would seem not to apply to the doctor performing the abortion any more than the excuse of duress applies to bystanders who help a threatened person carry out some difficult crime. The government's strongest argument, non-demandability as excuse, in favor of its statute makes little sense, for that statute clearly exempts from punishment *all* parties to certain abortions, not just the mother. The difficulty of excusing the aborting physician had been noticed already in 1982, in a quite cogent Spanish law journal article¹²⁷. If the anti-abortion brief had contained more than its one exceedingly short reference to this point¹²⁸, perhaps the Court would not entirely have overlooked this stumbling block in its lengthy summary of the arguments.

At this time, of course, the non-punishment of the doctor has been approved. That is the Court's holding, regardless of whether or how that conclusion is supported by its reasoning (at least until fuller argument leads it to a different conclusion). The principle of legality, the principle of non-punishment without a

of its greater normative resonance in English, but here the more physically coercive feeling of the word «exacted» captures the point better.

127. J. Cerezo Mir, *supra* note 33.

128. Petitioners' supplementary brief of 3 January 1983 [sc] at 16.

prior statutory violation, would seem to preclude any penalty for a physician doing an abortion in one of the specified circumstances. But this does not entirely dispose of our problem. If abortions is only excused rather than justified under penal law, what is its status in civil law?¹²⁹ For example, could a father sue for damages because his unborn child has been aborted? (Or could he sue a physician for negligently *failing* to abort his handicapped infant?) Must, or even may, State social insurance programs pay for the legal status of a contract to deliver abortifacients if abortion remains legally unjustified?¹³⁰

Even more significantly, if abortion remains always wrongful albeit excused, could not third parties intervene to stop abortion of developmentally disabled fetuses, especially if they did so in some minimally intrusive non-violent way? The necessity defense in the United States has not been very successful in preventing the conviction of those who sit in at abortion clinics¹³¹, but Spanish law looks very different. Article 8's idea of

129. The Spanish court opinion, in L. F. 14, explicitly avoids resolving the civil law issues raised by the non-punishment of abortion. *BJC*, *supra* note 5 at 536. (Not all the issues I here raise were, however, brought forward in petitioners' briefs). Rodríguez Devesa, *supra* note 93 at 557, 616 points out that civil responsibility remains for excused criminal acts. See also Jiménez de Asúa, *supra* note 94 at 201-02. Jonas and Gorby, in their commentary *supra* note 3 at 591-92, raise the possibility of civil suits in Germany, and the Dreher and Trondle discussion cited *supra* note 115, makes clear that the legitimacy of social insurance payments for unpunished but possibly still unlawful abortions is a live issue in Germany. See also the excellent survey and argument by W. Kluth, who concludes that abortion remains illicit and therefore cannot be a duty in civil law. «Zur Rechtsnatur der indizierten Abtreibung», 5 *Zeitschrift für das gesamte Familienrecht* 440 (1985).

130. See the Spanish Civil Code art. 1275, which deprives contracts for an illicit cause of any effect. An illicit cause is defined to be one opposed to laws or morals. Cf. the German Civil Code, article 134.

131. See e. g. *Sigma Reproductive Health Center v. State*, 297 Md. 660, 467 A. 2d 483 (1983); *City of St. Louis v. Klockner*, 637 S. W. 2d 174 (Mo. App. 1982); *Cleveland v. Municipality of Anchorage* 631 P.2d 1073 (Alaska 1981); *People v. Krizka*, 92 Ill. App. 3d 288, 48 Ill. Dec. 141, 416 N. E. 2d 36 (1980); *Gaetano v. United States*, 406 A. 2d 1291 (D. C. App. 1979). These post-*Roe* lower courts have generally refused even to listen to necessity arguments concerning the fact and value of prenatal life. Their opinions are fascinating in the light of the constitutional models developed earlier in this article. One might have thought that U. S. courts would construe *Roe*'s constitutional right to abortion to be solely a *rule* against *state* intervention, particularly after the *Maher* and *Harris* cases (see *supra* notes 85 and 88 and accompanying text). *Private* intervention in abortion clinics (to protect what proffered evidence supposedly would show to be human life with significant

necessity (preservation of the greater legal value) could be appealed to. Non-violent intervenors could argue «legitimate defense» — just as a bank teller can defend himself or an associate against a robber acting non-culpably under duress¹³². Most precisely on point may be that in Spain a person is justified in preventing another from destroying something of his or her own which has social utility¹³³.

ethical, statutory, or common law value) would remain unaffected by *Roe* and so possibly justified. But in fact virtually all lower court opinions treat *Roe* as imposing a negative *value* judgement, in regard to the fetus, on the whole legal order, quite analogous to the positive value imposed in Spain and Germany. The analogy is close: In those European nations the mandated high value of fetal life requires the State to *punish* conduct which destroys the fetus. In the U. S. the mandated low value of fetal life requires the State *not to refrain from punishing* conduct which prevents fetal destruction.

It could be argued that some of these lower courts have disallowed the necessity defense simply to prevent disorder at abortion clinics, without any sense of constitutional mandate. But the bare possibility of acquittal under necessity might not significantly increase the number of sitters willing to be arrested at abortion clinics. And even if clinic chaos were to result, a quick fix might be had in the form of a legislatively imposed abortion exception to the necessity defense. Judicial imposition of such an exception would not be required.

132. Both Rodríguez Devesa, *supra* note 93 at 557, 616 and Jiménez de Asúa, *supra* note 94 at 201-02 make clear that forcible defense is legitimate against acts which are merely excused. The former specifically applies this principle to the law excusing a parent who harbors a fugitive, at 619. The explicit wording of article 8 (4), referring to the defense «of the person or [of] rights» might not apply to the defense of the «legal good» of unborn life, but article 8 (7) would seem to offer obvious support for abortion clinic interventions. The latter permits actions against personal goods in order to avoid any «alien» evil. See the precise wording *supra* note 94. Of course, there would also have to be a weighing of the harm caused by the intervention against the value of any fetal life saved. In Spain this calculus is ordinarily based upon a comparison of the usual criminal penalties for, say, trespass and abortion. Rodríguez Devesa, *supra* note 93, at 546. The result of the balancing might well vary depending upon the means and consequences of the sit-in.

The wording of the German Penal Code is even more favorable to such defenses. In addition to the necessity arguments of articles 34 and 35 of the Penal Code, *supra* note 111 and *infra* note 145, articles 32 and 33 would seem to provide another justification and excuse argument for nonviolent clinic interventions. These *Notwehr* defenses are available to those who act to protect «another» against an unlawful attack, and the German court decision seems potentially open to an interpretation of the unborn child as «another». See *supra* notes 40-48 and accompanying text. The Dreher and Trondle commentary, *supra* note 111 prenote 9g to article 218, at 1002, comments that the abortion law should not be interpreted so as to make «necessary help (*Not-hilfe*)» for the unborn» unavailable. There is no evidence, however, that the author had sit-ins in mind.

133. Rodríguez Devesa, *id.* at 554.

Nor are these arguments merely technical or sophistic. It is clearly one thing to say that someone does not deserve punishment for an act because she could not be expected to behave otherwise, and quite another for the State to support or even not to prevent that act. Remember that non-demandability is a *penal* law doctrine; there are some things which are supposedly too much to demand by means of *ex post facto* penalties. The Spanish court's own discussion of non-demandability theory (L. F. 10) emphasizes that penal punishment for failure to comply with a legal norm is sometimes «totally unsuitable», which does not entail that the norm itself is to be called into question. The Court also points out that the State's duty to protect the legal good of life continues to subsist in other areas. If the State allows civil suits against abortionists, denies insurance coverage, does not recognize contracts, and does not punish sit-ins in abortion clinics or the equivalent, it is not imposing punishment on women who have had abortions. There is nothing incoherent in a legal system which makes all abortions illegal, but excuses some women who have them with the thought that compliance with the law is too much to demand of persons in great distress. To the contrary, a system would be incoherent which punished justified acts (e. g. sit-ins)¹³⁴ in order to further excused ones (i. e. abortions).

That this is the present state of Spanish law is implied by a number of sources. Proponents of abortion depenalization, and at least one of the high court dissenters, argued that abortions were not being «legalized», as has been pointed out above¹³⁵. Opponents of abortion now read the Court decision to say that abortion has not become «licit»¹³⁶. If such statements mean

134. If non-violent clinic intervention were futile (in the sense that women wishing abortions will invariably simply postpone them if a particular clinic becomes unavailable for a time), the necessity justification for sit-ins would lose much of its force. But the mere fact that pregnancy continuation is too much to demand *by means of a posteriori punishment* does not, without more, prove that *prior* intervention to close clinics or to dissuade women might not be effective and normatively called for. Surely a legal system could appropriately abolish penalties for some or all (attempted) suicides, under nondemandability excuse thinking, without entailing the abolition of defenses to battery for those who intervene to prevent suicides.

135. *Supra* notes 104 and 106. But cf. *supra* note 108.

136. So argues Federico Trillo-Figueroa in his early unpublished response to the Court entitled «En defensa de la vida» (the same title as that of the pre-

anything, they indicate a legal situation very close to that which has been described and very far from a legal right to abortion.

Can a case be made for a contrary interpretation of the Spanish decision, that it declares non-demandable abortions to be not excusable but justifiable and that the statute upheld is in fact one of justification? The most obvious argument in favor of this interpretation is not a legal but a political one. There might be little point in bringing about a legal situation which keeps women out of jail but which may well have very little effect on the actual availability of abortion. If abortion remains wholly illicit, clinics will be under burdens so great that they may find it unprofitable to operate. But an attempt at legal argumentation can also be made: Excuse reasoning is hard put to explain the Court's approval of the non-punishment of the aborting physician¹³⁷. And the analogy of abortion law to fugitive law is not perfect. In the latter case, only certain actors (i. e. family members) are declared exempt from punishment. In the former, the act itself of abortion is declared non-punishable. From the point of view of *penal* law, what can be made of a norm without a penalty? Perhaps the definition (type) of the crime of abortion has in effect been cut back after all, though not by the direct wording used in the Penal Code's article 489 *bis* requiring rescue¹³⁸.

decision book referred to *supra* note 37 and to which he contributed). The anti-abortion commentary *Ley del aborto*, *supra* note 94 at 91ff, 327, also asserts and implies the continuing illicitude of almost all abortions.

137. The Dreher and Trondle commentary, however, has little problem treating the physician's exemption as based upon separable public health grounds. That is, in order for excused abortions to be performed in safety, physicians are permitted to perform them, without implying that the law favors or is even neutral on the question of whether abortions should occur. *Supra* note 111, prenote 9e to article 218, at 1001-02. Spanish law has a similar catch-all category of excuse, called the «*excusa absoluta*», which the law could use to understand the status of the aborting physician. See Jiménez de Asúa, *supra* notes 23 and 24. But cf. Bernard Nathanson, *Aborting America* 193-94 (New York: Doubleday, 1979), who argues that the advent of modern antibiotics, of the plastic suction curette, and of self-abortive drugs makes illegal abortion no longer a major public health problem even if the medical abortionist is held penally accountable. (In my own opinion, the total public health effects of the non-punishment, or the full legalization, of abortion cannot be known without an estimate of the additional number of conceptions which occur because of the availability or legitimacy of abortion as a remedy for pregnancy).

138. Despite its own conclusion that abortion is only excused, the Dreher-Trondle commentary, *id.*, makes clear that the dominant legal opinion in Germany Abortion Law: First Experiences» 34 *Amer. J. Comp. L.* 369, 375 n. 40

There is an undeniable appeal in the justification interpretation of non-demandability. Always to value the interests of others equally with one's own is a heroic or saintly idea. To *demand* compliance with this ideal would clearly often be too much, whence the argument for excuse. But even to *ask* for heroic behavior may seem uncalled for. Don't we have a *right* not to be heroes, without incurring legal disapprobation? Quite a few spokespersons for abortion reform made just such an appeal, saying that to bear a child after rape or one likely to be gravely disabled is to be heroic, not just law-abiding. Analogies were made to self-defense law, which gives the victim's interest priority over that of the aggressor, and to the legal permission not to rescue others where any personal risk is involved¹³⁹. In those situations, too, the law recognizes an apparent right not to sacrifice one's own lesser interests for the sake of others' greater interests. The communitarian principles of the necessity defense here give way to a deep individualism.

Such a politico-legal theory is quite evidently not in harmony with a spirit of dedication to common goals. Instead, it would seem to be founded on something like social contract reasoning. People with essentially private interests come together out of a limited need for mutual defense and cooperation. They agree to accept a certain burden, but no more, for the sake of their joint enterprise. Once they have made the maximum expected contribution, they have a right to refuse further payments. Where an act or omission is necessary in order to

and accompanying text (Spring 1986) and Gropp generally, *supra* note 97. The latter's arguments virtually ignore the need to integrate penal and constitutional theory, however, while the Dreher-Trondle argument is built upon an attempt at such integration.

139. On 25 May 1983, in the Congress of Deputies, the PSOE spokesperson Saenz Cosculluela argued that the law values one's own life more than that of another, and that the law cannot demand heroism of a pregnant woman. *Supra* note 104 at 1853, 1854. On 7 September 1983, Sotillo Marti argued for the abortion depenalization bill by appealing to the fact that the law does not always demand that we rescue others, even though it may be our moral duty to do so. Again on 5 October 1983, he argued that to require the continuation of pregnancy in the hardship conditions covered by the proposed law would be to demand heroism, which the Penal Code does not do when it comes to rescue. *Supra* notes 35 and 33 at 2138, 2946.

Cf. Sanford Kadish's important attempt to understand the interaction of the values of proportionality and autonomy: «Respect for Life and Regard for Rights in the Criminal Law», 64 *Cal. L. Rev.* 871 (1976).

avoid an excess contribution to public values, that act or omission is legally justified.

It is a strange beast, this hybrid of Social State and social contract. From the point of view of community values, the act or omission is wrong. It results in a net value loss. Yet from the point of view of the individual, the act is right. The non-hero reasons that one should not have to give to the community anything more than one thinks one is likely to need from the community. Since he or she is certainly never going to be a fetus in need of maternal support, why should he or she feel obligated to give such support?¹⁴⁰

The idea of non-demandability can in this way be thought to justify abortion (particularly in circumstances of unusual hardship) despite the fact that the values of the community, the values for the sake of which we have come together, thereby suffer. Abortion is somehow justified and not justified at the same time. The community permits abortions without saying that abortions ought to occur.

What legal concepts can express the permission to be non-heroic — in regard to abortion or to non-rescue or to other analogous situations? Surely not «claim» and «duty». The fact that someone violates no legal duty in refusing to maximize the common good of life does not mean that others violate a legal duty in striving by means other than penal law to further that good. In other words, any Spanish (or German) permission to abort should be labeled a «liberty»¹⁴¹ rather than a «right». The State does not insist *sub poena* that a pregnancy continue, but neither may a pregnant woman insist upon support or pro-

140. Someone who thinks in this way puzzlingly overlooks the fact that he or she has *already* needed and received aid as a fetus. Yet such an analysis appears dominant in the decisions in question. Nowhere is the duty to support new life treated in these cases as a matter of simple reciprocity for benefits everyone has earlier received. Our friend from Mars, upon reading these constitutional opinions, might well conclude that human adults and fetuses belong to entirely different species, with the former occasionally generously hosting the latter as parasite. This point is further developed in Stith, «A Critique of Abortion Rights» *supra* note 65. That article also explores more deeply the conflict between socialist values and the *Roe v. Wade* decision.

141. The reference here is to the concept which Hohfeld calls «privilege». See generally, Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919).

tection for abortion. In this view, abortion would be objectively legal, not only excused, but it would be legalized only as a liberty and not as a claim upon the community. Such an understanding is similar to an old way of looking at the legal situation called «necessity» — that it returns all parties involved to a «state of nature», where legal duties and claims in the full sense do not yet exist¹⁴².

But if abortion is only a liberty, involves only the absence of penal prohibitions, necessity doctrine might still justify intervention to *prevent* abortions¹⁴³. Necessity always involves individual interference with what are otherwise legal rights of others. Even where one is not legally required to furnish his coat to a freezing child, the child may be excused and even justified in taking it. Or, better, suppose a nonswimmer bystander to be watching helplessly as an unknown child lies drowning at the bottom of a pool. A good swimmer walks by but refuses to help because he already has a cold and does not wish to risk making it worse. The bystander blocks the swimmer and grabs his hat, telling him he will not get it back unless he rescues the child. Would a court convict the nonswimmer of battery or of theft? I suspect not. Thus even assuming *arguendo* that we think the swimmer legally justified in refusing to help, we may also think the nonswimmer justified in forcing him to help. That we do not use the criminal law to coerce people into making sacrifices does not mean that we do not wish such sacrifices to be made, nor that we are willing to use criminal penalties to ensure that no sacrifices are made¹⁴⁴. If pregnancy is only like rescuing, and both are just sometimes too much to demand by means of criminal penalties, then abortion has not yet won the

142. See discussion in Rodríguez Devesa, *supra* note 93 at 555.

143. And civil damages for abortion might still be recoverable by a father. Even an act that is justified under penal law may incur liability for civil damages. See Penal Code article 20, and the commentaries thereon by Jiménez de Asúa, e. g. *supra* note 94 at 198-99.

144. See also the example mentioned above at note 130 concerning the Spanish right to prevent someone from destroying his socially useful property. He would presumably not be punished if he were to destroy his property, but neither would someone else be punished who stopped the destruction.

If American lower courts were to construe *Roe v. Wade* only to grant women «liberty» to abort (by making them immune to criminal prohibition), then even in the U. S. interference in abortion clinics might turn out to be justified. But cf. what U. S. courts actually have done, *supra* note 131.

full support of the law. Particularly under a jurisprudence of «effective» community values, it would seem that courts ought to ignore rules wherever acts further the greater constitutional value. And, at least in the case of abortion to avoid bearing a disabled child, it would be very hard for a Spanish tribunal to find that prevention of such an abortion, by means of non-delivery of abortifacients or of a non-violent sit-in, is not in accord with the constitutional order of values. On the side of the fetus are the values of life and protection for the handicapped, while the Court mentions no constitutional value at all on the side of abortion.

The theoretical and practical disadvantages of the conclusion reached here are obvious. Abortion, even if fully legal in the sense that non-rescue in the face of risks is fully legal, may still not become easily available — because non-cooperation with, and even intervention against, the performance of abortion may be justified by the thinking at the base of the necessity defense¹⁴⁵. Conceptual and public order may thereby be threatened. These disadvantages do not often arise in the parallel case of non-rescue, because not rescuing another does not ordinarily require the participation of third parties, nor does the intervention of third parties ordinarily preclude not rescuing. By contrast, abortion necessarily implicates third parties and the judicial system which judges those parties.

If the idea of non-demandability were limited to excluding women who undergo abortions, it would lead to no such anomalous results and would probably find near universal support. Most states in the U. S., for example, *de facto* and even *de*

145. But the German penal article 32 (establishing the defensive force doctrine of *Notwehr*) *supra* note 132, would not provide a defense for clinic intervenors because that doctrine (unlike necessity) presupposes a prior *unlawful* act, which does not exist if an abortion is in any way justified rather than merely excused. As to the German *Notstand* doctrine: the *Zwecktheorie* incorporated into article 34 requires also that an «appropriate means» be used, which the courts might use to disallow the necessity defense to some or all clinic intervenors. The Dreher-Trondle commentary alludes to the use of this last requirement to protect individual rights against more important community values, e. g. by preventing someone from being forced to give blood to a stranger who would die without it. *Supra* note 111, n. 16 following article 34, at 192. Nevertheless, article 35 might *excuse* certain interventions. The latter contains no «appropriate means» requirement. Cf. *supra* notes 111, 118.

*jure*¹⁴⁶, did not punish women for abortion prior to *Roe v. Wade*. But they did prosecute abortionists. The values of life and order are compatible with excuses which are truly and merely excuses, with the desire not to use penal law against women, but not with more.

Alternatively, we can hold to a justificatory sense of the non-demandability of bearing a child, letting it mean community support for a right not to make undue sacrifices. But we can do so in an orderly fashion only at the cost of devaluing human life (or of somehow honestly separating fetal life from postnatal life)¹⁴⁷. If unborn life has little value, abortion does little if any damage, and so contracts for it should be enforced and no one is justified in preventing it.

In other words, either abortion must remain a crime (though one for which many or even all women need not be punished), or it must be seen to promote the common good (because unborn human life hardly counts as part of that good). Only these two solutions are internally coherent in theory and practice.

Is the doctrine of non-demandability the best place to begin to think about which solution to seek? A good argument can be made that this doctrine is *not* a very helpful starting point (anywhere in the world) because it is likely one-sidedly to obscure as much as it reveals of the legally significant dimensions of pregnancy and of abortion.

To ask whether a continuation of pregnancy in certain circumstances is demandable of a woman is to emphasize exclusively the affirmative and sacrificial character of pregnancy. In other words, it makes us think of pregnancy as an act of giving and of abortion as an omission or a ceasing so to give. But surely in many ways abortion is an act by the mother or by her agent, and continued pregnancy is an omission. Somehow this makes a difference. It is often worse legally, if not morally, to

146. See Paul D. Wohlers, «Women and Abortion», published undated by the American Center for Bioethics. The author surveys pre-*Roe* statutory and case law and concludes that women were almost always exempted from punishment by one or the other.

147. But cf. the discussion of the dilemmas associated with such a devaluation earlier in this article at pp. 21-22.

throw someone who has slipped into one's home out into the freezing cold than not to let her in to begin with. Abortion, at the least, is like that act of expulsion. And pregnancy, after conception, in an important sense requires no further acts. Gestation is automatic, one might say, as long as one omits to terminate it. This fact makes a difference at least psychologically. It is harder to pay taxes than to endure government withholding of them. To donate blood to a relative every day for nine months could easily *feel* like a much greater sacrifice than to have something similar occur by itself in the womb. The *power* of the non-demandability doctrine is precisely that, in all contexts (not just abortion), it makes us treat what could be seen as acts instead as omissions. We ask not «Should he have robbed the bank?» but «Can we demand that he have his legs be broken by those trying to force him to rob the bank?» I am not suggesting that pregnancy is wholly an omission and abortion is wholly an act, only that there are important considerations on both sides and the question of non-demandability tends to make us overlook one side.

This focus on omission to sacrifice also takes our eyes off immediate intentions and leads us loosely to speculate about ultimate motives — something we would be much less likely to do with regard to an act. In the abortion context, for example, many write as if avoiding the burdens of pregnancy were the main purpose of abortions¹⁴⁸, though *Roe* itself emphasized postnatal burdens¹⁴⁹. But the desire to separate oneself from the fetus, before or after birth, is not the sole aim of abortions, otherwise adoption would have been mentioned by *Roe* as an alternative way to avoid the burdens to which it points. Clearly, many people who have abortions aim not just at avoiding the burdens of pregnancy or of childcare, but at not being mothers at all. A decisive motive may be to avoid the burdensome adoption choice. The intent then comes to be to kill the fetus. A lethal act with a lethal intent is much harder to justify or excuse than a failure to be a hero. Non-demandability makes us

148. See e. g. Regan and Thompson, *supra* note 121 and Calabresi, *supra* note 70 — though the latter at 114 notes that the purpose may also be to kill the fetus.

149. *Roe v. Wade*, 410 U. S. 113, 153 (1973).

forget the first way of looking at abortion and think only about the second.

Furthermore, just as non-demandability makes us turn away from the intent of an otherwise illegal act, it tends to make us forget the policy promoted by the particular law at issue. If we ask only «Can we force people to kill and risk being killed?», we may say «no». But if we ask whether national survival justifies the military draft, we may say «yes». If new life is to be treated as a fundamental public value, as the Spanish court asserts, it cannot be omitted from the question of how much can be demanded. Yet this value is wholly left out of that court's demandability discussions¹⁵⁰.

Non-demandability also, it seems to me, tends to make us think in very general terms. Should one have to sacrifice one's legs? Should one be expected, under penalty, to put up with a handicapped child? The generic answer to these questions may be «no». But we should also refer to the various sources of a special duty to make sacrifices. Non-demandability does not in itself¹⁵¹ allude to those sources.

Thus U. S. commentators have sought to show that, even if the fetus were a person, the law should not impose the burden of supporting him or her on the mother, any more than one should have to support a famous violinist who needs transfusions for nine months¹⁵². But *if* the fetus is a person, it is not *only* a person. It is also *one's own child*, and that fact may make all the difference.

It is true that the Spanish high court uses the normal burdens of *parents* as a standard of what can be demanded¹⁵³, which is no doubt higher than the standard for citizens in general. But are parents committed to putting up only with «normal» burdens? This question is never clearly addressed. Though the Spanish court uses article 8 necessity as a prop for its decision, it never discusses that portion of article 8 which denies

150. See George Fletcher's argument that even excuse reasoning must involve value-balancing. *Supra* note 100.

151. But demandability as found in the German Penal Code article 35 does require an inquiry into special legal relationships.

152. *Supra* note 121. The violinist is Thompson's creation.

153. See L. F. 11, *BJC*, *supra* note 5 at 535.

the necessity defense to one who has a special obligation to sacrifice herself¹⁵⁴.

Nor are the many possible sources of the duties of parents explored. Is there a natural duty resulting from a biological relationship? Is there a duty resulting from causation, from the sexual creation of a situation in which the fetus is in peril? Or does the act of intercourse involve a tacit consent to care for life resulting from that act?¹⁵⁵ Does it matter that, if one were still a fetus, one would enter into a social contract to give birth, even under hardship, to other fetuses in order to be born oneself in like circumstances? Rather than careful analysis of the strengths of each such factor, non-demandability (at least as expounded by the Spanish and German Constitutional Courts) encourages a superficial global assessment.

Yet in the final analysis, despite all its flaws, the question of demandability should not be overlooked. Most of the myriad sources of obligation listed above end up with women carrying greater burdens than men. That is, the burdens even of ordinary pregnancy, not to speak of hardship pregnancy, are greater than our law places on non-pregnant people during most of their lives and those burdens fall unequally onto one sex¹⁵⁶. Whether or not we consciously have recourse to a doctrine of non-demandability, we are bound to feel uneasy about demanding that women alone bear such burdens.

There are two ways, in my opinion, that this uneasiness can be overcome —and both bring us back to the Social State. As the Spanish court pointed out (L. F. 11) with regard to the burden of handicapped children, community aid can make the sacrifices entailed by pregnancy and parenthood much less— to the point where they may be demandable. If the legal community highly values unborn life, it ought to share the burden of

154. The Spanish Penal Code's article 8 (7) (tercero) states that the necessity defense is available only to one who does not have an obligation to sacrifice himself («... [que] no tenga, por su oficio o cargo, obligación de sacrificarse»).

155. Spanish law also creates another exception to article 8's necessity defense for those who intentionally bring about the state of necessity. It would seem arguable that a consciously intended conception would exclude a later necessity defense to abortion. And there is discussion in Spain concerning the lowering of this intentionality requirement to some degree of risk-taking.

156. See generally Calabresi, *supra* note 70 especially at 101ff.

bearing that life by means not only of social support services before and after birth, but even of special benefits and privileges for mothers¹⁵⁷ — including mothers who give up their children for adoption. That is what is often done in gratitude to young people who have been soldiers.

Secondly, the community must not refrain from asking for significant sacrifices from others besides women who have special abilities to contribute to what we value in common. From taxation and business regulation to zoning and blood donation, a high standard of expectation must be set — and backed up by some sort of penalty for unexcused failure to comply with that standard. Only then will the sacrifices of pregnancy seem obviously demandable. It is on some level bizarre, even if logically consistent, to take a stand both against abortion and for a *laissez-faire* economy and society.

157. Mary Ann Glendon, *supra* note 54, indicates that almost all Western nations provide maternity benefits, child care, paid leaves, paternity support, family benefits and the like to a far greater degree than is done in the U. S. Perhaps it is partially for this reason that the burdens at least of normal pregnancy and parenthood seem not too much to demand in Germany and Spain.