New Constitutional and Penal Theory in Spanish Abortion Law

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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 latter, it is hard to discern anything more than a tactical nexus of abortion-related issues with the socialist goal of community-based decisionmaking.

Not so in European law. The important 1975 West German decision mandated laws against abortion from a dramatically communitarian perspective, as has been so ably pointed out by Donald Kommers. The


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Mark Tushnet, a former coordinator and still a frequent speaker for the Critical Legal Studies movement, has called the right to reproductive choice “a leftish sort of right which, it is said, leftists must recognize as not relative lest they lose their political credentials.” Tushnet, An Essay on Rights, 62TEX. 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.

Antonio Carlos Pereira, 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 the Left’s 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. Quintano Ripollès, 1 Tratado de Derecho Penal, in PARTE ESPECIAL 504-05 (1962).


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Spanish Constitutional Court decision of 11 April 1985, which was strongly influenced by the German one, 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 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 preg-

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* Decision of 11 April 1985, STC 53/1985 (Pleno). The official version was first published in 119 BOLETIN OFICIAL DEL ESTADO 10 (suplemento, 18 mayo 1985) [hereinafter BOE], but I have hereinafter cited the clearer and perhaps more accessible 1985-49 BOLETIN DE JURISPRUDENCIA CONSTITUCIONAL 515 [hereinafter BJC].

* I do not believe this assertion to be controversial. The Spanish decision refers repeatedly to the German one in summarizing arguments of counsel. BJC, supra note 5, at 521, 523, 526, 527. In the Comision de Justiciae 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. Bartret, Cortes Generales, Sesiones del Congreso de los Diputados, II LEGISLATURA, Num. 18, 1983, at 6 ff. 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 Benda, Constitutional Jurisdiction in West Germany, 19 COLUM. J. TRANSNAT’L L. 1 (1981).
nancy is "too much to demand" or "nondemandable" ("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.

CHRONOLOGY AND SUMMARY OF THE DECISION

Prior to the bill here at issue, the Spanish Penal Code did not explic-
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igitly exempt any abortions from punishment. However, the general defense of necessity includes an exemption for acts done to avoid harm equal to or greater than the harm caused, which would make non-punishable at least those abortions necessary to preserve maternal life.

Soon after the sweeping Partido Socialista Obrero Espanol (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 law, 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.

The post-Franco Spanish Constitution of 1978 established for the first time a Constitutional Court with the power of judicial review of statutes. Consistent with the Kelsenian European tradition, a petition alleg-

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7 Código Penal arts. 411-17. Published as Código Penal y legislacion complementaria (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. See infra note 11 and accompanying text. Therefore, the brief argues, 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, of 11 April, 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.
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 (1984)]. Members are elected for nine-year terms, which are staggered over three-year cycles. Art. 159(3).
ing unconstitutionality may be interposed by certain authorized persons, without the need to await a concrete injury. 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 effect.

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 Garcia Pelayo y Alonso, an ex-soldier for the Spanish Republic who became an internationally-known scholar during his years outside of Spain.

After a lengthy development of the arguments presented by the petitioners and by the governmental respondent, the Court built its position on twelve “Legal Foundations” (Fundamentos Juridicos), 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) must be

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14 Organic Law of the Constitutional Court (Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional) art. 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 versus 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 Pais, 12 April 1985, at 13. Additional chronological and biographical details may be found on the same page. See Asi votaron los doce magistrados, Ya, 12 April 1985, at 5; Diario 16, 12 April 1985, at 6-7.
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,
considered a "legal good" (bien juridico) 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).

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

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.
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

In the last two sections of its opinion, the Court declines to require paternal participation in the abortion 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).

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 universal,18 being in the form we know it a development of late scholastic nominalism19 and Enlightenment individu-

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17 The government did not delay in complying with the Court’s demands. On 12 July 1985, a new enactment was published in BOE, supra note 5, no. 166. (Ley Orgánica 9/1985, de 5 de julio, de reforma del articulo 417 bis del Codigo 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 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 controversy under the new law.


19 Professor 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
alism. Some cultures apparently have 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 today. The rise of socializing legal theory has also put pressure on the idea of individual claim rights as a foundation of the legal order.

The received European legal protections accorded to the fetus cannot easily be squeezed into this modern subjective rights ideology. Of the many nations following Continental traditions, apparently only Argentina has seen fit to acknowledge civil personality from the moment of conception. 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

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 Villey, Droit subjectif, in Seize essais de philosophie du droit 140 (1969).


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 mortally 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 immortality 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.

Id.

Lacruz Berdejo, supra note 18, at 85; see, e.g., Marx, On the Jewish Question, in Early Writings 211, 230-31 (1975); Sandel, Liberalism and the Limits of Justice (1982). The socialist Mark Tushnet, see supra note 1, and Louis M. Seidman have explicitly argued for the permissibility of fetal protection on a non-rights basis in A Comment on Tooley's "Abortion and Infanticide," Ethics, Jan. 1986, at 350.

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 M. Damaska, The Faces of Justice and State Authority 83 (1986).

Lacruz Berdejo, supra note 18, at 93-94.

Quintano Ripollés, supra note 2, at 477. But cf. 6 Jiménez de Asúa, Tratado de Derecho Penal 998 n.36 (2d ed. 1962) (arguing that the fetus still does not count as a "visible person" under Argentine law).
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 problematic. 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 Italy.

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 hours, opponents of abortion substituted the sentence “All have the right to life...,” for the explicit purpose of protecting the unborn from abortion. It became difficult for a 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 being. From the materials available, the government does not

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24 The existence of infant persons can support the assertion that potentiality is sufficient for personhood and therefore that the unborn are likewise persons. See *Enciclopedia Jurídica Española* 709; see also Rawls, *A Theory of Justice* 509 (1971) (maintaining that potential rationality must be the basis for nonarbitrary recognition of rights); infra note 43 and accompanying text (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., Weiss, *supra* note 20 (citing the authors Tooley and Warren).

25 Quintano Ripollés, *supra* note 2, at 471 ff; see also Rodriguez Devesa, *Derecho penal español*, in *Parte Especial* 100 n.42 (7th ed. 1979) (arguing that feticide has never been considered homicide). See generally Cuello Calon, 2(2) *Derecho Penal* 522 (13th ed. 1972). Not all the juristic data are 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* (8th ed. 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. The summary of these debates is at L.F. 5 of the decision presently being considered.

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,
appear to have disputed the physical fact of human life prior to birth. Instead, it approached the issue wholly formalistically, arguing that legal norms are independent of non-legal facts—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 project nascent life. How could the Court conceptualize the legal status of living but unborn human beings?

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 recognized. It has been argued that society, rather than the fetus or the mother, is the titular of the protection accorded to the unborn child. Anti-abortion spokespersons had argued that even without a subjective right, the fetus may be protectable by an objective norm, as a “social good.” 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 its 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.

Even spokespersons for the right to abortion were willing to concede that the unborn are a legal good of the community. 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

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Report to the Comm. on the Judiciary, United States Senate Subcomm. on Separation of Powers, 97th Congress, 1st Sess. (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.

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

Quintano Ripolles, supra note 2, at 477 (reporting some support for all three possibilities).

Diaz Fuentes calls the fetus a “social good” in Diario de Sesiones del Congreso, No. 105, 5 October 1983, at 2943. Oscar Alzaga is cited by Cerezo Mir in note 46 of his essay La regulacion del aborto en el proyecto de nuevo Codigo Penal Espanol, in LA REFORMA PENAL (1982), to the effect that the fetus is protected by an objective norm even without a subjective right.

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.

Sotillo Marti 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, No. 61, 7 septiembre 1983, at 2139.
the legislative depenalization of abortion was constitutionally permissible.\textsuperscript{34} Perhaps 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 life.\textsuperscript{35}

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 “fundamental value” (L.F. 5), and a “central value” (L.F. 9). The Court reaches this conclusion by noting that life is a presupposition for all other rights, and by reflect-

\textsuperscript{34} The article by Luis Arroyo Zapatero develops the idea that what the community gives, the community can take away. Arroyo Zapatero, Prohibicion del aborto y Constitucion, 3 REV. FACULTAD DE DERECHO DE LA UNIVERSIDAD COMPLUTENSE 195 (1980); see infra note 69 and accompanying text. 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. Four of the dissenters to the final decision conceded that preborn life is or has some kind of legal value.

\textsuperscript{35} See, e.g., BJC, supra note 5, at 523 (summarizing petitioners’ argument that life is fundamental right or an absolute value rather than merely a legal good). Published anti-abortionist opinions had already rejected arguments like those of Arroyo Zapatero. See F. Trillo-Figueroa, LA LEGALIZACION DEL ABORTO EN EL DERECHO COMPARADO 113; Diez Moreno, El proyecto de Ley del Aborto desde la perspectiva constitucional, in EN DEFENSA DE LA VIDA 181-89 (1983).
ing 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 effort 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 Constitutional 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 depenaliza-
tion of abortion to be unconstitutional. 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 crisis.

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. . .). the German Court finds it unnecessary to hold the unborn child to be a person, or a “bearer” of a subjective right, 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

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**Footnotes:**

1. 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 might 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, Corte Constituzionale, decision of 18 February 1975, No. 27 [1975] 20 giur. Const. 117 (as translated in CAPPETTII & COHEN, COMPARATIVE CONSTITUTIONAL LAW 612-14 (1979)).

2. Alfonso Guerra, vice-president 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 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 55. The Court’s elegant self-defense reminds one of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

3. Basic Law (Grundgesetz) Art. 2, Sec. 2, Sentence 1.

4. [1975] 39 BVerfGE 1, 41. For a full translation of the German decision, see Jonas & Gorby, supra note 3, at 641-42.
order to receive constitutional protection. Both this right-to-life guarantee and the explicit constitutional value of "human dignity" leads the Court to rule that all human life, including prenatal life, is part of the "objective ordering of values" of the Basic Law. 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"—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 living.

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

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40 Basic Law, Art. 1, Sec. 1, Sentence 1. Note that the Spanish constitutional equivalent here (Art. 10, Sec. 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.
41 [1975] 39 BVerfGE 1, 41; Jonas & Gorby, supra note 3, at 642. For a further discussion, see Gerstein & Lowry, supra note 4, at 882, 887, and materials cited therein.
42 [1975] 39 BVerfGE 1, 68 (abweichende Meinung); Jonas & Gorby, supra note 3, at 663 (dissent).
43 [1975] 39 BVerfGE 1, 37; Jonas & Gorby, supra note 3, 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. For a further discussion, see infra text accompanying notes 63-72.
44 [1975] 39 BVerfGE 1, 37; Jonas & Gorby, supra note 3, at 638.
45 [1975] 39 BVerfGE 1, 37; Jonas & Gorby, supra note 3, at 638.
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 juridico) 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 mother. The German Court's further concern with government teaching and counseling in support of prenatal life also has a strongly communitarian ethos behind it. 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 gestation. New life, the next generation unborn, is the concern 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 hardship. 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.

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44 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 & Gorby, supra note 3, at 655-56. The refusal to aggregate is a departure from ordinary valuing and is more at home in discourse informed by rights.

9 There are 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). For a further discussion, see Stith, Toward Freedom from Value, 38 The Jurist 48 (1978) (critique of valuing); Stith, Thinking about Ecology, XLV(1) The Cresset 7 (1981) (critique of rights).

47 [1975] 39 BVerfGE 1, 50, 57-58, 61-64; Jonas & Gorby, supra note 3, at 649, 651-55, 657-60. For an excellent introduction to the German constitutional jurisprudence of values, see Benda, New Tendencies in the Development of Fundamental Rights in the Federal Republic of Germany, 11 J. MARSHALL J. OF PRACT. AND PROC. 1, 6-9 (1977). Dr. Benda at that time was president of the Constitutional Court.


49 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 & Gorby, supra note 3, at 647-49.
Like them, although much more strongly, it refuses to acknowledge constitutional personhood or rights possessed by the unborn. 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 extra-constitutional sense. 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 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 conclusion, and none has subsequently seen fit to rec-

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61 Id. at 159-62; see also infra note 53.
62 The cryptic French opinion (permitting the legislature to leave most early abortions unpunished) contains the following 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 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 & Cohen, supra note 36, at 577-78). For a different interpretation of the French decision, see Glenn, The Constitutional Validity of Abortion Legislation: A Comparative Note, 21 McGill L.J. 673, 677 (1975). The Italian decision referred to in supra note 36 observes that Art. 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’],” Cappelletti & Cohen, supra note 36, at 613, and later emphasizes obligatory protection for “the life of the foetus [‘feto’],” id. at 614, even while declaring that an embryo is not yet a person, id. at 613, and that abortions for serious maternal health reasons must be permitted. Corte Costituzionale, decision of 18 February 1973, n.27, [1975] 98 Foro It. I (Giurisprudenza Costituzionale e Civile) 515, 516. Even the Austrian decision, which alone holds that the 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,” 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, Consti-
ognize 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." 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 Constitution, 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

*institutional Court, [1974] Erklärungen des Verfassungsgerichtshofs* 221, 234-35 G 8/74 (as translated by Capelletti & Cohen, supra note 38, at 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 *Boletin do Ministerio da Justiça* 197, 216, 230 (Mar. 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 require some measure of constitutional protection for that life, with the precise degree of protection left largely up to the legislature. See generally Reis, *Das Lebensrecht des Ungeborenen Kindes als Verfassungsproblem* (1984).

Mary Ann Glendon's work, *Abortion and Divorce in Western Law* (1987), surveys the abortion laws of twenty Western nations and finds them all to be more sympathetic than *Roe* to fetal life.

*Roe* calls the fetus "potential life," 410 U.S. at 150, 154, "prenatal life," id. at 151, 155, "potential human life," id. at 159, "only the potentiality of life," id. at 162, "fetal life," id. at 163, and "the potentiality of human life," id. 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," id. 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 point prior to live birth," id. 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.

*But cf. Murphy, An Ordering of Constitutional Values, 53 S. CAL. L. REV. 703, 744 if. (1980) (Walter Murphy's attempt to construct such a system around the idea of "human dignity"). See generally the works of Profs. Lawrence Tribe and Frank Michelman.*
attenuated constitutional status to what is called “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 something the State may respect, even in the last moments before birth.  

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 privacy. And even in the last period before birth, where the state’s interest is nominally “compelling,” it cannot compel much. Abortions destructive of the fetus must be permitted, even just before birth, if they promote what the Court calls “health” but which it defines broadly to include virtually every significant reason a woman might have for a third trimester abortion. Donald Kommers, in contrasting the American and German cases, has well described the 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.

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 result is likewise far from that reached by other European nations which,

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84 Even after viability, the fetus need be protected by the State only “if the State is interested in protecting fetal life,” Roe, 410 U.S. at 163, and “if it chooses.” Id. at 164-65.
85 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.
86 Id.
87 Id. at 165. The recent Supreme Court decision of Thornburgh v. A.C.O.G., 476 U.S. 747 (1986), reemphasizes that even after viability, there cannot be “any ‘trade-off’ between the woman’s health and additional percentage points for fetal survival.” Id. at 769 (quoting Colautti v. Franklin, 439 U.S. 379, 400 (1979)).
88 Roe’s companion case, which should be “read together” with the former, see Roe, 410 U.S. 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 does not refer to this definition, but the court of appeals did so in the decision under review. The court of appeals’ 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.’” 737 F.2d 283, 299 (3d Cir. 1984) (quoting Doe, 410 U.S. at 192). The court 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. Id.
89 Kommers, Abortion and Constitution, supra note 4, at 282.
given the very great but nonpersonal public value of prenatal life, leave the matter of abortion almost entirely up to the legislature.\(^1\)

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 birth.\(^2\) 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 of even potential life, then the two sides of the Atlantic would draw much nearer to each other.

**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 superior.\(^3\) 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 and for community among ourselves. The Spanish and German attitudes toward the unborn are much closer than the official rights-based 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

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\(^1\) See supra note 52.
homicide. On the other hand, a newborn infant is considered a human being, and so is felt to possess what the German decision calls "inherent" (selbstständig) worth. 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 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 being. 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 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 birth—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 noncredible 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 not be 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 abortions. Other solutions, which grant the fetus some kind of inter-

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64 See Quintano Ripollés, supra note 2, at 503 (asserting that this is generally the case—at least as of 1962, the year of that edition of his treatise).
66 Justice Stevens' recent "pro-choice" concurrence in the Thornburgh case, 476 U.S. 747, 772-82 (1986), 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 well-recognized difference between a fetus and a human being," but fails even to hint at any grounds for such a distinction. Id. at 779 (Stevens, J., concurring).
67 And indeed throughout pregnancy, according to the argument of the German court. See supra note 43.
68 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 differ-
mediate 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 Zapatero, 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 community. 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 solidarity, 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 appropriate. 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 solutions 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 human beings—say at self-consciousness, or at puberty. In that everence between the law as ideal and the law in practice. See, e.g., G. Calabresi, Ideals, Beliefs, Attitudes, and the Law 88 (1985) (contrasting the official prohibition of euthanasia with actual jury practice).

Arroyo Zapatero, supra note 34. 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 Constitucion, 1982 Rev. Jur. Cataluna 1043, 1048 n.1, this foundation for fetal protection entered Spain with Arroyo Zapatero’s article and was then picked up by the Bilbao court. For a further discussion, see supra note 35.

Arroyo Zapatero, supra note 34, at 209 ff.


Arroyo Zapatero, supra note 34, at 217 ff.
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 solution to the law’s abortion dilemma.

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 it 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 extra-statutory defense to crime from an individualist perspective. One of the earliest uses of this concept in criminal law occurred in the famous 1897 Leinenfanger decision of the Reichgericht. 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 actor,” one must also ask whether it could be demanded of the accused under the circumstances. 30 RGST 25-28, quoted in Jiménez de Asúa, supra note 23, at 935.

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 ex-
cessity when an otherwise illegal act is done in order to avoid a greater or an equal harm. The doctrine of non-demandability is thought by the dominant opinion in Spain to account for the latter situation. 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 act.

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?

The dominant theory in Spain appears to treat the non-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 anti-social 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

empts “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 inuperable 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 Asua 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). 7 Jiménez de Asua, Tratado de Derecho Penal 196 (2d ed. 1977).

Some Spanish opinion also supports non-demandability as a legal excuse existing outside the Penal Code. See, e.g., Ricardo de Ángel Yangués, Ley del aborto 100-01 (1985).


77 The rationale for this defense is disputed, but the dominant opinion today appears to be that non-demandability is its basis. See 6 Jiménez de Asua, supra note 23, at 1014; Rodriguez Devesa, supra note 75, at 618-19.

78 Both 6 Jiménez de Asua, supra note 23, at 932 ff. and Rodriguez Devesa, supra note 75, at 609 ff, treat non-demandability under the more general category of exculpation or non-blameworthiness, i.e., as a kind of excuse rather than justification, and assert this to be the dominant view.
excuse for an act is involved, legitimate defense against the act remains possible, 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 justification. 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 party. Note that the omission of risky acts is here justified, at least in the special sense that it is excluded from the definition (tipo) of these crimes, 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 others. 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 excuse. Likewise the government brief in the constitutional case is written as

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78 6 Jiménez de Asúa, supra note 23, at 967-69 (discussing some penalists who consider non-demandability to be a justification). Rodriguez Devesa seems to use the non-demandability notion as a general concept containing all justifications and exculpations, as well as using it as a specific concept involving non-blameworthiness. See Rodriguez Devesa, supra note 75, at 609-11.

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, 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. G. Fletcher, Rethinking Criminal Law 804 (1978).

79 The socialist Minister of Justice, Ledesma Bartret, argued on 25 February 1983 that the non-demandability of continued pregnancy in certain circumstances is a cause of excuse ("inculpabilidad") for abortion. Bartret, supra note 6, at 17. On 25 May that year, Saenz Coscullela, 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 Legislature, No. 40, at 1850. Again on 4 October 1983, the PSOE member Sotillo Marti argued, in favor of nonpunishment of some abortions, that where other conduct is not demandable, an act lacks blameworthiness, i.e., is excused. Id., No. 61, at 2888.
though the issue of non-demandability is one of whether or not a woman having an abortion should be simply exculpated (i.e., excused) in the specified situations.80 The only dissents which mention the matter in some detail link the idea of non-demandability to that of legal excuse.81

In some of the above arguments, however, there is an undercurrent of justificatory reasoning.82 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 unblameworthy.83

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 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 constitu-

80 BJC, supra note 5, at 529-30.
81 Francisco Tomás y Valiente insists that the abortion bill contains neither a legalization nor a depenalization of abortion, but simply a declaration of non-punishment 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 article 417 continue being criminal ("continuan siendo delictivas"). He adds, however, that the basic rule prohibiting abortion appears to him of doubtful constitutionality. BJC, supra note 5, at 539; see also Arozamena Sierra, in BJC, supra note 5, at 537 (less clear linkage of nonculpability and excuse).
82 Arozamena Sierra, supra note 81, at 537; see also Sotillo Marti, supra note 79; BJC, supra note 5, at 529-30 (government brief).
83 So argued bill supporters Lopez Riaño and Sotillo Marti on 7 September 1983. See supra note 33, at 2121, 2140-41.
tionally 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)).

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 doctrinally. It is there used to explain code-based "excusing necessity," which is structured differently from the necessity defense in Spain. The German abortion depenalization statute itself permitted 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 (zumutbar and verlangt respectively). Not surprisingly, the West German Constitutional Court likewise uses the non-demandability 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 health. It applies the doctrine without further argument to the case of potentially grave disability abortions (which the Court calls "eugenic" abortions) 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-de-

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88 Despite the Constitution'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 G. Fletcher, Attitudes Toward Defective Newborns 21 (2(1) Hastings Center Studies Jan. 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.

89 For a discussion of the nature and the context of the German (and, indirectly, the Spanish) concept of "Unzumutbarkeit," see G. Fletcher, supra note 78, at 833 ff; Eser, Justification and Excuse, 24 Am. J. Comp. L. 624 (1976); see also Jiménez de Asúa, supra note 23, at 930 ff.

90 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 involved. See, e.g., Dreher & Tröndle, Strafgesetzbuch 188, 196 (42d ed. 1986).

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

92 [1975] 39 BVerfGE 1, 48-50; Jonas & Gorby, supra note 3, at 647-48; see also supra note 49.

Spanish commentary upon the German constitutional settlement, prior to Spain's own proposed law reform, was generally critical. Commentators both opposing and favoring 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 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 German "excusing necessity." 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 samaritans. Again, we sometimes permit a violent response to aggression, even where retreat is possible, and especially where retreat would involve some risk. Are we perhaps saying that it is too much to ask 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?

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80 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." [1975] 39 BVerfGE 1, 48-50; Jonas & Gorby, supra note 3, at 647-48. Yet the Court later insists that the law distinguish the justified (gerechtferigt) cases of abortion from the reprehensible (verwerflich) ones. [1975] 39 BVerfGE 1, 58; Jonas & Gorby, supra note 3, at 654-55. Sorting out these remarks in light of the basic principles governing the decision, the Dreher & Tröndle commentary concludes that the Constitutional Court's decision points in the direction of an excuse understanding. DREHER & TRÖNDLE, supra note 86, prenote 9 to § 218, at 999-1000.


82 Arroyo Zapatero, supra note 34, at 205.

83 Supra note 86. The German penal article 35 is limited to excusing those who protect themselves or those near to them. But there remains some support for non-demandability as an extrastatutory defense.

84 G. CALABRESI, supra note 68, at 102-03 (reporting and disagreeing with this sentiment).

Roe v. Wade obviously did not need to draw upon anything like the above lines of reasoning; its constitutional value in the unborn child meant that it did not have to search for 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." The explicit thrust of these arguments is that even if the fetus were recognized to be a living human being, and 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.

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, 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 Spain and in Germany as one involving excuse. Given both courts' refusal to affirm that the unborn child

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**See supra note 77 and accompanying text.**

**See supra note 85, at 627, 637. This essay is also a useful introduction to the basic structure of German (and of much of Spanish) penal theory.**
SPANISH ABORTION LAW

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 unsupplied. 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 versus justification, as has been argued.

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 (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 exacted by ex post facto penalties 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

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99 See generally DREHER & TRÖNDLE, supra note 86.
100 “Exactability” is the word used by Jonas & Gorby, supra note 3, to translate Zumutbarkeit. I have ordinarily preferred “demandability” because of its greater normative resonance in English, but here the more physically coercive feeling of the word “exacted” captures the point better.
unjustified self-preference.

But, for a number of reasons excuse thinking alone cannot fully legal-
ize abortion. Excuse is considered to apply only to the person so bur-
dened 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 diffi-
cult crime. The government's strongest argument in favor of its statute,
non-demandability as excuse, 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 no-
ticed already in 1982, in a quite cogent Spanish law journal article.\textsuperscript{101} If
the anti-abortion brief had contained more than its one exceedingly short
reference to this point,\textsuperscript{102} perhaps the Court would not entirely have over-
looked 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 prior statutory violation, would seem to
preclude any penalty for a physician doing an abortion in one of the spec-
ified circumstances. But this does not entirely dispose of our problem. If
abortion is only excused rather than justified under penal law, what is its
status in civil law?\textsuperscript{103} For example, could a father sue for damages be-
cause 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 commission of acts still con-
sidered unlawful? And what is the legal status of a contract to deliver
abortifacients if abortion remains legally unjustified?\textsuperscript{104}

\textsuperscript{101} Cerezo Mir, supra note 31.
\textsuperscript{102} Petitioners' supplementary brief of 3 January 1983 [sic] at 16.
\textsuperscript{103} 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). See Rodriguez Devesa,
supra note 75, at 557, 616 (pointing out that civil responsibility remains for excused crimi-
nal acts); see also 7 Jiménez de Asua, supra note 74, at 201-02. Jonas & Gorby, in their
commentary, see supra note 3, at 591-92, raise the possibility of civil suits in Germany, and
the Dreher & Tröndle discussion, see supra note 86, makes clear that the legitimacy of
social insurance payments for unpunished but possibly still unlawful abortions is a live issue
in Germany. For an excellent survey and argument, concluding that abortion remains illicit
and therefore cannot be a duty in civil law, see Kluth, Zur Rechtsnatur der indizierten
\textsuperscript{104} See Spanish Civil Code art. 1275 (depriving contracts for an illicit cause of any effect).
An illicit cause is defined to be one opposed to laws or morals. Cf. German Civil Code art.
134.
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 abortion clinics, but Spanish law looks very different. Article 8’s idea of 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 duress. Most precisely on point may be that in Spain a

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106 See, e.g., Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981); Gaetano v. United States, 406 A.2d 1291 (D.C. 1979); People v. Krizka, 92 Ill. App. 3d 288, 416 N.E.2d 36 (1980); Sigma Reproductive Health Center v. State, 297 Md. 660, 467 A.2d 483 (1983); City of St. Louis v. Klocker, 637 S.W.2d 174 (Mo. App. 1982). 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 light of the constitutional models developed earlier in this Article. One might have thought that American courts would construe Roe’s constitutional right to an abortion to be solely a rule against state intervention, particularly after the Harris and Maher cases. See Harris v. McRae, 448 U.S. 297 (1977); Maher v. Roe, 432 U.S. 464 (1977). Private intervention in abortion clinics (to protect what proffered evidence supposedly would show to be human life with significant 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 judgment, 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.

106 Both Rodriguez Devesa, supra note 75, at 557, 616 and 7 Jiménez de Asúa, supra note 74, 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. Rodriguez Devesa, supra note 75, 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 supra note 74. 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. Rodriguez Devesa, supra note 75, 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 86, articles 32 and 33 would seem to provide another justification and excuse argument for non-
person is justified in preventing another from destroying something of his or her own which has social utility.\textsuperscript{107}

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 to not prevent that act. Remember that non-demandability is a \textit{penal} law doctrine; there are some things which are supposedly too much to demand by means of \textit{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 (\textit{e.g.}, sit-ins)\textsuperscript{108} in order to further excuse ones (\textit{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 above.\textsuperscript{109} Opponents of abortion now read the Court decision to say that abortion has not become "licit."\textsuperscript{110} If such statements

\textsuperscript{107} Rodriguez Devesa, \textit{supra} note 75, at 554.

\textsuperscript{108} 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 \textit{means of a posteriori} punishment does not, without more, prove that \textit{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 non-demandability excuse thinking, without entailing the abolition of defenses to battery for those who intervene to prevent suicides.

\textsuperscript{109} See \textit{supra} notes 79, 81. \textit{But cf. supra} note 83.

\textsuperscript{110} 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-decision book referred to \textit{supra} note 35 and to which he contributed). The anti-abortion commentary \textit{LEY DEL
Span.

mean 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 physician. 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 rescue.

There is an undeniable appeal in the justification interpretation on non-demandability. Always to value the interests of others equally with one's own is a heroic or saintly ideal. 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

ABORTO, supra note 74, at 91 ff., 327, also asserts and implies the continuing illicitude of almost all abortions.

111 The Dreher & 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 86, prenote 9e to art. 218, at 1001-02. Spanish law has a similar catch-all category of excuse, called the excusa absolutoria, which the law could use to understand the status of the aborting physician. See 6, 7 JIMÉNEZ DE ASUA, supra notes 23 & 74. But cf. NATHANSON, ABORTING AMERICA 193-94 (1979) (arguing 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).

112 Despite its own conclusion that abortion is only excused, the Dreher & Trondle commentary, supra note 86, makes clear that the dominant legal opinion in Germany is that non-punished abortions are to be considered justified. See generally Eser, Reform of German Abortion Law: First Experiences, 34 AM. J. COMP. L. 369, 375 n.40 (1986); GROPP, DER STRAFFLOSE SCHWANGERSCHAFTSABBRUCH (1981). 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.
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 involved. In those situations, too, the law recognizes an apparent right not to sacrifice one’s own lesser interests for the sake of other’s 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 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?

The idea of non-demandability can in this way be thought to justify abortion (particularly in circumstances of unusual hardship) despite the

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1111 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. See supra note 79, at 1853-54. 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. See Diario de Sesiones del Congreso, supra note 31, at 2946; Diario de Sesiones del Congreso de los Disputados, supra note 33, at 2138.

Cf. Kadish, Respect for Life and Regard for Rights in the Criminal Law, 64 CALIF. L. REV. 871 (1976) (important attempt to understand the interaction of the values of proportionality and autonomy).

1114 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 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.
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” 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 protection 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 exist.116

But if abortion is only a liberty, involves only the absence of penal prohibition, necessity doctrine might still justify intervention to _prevent_ abortions.117 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 the 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 made. If pregnancy is only like rescuing, and both are just sometimes too much to demand by

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116 The reference here is to the concept which Hohfeld calls “privilege.” See _generally_ W. Hohfeld, _Fundamental Legal Conceptions_ (1919).
117 See Rodriguez Devesa, _supra_ note 75, at 555.
118 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 art. 20 and the commentaries thereon by 7 Jiménez de Asua, _supra_ note 74, at 198-99.
means of criminal penalties, then abortion has not yet won the full sup-
port of the law. Particularly under a jurisprudence of "effective" commu-
nity values, it would seem that courts ought to ignore rules wherever acts
further the greater constitutional value. And, at least in the case of abor-
tion 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 of 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 availa-
ble—because non-cooperation with, and even intervention against, the
performance of abortion may be justified by the thinking at the base of
the necessity defense. 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
normally preclude not rescuing. By contrast, abortion necessarily implic-
cates third parties and the judicial system which judges those parties.

If the idea of non-demandability were limited to excusing 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 jure,¹¹⁸ 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-de-
mandability 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 separat-
ing fetal life from postnatal life). 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

¹¹⁸ See Wohlers, Women and Abortion (published undated, American Center for
Bioethics) (surveying pre-Roe statutory and case law and concluding that women were al-
most always exempted from punishment by one or the other).
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 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 the 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 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 though avoiding the burdens of pregnancy were the main purpose of abortions, though Roe itself emphasized post-natal burdens. 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

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119 See, e.g., Regan, supra note 96; Thompson, supra note 96; see also G. Calabresi, supra note 68, at 114 (noting that the purpose may also be to kill the fetus).

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 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 discussions.

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 itself 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 months. 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 demanded, 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 the necessity defense to one who has a special obligation to sacrifice herself.

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...

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121 See G. FLETCHER, supra note 78 (arguing that even excuse reasoning must involve value-balancing).
122 But demandability as found in the German Penal Code article 35 does require an inquiry into special legal relationships.
123 See supra note 96. The violinist is Thompson’s creation.
124 See L.F. 11, in BJC, supra note 5, at 535.
consent to care for life resulting from that act? \footnote{Spanish law also creates another exception to article 8's necessity defense for those who intentionally bring about the state of necessity.} 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 the hardship pregnancy, are greater than the burdens our law places on non-pregnant people during most of their lives and those burdens fall unequally onto one sex. \footnote{See generally G. Calabresi, supra note 68, at 101 ff.} 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 bearing that life by means not only of social support services before and after birth, but even of special benefits and privileges for mothers \footnote{M. Glendon, supra note 52. Glendon 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.}—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.