Italian–American Narratives of Abortion: Crimes and Rights, Their Differences and Why they Matter

Narrativas jurídicas sobre el aborto: crímenes y derechos, sus diferencias y por qué son importantes. Un análisis sobre la legislación italiana y estadounidense

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Marianna Orlandi[1]
http://orcid.org/0000–0002–1544–5147
Austin Institute for the Study of Family & Culture
mo@austin–institute.org

1 Associate Director of Academic Programs of the Austin Institute for the Study of Family and Culture. Ph.D. in Law from the University of Padua, Italy, and from the University of Innsbruck, Austria. She was a 2019–2020 James Madison Associate Research Scholar and Lecturer in the Department of Politics at Princeton University. Admitted to the Italian bar in 2015 after graduating *magna cum laude* from the University of Padua, School of Law.

Abstract

This paper aims to underline the importance of language in abortion legislation and to defend the crucial role of criminal law in the protection of human life before birth. It wishes, furthermore, to expose the unsoundness of speaking of abortion as a fundamental right. To this end, the article starts off by examining the Italian abortion legislation, which exemplifies a typical "European approach" to the legal protection of the unborn: from the 1975 Constitutional Court judgement, which exempted some abortions from punishment to the recent "re–criminalization" of unlawful abortions. The second section focuses on American abortion jurisprudence. It underscores its uniqueness, specifically in having declared abortion a constitutional right, and analyzes some of its most troubling consequences, particularly with reference to current feticide crimes. The third section offers a defense of the first approach from both a legal and a philosophical perspective and broadly suggests abandoning the current "abortion–as–a–right–talk" in favor of a more principled use of the criminal law.

Keywords: Abortion; right to life; Personhood; Italian abortion law; Necessity.

Resumen

Este artículo tiene como objetivo subrayar la importancia del lenguaje en la legislación sobre el aborto, y defender el papel crucial del derecho penal en la protección de la vida humana antes del nacimiento. Pretende, además, exponer la falta de solidez del lenguaje del aborto como un derecho fundamental. Con este fin, el artículo comienza examinando la legislación italiana sobre el aborto, que ejemplifica un típico "enfoque europeo" de la protección legal de los no nacidos: desde la sentencia del Tribunal Constitucional de 1975 –que eximió del castigo a algunos abortos– hasta la reciente re–criminalización de los abortos ilegales. La segunda sección se centra en la jurisprudencia estadounidense sobre el aborto. Destaca su singularidad, específicamente por haber declarado el aborto como un derecho constitucional, y analiza algunas de sus consecuencias más preocupantes, en particular con referencia a los actuales delitos de feticidio. La tercera sección ofrece una defensa del primer enfoque, desde una perspectiva tanto legal como filosófica, y sugiere, en términos generales, el abandono del actual discurso del "aborto como un derecho", en favor de uno basado más en principios del derecho penal.

Palabras clave: Aborto; Derecho a la vida; Persona humana; Ley italiana; Necesidad.

Sumario

1. Introduction

"Comparative law does not provide blueprints or solutions. But awareness of foreign experiences does lead to the kind of self–understanding that constitutes a necessary first step on the way toward working out our own approaches to our own problems"[2].

In October of 2018, the Italian town council of Verona made world-wide news for approving a motion directed at protecting motherhood and unborn human life[3]. By that vote, the city undertook to provide

2 GLENDON, Mary Ann. *Abortion and divorce in western law*. Cambridge: Harvard University Press, 1987. p. 142.

3 Comune di Verona. Mozione. *Iniziative per la prevenzione dell'aborto e il sostegno alla maternità nel 40º anniversatio della legge* 194/1978. Prot. n. 0314849/2018, 5.10.2018, approved 4.10.2018. Available in: https://bit.ly/2YvmWja

funding for local pro–life associations and to promote measures directed at preventing abortions by helping mothers in distress. International media outlets cried at the scandal, fearing that the *right to* abortion of Italian women was once more endangered, under the attack of an ultra–conservative (religious) right[4]. A few months later, a similarly outraged reaction followed a specular move by the New York State Legislature. With the approval of the Reproductive Health Act, which allows for abortions performed after the 24th week, New York explicitly expanded a woman's legal access to abortion up to birth, reaffirming abortion as a *fundamental right* and eliminating any criminal law protection for unborn life[5]. Immediately, news outlets reported that New York had shockingly moved towards approval of infanticide[6].

Regardless of what one thinks of abortion, the most striking feature of these opposite courses of events is what they have in common. In both instances, the newly enacted measures were consistent with their respective and preexisting legal frameworks. In other words, the outraged and surprised reactions of the media –and of the general public– reveal that no matter how many books, essays, or encyclopedic articles were written on the topic, abortion and its legal qualifications remain not only controversial, but vaguely understood[7]. As the U.S. Supreme Court held in *Casey*, however, "*liberty finds no refuge in a jurisprudence of doubt*"[8].

4 CAMILLI, Annalisa. *The offensive of the far–right against abortion starts in Verona.* Internazionale. 13.12.2018. Available in: https://bit.ly/3mDNfvu; FOX, Kara & DI DONATO, Valentina. *Abortion is a right in Italy. For many women, getting one is nearly impossible,* CNN (May 2019). Available in: https://cnn.it/3lrh03m

5 Reproductive Health Act, NY Senate Bill s. 240, 2019–2020. Available in: https://bit.ly/3Bs1hqe

6 OGNIBENE, Francesco. *A New York la salute non è "diritto". Ma ormai lo è l'aborto senza limiti.* AVVENIRE. 27.1.209. Available in: https://bit.ly/304IrHL; RUSSEL, Nicole. *Disgusting: New York not only legalized late–term abortions, but also celebrated like it won the Super Bowl,* WASH. EXAM'R. 2019, Jan. 23. Available in: https://washex.am/3AryMYr

7 This is not to say nobody reported facts correctly: for an example of accurate reporting see PONNURU, Ramesh. "The Infanticide Craze". *National Law Review*. 2019, Jan. 30. Available in: https://bit.ly/2YGpXwR

8 Supreme Court of the United States. *Planned Parenthood of Southeastern Pa. v. Casey, Governor of Pennsylvania, et al. 505 U.S. (1992)*. Since that very holding implied not only a move from the *privacy*–based right to abortion to a *due process* one, but also a peculiar application of *stare decisis,* Justice Scalia

The "doubt" this paper tries to address does not derive from a *formal* lack of clarity: abortion laws are quite clear and public throughout the West. Rather, that "doubt" is generated by a lousy usage of the relevant legal terminology (a *substantial* lack of clarity). The current "doubt" derives specifically from the fact that the *abortion–right* narrative that originated in the U.S. Supreme Court and was later progressively adopted at the international level, is now often used to describe *any* national legislation that exempts abortion from criminal punishment, even though the limited and circumstantiated decriminalization of the practice never meant abortion had become a fundamental *right*[9].

In fact, most countries, including the United States, have not prohibited *any* form of criminalization of abortion. In this respect, Canada is "the only country to date that, through a Supreme Court decision in 1988, effectively decriminalized abortion altogether. *No other country, no matter how liberal its law reform, has been willing to take abortion completely out of the law that delimits it.*"[10] In this particular respect, while the term "decriminalization," and the current call for abortion decriminalization, are usually meant to signify, and to advocate that under no circumstance should a woman or a doctor be criminally liable for the intentional and consensual termination of the unborn child, at whatever

vibrantly replied with another maxim: "*Reason finds no refuge in this jurisprudence of confusion*." Id, at 933.

9 "Interestingly, no human rights body has gone so far as to call for abortion to be permitted at the request of the woman, yet many have called for abortion to be decriminalized. This raises the question of what is understood in different quarters by the term 'decriminalization'" BERER, Marge. *Abortion Law and Policy around the World: In Search of Decriminalization, Health and Hum*. Rts. J. 2017, Nº 19, p. 16. For an account of the many ways in which international bodies have advocated for further decriminalization, see ERDMAN, Joanna N. and COOK, Rebecca J. "Decriminalization of abortion – A human rights imperative". *Bestprac. & Rsch. Clinical obstetrics & gynecology.* 2020, vol. 62, p. 11. For a most recent example, see UN. Hum. Rts Comm. General comment. 2018, Nº 36 CCPR/C/GC/36, I, 9. On article 6 of the International Covenant on Civil and Political Rights, on the right to life: "States parties should not introduce new barriers and should remove existing barriers that deny effective access by women and girls to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers".

10 BERER, Marge. *Ibidem* 16, emphasis added.

stage of pregnancy[11], this paper suggests something different: i.e., that abortion should remain a crime, although exemptions from punishment may be prudent and reasonable.

The consequences of an inaccurate use of legal terminology may be severe, especially where one believes that abortion, albeit legal, should not be promoted, but rather prevented and discouraged. Besides contributing to the deceiving view that abortion has by now become an "international human right", worthy of international judicial enforcement[12], this generic talk inevitably affects our communities and values, while compromising our moral agency. At the level of legal regulations, the vague abortion–as–a–right talk is resulting in the progres-

11 See, for instance, SHELDON, Sally. "The Decriminalisation of Abortion: An Argument for Modernisation", *Oxford J. Legal Stud.* 2016, vol. 334, Nº 337.

12 The idea that abortion is a right guaranteed and grounded in international law is simply not true. At the UN level, the international consensus on abortion is still the one enshrined in the provisions of the 1994 International Conference on Population and Development (ICPD), which established that "Governments should take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning, and in all cases provide for the humane treatment and counselling of women who have had recourse to abortion". (ICPD §7.24). The following IV World Conference on Women (Beijing,1995), quoting directly from Cairo, reiterated that: "Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process", §106(k). Subsequent declaration by UN Treaty Bodies do not have the power to create international binding norm. For the only regional treaty that declares abortion a right see Protocol to the African Charter on Human And Peoples' Rights in the Rights of Women in Africa, which however limits it to "cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus" (art.14.2.c) and does not speak of a right to abortion on demand. The Treaty provision is also preceded by the sentence: "State Parties shall take appropriate measure to ensure that", so that the provision of article 14.2.c represents a so–called programmatic right. With respect to customary international law, abortion is equally undefinable as a "right" for the simple reason that a) there is no "general and consistent practice of states followed by them from a sense of legal obligation"; b) several countries liberalized the practice without declaring it a right. See also, CASTALDI, Ligia de Jesús. "The Supreme Court Should Look At International Abortion Law and Overrule Roe v. Wade", *Pub. Discourse* (Sept 6, 2020). Available in: https://bit.ly/3lqjFKt.

sive erosion of national laws –either by means of progressive liberalization[13], or by means of administrative guidelines that extend access to abortion beyond its original limits[14]. At the societal level, and due to the inevitable pedagogical role of the law, the message conveyed by the abortion–right narrative is shaping a culture in which the inalienable and inviolable nature of human life and the inherent dignity of all men become conventional concepts.

This narrative radically sets aside the mere *possibility* of an innocent victim. The result of its exclusive focus on a woman's sole, unlimited autonomy is that the most fundamental human relationships, i.e., those between intimate sexual partners, and within the biological family, become non–constitutive, non–fundamental aspects of human flourishing, freedom, and wellbeing[15]. At the individual level, the powerful and authoritative voice of international bodies and courts, which constantly suggest abortion *already is* an international human right, may also signify that today, and regardless of national legislations, women who choose abortion do not truly *deliberate and act for the intentional destruction of an innocent human life,* but with the sincere belief of exercising a fundamental right, and of getting rid of a biological inconvenience[16]. As a consequence, and

13 An example in this sense comes most recently from France, where the National Assembly voted in favor of extending access to the abortion procedure that was already permitted exclusively in cases of serious danger for the mother's health, and thus beyond the 12th week, on the grounds of a vague psycho–social distress ("détresse psychosocial"). See, *"IMG jusqu'au 9e mois pour "détresse psychosociale": le danger d'un motif imprécis". FigaroVox* 2020, Aug. 12. Available in: https://bit.ly/2Yz0F3f

14 As recently happened in Italy. See *Ministero Della Salute, Circolare 12 Agosto 2020, 0027166–12/08/2020–DGPRE–MDS–P.*

15 For an insight on how such relationships might instead be at the very basis of our own individual liberties, see SNELL, R.J. "Alone Together, or Just Alone? Social Conservatives Are Right". *Pub. Discourse.* 2020, May 18. Available in: https://bit.ly/3iKLCuL"in order to flourish and develop in freedom, persons must belong somewhere –in the sense of membership, not the sense of property– and it is belonging that forms affections and loyalties, duties and obligations, shaping us into fully free persons".

16 See GLENDON, Mary Ann. *Abortion and divorce in western law…* 138–139 ("[O]nly the most elementary legal information reaches the public, and this almost always in a slightly inaccurate form. Relayed through lawyers, newspapers, magazines, television, radio, or by family and friends, what comes through is frequently only a sort of cartoon of the law in question".

even where one believes that abortion is a *malum in se,* these women, as well as their partners and counsellors, may not be fully morally responsible for their choice[17]. Personal blameworthiness requires not only knowledge of the objective conduct being performed, but also a clear understanding of its *wrongful* nature. With reference to the *facts* of abortion, there is no scientific doubt that the termination of a pregnancy always and inevitably entails termination of a human life. Modern embryology is clear on the issue and no honest abortion advocate denies such truth any longer. With reference to the *morality* of abortion, however, there is an important role that scholars can play. Philosophers are now called to restore a public understanding of absolute and pre legal *right* and *wrong*, to point us to those principles of justice that are inscribed in our hearts, including the condemnation of any intentional destruction of an innocent human life[18]. Legal scholars can help philosophers accomplish this result precisely by

17 This is not to suggest that the wrongfulness of the intentional killing of a human life is not inscribed in our hearts, and universally true. "The basic beliefs of which we are speaking [however] constitute the universal background of the moral landscape, against which these details become visible. We may also think of them as the universal deep structure of conscience, by contrast with the culturally variable surface". J. Budziszewski, Cano v. Baker, 435 F.3d 1337 (11th Cir. 2006), *Brief of Amicus Curiae.* At the same time, however, human conscience can be affected and shaped by prior and by common behaviors. Following the Catholic tradition, Thomas Aquinas referred to the different levels of human conscience as "*synderesis*" (which never errs) and "*conscience"* (which can be wrong). As Saint John Paul II more recently wrote, "Sin, in the proper sense, is always a personal act, since it is an act of freedom on the part of an individual person and not properly of a group or community. This individual may be conditioned, incited and influenced by numerous and powerful external factors. He may also be subjected to tendencies, defects and habits linked with his personal condition. *In not a few cases such external and internal factors may attenuate, to a greater or lesser degree, the person's freedom and therefore his responsibility and guilt*". *Reconciliatioet Penitentiae,* 1984, emphasis added.

18 Exemplary, in this direction, are the works of Professors John Finnis, Robert P. George, and J. Budziszewski. As the latter writes, "We can't not know the wrong of deliberately taking innocent human life." J. BUDZISZEWSKI, *The Line Through The Heart*, 2011, p. 18. And as he continues, referring to the present role of philosophers and quoting from St. Bernard of Clairvaux, "'… there are still others who seek knowledge in order to serve and edify others, and that is charity'. The times are dark, and darkening. If ever there was a time for Christian philosophers to exercise such charity, it is now". Ibídem p. 22. As the

showing how courts and laws, even while (partially) decriminalizing abortion, have tried to remain coherent with those pre legal intuitions; they "legalized" abortion but avoided, at the same time, the misleading and dehumanizing narrative of abortion as a fundamental right, upholding, at least symbolically, the inherent value of the unborn[19].

To this end, the first section illustrates the way in which abortion was only partially "decriminalized" in Italy but never proclaimed a constitutional right. As demanded by the Italian Constitutional Court, Italian abortion legislation protects life both before as well as after birth. Although imperfect, and in urgent need of an amendment, such regulation of abortion has achieved some positive results. Courts and legislatures are still entitled to offer strong protection to the unborn, whenever needed. The law embodies a "compromise" solution, where the most divisive ethical issues are treated without the radicalism and polarization typical of the North American debate[20].

The second section completes that initial account by showing how the U.S. jurisprudence on abortion followed a completely different path. In 1973, the U.S. Supreme Court not only decided that women have a *constitutional right to abor-*

Catechism of the Catholic Church summarizes (1783), "The education of conscience is indispensable for human beings who are subjected to negative influences and tempted by sin to prefer their own judgment and to reject authoritative teachings".

19 Although critical of a contradictory Italian jurisprudence, Professor S. Amato recently acknowledged the importance of such symbolic protections. With explicit reference to J. Habermas' thought, he wrote: "it is important to underline the symbolic function that the protection of human embryos would have for all those 'who cannot defend themselves in first person'. The Italian Constitutional Court has, at least, affirmed this symbolic defence". Amato, Salvatore. In: CASTALDI, Ligia de Jesús; ZAMBRANO, Pilar – SAUNDERS, William L. (Coords.), *Unborn Human Life and Fundamental Rights: Leading Constitutional Cases Under Scrutiny*, Peter Lang GmbH, 2019, 264 pages.

20 See CALABRESI, Guido. Ideals, Beliefs, Attitudes, and the Law. Syracuse, New York: Syracuse University Press, 1985. p. 98 ("Solutions which recognize the existence of a conflict among fundamental values are rarely acceptable to the pure holders of a metaphysics belief. But, even to these, such solutions are likely to be less hurtful than a statement that their values do not matter […] [the compromise] is much less emarginating, and more hopeful for the future of society, than a statement that our law excludes your metaphysics as worthless").

tion, which states may not abridge; but, also, that states are under *no obligation* to protect life before birth. The focus on this section is on the specific wording adopted by the Supreme Court in its most important judgements, on the unique nature of this approach, and on its contradictory results.

Following the teachings of Professor Mary Ann Glendon[21], the closing section argues for the prefer ability of the Italian approach of partial decriminalization. Avoiding the narrative of abortion as a fundamental right, derogatory solutions are at least capable of upholding –as a matter of principle– the inherent dignity of every human being, including of those whose lives were prematurely and *unjustly* terminated. A sound and principled use of the criminal law, moreover, allows us to condemn the practice (under any circumstances) while creating room for exceptions and for clemency. In the author's view, finally, nothing in the U.S. Constitution prevents the adoption of this approach and the abandonment of abortion rights talk. Nothing prevents *Roe v. Wade* to be overruled.

2. The Italian law on abortion[22]: its strengths, limits, and most recent developments

Italy never proclaimed a constitutional right to abortion. Its Constitutional Court never found such a right implicitly protected in its founding document. In

21 See, GLENDON, Mary Ann. *Abortion and divorce in western law…*; and GLENDON, Mary Ann. *Rights Talk, The Impoverishment of Political Discours.* New York: Free Press, 1991.

22 The author adopts the unique term "abortion" to refer to all cases of intentional destruction of innocent human life before birth, be it lawful or unlawful, and at whatever stage of pregnancy. The current distinction between an unlawful abortion and a lawful termination of pregnancy, in fact, is but an arbitrary product of positive laws and does not help identifying the nature of the act performed. Following the thought of Professor J. Finnis, "it would be clearer to reserve the word 'abortion' (or 'induced abortion' or 'therapeutic abortion') for procedures adopted with the intent to kill or terminate the development of the fetus, and to call by their own proper names any therapeutic procedures which have amongst their foreseen but unintended results the termination of pregnancy and death of the fetus". FINNIS, John. *Justice for Mother and Child.* In: Human rights and common good. Collected essays Vol. III. Oxford: Oxford University Press, 2011. p. 308.

1978, following a judgement of the Constitutional Court[23], the Italian Parliament enacted Law n. 194 of 1978 ("Law 194")[24], which decriminalized the practice of abortion under specific and limited circumstances with the declared aim of protecting women's health. The law intended to prevent abortions and to help pregnant mothers carry their children to term wherever possible. Therefore, the recent "pro–life measures" (or commitments) passed in Verona were fully legitimate, consistent with the basic principles, as well as with specific provisions of Law 194 on *Voluntary Termination of Pregnancy*[25].

2.1 Historical background: Abortion in the Criminal Code

Before 1975, Italy's absolute prohibition of abortion was explicitly enshrined in articles 545 and 546 of the Penal Code, which respectively banned non–consensual and consensual abortion. In the first case, the sentence was of seven to twelve years imprisonment for the performing physician and in the second case, imprisonment for two to five years for both the physician and the consenting pregnant woman. Article 547, on self–induced abortion, once more sentenced the same woman to one to four years imprisonment. The following provisions[26], included in the same title of the Code, prohibited abortion incitement as well as general incitement to practices hostile to procreation.

In 1978, Law 194 repealed all such crimes and the entire section of the

23 Constitutional Court of Italy, 18 Feb. 1975, n 27, https://www.cortecostituzionale.it/actionPronuncia.do. For the English translation see COHEN, William and CAPPELLETTI, Mauro. *Comparative constitutional law, cases and materials.* Indianápolis: Bobbs–Merrill, 1979. p. 612–614.

24 Italian Republic. Law May 22, 1978, n. 194, *Official Gazette* May 22, 1978, Nº 140

25 The same cannot be said about the most recent ministerial guidelines on medical abortion (Ministero della Salute, Circolare 12 Agosto 2020, 0027166–12/08/2020–DGPRE–MDS–P). These guidelines not only extended the possibility to access medical abortion to the 9th week (with increased danger for women's health), but also make it possible to undergo an abortion "at home", in violation of article 8, Law 194; and even in the "consultori" which were never meant to serve as abortion providers, in clear violation of Law 194. For an early comment on these guidelines see ROCCELLA, Eugenia e MORRESI, Assuntina. *Le scelte sulla vita. Aborto anche nei consultori? Ma così si va oltre la legge* 194. AVVENIRE. It [on line] 2020, Aug. 17. Available in: https://cutt.ly/QE23JSw

26 Italian Republic. Italian Penal Code, articles 548–555.

Penal Code, but it simultaneously introduced new criminal provisions. The legal goods (*Rechtsgut*)[27] protected by the old penal norms, however, were radically different from the ones enshrined in the more recent criminal provisions. The whole Penal Code, including the former abortion crimes, was enacted in 1930, at the time of the fascist regime; in line with that ideology[28], those provisions were included in the disgraceful section titled, "*Crimes against integrity and fitness of the breed",* and no more classified, as per the liberal and enlightened code of 1889, as "*Crimes against the person*". These abortion crimes, in other words, did not protect the "life of the fetus", nor that "*speshominis*" that the unborn may represent. Aiming at preservation of "race," and functional to the "demographic interest of the state", the pre–1978 norms were expressions of a time when the state, and its discriminatory *interests,* mattered more than its citizens, born and unborn alike, and superseded their fundamental *rights*[29]. Per the old penal code provisions, the unborn mattered instrumentally, and the health conditions of the pregnant woman, as well as her own life, were equally irrelevant.

Before the enactment of Law 194, however, Italian courts rarely dealt with

27 The notion of "legal good" (German: "*Rechtsgut*"; Italian: "*bene giuridico*") is of fundamental importance when analyzing non–Anglo–American criminal law. The "*Rechtsgut*" theory is in fact the European alternative to the "harm principle" as the ultimate justification of criminal norms and prohibitions. The term "legal good" refers to the objects, interests, and values protected by each criminal offence. Homicide protects the legal good of "life;" theft the legal good of "property". Several crimes protect more than one legal good: extortion, for instance, protects both the victim's autonomy and her material property. This concept will again be relevant with reference the state's *duty* to protect unborn human life as a constitutionally protected "legal good", as is typical of a European approach, and as opposed to the U.S. concept of a "state interest" in potential life.

28 It is worth noting that the 1930 Penal Code, while ideologically influenced by the regime, remained faithful to the rule of law –explicitly sanctioned at articles 1 and 199. That Penal Code was largely the product of a rational and technical approach to the criminal law ("*scuolatecnico–giuridica"*), which the regime could only partially corrupt. For this reason, while specific provisions were found unconstitutional, the Code is still in force, being largely consistent, in its basic principles, with the later Republican Constitution.

29 For the history of these norms see, RONCO, Mauro. *La tutela della vita nell'ordinamento giuridico italiano.* L–Jus. Rivista semestrale iscritta. 2019, Fascicolo 2, p. 10. (with reference to MANZINI, Vincenzo. *Trattato di diritto penale italiano.* 1984, VII, 612, Nº 4. Available in: https://cutt.ly/HE28l0g

the issue of abortion. Most cases, furthermore, ended up with a "*pardon*"[30]. Due to the progressive international acceptance of the practice, and to the instrumentalization of the most dramatic stories, the idea that the problem rested with current prohibitions –rather than with debatable sexual mores– gained ever more power and traction[31]. Were the laws different, women would not resort to clandestine clinics and would not be risking their own lives. This argument clearly underestimated the life of the unborn, as well as the idea that the criminal law embodies the principles a society holds fundamental –one of them (and possibly a foundational one) being the inviolability of each human life. This view was an inevitable by–product and the most reasonable outcome of a culture that had lost its ability to talk of objective and prelegal truths and values[32]. Such a

30 See PERINI, Lorenza. "Quando la legge non c'era. Storie di donne e aborti clandestini prima della legge 194" *Storicamente*. it [on line]. Nº 6, art. 7, p. 9. Available in: https://cutt.ly/IE24qpI ("only the poorest and most isolated women would be humiliated by a public trial, those who either performed a self–abortion or were helped by other women, without the possibility of seeing a doctor or unable to find alternatives…" Clearly, these were trials to the law itself, trials that almost never made it to a final judgment, but were postponed to a date to be determined or which, as in a hoax, ended up with a judicial "pardon" for the woman defendant". Informal translation).

31 As per Emeritus Professor of Criminal Law, Mauro Ronco, a constant feature of abortion reforms in the 60s and 70s consisted in the reiterated claim that since abortion is often performed, it shall not be punished: the ground for such exemption being its own inevitability. See RONCO, Mauro. "L'aborto in Quattro paesi dell'Europa Occidentale: Legislazioni e Cause". *Quaderni di cristianita* [on line]. Anno II, Nº 4, primavera 1986. Available in: https://cutt.ly/lE9y0MO

32 See MACINTYRE, Alasdair. *After virtue: a study in moral theory.* 3rd ed. London: Bloomsbury Academic, 2007. p. 6, 68 ("The most striking feature of contemporary moral utterance is that so much of it is used to express disagreements; and the most striking feature of the debates in which these disagreements are expressed is their interminable character. I do not mean by this just that such debates go on and on and on –although they do– but also that they apparently can find no terminus. There seems to be no rational way of securing moral agreement in our culture […] [B]oth, the utilitarianism of the middle and late nineteenth century and the analytical moral philosophy of the middle and late twentieth century are alike unsuccessful attempts to rescue the autonomous moral agent from the predicament in which the failure of the Enlightenment project of providing him with a secular, rational justification for his moral allegiances had left him").

pragmatic reasoning rested on the now predominant idea that criminal norms may only be grounded upon their general acceptance by the people, deprived of any reference to *natural rights* and *wrongs*. They may not aim at *improving* societies, least being denounced as dogmatic and paternalistic; and they should be valued according to citizens' compliance, and even to the risks encountered by their own transgressors[33]. The criminal law had to *reflect the times*, regardless of how good or bad they were: if women demanded abortions, the law had to make it lawful. In the midst of the sexual revolution, moreover, secular voices seldom spoke of chastity, of exclusive marital sexuality, or of paternal duties towards the unborn as the real antidotes to unwanted pregnancies and to abortions[34]. As a result, the idea that protection of prenatal life was rooted exclusively on a religious worldview grew stronger and undisturbed.

It has been argued, however, and including from a pro–life perspective, that the old abortion crimes needed an amendment. In addition to their mentioned troubling classification in the Penal Code, the absoluteness of those provisions risked being unable to take the rights of the mother, to life and to physical health,

33 See ELY, John Hart. "The Wages of Crying Wolf: A Comment on Roe v. Wade". *Yale Law Journal.* 1973 April, Nº 82, p. 920, 947. ("It is a strange argument for the unconstitutionality of a law that those who evade it suffer, but it is one that must nevertheless be weighed in the balance as a cost of anti–abortion legislation".) In speaking of "costs" of a particular legislation, this sentence presupposes a pragmatic and utilitarian –rather than a value–based– justification of criminal norms.

34 A strong and original voice in this sense was that of Cambridge Professor of Philosophy G.E.M. ANSCOMBE (see, for instance, her *Contraception and Chastity,* 1972; and *The Dignity of the Human Being*, in GEACH, M.& GORMALLY, L. eds., Human Life, Action and Ethics. Essays by G.E.M. Anscombe (2005). In Italy, an interesting perspective was offered by writer, movie director, and intellectual Pier Paolo Pasolini, who, not withstanding his radical communist leanings, considered abortion legislation as the "legalization of homicide", PASOLINI, Pier Paolo. "I Am Against Abortion". *Il Corriere della Sera* [on line]. 1975, Jan 19; for an English translation see: Available in: https://cutt.ly/wE9p7iT. A few years later, on the occasion of the 1981 referendum on Law 194, Italian philosopher of Law Norberto Bobbio, expressed a similar opinion ("the fundamental right of the concepito, that birth–right which, in my opinion, cannot be called into question. It is in the name of this same right that I am opposed to capital punishment. We can talk of abortion decriminalization, but we cannot be morally indifferent to it." Informal translation). See, MAGRIS, C. "Bobbio e l'Aborto". *Il Corriere della Sera* [on line]. 2008, Feb. 19.

into serious consideration, and risked imposing performance of heroic behaviors which no just law may demand. Based on the Code's provisions, abortion could go free from punishment exclusively when performed *to save a mother's life*[35], and exclusively within the narrow limits set forth by its article 54, commonly known as the necessity defense ("*stato di necessitá"*)[36]. According to its letter, the general exemption applies whenever a crime is committed to preserve oneself or a third party from a *present danger* of *grave personal injury*. As for further conditions: the defendant shall not have caused the averted danger; the danger may not be otherwise prevented; and the criminal offence shall be proportional to the averted danger. Therefore, while the textual limits of this defense seem to permit "indirect abortions"[37], the norm and its jurisprudential interpretation did not necessarily ensure that the *intention* of the action would be taken into serious consideration: the "*present* danger" requirement had come to be rigidly –and mistakenly– applied by courts, which demanded not only a threat's "*current existence*" ("attualitá"),

35 As argued by J. Finnis, however, a coherent system of human rights implies that "means of protecting the life of the mother are proper when they are means inherently suited to protecting life and intended to preserve both lives as far as possible", FINNIS, John. In: ZAMBRANO, Pilar – SAUNDERS, William L. (Coords.), "Unborn Human Life and Fundamental Rights…" Op. Cit., Intention, in other words, is what makes the difference, not just the action's motive. See also, FINNIS, John. *Justice for Mother and Child.* Op. cit. Infra.

36 Art. 54 Italian Penal Code: "A person is not punishable for the realized conduct if it was necessary to save himself or others from imminent danger of serious personal harm, provided he did not cause the danger, could not otherwise have avoided it and that his conduct was proportionate to it. This provision does not apply to someone who has a legal duty to expose himself to such danger. The provision of the first part of this article applies also if the state of necessity was brought about by the threat of a third party; but in that case, the person who caused the realization of the criminal conduct will be liable". Informal translation.

37 The distinction between direct and indirect abortions is the one adopted by the Catholic Church. Direct abortions are prohibited, consisting in all actions and omissions that are intentional eliminations of the unborn. As already mentioned, "abortion" in this paper refers to all direct abortions, lawful and unlawful: so called "indirect abortions" –acts that are solely directed at preserving the life or physical health of the mother, but which would welcome, if at all possible, the preservation of the unborn life– do not cause any real legal problem.

but the actual "*imminence*" of the danger[38]. This, in turn, made necessity largely inapplicable also to abortions resulting from actions performed *to save* a mother's life: medically speaking, in fact, serious and inevitable dangers could often be predicted at an early stage of pregnancy, while later terminations signified much higher risks for the woman's health and life. An additional problem of this defense came then from the fact that courts had also conflated the temporal requirement of the danger –its *imminence*– with the lack of alternatives, which was not always easy to assess in life–saving abortion scenarios[39]. The criminal defense, moreover, would have exempted defendants from punishment (both mothers and doctors) –and that was usually the case– but not from criminal trial. In Italy, the strict rule of mandatory prosecution prevents public prosecutors from exercising prior acts of lenience or mercy, including where evidently needed and deserved. Any public prosecutors' decision as to whether there is sufficient evidence for indictment needs to be vetted and approved by a pre–trial judge. The latter may be of a different mind and require the prosecutor to further investigate, or to proceed with indictment[40]. Thus, while the possibility of a criminal trial may be a reasonable way to ensure due respect for unborn life, the lack of specific regulations for abortion cases, combined with the heavy sentences attached to the crime, could not exclude doctors' reluctance to act, and to risk public (and years–long) criminal trial, including when a termination of pregnancy were the unintended result of an action meant to save the mother's life.Abortion advocates took advantage of this blurred situation. Their campaigns[41], supported by a grow-

38 In this sense, and for an extensive account of the jurisprudence on article 546, see ROMANO, B. *Codice Penale Ipertestuale Commentato,* a cura di M. RONCO e B. ROMANO. 4 ed. Torino: UTET Giuridica, 2012 sub art. 54, 426–446.

39 Idem, ("Clearly, a danger which is not about to become an injury may offer more frequently chances of being averted by conducts other than the offence of the legal good. But this has to do with the inevitability requirement, not with the "present" danger." Informal translation).

40 This is true for abortion as well as for any other crime and it is consistent with provision of article 112 of the Constitution, which establishes the principle of mandatory prosecution.

41 See, MANTOVANO, Alfredo. *L'aborto e un bilancio della legge 194* (con milioni di bimbi soppressi). Centro Studi Rosario Livatino [on line] 2018, May 23. ("That campaign rested on false data. Confronted with a clandestine area that 40 years ago was estimated at 50/100,000 abortions per year, the claim was for

ing international consensus, found fertile soil in the Italian Parliament, where the first abortion bill was introduced in 1973. Neither the Communist Party (PCI) nor the Christian Party ("Democrazia Cristiana"), however, wished to risk their reputations on such a controversial issue. At a short distance, a pronouncement of the Italian Constitutional Court saved them both from "embarrassment," and forced the legislature to intervene.

Before addressing that judgment, however, and in partial anticipation of an argument developed in the closing section, it is worth underlining that the most problematic aspects of the necessity defense went beyond its textual shortcomings and remain at the core of problems we face today. What is most troubling is in fact the reason for the "normative" relevance of the defense of necessity. In very broad terms, according to one theory, the situation of necessity provides an *objective justification* for the crime, independent from the author's intention: the conflicting rights and interests may be balanced against each other and the *crime committed to preserve* the "higher" one would turn into a *just act*ion the other hand, there is the idea that necessity is the source of a subjective *excuse*: a defense grounded on the consideration of the peculiar and abnormal conditions in which the agent found himself acting and deliberating, his *intention* being inevitably affected by the necessitated and extreme circumstances[42].

The distinction between justifying and excusing necessity is grounded on the tripartite theory of crime, which originated in Germany and was later adopted by several civil law jurisdictions, including the Italian one. According to that theory, each criminal offence is constituted by 1) a typical conduct, action or omission; 2) its objective illegal character (*contra jus*); 3) the agent's blameworthiness (personal competence, and either intent or negligence).

> "Each of these three inculpatory dimensions corresponds with an exculpatory dimension that can negate the inculpatory dimension. Unlike the bipar-

the improbable number of 3 million every 12 months; similarly "fabricated" were the numbers referring to the deaths allegedly caused by pregnancy terminations". Informal translation). The full interview to the Italian Cassation judge and former Deputy Secretary can be accessed online at: https://bit.ly/3uUAuAi

42 For a rich and exhaustive analysis of the justificatory and excusing dimensions of necessity see FLETCHER, George P. *Rethinking Criminal Law.* USA, Oxford: Oxford University Press, 2000. p. 759–835.

> tite system in which one might consider the actusreus either before or after the mens rea, the ordering of the stages is "critical." Thus, the inculpatory dimension of the first stage of definition of the offense includes, according to Fletcher, the elements of human action, norm violation, causation, and harm. The negation of any of these elements establishes the defendant's lack of criminal liability. If, however, the defendant's conduct satisfies all the elements of the first stage and none of these elements is negated, the defendant's conduct is presumed to satisfy the second stage of wrongfulness. This presumption of wrongfulness can be negated by a justification. The inapplicability of a justification leads to a presumption that the defendant satisfies the third stage of guilt, culpability, accountability, or responsibility. This presumption can be negated by an excuse. The inapplicability of an excuse, however, leads to a determination of the defendant's criminal liability"[43].

Whether necessity has the effect of rendering any abortion *just,* or whether it merely *excuses* it, however, is a matter replete with both practical and ethical consequences[44]. Where grounded on an objective *calculus* of competing interests

43 RUSSEL, Cristopher. "Tripartite Structures of Criminal Law in Germany and Other Civil Law Jurisdictions". Cardozo L. Rev. [on line] 2007, Vol. 28, p. 2676–77. Available in: https://bit.ly/3akV3fO The common law, grounded on a bipartite system, usually denies a necessity defense in cases of murder–including under its "excusing" declination as duress. See FLETCHER, George P. Rethinking Criminal Law… Op. Cit., at. 789 ("There is no explicit recognition of the claim of necessity as a justification as a general limitation on the punish ability of all offenses. So far as the defense exists in Anglo–American law, it is to be found in the interstices of particular offenses, with a wide variety of arguments deployed to support the claim").

44 Since 1975, the German criminal code explicitly distinguishes the two defenses. Deutsche Republik. Strafgesetzbuch [StGB], §§ 34–35, https://bit.ly/3mD99Pn. Article 34 establishes the justifying defense of necessity, "*rechtfertigenderNotstand",* while Article 35 provides for its excusing form, "*entschuldigenderNotstand*". While this distinction is grounded precisely on the idea that the first defense may only be invoked in presence of commensurable goods, Professor M. Ronco convincingly argues that this is still an inaccurate understanding of the criminal defense. The justified nature of the necessitated conduct, in fact, does not derive from a balancing of interests and rights, but *from the very nature of the human act,* which is rendered *intrinsically just* by the circumstances of the action. The man who in time of war or famine takes for himself the fruit of his neighbor's abundant tree in order to feed himself and his family, is committing no theft.

the defense entails that lives *are* commensurable goods, and that one of them, usually that of the mother, may be considered of a higher value. Furthermore, by legitimizing, and by considering that the intentional elimination of an innocent human life may ever be *just*, be it that of the mother or of the child, this utilitarian reasoning ends up relativizing the absolute prohibition of homicide. At the practical level, however, and where unsupported by further provisions, a merely *excusing* necessity may signify that abortion could at any time be lawfully prevented by third parties, including when the mother's life is at risk[45]. Grounding the excuse in psychological pressures, moreover, risks treating human freedom as the mere result of a decision to avert pain and suffering, rather than the choice to act in accordance with practical reason[46].

The Constitutional Court did not explicitly address these matters, but it implicitly subscribed to the idea of necessity as an objective and justifying defense of abortion.

2.2 The Constitutional judgement of 1975

In 1975, the Constitutional Court addressed the constitutionality of article 546 of the Penal Code and declared it an insufficient solution, defining the

Correctly, medieval law described this situation as one where the "lesser' right (private property, in our case) ceases to exist in front of the "prior" good (the universal destination of all goods). Certain acts, on the other hand, can never lose their wrongful nature, as is the case of murder, being characterized by an intrinsically wrongful intention. Their performance, however, may at times be tolerated by the legal system, due to the extraordinary circumstances in which the will of the author originated and took form and shape. See, ROMANO, B. (2012). Codice Penale Ipertestuale Commentato… Op. Cit. , sub. art. 54

45 See STITH, Richard. "New Constitutional and Penal Theory in Spanish Abortion Law". The American Journal of Comparative Law. Oxford University Press Vol. 35, No. 3 (Summer, 1987), p. 513, 546. ("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 [to excusing necessity], but that defense is more limited […] It could not apply to abortion because no one is threatening harm to the mother unless she ends her pregnancy".

46 See FLETCHER, George P. *Rethinking Criminal Law…* Op. Cit., 813–817 (explaining that the utilitarian justification of excuses rests on the idea of "pointless punishment").

partial unconstitutionality of the norm an "inevitable"[47] conclusion. What the Constitutional Court found, however, was by no means comparable to what the U.S. Supreme Court had recently discovered in its then almost bicentennial Bill of Rights. By no means, and in no way, in fact, did the Italian Constitutional Court declare abortion a fundamental right. In less than 2000 words, the Court acknowledged its own limited and rather technical role and it explicitly stated:

> "This is not the place to retell the legislative history of voluntary abortion as a crime, a history which is linked with the development of a religious thought and with the evolution of moral philosophy, as well as social, legal, political and demographic doctrines"[48].

The Court found the criminal provision unconstitutional *only insofar as* ("*in parte qua*"), when read in conjunction with article 54, did not allow for a termination of pregnancy when the pregnancy's own prosecution would cause serious injury or risk for the mother's health, and provided that the same injury or risk had been medically certified and may not be otherwise averted[49]. The current ban violated the second paragraph of article 31 and the first paragraph of article 32 of the Italian Constitution, which respectively protect motherhood, and the individual right to health[50].

47 "Therefore, it seems *inevitable* that part of article 546 of the penal code must be declared unconstitutional," See COHEN, William and CAPPELLETTI, Mauro. Comparative constitutional law… Op. Cit., at 612–13, emphasis added.

48 Ibídem, p. 612.

49 Idídem, p. 614 ("For these reasons the Constitutional Court declares the unconstitutionality of that part of article 546 of the penal code which does not recognize that pregnancy may be interrupted when further development of the gestation could imply injury or danger which is grave, medically ascertained in the manner indicated above, and not otherwise avoidable, for the health of the mother").

50 See Italian Republic. Costituzione della Repubblica Italiana. Art. 31–32 C (It.) ("Art. 31. The Republic assists the formation of the family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits. The Republic protects mothers, children and the young by adopting necessary provisions."; "Art. 32. The Republic safeguards health as a fundamental right of the

While declaring the norm's invalidity, however, the Court made some rather strong statements regarding the need for continued protection of the unborn. These statements directly contradict the narrative of abortion as a fundamental *right*. The Court's holding and its later pronouncements remain the basis for Italy's protection of prenatal life and establish the parameters for assessing the constitutionality of any new abortion law. According to the 1975 Court:

> "• … the 1930 criminal code erred in classifying abortion as a crime against the breed, as it is a crime against the person (i.e., the unborn)[51];
>
> • based on articles 2 and 31 of the Constitution, *the unborn enjoys independent constitutional protection*. In particular, while the latter provision protects "mothers, children, and the youth," article 2, which affirms and guarantees the inviolable rights of man, could not but include protection of the peculiar "legal condition" ("*situazionegiuridica*") of the "*concepito*" (literally, the conceived one), although with its own and unique characteristics[52];
>
> • when a conflict arises between the constitutionally protected interests of the *concepito* and those of others, the former shall not enjoy absolute prevalence"[53].

individual and as a collective interest, and guarantees free medical care to the indigent. No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person"). https://bit.ly/30d6y7l

51 See COHEN, William and CAPPELLETTI, Mauro. Comparative constitutional law… Op. Cit ("The preceding [pre–fascist] code, on the other hand, considered abortion among the 'crimes against the person', *seemingly a fairer and more correct way of putting it*".) Emphasis added.

52 Ibídem, at 612–613, ("The Court holds that the protection of conception [*better, of the conceived one*] –which already figures prominently in the law (articles 320, 339, 687 of the civil code)– has constitutional foundation. Article 32, 2nd paragraph, of the constitution expressly imposes the 'protection of motherhood' and, more generally, article 2 of the Constitution recognizes and guarantees the inviolable rights of man, among which must be placed, although with the peculiar characteristics unique to it, the legal situation of the fetus [*better again, of the conceived one*]).

53 Ibídem, at 613 ("What has just been said –which in itself justifies legislative interventions resulting in penal sanctions– must however be accompanied by the further consideration that the constitutionally protected

Precisely in these latter terms was the criminal norm invalid. The Court, in other words, told the Italian legislature that it could not leave the matter of therapeutic abortions to the uncertain regulation of a general defense, which proved unable to provide effective protection for pregnant women's lives and health and which rested on a dubious balancing of rights and interests. In this second respect, however, the holding was followed by a rather ambiguous and troubling statement:

> "Moreover, the exemption contained in article 54 is based on the presupposed equivalence of the infringed value to another value which this very infringement was meant to safeguard. Yet, there is *no equivalence* between the right not only of life but also to health of one who –like the pregnant woman– is *already a person*, and the safeguard of an *embryo which has yet to become a person*"[54].

By this statement, the Court seemed not only to adhere to an objective interpretation of the necessity defense, but it also expressed a value judgement –regarding both the abstract commensurability of lives, as well as the definition of persons– which exceeded its competence. Nonetheless, that one sentence could not alter the meaning and effect of a judgement that spoke of a balancing of rights and interests that belong to *two distinct legal subjects* (or entities/or constitutionally relevant "*situazionigiuridiche*"): the mother and the unborn child. For this reason, and notwithstanding that this dubious statement became the national slogan of abortion advocates, the *personhood* debate remained extraneous to subsequent Italian debates. The same Court, moreover, explicitly held that any termination of pregnancy shall be performed while aimed at the preservation of, wherever possible, the life of the fetus[55].

interests of the fetus [*concepito*] may conflict with other values which are themselves constitutionally protected. Consequently, the law cannot place a total and absolute priority on the first interest, denying adequate protections to the others").

54 Ibídem, at 613.

55 Ibidem p. 614 ("It should be added, however, that the exemption from any punishment of anyone who, in the situation described above, procures the abortion, and of the woman who consents, does not at all

Finally, a further and compelling reason why the 1975 holding did not establish a woman's right to "autonomy" (*"autodeterminazione",* or "self–determination"), not even within a specific timeframe, or before viability, lies in that the Court openly affirmed that the legislature had not just the possibility, or the *interest,* but an actual *duty* to adopt "preventative measures". The law had to ensure that abortions would only be performed based on serious assessment of both the existence and the gravity of the danger or injury that carrying the pregnancy to term would cause to the pregnant woman. The Court concluded that, "*the legitimacy of abortion shall be anchored to a preceding evaluation of the existence of the conditions which justify it*"[56].

The Constitutional tribunal left it then up to the elected representatives to enact a specific regulation. Three years later, Law 194 filled that void.

2.3 Law 194: provisions, strengths, and shortcomings

As mentioned, the 1978 law decriminalized abortion, but only under limited circumstances. By provision of its article 22, Law 194 repealed the old abortion crimes and two aggravating circumstances[57]. At the same time, it introduced new criminal offences that continue to protect the life of the unborn (Articles 17–20). In its entirety, the law aims to protect *both* the mother *and* the unborn child while avoiding any reference to an all–encompassing right to privacy, abortion, or absolute *autonomy*[58]. This is already evidenced by the very

exclude the requirement, already under the present law, that the operation should be performed in such a way as to save, when possible, the life of the fetus").

56 Idem ("But this Court also holds that it is the legislators' obligation to set up the necessary legislative safeguards intended 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 the result of the continuation of the pregnancy: therefore the lawfulness of abortion must be anchored to a preceding evaluation of the existence of the conditions which justify it").

57 Article 22 repealed the whole Title X, Book 2, "Crimes against the integrity and fitness of the breed", and 2 aggravating circumstances of article 583 (sec. 1, n.3, and sec. 2, n. 5).

58 See ZANCHETTI, Mario. *La legge sull'interruzione della gravidanza: commentario sistematico alla legge 22 maggio 1978,* Nº 194. Padova: CEDAM, 1992. As the author writes, "The prohibition of voluntary termination of pregnancy as a method of family planning demonstrates that it is not the expression of

title of the law: "Norms *for the social protection of motherhood* and on voluntary termination of pregnancy".

Article 1 of Law 194 proclaims the state's duty to guarantee "informed and responsible parenting", to recognize the "social value of motherhood," and to "protect life from its inception"[59]. The provision further specifies that abortion may never be considered as a method of family planning[60]. To this end, public institutions, including those at the local level, have an *obligation to promote and enforce social and health services* and any other measures that may help *prevent recourse* to abortion. To substantiate these public duties, article 2 establishes that the public family counseling clinics created in 1975 (*"consultorifamiliari")* shall be responsible for assisting pregnant women. They shall inform them about their rights and about the available healthcare services, contributing to *help overcoming the causes* that could lead the woman to seek an abortion. Far for being designed as abortion providers, they are meant to *accompany* women in their choices, including abortion, but with the goal to prevent it. They may cooperate with local associations which may assist mothers *after childbirth*. In

a right to responsible and conscious procreation. On the contrary, it may be argued that this provision completes the principle of life's protection and the consequent rigorous limitation of the lawful termination of pregnancy to cases of therapeutic indications: an abortion not justified by a dangerous situation for the (health of the) mother is a method of family planning", *id*, at 106, informal translation.

59 "The State guarantees the right to considered and responsible and Planned Parenthood, recognizes the social value of motherhood, and shall protect human life from its inception. The voluntary termination of pregnancy as covered by this Law, shall not be a means of birth control. The State, regions and local authorities, acting within their respective powers and areas of competence, shall promote and develop health and social services and shall take other measures necessary to prevent abortion from being used for purposes of birth control". Law 194, Article 1, as translated in 29 International Digest of Health Legislation, 589 (1978).

60 See ICPD Program, supra n. 11 ("in no case should abortion be promoted as a method of family planning" at 7.24, 8.25. According to Lucia Berro Pizzarossa, the sentence was "first formulated in 1984 as per request of the Reagan Administration", but Italian law seems to contradict this broad statement, in that it shows this concern was formerly shared across the globe. See, BERRO PIZZAROSSA, Lucía. "Here to Stay: The Evolution of Sexual and Reproductive Health and Rights in International Human Rights Law". Laws. 2018. Vol. 7, Nº 3, p. 29. https://doi.org/10.3390/laws7030029

reality, however, *consultori* became centers that routinely issue certificates entitling women to access abortion and seldom perform any dissuasive function[61].

Articles 4 and 5 are the law's most important (and most problematic) provisions. Based on article 4, a woman may have an abortion within the first 90 days of pregnancy provided that: a) she recurs to a *consultorio*, a licensed healthcare facility, or her personal physician; b) the continuation of pregnancy, childbirth or motherhood constitutes a serious danger for her physical or mental health; and c) such danger is the result of some specific health, economic, social or familial conditions, of the particular circumstances of conception, or of predictions of anomalies or malformations affecting the *concepito*[62].Article 5 further specifies that the chosen institution or physician is not just an abortion provider: along with assessment of the required conditions, it must examine the situation *"with the pregnant woman"* and, where possible, and upon her own consent, with the father of the unborn. Together, they must *look for possible alternative solutions* (to abortion), helping her *remove the causes that would lead her to have an abortion,* promoting every appropriate intervention apt to support the woman, and offering her assistance, *both before as well as after birth*[63].

61 On the inconsistency between the Law's "principles" and actual practice, *infra.*

62 Article 4: "For a termination of pregnancy within the first ninety days, the woman claiming circumstances under which the continuation of her pregnancy, childbirth, or motherhood would cause a serious danger for her physical or mental health, based on her health status, or on her economic, social, familial conditions, or on the circumstances in which conception occurred, or based on the likelihood of anomalies or malformations of the child, should recur to a public counselling center, as per article 2, […], or to a health–social agency duly authorized by the region, or to a physician of her choice". Law 194, Op. cit.

63 Article 5: "The public counselling center and the health–social agency, in addition to a duty to guarantee performance of the necessary medical assessments, and especially when the request of termination of pregnancy is motivated by the incidence of economic, social, or familial conditions on the health of pregnant woman, shall in all cases examine with her and, upon her consent, with the father of the conceptus, with due respect for the dignity and privacy of the woman and of the person identified as the father of the conceptus, possible solutions to the mentioned problems, to help her remove the causes which would lead her to interrupting her pregnancy, to enable her to enjoy her rights as a working woman and as mother, and to promote every appropriate intervention apt to support the woman, offering her all the needed assistance both before as well as after birth. In the event the woman recurs to a physician of her choice,

Only following this counselling process, the acting physician may (shall)[64] issue a document reporting the woman's pregnant condition (and its stage) and her request for termination. After a seven–day waiting period, and only then, the woman is authorized to have an abortion.

The *original* problem with these norms is that at the end of those seven days the woman becomes the final and unique arbiter of her condition, of her own "necessity" to have an abortion. Notwithstanding the directives of the Constitutional Court, and contrary to the apparent spirit of the law, indeed, these norms entail that in the first trimester the woman is substantially *free* to have an abortion for reasons unrevealed to the doctors, including as a method of family planning or when her choice is exclusively animated by an utter disregard for the "constitutionally protected interest" of the unborn. The woman's sole desire is abstractly sufficient and impossible to verify. This is *not* what the law *says*, but

> he shall perform the necessary medical assessments, with due respect of her dignity and freedom; he shall evaluate with the woman and with the father of the conceptus, upon her consent, with due respect for the dignity and privacy of the woman and of the person identified as the father of the conceptus, including based on the results of the mentioned assessments, the circumstances that would lead her to request a termination of pregnancy; he shall inform her of her rights and of the social measures for which she could apply, and of the public counselling centers and of the health–social agencies. In the event the physician of the counselling center, or the physician of her choice finds the existence of conditions which make the termination of pregnancy urgent, he shall immediately issue the woman a certificate attesting the urgency. With that certificate the woman may recur to one of the facilities authorized to perform terminations of pregnancies. When no urgency is certified, at the end of the visit the physician of the counselling center or of the health–social agency, or the physician of her choice, faced with the woman's request of termination of pregnancy that is based on the circumstances under article 4, shall issue her copy of a document, signed also by the woman, attesting the pregnant status and the request, and shall invite her to reflect for seven days. After the seven days have elapsed, the woman can recur to one of the authorized facilities in order to have her pregnancy terminated on the basis of the document issued under the present section". Ibídem.

64 While judicially interpreted as an actual obligation, scholars contend that the only interpretation consistent with the Constitution is that the physician may refuse issuing the certificate if he does not find the legitimizing conditions to be satisfied. For an overview of the different opinions see, ZANCHETTI, Mario. La legge sull'interruzione della gravidanza… Op. Cit. supra note 57, at 145–153.

it ultimately *is* what it *permits*. The statute provisions go beyond the principles expressed by the Constitutional Court in that they allow abortions even where the danger for the mother's health is not "medically certified" as serious[65].

In this respect, it may well be argued that abortion is nowadays treated as a *right* in Italy. This, however, does not make it a constitutional one, its admissibility being limited to its legitimacy within the hierarchy of the sources of law. It is worth mentioning, moreover, that although one of the highest Italian courts referred to abortion as a right included in the sphere of women's autonomy, and while it condemned a physician for refusing to assist a post–abortive woman, the findings in favor of the woman were grounded on the physician's obligation to act to protect her "right to health" and to act "whenever her life is in imminent danger;" rather than on her *right* to abort[66].

Article 6 of Law 194 further contributed to creating the false impression that Italy had adopted –or imported– a "trimester framework", similar to the one the U.S. Supreme Court had recently devised in *Roe v. Wade*, which allowed for an abortion "on demand" during the first trimester of pregnancy[67]. Based on this provision, pregnancy termination may take place at a later stage, and

65 See RONCO, Mauro. Interruzione della Gravidanza, L. 22 maggio 1978, n. 194. In: GAITO, A. and RONCO, M. (EDS.) Leggi penali complementari commentate. Turín: Utet Giuridica, 2009. p.1685 ("Law 22.5.1978, n. 194, clearly shifted its focus from the protection of the *concepito* to that of the mother's health. The legitimacy of abortion is now broader than under the limits set forth by *stato di necessita',* as well as than what established by judgment 27/1975 of the Constitutional Court".) Informal translation.

66 Italia. Suprema Corte di Cassazione, Sez. VI Penale, sentenza 2–4–2013, Nº 14979 (It.), at 4.1 ("On the other hand, the right to abort has been recognized as one that is included in the sphere of autonomy of the woman and if the doctor who is exercising his right to conscientious objection is entitled to abstain from contributing to the fulfillment of that right, he shall not refuse to act for the safeguard of the woman's health, not only in the phase that follows the termination of pregnancy, but, as seen, in all instances where her life is in imminent danger". Informal translation).

67 As mentioned, a constitutional right to abortion was never introduced in the Italian legal system, not even in the first trimester. Law 194 is an ordinary law: had it created new "rights", they would still have a subordinate value and could not violate the unborn protected "legal status". As per the *trimester* framework, such an understanding of *Roe v. Wade* does not take into account the companion *Doe v. Bolton* case and its holding. The subsequent holding in *Casey* replaced the trimester framework with the new limit of viability.

up until viability[68]. After the first 90 days, however, abortions are only permitted: when the life of the mother is threatened by pregnancy or childbirth, or when medically certified conditions, including malformations and anomalies of the fetus, severely endanger her mental or physical health. Arguably, this final provision permits both strictly *therapeutic* as well as *eugenic* abortions. If the life of the unborn is deemed unworthy of legal protection even where his anomalies and malformations are not *per se* incompatible with life, the only legal goods effectively protected may indeed end up being the life and health of the mother[69]. Italian jurisprudence, however, excludes this option (at least *literally*)[70]; and the norm makes clear that those conditions should adversely

68 Article 6: "After the first ninety days, voluntary termination of pregnancy may be performed: a) where pregnancy or childbirth involve a great danger for the life of the woman; b) where there has been a diagnosis of pathological processes that would cause a serious danger fort the physical or mental health of the woman, including those associated to relevant anomalies and malformations of the child to be born". Law 194 Op. cit.

69 See CASINI, Carlo e CIERI, Francesco. *La nuova disciplina dell'aborto.* Padova: CEDAM, 1978.With reference to Latin America see CASTALDI, Ligia de Jesús. *Abortion in Latin America and the Caribbean: The Legal Impact of the American Convention on Human Rights.* University of Notre Dame Press, 2020, p. 203: ("[O]nly […] eight out of twenty–three of states parties to the American Convention waive criminal punishment for […] abortion of unborn children that have been medically diagnosed as nonviable, that is, suffering from a condition designated as "incompatible with life"; only three states allow it for other serious disabilities").

70 See, Italia. Suprema Corte di Cassazione civile, Sez. III, sentenza 11 apr. 2017, Nº 9251 where the highest Italian Court excluded that eugenic abortions are allowed under provision of article 6 "The legal system does not permit "eugenic abortion", meaning one which prescinds from "serious" or "severe danger" for the "life" or the "physical or mental health" of the mother. Italia. Suprema Corte di Cassazione civile. Sez. Un, sentenza 22 dicembre 2015, Nº 25767 Rovelli Primo Presidente f.f. –Bernabai. Estensore– Spirito Relatore; Italia. Suprema Corte di Cassazione civile, Sez. III, sentenza 29 luglio 2004, Nº 14488; Italia. Suprema Corte di Cassazione civile, Sez. III, sentenza 14 luglio 2006, Nº 16123; Italia. Suprema Corte di Cassazione civile, Sez. III, sentenza 11 maggio 2009, Nº 10741. And yet, Italia. Suprema Corte di Cassazione civile, Sez. III, sentenza 22 novembre 1993, Nº 11503. It then affirmed that, "voluntary termination of pregnancy is solely aimed at averting a danger for the health of the pregnant woman, serious (within the first 90 days of gestation) or severe (afterwards); possible malformations or anomalies of the fetus matter exclusively

affect –and severely so– the mother's health[71]. It remains true, however, that fetuses diagnosed with Down syndrome can today be terminated solely based on their own genetic condition[72].

Article 7 further regulates article 6's medical assessments[73]. Following viability, abortion can only take place to save the mother's life, while the doctor has the explicit *obligation to adopt every appropriate measure to save the life of the fetus.*

Article 8 specifies that abortions may only be performed in public hospitals or in private and duly authorized clinics. As recently pointed out, this provision is of particular normative relevance since, *"Limiting abortions to the public sector means avoiding the market with its pressures and being able to promote*

insofar as they may cause a health damage to the same pregnant woman, but not in themselves and with exclusive reference to the unborn" (informal translation). For a comment on this decision, see VARI, Filippo. "La Suprema Corte ribadisce l'illegittimità dell'aborto eugenetico e l'inesistenza del diritto a non nascere". *Diritto Mercato Tecnologia* [on line] Aug. 2017. Available in: https://bit.ly/3Awdedg

71 See, FABRIZIO, Luciano Moccia. "I profili penalistici dell'aborto. Tipologie: aborto terapeutico, eugenetico, selettivo". *Altalex* [on line] Feb. 2008. Available in: https://bit.ly/3mHVqXy

72 As recently exposed by Giuseppe Noia, President of the Italian Association of Catholic Gynecologists, in 90% of cases, following a prenatal diagnosis of Down syndrome parents are invited to consider abortion. See: Bambini Down: Noia (Aigoc), "chi decide di non abortire subisce pressioni psicologiche e abbandono terapeutico. Scarsa cultura del prenatale". Servizio Informazione Religiosa. Agenzia d'informazione [on line] 1 Febbraio 2020. Available in: https://bit.ly/3DwkGa5 See also, RONCO, Mauro. Interruzione della Gravidanza… Op. Cit. at 1692.

73 Article 7: "The pathological processes that would satisfy the criteria of the previous Section shall be diagnosed, and its existence certified, by a physician of the obstetrics and gynecology department of the health clinic where the termination is to be performed. The physician may call upon assistance of specialists. The physician has a duty to submit the documentation on the case and its certification to the medical director of the healthcare clinic for the termination to be performed immediately. If the termination of pregnancy is needed so as to prevent the imminent danger for the life of the mother, said termination may be performed without compliance of the procedures set forth at the previous paragraph and in a place other than those described at Section 8. In such cases, the physician shall inform the medical officer of the local province. In the event that the fetus may be viable, the termination of pregnancy may be performed exclusively in the circumstance described at item a) of Section 6 and the physician performing the termination shall adopt any appropriate measure to save the life of the fetus". Law 194. Op. cit.

prevention, which is the real key word of Law 194/78"[74]. Reaffirming the ethical drama of abortion, article 9 grants the right to conscientious objection to involved physicians and medical personnel, which however excludes pre– and post–termination assistance.

Following some regulatory provisions, articles 17, 18 and 19 finally reveal the criminal perspective adopted by Law 194, which contradicts the view of abortion as an individual right. They were the object of a recent reform, which, however, did not affect their wording[75].

The first norm punishes any termination of pregnancy –or premature birth– caused by gross negligence ("*per colpa:*" voluntarily but without malice/direct intent), with a maximum sentence of two years[76]. The innovative nature of this provision is striking: prior legislation did not consider negligent abortion an autonomous crime, but an aggravating circumstance of personal injuries (to the woman)[77]. Pursuant to article 17, instead, a negligent conduct that results not only in an abortion, but also in personal injuries to the mother, would originate a concurrency of crimes (and of protected legal goods), which reinforces the idea that the unborn is an autonomous legal subject, *autonomously* worthy of protection[78].

Article 18 sanctions abortions performed without the woman's consent with

74 See MORRESI, Assuntina. MORRESI, Assuntina. "Abortion in Italy: Law & social perspectives" *Preventing Abortion in Europe.* [On line] 2016, Nº 284. University of Perugia. Available in: http://bitly.ws/hczA The most recent violation of this principle, however, comes from the latest ministerial guidelines on medical abortion, Ministero della Salute, Circolare 12 Agosto 2020, Op. Cit.

75 By means of legislative decree n. 21 of 2018, articles 17 and 18 were repealed and simultaneously replaced by articles 593 *bis* and 593 *ter* of the criminal code.

76 Article 17: "Any person who per gross negligence causes a woman to terminate her pregnancy shall be liable to imprisonment from three months to two years. Any person who per gross negligence causes a woman to give premature birth shall be liable to the penalty indicated in the preceding paragraph reduced by one–half. In the cases referred to in the preceding paragraphs, if the act is committed in violation of labor protection norms, the penalty shall be increased." Law 194. Op. cit.

77 Italian Republic. Italian Penal Code, articles 583, sec. 3, 5, repealed by Law 194.

78 "The legal good protected is the life of the embryo", ZANCHETTI, Mario. La legge sull'interruzione della gravidanza… Op. Cit. 332, informal translation.

a maximum sentence of eight years imprisonment[79]; the same sentence applies when termination of pregnancy is the unintended consequence of an assault and it is doubled where death of the woman ensues. In this case, the crime echoes the negative value of abortion originally enshrined in the Penal Code. Nonetheless, Law 194 provides sentences that are milder than the ones originally established by articles 545, 583, and 549 of the Penal Code, which suggests the idea of a "diminished" right to life of the unborn had taken hold[80].

Lastly, article 19 criminally sanctions abortions performed in violation of the law's own requirements. Sentences go from a maximum of three years imprisonment for first trimester abortions to a maximum of five years at later stages, and of seven years if death of the woman ensues[81]. For our purposes,

79 Article 18: "Any person causing a pregnancy termination without the consent of the woman shall be liable to imprisonment from four to eight years. Consent obtained by means of violence or threats, or with deception shall be deemed as non–existent. The same sentence shall be applicable to any person who brings about a pregnancy termination by actions directed at causing injuries to the woman. This sentence shall be reduced by one–half if the injuries result in hastening childbirth. If the woman dies as a result of the acts referred to in the first and second paragraphs, the sentence shall be from eight to sixteen years' imprisonment; where very grave personal injury is the result, the sentence shall be from six to twelve years' imprisonment; where grave personal injury is the result, the latter sentence shall be reduced. The sentences laid down under the previous paragraphs shall be increased if the woman is under eighteen years of age". Law 194. Op. cit.

80 Based on the old criminal code provisions: a) article 545, abortion without consent –from seven to twelve years imprisonment; article 583, abortion caused by actions aimed at injuring the mother– from six to twelve years imprisonment; article 549, death as a result of a non–consensual abortion –a maximum of twenty years imprisonment.

81 Article 19: "Any person who causes a voluntary termination of pregnancy failing compliance with the conditions laid down in Sections 5 or 8 shall be liable to up to three years' imprisonment. The woman shall be liable to a fine of up to 100,000 lire. Where voluntary termination of pregnancy occurs without the medical assessments provided for under items a) and b) of Section 6, or in any event failing compliance with the conditions laid down in Section 7, the person causing such termination shall be liable to imprisonment from one to four years. The woman shall be liable to up to six months' imprisonment. Where voluntary termination of pregnancy is performed upon a woman who is under eighteen years of age or who is under civil disability, in cases other than those laid down in Sections 12 or 13 or while failing to comply with the conditions laid down in those Sections, the person causing such termination

this last norm seems particularly relevant as it underscores how the woman's sole consent is an insufficient justification to destroy an innocent human life. It therefore proves that the law does not exclusively protect the mother's 'self–determination'; *not even in the first trimester*[82]. The sentence for the woman is symbolic –a minimal fine in non–aggravated cases and a maximum of 6 months imprisonment in aggravated ones[83]. Symbols, however, have meanings. This is precisely why they exist[84].

In conclusion, based on the letter of Law 194, the Italian legislator opted for leniency and mercy towards mothers, feeling unentitled to *judge* such tragic choices. At the same time, it preserved the coherence of a legal system which cannot commend nor disregard *any* intentional destruction of an innocent and constitutionally protected human life.

shall be liable to the corresponding sentences laid down in the preceding paragraphs, increased by up to one–half. The woman shall not be liable to any sentence. Where the woman dies as a result of the acts referred to in the preceding paragraphs, the sentence shall be from three to seven years' imprisonment; where very grave personal injury is the result, the sentence shall be from two to five years' imprisonment; where grave personal injury is the result, the latter sentence shall be reduced. The sentences laid down under the preceding paragraphs shall be increased if the woman dies or is injured as a result of the acts referred to in the fifth paragraph". Law 194. Op. cit.

82 See ZANCHETTI, Mario. *La legge sull'interruzione della gravidanza…* Op. Cit. ("the legal good is without a doubt the life of the *concepito*") (informal translation). As Zanchetti reports, other Italian scholars argued that the only "legal good" protected by this norm consists in compliance with the law's own provision–an option which, however, seems rather tautological, and violative of the principle that criminal sanctions should constitute an *extrema ratio*. Others held it to protect the woman's health and freedom, along with public morals (CASINI, Carlo e CIERI, Francesco La nuova disciplina dell'aborto… Op. Cit.): an option which sounds hard to reconcile with the idea that abortion is a woman's right, grounded in her right to autonomy ("self–determination").

83 By means of Legislative Decree 8/2016, art.1, par.1, the criminal liability of the woman became an administrative one in non–aggravated cases.

84 See GLENDON, Mary Ann. *Abortion and divorce…* Op. cit. supra note1, 62, "the 'stories with tell', 'the symbols we deploy' the 'visions we project' in our laws contribute to making us what we are as a society", with reference to GEERTZ, C. *Local Knowledge: Further Essays in Interpretative Anthropology.* United States of America: Library of Congress, 1983. p. 234.

2.4 Law 194 today

For its mentioned inconsistencies –which would need amendment[85]– some of the law's provisions were object of constitutional challenges[86]: too lax for some, too restrictive for others[87]. The Constitutional Court, however, has stepped aside and declared all challenges manifestly unfounded. One of its later pronouncements is however worth of mention.

In 1997, while declaring the inadmissibility of a referendum aimed at a complete "liberalization" of abortion, the Italian supreme tribunal acknowledged that the basic principles on the matter had already been spelled out by the 1975 Court[88]. In particular, the Court acknowledged that constitutional protection extends to:

1) *the embryo,* his legal status being among the inviolable rights of man guaranteed by article 2, and consisting in a *right to life*;
2) *motherhood*;
3) the *mother's right to health* and *life*.

85 For Law 194 to be a coherent defense of human dignity without becoming an absolute ban, Professor Mauro Ronco recently suggested amendment of articles 2 and 5. Based on their provisions, the *consultori* went from being entities aimed at preventing abortions to centers that routinely issue certificates entitling women to access abortion. These contradictory functions cannot coexist without compromising their original function. See, RONCO, Mauro. *La tutela della vita* Op. cit. 15–19. See also, CASINI, Carlo. "Possibili cambiamenti della legge sull'aborto oggi in Italia". *Studia Bioethica*. 2008, vol. 2–3 at 121–132.

86 Repubblica Italiana. La Corte Costituzionale. Sentenza 108/1981, Repubblica Italiana. La Corte Costituzionale. Ordinanza.44/1982, Repubblica Italiana. La Corte Costituzionale. Ordinanza 45/1982, Repubblica Italiana. La Corte Costituzionale. Repubblica Italiana. La Corte Costituzionale. Ordinanza 47/1982, Repubblica Italiana. La Corte Costituzionale. Ordinanza 389/1988, Repubblica Italiana. La Corte Costituzionale. Ordinanza 462/1988, Repubblica Italiana. La Corte Costituzionale. Ordinanza 293/1993, Repubblica Italiana. La Corte Costituzionale. Ordinanza 76/1996, Repubblica Italiana. La Corte Costituzionale. Sentenza 35/1997, Repubblica Italiana. La Corte Costituzionale. Ordinanza 514/2002, Repubblica Italiana. La Corte Costituzionale. Ordinanza 366/2004, Repubblica Italiana. La Corte Costituzionale. Ordinanza 196/2012.

87 See, ZANCHETTI, Mario. La legge sull'interruzione della gravidanza… Op. cit. 74–79.

88 Repubblica Italiana. La Corte Costituzionale. Sentenza 35/ 1997 (it.). Available in: http://bitly.ws/hcBb
See CASINI, Carlo and OLIVETTI, Marco. "Verso il riconoscimento della soggettività giuridica del concepito". In: *Giurisprudenza Costituzionale,* 1997, n. 35 at 281.

It then admitted that the rights of the mother take precedence over the rights of the unborn, but *provided that* 1) they are *both endangered*, and 2) *the life of the fetus is preserved whenever possible*. Once more, it concluded that legislators have *the duty*, and not just the option (or the *interest*), *to adopt measures to prevent abortions* performed in the absence of serious assessments.

Most importantly, the 1997 Court held that most statutory provisions could not be subject to the proposed referendum as their content was *"costituzionalmentevincolato"*, i.e. imposed by the Constitution itself[89]. This, in particular, was true for the proposed abrogation of article 1, which protects human life from conception. That provision, the Court held, reaffirms the unborn "right to life" ("*e' ribaditoildiritto del concepitoalla vita*")[90] and may not be eliminated. Similar considerations applied to the proposed complete elimination of articles 4 and 5, which would have caused a complete liberalization of abortion in the first trimester. Additionally, the Court rejected the possibility of the proposed partial abrogation of article 7, which would have resulted in the exclusive protection of fetuses capable of autonomous life. Such a result, the Court held, "underlines a relinquishment of any protection for other unborn children, whose right to life is consecrated […] in article 2 of the Constitution"[91].

In a final passage, the Court underscored that the effect of the requested referendum would be the complete elimination of any legal regulation –and

89 Ibídem, par. 5 ("What the Constitution prevents from being object of repeal, including of a limited one, of Law of May 23, 1978, n. 194, is that bundle of provisions regarding the protection of the right to life of the *concepito* when neither health–related nor lifesaving needs of the mother exist, and along with that complex of provisions regarding the protection of the pregnant woman: as an adult as well as a minor woman, both in the first trimester as well as at a later stage of pregnancy", informal translation.)

90 Ibídem, par. 4 ("Those propositions not only express the basis for the public entities' effort to evaluate the requirements that legitimize access to a lawful termination of pregnancy, but they reiterate the unborn right to life", informal translation).

91 Informal translation. ("With reference to the amendment that would result from the requested partial abrogation of article 7, it must be noted that the proposal to keep some protection exclusively for the fetus whose possibility to live an autonomous life has been previously certified underscores the relinquishment of every protection for other unborn, whose *right to life* is however *consecrated* –according to the mentioned decision n. 27 of 1975– by article 2 of the Constitution" emphasis added).

not just to the criminal "irrelevance"– of pregnancy termination. The woman would become the sole responsible for a decision that could violate her own constitutional rights to life and health[92]. Even the legislature was precluded from enacting such a "liberal" reform. Implied in this conclusion, is the understanding that inalienable rights are radically different from individual *freedoms* in that not even their bearer may lawfully waive them.

The 1997 pronouncement regarded the admissibility of a referendum and did not establish nor discover any new principles of constitutional force. It nonetheless revealed that twenty years after the law's first approval, and at a time when countries were facing progressive decriminalization, Italy still believed that the unborn right to life exists from conception, and from that very moment enjoys constitutional protection. The Court mentioned it *six times*. This later tribunal –aware of the vigorous debates on the other side of the Atlantic– never mentioned the questionable distinction between *person* and *not–a–person–yet* that the previous Court had clumsily imported. Nor did Italian judges show any inclination for that *mystery–of–life* jurisprudence that, as we shall shortly see, had recently transformed free American citizens into self–sovereign individuals[93]

Law 194 contains state's promises to protect the unborn that the City of Verona legitimately tried to keep in 2018, when it simply deliberated future allocation of funding for organizations and programs whose mission is to assist mothers facing difficult pregnancies[94]. Avoiding the "*rights talk*" typical of the

92 Ibídem ("In conclusion, the request is formulated by means of a partial amendment of the current text, which results into turning this proposed abrogation into the pure and simple suppression of any legal regulation –and not only into sanctioning the criminal irrelevance– of voluntary termination of pregnancy within the first ninety days, tracing this event back to a legal regime where the single pregnant woman enjoys complete freedom, including with reference to the future of the constitutionally relevant interests that are involved in the case. Now, this is precisely what the legislature is itself restricted from doing, and the same must be true for an abrogative deliberation of the electoral body too". Informal translation).

93 Supreme Court of the United States. *Planned Parenthood of Southeastern Pa. v. Casey*. Op. cit. infra. On the idea that Casey's holding embodies a principle of "self–sovereignty," see BUDZISZEWSKI, J. *The Line Through the Heart: Natural Law as Fact, Theory, and Sign of Contradiction.* Wilmington, Delaware: ISI Books, 2009.

94 Comune di Verona, Mozione, Prot. n. 0314849/2018, 5.10.2018, approved 4.10.2018, n. 2.

U.S. jurisprudence[95], Law 194 reached a compromise whose prefer ability will be further examined in the final section. At the practical level, abortion has considerably been prevented. As a Member of the Italian National Bioethics Committee recently reported:

> "In Italy the numbers of abortion – usually indicated with the expression "Voluntary Termination of Pregnancy" (VTP) – *have steadily declined from 1982 to today, according to all parameters (both absolute numbers and abortion ratios)*; at the same time, all the data regarding attitudes about abortion show that this practice is considered as the last resort for Italian women. In this sense, Italy is an exception in the international context. *Surely, the absolute number of abortion is far from our goal of zero abortions; however, the Italian situation should be taken as a model for other countries*, in order to establish affective prevention policies in this very sensitive area"[96] [97].

The Italian government covers abortion costs. At the same time, being committed to protection of life "before and after birth," it grants maternity and parental leaves, and it also takes care of unemployed mothers. Of course, these

95 Reference here is to the expression, and to the reflections developed by GLENDON, Mary Ann. *Rights Talk*. Op. cit.

96 See MORRESI, A. MORRESI, Assuntina. Abortion in Italy: Law & social perspectives… Op. Cit. at 218. For a different opinion, shared by several scholars, see CASINI, M. "La legge 194 del 22 maggio 1978 tra applicazione e disapplicazione". *Studia Bioethica*. 2008, vol. 1 Nº 2–3 at 109–120.

97 The same "positive trend" could be confirmed by the latest official Report on Law 194's application. In the year 2018, the number of abortions was 76,328, a further decrease compared to previous numbers (–5,5% with reference to 2017). The number is also far from the 234.801 cases reported in 1983. These numbers, however, are also largely affected by the widespread and increased access to medical abortions, In: Ministero della Salut. Relazione del Ministro della Salute sulla attuazione della legge contenente norme per la tutela sociale della maternità e per l'interruzione volontaria di gravidanza (legge 194/78). Available in: http://bitly.ws/hcCf. See MANTOVANO, Alfredo. *Pubblicata (in ritardo) la relazione sull'attuazione della legge 194*. Centro Studi Rosario Livatino [on line] 2020, June 21. Available in: http://bitly.ws/hcCm; and CASCIANO, Antonio. *L'attuazione della L. 194: gestanti straniere, "farmaci" abortivi, clandestinità.* Centro Studi Rosario Livatino [on line] 2020, July 2. Available in: http://bitly.ws/hcCv

are programmatic commitments, whose specific fulfilment depends on the evolving capacities of the welfare state, and on parties' priorities. But no government could claim exemption from such obligations.

Furthermore, while other European countries have far more permissive laws[98] or move in the direction of complete decriminalization[99], Italy recently reiterated the criminal nature of *unlawful* abortions. By means of legislative decree 21/2018, articles 17 and 18 were repealed and simultaneously replaced, with the same wording and sentences, by articles 593 *bis* and 593 *ter* of the Penal Code[100]. These provisions, moreover, follow the section of the code dedicated to the crimes *against the person* and *precede the one on crimes against personal freedom*, once more suggesting the woman's sole "self–determination" is not all that the law protects. According to the Report that accompanied the Decree, moreover, the novel measure aimed at "reinforcing the protection of vulnerable *subjects*" (plural), whenever an offence is directed either at the mother, her physical wellbeing, and her maternity project, or *at the unborn*[101].

98 As is the case for Sweden, where abortion "on–demand" may be performed up to the 18th week; or in the Netherlands, where not only late–term abortions, but also termination of neonates may happen without criminal consequences and subject only to *due–care criteria.* On the latter see, http://bitly.ws/hcCP.

99 Most recently, the European Parliament passed a resolution which, among others, "urges" member states to "decriminalise abortion, as well as to remove and combat obstacles to legal abortion" and "invites" them "to review their national legal provisions on abortion and bring them into line with international human rights standards and regional best practices by ensuring that abortion at request is legal in early pregnancy and, when needed, beyond if the pregnant person's health or life is in danger", European Parliament resolution of 24 June 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health, (2020/2215(INI), at 34 and 35.

100 See PUPPINCK, Grégor. *Why Abortion Is No Human Right.* European Centre for Law and Justice is an international [on line] June 2021. Available in: http://bitly.ws/hcCV ("In many countries, abortion is decriminalized under certain conditions, but because of these very conditions, abortion remains a derogation to the principle of the right to life. One cannot abort "freely", as one would exercise a true freedom or a true right").

101 Final Report to the Decree titled: Decreto Legislativo. "Disposizioni di attuazione del principio di delega della riserva di codice nella materia penale a norma dell'articolo 1, comma 85, lettera q), della legge 23 giugno 2017, n. 103", Altalex [on line] 8 February 2018. Available in: http://bitly.ws/hcDw ("The decision

On the other hand, as mentioned above, new ministerial guidelines were adopted in 2020. By bypassing the Parliament, they are attempting to transform abortion into a private act that can be performed without any form of public oversight[102]. In particular, they allow for medical abortion to be performed in day–hospital, notwithstanding the high risks that these procedures involve for women's health. Scholars, however, have already pointed at the illegitimate nature of these measures, which are clear violations of both the provisions of Law 194 as well as of the principles established by the Constitutional Court in 1975[103].

Italian criminal law never ceased protecting the life of the unborn as an independent legal good[104]. Although some *direct* abortions are not subject to criminal punishment, this solution represented a prudential answer to hardly evitable choices, which is not the proclamation of a constitutional right to destroy prenatal life. *De jure condendo,* amendments are needed. As currently applied, the law is inconsistent not only with the principles originally expressed by the Constitutional Court –something the legislature had the freedom and the power to do– but also with the ones embedded in the same law, proclaimed by its article 1 and echoed throughout the statute. Presenting the draft to the parliament, communist MP Giovanni Berlinguer had affirmed that the bill could not be interpreted as equating abortion with a civil right[105]. The law's *ratio*, he

has been to transfer into the criminal code the crimes […] of articles 17 and 18 of Law 194/1978 which punish negligent (the first one) as well as intentional and "unintentional" abortion (the second one). Such an insertion is also meant to *strengthen the protection of vulnerable subjects*, when the woman is the victim of an offense, particularly with reference to her physical integrity and her project of maternity, as well as the unborn…." Informal translation, emphasis added).

102 Supra, n. 24, Ministero della Salute, Circolare 12 Agosto 2020, 0027166 http://www.quotidianosanita.it/allegati/allegato228648.pdf

103 See, for instance, the opinions expressed by MORRESI, Assuntina; DUBOLINO, Pietro and MANTOVANO, Alfredo. *Legge 194/1978, RU 486, Ellaone: verso la privatizzazionedell'aborto?* (It.). Centro Studi Rosario Livatino [on line] April 9, 2021. Available in: http://bitly.ws/hcE7

104 See VALIANTE, Paolo. "L'aborto Preterintenzionale: Una Contraddizione del Sistema". *L–Jus.* Rivista semestrale iscritta. 2019, Fascicolo 1, p. 84–113. Available in: https://bit.ly/3aBpApY

105 Camera dei Deputati. Relazione delle Commissioni riunite IV e XIV (Giustizia– Igiene e sanità). November 30, 1977. Available in: https://bit.ly/3mWamlc ("By doing so, criminal relevance is established for the conducts

said, consisted in an effort to amplify the prevention of abortion, described as an *evil to be averted*.Since the law's entry into force, however, it is estimated that around 6 million unborn lives were terminated (although the law's main goal was "*to make abortion rare"*)[106].

As a final point, it should be noted that even though the European Court of Human Rights confirmed the permissibility of an abortion performed against the father's will, it also explicitly appreciated the balance struck by the Italian law on abortion. Instead of asserting a woman's fundamental right to privacy or to bodily autonomy:

> "[T]he Court notes that the relevant Italian legislation authorizes abortion within the first twelve weeks of a pregnancy if there is a risk to the woman's physical or mental health. […] It follows that an abortion may be carried out to protect the woman's health. In the Court's opinion, *such provisions strike a fair balance* between, on the one hand, *the need to ensure protection of the foetus* and, on the other, the woman's interests"[107].

that correspond to the circumstances described in the bill, but from here no value–judgement, nor petition of principle can be inferred, it cannot be the ground for the equation abortion = civil right, there is no violation of the conscience of those who hold abortion to be a morally illicit act. On the other hand, the stress on the preventative role of the *consultori*, which answers a request that came from the Catholic world, means that abortion practices have been charged with a negative value, reaffirming the State interest to perform a dissuasive intervention with regard to the woman's decision to interrupt her pregnancy, a dissuasive intervention which, expressed in the forms of societal participation to the problems of she who is afraid to become a mother, may have much better results than those up to now achieved by a "criminal law terrorism". Informal translation).

106 Based on official reports, the number was of 5,814,625 in 2016. https://www.avvenire.it/vita/pagine/40–anni–di–194–laborto–classista. As per n. 24, *supra*, moreover, the international narrative of abortion as a "right," rather than the principles of Law 194, seem to justify the most recent Italian guidelines on medical abortions.

107 European Court of Human Rights European. *Boso v. Italy*. 2002–VII, Eur. Ct. H.R. at 451.

Indeed, the European Court of Human Rights has never declared the existence of a fundamental right to abortion on demand[108].

3. The American abortion framework, in a nutshell

As noted above, things are radically different in the United States. The 1973 U.S. Supreme Court decision, with its "constitutionalization" of abortion, followed a trajectory, and adopted a narrative that, regardless of its practical results, is diametrically opposed to the ones implied by the Italian Constitutional Court and by the Italian legislature[109]. The U.S. Supreme Court *did not look at the conceived human being as a life* that *may or may not* be sacrificed. The embryo, as well as the fetus and the post–viable unborn, was to be *excluded from the* relevant constitutional picture –and from the human family– considered from the sole standpoint of the state's possible "interest" in its protection. For the Supreme Court, the only one legal subject and bearer of rights was the pregnant woman; the one and only constitutionally protected legal good was her individual autonomy. As a consequence, any shocked reaction to the New York "Reproductive Health Act"[110], while morally understandable, would be legally naïve[111].

Ever since 1973, abortion remained at the center of the political arena and most U.S. citizens are strongly opinioned about their own "right" to abort[112].

108 See, PUPPINCK, Grégor. *Abortion on Demand and the European Convention on Human Rights*, European Center for Law and Justice (ECLJ) [on line], 2013, Available in: https://bit.ly/3FFdWIZ, ("Through its various rulings, the Court explicitly declared that abortion is not a right under the Convention: there is no right to have an abortion (Silva Monteiro Martins Ribeiro v. Portugal) or to practice it (Jean–Jacques Amy v. Belgium). Examining the Court's case–law, it appears that the Court has never admitted that the free–will or the autonomy of the woman could, on its own, suffice to justify an abortion").

109 Supreme Court of the United States. *Roe v. Wade*. 1973, 410 U.S., 113, 182–84.

110 New York State Senate. Public Health. Law §2599–BB, supra n. 4.

111 These pages are written predominantly, but not exclusively, for a non–American audience.

112 In the last 20 years, the percentage of voters valuing abortion as a major factor in Presidential nomination never dropped below 44%. See, GALLUP. *The Abortion Issue in Presidential Elections.* Gallup, Inc. 2021 [on line] Available in: https://bit.ly/3v5yDc4. Most Italian citizens, on the other hand, do not even know what

At the same time, however, the impression is that the lay understanding of U.S. abortion law, rarely discussed in honest and non–polarized terms, may often fail to grasp the *extremism* that characterized the 1973 decision and its legacy, as well as the relevance of the theoretical (and moral) differences implied by alternative abortion regulations, such as the Italian one. As Gallup polls suggest, the majority of U.S. citizens want *Roe v. Wade* to stand[113]. Nonetheless, it is again a majority who favors abortion *with limitations*[114]. *Roe,* however, while it created latitude for legislation that imposes certain limits on abortion[115] did not compel legislatures to enact any such legislation.

Possibly, the generalized and unspecific "abortion rights talk" that pervaded national and international public fora, echoed by unsophisticated or partisan politicians, contributed to this confusion, generating the false understanding that, *more or less,* abortion regulations are the same across the West[116]. An additional source of confusion may also come from the mentioned contemporary tendency to view norms and laws from a pragmatic and "consequentialist" perspective; criminal bans tend to be evaluated based on their efficacy rather than on ethical terms, in light of their immediate *results* rather than for the *reasons*

a pro–life candidate looks like –and to be fair they rarely asked for one. This fact, however, could also evidence satisfaction with the current "compromise" legislation, rather than a lack of care for the unborn. On this point, and on the "stability of compromise," see, OUTSHOORN, Joyce. "The Stability of Compromise: The Politics of Abortion in Western Europe". In: GITHENS, Marianne y MCBRIDE STETSON, Dorothy eds., *Abortion Politics: Public Policy in Cross–Cultural Perspective.* Nueva York: Routledge, 1996. p. 145.

113 BRENAN, Megan. *Nearly Two–Thirds of Americans Want Roe v. Wade to Stand.* Gallup, Inc. 2021 [on line] July 2018, Available in: https://bit.ly/2YHKzVe

114 See SAAD, Lydia. *Majority in U.S. Still Want Abortion Legal, With Limits.* Gallup, Inc. 2021 [on line] June 2019. Available in: https://bit.ly/3AJX1kQ

115 As the latest judgement once more revealed, that latitude does not really exist. In: Supreme Court of the United States. JUNE Medical Services L. L. C. ET AL. v. RUSSO, Interim Secretary, Louisiana department of health and hospitals, 591 U. S. (2020), the U.S. Supreme Court struck down a Louisiana law aimed at making sure abortions procedures would not endanger women's lives. That law only required doctors who perform abortions to have admitting privileges at a nearby hospital.

116 For a general overview of World Abortion Laws see the WHO, World Abortion Policies Database, https://abortion–policies.srhr.org.

that justify them. In this respect, U.S. and Western European abortion rates are quite similar[117]. Laws, however, have long term effects, most of which cannot be measured[118]. Let's then look at *Roe v. Wade*'s radicalism, how we got there, and what came next.

3.1 The Law Before *Roev. Wade*[119], and the Constitutional "Right" to Abortion

The reason to call it *radicalism*[120] is that in 1973 the U.S. Supreme Court not only "constitutionalized" abortion; in 1973, a majority of life–tenured[121] Justices "*imposed*"[122] their own view on abortion and on the relative value of human life on the people of 50 states.

As a matter of fact, 1973 was not the first time in U.S. history women could terminate their pregnancies without incurring criminal penalties[123]. Be-

117 The lowest regional rates are in North America, 17 per 1,000. Numbers vary widely in Europe, but in Western Europe the average is 16 per 1,000! See, Abortion Worldwide: Uneven Progress and Unequal Access. Instituto Guttmacher [on line] 2018. Available in: https://bit.ly/3aEehgo.

118 See CALABRESI, Guido. Ideals, Beliefs, Attitudes, and the Law… Op. Cit., 84 ("Law, unlike economics, is not concerned only, or even primarily, with the reduction of costs, "given tastes." It is fundamentally concerned with *shaping* tastes. We always must be on guard that those allocations which lessen short run costs by reducing moralisms or offense do not *mindlessly* lead us, in the long run, to tastes and values which today we would find appalling".).

119 Supreme Court of the United States. *Roe v. Wade.* Op. cit. p. 113.

120 "Radicalism" is one of *Roe's* main feature according to Law Professor Michael Stokes Paulsen. See PAULSEN, Michael Stokes. *The Unbearable Wrongfulness of Roe.* Pub. Discourse. [on line] Jan. 23, 2012. Available in: https://bit.ly/3lFnImp

121 Justices B. White and W. Rehnquist dissented both in *Roe v. Wade* and in the companion case *Doe v. Bolton*.

122 See SAUNDERS, W. L. "Judicial Interference in the Protection of Human Life in the United States: Actions and Consequences". In: ZAMBRANO, Pilar – SAUNDERS, William L. (Coords.), "Unborn Human Life and Fundamental Rights…" Op. Cit, at 15–27. As Saunders writes, "to understand the experience in the United States, one must recognize that abortion was imposed upon the country by our Supreme Court. I use the word "imposed" intentionally to indicate that it was all but ultra vires manner in which it did so", Ibídem 15, 16.

123 See LEAVY, Zad & KUMMER, Jerome. "Criminal Abortion: Human Hardship and Unyielding Laws". *Southern California Law Rev.* 1962, Nº 35. p.123, 127 (discussing that while procurement or attempted procurement

sides the fact that abortion prosecutions were rare[124], by the time this case had reached the Supreme Court, several state legislatures had dealt with abortion by regulating it in accordance with the peculiar sensitivities of their respective constituencies and, at times, by liberalizing access. However, even in the most "liberal" states, the unjustified and intentional destruction of the unborn remained a punishable crime. Such was the case in Colorado, often cited as a pioneer of reproductive rights. What the New York Times defined "*the most liberal abortion law in the nation*"[125], in 1967, was a law that exempted abortions from punishment if the woman's physical or mental health was seriously threatened, if the baby would be born "mentally retarded or with serious deformities," or in cases of rape and incest. That law did not speak of abortion *rights*, and it even subjected the clinical decision to the favorable opinion of a three–members board of doctors.

of an abortion was a possible felony in nearly every state, by 1962 "[e]ach jurisdiction, however, has in one form or another an exception to the harsh prohibitory law"). As the authors report in detail, 42 states had exceptions to preserve life of mother, three to preserve life or health of mother, two to save the life of mother or to prevent serious or permanent bodily injury to her, one when the physician is "satisfied that the fetus is dead, or that no other method will secure the safety of the mother".

124 Ibídem, at 126 ("For professional abortionists there exists a low rate of prosecution and an even lower rate of conviction. Women–abortees are reluctant to speak out, as they feel grateful to the person who relieved them of the unwanted burden, and such cases are seldom even detected unless serious illness or death results. The abortees, though labeled felons for submitting to illegal surgery, are seldom if ever prosecuted, as their testimony is usually needed to further implicate the abortionists. It seems apparent that morals, religion and the criminal law offer little restraint when it comes to abortion, which led the eminent Dr. F. J. Taussig to remark that he knew of "no other instance in history in which there has been such frank and universal disregard for a criminal law.") According to a 2010 report published by Americans United for Life, "There are 'only two cases in which a woman was charged in any State with participating in her own abortion': from Pennsylvania in 1911 and from Texas in 1922. *There is no documented case since 1922 in which a woman has been charged in an abortion in the United States*", (references omitted), FORSYTHE, Clarke D. *Why the States Did Not Prosecute Women for Abortion Before Roe v. Wade.* Americans United for Life [on line] April 23, 2010. Available in: https://bit.ly/3DT7FHZ

125 Colorado Passes Liberal Abortion Bill. The N. Y. Times [on line] April 9, 1967, at 34. Available in: https://nyti.ms/2YUfRZx

Furthermore, as the U.S. Supreme Court reported in *Roe*, by 1973, fourteen states had adopted some form of decriminalization, all patternedafter the Model Penal Code (MPC), published by the American Legal Institute in 1962[126]. Based on par. 230.3 MPC, abortion remained a criminal act, "justified" under certain circumstances:

> "(1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty–sixth week, a felony of the second degree.
>
> (2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible]".

This "three grounds" policy is still often suggested as a "compromise solution" by many[127], and it would be unsurprising to discover that its provisions

126 See GILLES, Stephen G. "Why the Right to Elective Abortion Fails Casey's Own Interest–Balancing Methodology–and Why it Matters". *Notre Dame Law Rev.* 2016, Nº 91, p. 753. ("*Roe* itself relied far more heavily on its flawed theory that the Anglo–American legal tradition gave women extensive abortion liberty prior to the late nineteenth century than on the post 1960 trend toward liberalization *because that trend lent virtually no support to a right to elective abortion*") (emphasis in the original).

127 Some authors argue that in these three instances abortion is already *imposed* by current human standards. See ERDMAN, Joanna N. and COOK, Rebecca J. ERDMAN, Joanna N. and COOK, Rebecca J. "Decriminalization of abortion – A human rights imperative"… Op. Cit. at 14 ("Human rights standards require the decriminalization of abortion, at a minimum, on three grounds: where pregnancy presents a risk to the life

satisfy the demands of a good portion of the so–called "pro–choice" people[128]. In 1973, however, the U.S. Supreme Court moved far beyond these lines. The Court's judgments in *Roe v. Wade* and its companion case *Doe v. Bolton* turned America into "a nation of 'abortion on demand.' Let me be clear what that means: it means that a woman can have an abortion at any time for any reason"[129].

The case of Jane Roe (alias, Norma McCorvey) involved the constitutionality of the Texas criminal abortion law, which proscribed procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life (more or less, the Italian situation of 1975). In contrast with the Italian decision, however, the opinion penned by Justice Blackmun established that a pregnant woman has a constitutional right to access abortion, which is absolute during the first trimester but exists throughout pregnancy[130]. Such a right stemmed from her fundamental *right to "privacy,"* and/or constituted an aspect of that individual "*liberty*" constitutionally protected by the "Due Process Clause" of the

or health of the pregnant person, where pregnancy results from sexual crime (i.e., rape, sexual assault, or incest), and where there is a risk of serious fetal Impairment"). This position, however, is grounded on the novel idea that treaty monitoring bodies, while interpreting international treaties, were themselves sources of binding international norms. Most recently, such a policy was introduced in Chile, in 2017. CASTALDI, Ligia de Jesús. L*egalization of Abortion on Three Grounds.* Oxford Human Rights Hub [on line] Feb. 2018, Available in: https://bit.ly/3FK11p3. As the author notes, however, "the Constitutional Court clarified that abortion continued to be a crime in Chile. One of the judges in the majority, Domingo Hernández, categorically rejected the idea that the law could be interpreted as creating a constitutional right to abort".

128 See JONES, Jeffrey M. *U.S. Abortion Attitudes Remain Closely Divided.* Gallup, Inc. 2021 [on line] June 11, 2018. ("Although close to eight in 10 Americans believe abortion should be legal in all or some circumstances, further probing of their attitudes finds the public favoring more restrictive rather than less restrictive laws). Based on that same survey, only 29% of respondents believed abortion should be legal in all circumstances.

129 See ZAMBRANO, Pilar – SAUNDERS, William L. (Coords.), "Unborn Human Life and Fundamental Rights…" Op. Cit.

130 GLENDON, Mary Ann. GLENDON, Mary Ann. Abortion and divorce in western law… Op. Cit. at 112 ("Today, abortion is subject to less regulation in the United States than in any other country in the Western world").

Fourteenth Amendment. A few premises on U.S. Constitutional law and history must be set forth before digging deeper into the merits of the case.

First, one must resist the temptation to compare the 1789 U.S. Constitution with the more modern constitutions of continental European states, or even with the most recent examples of international declaration of rights that followed the tragic experiences of World War II. Including after the addition of the Bill of Rights, in 1791, the U.S. Constitution remained radically different in both its function, and in its premises[131]. That document served the founding[132] of a government of "limited and enumerated powers", which was not meant to substitute, nor to "supersede" state governments and legislatures, but to fulfill the promises contained in its own Preamble: to "form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity". The Bill of Rights did not enshrine a sovereign's concession of rights, nor did it serve as the basis for their proclamation. Those initial Ten Amendments, on the contrary, represented fundamental rights that the people *already possessed,* and that the federal government, and its courts *may*

131 See GLENDON, Mary Ann. *Rights Talk*, Op. cit. at 160 ("Comparative lawyers would have to express some reservations about the extent to which our Constitution really has served as a model".) As the author further summarizes, the major differences are in the catalogs of rights and in their specific terms; European Constitutions "gather the past into the present, carrying forward into modern social democracy certain older notions concerning reciprocal obligations of protection and loyalty, as well as elements of classical Biblical views of man, society, and law". Ibídem at 161.

132 ARKES, Hadley. *Beyond the Constitution* 40. Princeton: Princeton University Press. 1990 (arguing how the Union, to a certain extent, existed even before the Constitution "To the extent that Americans were constituted as a political community, they found their common character in the commitment to that principle ['all men are created equal'] of the Declaration. The Constitution was a means, an instrument for conveying, in a legal structure, the principles that marked the character of the American republic").

not violate[133]. Those rights existed before and regardless of the Union[134]. They existed against and above it[135]. As the fascinating story that led to its ratification reveals[136], the preoccupation of the Founders (and in particular of the Federal-

133 For a short but instructive account of this fascinating history see, ARKES, Hadley. Op. cit. chapter 4, "On the Dangers of a Bill of Rights: Restating the Federalist Argument". As the author writes, "It is one of the ironies of the original debate over the constitution that some of the most illuminating commentaries on the character of the new government were provided by the opponents of the Constitution". Ibídem, at 21.

134 Ibídem, at 60 (explaining how the Founders possessed an understanding of human rights, and of natural law, far deeper than the current one, and one which urgently needs to be restored, as emerges clearly from the Federalists' reasons to oppose a Bill of Rights. For instance, as Hamilton wrote in Federalist n. 84, "bills of rights are, in their origins, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservation of rights not surrendered to the prince".). See also BUDZISZEWSKI, J. *The Line through the Heart: Natural Law as Fact, Theory and Sign of Contradiction.* Wilmington, DE: Intercollegiate Studies Institute, 2011. p. 149 (explaining that the reason why the Founders' belief in natural law may not be *self–evident* may come from the fact that, "at the beginning of the American republic, the strongest testimony to belief in natural law comes not from our foundational legal document, the Constitution, but from our foundational political document, the Declaration of Independence.") As the author further explains, the Declaration notoriously speaks of self–evident truths and this in turn means that no one can honestly claim not to know that "all men are created equal" "[F]rom this fact follows *rights* of a sort that cannot be given up, cannot be taken away, and cannot be destroyed. The Constitution's strange silence about natural law does not show that the framers were in doubt about its reality". Ibídem, 150.

135 See ARKES, Hadley. Beyond the Constitution… Op. Cit. at 64 (arguing that the Founders had not drafted the Constitution upon acceptance of "the 'modern' notion of natural rights put forth by Hobbes, and that understanding encompassed the notion that rights were in fact surrendered in entering civil society". As he notes, "But not the least of difficulties, passed over in this interpretation, is that it fails to take seriously the Christianity of the Founders […] It would simply be untenable, therefore, to identify these men with the notion that civil society marked the advent of morality".). See also ARKES, Hadley. *Natural rights and the right to choose.* Cambridge: University of Cambridge, 2004, p.139 (speaking of James Wilson, one of "only six men who had been both a signer of the Declaration of Independence and a member of the Constitutional Convention in 1787", he "took matters to the root: The very purpose of government was not to create new rights, but to secure and enlarge the rights we already possessed by nature") (references omitted).

136 See ARKES, Hadley. Beyond the Constitution… Op. Cit. at 56 (The reason the Federalists opposed the Bill

ists), who initially resisted the inclusion of a Bill of Rights, consisted precisely in that a "written" list of rights could later be read as if those were the only rights retained by the people[137]. Since a compromise needed to be reached, the solution came with the inclusion of the provisions of the Ninth and of the Tenth Amendments: "*The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people*"[138]; and, "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people*". Since the founding, in other words, U.S. citizens knew that they had *more* fundamental rights than the few listed in the Bill of Rights. That list was meant to only limit the federal government and its actions. States, meanwhile, had their own constitutions; and that was the place where limits on their powers, and legislatures, were to be found. The fear of the Federalists, however, proved correct.

During the 20th century, the Fourteenth Amendment, which originally meant to ensure the end of slavery throughout the Union,[139] became a vehicle by which the first eight Amendments (and their *penumbras*) applied against the states: limiting state legislatures and governmental action and subjecting to a greater extent to judicial review. The jurisprudential mechanisms that enabled this process were grounded in the "due process" clause of the Fourteenth Amendment, which recites, "nor shall any state deprive any person of life, liberty, or property, without due process of law". Due process came to mean a series of procedural and substantial limits for state legislatures, which includes the rights originally protected against the federal government. By this

of Rights, is that "they saw, in the Bill of Rights, a grand device of civic education that would misinstruct the American people about the ground of their rights, and therefore about the ends or purposes of the government under the Constitution".).

137 Ibídem, at 65 ("But the concern ran even more deeply, and it touched, as I have suggested, our understanding of the source and logic of these rights").

138 See BUDZISZEWSKI, J. THE LINE THROUGH THE HEART: NATURAL LAW AS FACT… OP. CIT. at 150, (explaining how the Ninth Amendment "presupposes not only that some rights are retained by the people, but that we can tell which rights they retain").

139 See CURTIS, Michael Kent. Fourteenth Amendment. In *The Oxford Companion to American Law.* New York: Oxford University: Kermit L. Hall et al., eds, 2002, p. 320.

slow revolution, known as the "incorporation doctrine", the Supreme Court decided, judgement after judgment, that specific Amendments limited the action of states. Rather than incorporating their whole text, moreover, the Court referenced specific clauses and rights implied by the relevant Amendment ("selective incorporation"). Along with this phenomenon, a so–called "substantive due process" jurisprudence held that "due process" protected substantive rights not necessarily listed in the Constitution too[140]. And even though "substantive" due process is still a hotly contested doctrine, it is the law of the land[141].

As a bizarre result, the Ninth Amendment –with its implied affirmation of unenumerated rights– became the justification for an ever–increasing power of the federal government, and the legitimizing card that federal courts (and the Supreme Court) could play to strike down state laws. The "new" federal Constitution included "rights" and "liberties" that *states* could *not* legitimately limit. Such as the right to abort.

On these very bases, indeed, Justice Blackmun found that the Constitution protected an unwritten individual right to "privacy" –"*whether it be founded in the Fourteenth Amendment's concept of personal liberty* […] *or* […] *in the Ninth Amendment's reservation of rights to the people"*– and that right implied a woman's qualified right to terminate her pregnancy (*"[it] is broad enough*

140 CONKLE, Daniel O. "Three Theories of Substantive Due Process". *North Carolina Law Review.* December 2006, Vol. 85, Issue 1. P. 63, 69 ("Byits terms, the language suggests no limitation on procedurally proper deprivations, nor does it authorize the recognition of substantive constitutional rights" –nonetheless– "the Court has infused the Due Process Clause with substantive content. Focusing especially on the word "liberty," it has declared for itself the power to define otherwise unenumerated constitutional rights, rights that are protected from governmental deprivation, no matter the procedure").

141 Some of the most recent and of the most relevant U.S. Supreme Court are indeed grounded on substantive due process: *Griswold v. Connecticut* (1965), on marital privacy and the use of contraceptives; *Loving v. Virginia,* 1967, on the right to interracial to marriage; *Eisenstadt v. Baird* (1972), on the individual right to use contraception (1972); *Roe v. Wade* (1973), on the right to abortion; *Lawrence v. Texas* (2003), on the right to engage in intimate same–sex conduct; *Obergefell v. Hodges* (2015), on the right of same–sex couples to marry.

to encompass a woman's decision whether or not to terminate her pregnancy"[142]). Without invoking any *evolutionary* interpretation of the Constitution, the Court also held that *history* showed that abortion prohibitions were a recent phenomenon, and that they were not grounded on the principle of inviolability of human life.[143] Furthermore, nothing in the Constitution could be interpreted so as to grant the unborn a right to life. For the purposes of the Constitution, a fetus was not a "person."[144] Whenever the Constitution spoke of persons, Justice Blackmun wrote, "*the use of the word is such that it has application only postnatally. None* [of its uses] *indicates, with any assurance, that it has any possible pre–natal application*"[145].

Implied in this last statement, however, and in its (apparent) unwillingness to read beyond the text, there is the subversion of that original understanding of the law, and of individual rights, that animated the Founders and that they wanted to preserve[146]. There is, furthermore, a misunderstanding of the very spirit

142 Supreme Court of the United States. *Roe v. Wade*. Op. cit. 155.

143 For detailed scholarly criticism on *Roe's* historical findings see, KEOWN, John. "Back to the Future of Abortion Law: Rejection of America's History and Traditions". *Issues Law Med.* 2006, Summer 22 (1). p. 22; ELY, John Hart. "The Wages of Crying Wolf…", Op. Cit. ("The suggestion that the interest in protecting prenatal life should not be considered because the original legislative history of most laws restricting abortion concerned itself with maternal health, is rightly rejected–by clear implication in *Roe* and rather explicitly in Doe").

144 On the contradictions implied by this proposition see, BRADLEY, Gerard V. *Constitutional and Other Persons*. In: Reason, Morality, and Law. Oxford, Oxford University Press: J. KEOWN & R. GEORGE eds., 2013.

145 Supreme Court of the United States. *Roe v. Wade.* Op. cit. at 157.

146 This interpretation, however, is only "apparently" based on the positive law. As Justice Scalia remarked, "the issue in these cases [is] not whether the power of a woman to abort is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women […]. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion […] because of two simple facts: 1) the Constitution says absolutely nothing about it, and 2) the longstanding traditions of American society have permitted it to be legally proscribed", Supreme Court of the United States. *Planned Parenthood of Southeastern Pa. v. Casey*, Op. cit. at 980. As per his own footnote n.1, "The enterprise launched in *Roe v. Wade,* […] by contrast, sought to *establish* –in the teeth of a clear, contrary tradition– a value found nowhere in the constitutional text". *Id*, emphasis in the original. Beyond

that animated the Fourteenth Amendment, which aimed to protect "the common right of humanity"[147]. The same constitutional silence, however, did not prevent an "unenumerated" sexual and reproductive liberty to enjoy the highest reverence.

Most famously, Professor Hadley Arkes dedicated his writings to show how Justice Blackmun's words may echo the arguments of those who supported slavery precisely by holding that nothing in the Constitution justified thinking that the Declaration's "all men are created equal" applied to black Americans[148]. In light of U.S. "history" –they argued– equality applied only to "white males," […] and perhaps exclusively to those belonging to the nationalities represented in America and Britain in 1776[149]. According to the Court's opinion, the fetus

Scalia's position, and arguing that an originalist interpretation of the Constitution attributes personhood to the unborn, see CRADDOCK, Josh. "Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?" *Harvard Journal of Law & Public Policy.* 2017, Vol. 40, Nº 2, p.539.

147 BRADLEY, Gerard V. *Constitutional and Other Persons. Op. cit.*, with explicit reference to the words of Representative Ewing and to the historical research of Professor BOND, J. E. "The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania". *Akron Law Review.* 1985, vol. 18, issue 3, art. 4.

148 ARKES, Hadley. *Natural Rights and The Right to Choose,* Cambridge Unviersity press, p. 2002, p. 82 (discussing that the denial of personhood to the unborn is a repetition of that mistaken understanding of equality, of the same formalistic attitude that re–defined human rights based on positive laws, and as concessions from power rather than innate). See also KLASING, Murphy S. "The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases". *Pepperdine Law Review.* 1995, vol. 22 at. 977 ("To one who has never attended a law school class, the concept that the word "person" could assume different meanings in different contexts must be disturbing. The only other time in American history that this author recalls the United States having different legal meanings for the word "person," other than when referring to unborn children, is in the context of slavery, and it took this country hundreds of years to realize the outright falsity and immorality of that distinction").

149 On the "prelegal" truths understood by Lincoln, and forgotten by Stephen Douglas, see ARKES, Hadley. F*irst Things: An Inquiry in the First Principles of Morals and Justice. Princeton,* NJ: Princeton University Press, 1986, p 40. ("In Douglas's argument, all law became 'positive' law and all rights were assimilated to this second category of "positive" rights. Whether it was right or wrong for blacks to be slaves […] did not depend on any claims that are intrinsic to the nature of human beings. The 'right' not to be enslaved was a right only if it were recognized or created by the people who made the laws in any country, and

was neither a "person" –entitled to a right to life– nor a "legal subject", entitled to some other sort of legal protection. The unborn, in other words, was not an independent bearer of rights. At the same time, the Supreme Court found that an unwanted pregnancy could cause of several *detriments*[150], and this was sufficient to justify a decision to terminate it.

Finally, rather than leaving the delicate ethical matter to the people, the Supreme Court, acting as a super–legislature, drafted a whole new regulation of abortion. As Justice Blackmun summarized it:

> "a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgement of the pregnant woman's attending physician.
>
> b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting *its interest* in the health of the mother, *may, if it chooses, regulate the abortion procedure* in ways that are reasonably related to *maternal health*;
>
> c) For the stage subsequent to viability, the State in promoting its *interest* in the *potentiality of human life may, if it chooses, regulate, and even proscribe, abortion* except where it is necessary for, in appropriate medical judgement, for the preservation of the life or health of the mother"[151].

Having analyzed the Italian judgement, what is most striking –and

of course that 'right' could be withdrawn when it no longer commanded the approval of the community").

150 See Supreme Court of the United States. *Roe v. Wade.* Op. cit. at 153 ("The detriment that the State would impose upon the pregnant woman by denying this choice altogether isapparent. *Specific and direct harm* medically diagnosable even in early pregnancy may be involved. *Maternity, or additional offspring*, may force upon the woman a *distressful life and future*. *Psychological harm* may be imminent. *Mental and physical health* may be taxed by child care. There is also the *distress, for all concerned,* associated with the *unwanted child*, and there is the problem of *bringing a child into a family already unable*, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and *continuing stigma of unwed motherhood* may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation", emphasis added).

151 Supreme Court of the United States. *Roe v. Wade.* Op. cit. at 164–65, emphasis added.

revealing of *Roe*'s radicalism is the use of the *conditional sentences,* and of the word "*interest*." While *privacy* implies and grants a *right* to abortion, which exists independently and before its positive recognition, the *Roe* Court says that *nothing* in the Constitution (be it Due Process, the Ninth Amendment, the Equal Protection clause) makes it possible to consider the unborn as an independent legal *subject*. Based on those conditional sentences, the unborn has no *rights* that *precede* the law, to be balanced against those of the mother. As the Court explicitly held, the unborn is *not* a "person" ("*[they] have never been recognized in the law as a person in the whole sense*"); but as these conditional sentences further reveal he is *not much different from "nothing*". His nature does not entitle him to any protection: nothing but the arbitrary decision of state laws will make him a barer of rights (which then, by definition, are not inviolable). As the Court writes, he *may be* protected by the states, but he *need not be*: there is no *duty* to protect him.

In terms of criminal law, this holding means that crimes related to abortion, if and whenever proscribed by states, are *mala prohibita*: there is nothing intrinsically and universally unjust in terminating an unborn life, but only a *state interest* in preventing such an act[152]. If that's the case, however, such crimes may be hard to distinguish from those that criminalized the selling of alcohol in the 1920s.

Roe's companion judgement worsened this already grimpicture. In *Doe v. Bolton*[153], the same Supreme Court ruled that a woman's right to abortion could never be limited by the state, at whatever stage, if abortion were sought

152 FLETCHER, George P. *The Grammar of Criminal Law: American, comparative, and international.* Oxford; Oxford University Press, 2007. p. 29 ("There are two ways of thinking about wrongdoing. One can see the crime as intrinsically wrong, regardless of the norm that makes it punishable; this view is reflected in the doctrine of crimes *mala in se.* The alternative is to view the wrong as a consequence of violating a norm enacted by the legislature. Crimes called *mala prohibita* are wrong only because of the violation. *Mala in se* offenses are also violations of enacted norms, but the norm is secondary in the judgment of wrong doing").

153 Supreme Court of the United States. *Doe v. Bolton*.410 U.S. 179 (1973). The case involved the Georgia statute on abortion modelled after the Model Penal Code.

for reasons of maternal *health*[154]. Furthermore, it adopted a definition of health which included, "all factors –physical, emotional, psychological, familial, and the woman's age– relevant to the well–being of the patient. All these factors may relate to health"[155]. As a result, the right to abortion *Roe* had set forth became available, for virtually any reason, throughout the entire pregnancy[156].

3.2 *"Casey"* and the status of abortion today

Notwithstanding several attempts and hopes to overturn *Roe*, paralleled by the ones to make any limitation of abortion rights unconstitutional[157], the

154 FORSYTHE, Clarke D. "A Legal Strategy to Overturn Roe v. Wade after Webster: Some Lessons from Lincoln". *BYU Law Review.* 1991, 520–21, fn. 7 ("*Roe* ushered in abortion on demand from conception to birth for any reason or no reason in every stab. *Roe* held that the states could prohibit abortion after viability "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother". Supreme Court of the United States. *Roe v. Wade.* Op. cit. at 165. But the Court then expanded the exception for "health" of the mother to make it impossible for states to prohibit any abortion after viability. The Court held that *Roe* and *Doe* "are to be read together," Ibídem, at 165, and the Court defined "health" in *Doe* as "all factors–physical, emotional, psychological, familial, and the woman's age–relevant to the well–being of the patient. All these factors may relate to health." *Doe,* 410 U.S. at 192. See also Supreme Court of the United States. *Roe v. Wade*. Op. cit. at 153 (stating the emotional factors a physician might consider").

155 Supreme Court of the United States. *Doe v. Bolton.* Op. cit. at 192. As seen in the previous section, also the Italian abortion statute adopts a broad definition of "health", which includes mental health. Following the first trimester, however, the health of the mother must be threatened by the (certified) existence of malformations or anomalies in the unborn (art. 6).

156 See *ZAMBRANO, Pilar – SAUNDERS, William L. (Coords.), "Unborn Human Life and Fundamental Rights…" Op. Cit.* ("In *Roe's* companion case, *Doe v. Bolton,* the Supreme Court extended this new abortion right throughout all nine months of pregnancy").

157 "Rather than settle the issue, the Court's rulings since *Roe* and *Doe* have continued to generate debate and have precipitated a variety of governmental actions at the national, state, and local levels designed either to nullify the rulings or limit their effect. These governmental regulations have, in turn, spawned further litigation in which resulting judicial refinements in the law have been no more successful in dampening the controversy". Abortion: Judicial History and Legislative Response. Congressional Research Service [on line] 2019, Sept 1. Available in: https://bit.ly/3j1RxLX

present status of abortion in America is not far from the one then described by Justice Blackmun, and further specified by *Doe*. In this respect, and for the limited purposes of this paper, one more decision is here worthy of mention, as it partially altered the picture: *Planned Parenthood of Southeastern Pa. v. Casey*[158].

In 1992, the Supreme Court was given the chance to correct what a very broad portion of the American people considered to be an "*exercise of raw judicial power*"[159]. That view was shared by many scholars, including among abortion supporters. J. H. Ely described *Roe* as "*frightening*", in that it discovered a "*super–protected right*" that "*is not inferable from the language of the Constitution, the framers' thinking* […], *any general value* […] *or the nation's governmental structure*"[160]. In 1973, Professor Richard Epstein wrote:

> "The frail language of the Due Process Clause does not give the Supreme Court license to rewrite the substantive criminal law. We could decide that the unborn child is a person under the Constitution and still leave it to state law to decide what complex of rights and duties attach to that status"[161].

A few years later, Professor Guido Calabresi, who supported abortion for reasons of "equality"[162], denounced *Roe*'s holding for its one–sidedness: "far from being a successful subterfuge or ducking, the Court's opinion in *Roe v. Wade* was

158 Supreme Court of the United States. *Planned Parenthood of Southeastern Pa. v. Casey*. Op. cit., at 833.

159 See Supreme Court of the United States. *Doe v. Bolton.* Op. cit., at 222 (White, J., dissenting). On that occasion, he labeled the Court's majority decision "an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court".

160 ELY, John Hart. "The Wages of Crying Wolf…", Op. Cit. at 935–936.

161 EPSTEIN, Richard A. "Substantive Due Process by Any Other Name: The Abortion Cases". *The Supreme Court Review.* University of Chicago Press, 1973, vol. 1973, p. 159, 180.

162 See CALABRESI, Guido. Ideals, Beliefs, Attitudes, and the Law… Op. Cit. at 101 ("For me, the essence of the argument in favor of abortion is an equality argument. It is an equal protection rather than a due process argument […] It is based on the notion that without a right to abortion women are not equal to men in the law. They are not equal to men with respect to unburdened access to sex–with respect, that is, to sexual freedom").

a disaster. It opened wounds one wishes were closed"[163]. As he further wrote,

> "The Court, when it said that fetuses are not persons for purposes of due process, said to a large and politically active group: '*Your* metaphysics are not part of our constitution.' This is far worse (and more dangerous) in a pluralistic society than the statement that the Court sought to avoid making, namely, 'Sorry, but your metaphysics are wrong. A fetus is not alive.' The Court said it does not matter whether a fetus is alive (whether *your* metaphysics are correct). A fetus still is not protected by *our* Constitution"[164].

If possible, this *metaphysics* argument worsened in 1992. At a time when personal views on abortion had already become the relevant factor for any new appointment to the bench[165], the Supreme Court not only upheld *Roe*'s basic holding –with its constitutional right to abortion and the constitutional irrelevance of the unborn– the Court turned it into the explicit denial of any prelegal principle or absolute truth, and into what then soon–to–be Pope Benedict XVI denounced as "a dictatorship of relativism that does not recognize anything as definitive and whose ultimate goal consists solely of one's own ego and desires"[166].

While acknowledging the shaky ground upon which *Roe* had been decided, and while questionably invoking the principle of *stare decisis* (or, rather, a con-

163 Ibidem, at 97.

164 Ibidem at 95.

165 The nominees' views on abortion became ground for opposition to the appointment of Judge Robert Bork to the Supreme Court, in 1987, and of Justice Clarence Thomas, in 1991. In the first case, abortion advocates' efforts proved so successful that "to Bork" became the verb used to oppose Justice Thomas nomination a few years later. For accounts on those nominations, see ARKES, Hadley. *Natural Rights and The Right to Choose*, Cambridge Unviersity press, p. 2002, p. 154 ("Those nominations became freighted with a larger significance because either man was understood to be, potentially, the fifth vote in favor or overruling *Roe v. Wade").*

166 RATZINGER, Card. J. Mass: "pro eligendo Romano Pontifice". Homily of his eminence card. Joseph Ratzinger dean of the college of cardinals. Vatican Basilica [on line] Monday 18 April 2005. Available in: https://bit.ly/2Xg1a2a

sequentialist reasoning about sexual choices women had already made based on the availability of abortion[167], and about the Court's own legitimacy[168]) Justice Kennedy defended women's constitutional right to abortion by what came to be known as the "mystery passage:"

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life*. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State"[169].

Abandoning the trimester framework, substituted by the pre– or post–*viability* discrimen, the 1992 Supreme Court conceded that states may enact laws aimed at protecting prenatal life *throughout the entire pregnancy*, and they may even proscribe abortion *after viability*. Once again, however, abortion prohibitions

167 See Supreme Court of the United States. *Planned Parenthood of Southeastern Pa. v. Casey.* Op. cit., at 833, 856 (1992): ("But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion, in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives"). Stare decisis was also at the basis of the most recent abortion judgment, latest June Medical Services LLC v. Russo, 591 U. S. (2020).

168 See Ibídem at 833, 866 (1992) ("Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation").

169 Supreme Court of the United States. *Planned Parenthood of Southeastern Pa. v. Casey*. Op. cit., at 851, emphasis added.

would not be grounded on any *inherent value of life*, nor on the *intrinsic dignity* of the unborn. Even after fetal viability, *Casey* established, the state had *no duty* to protect the unborn, but solely an arbitrary "*interest*" in potential life[170]. If the value of a human being *may or may not be denied*, however, purely based on personal (including majoritarian) beliefs, the whole idea of men "created equal," and "endowed by their Creator with certain unalienable Rights", collapses.

Casey seemed to strengthen the protection of the unborn: abortion regulations would now be constitutional at the condition that they did not impose an *"undue burden"* on women's right to access abortion[171]. In its own words, the Supreme Court meant to legitimize *"regulations which* […] *are not a substantial obstacle to the woman's exercise of the right to choose"*[172]. What these regulations look like *in practice*, however, remained far from clear[173]. As the dissenting opin-

170 Ibídem at 878 ("a) To protect the central right recognized by *Roe v. Wade* while at the same *time accommodating the State's profound interest* in potential life, we will employ the undue burden analysis as explained in this opinion; […] d) Our adoption of the undue burden analysis *does not disturb the central holding of Roe v. Wade,* and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, *a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability*; e) We also reaffirm *Roe´s* holding that: subsequent to viability, the State *in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe,* abortion").

171 Ibídem at 876. This new test seemed to allow for more/broader state regulations, since it represented an intermediate level of scrutiny. Before Casey, the "fundamental" nature of the right meant that the Court would apply the strict scrutiny standard where such right was being infringed upon by state action. Under strict scrutiny, state action may limit an individual right if it furthers a "compelling state interest" and is "narrowly tailored," being the least intrusive means to achieve its result. On the interpretation of *Casey* as actually implying that a right to elective to abortion prior to viability may not be predicated, see GILLES, Stephen G. "Why the Right to Elective Abortion Fails…", Op. Cit.

172 Ibídem at 833, 877 (1992).

173 Ibídem at 966, (Rehnquist, J., dissenting) ("The undue burden standard presents nothing more workable than the trimester framework which it discards today. Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code.") Similarly, in the words of Justice Scalia, *id,* at 987 ("Defining an 'undue burden' as an 'undue hindrance' (or a 'substantial obstacle') hardly 'clarifies' the test. Consciously or not, the joint opinion's verbal shell game will conceal

ions correctly warned, this new and vague standard simply determined greater unpredictability as to which laws would *ultimately* survive judicial review[174]. And it is no "mystery" that abortion litigation at the Supreme Court level did not end after *Casey*[175].

As Justice Scalia clearly pointed out in his dissenting opinion, the greatest contradiction of the "undue burden" standard consisted in that:

> "*Any* regulation of abortion that is intended to advance what the joint opinion concedes is the State's 'substantial' interest in protecting unborn life will be 'calculated [to] hinder' a decision to have an abortion. It thus seems more accurate to say that the joint opinion would uphold abortion regulation only if they do not *unduly* hinder the woman's decision"[176].

As a consequence, moreover,

> "[D]espite flowery rhetoric about the State's 'substantial' and 'profound' interest in 'potential human life,' and criticism of *Roe*, for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful[177]".

raw judicial policies choices concerning what is 'appropriate' abortion legislation").

174 Supreme Court of the United States. *Planned Parenthood of Southeastern Pa. v. Casey*. Op. cit., at 992 ("The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as 'undue'–subject, of course, to the possibility of being reversed by a court of appeals or Supreme Court that is as unconstrained in reviewing his decision as he was in making it").

175 See Supreme Court of the United States. *JUNE Medical Services L. L. C. ET AL. v. RUSSO. Op. cit.* On June 29, 2020, the Supreme Court struck down the Louisiana's Unsafe Abortion Protection Act, requiring doctors who perform abortions to have admitting privileges at a nearby hospital. Once again, the Supreme Court was dramatically divided, 5–4.

176 Supreme Court of the United States. *Planned Parenthood of Southeastern Pa. v. Casey*. Op. cit., at 833, 986 (Scalia, J., dissenting, emphasis in the original).

177 Ibídem, at 992.

Not even the subsequent *Gonzalez v. Carhart*[178] decision, where the Supreme Court upheld the *Partial–Birth Abortion Ban Act* of 2003, altered the legitimizing framework *Roe* had put in place (perpetuated by *Casey*). That ban's validity, in fact, was once again grounded on the state *interest* –not on its *duty*– to protect fetal life[179]. Furthermore, since the federal statute's liability was limited to the doctor who "knowingly performs a partial–birth abortion and thereby *kills a human fetus*", what the Supreme Court upheld in 2007 was much closer to an infanticide prohibition than to an abortion regulation[180]. In *Gonzales*, indeed, the majority opinion explicitly referenced the Congressional findings, which "*determined that the abortion methods* [the Act] *proscribed had a "disturbing similarity to the killing of a newborn infant,*" and specified that Con-

178 See Supreme Court of the United States. *Gonzalez v. Carhart*. 550 US 124, 169 (2007).

179 Ibídem, at 158 ("The third premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey's* requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all *in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn*." emphasis added).

180 Supreme Court of the United States. *Gonzalez v. Carhart*. Op. cit. at 150–151 ("The Act prohibits a doctor from intentionally performing an intact D&E. The dual prohibitions of the Act, both of which are necessary for criminal liability, correspond with the steps generally undertaken during this type of procedure. First, a doctor delivers the fetus until its head lodges in the cervix, which is usually past the anatomical landmark for a breech presentation. […] Second, the doctor proceeds to pierce the fetal skull with scissors or crush it with forceps. This step satisfies the overt–act requirement because it kills the fetus and is distinct from delivery. […]. The Act's intent requirements, however, limit its reach to those physicians who carry out the intact D&E after intending to undertake both steps at the outset. The Act excludes most D&Es in which the fetus is removed in pieces, not intact. If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability. A doctor performing a standard D&E procedure can often "tak[e] about 10–15 'passes' through the uterus to remove the entire fetus". Removing the fetus in this manner does not violate the Act because the doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery…").

gress was concerned with "d*raw[ing] a bright line that clearly distinguishes abortion and infanticide"*[181]. The problem of *Roe*'s radicalism, however, is that if it does not undermine the legitimacy of infanticide, it at least calls into question the constitutionality of current feticide crimes[182].

3.3 Feticide Laws and the New York Reproductive Health Act

One does not need to be a criminal lawyer to grasp how current feticide bans are hard to reconcile with a constitutional right to abortion that is not grounded on consideration of some exceptional circumstance (like a mother's health), but on the *constitutional irrelevance* of the unborn[183]. However, as recently remarked by Notre Dame Professor Gerard Bradley, while abortion is a constitutional right, "the unborn *are* recognized as persons with a right not to be killed in 38 American states[184] as well as in federal law"[185]. In general,

181 Ibídem, at 158.

182 A radical but nonetheless logically consistent defense of a right to abortion, such as the one proposed by Professor Peter Singer, would indeed maintain that infanticide is equally permissible. See SINGER, Peter. *Practical Ethics*. 2d ed. United Kingdom: Cambridge University Press, 1993 ("[T]he fact that a being is a human being, in the sense of a member of the species Homo sapiens, is not relevant to the wrongness of killing it; it is, rather, characteristics like rationality, autonomy, and self–consciousness that make a difference. Infants lack these characteristics. Killing them, therefore, cannot be equated with killing normal human beings, or any other self–conscious beings. No infant –disabled or not– has strong a claim to life as beings capable of seeing themselves as distinct entities, existing over time").

183 For a recent study on the different definitions of "persons" in U.S. law, pointing at their connections and inconsistencies, see KLASING, Murphy S. "The Death of an Unborn Child…", Op. Cit.

184 See NCSL. State Laws on Fetal Homicide and Penalty–enhancement for Crimes against Pregnant Women. National Conference State Legislatures [on line] May 1, 2018. Available in: https://bit.ly/3FOxNFC (stating that the 38 states are: "Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wisconsin. At least 29 states have fetal homicide laws that apply to the earliest stages of pregnancy ['any state of gestation/development', 'conception', 'fertilization' or 'post–fertilization']").

185 BRADLEY, Gerard V. "Whither United States Abortion Law". In: ZAMBRANO, Pilar – SAUNDERS, William

feticide crimes are different from crimes of unlawful abortion in that the latter criminal figures are meant to preserve mothers from unlawful procedures, aimed at protecting their health; they are usually punished less gravely, and considered misdemeanors[186]. Feticide crimes, on the contrary, entail a harm to the unborn, which is specific and different from the one to the mother[187]. In "continental" terms, they are meant to protect the "legal good" represented by the unborn child's continued existence […] *in addition* to the legal good of the mother's health (and autonomy).

In the U.S., and in addition to state laws, the most prominent example of a feticide law is the federal Unborn Victims of Violence Act[188], which establishes that whoever causes the "death" of or a bodily injury to a child *in utero* is guilty of an offense that is independent from the one committed against the mother[189]. It establishes that the child in utero is a "member of

L. (Coords.), "Unborn Human Life and Fundamental Rights…" Op. Cit, at 34. on the same topic and by the same author see also, BRADLEY, Gerard V. *Constitutional and Other Persons.* Op. cit.

186 See BRADLEY, Gerard V. Whither United States Abortion Law. In: ZAMBRANO, Pilar – SAUNDERS, William L. (Coords.), "Unborn Human Life and Fundamental Rights…" Op. Cit. at, 36. ("These laws [feticide crimes] must be distinguished, too, form laws which punish unlawful abortions –including self–abortion– for the sake of regular medical practice and maternal safety. These are usually misdemeanors, and never punished so gravely as to make these prohibitions comparable to feticide".) As seen, this is not the case in Italy, where the *legal good* of the life of the unborn is also object of the criminal norm's protection.

187 In the past, the death of an unborn child was punished exclusively based on the "born–alive rule". For a comprehensive historical study of the rule in U.S. law and jurisprudence see, FORSYTHE, Clarke D. "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms". *Valparaiso University Law Review.* 1987, Vol. 21 Nº 3, p. 563–629 ("The application of a homicide statute to an unborn child is thus itself a strict construction, an application of the very letter of a homicide statute to encompass a human being. A contrary application narrows the plain language of the statute. Even if the most narrow reading was required, a literal application of a homicide statute to encompass every 'human creature' would encompass the unborn child".).

188 EE. UU. 18 Code § 1841. Protection of unborn children. Available in: https://bit.ly/2XgKac6

189 Idem. Consistent with the common law tradition, the law also provides for a maternal exception ("(c) Nothing in this section shall be construed to permit the prosecution – (1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf,

the species homo sapiens, at any stage of development, who is carried in the womb"[190]. Notwithstanding its maternal exception, and the exception for *lawful* abortions, common to several state statutes[191], the abstract problem with this kind of crime is quite evident. If federal law punishes whoever causes the *death* of a child *in utero*, that child is, by definition, *alive*; and the criminal law holds that same *life* to be a legal good that is worthy of recognition and of legal protection, regardless of a mother's consent[192]. The reason why these principles do not apply in the abortion scenario, then, remains far from a principled one.

has been obtained or for which such consent is implied by law; (2) of any person for any medical treatment of the pregnant woman or her unborn child; or (3) of any woman with respect to her unborn child", Id).

190 Ibídem let. d).

191 For a recent survey see MURPHY, Andrew S. "A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses". *Indiana Law Journal.* 2014, Vol. 89, Issue 2, p. 847, 877 (looking at Table 1).

192 Although most statutes include maternal exceptions, they would not necessarily exclude the liability of a third party who, at the pregnant woman's request, injures her, so as to kill the child. One such case, reported by BRADLEY, Gerard V. Whither United States Abortion Law. In: ZAMBRANO, Pilar – SAUNDERS, William L. (Coords.), "Unborn Human Life and Fundamental Rights…" Op. Cit. at, 39, where also the mother risks liability, is that of a 17–year old girl from Utah (J.M.S.), who hired a man to cause her abortion at an advanced stage of pregnancy (Supreme Court of the United States. *Utah v. J.M.S.* 2011. Available in: https://bit.ly/2YKd8kW (Bradley reports how J.M.S. paid a man for kicking her repeatedly in the stomach. The abortion failed, but the man was, "convicted and sentenced for attempted murder. Notwithstanding that Utah law exempted women from prosecution for murder in cases of 'abortion', J.M.S. too faces criminal penalties. The Utah legislature had amended its criminal homicide statutes in 1983 to include within that crime anyone who 'intentionally […] causes the death of another human being, including an unborn child at any stage of development'. 'Abortion' was an exception, and in no circumstance could a woman be charged for obtaining an 'abortion'. But 'abortion' was defined as the post–fertilization 'procedures' to 'kill a live unborn child', which the Utah Supreme Court interpreted to include only *medical* procedures".). As the Utah Supreme Court wrote, "the alleged solicited beating fawomanto terminate her pregnancy cannot constitute see kingan abortion. We therefore reverse the juvenile court's order dismissing the State's delinquency petition against J.M.S. and remand for further proceedings consistent with this opinion". Supreme Court of the United States. *Utah v. J.M.S.* Op. cit., par. 34.

How can an *at–will–disposable–fetus* become a *non–disposable–child–in–utero*? How can the same legal system allow for such a different treatment of the same objective reality and when the only variable is the identity of the perpetrator? If a consenting woman may provoke her own abortion "unlawfully", without that action turning into an actual feticide, shouldn't a doctor, her husband, or any other third party be reserved the same treatment if and whenever acting with the same intention?[193]

In this respect the criticism of both pro–choice advocates[194], as well as of criminal defendants, seems to be on point: if a woman's decision could always deprive an "essence" (the unborn) of any value, there would be no compelling reason why that "value" should be protected by the criminal law, which is the strongest state instrument and should be reserved to defending those rights and interests that society holds *fundamental*. The only way to preserve feticide crimes, indeed, seems to lie in the acknowledgment that: a) these crimes protect an unborn child; b) the unborn child is a constitutionally relevant subject, who is *constitutionally –and inherently–* entitled to (some) protection from the moment of conception; c) abortion, including where "lawful," might bea liberty, but not a*right*[195].

In contrast with what pro–choice advocates seem to argue, these laws

193 See, BRADLEY, Gerard V. Whither United States Abortion Law. In: ZAMBRANO, Pilar – SAUNDERS, William L. (Coords.), "Unborn Human Life and Fundamental Rights…" Op. Cit. at, 34 ("Some feticide defendants have challenged their convictions upon constitutional grounds, chiefly Equal Protection").

194 See SHELDON, Sally. *The Decriminalisation of Abortion…* Op. Cit. at. 334, 337 (while acknowledging that "the human fetus is of moral value", the author suggests amending the current abortion crimes: "The guiding principle of such reform would be that where self–induced or requested by the pregnant woman, the destruction of an embryo or fetus would no longer form an independent ground for criminal sanction. This would not, of course, leave abortion in a legal vacuum. Rather, it would be treated as any other area of medical practice, remaining subject to the same range of criminal, civil, administrative and disciplinary regulations that apply to all clinical procedures. Specifically, this should mean that criminal sanction remains available where terminations involve a serious harm to the woman concerned, most obviously, where they are non–consensual").

195 Any state that is truly respectful of the right to life, grounded on equality and on inalienable human dignity, has not just an interest, but an actual duty to offer (at least some) protection to the unborn.

protect the unborn regardless of his/her being wanted or unwanted. "*Unwantedness*" is not the *ground* for not punishing women who abort; that ground is the human understanding for a difficult choice that they probably wished they were not making. If that were not the case –and even just as a thought experiment– a woman could repeatedly and deliberately get pregnant for the sole purpose of eliminating her child in the most gruesome manners without ever facing criminal consequences: clearly, this is not the *moral* reason behind exempting women from punishment. Clearly, this is not what we demand from criminal law. This is precisely why the New York Reproductive Act (RHA), with its extreme liberalization of abortion, sounded shocking to many.

Based on RHA, abortion is now legal in the State of New York including after the 24th week of pregnancy, and provided that either the woman's health or life are at risk, or the fetus is not viable. Consistent with U.S. jurisprudence and medical practice, however, the concept of "health", undefined by state law, is once more as broad as to include women's mental health. Up to the moment of birth, in other words, abortion is solely a woman's choice. Furthermore, and precisely to avoid the incoherent results underlined above, New York decided to amend all its criminal protections of unborn human life. In particular, RHA repealed sections 125.40 ("abortion in the second degree"), 125.45 ("abortion in the first degree"), 125.50 ("self–abortion in the second degree"), 125.55 ("self–abortion in the first degree", and 125.60 ("issuing abortion articles") of the penal law[196]. This process started off by amending section 125.00, which formerly defined homicide as "the conduct which causes the death of a person *or an unborn child with which a female has been pregnant for more than twenty–four weeks*." RHA eliminated from its text any reference to the unborn and to abortion[197].

As mentioned, the RHA enactment caused immediate scandal. The origins of that scandal, however, trace back to 1973. If life is a disposable good, and if the state has no *duty*, but the mere *freedom* to protect it, there is truly no necessitated reason why it should not be disposable up to moment of birth –and even beyond.

196 New York. State Penal Law. Part 3, Title H, Article 125: "Homicide, Abortion and Related Offenses".

197 Idem.

4. Prelegal Rights and Human Justice – A Compromise to Defend All Lives

As Professor Mauro Ronco argued almost forty years ago, the recognition of abortion as an individual *right* inevitably contradicts the inherent value of human life. It:

> "… underestimates how the law, willy–nilly exercises an influence in orienting individual consciences and this for the sole reason of expressing social disapproval or appreciation of a determined class of facts. In this respect, and as observed by English criminologist Nigel Walker, one must acknowledge that 'the laws of one generation may become the morals of the following one'[198]".

As the previous sections discussed, even though American and Italian women may currently exercise similar amounts of "lawful reproductive freedom", the U.S. narrative of abortion as a woman's right might teach a more dangerous lesson, which puts in greater jeopardy the *prelegal* value of life. Indeed, Italian women may effectively enjoy broader "freedom" –being financially supported by the state in their physical or mental inability to bring a pregnancy to term– but the absoluteness of the U.S. solution fails to recognize that States have an *obligation*, and not only an *interest,* to prevent and to punish any harm unjustly inflicted on innocent human beings; and that they shall and may do so with the instruments already offered by the criminal law.

The U.S. narrative forgets that, regardless of *criminal sanctions*, a *freedom* that is directed against one's own child will not come without consequences.

The abuse of the rights' vocabulary, and the excessive focus on individual autonomy that is typical of the U.S. approach to abortion seems also connected

198 RONCO, Mauro. *L'aborto in Quattro paesi dell' Europa Occidentale*. Op. cit. at 14, informal translation, references omitted. Id., at 16 ("To socially disapprove of voluntarily induced abortion and to punish it as a crime is to recognize that at the foundation the law there is a value higher than pure utilitarian convenience; and that such value may not be disposed by the State or by the citizens. It is a recognition of the fact that the State and its citizens are not absolute masters of reality, but have duties of justice towards it, obligations that surpass individual self–determination". Informal translation).

to the modern "tendency to fight political battles with the vocabulary of human rights," which "risks stifling the kind of robust discussion on which a vibrant democracy depends"[199]. This *rights*–talk, indeed, "promotes intolerance, impedes reconciliation, devalues core rights, *and denies rights in the name of rights*"[200]. As the recent Report of the U.S. Commission on Unalienable Rights insightfully warned, "There is good reason to worry that the prodigious expansion of human rights has weakened rather than strengthened the claims of human rights and *left the most disadvantaged more vulnerable*"[201].

4.1 Beyond *Personhood*: the Unborn as a Legal Good

A first solution to the mentioned problems might come from the possibility of temporarily setting aside the "personhood" debate, both in the U.S. and at the international level, and adopting a "legal good" approach to the protection of prenatal life. As mentioned, this is already the case in Italian jurisprudence and elsewhere in Europe[202].

199 U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Draft Report of the Commission on Unalienable Rights. [on line] 2020, at 57. Available in: https://bit.ly/3AH9INb

200 Ídem.

201 Ibídem, p. 39.

202 In addition to the Spanish decision, also the 1975 decision of the German Constitutional Court established that "Article 2, paragraph 2, sentence 1, of the Basic Law also protects the life developing within the mother's womb as an independent legal good", "Bundesverfassungsgericht". *BVerfGE*. 1975, 39, 1. Available in: https://bit.ly/3velpKf

For a standard English translation see, JONAS, Robert E. and GORBY, John D. "West German Abortion Decision: A Contrast to Roe v. Wade". *John Marshall J Pract Proced.* 1976, vol. 9 (3) p. 605, 684. In its subsequent 1993 judgment, the Court left the *personhood* debate at the margins (although it explicitly and repeatedly spoke of the unborn's right to life). BVerfG, Order of the Second Senate of 28 May 1993, available at: https://bit.ly/2YR2BEI For a comment on that decision, and on its meaning for American jurisprudence, *see* KOMMERS, Donald P. "The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?" *Journal of Contemporary Health Law and Policy.* 1994, 10, 1 Similar solutions were reached by the French and by the Austrian Constitutional courts, which did not deny the existence of prenatal life. The former court, while admitting early abortions, pointed out that the law "does not authorize any violation of the principle of respect for every human being from the very commencement

As Professor Stith illustrated and discussed at length in a 1987 piece[203], the legal good theory was at the basis of the Spanish constitutional decision that, in 1985, upheld the new statute that had *decriminalized* abortion under specific circumstances[204]. As the author noted, that Court admitted abortion permissibility without ever evoking, nor even suggesting a constitutional right to abortion. At the same time, it did not speak of the unborn's "right to life"[205]. For the Spanish Justices, as much as for the Italian ones, abortion's lawfulness was limited precisely by the state's *duty* to protect the "legal good" represented by the life of the unborn, a duty that existed regardless of whether his *personal* "right to life" could be fully predicated. As the same author reported, moreover, and on these same bases, "the [Spanish] Court has clearly held the complete depenalization of abortion to be unconstitutional"[206]. Where the unborn remains an independent *legal good,* in fact, elective ("unjustified") abortion *cannot* become a constitutional *right*; it might be circumstantially de–penalized, it might be legally/criminally "excused", but *the inherent and autonomous value of prenatal life creates an obligation for the state*; in cases of conflict, the value of that prenatal life must be weighed against the legal good represented by a woman's life or health.

As mentioned in the first section, the *legal goods* –or *Rechtsgut*–theory[207]

of life, […] except in case of necessity and according to the conditions and limitations it defines". Conseil Constitutionnel, Décision n. 74–54 DC, 15 January, 1975, ECLI: FR:CC:1975:74.54.DC. Even the Austrian tribunal, while declaring the constitutionality of first trimester abortions "on demand," acknowledged that the *"Schutzobjekt"* (object of protection) of abortion crimes is not only the pregnant woman *(Schwangere)*, but also the "*Leibesfrucht*", (*nasciturus,* child–to–be–born). See, *Verfassungsgerichtshof*, G8/74, 11 October 1974, ECLI:AT:VFGH:1974:G8.1974.

203 See STITH, Richard, New Constitutional and Penal Theory in Spanish Abortion Law, Op. cit. at 514.

204 Decision of 11 April 1985, S.T.S. 53/1985 (Pleno). English version: Constitutional Court Judgment No. 53/1985, of April 11 Available in: https://bit.ly/3BHEl6k

205 Idem, Conclusions of Law, n. 5 ("the objective meaning of the parliamentary debate corroborates that the unborn child is protected by art. 15 of the Constitution even when it does not permit an affirmation that it is holder of the fundamental right").

206 As he referenced in a footnote, this conclusion "may to a degree have been inspired by similar language in 1975 Italian constitutional abortion decision" See STITH, Richard. Op. cit. supra n. 44, at 525, fn. 36.

207 Idem supra, n. 27.

is, to phrase it simply, the continental alternative to the harm principle as the doctrinal justification of criminal norms[208]. In either case, the theories are in part normative and in part a way to look at existing criminal norms to discern and evaluate their content and structure. With their respective merits and shortcomings, moreover, both theories seem abstractly consistent with the fundamental principles of liberal democracies and in particular with the idea that the role of the penal law is a minimal one, its punishments being reserved to the gravest offences to the values and goods that our societies hold fundamental[209]. Some merits of the legal goods' theory, however, seem to become apparent in the abortion scenario and in particular where society and courts are not ready, or not willing, to: a) consider the unborn child as a full person[210]; and b) accept that the universal *duty to protect life* precedes and is independent from any *right to*

208 See AMBOS, Kai. "The Overall Function of International Criminal Law: Striking the Right Balance Between the Rechtsgut and the Harm Principles". *Crimnal Law y Philos.* 2015, vol. 9 p. 302.

209 For a recent analysis of the "legal goods'" theory as a basis for "minimal" criminalization *see* PUIG, Santiago Mir. "Legal Goods Protected by the Law and Legal Goods Protected by the Criminal Law as Limits to the State's Power to Criminalize Conduct". *New Crim. L. Rev.* 2008, vol. 11 p.409, 412–413, 417.

210 Not even European Constitutional Courts have gone as far as to holding that the unborn child is a "full person". This was not only the implied message of the Italian Constitutional judgment, but also of the Spanish one: "In short, the arguments put forward by the appellants *cannot be accepted in support of the thesis that the unborn child is also entitled to the right to life, however*, in any case, and this is decisive for the issue which is the object of this appeal, we must state that the life of the child, in accordance with the arguments in the foregoing points of law in this judgment is a legal right constitutionally protected by art. 15 of our fundamental regulation". See Decision of 11 April 1985, S.T.S. 53/1985 (Pleno), par. 7. English version: Constitutional Court Judgment No. 53/1985, of April 11 Available in: https://bit.ly/3BHEl6k. Similarly, the German Constitutional Court of 1975 said: "Where human life exists, human dignity is present to it; it is not decisive that the bearer of this dignity himself be conscious of it and know personally how to preserve it. The potential faculties present in the human being from the beginning suffice to establish human dignity". *"Bundesverfassungsgericht". Op. cit. supra* n. 202. In the context of the European Court of Human Rights, see PUPPINCK, Gregor. "Abortion and the European Convention on Human Rights", *Irish J of Leg Studies.* 2013, vol. 3(2) at 144 ("The central question was, and still is, whether or not the unborn child is a "person" within the meaning of Article 2. The Court keeps this question open in order to allow the States to determine when life begins, and therefore when legal protection starts").

it. This theory of criminalization has in fact proven capable to justify punishment for conduct that is not necessarily violative of any individual "right"[211], and without calling *morals laws* into question.

With reference to the first aspect, it may come as no surprise that, "the Rechtsgut–concept was originally developed as an anti–thesis to the rights theory, according to which only violation of rights can be legitimately criminalized […] The Rechtsgut–concept did not presume any contractually–based rights; it presumed only the existence of some relevant 'goods'"[212]. The harm principle, on the other hand, while abstractly equally capable of justifying the criminalization of conducts that are not the direct violation of an individual right[213], seems to suffer still from an "original, narrow understand-

211 An exception being possibly represented by the Polish Constitutional decision K26/96, of 28 May 1997, which declared the constitutional principle that human life is protected at every stage of development and which prohibited abortion for so–called social reasons. For a comment on that judgment see FERENZ, J.M. and STEPKOWSKI, A. "The Emergence of the Right to Life in Polish Constitutional Law". In: ZAMBRANO, Pilar – SAUNDERS, William L. (Coords.), "Unborn Human Life and Fundamental Rights…" *Op. Cit,* 115–132.

212 See AMBOS, Kai. "The Overall Function of International Criminal Law…" Op. Cit. at 305. See also ESER, Albin. "Principle of Harm in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests". *Duquesne Law Review.* 1965, Vol. 4, Nº 3, at 345, 358–359 ("After Feuerbach had defined crime as violation of a private or state "right," it became evident that all those traditional offenses, the objectives of which could not be called a "right" in its precise sense (*e.g.,* rape, bankruptcy, etc.), would have to be excluded from the concept of crime". This concept was, of course, unsatisfactory. Finally, Karl Birnbaum replaced Feuerbach's "right" by his own concept of *"Rechtsgut"* (legal good)").

213 In Joel Feinberg's definition, as reported in AMBOS, Kai. Op. cit. at 311, harm is the "'thwarting, setting back, or defeating of an interest' through wrongful conduct." As for the limits of his theory, Ambos further writes: "Thus, the concept of harm seems, at first sight, broader than that of *Rechtsgut*, referring merely to setback of interests; yet there is some qualifying criterion: only wrongful harms shall be prohibited by the criminal law. Wrongfulness is defined as follows: 'One person wrongs another when his indefensible (unjustifiable and inexcusable) conduct violates the other's right…' i.e. sets back his or her interests. […] Yet Feinberg does not provide much concrete content for his normativising criteria: that the relevant conduct must be 'indefensible' does not say much about the criteria for 'indefensibility' or the cases in which the conduct would be 'indefensible'. Furthermore, it hardly distinguishes between interests whose violation can constitute harm and interests whose violation cannot constitute harm. […] In other words,

ing of harm", which "refers to the actual commission of crimes ('harmful to others'), i.e. *a concrete rights violation* with the ensuing tangible (primary) harm (demanding insofar more than the *Rechtsgut*–principle)"[214]. Although its interpretation has expanded to cover not only harm, but also the *risk* of harm[215], its broader understanding may be still too tightly connected with the idea that the state may intervene to punish harmful conducts only where the latter endanger or offend individual *autonomy*[216]. Following the teachings of Joseph Raz, the focus of the Anglo–American criminal law seems in fact to be directed at the reduction of those opportunities[217] that individual autonomy implies, becoming a principle of "non–interference", which Arthur Ripstein calls the "sovereignty principle"[218].

In these terms, however, a harm principle–based criminalization risks being unable to protect universal values that go beyond the individual subject and his momentary, and even immoral personal desires[219]. Indeed, even though Raz

Feinberg identified a shortcoming of the earlier harm principle, namely its purely naturalistic nature, and he also pointed to the direction in which this shortcoming can be overcome, but he did not provide a full theory that actually overcomes it". Idem, references omitted.

214 Ibídem, 313.

215 Ibídem, 313, 314.

216 Ibídem, 312, and with explicit reference to Joseph Raz. For criticism see TADROS, Victor. "Harm, Sovereignty, and Prohibition". *Legal Theory*. 2011, Vol. 17, Issue 1, at 62. ("[The sovereignty principle] implies that criminalization decisions are concerned to prevent and punish wrongful interference with the autonomous actions of only those with a sovereign will. This is clearly false for a familiar reason. There are those who lack a sovereign will whom we wish to protect from harm through the criminal law. This includes very young infants, those who have severe cognitive defects, and, most obviously, nonhuman animals ("animals", for short)").

217 See AMBOS, Kai. Op. cit. at 312.

218 Idem.

219 PERŠAK, Nina. *Criminalising harmful conduct.* New York: Springer, 2007 at 130 ("The anthropocentricism and individualism of the principle (its main focus being on the human individual), remains, for the political and moral basis on which the harm principle was developed, "suffers" from the same predicament".). The same author, however, holds that, "While our thinking should go beyond our own individual interests and move more towards an individual, (re)integrated into the community, the criminal law itself need not to follow that

denies that *autonomy* has any value if exercised to pursue *unjust* ends, he excludes the criminalization of 'harmless' crimes, or of victimless immoralities[220]. As a consequence, his declination of the harm principle seems still unable to protect that basic human good which precedes and is the very condition for autonomy itself: non–autonomous human life[221]. This same approach, in fact, may soon prove unable to justify not only abortion and feticide crimes, but also contemporary protections of infants, or of adult people with cognitive impairments[222].

path, i.e. there is no need to use the criminal law in this expansive way of protection of such concerns").

220 See GEORGE, Robert P. *Making men moral civil liberties and public morality.* Oxford: Clarendon Press, 1993, at 163.

221 Ibídem, at 176–77 ("Autonomy *appears* to be intrinsically valuable because something really is more perfect about the realization of goods when this realization is the fruit of one's own practical deliberation and choice. The additional perfection is provided not by autonomy, however, *but by the exercise of reason in self–determination.* […] Practical reasonableness is not merely the formal standard of rectitude in action; it is itself a reason for action"). The idea that "self–determination" (i.e., autonomy) may go as far as to deny and destroy the existence of the very *subject* who exercises it seems intuitively wrong. See RONCO, Mauro. "L'indisponibilità della vita: assolutizzazione del principio autonomistico e svuotamento della tutela penale della vita". *Quaderni di cristianita*. 2007, Nº 341–342 (2007) ("The absolutization of the principle of self–determination [autonomy] irreparably corrupts the meaning of the law in a nihilist line of thought, which, by mistakenly interpreting rights as absolute powers of the individual, ends up destroying their content and function. Each right consists in the recognition of a subjective liberty for the pursuing of a good and, therefore, in the protection of a possibility to act for a particular goal. Every right includes a negative aspect, which the legal system offers as a safeguard against possible external influences, by individuals or by the state, over the enjoyment of the individual liberty. The legal system protects also this negative liberty, but it shall never lose sight of the good that is at the basis of the right's recognition. It may permit that the individual does not pursue the good for which the right is granted, but it cannot turn a mere objective liberty to destroy the good that is the ground for the rights' existence into a "right" itself. This is true for life or health, for dignity, for personal freedom and for any other fundamental human right. None of these goods admits a complete "disposability" of the right, as it would be where the right to life and health included also the right to destroy them, or the right to dignity and freedom included the liberty to deny them, imposing on a third party –and ultimately on the state– performing conducts capable to annihilate life, health, freedom, and dignity", informal translation).

222 See ASHWORTH, Andrew & HORDER, Jeremy. *Principles of criminal law.* Oxford: Oxford University Press,

The moral reasons put forward to justify elective abortions, and to hold them qualitatively different from the intentional killing of adult human beings, in fact, have a lot in common with the ones related to the decriminalization of infanticide and of assisted dying: in both cases, the underlying premise is that a *right to life*, or even a *life* worthy of legal protection *exists* exclusively where its bearer is either capable of having "interests", or when he can exercise some sort of moral agency: features that unborn children are not the only ones lacking[223]. The centrality of autonomy, moreover, means that within the American jurisprudence that "unenumerated" right to privacy that the U.S. Supreme had first discovered in 1965 is now the true normative principle hidden behind the harm theory.

The incapacity to declare that a common obligation to protect prenatal life exists, and that it takes precedence over any individual right to privacy, moreover, is by no means the necessitated product of liberal democracies or of the respect they constitutionally bestow to individual rights. Recognition of individual and inalienable rights neither automatically nor necessarily entails absolute and inevitable preference for the individual over the collective. Individual liberties are fundamental guarantees against states' *abuse* of power, but not against states' *legitimate* actions. Individual freedoms, and rights, are legally protected opportunities to pursue basic human goods, but not to destroy them: they do not constitute licenses to do wrong[224]. Within liberal and democratic

1991. p. 22–26 ("However, even for the liberal theorist there must be exceptions, so as to ensure the protection of the young and the mentally disordered").

223 See MONTAGUE, Phillip. "Infant Rights and the Morality of Infanticide". *NOUS*, 1989, Nº 23, at 63, 79. ("I have defended the conservative position on infanticide in terms of the idea that an individual's right to life can be violated during his infancy, an idea which presupposes that adults are identical to the infants from which they develop. If adults are also identical to the *fetuses* from which they develop (or at least to these fetuses during certain stages of gestation), then the arguments presented here can be used *mutatis mutandis* in defense of a conservative position on the morality of abortion.") According to the author, the mistake of arguing in favor or against the criminalization of infanticide based on either of these theories derives from the fact that the infant's right "not to be killed" is the product, not the premise, of third parties' obligations of non–interference and non–arrogation.

224 See GEORGE, Robert P. Making men moral civil liberties and public morality… Op. Cit. at 93 ("[R]espect

states, governments may not *unjustly* limit individual liberties: they may not criminalize private or public conducts in order to advance a state interest that is *inconsistent* with individual flourishing[225]. What this "*unjustly*" means and implies, however, is that they *may* do so, and it is perhaps their *duty* to do so *justly*: i.e., when the public interest contributes to, or is a necessary condition for the achievement of what the tradition called "the common good"[226]. It is their duty to do so when the collective interest is what enables individuals to pursue those same basic goods that are the sources and the ultimate justifications of their individual rights[227]. As Professor Robert George writes, the conflict between the public and the private interest may often be an illusion. Where properly understood, "'collective interests' are, in reality, the interests of individuals"[228]. As he further explains:

> "There simply are no 'collective interests' not reducible to concrete aspects of well–being of individual members of the collectivity. Does this proposition insinuate the sort of 'individualism' characteristic of libertarian political

for the value of liberty and autonomy does not mean that individual choice and action may never be properly impeded –only that the legitimacy of governmental decisions to interfere with individual choice and action depends upon the consistency of those decisions with the requirements of practical reasoning that structure human choosing in respect of the range of incommensurable human values").

225 Ibidem at 93.

226 Ibídem at 47 ("[L]aws that effectively uphold public morality may contribute significantly to the common good of any community by helping to preserve the moral ecology which will help to shape, for better or worse, the morally self–constituting choices by which people form their character, and in turn affect the milieu in which they *and others* will in future have to make such choices.").

227 See FINNIS, John. *Natural law and natural rights.* 2d ed. Oxford: Paul Craig ed. ,2011 at 2018 ("On the one hand, we should not say that human rights, or their exercise, are subject to the common good; for the maintenance of human rights is a fundamental component of the common good. On the other hand, we can appropriately say that most human rights are subject to or limited by each other and by other aspects of the common good, aspects which could probably be subsumed under a very broad conception of human rights but which are fittingly indicated (one could hardly say, described) by expressions such as 'public morality', 'public health', and 'public order'").

228 See GEORGE, Robert P. *Making men moral civil liberties and public morality…* Op. Cit. at 90.

> theories? No, because among the concrete interests of every individual human being is living in harmony and friendship with others"[229].

It is indeed hard to believe that a public protection of the absolute value of human life does not contribute to the flourishing and wellbeing of each and every human being. The "conflict" between a collective interest in life and an individual right to privacy seems to exist exclusively where one adopts a perverted understanding of the latter, one that transforms human choice and imagination into reason for action. Where properly understood, however, privacy is:

> "… not the substantive right to be legally free to perform certain 'private acts, the immorality of those acts notwithstanding. It is, rather, the essential procedural right to be free from governmental and other intrusions into one's home or office or other premises, or into one's files, papers, or other records, unless the government can justify invading private space or reviewing private information by providing powerful reasons[230]".

A rather common criticism against the legal goods' theory –and against Courts protecting the "value" of prenatal right rather than a "right to" it– consists in a matter of definition[231]. In and of itself, in fact, this theory does not say much about when, at what conditions or to what extent the protection of legal goods by means of criminal law may determine a limitation of individual rights[232]. It does not say *which* are the legal goods that are worthy of criminal

229 Ibidem, at 90 ("Moreover, an appreciation of the values of interpersonal harmony and friendship helps to bring into focus the moral requirement that the benefits and burdens of communal life (including legal rights and duties) be distributed fairly and with due regard for the particular needs and abilities of different persons").

230 Ibídem, at 211.

231 On the various school of thoughts on the theory see PERŠAK, Nina. *Criminalising harmful conduc*t.. Op. Cit. at 107–111.

232 See SIMESTER, A. P. & HIRSCH, Andreas Von. *Crimes, harms, and wrongs: on the principles of criminalisation.* Oxford, UK; Portland, OR: Hart Publishing, 2011. n. 31 at 29.(Comparing the German *Rechtsgut* doctrine to the Anglo–American tradition and its debate over the role of morality, the author writes, "Interestingly,

law protection, nor does it imply a specific normative principle capable of helping us identifying them. The construction of criminal laws around legal goods, in other words, presupposes other fundamental *choices* about the values and interests that each legal system holds fundamental. The non–neutrality of the theory, however, is a false problem.

The constitutions of our liberal democracies, and even our international declarations of human rights, in fact, are equally far from neutral[233]: they are grounded on the very idea that there are certain goods, rights, and interests that are worthy of protection; rights and values that, in case of conflict, should take precedence over others. Thus, when called to evaluate criminal laws' legitimacy, constitutional courts need not draw on the judges' own preferences, but they must verify that the objectives enshrined by their provisions –and the legal goods they aim at protecting– are consistent with the principles of their respective legal systems, and that the limitations they impose on individual rights are proportional, necessary and suited to achieve those same objectives[234].

discussion of this claim is more developed in Anglo–American theory than in Germany, notwithstanding the sophistication of that country's criminal law and theory. German discussion has depended, in large part, on the proposition that conduct should be criminalized only if it intrudes upon a Rechtsgut –a legally–protected interest. *However, comparatively little progress has been made in developing normative criteria for the recognition of a legitimate* Rechtsgut. Only in the last decade, when the notion of Harm principle began to attract the interest of German scholars, have discussions of criminalization theory begun to flourish").

233 See MURPHY, Walter. F. "An Ordering of Constitutional Values". S. *Cal. L. Rev.* 1980, vol. 703, Nº 53 ("Even Hans Kelsen insisted that every legal system rests on a basic norm that represents a choice among values. Although he labelled that seminal decision "irrational," he acknowledged the obligation of those who operate the system to carry out that choice in formulating lower ranking norms").

234 In this respect, however, as correctly pointed out by PPERŠAK, Nina. *Criminalising harmful conduct.*. Op. Cit. at 117 ("The constitutional law or constitutional rights can serve only as an additional, supplementary aid to explaining legal goods, yet they are a separate notion, historically and content–wise. Not all legal goods are rights and not all rights are incorporated into the constitution […] Roxin was aware of that when he proposed searching for the contents of the concept, not in positive law, but in the legal system as such. Von Hirsch went even further and *via* his conception of an interest as "a resource over which one has a valid claim", located, in my view, the legitimate interests worthy of criminal protection outside the realm of law, i.e. as an extra–legal concept").

In this respect, one may note that while recognizing a *right to abortion,* the U.S. court *did* acknowledge that *there is*, that there *exists* a "potential life" that a state *may* decide to protect. True, that Court did not speak of a *duty* to protect it: but that is because it did not find the *legal good* of prenatal life *as* valuable as the *legal good* of privacy, and of private choice. That *was* itself avalue–judgment; as such, why couldn't it be reversed? As Professor Donald Kommers wrote in 1994, "*Roev. Wade* did not convincingly argue that abortion is strictly a private matter between a woman and her doctor. *The very idea* of fetal life as a public legal value undercuts the privacy argument"[235]. According to Professor Stith, moreover:

> "… 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 it at least some attenuated constitutional status to what it calls 'potential life'?[236]"

The answer, I believe, is in the affirmative[237].

235 See KOMMERS, Donald P. "The Constitutional Law of Abortion in Germany…" Op. Cit. at 30. ("Let us not forget that even Justice Blackmun distinguished abortion from the privacy right discovered in *Griswold v. Connecticut,* and he went on to observe in *Roe*, with a touch of uneasiness, that '[t]he pregnant woman cannot be isolated in her privacy'").

236 See STITH, Richard. *"New Constitutional and Penal Theory in Spanish Abortion Law"…* Op Cit. at 530 Professor Stith is however critical of the "legal good" concept, which he understands as a product of the Social State. In particular, he finds it dangerous to combine the "social state approach" with judicial review. Idem at 539–540.

237 See GILLES, Stephen G. "Why the Right to Elective Abortion Fails…", Op. Cit. at 692–693 (more broadly, the author holds that *Casey* deprived the right to elective abortion of its fundamental character and grounded it "in an interest–balancing judgment that the woman's liberty in an elective abortion outweighs the State's interest in protecting pre–viable fetal life. […] the right to elective abortion is unsound in *Casey*'s own terms […] My thesis is that even when an interest–balancing analysis is conducted on terms generally favorable to

In 1980, Professor Walter Murphy defended the idea that the American Constitution, as much as other constitutional democracies, enshrines and implies a "network of values"[238]. He argued, moreover, for a U.S. hierarchy of Constitutional values that could be built around the superior concept of human dignity[239]. What this further suggests is that nothing *in principle* prevents the American bench from considering prenatal life a constitutionally protected legal good, whose protection may (and should) take precedence over a woman's right to *privacy*; nor from "discovering" states' *duty* to protect such life from conception to natural death[240][241]. That constitutional courts do and will engage

recognizing a constitutional right to elective abortion, a persuasive case can be made that the state's interest in protecting the life of the pre–viable fetus outweighs the woman's liberty interest in terminating her pregnancy").

238 See MURPHY, Walter. F. "An Ordering of Constitutional Values"… Op. Cit. at 713 ("the refusal (or inability) of judges to articulate their reasoning cannot hide the fact that the American Constitution, like those of other constitutional democracies, contains a network of values, not every one of which is of equal importance. *To state the proposition in its simplest form, it would take a crassly obtuse or wonderfully Jesuitical mind to defend willingly the thesis that the constitutional system equally weighs freedom of religion and the right to a jury trial in a federal civil suit involving twenty–one dollars*". Emphasis added).

239 Ibídem, at. 754 ("Nevertheless, acceptance of human dignity as the chief value of the American Constitution does not set a mere barmecidal banquet before constitutional interpreters. Two real advantages have already been mentioned: (1) the notion is an inherent part of constitutionalism and is also congruent with democratic theory; and (2) more particularly, it fits the spirit, structure, and purposes of the constitutional document and the development of this country's political ideals").

240 MURPHY, Walter. F. "An Ordering of Constitutional Values"… Op. Cit, at 753 ("Recognition of human dignity as being at the apex of constitutional values does not erase all practical or intellectual problems of constitutional interpretation. The concept suffers from vagueness and badly needs refinement (perhaps 'specification' would be more accurate). All the Justices of the Federal Constitutional Court could claim to respect the primacy of human dignity in constitutional law and still bitterly disagree whether wiretapping without notice to the suspect and without judicial supervision contravened that value; or whether laws allowing abortion or those restricting it were the worst offenders against dignity") Perhaps too optimistically, but with specific reference to the "constitutional dignity" of potential life, R. Stith held, in 1987, that there was a possibility of "the two sides of the Atlantic" drawing "much nearer to each other." See, STITH, Richard. "New Constitutional and Penal Theory in Spanish Abortion Law"… Op. Cit. 531.

241 With reference to states' duties see TRIBE, Lawrence H. "The Abortion Funding Conundrum: Inalienable

in value–judgements that are not written in the law, and that are not limited to an impartial "balancing" of different individual rights, furthermore, is inevitable[242]. A value–free law, legal system, or constitutional jurisprudence has yet to be invented[243]. With reference to the U.S., it is *already* the role of legislatures, and not of the Supreme Court, to decide whether and to what extent a non–fundamental right may curtailed by an overriding interest of the state[244]. It is still within the Supreme Court's power, however, to establish whether such "balancing" is *truly* constitutional[245]: respectful of the values and ideals enshrined, implied, animating the entire system.

Rights, Affirmative Duties, and the Dilemma of Dependence". *Harv Law Rev.* 1985, vol. 99 at 340–341 (discussing that duties "may not be owed solely to the mother […] [F]or its biological dependence on the woman, it is at least arguable that the fetus could be regarded as a holder of rights under the due process clause of the fifth and fourteenth amendments, as well as the equal protection clause of the latter. Any such 'right to life' could hardly be deemed alienable by the unborn or on their behalf. The inalienability of that right suggests that the government bears an *affirmative duty* to protect the interest of the fetus to the extent that it may do so without coercing involuntary pregnancy").

242 See MURPHY, Walter. F. "An Ordering of Constitutional Values"… Op. Cit at 711–12 ("Balancing interests has provoked a great deal of attention and criticism. The primary problem with balancing is that unless judges clearly define the interests or rights involved, offer some weights for those interests and the values that underlie them, and consistently maintain those weights in other decisions, it amounts to little more than a black box that yields 'correct' answers only to seventh sons (or daughters) gifted with second sight (or to judges blessed with the acquiescence of a majority of their colleagues). As typically used in American constitutional adjudication, balancing has been shorthand for, 'I can't think of or secure majority agreement on any basic principles, but if the choice were mine alone, I'd come down like so'").

243 Ibídem, at 730 ("In constitutional interpretation, not even a strict legal positivist can obtain dispensation from the duty of making choices among values").

244 See CARTER SNEAD, O. *The Way Forward after June Medical. First Things.* [on line] July 4, 2020. Available in: https://bit.ly/3aHNEaF

245 See MURPHY, Walter F. et al. *American Constitutional Interpretation.* U.S.: Foundation Press, 2008 at 446. ("Balancing may be unavoidable once we allow that few if any rules hold under all conceivable circumstances. And balancing would seem not only a necessity but a virtue once we realize that many conflicting considerations must be brought to bear in hard cases").

4.2 "Justified" abortions or excused behaviors? The meaning of criminal punishment

If "compromise" solutions (i.e., partial decriminalization statutes) have the benefit of not questioning the existence of an unborn life that is always worthy of legal protection –which is what a "fundamental right to abortion" inevitably does– the need for *some abortions* to be *exempted* from criminal punishment may be grounded on some of the most basic principles of criminal law, such as personal blameworthiness, and the retributive nature of punishment[246].

To be sure, the intentional termination of an innocent life *never* acquires a *just* nature; therefore, and as a matter of principle, it should never be fully "decriminalized": i.e. entirely removed from that realm of public law that punishes any unjust aggression to fundamental human rights and goods. With its peculiar communicative power, a criminal ban on the termination of prenatal life tells society that every life is not only a value *of* the individual, but one also *for* the community. Criminalization makes sure that the wrongdoer *knows* the meaning of his own action, and that he is treated as a true moral agent, capable of making choices. At the same time, however, that *intention to do wrong* that the criminal law proscribes is not necessarily present in each and every woman who chooses abortion; even where intentional, moreover, when that choice is formed and performed under hostile circumstances and environments, the woman's conduct may be legally non–culpable; even in the best circumstances, finally, her personal *blameworthiness* might be enormously mitigated, if not zeroed, by the deafening sound of the "abortion–is–my–right" dogma of contemporary feminism.

As for the actual *intention* to abort –to be distinguished from personal culpability, or from the *mens rea*– its possible absence may be better understood by recalling that, in order to constitute a criminal offence, the prohibited human conduct need not only to result in the material production of the unjust harm sanctioned by the law. Before that, the conduct under judgment needs to correspond to that particular course of action (or omission) that the norm *describes*. *Intention,* in this respect, could be defined as that human element that we recog-

246 The following reflections focus on punishment for consenting women –on their personal blameworthiness and need for retribution.

nize in the voluntary conduct of another human being, and which enables us to give it a specific name: to formulate its *description*[247]. Such description, moreover, mayor may not fit the terms of the criminal norm, somehow regardless of its naturalistic consequences and contours. *Intention,* in other words, is what immediately allows us to distinguish an act of *accidentally–falling–down* of a third party, from the same party's act of *sitting–on–the–floor* –revealing the presence of an act of reason; and it is what then distinguishes a "cesarean section" from a "bodily injury". In this sense, *intention* is that unique goal of a voluntary human conduct that unites the several acts under one common denominator. With reference to abortion, it is by virtue of the conduct's specific *intention* that no (reasonable) criminal court should *describe* (and *punish*) as criminal abortions those medical procedures that are directed at treating a uterine cancer, or another life–threatening condition of the mother, even where they may result, as a side effect, in the death of the unborn child; and even where such side–effects were foreseeable and foreseen[248]. As noted in the first pages of this paper, indeed, this is why the term "abortion" should be used both more limitedly and more broadly than it is today: more limitedly, to indicate exclusively those actions and omissions whose *intended* result is the termination of the life of the unborn[249];

247 This concept of *intention* is another one whose analysis would require an extensive discussion, which is beyond the possibility and the objectives of the present paper. For more on this topic *see generally* ANSCOMBE, G. E. M. Intención. Oxford: Blackwell, 1957. Along with her collected essays, *supra* note 34. Anscombe, however, criticized the understanding of *intention* that is usually implied by the double–effect doctrine. For a defense of the latter, see FINNIS, John. *Intention and Side Effects.* Cambridge: RG Frey y Christopher W. Morris, 2011. Vol. II, Intention and Identity. For more on the matter, and critical of Finnis's view, see O'BRIEN, Matthew B. & KOONS, Robert C. "Objects of Intention: A Hylomorphic Critique of the New Natural Law Theory". *Am. Cathol. Philos. Q.* 2012, vol. 86, Nº 4, 655–703.

248 For an extensive illustration of the reasons why, in these cases, there is not actual –criminally relevant– *intention* to kill, see FINNIS, John. *Intention and Side Effects*. Op. cit. at 173 ("One can summarize this understanding in two propositions: one may intend to achieve a certain result without (1) desiring it to come about; and (2) one's foresight of a certain result as likely (or even, perhaps, as certain) to follow from one's action(s) does not entail that one intends that result").

249 See FINNIS, John. *Intention and Side Effects.* Op. cit. at 309 ("A just law and a decent medical ethic forbidding the killing of the unborn cannot admit an exception formulated as: 'to save the life of the

more broadly, referring to any "voluntary termination of pregnancy", lawful and unlawful. What the recent evolution of abortion jurisprudence and laws seem to suggest, however, is that this understanding of intention is alien to the current practice of criminal law, in civil law as well as in common law jurisdictions.

On the one hand, the non–criminal nature of unintended "side–effects" of a medical procedure is confused with the *justification* of the intentional violation life; with a justification grounded on a utilitarian approach to the law and to the values it protects. Once instrumentalized, the *individual* value of human life becomes expendable for the good of the *many,* or of the more mature ones. This is the reasoning at the roots of the Italian Constitutional Court's holding, with its idea that an abortion could be performed "*to* save" a mother's life and health. On the other hand, this need for an *intentional* wrongful act, whose absence excludes not only the punish ability but the actual criminal nature of the conduct performed, appears often conflated with the more specific requirement of criminal liability known as the subjective element of the crime.

As it is true for any crime, this latter element –identifiable in the continental "culpability", or in the common law notion of *fault*[250] –may very well be defective in abortion scenarios. Such absence, however, may only exempt the defendant from *punishment*. The absence of the subjective element of the crime does not negate the objective commission of the conduct prohibited by the criminal provision, nor may it exclude its permanent wrongfulness. At the root of contemporary calls for complete decriminalization, however, there seems to me to lie the inability, or the unwillingness, to distinguish the lack of

mother'. Many of the laws in Christian nations used to include exactly that exception (and no others), but there are two decisive reasons why a fully just law and medical ethic cannot include a provision formulated in that sort of way. First, that sort of formulation implies that, in this case at least, killing may rightly be chosen *as a means* to an end. Second, by referring only to the mother, any such formulation implies that her life should *always* be preferred, which is unfair").

250 See generally ASHWORTH, Andrew & HORDER, Jeremy. *Principles of criminal law.*. Op. Cit. at 137–88 (indicating that the negative requirements of fault are: mental disorder, intoxication, duress or necessity provocation, putative defenses, ignorance or mistake of the law, entrapment). Both concepts go beyond what is usually understood as the content of mens rea. In the common law tradition, to be blameworthy the criminal conduct needs to have taken place in the absence of the mentioned negative requirements of fault.

personal blameworthiness –along with the personal need for punishment– with the objective (and voluntary/*intentional*) concretization of an unjust conduct that must be condemned by the legal system. These two misleading understandings of abortion's permissibility, which equally end up concluding that abortion may be a woman's *right*, are in many ways the heirs of a still doubtful theorization of the necessity defense.

As mentioned in the first pages, the actual meaning and nature of *necessity* is not a settled matter in criminal law[251]. For the purposes of this paper, suffice it to note that the so–called *justifying* nature of the necessity defense, which is traditionally rooted in a utilitarian understanding of the legal system, may not be predicated when applied to abortion. That solution comes at the price of declaring that *there are* some *intentional destructions of innocent human life* that are *not–wrongful*. And it rests on the utilitarian premise that the legal system may and perhaps should protect individual rights and interests based *not* on their constant, intrinsic, and prelegal value, but on a calculation of overall costs and benefits[252]. Such a utilitarian understanding of the defense, however, and of the law in general, is simply incompatible with a system grounded on the protection

251 For an overview, combined with a comparative perspective, see: ESER, Albin. "Justification and Excuse". *American Journal of Comparative Law.* 1976, vol. 24, p. 621–637.

252 This understanding, which breaks with the previous tradition, was largely at the basis of the Italian theorization of necessity per the current criminal code, See ROMANO, B. (2012). *Codice Penale Ipertestuale Commentato…* Op. Cit. , sub. art. 54 at 429 ff. See ESER, Albin. "Justification and Excuse"… Op. Cit. at 634 (holding that with reference to Germany, "justifying necessity (§34) provides a clear case of justification by reason of superior interest"). The same is true in the Anglo–American tradition: see BRUDNER, Alan. "A Theory of Necessity". *Oxford J. Legal Stud.* 1987, vol. 7 p. 339 ("The Anglo–American theory of necessity as justification has traditionally been formulated in utilitarian terms"). Brudner further notes that, "According to section 3.02 of the American Law Institute's Model Penal Code, 'conduct which the actor believes to be necessary to avoid an evil to himself or to another is justifiable, provided that: (a) the evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence charged; and (b) neither the Code nor the law defining the offence provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear'. Note that this provision would justify taking innocent life to achieve a net saving of lives" Id, fn 11.

of human rights[253]. Utilitarianism once more transforms the inalienable rights of men into discretionary entitlements[254]. Inevitably, utilitarianism violates equality under the law[255]. For this reason, and although the famous *Dudley and Stephens* case might have been otherwise decided[256], it sure was correct in asserting that *duress* may never transform an intentional killing into a *just* act[257]. In "necessitated" scenarios, and whenever the choice to continue the pregnancy

253 For a synthesis on the incompatibility of utilitarianism (and consequentialism) with a sound protection of human rights, see GEORGE, Robert P. and TOLLEFSEN, Christopher. "Embryo: A Defense of Human Life". *The American Journal of Bioethics.* 2011, vol.8, issue 12 p. 65 – 66) (in part. ch. 4).

254 See BRUDNER, Alan. "A Theory of Necessity"… Op. Cit. at 342 ("Once the justificatory theory of necessity is identified with utilitarianism, moreover, it becomes a relatively simple matter to discard it. For in situations where overall welfare is served by infringing rights, utilitarianism proves more than its foundations will bear. Not only does it justify the sacrifice of the few by the many in its own self–interest; it also imposes on the few a moral obligation to sacrifice themselves. Thus the moral theory whose premise is that pleasure is the good must, in order to be a theory of moral (as distinct from prudential) obligation, embrace a conclusion that contradicts that premise. Nor does the obligation of altruism rest any more comfortably on the foundations of the common law. The latter, it seems, cannot accept a utilitarian theory of necessity without committing itself in principle to a legal duty of beneficence destructive of the distinction between acts and omissions".) On the libertarian objection to utilitarianism see FLETCHER, George P. *The Grammar of Criminal Law.* Op. cit. at 166 ("libertarians take property and other rights defined by legislation as sacrosanct. It would be impermissible to require an innocent individual to suffer harm juts because it seemed, on balance, to be in the social interest to do so. It would also be problematic to subject all rights to the contingency that a judge might rule that the right was overridden by the greater utility of society").

255 Ibídem, at 165 ("Whether discriminatory treatment is justified always depends on the costs and benefits of punishing in a particular case. There is no way, under the principle of utility, to have it both ways, to insist both on equal application of the law and on maximizing the welfare of society").

256 See generally Courts and Tribunals Judiciary. Queen's Bench Division. The Queen v. Dudley and Stephens, (1884) 4 QB 273. This was the case at the root of the common law tradition to deny a defense of duress in cases of murder.

257 See DRESSLER, Joshua. "Reflections on Dudley and Stephens and Killing the Innocent: Taking a Wrong Conceptual Path". In: *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams.* Universidad Estatal de Ohio: Dennis J. Baker and Jeremy Horder, eds., 2013 (arguing that Dudley and Stephens should be re–interpreted so as to exclude that necessity justifies intentional killing, but it may excuse it).

involves a woman's *hard choice,* courts and legislatures *may* reach compromise solutions. They *may* and perhaps *should* exempt women from punishment, as they already do throughout Europe; but they may do soby focusing on the lack of individual blameworthiness, rather than on the *lawful* –or *rightful*– nature of the pregnancy termination.

To a certain extent, the non–punishable nature of abortion may then be rooted in the "non–demandable" nature of the alternative conduct, which, however, remains the sole just option. According to some legal scholars, non–demandability is also the doctrine at the basis of necessity's excusing declination[258], whose clearest formulation is usually identified in the provision of § 35 of the German criminal code[259]. As the letter of the law makes clear, this criminal defense (excuse) applies only where the alternative lawful conduct may not be "expected" ("*zumutet*" in the original text) by that particular agent. The defense, moreover, does not demand the existence of any proportionality between the offence averted and the one committed: its rationale is not in the *balancing* of different interests, but in the consideration of the agent's limited capacity to act otherwise. The act remains "*rechtswidrig*" –against the law– but the defendant acts without guilt –*"ohneSchuld"*.

With reference to abortion, the usual calls for decriminalization seem then to be grounded on similar rationales. While not everybody supports a *right* to intentionally destroy the unborn, most people would agree that the

258 This thesis, as reported by Ronco, is defended in Italy by G. FORNASARI, *Il principio di inesigibilità nel diritto penale,* Padova, 1990, 351; and by F. Vigano'. See *ROMANO, B. (2012). Codice Penale Ipertestuale Commentato… Op. Cit.* at 431. See STITH, Richard. "New Constitutional and Penal Theory in Spanish Abortion Law"… Op. Cit. at 542 ("The dominant theory in Spain appears to treat the non demandability doctrine as one of excuse").

259 Deutsche Republik. St Gb. Op. cit. §35, sec. 1. ("Whoever, when faced with a present danger to life, limb or liberty which cannot otherwise be averted, commits an unlawful act to avert the danger from themselves, a relative or close person acts without guilt. This does not apply to the extent that the offender could be expected, under the circumstances, to accept the danger, in particular because said offender caused the danger or because of the existence of a special legal relationship; the penalty may, however, be mitigated pursuant to section 49, unless the offender was required to accept the danger on account of the existence of a special legal relationship").

continuation of pregnancy is far more *demanding* for women who find their own lives or health at grave risk, or who were victims of rape, than for regularly and happily married, healthy women. It is for *this* reason –i.e., for the limited "voluntariness" of their conduct– that women in distress might be less deserving of punishment[260].

In this respect, a particularly interesting feature –which may shed some light also on the real nature (and function) of criminal punishment– is that the same "exceptions" (i.e., risk for the mother's life or health, rape/incest, serious pathologies of the unborn) came to be exempted from punishment within the most diverse legal systems and traditions. This very fact may indeed be evidence of their correspondence to a pre–legal sense of what a just punishment is.[261] None of these exceptions would necessarily imply that the mother's life is more valuable than the one of the unborn. What they imply, instead, is that the personal degree of blameworthiness is determined by the objective and reasoned deliberation to act against the legal good[262].

Non–demandability was at the basis of the Spanish Constitutional judgment of 1985, which held elective abortion unconstitutional[263]. The same doctrine,

260 While *non–demandability* may be an acceptable ground for excuse, the diminished level of blameworthiness shall not be grounded on the idea that human freedom is the slave of passions. The reason why the agent is excused for not performing a non–demandable conduct is not to be found in the impossibility to deter his conduct by threat of a greater punishment; he is excused because, as human beings, we understand that such conduct, under dire circumstances, does not express the agent willful aggression or contempt for the protected right/interest/good.

261 But for the health exception, however, such reasoning would not apply to the several "detriments" mentioned by *Roe v. Wade*. Rather than the expression of an attitude of compassion and understanding for the woman's frailty, they treat human life as the disposable object of a human desire.

262 See DRESSLER, Joshua. *Reflections on Dudley and Stephens and Killing the Innocent…* Op. Cit. at 19 ("There are various theoretical explanations offered for why we excuse people in "our everyday moral practices" and in the law. But descriptively, the theory that most closely explains the law of excuses is the "choice" theory. According to this explanation, a person may only be blamed for her conduct if she had the capacity and fair opportunity to choose whether or not to violate society's legal norms").

263 See STITH, Richard. "New Constitutional and Penal Theory in Spanish Abortion Law"… Op. Cit. at 541–547. Based on the Organic Law 2/2010 of 3 March on Sexual and Reproductive Health and Voluntary Termination

moreover, was at the heart of the 1993 decision of the German *Bundesverfassungericht*. By that judgment –famous for its rather strong *pro–life* meaning[264]– the Court found the new abortion law unconstitutional inasmuch as it extended the consequences of "non–demandability" to any abortion performed within the first twelve weeks for so–called social reasons, and following the mandatory process of counseling. In the Court's view, these "elective" abortions could be tolerated by the legal system, but under a different rationale. They continued to be fully *against–the–law* (*Rechtswidrig*): unjust[265]. As the German Tribunal explained:

> "… in order to fulfill its *duty* to protect unborn life, the state must adopt sufficient legal and practical measures, while at the same time considering the conflicting legal values so as to ensure that appropriate, and as such effective, protection is achieved. For this to be done, it is necessary to create a clear protection concept which combines preventative and repressive elements. It is up to the legislature to develop and transform into law such a protection concept. In doing so, it is not free under the existing constitution to treat termination of pregnancy –*other than in exceptionable situations which are constitutionally unobjectionable*– as not illegal i.e. allowed"[266].

At the same time, the German Court went as far as to hold that non–

of Pregnancy, abortion is now legal in Spain on the basis of the woman's sole decision in the first 14 weeks. On the constitutionality of the new provisions, see GOMEZ MONTERO, A. J. "Leading Cases from the Spanish Constitutional Court Concerning the Legal Status of Unborn Human Life". In: ZAMBRANO, Pilar – SAUNDERS, William L. (Coords.), "Unborn Human Life and Fundamental Rights…" Op. Cit, p. 83–114, at 96–97 ("Despite attempts to present the Act as respectful of the doctrine of the STC 53/1985, and although several authors had no doubts as to its constitutionality, I think that it is difficult to reconcile the new regulation with the Court's jurisprudence").

264 Deutsche Republik. StGb. Op. cit. Order of the Second Senate of 28 May 1993 – 2 BvF 2/90. For a commentary, *see* the above–referenced article by KOMMERS, Donald P. "The Constitutional Law of Abortion in Germany…" Op. Cit.; and STITH, Richard. "On the Strength of Its Human Dignity: The Pro–Life 1993 Decision of the German Constitutional Court". *The Human Life Review.* Summer 1993, vol. 88.

265 See Deutsche Republik. StGb. Op. cit.2 BvF 2/90, May 28, 1993, par. 191.

266 Deutsche Republik. St Gb. Op. cit. par. 174.

demandability constituted a ground for justification[267]. In doing so, however, it explicitly rejected the idea of grounding its conclusion on the balancing of competing interests:

> "[S]o as not to breach the prohibition on too little protection, [the legislature] must take into account that *conflicting legal values cannot be proportionately balanced because what is being weighed up on the side of the unborn life is not just a matter of a greater or fewer number of rights nor the acceptance of disadvantages or restrictions, but life itself*. A balance which guarantees both the protection of the unborn's life and, at the same time, grants the pregnant woman a right to terminate is not possible because *the termination of a pregnancy is always the killing of an unborn life*"[268].

Be it a ground for excuse or for justification, the United States does not contain an explicit defense of non–demandability (and excludes duress as a defense for murder). Nonetheless, as criminal law comparatist George Fletcher pointed out:

267 The fact that the Court found *non–demandability* to constitute an actual *justification* remains a perplexing feature. However, see STITH, Richard. "New Constitutional and Penal Theory in Spanish Abortion Law"… Op. Cit. at 545 (already with reference to the 1975 decision, "the Court sen[t] mixed signals on the issue of whether *non–demandability* makes all these abortions justified or merely excused."). The 1993 judgment seems equally ambiguous. See Deutsche Republik. StGb. Op. cit. 2BvF2/90, May 28, 1993, paras. 158–166. ("aa) In line with the above, *a termination must be regarded for the duration of the pregnancy as fundamentally wrong and thus forbidden by law* […] If there were no such prohibition, control over the unborn's right to life –be it only for a limited time– would be handed over to the free, legally unbound decision of a third party, who might even be the mother herself, and the legal protection of the life within the meaning of the abovementioned standards of conduct would not be guaranteed. […] *A woman's constitutional rights do not take precedence over the fundamental prohibition on termination of pregnancy*. Although such rights also exist vis–à–vis the unborn and must accordingly be protected, they do not extend so far as to allow the constitutional duty to carry the child to term to be suspended even for a limited time". emphasis added). The German Court's choice might be grounded on the practical need to exempt doctors from punishment and to exclude the lawfulness of third party's interventions to prevent abortions.

268 Deutsche Republik. St Gb. Op. cit. 2 BvF2/90, par. 158.

> "To a large extent, the same value is addressed in the [Model Penal Code]'s approach to duress, which probes what 'a person of reasonable firmness' would do if faced with the equivalent threat of imminent harm"[269].

The difference, in other words, is more a matter of translations than of content and meaning[270]. As Richard Stith further noted, an implicit and more general principle of non–demandability seems to pervade, and to dominate the American legal system as a whole: [W]e do not require rescues of strangers in the first place, not even when they involve no risk whatsoever"[271]. "[W]e sometimes permit a violent response to aggression, even where retreat is possible"[272]. The U.S. Constitution, with its rights–centered narrative and without references to duties, conveys the impression that what is *demanded* of American citizens is nothing more than what is strictly reasonable. For these reasons, even where *Roe v. Wade* were reversed, and even where the unborn's right to life were fully recognized from the moment of conception, nothing would prevent the U.S. Supreme Court to uphold the constitutionality of state laws that exempt abortion from criminal punishment under particular circumstances.

The principle of non–demandability, however, shall not be viewed as a normative ground for general abortion decriminalization. Taken on its own, this doctrine may quite easily obfuscate those particular duties that parents have towards their children, born and unborn alike, which often "demand" unusual sacrifices;[273] and it may also and more gravely underestimate the duties that we all have towards each other. If not our brothers, we certainly are our children's keepers. Non–demandability, in other words, is not a "conduct rule," but a "decision rule"[274].

269 FLETCHER, George P. The Grammar of Criminal Law:… Op. Cit. at 148

270 Ibidem at 148–49 ("Discourse about culpability in English stresses reasonable behavior under the circumstances, just as the term *Zumutbarkeit* elicits, in a different idiom, our expectations of appropriate behavior in unusual situations").

271 STITH, Richard. "New Constitutional and Penal Theory in Spanish Abortion Law"… Op. Cit. at 546.

272 Idem.

273 Ibidem at 556–557.

274 For more on this distinction see DAN–COHEN, Meir. "Decision Rules and Conduct Rules: On Acoustic

In the absence of a radical change in the broader culture, one by which sex is no more detached from a committed relationship open to procreation, and in the absence of measures truly capable to help women in distress, the law, and courts, cannot place the whole burden of maternity and childcare on them.

> "If necessity is an excuse, therefore, it must be one that is sui generis. And it must be one that signifies not that the accused is objectively blameless, but that we withhold blame from him out of compassion for his predicament, or as a concession to the human–all–too–human in his behaviour"[275].

From a practical perspective, excused abortions generate the problem of the punishable nature of participation –abortionists may not claim having been pressured by the circumstances nor having faced a hard choice. And a third party may lawfully intervene and prevent the performance of a *wrongful* abortion by invoking the legitimate defense's right of the prospective victim. These problems, however, do not seem unsurmountable. They result from the application of general principles of criminal law to a rather specific –to a unique– scenario, one which may very well require and deserve the adoption of equally uniquesolutions[276]. The intentional termination of one's own child not only entails a conflict between different lives but also calls into question the most fundamental and constitutive relationship of every human existence. It is therefore quite reasonable for the law, and for the criminal law, to address it with specific tools, and to resist the temptation of treating it as *any other* crime[277].

Of course, the risk of any statutory and generalized decriminalization of abortion is that it may end up conveying the message of abortion as universally

Separation in Criminal Law". *Harvard Journal of Law.* 1984, vol 97, p. 625–677. In the present instance the terms are borrowed exclusively to signify that exemption from punishment based on *non–demandability* is not the result of an objective right, but a rule for judgment.

275 See BRUDNER, A. "Theory of Necessity". Op. cit. p. 339, 351.

276 In this respect the choice of the German Constitutional Court to speak of justified abortions in cases of statutory non–exactable conduct seems a direct and very pragmatic answer to such worries.

277 As for the physicians' participation, an evident need to protect the lives of mothers from the dangers of clandestine abortions may also be sufficient ground for exempting their conduct from punishment.

acceptable: as a personal *right*[278]. One may not exclude, for instance, that so–called therapeutic abortions are now performed for superficial reasons, or with utter disregard for the unborn life. Such consequences, however, might be mitigated by drafting and enacting laws that:

> "a) never speak of abortion as a right;
>
> b) as demanded by the German Constitutional Court of 1993, reaffirm the intrinsic and absolute value of each human life and do all they can to make sure that women's consent is fully and truly *informed*"[279].

278 BRUDNER, Alan. "A Theory of Necessity"… Op. Cit, provides very thoughtful analysis on the reasons why necessity does not give rise to a personal *right* but is at the same time different from those factors that only mitigate the sentence. The latter "transcend the act toward the actor –factors such as his moral character, signs of repentance, the circumstances of his background and environment and so on. Such considerations are, of course, quite alien to the issue of culpability for an isolated wrongful act, and as such are relevant only to a discretion that itself begins where the demands of right leave off". In the case of necessity (or duress), "what evokes compassion is precisely the sense that the act itself in all its isolation is strangely equivocal– culpable and not culpable at once". *Id,* at 358. Thus, as Brudner concludes, "While the drowning sailor has no objective excuse, the fact remains that he has not *by his act* empirically differentiated himself from the human community, and forbearance really would have been praiseworthy in the circumstances. […] If, therefore, mercy in the usual sense is a mere benefaction, and if true excuses confer rights, then the compassion evoked by wrongful acts committed from necessity is something in between a benefaction and a right. I can think of no other way of adequately reflecting this objectively unique status than through the creation of a statutory excuse".

279 See, for instance, the following passages: "The first and foremost condition of a counseling concept is that counseling be made obligatory for the woman and that it be directed to encouraging her to carry her child to term". Deutsche Republik. St Gb. Op. cit. 2 BvF2/90, para. 192; "However, even where there is a counseling regulation, which inevitably dispenses with the emergency indication, one must not lose sight of the legal duty to carry a child to term and its limits. Even where there is a real pregnancy conflict, rules directed to the protection of unborn life cannot be set aside; the constitutional position of the legal value of unborn human life must continue to remain present in the general legal awareness (so–called general prevention). Thus, a counseling regulation must give expression under the constitution to the idea that a pregnancy termination can only be legal in those exceptional circumstances where carrying a child to term would place a burden on the woman which is so severe and exceptional –such as in the cases

A final reason to exempt women facing a *hard choice* from punishment may be grounded on a proper understanding of that "retribution" that is the essence and aim of criminal punishment. If "depriving the criminal of this ill–gotten advantage is […] the central focus of punishment"[280], it is quite hard to see what *advantage* a woman ever gets from having aborted her own child[281].

Abortion is wrong and unjust, but neither the women who procure abortions nor the abortionists are typically acting out of malice. The women are frequently in difficult, and sometimes in desperate, circumstances. They do not have the same emotional bonds with their unborn children that mothers of infants and toddlers typically do. The abortionists typically believe they are providing a kind of humanitarian service –grotesquely, in light of moral reality, but nonetheless sincerely. For these reasons, some pro–lifers avoid (and all pro–lifers should avoid) using the word "murder", with its connotation of malice, to describe abortion.

What may be most important is that in our society, both the mothers and the abortionists have had their understandings of abortion shaped by a culture that does not communicate the truth about abortion and unborn children –a culture that includes laws that do not treat abortion as a crime or wrong at

of the medical and embryopathic indications (§ 218 a, Sections 2 and 3 of the Penal Code, new version)– that it would exceed the limits of exactable self–sacrifice. Such expression would provide a woman who acts responsibly with a basis for judging her actions. This is exactly the core of responsibility which the counseling regulation leaves to a woman; of course, no justification can follow from her availing herself of it (cf. D. III. 2. b) a)". Id, para 195.

280 BRADLEY, Gerard V. "Retribution: The Central Aim of Punishment". *Harvard Journal of Law & Public Policy.* 2003–2004, vol. 19, at 23.

281 Particularly interesting, in this respect is the provision of article 121, par. 5, of the Brazilian Criminal Code. Addressing cases of manslaughter, the norm provides that punishment may be waived by the judge "where the consequences of the violation affect the perpetrator so severely that criminal punishment becomes unnecessary." As Professor Ligia Castaldi reports, one such case may be that of the "accidental death of a child at the hands of his or her parent". See CASTALDI, Ligia de Jesús. Abortion in Latin America and the Caribbean. Op. cit. p. 197. As Castaldi further writes, and in tune with the thesis developed in this paper, "Punishment exemptions under these circumstances, however, do not turn theft, fraud, or manslaughter into a legally permissible act, much less into one that is justified or that constitutes a legal entitlement". Idem.

all, and that deny the very humanity of unborn children. In this way, our law and culture lead people into serious moral error. A reformed law and culture need to take account both of the seriousness of that error and of the way that our culture has diminished people's culpability for it"[282].

5. Conclusion

In a piece written in 1980, Professor Phillip Montague argued that the ground of legal duties is not necessarily found in corresponding individual claim–rights[283]. "I am convinced", Montague wrote:

> "… that much talk about rights is really talk about obligations, and in many cases it would be better to frame these discussions in terms of references to obligations rather than references to rights. *I see no advantage whatever, for example, in speaking of the right not to be killed rather than the obligation not to kill; and appealing to the former rather than the latter –to argue against abortion,* or to wonton destruction of animals, for example– *has a significant disadvantage on the way it raises questions about the sorts of individuals that are capable of possessing rights*"[284].

That disadvantage is showcased quite well, I think, by U.S. abortion jurisprudence, which ends up legitimizing infanticide. The criminal law, on the other hand, reminds us that –if not before[285]– along with anyone's right to life,

282 PONNURU, Ramesh. "The Infanticide Craze"… Op Cit. See also KACZOR, C. "Abortion as Human Rights Violation". In: *Abortion Rights. For and Against.* Cambridge: K. Greasley, C. Kaczor, eds., 2018. p. 158–160.

283 See MONTAGUE, Phillip. "Two Concepts of Rights". *Phil. & Pub. Affairs.* 1980, vol. 9, p. 372, 374.

284 Ibídem, at 376.

285 With its commands, the criminal law may be reminding us of that component of "*jus*" that cannot be reduced to the contemporary *rights–talk,* unless what these "rights" mean is further specified. See, FINNIS, John. *Natural law and natural rights.* Op. cit. (ch. VIII "*Rights,*" in part. 206–210). Differently from Montague, and following Finnis's teaching, I would maintain that obligations do not "*precede*" rights; but both concepts derive from *justice,* and from the understanding that a legal system is *just* as long as *both* duties *and* rights are grounded on those basic human goods that are at the core of individual flourish-

including one's own (and before anyone's claim to privacy), there is everybody else's duty not to terminate any life, including one's own[286].

In our contemporary societies –pervaded by the idea that individuals are the sole authors of their lives, where families, and broader communities, are seldomly at the gratuitous service of their members, and where even the pro–life movement forgets that mothers do not only need to be helped at the moment of birth, but also afterwards– it may still prudentially right to exempt some direct abortions from punishment[287]. This may be true for cases of serious and medically certified risks for mother's physical and mental health, for cases of rape and/or incest, for pregnancies involving minors […] and for those cases which the peculiar sensibility of a particular people, at a particular historical time, deems to deserve understanding and forgiveness. These choices, however, remain tragic and can never become a right:

ing; and as long as the legal system "fosters rather than hinders such flourishing". Ibídem, at 219–220.

286 See FINNIS, John. "The Rights and Wrongs of Abortion". In: *Human Rights and Common Good.* Oxford: university of Oxford, 2011. Volume III, 293 "That is, the point of speaking of 'rights' is to stake out the relevant claims to equality and non–discrimination (claims that are not to absolute equality, since my life and my well–being have some reasonable priority in the direction of my practical effort, if only because I am better placed to secure them). But the claims are to equality of treatment; so, rather than speak emptily of, say, a 'right to life', it would be better to speak of, say, inter alia, a 'right not to be killed intentionally' –where the meaning and significance of 'intentional killing' can be illuminated by consideration of the right and wrong of killing oneself (that is, of a situation where no 'rights' are in question and one is alone with the bare problem of the right relation between one's acts and the basic values that can be realized or spurned in human actions").

287 See CASTALDI, Ligia de Jesús. *Abortion in Latin America and the Caribbean.* Op. cit. at 195–96 (discussing that in Latin America, most countries permit abortion precisely by invoking some sort of exemption from punishment, defined as "*supestos de aborto no punible* (requirements or prerequisites for the nonpunishment of abortion), *excusasabsolutorias* (absolutory excuses), or *supuestos de inexigibilidad* (requirements for nonenforcement, nonexactability, or non demandability) […] legislators recognize the existence of a crime but decide to waive criminal punishment in certain situations defined by statute […] Such nonpunishment must be understood to depenalize (not decriminalize) abortion in the narrow linguistic sense, in that it removes criminal penalties for abortion under certain circumstances. It is unlike decriminalization, in the broad sense, in that even in these selected circumstances abortion remains criminal, despite its lack of any legal penalty").

> "[A]bortion will always be different from a right. Indeed, a right aims at guaranteeing the faculty of a person to act for his/her good as a human being. Everything that we recognize as fundamental rights: think, associate, pray, speak, are faculty through which every person expresses his humanity […] [F]undamental rights protect the exercise of these noble faculties, specifically human. They protect what every person realizes his or her humanity in. Which means that by exercising these fundamental rights, man becomes more human"[288].

This is clearly not the case with abortion.

Laws and courts should never question the existence and the independence of the inherent dignity of each human life, from conception to natural death. Hence, while they may exempt abortions, and abortionists, from punishment, they should always aim at preventing its performance, acknowledging that the intentional destruction of innocent life can never be just. Abortion can never be a human right.

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