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Fundamental Rights, Moral Law, and the Legal Defense of Life in a Constitutional Democracy

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FUNDAMENTAL RIGHTS, MORAL LAW, AND THE LEGAL DEFENSE OF LIFE IN A CONSTITUTIONAL DEMOCRACY

A Constitutionalist Approach to the Encyclical *Evangelium Vitae*

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I. INTRODUCTION: THE DEFENSE OF LIFE AND THE CHALLENGES OF A "CULTURE OF DEATH"

The defense of human life in its physical integrity is, unquestionably, a traditional duty of the state. This duty, however, is currently being contested in two specific areas: the beginning and the end of life. The encyclical *Evangelium Vitae* (1995) denounces the inhumanity of what it calls a "culture of death": a culture within which killing becomes an ordinary means to resolve conflict and end suffering, at times grievous and tragic, and caused to a great extent by a remarkable irresponsibility within the area of sexual behavior. The encyclical also appeals to the responsibility of the state, the legislator, democratic institutions, and the people, so that they continually guarantee a more effective safeguard of life, above all the life of the weakest, including the unborn, the elderly, the handicapped, and the terminally ill.[1]

In the following pages, I would like to show how the chapter in *Evangelium Vitae* that discusses the relationship between moral and civil law adopts a line of reasoning that could be called "constitutionalist." It follows closely the reasoning already propounded in the document *Donum Vitae* (1987) and in the encyclical *Centesimus Annus* (1991), which in its fifth chapter proposes a conception founded on the basic principles of modern constitutionalism: the idea of the supremacy of law over power; the separation of powers; and the protection of individual freedom based on fundamental rights. These are the constitutional presuppositions of a democracy that seeks to avoid degenerating into a tyranny of the majority.

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1. *Evangelium Vitae*, 90. Numerical references for *Evangelium Vitae* and the other encyclicals cited within are to the section(s) of the encyclical. Quotations from *Evangelium Vitae* are from the Vatican translation (St. Paul, Minn.: The Leaflet Missal Company, n.d.).

I shall pay particular attention to the problems involving the legal protection of prenatal human life; the principles developed there are only partly applicable to the problem of euthanasia. Starting from the conviction that mere moral argument is insufficient, this essay intends to propose a line of reasoning that can insert the doctrine of *Evangelium Vitae* into the real legal-political context of today. So I shall begin with a short yet necessary reflection on the difference between a strictly moral dimension and a legal-political one (Part II). Later we shall see whether and to what extent such a distinction seems justified against the setting of traditional Christian thought (Part III). Then we shall proceed to an exposition of the doctrinal core of *Evangelium Vitae* on this subject (Part IV), and to a comparative and critical analysis of the constitutional jurisprudence of the Federal Republic of Germany and of the United States of America (Part V). This analysis will yield criteria and categories for dealing appropriately with the chosen subject. In Part VI, I will point out the main propositions in opposition to the legal defense of the unborn, propositions which intend to "neutralize" and render irrelevant the fundamental truths that the unborn child is a human person and that with respect to human dignity, he or she is equal to any other living person. Finally, in Part VII, starting from the teaching of *Evangelium Vitae* on the subject, I shall propose two arguments to show the fundamental nexus between the legal-political order and the moral law within the area of my chosen subject, the legal defense of human life.

II. Distinguishing between the Legal-Political Plane and the Moral Plane

To focus effectively on the question of the defense of life through legislative action and perhaps even social assistance by the state, we must recognize two well differentiated planes: the moral and the legal-political. *Evangelium Vitae* deals not only with ethical but also with complex legal-political themes. Addressing the relationship between the civil and the moral law, it affirms that "the purpose of civil law is different and more limited in scope than that of the moral law."[2] Not only are there *limits* regarding civil law, but the civil and the moral law have different tasks. The moral and civil law are not subject to the same practical logic. Civil law is saturated with a *specific* ethical-practical rationality within a *specific* ambit.

Moral law—as "natural law"[3]— is nothing other than the light of the intellect or of practical reason, which orders the actions of individual human beings toward happiness, the end of human life. The moral law simply distinguishes what is good from evil within human actions. It comprises

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2. *Evangelium Vitae*, 71.
3. See John Paul II, *Veritatis Splendor*, 40-44.

those principles that steer free and responsible human actions toward moral virtue and toward the good which perfects the agent. It ensures that a person perfects himself through his life and actions and becomes a just person with well-ordered sentiments: self-controlled, strong, courageous, and patient.

Legal-political logic is not alien to moral law or practical moral rationality, nor is it opposed to it. Nevertheless, what we could call its "formal objective" is different: it tends to make it possible for people to live in community. It tends, therefore, toward peace, freedom, and justice, which principally means "equality in freedom." The main precondition for reaching such goals is the security (conferred by the state) of being able to survive without becoming the easy prey of the stronger or the more cunning. That is why citizens grant to state authority a "monopoly of legitimate violence" (in the words of Max Weber). Only the state may legitimately use physical force or delegate such a right to specific persons or institutions. Backed by coercive authority of the modern state, civil law guarantees above all the survival and physical security of every person. This is the first element of the common good, a necessary presupposition for any other good that falls within the legislative competence of the state.

In summary, the moral law regulates the actions of the individual, aiming at the *goodness of one own's actions*; civil law (positive constitutional, civil, and penal law) instead regulates the relationship between individuals, aiming at the *common good*. This does not mean that moral law and the individual actions it regulates are not directed toward the good of others. Quite the contrary. The just relationship with others (which is not the "common good," but rather the "good of others") is an integral part of the goodness expressed by the actions of each individual person. The moral law dictates the corresponding behavior through its requirement that "my actions"—the actions carried out by each person—be good, so that "I may be or become just or good." Civil law, instead, seeks to regulate the *relationship between persons* so that they may live together in peace, security, and freedom, and so that among them may be established that justice which guarantees equal freedom, both political and economic. Accordingly, civil law does not aim at making men good, even if public legislative action certainly has great responsibility to promote and favor the conditions and environment where it may be possible to lead a life that is good, virtuous, and worthy of man.

Such diversity in task and logic between moral and civil law may correspond to a different logic on the basis of which the two laws may prohibit an action, such as induced abortion, or the suppression of the embryo or fetus in the womb of the mother. The moral law—that is, the moral reason which distinguishes good from evil—forbids such an action as evil and unjust. It is a sin, an act contrary to virtue, a crime against the love of one's neighbor. The person who carries it out acts in an immoral way, thus becoming a morally bad person. The moral law imposes duties so as to make good every single moral agent.

For example, the moral law prohibits all types of lies as actions contrary to the virtue of justice. Civil law, instead, will forbid lying only insofar as it is an action that harms the relationship among persons to the point of threatening the social order and their living together in peace and security. Hence, at the legal level, only lies and fraud in commercial relations (and so forth) are forbidden and punished. This prohibition means that such an action has a particular moral seriousness: an action that harms not only the good of others but also the common good (the good of order, peace, and security, as well as the existing trust among men) is morally more negative.

What is forbidden by civil law is in a moral sense very important, but the converse is not necessarily true. What may appear morally relevant and grave need not be regulated solely for that reason by civil law; in other words, it does not fall within the province of civil law to sanction moral order with the coercive power of the state. The state is not the "executor of the moral law": "to the unconditional duty to abstain in every case from directly and intentionally killing an innocent person—that is, to the absolute moral prohibition, without exception, of abortion—does not correspond an identical unconditional duty of the state to prevent all killings."[4]

If civil law were to prohibit and even punish an action such as abortion, it would do so not simply to impede an immoral act with the aim of leading men through state authority to practice virtue, to become good, and to attain happiness. It does so merely to protect the life of the one who, through such an act, would be threatened by death and deprived of his or her right to live. In addition, it would do so to protect an expectant woman from possible pressure from her environment, for instance, from the father of the baby, if he wanted to avoid the duty of paying child support. So the reasons that will lead a legislator to take legislative measures will pertain to the intrinsic nature of state authority: it would be for political reasons, in the most inclusive and noble sense of the word (in a sense, however, not contrary to "moral"[5]). Safeguarding human life through civil law—that is, positive right—is a political task. The argument for justifying legislative intervention in this field must necessarily be a political or legal-political argument which, however, *will imply* a whole series of premises: biological, anthropological, and ethical.

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4. R. Spaemann, "Preface" to the German edition of Stephen D. Schwarz, *Die verratene Menschenwürde. Abtreibung als philosophisches Problem* (Köln: Communio Verlagsgesellschaft, 1992) (originally published as: *The Moral Question of Abortion* [Chicago: Loyola University Press, 1990]). With these words, Spaemann corrects the position of Schwarz, which is insufficiently developed on this point.

5. That is, in the sense of a specific "political ethics," which is "ethics," though not "ethics" *tout court*, but rather that specific part of ethics which refers to human actions, whose object is the common political good. The acts of institutions and public agents (e.g. legislators) are also included. On this, see Martin Rhonheimer, "Perchè una filosofia politica? Elementi storici per una risposta," *Acta philosophica* 1 (1992) 233-263. This does not mean that two different norms exist, one "moral" and the other "political," for the same act.

III. The Function of the Civil Law: An Historical Digression

A. From Aristotle to the Patristic Tradition

The distinction between the moral level and the legal-political level presupposes abandoning an "Aristotelian" vision of the function of the *polis* and of civil law. To Aristotle, man finds his fulfillment in the state—not the modern state, but the ancient *polis*, a community of life and law, of culture and religion. For this Greek philosopher, the task of law is to lead men to virtue. Aristotle believes that the purpose of the laws of the *polis*—conceived, still in the Platonic tradition, as an educational enterprise—is to compel corrupt men to behave according to virtue under the threat of punishment: "It is difficult to have a correct education in virtue from one's youth if one is not reared under such laws."[6]

Law is needed for everything, "even, in general, for life as a whole; as a matter of fact, more people obey out of necessity than reason, and more for punishment than for propriety."[7] The law, then, with "coercive power . . . prescribes what is morally suitable."[8] Thus, we can understand why Aristotle's *Politics* constitutes the very crown of his *Ethics*.[9]

So begins a whole tradition that understands the education of people in moral virtue to be the function *par excellence* of civil law. This tradition is still present in the thought of Saint Thomas Aquinas, in whom, however, it is possible to identify another trend of thought, which preexisted in patristics, for instance in Saint Irenaeus, but above all in Saint Augustine. It was precisely Christianity, with its typical dualism, that rendered impossible the unitary conception of the Aristotelian ethics of the *polis*.

Saint Irenaeus asserts that the task of the state is nothing other than to provide security under the threat of punishment: to prevent the big fish from eating the small ones.[10] The image of the fish is not too far from Hobbes's wolves. It is, however, Saint Augustine who finally includes the temporal order in the level of "fallen" reality, and who reserves to the Church the task of guiding men to salvation and moral integrity, while entrusting to the State the task of taking care of temporal goods, the foremost being peace among men. The *civitas caelestis* or the community of believers in Christ, is not concerned with "*quidquid in moribus, legibus,*

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6. Aristotle, *Nicomachean Ethics*, X, 9 1179 b 33-34.
7. Ibid., 1180 a 5-6.
8. Ibid., 1180 a 20 e25.
9. See M. Rhonheimer, "Perchè una filosofia politica?" For the link between Aristotelian ethics and politics, see my book *Praktische Vernunft und Vernünftigkeit der Praxis. Handlungstheorie bei Thomas von Aquin in ihrer Entstehung aus dem Problemkontext der aristotelischen Ethik* (Berlin: Akademie Verlag, 1994), 391 et seq. See also Martin Rhonheimer, *La prospettiva della morale. Fondamenti dell'etica filosofica* (Roma: Armando, 1994), 184 et seq.
10. Saint Irenaeus of Lyon, *Adversus haereses*, V, 24.

institutisque diversum est, quibus pax terrena vel conquiritur vel tenetur." Let the state, then, take care of *pax terrena* and it will do so legitimately *"si religionem qua unus summus et verus Deus colendus docetur, non impedit."*[11]

This relative indifference toward the legislative system of the state is quite distant from what will develop later as "political Augustinianism"—a program for integrating state power in an attempt to create a *res publica christiana*, in which temporal power is in the service of the salvation of the soul.[12]

B. Saint Thomas Aquinas

Saint Thomas is totally immune from this last trend, which culminates in the hierocratic theories of some curial canonists of the thirteenth century.[13] In Saint Thomas we encounter both the patristic and the Aristotelian traditions, but also the very important tradition of Roman law, as well as canon law with its propensity to limit law to the external realm.[14] In a formula that is clearly Augustinian, Saint Thomas asserts that "the end of human law is temporal peacefulness in society, an end for which it is sufficient that the law prevent those evils that may disturb the peaceful conditions of society. It is instead the concern of divine law to lead men to eternal happiness."[15]

Saint Thomas is aware that not everything that is regulated by divine law can also be regulated by human law. This asymmetry, however, is not necessarily a defect; it belongs instead to the order anticipated by eternal law.[16] Nevertheless, human law must never approve what divine law

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11. Saint Augustine, *De Civitate Dei*, XIX, 17. See also Augustine's *De Libero Arbitrio*, I, 5, 39: "Ea enim [positive human law] vindicanda sibi haec adsumit, quae satis sint conciliandae paci hominibus imperitis et quanta possunt per hominem regi."

12. See H. X. Arquilliere, *L'Augustinisme politique. Essai sur la formation des théories politiques du Moyen Age*, 2nd ed. (Paris: J. Vrin, 1955); J. J. Chevalier, *Storia del pensiero politico*, Vol. I, 2nd ed. (Bologna: Il Mulino, 1989), 256-280; R.W. and A.J. Carlyle, *A History of Mediaeval Political Theory in the West*, 6 vols. (Edinburgh-London: William Blackwood, 1903-1936) (1970 reprint).

13. M. Grabmann, *Studien über den Einfluss der aristotelischen Philosophie auf die mittelalterlichen Theorien über das Verhältnis von Kirche und Staat* (Sitzungsberichte der Bayerischen Akademie der Wissenschaften, Philosophisch-historische Abteilung, 1934, Heft 2), (München: Verlag der Bayer. Akad. d. Wiss./ C.H. Beck, 1934), 41-60; R.W. and A.J. Carlyle, *History of Mediaeval Political Theory*, vol. II.

14. See Thomas Gilby, *Principality and Polity: Aquinas and The Rise of State Theory in the West* (London and New York: Longmans, Green and Co.,1958), xxiii.

15. "Legis enim humanae finis est temporalis tranquillitas civitatis ad quem finem pervenit lex cohibendo exteriores actus, quantum ad illa mala quae possunt perturbare pacificum statum civitatis. Finis autem legis divinae est perducere hominem ad finem felicitatis aeternae. . . ." *Summa Theologiae*, I-II, q. 98, a. 1.

16. See ibid., I-II, q. 93, a. 3, ad 3: "Unde hoc ipsum quod lex humana non se intromittat de his quae dirigere non potest, ex ordine legis aeternae provenit."

forbids.[17] "Not regulating" and "not prohibiting" is not the equivalent of "approving" or even commanding. From the moral viewpoint, imperfection—a deficient character—belongs to the very nature of human law. What is morally "imperfect" may be optimal, and (more or less) perfect from a legal-political point of view (therefore, also from the standpoint of political ethics).

This is how Saint Thomas gives his celebrated formula according to which civil law does not intend to suppress all human vices: "but only the most serious ones, from which even the majority of men are able to abstain, and above all those that harm others, *without the prohibition of which the preservation of society would not be possible*—just as human law forbids murder, theft, and similar things."[18]

It seems evident that such an assertion is very far from the Aristotelian spirit. Saint Thomas certainly does not deny that even civil law must create an environment favorable to human virtue. But these conditions are above all conditions of justice, of human interrelations, which constitute the cornerstones for living a good life. Saint Thomas already distinguishes *peccatum* from *crimen*;[19] not everything which in conscience is sin can be the subject of human legislation. That subject matter is limited to what may be ordered for the common good of civil society

> either in an immediate manner, as when something is established directly for the common good, or in a mediated manner, that is, when something is established by the legislator insofar as it is part of the good discipline characteristic of citizens so that the common good of justice and peace is preserved.[20]

The phrase "good discipline" refers to external behavior between persons, a characteristic of the limitations and specificity of human law that does not address simply the province of the goodness of men or of citizens, but rather the conservation of peace and justice in the social order, the *common good* of men living in society.

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17. Ibid.: "Secus autem esset si approbaret ea quae lex aeterna reprobat."

18. Ibid. ". . . sed solum graviora, a quibus possibile est maiorem partem multitudinis abstinere; et praecipue quae sunt in nocumentum aliorum, *sine quorum prohibitione societas humana conservari non potest*, sicut lege humana prohibentur homicidia et furta et huiusmodi" (I-II, q. 96, a. 2). See also II-II, q. 69, a. 2, ad 1: "multum secundum leges humanas impunita relinquuntur quae secundum divinum iudicium sunt peccata, sicut patet in simplici fornicatione"; ibid. q. 77, a. 1, ad 1: ". . . lex humana non potuit prohibere quidquid est contra virtutem, sed ei sufficit ut prohibeat ea quae destruunt hominum convictum."

19. Gilby, *Principality and Polity*, 175 et seq. Beginning with Thomas Hobbes, this distinction will become crucial for criminal law.

20. ". . . sed solum de illis qui sunt ordinabiles ad bonum commune, vel immediate, sicut cum aliqua directe propter bonum commune fiunt; vel mediate, sicut cum aliqua ordinantur a legislatore pertinentia ad bonam disciplinam, per quem cives informantur, ut commune bonum iustitiae et pacis conservent" (*Summa Theologiae*, I-II, q. 96, a. 3).

We must add, however, that neither the patristic-Augustinian tradition nor the thought of Saint Thomas corresponds to a theoretically elaborated differentiation in principle between an area of virtuous perfection of the person and a more properly legal-political area. For Saint Augustine, the limited character of the duty of any temporal authority is due to the transient character of any reality of this world. Salvation and moral perfection are the prerogative of the spiritual power of the Church: one becomes good and saintly as a member of the *civitas caelestis*. According to Saint Thomas, also, it is not the specific duty of human law to make men good, despite the fact that for him social reality and state authority are "natural" and not a consequence of original sin as they are for Saint Augustine. In the end, it is a typically Christian reservation, echoing the principle of giving to Caesar what is Caesar's and to God what is God's.

C. The Modern Conception of the State and Civil Law

The principle and the reservation just mentioned undergo a radicalization and transformation in modern thought. Against the background of the bloody ideological-religious conflicts of early modernity, an answer is sought to the question of the rational basis for the sovereign power of the state. The state is no longer conceived as a fact; rather, its existence requires a logical, well-constructed justification that must simultaneously clarify the duty and function of both the state and its legislative power.

The first answer, whose unquestionable proponent is Thomas Hobbes, bases the legitimacy of the state on its ability to ensure the survival of the individual: his right to live and prosper is guaranteed only if he can live in security, if his neighbor is not an insidious wolf but a person with whom he can live in trust. It is therefore necessary to transfer the right to self-defense and recourse to violence to a sovereign above everyone. Thus, peace, the first condition for a dignified and prosperous life assured by freedom, is established through a pact of mutual and spontaneous renunciation of self-defense, with the consequent submission to a sovereign authorized to defend everyone's life and enforce the laws.[21]

In its fundamental traits, even though it is only a part of the truth, the utilitarian logic of a pact for the mutual and spontaneous renunciation of self-defense, as delineated by Hobbes, is still valid today. An essential part of the civil behavior of a normal citizen can only be explained on the basis of his willingness to submit to a civil power in exchange for a guarantee of certain vital goods. He has renounced protecting them by himself for the purpose of reaching in this way a more advantageous state in the long run. Perhaps we do not realize that as citizens we have already internalized such

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21. In addition to many other studies on the philosopher from Malmesbury, I take the liberty of referring to my recent analysis: Martin Rhonheimer, *La filosofia politica di Thomas Hobbes: coerenza e contraddizioni di un paradigma* (Roma: Armando, 1997).

a logic, accustomed as we are to this renunciation of self-defense and to the functioning of the institutions guaranteeing our security.

History soon provided evidence of the need to guarantee security not only from the wolves that are other men, but also from the only remaining wolf: the state with its institutions. Thus we come to the birth of a more nuanced thought, represented by Locke and Montesquieu in line with the Anglo-Saxon tradition of the rule of law. Rights of liberty—fundamental rights directed to limiting the power of the state—are discovered, positively guaranteed, and made capable of being claimed before a judge. It is the birth of modern constitutionalism.

It is within this context that we must place today the question of the legal defense of life, especially prenatal life. It is insufficient simply to underline the immoral character of procured abortion, or of what is called "active euthanasia," in order to establish the need for a corresponding legislative, even penal, rule. We could then ask why the state must protect the life of the unborn, when its abstention from taking any measure in that regard would not constitute any threat to peaceful coexistence among men.

It is clear that according to basic principles, Thomistic as well as Hobbesian, the law must repress and criminalize those sins that would be harmful to peace among men. The logic of the modern, contractarian tradition is decidedly utilitarian, and in this sense limited. It does not work in those cases when we discriminate against a group of human beings—not yet born or of a particular race or color—among whom, by definition, the discriminators cannot ever be included.

It seems obvious that within the context of the principles stated, an argument favorable to the legislative regulation of abortion takes on a particular difficulty. In what sense is a human legislator competent to prohibit an act that is undoubtedly sinful but that seems to disturb only minimally the peaceful coexistence among men living in tranquillity, order, and justice? We shall come back to this crucial problem later.

D. Civil Law and the Defense of the Unborn before the Contemporary Age

It seems that within the premodern tradition, one can find scarce help in addressing the problem just mentioned, since only two criteria were then prevailing. One determines what was to be forbidden by civil law, that is, those vices *that make it impossible for men to live together.* The other criterion identifies iniquity, the intrinsic injustice of a law, the fact that the law *may command* something contrary to natural or divine law, or that it *may impose excessively onerous obligations or burdens* on citizens. Such a "law" would be a form of violence rather than a law, and would give rise

to an obligation to disobey.[22] These criteria do not, in principle, anticipate the case of a possible legislative tolerance toward the practice of abortion. Yet we cannot derive from the practice of abortion a legislator's duty to repress it by law and to impose punishment for it. At least this is not evident and requires a broader treatment of the question.[23]

A second problem follows. Even if the moral verdict of Christian tradition with respect to abortion was clear, usually it did not satisfactorily distinguish between abortion and contraception. Under the influence of Saint Augustine, both contraception and the killing of the fetus were considered sins against one of the goods of marriage, the *bonum prolis*.[24] The legal defense of the unborn through punishment by temporal authority was almost never considered. In twelfth-century England, abortion cases seem to have been delegated to ecclesiastical courts for trial.[25] The first great European penal code to provide for a penalization of abortion was the *Constitutio Criminalis Carolina* of 1532. It was difficult, however, to prosecute abortion in court because of the lack of proof. One finds convictions for infanticide, but rarely for procured abortion.[26] Even in English common law, under the influence of the theory of later quickening, abortion as simple *misprision* (infraction or crime) was distinguished from actual *homicide*. Only in the seventeenth century, with new scientific discoveries, does awareness increase of the beginning of human life with conception.[27] This scientific progress is reflected in the first codifications

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22. See *Summa Theologiae*, I-II, q. 96, a. 4. We should also interpret I-II, q. 93, ad 2 in this way.

23. Let us not forget that the idea of a state as the comprehensive ordering power, obligated to safeguard the goods of the citizens and, moreover, with the possibility of unjust *legislative omissions*, presupposes the concept and modern reality of the state.

24. Moreover, under the influence of Saint Augustine and the later decretal *Si Aliquis*, medieval penitential practice treated as "murderers" both he who procured an abortion of a "formed" fetus (i.e. animated with human life, after the fortieth day) and those who practiced contraception because of lust, whereas it was considered less serious to procure the abortion of a "non-formed" fetus (i.e. before the fortieth day from conception). Saint Augustine's decisive text is *De nuptiis et concupiscentiis*, I, c. 15, n. 17 (CSEL: vol. 42, p. 230), taken up again in the *Sententiae* by Peter Lombard, lib. iv, Dist. XXXI, cap. 3, and then commented on throughout the Scholastic age. For the decretal *Si Aliquis*, see John T. Noonan, Jr., *Contraception: A History of its Treatment by the Catholic Theologians and Canonists*, 2nd ed. (Cambridge, Mass.: Harvard University Press, 1986), 168 ff.; 176 ff.

25. See John Keown, *Abortion, Doctors, and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (New York: Cambridge University Press, 1988), 5; D.J. Horan and T.J. Balch, "*Roe v. Wade*: No Basis in Law, Logic, or History," in Louis P. Pojman and Francis Beckwith, eds., *The Abortion Controversy: A Reader* (Boston: Jones and Bartlett, 1994), 86-108, esp. 93 ff.

26. See R. Jütte, ed., *Geschichte der Abtreibung, Von der Antike bis zur Gegenwart* (München: C. H. Beck, 1993), 85 ff.

27. A brief summary of the development of concepts regarding the beginning of human life can be found in the book by Norman M. Ford, *When Did I Begin?: Conception of the Human Individual in History, Philosophy, and Science* (New York: Cambridge University

of law infused by an Enlightenment spirit. Thus, the *Preussische Allgemeine Landrecht,* of 1794 (I,1,10) decrees that "the universal rights of humanity are applicable also to children not yet born, from the moment of their conception." The Austrian *Allgemeine Bürgerliche Gesetzbuch* of 1811 (para. 22), still in force today, and the Bavarian Penal Code of 1813 followed in the same spirit. In 1803, the first statute against abortion was issued in England, narrowing further the equivalence between abortion and homicide of the "quick fetus" (a fetus that already moves). This represents a noteworthy change relative to the common law; all subsequent legislation is subject to the influence of new medical knowledge.[28]

Without going into the particulars of a very complex history, we can see that the problem of the state's defense of unborn life is a relatively modern theme. The problem became more urgent with progress in science and health. As Robert Spaemann has written,[29] in the past abortion was a drama performed in the penumbras of society. That is no longer true today. Abortion has become readily accessible in an easy, safe manner. The great problem of the "liberalization" of abortion, which has been made into an ordinary service in medical institutions and is even financed by health insurance, is that society and the state, with full responsibility, officially plan the killing of unborn human beings. It is no longer a question of tolerating what is notoriously an evil, but rather of making it easily accessible to anyone, with the backing of the state. Causing directly the death of innocent beings thus becomes an ordinary means protected by law for resolving conflicts as old as human sexuality.

The problem of the "culture of death" is not, therefore, that of a "moral collapse" of society, but rather the effect of the acquisition of a new power over life, made accessible by modern science. This is also true in a special way for the problem of euthanasia, made more acute by the fact that within the framework and ethos of modern medicine it no longer seems justifiable to take every action capable of prolonging life. By contrast, the modern state is the first in history that possesses the means to guarantee an effective defense of prenatal life; the modern state may nevertheless become an accomplice in the planned killing of unwanted human lives, or life that has become burdensome for the welfare system.[30]

Press, 1988), 19-51.

28. See Keown, *Abortion, Doctors, and the Law.*

29. R. Spaemann, "Sind alle Menschen Personen?," in R. Löw, ed., *Bioethik. Philosophisch-theologische Beiträge zu einem brisanten Thema* (Köln: Communio, 1990), 48-58; here: 56 ff.

30. Interesting impressions of this problem in Holland are reported by O. Tolmien, *Wann ist der Mensch ein Mensch? Ethik auf Abwegen* (München: Hanser, 1993), 77 ff. See also K. Dörner, *Tödliches Mitleid. Zur Frage der Unerträglichkeitdes Lebens oder: die Soziale Frage: Entstehung, Medizinisierung, NS-Endlösung heute, morgen,* 3rd ed. (Gütersloh: Verlag Jakob von Hoddis, 1993); T. Bastian, ed., *Denken-Schreiben-Töten. Zur neuen "Euthanasie"-Diskussion* (Stuttgart: S. Hirzel, 1990).

IV. Moral and Civil Law according to *Evangelium Vitae*

It is just this social context that has stimulated the Magisterium of the Church to intervene against the increasingly widespread trend to "justify certain crimes against life in the name of the rights of individual freedom," demanding "not only exemption from punishment but even authorization by the State, so that these things can be done with total freedom and indeed with the free assistance of health care systems."[31]

So, according to *Evangelium Vitae,* it is not simply a question of asking the state not to interfere in a "private sphere," but instead of claiming "abortion rights," such as the right to be able to dispose of the life of the unborn, even with the support and help of public health systems and coverage by health insurance. It is within the context[32] of the call for a "legal legitimation" of an alleged "right to kill" that the Magisterium reminds us of certain principles regarding the relationship between moral and civil law.

According to *Evangelium Vitae,* the problem is twofold. It is first a problem of democracy, in which on the basis of the vote of the majority any law may be sanctioned. Second, however, it is also a problem of constitutional law, which as such rises above democratic and legislative mechanisms.

The encyclical maintains that "objective moral law which, as the 'natural law' written in the human heart, is the obligatory point of reference for civil law itself,"[33] will always be the measure of the legitimacy of any vote in a democracy. The democratic process cannot be "reduced to a mere mechanism for regulating different and opposing interests on a purely empirical basis."[34] To assert that at times it is necessary to accept such a reductive role, for lack of a better way to assure social peace, certainly contains "some element of truth"; but in that case, the encyclical adds, "without an objective moral grounding not even democracy is capable of ensuring a stable peace."[35]

In this way, *Evangelium Vitae* confirms the central doctrine of the encyclical *Centesimus Annus*,[36] that an absolute truth about man, not a relativist philosophy, is the foundation of democracy. When reading *Evangelium Vitae*, one should not forget that the innovation of *Centesimus Annus* was the affirmation of a fundamental congruence between this truth about the human person and the modern culture of human rights, which is clearly seen in the principle of the *submission of democracy to law and*

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31. *Evangelium Vitae*, 4; cf. ibid., 11.
32. Cf. *Evangelium Vitae*, 68.
33. Ibid., 70.
34. Ibid.
35. Ibid.
36. See sections 44-47.

human rights,[37] that is, according to the tradition of the rule of law and the corresponding separation of powers.[38]

Obviously, in the absence of such an institutional-juridical perspective, referring to "objective moral law" or to the existence of "essential and innate human and moral values which flow from the very truth of the human being and . . . safeguard the dignity of the person" would remain a sterile and ineffective appeal. Hence "no individual, no majority and no State can ever create, modify, or destroy" such values, but instead they "must only acknowledge, respect, and promote" them.[39] At this point, we are much closer to the language of modern constitutionalism than to that of tradition.

In my judgement, *Evangelium Vitae* does not intend to cast any doubt on the legitimacy of democratic majoritarian mechanisms. It does not even suggest that a law not in full consonance with the moral law is *ipso facto* illegitimate. The encyclical does not establish an opposition between democracy and a culture of human rights on the one hand and the moral law on the other. It declares, instead, that *civil law—meaning, primarily, constitutions with fundamental personal rights—includes a morally relevant dimension: the expression of that truth about man which in the end is also the measure of the legitimacy of any decision made by a democratic majority.*

We can thus assert that the argument of *Evangelium Vitae* is strictly constitutionalist. It situates itself at the legal-political level, but with the peculiarity of integrating that level (following its own "political" logic) and the ethical sphere, that is, the source of all human rights inasmuch as they are a secularized product of an ethos formed within the Judeo-Christian tradition with the support of Greek philosophy.

Here it is useful to cite the central passage of *Evangelium Vitae* (71) on the subject:

> Certainly *the purpose of civil law* is different and more limited in scope than that of the moral law. . . . [It] is that of ensuring the common good of people through the recognition and defense of their fundamental rights, and the promotion of peace and of public morality. The real purpose of civil law is to guarantee an ordered social existence in true justice. . . . Precisely for this reason, civil law must ensure that all members of society enjoy respect for certain fundamental rights which innately belong to the person, rights which every positive law must acknowledge and guarantee.

The constitutionalist imprint of these formulations is easily perceived: the power of the state is subordinated to the acknowledgment and guarantee of

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37. *Centesimus Annus*, 47.
38. Ibid., 44.
39. *Evangelium Vitae*, 71.

individual rights. The words just quoted, however, recall the essentially *ethical* or moral status of these rights. Thus, the mediation between moral exigencies and the legal-political order is carried out through constitutional law insofar as it includes fundamental rights. The encyclical does not deny the "diverse" and "limited" character of civil law and its specific ends (peace, orderly social coexistence, justice, public morality); at the same time, however, it teaches that such functions have their roots in that truth which came to be known as "human rights."

Admittedly, there are other interpretations that ignore fundamental rights understood as an expression of a truth and view them as a sort of least common denominator in a pluralistic society that foregoes any formulation of a "common good" in terms of substantive values. Without discussing the problem at this point, let us continue with the text of the encyclical, which now goes a step further:

> First and fundamental among these [rights] is the inviolable right to life of every innocent human being. While public authority can sometimes choose not to put a stop to something which—were it prohibited—would cause more serious harm, it can never presume to legitimize as a right of individuals—even if they are the majority of the members of society—an offense against other persons caused by the disregard of so fundamental a right as the right to life. (71)

Finally, here is the passage that includes perhaps the decisive argument from a practical-legal viewpoint:

> The legal toleration of abortion or of euthanasia can in no way claim to be based on respect of the conscience of others, precisely because society has the right and duty to protect itself against the abuses which can occur in the name of conscience and under the pretext of freedom. (71)

So the encyclical proposes a three-part thesis:

(1) The unborn (individuals belonging to the species *homo sapiens* in embryo and fetal form) possess a right to life. The question therefore is placed within the scope of fundamental rights.

(2) It follows that such unborn individuals are human persons appropriately entitled to such rights.

(3) The state has the duty not only to respect fundamental rights of liberty, but also to have them respected against interference by others; in the case of abortion, this means interference by the mother (perhaps under pressure by others) and by the doctor.

This last point is the decisive one, because it clearly implies affirmations (1) and (2). There are those who deny point (3). There are also those, however, such as Ronald Dworkin, who deny that this question is pertinent to "individual rights." Finally, there is the most extreme theory, but very influential because it is internally coherent, which does not deny that (1) is relevant, *provided that the unborn is truly a person*, the acknowledgment of

which is, however, denied both to the unborn and to the baby after birth at least up to a certain stage (the view of Mary Anne Warren, Peter Tooley, Peter Singer, Helga Kuhse, and Norbert Hoerster). We will discuss this in Section VI.

The doctrine of the encyclical truly opens an avenue for an argument regarding fundamental rights and freedoms in a constitutional state.[40] Let us see now how the question presents itself in two concrete cases: the Federal Republic of Germany and the United States of America. The ethical-political discussion, if it hopes to be practical and truly relevant, must necessarily face the real problem within the juridical order of the state.

V. The Protection of Life in Constitutional States: The Federal Republic of Germany and the United States of America

The constitutional state that recognizes fundamental individual rights, more than any other type of state, is compelled by its own inner legal-political logic to provide an effective defense of life, including the lives of the unborn. A thorough analysis of the differences between Germany and the United States will give us sufficient grounds for judgment. What interests us in both cases is the jurisprudence of the supreme constitutional courts. Their approaches take on a paradigmatic value insofar as they are antithetical.[41]

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40. I omit the first paragraph of section 72 because I consider it unimportant: the doctrine of the law that is unjust because it goes against natural law is applicable only in those cases in which civil law *commands* or *orders* something to be done that is immoral. In the case of abortion, this is not the fundamental problem. No one defends the right of the legislator to order the carrying out of abortions. In the extreme case of the state's total abstention from protecting the life of the unborn, there is no unjust law for the simple reason that there is no law.

41. See also Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge, Mass.: Harvard University Press, 1987), 24 ff; H. Kaup, *Der Schwangerschaftsabbruch aus verfassungsrechtlicher Sicht. Eine rechtvergleichende Untersuchung anhand des deutschen und des amerikanischen Rechts* (Frankfurt/M.: Peter Lang, 1991); H. Reis, *Das Lebensrecht des ungeborenen Kindes als Verfassungsproblem* (Tübingen: J.C.B. Mohr Paul Siebeck, 1984). For information on legislation and related problems in different countries, see United Nations (Department of Economic and Social Development), *Abortion Policies: A Global Review*, 3 vols. (New York: UN, 1992); P. Sachdev, ed., *International Handbook on Abortion* (New York: Greenwood Press, 1988); A. Eser and H.G. Koch, eds., *Schwangerschaftsabbruch im internationalen Vergleich. Rechtliche Regelungen - Soziale Rahmenbedingungen - Empirische Grundlagen*, (Teil 1: Europa; Teil 2: Aussereuropa), (Baden-Baden: Nomos Verlagsgesellschaft, 1987 and 1989); E. Ketting and Ph. von Pragg, *Schwangerschaftsabbruch. Gesetz und Praxis im internationalen Vergleich* (Tübinger Reihe 5) (Tübingen: DGVT, 1985); S.J. Frankowski and G.F. Cole, *Abortion and Protection of the Human Fetus: Legal Problems in a Cross-Cultural Perspective* (Dordrecht: Martinus Nijhoff, 1987); E. von Hippel, "Der Schwangerschaftsabbruch in rechtsvergleichender Sicht," in H. von Voss et al., eds., *Chancen für das ungeborene Leben* (Köln: Kölner Universitätsverlag, 1988), 69-94.

To a certain extent it is possible for the constitutional state not to recognize and protect the right to life of the unborn. It depends on the political will. My argument, therefore, is not a judgement of political facts—which, in my view, do not correspond to what legal logic requires—but of the legal-political ethics that animate democratic constitutionalism. What I am concerned to highlight is that such will can never be based on law; rather, it is precisely the legal-political logic that points the way toward an effective legal defense of prenatal life.

A. The Jurisprudence of the German Constitutional Court and Its Implications

In Germany, the recognition of fundamental rights began in the 1960s to evolve from their interpretation as simple individual "freedoms" claimed in order to protect the individual from the state, to a more "institutional" understanding of them. Fundamental rights not only represent the freedoms of the individual in relation to the state but also express an order of values to be realized by the political community; they constitute the aims that define state functions and tasks.[42]

From the standpoint of the theory of fundamental rights, a decision of the Federal Constitutional Court on 25 February 1975[43] regarding an attempt by the *Bundestag* to liberalize abortion,[44] was a decisive turning point. It was a turning point in understanding that fundamental rights (in particular the right to life) not only guarantee immunity from interference or threats by the state (the liberal idea of the *status negativus*, of law that protects *against* the state), but they also confer on the individual, through state

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42. See H.P. Bull, *Die Staatsaufgaben nach dem Grundgesetz* (Kronberg/Ts: Athenäum Verlag, 1977) esp. 155 ff; P. Häberle, *Die Wesensgehaltgarantie des Art. 19 Abs. 1 Grundgesetz. Zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt*, 3rd expanded ed. (Heidelberg: C.F. Müller, 1983) (partially translated into Italian under the title: *Le libertà fondamentali nello Stato costituzionale*, P. Ridola, ed. [Roma: La Nuova Italia Scientifica, 1992]); K. Löw, *Die Grundrechte. Verständnis und Wirklichkeit in beiden Teilen Deutschlands* (München: UTB/Verlag Dokumentation, 1977).

43. The most important passages from the judgment are found in the excellent book by H. Thomas and W. Kluth, eds., *Das zumutbare Kind. Die zweite Bonner Fristenregelung vor dem Bundesverfassungsgericht* (Herford: Busse-Seewald, 1993). The original version of Häberle's important study, mentioned in the preceding footnote, goes back to 1962 and it therefore does not include this pivotal decision of the *Bundesverfassungsgericht*. In the expanded edition of 1983 the decision is mentioned briefly (at 289) in a manner that shows how this judgment establishes that the *nasciturus*'s right to life unconditionally prevails over competing interests.

44. For the history of the debate, see M. Gante, *§218 in der Diskussion. Meinungs- und Willensbildung 1954-1976*, (Düsseldorf: Droste Verlag, 1991) (Forschungen und Quellen zur Zeitgeschichte Bd. 21).

action, the right to protection from similar interference by others, as is the case of the unborn with respect to the mother or doctors.[45]

The decision of the Federal Constitutional Court thus includes two fundamental affirmations. First of all, the *nasciturus* is not a being "not yet human," but is in the course of developing its humanity; it is a human being that is developing at all time *as a human being* (a process that obviously continues for many years after birth). On the basis of that premise, the court equates the right to life of the unborn with that of any other human life, explicitly declaring that in the phrase "everyone possesses the right to life . . . " (in Article 2, Section 2 of the *Grundgesetz*), the word "everyone" refers to each living human individual, including therefore the unborn human being. It follows that his or her right to life prevails at any time over the mother's right to self-determination.[46]

The second affirmation recognizes that the right to life of the unborn requires the state not only to abstain from any interference with the life of the unborn, but also to protect that life if threatened by others. Since the right to life is the fundamental good, the source for any other right or legal entitlement of the individual, any legally recognized interference that would contradict it cannot be tolerated in principle, with the exception of a case relating to the application of the principle of proportionality (for instance, when the life of the unborn child seriously threatens the mother's life).[47]

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45. Fundamental in this respect: J. Isensee, *Das Grundrecht auf Sicherheit. Zu den Schutzpflichten des freiheitlichen Verfassungsstaates* (Schriften der Juristischen Gesellschaft e.V. Berlin, Heft 79), (Berlin-New York: Walter de Gruyter, 1983); E. Klein, "Grundrechtliche Schutzpflicht des Staates," *Neue Juristische Wochenschrift* 42 (1989) 1633-1640; H. Tröndle, "Der Schutz des ungeborenen Lebens in unserer Zeit," *Zeitschrift für Rechtspolitik* 22 (1989) 54-61; D. Lorenz, "Recht auf Leben und körperliche Unversehrtheit," in J. Isensee and P. Kirchhof, eds., *Handbuch des Staatsrecht der Bundesrepublik Deutschland,* Vol. VI (Heidelberg: C.F. Müller, 1989), 3-39. See also W. Kluth, "Verfassungauftrag Lebensschutz. Vorgeburtlicher Lebensschutz zwischen staalicher Anmassung und verfassungsrechtlicher Pflicht," 93-117; and W. Höfling, "Die Abtreibungsproblematik und das Grundrecht auf Leben," 119-144, in H. Thomas and W. Kluth, *Das zumutbare Kind.*

46. According to Article 1, Section 1 of the *Grundgesetz*, the state has a duty to respect and protect human dignity. In the abortion decision by the German Constitutional Court in 1993, the court stated that the Human Dignity Clause of Article 1 is the basis of the state's duty to protect the right to life, which is affirmed in Article 2, Section 2.

47. This position has been confirmed by the second judgment of the German Constitutional Court, in 1993; the whole text can be found in *Juristen Zeitung* (special edition) of 7 June 1993. On the law voted by the *Bundestag* in 1992 that brought about this judgment, see the study, stemming from an expert's report requested by the Bavarian government, by M. Kriele, *Die nicht-therapeutische Abtreibung vor dem Grundgesetz* (Berlin: Dunker & Humblot, 1992). The report commissioned to Professor Albin Eser by the *Bundestag* instead reached a conclusion favorable to the law that was finally declared unconstitutional by the Constitutional Court; cf. A. Eser, *Schwangerschaftsabbruch: Auf dem verfassungsrechtlichen Prüfstand. Rechtsgutachen im Normenkontrollverfahren zum Schwangeren- und Familienhilfegesetz von 1992* (Baden-Baden: Nomos Verlagsgesellschaft, 1994).

A dissenting opinion in this case asserted that fundamental rights should only have the function of protecting the individual from interference by the state; a right to life would only exist to safeguard oneself from the state's threats to life. This theory—which I shall henceforth refer to as a "proto-liberal" view—assumes that conferring a duty on the state to restrict the freedom and ostensibly private choices of its citizens perverts the essential meaning of the aforementioned rights.[48] Precisely this theory, however—underlying the decision of the U.S. Supreme Court in *Roe v. Wade*—is rejected by the German Federal Constitutional Court with the double affirmation that the unborn child possesses a fundamental right to life, just as any other living human being does, and that the state is obliged to intervene to protect it from aggression by third parties.

Such a stand in favor of state intervention is based on a Hobbesian argument: the coercive power of the state is legitimized precisely by its function of establishing security, order, and peaceful coexistence among men.[49] For this purpose, the citizens delegate to the state a monopoly of legitimate violence, renouncing the right to defend themselves or to take the law into their own hands, thus establishing a mutual linkage of subordination and protection. This development, however, clearly implies that the state also has the duty of guaranteeing the security and protection of the individual, who has freely deprived himself of the possibility of self-protection. The "liberal" notion of freedoms *in opposition* to the state, to protect against the state's interference, is only established later in history. As Professor Isensee stresses, the liberal and constitutionalist idea of freedoms asserted *against* the state already presupposes the state's protective function. Liberty has two sides: security *by means of* the state and security *in relation* to the state. These are the two sides of civil liberty.[50]

Especially in the case of the unborn, the mere *status negativus* (freedom and security from the state) is obviously insufficient. For the unborn, the greatest threat is not the state, but the mother. So if the state does not confer protection, the right to life would serve no purpose for the unborn (the same is true for babies already born but still small and totally

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48. This argument has remained without decisive influence on legal doctrine: see P. Preu, "Freiheitsgefährdung durch die Lehre von den grundrechtlichen Schutzpflichten," *Juristen Zeitung* 46 (1991) 265-271, esp. 266; and R. Wahl and J. Masing, "Schutz durch Eingriff?," *Juristen Zeitung* 45 (1990) 553-563. The notion "protoliberal" refers to the first of two historical phases of liberalism. The first phase is characterized by the establishment of individual rights against the state (e.g., the absolutist state). The second phase adheres to the view that individual rights are to protect persons not only from the sovereign state but also from one another (that is, from other persons). In this second historical phase, it is widely understood that a political society is shaped by persons living together in mutual respect of rights.

49. See Isensee, *Das Grundrecht auf Sicherheit*, and also Klein, *Grundrechtliche Schutzpflicht des Staates*, 1635 ff.

50. J. Isensee, *Das Grundrecht auf Sicherheit*, 6; 21ff.

defenseless). It seems logical, then, that the only means for the unborn to enjoy an effective right to life is through the state's guarantee to protect that life from private interference, from whomever may be interested in eliminating it.

As we have already mentioned, however, the problem is that the implicit calculation in a self-renunciation of private defense, even if it turns out to be particularly suitable as the basis for the duty of the state to safeguard life against threats from third parties, does not seem to work in the case of the unborn. Even if protecting prenatal life now appears to be an incontestable duty of the state, it is not clear how it can be sufficiently motivated by a purely contractarian logic. Once the right to life of the unborn is granted, we cannot see how to deduce in a cogent manner the duty of the state to protect prenatal life on the basis of a merely utilitarian conception, whether of the Hobbesian or Lockean type. It seems that the state protects only the interests of the *born*, that is, those who represent the parties to the social contract. This appears to be implied, at least hypothetically, in the image of mutual self-renunciation and subordination to state power.

The dilemma is evident also in the question of the measures with which the state must carry out its protective role. These must be proportional, reasonable, and not excessive. For instance, it would be contrary to those principles to expect that the state place under the surveillance of a policeman every expectant mother until birth, to prevent a possible abortion. The protection of the unborn must nevertheless be effective. Discussions mainly concern the question of whether the most appropriate means is the penal code or some other measure(s). In 1975, the Federal Constitutional Court established that whenever other measures for the defense of the life of the unborn prove to be ineffective, the state is obliged to intervene with the criminal law.[51]

Abortion undoubtedly remains an *unlawful* act (*rechtswidrig*). So it is out of the question that it could be regulated as an ordinary service, provided by the health care system. It cannot be financed by insurance, because the state would thus be favoring, indirectly, an illegal act. We can also affirm that the state is obliged to promote measures capable of preventing situations

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51. According to the 1993 judgment and the subsequent law adopted in 1995, the legislator can, without violating the Constitution, largely renounce the use of the criminal law, resorting to preventive and compulsory counseling in order to encourage the expectant mothers to accept the baby. By renouncing the resort to the criminal law, appealing to the woman's sense of responsibility, and stressing the availability of social assistance, the court's decision was meant to ensure that this counselling gave more effective protection to the unborn. That objective, however, seems to have been undermined by the 1995 law, which declares that the counselling must be "open to any outcome," in the sense of precluding any attempt to influence the women's decision. In most instances, this effectively limits the counsellor to providing information about the availability of abortion and issuing the required certificate, which, de facto, is a "license to abort." As of August, 1999, the Constitutional Court has not had occasion to determine the constitutionality of the 1995 law.

of serious conflict, creating a climate of respect for life (and therefore rejecting any pro-abortion propaganda by public means). Furthermore, it is the task of public authorities to organize or stimulate specific private initiatives, to promote a social net capable of guaranteeing the survival of babies born but rejected by their mothers, thereby encouraging expectant mothers to give birth to their babies. In a culture of life, not death, completion of the pregnancy would be made attractive to the women even in cases of true conflict. The alternative, the planned elimination of these human beings,[52] implies the assassination of a woman's conscience, to use Mother Teresa's strong expression.

Reality shows, however, how such measures are still inadequate. The need for the criminal law appears inevitable. It provides protection for the woman herself, often exposed to pressure from others, such as the father of the baby or the surrounding family or social environment. It is almost impossible for a woman facing such pressures to resist choosing a procedure that is legal and therefore presented as an ordinary medical service financed by health insurance. In this respect, it is precisely the criminal law that provides legitimate help to the woman and often represents a last appeal. This does not automatically imply the need to inflict the expected penalty upon the woman, since criminal law applies upon recognition of the guilt of the incriminated person. Criminal law is very flexible, and it would be just for abortion doctors, especially those who make a business of abortion, to be the ones punished.[53] Finally, to maintain in society and in individual conscience an awareness of the injustice and violation of the law implied by a given behavior, its criminalization will usually prove to be indispensable.[54] The fact that this criminal law cannot be enforced systematically is analogous to the case of rape within marriage. Though difficult to apply, this penal measure is being promoted by some who justify it because of the grave wrongfulness of raping one's spouse.

Even though I consider the intervention of criminal law to be inevitable, its legitimacy must be based on a specific and well-articulated reasoning. The German Federal Constitutional Court clearly affirms that the question of a possible intervention through the criminal law is not equivalent to the

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52. W. Geiger, "Rechtliche Beurteilung des Schwangerschaftsabbruchs," in H. von Voss, ed., *Chancen für das ungeborene Leben*, 55.

53. Fundamental rights rest with the holder of the right and therefore cannot be made relative. Criminal law, instead, allows a differentiation according to the culpability of the accused for injury to the fundamental rights of others. Such differentiation, however, cannot ever attenuate the duty of safeguarding the fundamental right; see Daniel Rhonheimer, "Das Recht des hilflosen Lebens: Zum Zusammenhang von Menschenrechten, Existenzrecht, Rechtsfähigkeit und Rechtsstaat," in P.P. Müller-Schmid, ed., *Begründung der Menschenrechte (Archiv für Rechts- und Sozialphilosophie*, Beiheft 26), (Stuttgart: Franz Steiner Verlag, 1986), 45-127, esp. 47 ff.

54. *Evangelium Vitae* asserts this in section 90. Cf. also Kriele, *Die nicht-therapeutische Abtreibung vor dem Grundgesetz*; Gante, *§ 218 in der Diskussion*, 218 ff.

question of whether the state is obliged to punish particular actions because they are immoral. To provide an answer, the Constitutional Court affirms that one must consider not only the importance of the good involved (in this case life), but also the limits beyond which its injury may become *harmful to society*. The real effectiveness and applicability of penal sanctions must be evaluated as well.

While it remains a morally unjustifiable act, a valid argument cannot be found to punish an abortion carried out in the event of a diagnosed danger to the life of the mother. In that case—a well-chosen example of the difference between moral and legal-political logic—the superiority of the right to life of the unborn would not be even defensible, according to the common view of pro-life jurists. The state, in fact, cannot *force* a woman to sacrifice her life to save the life of the unborn. Two *equal* goods are involved here. Furthermore, it is difficult to show the harm to society and human coexistence caused by such behavior. This type of abortion, then, should not even be considered illegal (with respect to the *Grundgesetz*), but justified.[55]

The case of what is known as the "embryo-pathological diagnosis" appears to be different from the preceding. (At present, under the German legislation of 1995, this diagnosis is now likened to a life-threatening pregnancy, giving rise to more problems.) Contrary to a widespread misunderstanding, this diagnosis is not based strictly on "eugenic" grounds, in the sense of intending to decriminalize or even declare legal the killing of an unborn human who is handicapped or subnormal or disabled, because its future life is considered unworthy of being lived. That is to say, this diagnosis is not intended to legalize the killing of a fetus "in his own interest" (as Peter Singer and others would say), but in the interests of the mother. It is not considered possible to demand that the mother give birth and take care of a baby with such disabilities. Thus, the embryo-pathological diagnosis is based on a weighing of the good of the "unborn life" and an ill-defined right of the mother, which might be called the "right to a healthy baby."

We can immediately perceive the inhumanity inherent in the proclamation of a right of this sort. It is incoherent inasmuch as the German legal system had previously equated the constitutional protection of the life of the unborn with the protection of the life of any other individual who is already born. The embryo-pathological argument must also in principle justify infanticide for analogous reasons (it would even seem more logical since prenatal tests have a margin of error, so it appears much more sensible to wait for the birth of the unborn child and then proceed to infanticide).

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55. The problem, pointed out by some authors, consists in the intention initially to favor the mother's life, but "later the same criterion has been used to protect the mother's health, then her psychological health, then for social reasons"; cf. E. Sgreccia, *Manuale di Bioetica*, I, 2nd ed. (Milano: Vita e pensiero, 1994), 399.

The implicit reasons for such a procedure are revealed in the general attitude toward the physically and mentally disabled. It is also evident that the practice of such behavior will deeply change the conditions of the handicapped within our society, precisely together with the growth of knowledge of the embryo and the fetus as a result of scientific progress. The value of mutual respect for life will weaken and become corroded. This clearly applies also to other diagnoses, such as the "psycho-social" one, which ultimately renders the embryo-pathological one superfluous since it declares legal any abortion carried out whenever the unborn may constitute a potential threat to the psychological stability or the social or professional prospects of the woman (or possibly of the couple).[56]

What is certain in all these cases is that the legal-political argumentation adopted by the German Federal Constitutional Court does not appear disposed to tolerate a generalized "right to self-determination" of the woman that would prevail even for a limited time over the right to life of the unborn. But this appears to have been exactly what the Supreme Court of the United States has granted in *Roe v. Wade*, the decision that declared unconstitutional a Texas law of 1857 which prohibited abortion except in the case of a diagnosed danger to the life of the mother.

B. The United States of America: The Right to Abortion as a Liberty Protected by the Constitution

The Constitution of the United States of America, unlike that of the Basic Law of the Federal Republic of Germany, does not explicitly recognize a "right to life." The American Constitution did not even originally include any separate list or "bill" of fundamental rights. The Bill of Rights was added only in 1791, and other specifications concerning civil rights were inserted subsequently, according to the requirements of the historical situation.[57]

An example of such an addition is the Fourteenth Amendment, ratified in 1868. The Due Process Clause of this amendment, analogous to the Fifth Amendment of 1791, affirms the constitutional right of every person to lawful judicial proceedings, and the Equal Protection Clause mandates that persons be treated equally before the law. The relevant part of the text reads as follows: "nor shall any State deprive any person of life, liberty, or

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56. I am not speaking here of the case of verified criminality (that is, rape). Not because I believe it to be licit, but because here again the problem is different, in the sense that the pregnancy cannot be imputed to the mother; it is not the effect of a free act. For the legislator, it can then be a case in which he does not have to intervene, at least not necessarily, out of motives of *Zumutbarkeit* (reasonableness), for instance. Supposing, however, that even in this case the unborn has a right to life, it will be difficult to establish the basis for the *lawfulness* of such an abortion.

57. The Fifth Amendment, ratified in 1791, protects the "life" of a "person" against deprivation by the national government without "due process of law."

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

At least two previous decisions (*Griswold v. Connecticut*[58] in 1965 and *Eisenstadt v. Baird*[59] in 1972) had interpreted these clauses as admitting the existence of a constitutional right to privacy. In declaring invalid a Massachusetts law that prohibited the sale or distribution of contraceptives to unmarried persons, *Eisenstadt* applied this right to what some scholars have called "procreative autonomy." In *Roe v. Wade* this right was extended to abortion.[60]

The majority opinion in *Roe*, written by Justice Harry A. Blackmun, justifies the decision in the following terms: a law, or any other intervention by the state that would prohibit a woman from freely disposing of her unborn child, would be a violation of her constitutional right to privacy. Blackmun writes that "we feel" that the Fourteenth Amendment encompasses the right of the woman to decide "whether or not to terminate her pregnancy."[61] The opinion also maintains that such a right is not absolute. It is said to find its limit when reaching certain matters that are of interest to the state, such as the woman's health, the quality of the health care system, and finally *prenatal life*, beginning from the moment the fetus is viable (that is, capable of living independently from the mother, in case of premature birth).[62]

These elements immediately distinguish it from the German constitutional situation: on the basis of the German *Grundgesetz*, a law that forbids abortion has the juridical meaning of protecting a fundamental right of the unborn, provided for in the constitution. In the United States, by contrast, the same law is deemed an intrusion on the the woman's freedom to decide whether or not to go forward with a pregnancy. The difference reflects the development of German juridical doctrine, which sees in fundamental rights an order of values to be realized by political society, whereas the United States' conception remains at a protoliberal, individualistic level, relating to the freedoms to be set "against the state."[63]

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58. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

59. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

61. Ibid., 153.

62. Ibid., 153-155; 161-166. Note that in *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Roe v. Wade*, maternal health was defined in extremely broad terms. It was said to comprise all factors ("physical, emotional, psychological, familial, and the woman's age") relevant to the patient's well-being (*Doe v. Bolton*, at 192). When read in conjunction with the concluding paragraphs of *Roe v. Wade*, this broad understanding of maternal health suggests that the pregnant woman is at liberty to have an abortion even after viability so long as "in appropriate medical judgment" it is necessary for the "health" of the mother (*Roe v. Wade*, at 165).

63. See Glendon, *Abortion and Divorce in Western Law*, 33 ff. An important contrary position, in defense of *Roe*, is taken by Ronald Dworkin, *Life's Dominion: An Argument*

From this point arises the question whether it is possible to include the unborn also within the "persons" mentioned in the Fourteenth Amendment. For Blackmun, however, it is fundamental that the unborn child cannot be a "constitutional person"; he submits that the use of the word "person" in the Constitution has only postnatal applications.[64] Furthermore, according to Blackmun, the allegedly higher level of tolerance toward abortion in the nineteenth century is evidence that the word "person" used in the Fourteenth Amendment does not include the unborn.[65] There is no precedent that recognizes the unborn child as a person within the meaning of this amendment, says Blackmun.[66]

It may seem correct, then, to affirm that on the basis of conventional legal sources (constitutional text, case law, and nineteenth-century statutes) it is not possible to bestow any right on the unborn. Nevertheless, the simple deduction of procreative autonomy deriving from the text and precedent implies other presuppositions, and here begin the "mysteries" of *Roe v. Wade*. We may ask:

(1) In a legal question concerning the life of the unborn, why did the Court limit itself to the text of the Fourteenth Amendment, which does not address the question of (possible) rights of the unborn?

(2) Why suppose that the right to privacy might not be limited by another possible right, such as the right to life of the unborn?

Let us look at the second question first. We may recall that the German Federal Constitutional Court did not encounter any difficulty in affirming that the word "everyone" in Article 2, Section 2 of the *Grundgesetz* ("everyone possesses the right to life") includes every "living human being, and therefore also the one not yet born." The German Constitutional Court assumed that the decisive basis for an entitlement to be treated equally to others plainly consists in being a (living) human, that is, a living being belonging to the biological species *homo sapiens*. *Roe v. Wade* is distinguishable in that the German court did not dwell on an alleged meaning of "the text," but acknowledged the reality of the new existence of a human being, a reality sufficiently known on the basis of the evidence furnished by modern science.[67]

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about Abortion and Euthanasia (London: Harper Collins, 1993). For an interesting, resolute criticism of Blackmun, see Hadley Arkes, *First Things: An Inquiry into the First Principles of Morals and Justice* (Princeton: Princeton University Press, 1986), chapters XV, XVI, and XVII. (The author nevertheless seems to me to be exaggerating in denying the existence of a private sphere, immune from the interference of civil law.)

64. *Roe v. Wade*, 410 U.S. 113, 156-157.

65. Ibid., 158.

66. Ibid., 157-158.

67. It is important to note that such evidence is not denied today even by the most relentless advocates of freedom of abortion, such as the followers of the theories of Michael Tooley, Peter Singer, Norbert Hoerster; they merely deny that an individual of the human species is already a *person* with the corresponding right to life. We shall speak briefly about

Even if for Justice Blackmun the right to privacy is "not absolute," but limited where the "interests of the state" are implicated in relation to prenatal life, this obviously does not confer any indefeasible right on the carrier of that life. Consequently, the decisive point does not seem to consist in the existence or nonexistence of a right to privacy—a question that in this context seems irrelevant—but rather whether the unborn, in the embryonic stage or in the fetal stage, is or is not a human being with a corresponding right to life capable of restricting the "right to privacy," as well as any other freedom or right of the mother.

The question of whether the unborn is a person in the constitutional sense does not depend so much on the different passages where the Constitution speaks of "persons," not even those of the Fourteenth Amendment, but rather from the answer *tout court* to the question of whether the unborn is a person or not. The fact that the unborn is not a person in one or more specific legal contexts, such as the Fourteenth Amendment, does not necessarily mean that it is not to be considered a person. Nor does it mean that it is undeserving of those protections and entitlements that every person enjoys precisely insofar as he or she is a human being. This, rather than the putative right to privacy, is the decisive point here. And the very exclusion of this question is the foundation of *Roe v. Wade*.[68]

Furthermore, Blackmun did not show that the legal analysis could proceed without philosophic analysis. As Mary Ann Glendon has written, Justice Blackmun "has diligently avoided describing the fetus either as human or as alive."[69] In this regard, Blackmun wrote: "We need not resolve the difficult question of when life begins."[70]

For Blackmun, it is a question on which there are as many opinions as there are religions, philosophies, and scientific theories. He therefore concentrates on the issue of "viability."[71] In his view, only the right to life of the fetus already able to survive independently from the mother would be defensible, from both "logical and biological" standpoints.[72] In defending Blackmun more than twenty years later, Ronald Dworkin writes that an idea of some antiabortionists, according to which the unborn is a constitutional person, derives from the theological-religious conviction that "God, at the moment of conception provides the human fetus with a rational soul and that a rational soul possesses the moral right to live."[73] Yet Dworkin's account is mistaken because the "person" is not "the soul," and we cannot affirm

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them later.

68. Blackmun admits that if the unborn were a "constitutional person," the entire argument against the Texas law would collapse. The same is affirmed by Dworkin, *Life's Dominion*, 116.

69. Glendon, *Abortion and Divorce in Western Law*, 34.

70. *Roe v. Wade*, 410 U.S. 113, 159.

71. For a criticism of the concept of viability, see Arkes, *First Things*, 376 ff.

72. *Roe v. Wade*, 410 U.S. 113, 163.

73. Dworkin, *Life's Dominion*, 110.

that the human fetus is a person *because* it has a rational soul. Rather, it is maintained that the living fetus has a soul *because it is a human person* and that it is a person precisely *because and inasmuch as he or she is a living individual of the species homo sapiens.* The latter point is a matter of scientific fact, not "religion." Both Blackmun and Dworkin err in refusing to recognize the fundamental relevance of an individual belonging to the human species—the truth that it is just such belonging that *implies* being a person with an equal right to life.[74]

Denying the status of the unborn as a person, Blackmun referred to tradition of the common law, with the words: "the unborn have never been recognized in the law as persons in the whole sense."[75] What, however, does "a person in the whole sense" mean? Does it mean, perhaps, that in the common law the unborn is considered a sort of half-person? A person in some lesser sense? A person, but somewhat less than a born one? This is impossible. Half-persons, or three-quarter persons, do not exist. Instead, there exist individual humans who are true and authentic persons, but who have not yet developed all of the properties typical of persons (for example, certain physical attributes; a certain level of intelligence and formation; and the capacity to act freely and responsibly). These properties may develop in such individuals precisely because they *are* persons.[76]

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74. On this matter, see A. Suarez, "Ist der menschliche Embryo geistig beseelt?," *Annales Theologici* 4 (1990) 69-107, esp. 93. A certain inability to understand the position of the Magisterium of the Catholic Church on the fundamental identity between "human person" and "human individual" has become almost universal. Even authors engaged in refuting the so-called "Catholic position" seem to err on this point, thinking that "person" is the individual soul, and not the human individual, a substantial unity of body and soul. This error, which invalidates the whole argumentation by such authors, can be found in A. Leist, *Eine Frage des Lebens. Ethik der Abtreibung und künstlichen Befruchtung* (Frankfurt/M.: Campus, 1990), 110, where surprisingly he links himself to N.M. Ford, *When Did I Begin?,* whose exposition on this point (61-101) is clearly correct. According to Ford, the person is not "the human soul," but the individual of a human nature.

75. *Roe v. Wade,* 410 U.S. 113, 162.

76. Effectively, Anglo-Saxon common law has recognized the so-called "Born Alive Rule" since the thirteenth century, according to which the killing of a fetus prior to birth, although considered to be misprision, was not a homicide according to the law. Bonnie Steinbock, *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses* (New York: Oxford University Press, 1992), 105 ff. (a book that defends the judgment in *Roe v. Wade* as well as the idea that the unborn cannot be the holder of a right to life), makes an attempt—referring to Edward Coke, Chief Justice and the famous author of the Petition of Right in the 1600s—to read the Born Alive Rule as reflecting, first, the fact that at the time the fetus was considered to be a part of the mother and not to have a separate existence (an opinion that we can now say is obsolete), and second, the belief that "a fetus is not yet a fully developed human being, a person like the rest of us" (106). Even if this were the opinion of Edward Coke (and later of Blackstone), on the basis of the still dominant influence of the Aristotelian-scholastic theory of the later "animation" of the fetus, it is certainly possible to correct the venerable jurisprudential tradition of the common law on the basis of more current and modern scientific knowledge. It seems, however, that Blackstone was thinking instead about the question of a judicial ascertainment of the existence of a

The fact that the law does not extend all of the rights of persons to the unborn—because the unborn, for example, lack the present capacity to exercise or to benefit from those rights—does not mean that they would not benefit from a right to life. Clearly, they would. Distinctions before the law do not mean, for example, that a legal adult is "more of a person" with an "elevated right to life" than, say, a minor. The right to life obviously plays a special role. Every other right, even if still not accorded to the unborn, may be granted to them at a later time, according to suitability and maturity; other rights may even be revoked from a mature person and later restored. This is not the case with respect to the right to life, which therefore occupies a singular place. The necessity of recognizing it is not based on the development of specific properties typical of persons, but on the fact of being an individual who will develop such properties—in other words, on the basis of "being a person."

It does not appear to be a problem that the Constitution confers certain rights only to those who satisfy certain conditions—such as age—as long as the principles of equality before the law are protected. As we shall see in Section VII, however, granting such rights *assumes* that the individual in question is a person, with a right to live; otherwise, it would not be plausible to confer on him or her *any* civil right. No civil norm is legitimately capable of conferring on or withholding from a person the right to life. The civil law is *for* human persons, but it cannot (without arbitrary and therefore unjust discrimination) make the question of *who* counts as a human person a matter of intrasystemic legal analysis. Or it does so, as did the *Roe* Court, at the risk of catastrophic moral error.

Possessing the right to life cannot depend on the law, but instead on a fact antecedent to the law. The legislator is therefore obliged simply to ascertain whether the individual is or is not, in truth, a human person, with a corresponding right to live. The fact that the law does not define who is a "human person" does not change anything. Accordingly, the Supreme Court of the United States should have been obliged to decide what it expressly refused to discuss: when human life begins.

Given that the unborn is a human person with all of the rights connected with "being man," we must conclude that *Roe v. Wade* is simply based on an error. In the text of the American Constitution there is no basis for establishing whether the right of privacy does or does not include a

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human being at the time of an indictment for homicide: in order for someone to be condemned for homicide there must be clear and visible proof—*in rerum natura*, as it was said—of the prior existence of the victim, not just of the incriminating act. See also Keown, *Abortion, Doctors, and the Law*, 3-12; Clarke D. Forsythe, "Homicide of the Unborn Child: The Born Alive Rule and Other Anachronisms," *Valparaiso University Law Review* 21 (1987) 563; Joseph W. Dellapenna, "The History of Abortion: Technology, Morality, and Law," *University of Pittsburgh Law Review* 40 (1979) 359; Horan and Balch, "*Roe v. Wade*: No Basis in Law, Logic, or History," 93 ff.

woman's right to decide whether the unborn will live or die before reaching viability.

The Court could have declared that it was not qualified to decide the question, leaving it to the legislative competence of the several states.[77] I nevertheless think that, instead of declaring itself unqualified, the Court in 1973 could have appealed to sources of law not explicitly contemplated in the text of the Constitution. The Court's decision to limit itself to the express provisions of the Constitution could be justified only on the basis of a "positivist" or "originalist" interpretation of the Constitution.[78] This is not, however, the position of those who currently defend the decision in *Roe v. Wade*, such as Ronald Dworkin.[79]

A non-positivist approach could offer the possibility of having recourse to sources of law outside of the text of the Constitution, which in its Ninth Amendment states that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." According to this amendment, which was adopted in 1791, there is an explicit guarantee of rights unmentioned in the written text of the Constitution. One of the reasons for this was to calm the concerns of those who were initially opposed to the inclusion of a bill of rights in the Constitution, for fear that it could imply an abrogation of rights that existed but were not enumerated in the written text.[80]

Whatever its precise meaning, the Ninth Amendment is a legal text that affirms the existence of sources of law antecedent to and outside of the text of the Constitution. We should not forget that prior to the creation of the federal United States, individual states already had their own bills of rights.

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77. This was the argument of the famous article of John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *Yale Law Journal* 82 (1973) 920. Criticisms of the judgment in *Roe v. Wade* on the part of eminent specialists in constitutional law—many of whom favored abortion—were numerous; see the discussion in Glendon, *Abortion and Divorce in Western Law*, 44 ff.; 171 ff. (bibliography at note 175). A more extensive and recent bibliography can be found in Maureen Muldoon, *The Abortion Debate in the United States and Canada: A Sourcebook* (New York: Garland, 1991).

78. A notable representative of this line of thought is Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon and Schuster, 1989). See also Bork's article, "Natural Law and the Constitution," *First Things* (March, 1992), 16-20, and the critical responses to it in the May issue from the same year. More systematically: Russell Hittinger, "Natural Law in the Positive Laws: A Legislative or Adjudicative Issue?," *The Review of Politics* 55 (1993) 5-34. Also useful for understanding the problem is Michael J. Perry, *Morality, Politics, and Law* (New York: Oxford University Press, 1988), chapter six.

79. Dworkin, *Life's Dominion*. See also Dworkin's *Taking Rights Seriously*, 2nd expanded ed. (London: Duckworth, 1977), 131ff.

80. See Alexander Hamilton's polemic in *Federalist* No. 84 against the idea of including a "Bill of Rights" in the Constitution; cf. Hadley Arkes, *Beyond the Constitution* (Princeton: Princeton University Press, 1990), chapter four.

The most famous codification of rights was that of Virginia, in 1776, which states in its first paragraph, as a "right of the people":

> That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness and safety.[81]

This text does not speak of the procedural rights of citizens, but instead of "rights naturally inherent in man." It is the language of the modern tradition of human rights, based on the fundamental idea that humans possess certain rights *because they are human* and not because the rights have been conferred on them by society, and that the most fundamental of these rights is the right to life. As we have already seen, in the Prussian *Allgemeine Landrecht*, following the progress of embryological knowledge toward the end of the eighteenth century and under the influence of Enlightenment ideas, "the universal rights of humanity" were extended even to "children not yet born, beginning from the time of conception."

I do not mean to assert that the constitutional texts of the several states are to be considered binding on the case law of the Supreme Court of the United States; they are valid, of course, within the jurisdictional sphere of the respective states. Nevertheless, they could be sources of a law that has until now remained partially circumscribed in the United States for specific historical reasons. As Martin Kriele has observed,[82] an important reason for not having introduced the "rights of *man*" into the 1791 Constitution, let alone the concept of "human dignity," was the acquiescence in the interests of the slave states. Not even the Virginia language "that all *men* . . ." had any legal effect. In Massachusetts, instead, the declaration on the liberty and equality of all men led in 1783 to the abolition of slavery. Certainly, the slave owners could not accept the inclusion of any similar language in the Constitution. This explains why the idea of an equality of rights founded solely on "being man" or "human dignity" remained absent from U.S. constitutionalism. Here, in addition, is the logical premise of the famous *Dred Scott v. Sandford* decision in 1857, which denied the status of citizenship to slaves.

In light of the preceding, we can now see that the Court's legal options were open. The Court could have chosen to rely on the Ninth Amendment

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81. The constitution of Massachusetts speaks of "certain natural, essential and inalienable rights," and the Declaration of Independence of 1776 asserts as "self-evident truths" that all men "are endowed by their Creator with certain inalienable rights," among which is also the right to life.

82. *Einführung in die Staatslehre. Die geschichtlichen Legitimätsgrundlagen des demokratischen Verfassungsstaates*, 4th ed. (Opladen: Westdt. Verlag, 1990), 160 ff.

as justification for answering the pressing philosophic question, When does life begin?[83]

As we have observed, at key junctures in *Roe v. Wade* the Court adopted a rigidly positivist attitude to the rights of the unborn. Curiously, however, the Court also accepted the expansive account of the unenumerated right to privacy offered by the plaintiffs, and without serious analysis of legal materials such as text, precedent, and statutory practice. This discrepancy seems to have been the basis for the remark in Justice White's dissent that the Court's decision was "an exercise of raw judicial power."[84]

A later effort to have *Roe v. Wade* overruled in the 1992 case *Planned Parenthood v. Casey* was unsuccessful.[85] The latter decision partly modified the former without overruling it, inasmuch as it declared constitutional certain statutory provisions in Pennsylvania, which imposed restrictions on the freedom to abort. Based on the principle of *stare decisis*, the joint opinion in *Planned Parenthood v. Casey* argued that it is not possible simply to declare as erroneous a judgment that for over twenty years has stamped the politics of abortion and the public conscience of the nation. Moreover, according to the joint opinion, even if the result in *Roe v. Wade* was mistaken, overruling it would be the equivalent of unnecessarily weakening the legitimacy of the Court and the fidelity of the whole nation to the rule of law. In a dissenting opinion, Justice Scalia asserted instead that, supposing that there is a near-unanimous conviction on the part of specialists that the arguments in *Roe v. Wade* were inconsistent and erroneous, one could arrive at a conclusion that the principle of *stare decisis* should not be applied to this case. In sum: the *fact* that there exists a precedent, and that it was applied, does not dispense with the need to ask whether that precedent was mistaken.

VI. Strategies against the Legislative Defense of Life

Our discussion of the abortion decisions of the German Constitutional Court and the U.S. Supreme Court allows us to identify a few decisive points in our attempts to justify an effective protection of prenatal life in a constitutional democracy. We have seen that a coherent legal argument in defense of the unborn depends on the recognition of the unborn as a human

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83. We should not forget that Blackmun contends, with respect to the argument of the District Court of the State of Texas, that the woman's right to decide whether to terminate her pregnancy might also be derived from the Ninth Amendment (*Roe v. Wade*, 410 U.S. 113, 153). If that is possible, it also opens the door to asserting the unborn's right to life, as long as it is recognized to have the status of "human."

84. *Doe v. Bolton*, 410 U.S. 179, 222. Justice White's dissent in this case was joined by Justice Rehnquist, and a note indicates that White's dissent in *Doe v. Bolton* also applies to the Court's decision in *Roe v. Wade*. See *Doe v. Bolton* at 221.

85. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

person who is therefore endowed with a corresponding right to life. *Evangelium Vitae* also takes up this line of thought.

There are, however, strategies favoring a broad legalization of abortion that are founded on the attempt to abolish the recognition of the unborn as a *person*. The first strategy consists in distinguishing between "human individual" and "human person." The second is that of declaring irrelevant, legally as well as politically, the question of the "personhood" of the unborn. The third is to avoid such discussions by appealing solely to a woman's right to self-determination.

A. The Problem of Democracy

Allow me to digress briefly. The text of *Evangelium Vitae* could give rise to the impression that abortion is a question arising exclusively in democracies. In some sections, especially numbers 67 and 70, the encyclical seems ultimately to be identifying the problem of abortion with the power of democracies to decide anything arbitrarily, based on the will of the majority. The truths included in these passages seem to be taken for granted. They cannot, however, be interpreted to mean that democratic mechanisms favor the legalization and promotion of abortion. Even if this were the correct interpretation of these sections, this opinion would be difficult to defend empirically, because communist dictatorships were among the first nations to liberalize abortion, providing for its support with the assistance of the state.

In the United States, abortion was liberalized by a decision of a court—with more of an aristocratic, rather than democratic, character—that *opposed* an antiabortion law passed by a democratically elected legislature. The decision in *Roe v. Wade* did not represent the outcome of a majoritarian vote, but instead gave into the claims of what was at the time only a minority in American society. Furthermore, even the parliaments that have liberalized abortion in other countries are *representative* institutions, and their democratic legitimacy is not always clear. In this respect, the case of Switzerland is significant, where in the 1970s the people voted on a proposal to liberalize abortion in the first three months of pregnancy, and a majority rejected it. (An attempt to insert a definition of the beginning of human life in the Swiss constitution was, however, unsuccessful.) Such a definition was included in the Irish constitution, by a majority vote. In Poland, democratization meant also a revocation of the liberalized abortion that existed under the communist regime. Thus, it is not clear on what empirical facts one could maintain that democracy, in a special way, favors the introduction of legal abortion. Given certain cultural presuppositions, a democracy is capable of introducing and permitting abortion, as is every other form of government. (It would be more difficult to have abortion on demand if there were a "Catholic" dictatorship or monarchy, but is that form of government really desirable?)

At present, we are clearly facing a widening of the "culture of death," which is advancing at the same pace as the diffusion of democracy. This, however, is not the point, and we would be blind to maintain it in the face of the real problems of society, culture, people, and public opinion.

More than democracy, the real problem seems to be that represented by the institutions of the mass media, which are biased in this area. Even if their freedom is one of the great values of a democracy and represents a significant victory of democracy, they do not present themselves as subordinated to democratic control. This is, nevertheless, the price one must pay for the existence of an authentic and free public opinion, formed only in a climate of liberty. If a dictatorship were to permit the formation and articulation of public opinion (which normally would not occur), once it is subject to the pressure of the latter, the dictatorship would give in—much more easily than a democracy—to the temptation to liberalize abortion. Yet dictatorships are also prone to call for plebiscites (when they consider them convenient), premised on a majoritarian, but not democratic, logic (because they exclude a free process for the formation of public opinion and, in addition, offer no alternative in the vote itself). It is therefore not democracy that constitutes the problem, but the mechanisms and persons that form public opinion. It is not a question that depends on democratic institutions as such, but of human and cultural formation. In sum, the problem of the "culture of death" is not caused by political institutions, but reflects a problem of the society, and only indirectly becomes also a problem having to do with the institutions of the state and democracy. This is certainly one of the most important messages of *Evangelium Vitae.*

B. The Strategy of Distinguishing between a "Human Individual" and a "Human Person"

As we have seen, a fundamental premise for the legal defense of the life of the unborn in a constitutional democracy is recognizing that the unborn, in an embryonic as well as fetal state (and, by analogy, the physically or mentally impaired, no less than the person in an irreversible coma) must be considered human beings before the law, as much as any other human who is already born. This principle is one of the explicit premises of the German constitutional case law; by contrast, in *Roe v. Wade* the principle was supposedly "bracketed" by Blackmun, but its denial constituted the main premise of the decision. Given the present day scientific knowledge of genetics and embryology, no one today can reasonably deny that an individual formed by the fusion of gametes coming from individuals of the species *homo sapiens* is also of the species *homo sapiens*—an individual who needs nothing else to be defined as "human."

The first strategy for rendering this fact innocuous or irrelevant is the theory according to which the human fetus—and *a fortiori* the embryo—may be an individual belonging to the species *homo sapiens* but is not yet a *person*. According to this strategy, a "person" can be defined only

as a being endowed with a sufficiently developed self-awareness to have the desire and/or interest to survive, and therefore a corresponding *right* to life. This theory is thus based on the idea that every right corresponds to a subjective interest, one that is consciously formed by the holder of that right. The concept of a "person" is profoundly altered: "being a person" is reduced to a *property* of an individual of the human species that appears to begin only at a certain interval after birth and that can be lost during the course of life.[86]

This is evidently an idea imbued with strong anthropological-philosophical implications.[87] It can thus also be refuted with relative ease.[88] The theory nonetheless has the advantage of a certain intuitive plausibility based on the imprecise character of expressions such as "the fetus is not a person in the full sense," or "it is *potentially* a person" or "a potential person." We have already seen that this lack of precision was present in Justice Blackmun's opinion. In fact, there are no such things as "potential persons," just as there are no individuals who are "potential birds" (but there are gametes that potentially can become human persons, although the gametes themselves do not constitute an individual of the human species). The fetus is not a potential person but an *actual* human person, with potentialities not yet developed. The fact of having such potentialities, which later will be actualized, shows precisely that it is not a question of development "toward being a human" but development "of a human being."

Therefore, the distinction between "being human" and "being a person" implies that being considered a human or a human person, with corresponding rights, depends on factors other than the mere fact of belonging to the species *homo sapiens* (to affirm the latter would be "speciesism"), such as self-awareness and the capacity to have permanent and future-oriented desires. This means that a human being who has not yet reached this stage

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86. Some of the most notable representatives of this view are Peter Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1979); Mary Anne Warren, "On the Moral and Legal Status of Abortion," *The Monist* 57 (1973) 43; Michael Tooley, *Abortion and Infanticide* (Oxford: Clarendon Press, 1983); N. Hoerster, *Abtreibung im säkularen Staat. Argumente gegen den §218*, (Frankfurt/M.: Suhrkamp, 1991). See also Steinbock, *Life Before Birth*.

87. See R. Spaemann, "Sind alle Menschen Personen? Über neue philosophische Rechtfertigungen der Lebensvernichtung," in J.P. Stüssel, *Tüchtig oder tot. Die Entsorgung des Leidens* (Freiburg/Br.: Herder, 1991),133-147 (This article is also found, slightly revised, in the volume edited by Thomas and Kluth, cited above in note 43); L. Honnefelder, "Der Streit um die Person in der Ethik," *Philosophisches Jahrbuch* 100 (1993) 246-5.

88. I refer to G. Pöltner, "Achtung der Würde und Schutz von Interessen," in J. Bonnelli, ed., *Der Mensch als Mitte und Maßstab der Medizin* (Medizin und Ethik Bd. 1), (Wien - New York: Springer Verlag, 1992), 3-32; S. Schwarz, *The Moral Question of Abortion*; Martin Rhonheimer, *Absolute Herrschaft der Geborenen? Anatomie und Kritik der Argumentation von Norbert Hoersters* Abtreibung im säkularen Staat (Wien: IMABE, 1995) (IMABE-Studie No. 5).

(or who has lapsed from it in a manner presumed to be definitive) can be killed for any reason, without any justification before the law.

C. The Strategy of Separating the Right to Life from the Intrinsic and Specific Value of Human Life

A second strategy that tries to immunize against recognition of the fact that the unborn is a human person consists in an affirmation of the necessity of distinguishing the question of the status of the unborn (and thus possible right to life) from the question of the intrinsic value or "sacredness" of life. This is Ronald Dworkin's central thesis.[89] Dworkin argues that one can be opposed to abortion and require the pro-life intervention of the state for two reasons: either for a "derivative" reason—that is, because one thinks that the unborn child is a human person with a right to life, from which is *derived* the responsibility (including that of the state) to protect the fetus—or for a "detached" reason, not otherwise derived, but simply founded on the conviction that human life, as such, possesses an intrinsic and sacred, even if intangible, value from which springs an obligation—to be assumed by the state—to protect that life.[90]

Dworkin asserts that in reality the question of the personhood of the fetus and the related right to life do not and could not represent the core of the question, even within the scope of the Catholic tradition.[91] Thus, according to him, it is not crucial to determine when the existence of a human begins. Dworkin denies that the unborn can be considered a "constitutional person," and thus defends the decision in *Roe v. Wade*. He nonetheless submits that the real reason why some show a propensity either for or against abortion comes from a different evaluation of the intrinsic value, or "sacredness," of human life. This evaluation depends on premises that are ideological, religious, and theological, concerning which there exist a plurality of opinions—very subjective ones, moreover—that in a pluralistic society are not susceptible to regulation in a uniform manner for all. It would be unjust, writes Dworkin, to impose on all citizens the opinions of the majority regarding the intrinsic value of human life. We may be able to arrive nevertheless at a peaceful compromise, *precisely because it is possible to bracket, as irrelevant, the question of whether the unborn is, or is not, a person endowed with a corresponding right to life*. Proposing with admirable ability an interpretation of the jurisprudence of the Supreme Court founded on "freezing" the question of the status of the unborn, Dworkin

89. Dworkin, *Life's Dominion*.

90. Ibid., 11.

91. Ibid., 39-50. Obviously, this assertion is not wrong, but it is banal, since the framing of the issue in terms of "rights" is specifically modern. It is, however, quite typical of the "Catholic position" on the subject to identify an essential connection between the intrinsic value—sacredness—of human life and the right to life of every living human. *Evangelium Vitae* affirms this from the beginning, in section 2.

succeeds in conferring juridical logic on a legal situation that is, in reality, profoundly contradictory.

Nevertheless, this position has two implications that are unacceptable:

(1) To deny the right to life (and the corresponding legal protection) of certain living beings *it is not important to know whether they are persons or not, and thus also whether they are the holders of a right to life.* Dworkin's position is in any event incompatible with that of Warren, Singer, Tooley, and Hoerster, which are based on a certainty that the unborn is not a person and consequently lacks any right to life. *For Dworkin, instead, it is enough that it not be considered a person under positive law.*

(2) In Dworkin's theory, enjoying a right to life, on the one hand, and admitting the "sacredness of life" to be a good that is indispensable for man, on the other, appear to be two different realities, lacking any relationship between them. Here, then, is the crux. On the basis of that premise, the *legal recognition of the person* (that is, whomever the law and the constitution recognize as such) *has no foundation other than the same recognition on the part of positive law* and also, therefore, on the part of the majority vote that sanctioned its enactment.

The "right to life" of whoever is a "human person" according to an explicit legal or constitutional recognition would not, in accordance with the implication in point (1), depend therefore on some fact that transcends the law itself, but precisely and only on the fact that the law established it. It is thus a question of a complete separation of the two types of morality: a "pre-legal," pre-political and private morality (to be politically bracketed) and a legal, political, and public morality (independent of the first). In accordance with the implication in point (2), such a right would not depend on any property *intrinsic* to human life, either, but again only on positive law to the extent that the latter establishes what is relevant and normative for "public morality."

In the case of Dworkin, who in principle does not want to be, and is not in any real sense, a representative of legal positivism,[92] such an extreme positivist attitude is surprising. I do not believe that Dworkin, a jurist, followed the logic of his argument. Otherwise, he would certainly have realized that his fundamental legal-political formula, the demand for "equal concern and respect," requires a foundation able to demonstrate *why concern and respect are due to the human person.* In truth, the argument that establishes the value to which equality refers must precede the argument in favor of equality. Equality is always a value relative to a substantive value such as life or liberty.[93]

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92. See Dworkin, *Taking Rights Seriously*, especially chapters 1-3. Clearly, neither Dworkin's opposition to "originalist" theories, nor his choice to see the Constitution not as a collection of detailed rules so much as moral principles to be constantly reinterpreted, seem positivist; see *Life's Dominion*, 119 ff.

93. Agnes Heller, *Beyond Justice* (Oxford: Basil Blackwell, 1987), 120 ff.; 154.

It is not possible that the foundation of the value of respect is the same law that is supposed to guarantee its equality; in that case, it would not be a foundation at all. It is thus not possible that there is no relationship at all between being the holder of an equal right to life on the one hand, and the intrinsic value of human life, on the other. In this way, a large part of Dworkin's argument fails.

D. The Strategy of Appealing to a Woman's Self-Determination

The third strategy, which is linked to certain strands of contemporary feminism, is perhaps the most widespread, and it consists in deference to a woman's right to self-determination. It would be a morally as well as legally reasonable position if the unborn is not a human person with a right to live. Even Singer and Hoerster explicitly admit that if the contrary were true, an appeal to women's self-determination could not claim any legal validity.[94] Note, however, that this claim is not usually based on an explicit assertion that the fetus is not a person with a right to live,[95] but it simply—and thus in a very emotional way—claims the woman's right to self-determination, *without regard to a possible right of one who has no voice, who is not visible, and who cannot defend himself or herself.*

Even if there are really cases of grave and even tragic conflict[96]—which should be resolved with love and solidarity, without leaving the pregnant woman alone—the demand for the woman's self-determination has a different justification. It is intrinsically united with a lifestyle that interprets sexuality as lacking any relationship to the purpose of transmitting human life and thus to the corresponding responsibilities of parenthood. But every pregnancy is the fruit of a sexual act, ordinarily freely chosen or consented to. In this context, the existence of a new life, a pregnancy with the consequent expectation of the birth of a child, is considered to be a threat to one's own liberty (this also arises, analogously, when faced with relatives who may be old, suffering, and in need of intensive care). Its growing cultural predominance, based on a claim of "self-determination" together with a profound crisis in female identity, constitutes a radical threat to society.[97]

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94. The arguments of N. Hoerster in *Abtreibung im säkularen Staat*, 26-54, based on the conviction that the fetus has a right to life, conclude that only a diagnosis of danger to the life of the mother would be justified on those premises. Only later does he abandon this premise, inasmuch as it is based on "speciesism." I think that the position of Hoerster (a jurist) and others is really the only coherent position contrary to the "Catholic" one.

95. It is a matter of what A. Leist defines as an *Umgehungsstrategie* (a strategy of avoidance); see Leist, *Eine Frage des Lebens*, 32 ff.

96. Cf. *Evangelium Vitae*, 58.

97. Cf. *Evangelium Vitae*, 13. On the nexus between procreative irresponsibility, the contraceptive mentality, and abortion, see also Martin Rhonheimer, *Sexualität und Verantwortung. Empfängnisverhütung als ethisches Problem*, (Wien: IMABE, 1995), (IMABE Studie No. 3) especially 115 ff. This book is a revised and expanded version of my

Politically, this position finds support in a "protoliberal" attitude, which is incapable of identifying in fundamental rights anything other than rights of liberty to be asserted *against* the state and the risks arising from an abuse of state power. We have seen how German constitutional jurisprudence some time ago overcame this imperfect concept in its first decision relating to a proposal to liberalize abortion. There, rightly, the protection of the life of the unborn when threatened by third parties—exactly what the "protoliberal" insists is an illegitimate intervention of the state—was confirmed as a duty of the state.

We come across a strange coalition, therefore, which invokes an account of the woman's right to self-determination, an account that is protoliberal in its understanding of fundamental rights and which has been superseded by the development of the institutions of the liberal tradition. Such an argument is founded on two premises, both of which are incorrect—one from a jurisprudential point of view, and the other for biological-anthropological reasons provided by modern science.

VII. The Argument in favor of the Legal Defense of Life and the Connection between Civil Law and Moral Law

A. *The Argument of* Evangelium Vitae

If these three strategies—partly incompatible with one another—turned out to be true, or if they could really be included in constitutional law, our culture of human rights would undergo a profound, if not actually perverse, transformation.

This is just what *Evangelium Vitae* seems to want to demonstrate in one of its fundamental passages. The encyclical gives two reasons that show the incompatibility between a legal-political culture based on respect for human rights and one founded on a general consent to abortion, as well as real euthanasia (identifiable on the basis of acts or omissions based on an intention to cut short, in the patient's interest, a life no longer considered worthy of being lived). The first turns on the idea of equality before the law: "laws which legitimize the direct killing of innocent human beings . . . are in complete opposition to the inviolable right to life proper to every individual; they thus deny the equality of everyone before the law."[98]

The second reason springs from what we might call the "non-disposability" of life, a principle which is also harmed through the legalization of the suicide-homicide of euthanasia (understood here as procuring death with the assistance of a doctor; it is another question whether suicide as such should be punished or given support). The reason

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article "Contraception, Sexual Behavior, and Natural Law: Philosophical Foundation of the Norm of *Humanae Vitae*," *The Linacre Quarterly* 56 (1989) 20-57.

98. *Evangelium Vitae*, 72.

is clear: "In this way the State contributes to lessening respect for life and opens the door to ways of acting which are destructive of trust in relations between people."[99]

Finally, the encyclical explains that the political reason that makes this question important is not merely the good of the individual (inasmuch as that is not necessarily enough to prompt the intervention of the state):

> Laws which authorize and promote abortion and euthanasia are therefore radically opposed not only to the good of the individual but also to the common good; as such they are completely lacking in authentic juridical validity. Disregard for the right to life, precisely because it leads to the killing of the person whom society exists to serve, is what most directly conflicts with the possibility of achieving the common good. Consequently, a civil law authorizing abortion or euthanasia ceases by that very fact to be a true, morally binding civil law.[100]

In the final paragraph of the main text, before the "Conclusion," the encyclical even says:

> Only respect for life can be the foundation and guarantee of the most precious and essential goods of society, such as democracy and peace. There can be no *true democracy* without a recognition of every person's dignity and without respect for his or her rights. Nor can there be *true peace* unless *life is defended and promoted.*[101]

These texts show, above all, how the Magisterium has adhered to, and even appropriated for its own, a legal-political type of argument. The encyclical confirms the incongruence, with respect to the common good, of legislation favoring abortion and euthanasia, a contradiction that reveals itself in the specific and peculiar reason that such legislation originates in a society (including political society) that is oriented toward "the service of the person" and that, consequently, cannot contemplate a legal norm declaring it legal to kill an innocent person (or one that does not condemn it by a legitimate judge and a punishable crime under positive law).

Moreover, the encyclical mentions, among the fundamental goods of social life threatened by a culture of death, equality of all before the law, respect for life, and trust in relations between people. Finally, *Evangelium Vitae* affirms that authentic democracy and peace are impossible where life is not respected.

To be sure, the text needs further specification in some places. In particular, it is not at all clear what it means to assert, in this context, that a law instituting abortion is not "morally binding," since such a law does not command that anything be done, but rather permits and decriminalizes

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99. Ibid.
100. Ibid.
101. Ibid., 101.

certain actions. The assertion could be understood to mean that such a law is contrary to the morality that citizens in legislative and judicial institutions are bound to follow insofar as they are the authors of acts of public relevance (e.g. legislative acts), that is, which are of interest to the civil society as a whole. Moreover, in this context it is important to clarify the difference between the "decriminalization" ("de-penalization") of certain acts (*Tatbestandsausschluss*) and their "legalization" or "justification" (*Rechtfertigung*). To fail to intervene with the criminal law is not obviously the equivalent, in certain cases, of declaring specific acts to be "legal" (*rechtmässig*) or legally justifying them, especially because, in the latter case, it will also be possible to have recourse to public support through the health system and the supporting community that maintains health insurance financing for such acts. It could even be possible to impose on health personnel an obligation to offer the corresponding services.[102] It is also important to emphasize, however, the large social and psychological difference between abrogating an existing penalty on the one hand, and not introducing a penalty that never before existed, on the other.

The only justifiable case foreseeable by juridical logic in which abortion could be declared *legal*, that is, in accordance with the law, is an interference with the right to life of the unborn in order to save the life of the mother. In fact, here there are two juridical goods at stake, which in constitutional terms are equivalent and thus offer the possibility of juridically justifying such an interference.[103]

It remains to consider why the legal advancement of abortion and euthanasia entails the steady abolition of equality before the law, trust in relations between people, and, ultimately, democracy and peace. At this level, we encounter the connection between civil law and moral law: the "culture of death" is contrary to the moral premises of the social order and of the legal-political culture of the constitutional democratic state.

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102. Even if it can be imagined, it is highly problematic to declare an act illegal without arranging for a corresponding sanction provided by criminal law. This is what the German Constitutional Court proposed in its second judgment of 1993, and the proposal would mean that an action is illegal and permitted at the same time. See W. Kluth, "Der rechtswidrige Schwangerschaftsabbruch als erlaubte Handlung," *Zeitschrift für das gesamte Familienrecht* 1993 (Heft 12) 1382-1390.

103. We should not forget that all fundamental rights are valid with reservations determined by the existence of a law that may restrict them (*Gesetzesvorbehalt*). Thus even Article 2, Section 2 of the *Grundgesetz* provides that it is only possible to interfere with the right to life on the basis of a law. At the same time, however, Article 19, Section 2 provides that no fundamental right can be impaired in its "essential content" (*Wesensgehalt*); homicide would be such an example. Juridically, however, one could choose to balance it against the life of the mother—a path which is not practicable from a strictly moral point of view—given that it is not the state's role to oblige men to behave with moral rectitude, but instead to protect human life according to the principle of equality before the law. Obviously, no public authority, on the basis of such a balancing, can be permitted to force anyone to abort.

B. Civil Law and Moral Law: The Moral Premises of Democratic Constitutionalism

In the course of our inquiry we have asked ourselves, more than once, how to justify the protection of prenatal life within a political culture based on a more or less Hobbesian-type utilitarian calculation. Within that sphere, those who submit to the coercive power of a state renounce part of their liberty in order to gain thereby a civil liberty, which includes security, peace, and the possibility of prosperity. We have seen how fundamental this logic is in the search for a guarantee of civil liberty; it is needed to justify the state's juridical duty to protect basic rights threatened by third parties and thus to show that such rights are a defense not only against the state. What is more, such rights serve to guarantee certain basic values, the protection of which defines the elementary task of state authority: protecting everyone's life and guaranteeing their security.

It is evident that this is a powerful argument on which to base any state law that prohibits homicide and punishes the guilty man for the killing of the another. Without such a law, human coexistence would be impossible. The state could no longer fulfill its most elementary functions. The link between protection and obedience would be broken. But how would the unborn fall within this? Even a law that establishes a right to kill embryos and fetuses does not yet represent any threat to citizens. Thus, Peter Singer, not without a measure of cynicism, quotes Bentham's noted remark, according to which "infanticide is not capable of stealing tranquillity even from the most fearful soul," adding that "once we are old enough to understand this policy we are already too big to feel threatened by it."[104]

The logical structure of the "strategies" outlined above nonetheless demonstrate that legislative demands in favor of abortion and euthanasia contradict the foundations of a democratic culture and of a state engaged in guaranteeing security and peace to its citizens.

(1) Moral Premises of the Culture of Death

We need to bear in mind that the proposals of a culture of death are ruinous not just because of what they propose. They are also destructive because their acceptance excludes alternatives, which can even be erased from memory. The culture of death is an alternative to that of solidarity, of *unconditional* respect for life, of the permanent willingness of those who are living and strong and endowed with greater capacity for achievement to renounce certain advantages and rights in favor of others who are defenseless, weak, and needy. As the encyclical declares, such a "culture which denies solidarity"[105] is based on a "*notion of freedom* which exalts the

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104. Singer, *Practical Ethics*, chapter six, 170; cited according to the German edition (Stuttgart: Reclam, 1984).

105. *Evangelium Vitae*, 12.

isolated individual in an absolute way, and gives no place to solidarity, to openness to others and service to them."[106]

The "culture of death" represents not only the alternative to a civilization of love, but also to a civilization of profound respect for one's neighbor based on the simple affirmation that one finds oneself before another human being. We have confirmation of this when the handicapped are insulted and even physically assaulted by other citizens who reprimand them for being public burdens, or when parents of a handicapped child are seemingly disliked because it is thought that they have—irresponsibly—committed the error of not having chosen abortion at the appropriate time. The ethic of the value of life strongly contrasts with that promoted by the supporters of infanticide as a form of "mercy killing,"[107] who assert that "life is not a good in itself, but a means to something else—for example, to reach pleasant states of consciousness."[108]

This places in doubt what we commonly define as "human dignity" and the dignity of human life in general, given that human life—and thus the existence of the individual person—becomes a mere means for values *connected* to life, reducing life to an instrument to attain those goods. Here it is unnecessary to take up a discussion of this central point; it is sufficient to show that in the end the aforementioned strategies are oriented toward eliminating from our culture and our most deeply rooted convictions the truth expressed by Kant in a crucial moment of modern history: that a human being has no price, but dignity; and that he can never be treated as a mere means, but always also as an end. This truth is the heritage of a civilization, which originated in Christianity.

(2) Juridical Premises of the Culture of Death

Furthermore, according to the strategies outlined above, our legal system ought to recognize a series of principles such as the following (not necessarily all of them together, however, given that they are in part logically incompatible):

(1) Being considered a human, or a human person, with corresponding rights, depends on factors other than the mere fact of belonging to the species *homo sapiens*. That is, it depends on specific properties and capacities that an individual human may or may not possess, and that may be lost even during an individual's life. It is the task of society (that is, philosophers, biologists, jurists and others) to determine what properties are capable of providing a foundation for the right to life and, accordingly, of defining who is a person. Obviously, it is not possible to be certain that this

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106. Ibid., 19.

107. H. Kuhse and P. Singer, *Should the Baby Live? The Problem of Handicapped Infants* (Oxford: Oxford University Press, 1985).

108. H. Kuhse, *The Sanctity-of-Life Doctrine in Medicine: A Critique* (Oxford: Clarendon Press, 1987), 213.

process will remain immune from the influence of the specific interests of those who affect such a determination;

(2) The intrinsic value of human life, its dignity and sacredness, has no relation at all with those possible "rights" that ought to be connected with that life (from this principle the next one follows);

(3) It is the role of the positive law alone to determine who, by law, may be considered a "person," and therefore who is the object of equal treatment before the law; that is to say, independently of biological and anthropological facts, which are generally considered to be morally irrelevant. In contrast to the first principle, this third one would allow only politicians, legislators, and judges to determine who can be recognized as a person with a right to equal treatment on the part of the law (in practice, however, it has an identical effect);

(4) Any possible limit to the self-determination of a subject (for example, a pregnant woman) justifies the elimination of the cause of that limit, assuming that that cause is not, in turn, already a subject with a present capacity for self-determination (something not possible for the unborn, or persons in an irreversible coma, or even the elderly in need of intensive care without hope of recovery).

No one would desire, in my opinion, a society and a legal system based on such principles. On the contrary, we take pride precisely in having overcome, in our legal-political culture, a similar danger. Nevertheless, perhaps this aversion survives only at an intuitive level. I shall now propose two basic arguments to make these intuitions, which are correct, more rationally explicit. Both of the arguments are based on the premise that the unborn is, as is every human, an individual belonging to the species *homo sapiens*, and is thus a human person (since the existence of such individuals, except insofar as they are persons, is not possible).

(3) The Pre-Political Character of the Right to Life and the Logic of Discrimination.

Even remaining within Hobbesian logic, we must realize that the fundamental right on which the entire subsequent edifice is built is the right to life. For Hobbes, the primary and fundamental *bonum* is identified precisely with life, survival, and self-preservation. The *summum malum*, in contrast, is represented by violent and painful death, unnatural and undesired, in frustration of one's self-interest.[109]

The critical point is that this right is not, even in Hobbesian thinking, founded in a utilitarian way. On the contrary, the entire utilitarian calculus that leads to the institution of state authority is placed in the service of "the value of life." The right to live, for any man, is a presupposition for the

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109. Hobbes, *De Homine*, XI, 6.

legitimacy of any legal and civil order. Hobbes, in a radical way, understands a threat to one's own life to be the sole but decisive reason for not being obliged to submit to the sovereign, given that it is precisely the sovereign who has been authorized to protect life.

The advantage of Hobbesian thought, in this context, is that it provides a theory that formulates the minimum requirements for demonstrating a common heritage of Western culture: the right to live is not conferred by political power or by law. It is prior to them. Political society and the state are always in the service of the life of every individual, acknowledging the human dignity even of subjects who do not participate in the hypothetical social contract, inasmuch as they are too weak to represent any threat to the peaceful coexistence and prosperity of men (and who, moreover, make no contribution whatsoever to others but instead constitute a burden on them, a limitation on their liberty). If this is true, no utilitarian calculus can justify respect for life. Here is where the principle of "human dignity" comes into play, as a foundation for the unconditional respect for the other, respect based simply on *being human.*[110]

It follows from this that one who is "human" but excluded from such protection and security is *discriminated against,* because for whatever reason he is not capable of consciously assuming the contractual bond holding together the political community, or because his exclusion is sanctioned by a majority. The first case applies to the unborn, and also concerns newborns and children; the second, for example, is the case of blacks in the United States until the latter half of the nineteenth century. It is a question of discrimination because a "non-species" criterion of exclusion is applied, that is, a criterion that differs from one that takes into account membership in the species *homo sapiens.*

The important result of these reflections is that the utilitarianism of the Hobbesian calculus—and *a fortiori* of the Lockean and similar ones—cannot relativize the right to life of every individual human; it is rather presupposed as a pre-political right. Thus, this reasoning coincides with the idea that there exists a level of "value"—that of life and security—which must be respected by the legislator. As we have already discussed in connection with *Roe v. Wade,* no legislator has ever *conferred* such a right on a human; on the contrary, the legitimacy of legislative power—which is the core of Hobbesian thought—depends on the effectiveness of the protection

110. This is the argument in Kriele, *Die nicht-therapeutische Abtreibung vor dem Grundgesetz,* 95 ff. The category of "human dignity" obviously goes beyond Hobbesian political theory. Nevertheless, in the Lockean version of contractualism, found in the Declaration of Independence of the United States of 1776, we can find the formulation: "that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among men . . ." (cf. Locke, *Second Treatise of Government,* §§ 87; 94).

of the life of the individual person. The only limitation that can even be *contemplated* would be to restrict this to the *innocent* person, that is, one who is not guilty of a crime that by law carries with it capital punishment. Nevertheless, even in this case it was not the state that conferred the right to live to anyone; it simply *revoked* it, but does so *ad personam* and assumes a judgment for a crime for which the accused is found guilty. It is not revoked, therefore, on the basis of a discriminatory law, but on the basis of an individual judgment constitutive of guilt.

Certainly, the Hobbesian formulation is minimal, poor, and not free of ambiguity, insofar as it reduces everything to mere survival. But in the present context it is more than sufficient to show that the respect for life has priority and is immune from every utilitarian calculus, *even in so utilitarian a thinker as Hobbes*. Now we can also understand why, according to Hobbes, the science of these terms of peace, or the precepts of reason that lead to conditions of peace among men, represent in his opinion "the true and only moral philosophy"; this is why Hobbes defines them as "natural laws."[111] Preserving and protecting human life because it is the life of a man and "my life" is the fundamental point of convergence between moral law and civil law.

With respect to the protection of legally enforceable rights, to allow a criterion different from that of belonging to the species *homo sapiens* means legitimizing discriminatory laws elsewhere as well. People are apt to discriminate in this way, so long as it corresponds to the interest of an "exclusive" majority—a majority able to protect itself in such a way as to ensure that none of its members ever risks being counted among the members of the class discriminated against. The unborn are surely the prime candidates for such discrimination.

While racial, ethnic, religious, or social discrimination tends to become attenuated and is gradually overcome (since those discriminated against become historical actors who vindicate their rights), this is impossible in the case of those who are not yet born. They find themselves in a situation of total dependence on the born. Consequently, the initiative for respecting their right to life is the duty only of those who potentially discriminate against them. Thus we arrive at the second argument.

(4) The Golden Rule and the Sense of Justice

Granting that the unborn is a human person with a right to life, legalizing abortion means favoring, with the support of state authority and the entire society of the living, a weakening of the sense of justice. We shall be required to become accustomed to violating the good of others—the same good that, if it were our own, we would instead want respected by others—as not contrary to the most elementary sense of justice, *only because*

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111. Hobbes, *Leviathan*, chapter XV.

we have nothing to fear from that other person: neither he nor any other member of the "class" of the as yet unborn will ever be able to make us pay for this injustice of ours.

Hobbes maintained that his theory of natural laws—which are the terms of peace that lead to the agreement instituting the sovereign power of the state—would be nothing more than a new formulation or a "succinct formula" of the "law of the gospel," and in particular of the golden rule contained therein: "do not do to others what you would not wish done to you."[112] It is here that Hobbes's theory seems insufficient, inasmuch as it does not correspond at all to the logic of the golden rule but rather to what Gregory Kavka has called the "copper rule" (which is less perfect and bright): the principle "Do unto others as they do unto you."[113]

The "golden rule," however, which commands us (not) to do unto others what we would (not) want others to do unto us, is not based on the expectation of an effective reciprocal behavior on the part of others—impossible in the case of the unborn and in many other cases—but only on the *desirability* of that behavior toward us. It is a question of a way of behaving that—and here lies the essence of the principle of "justice"—becomes "for me" a norm of behavior "with respect to the other" and "in the interests of the other."[114]

None of us, at present, would wish to have been aborted while in a fetal state. Or better yet, no one would consider someone a benefactor who decided at that time to terminate our nascent life. No one would even make the following concession: "I cannot take issue with the behavior of that person, given that at the time, I, not then being a person, did not have interests and desires." On the contrary, if we were to find out about someone who, at that time, attempted to perpetrate a similar act but failed, we would be inclined to accuse him of attempted homicide before a court. (This demonstrates that every aborted fetus, while not a "potential person" but already a person in fact, is a potential *actor*. But being an actor in a court is a property that the fetus only potentially possesses, which seems to constitute a further reason for assigning to the state a duty to take up the protection of the unborn.[115])

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112. Hobbes, *Leviathan*, chapter XV. I refer, for this, to my book: *La Filosofia politica di Thomas Hobbes*, 6.2 and 6.5.

113. Gregory S. Kavka, *Hobbesian Moral and Political Theory*, (Princeton: Princeton University Press, 1986), 347.

114. M. Rhonheimer, *La prospettiva della morale. Fondamenti dell'etica filosofica*, 242 ff.

115. See M. Rhonheimer, *Absolute Herrschaft der Geborenen?*, 46 ff. A very similar argument is that of H. J. Gensler, "The Golden Rule Argument Against Abortion," in Pojman and Beckwith, *The Abortion Controversy*, 305-319.

As emphasized, with reference to an argument by Richard M. Hare that is equally founded on the golden rule,[116] every application of this fundamental rule of justice assumes an identity between the unborn (embryo or fetus) and the person after birth.[117] It is true that various theories exist, in the tradition of Locke's concept of "person," that attempt to contest that identity, on the basis of the previously noted distinction between "person" and "human individual."[118] Nevertheless, we have no reason to think that a fetus—say, this author at eight and a half months in my mother's womb, visible in an ultrasound image—is not "me," or that the photograph that my father took of an already smiling two-year-old is not my image, even if there are some philosophers who would assert the opposite simply because, they say, we cannot *remember* those "fetal" moments. It would follow that that fetus was an individual other than the one I am now.

Each one of us would perceive it as intrinsically unjust to imagine our own abortion committed on the basis of the argument that this human individual did not yet enjoy that right to life which is now ascribed to him, having been born and thus having acquired the rights of a citizen; or that he unfortunately was an obstacle to the self-determination of his mother and her projects (or simply that he was the "unwanted" fruit of a sexual act with a defective contraceptive); or that ultimately it was not so important whether he was a person at the time since the law did not consider him a "constitutional person" and since, in general, the state cannot impose on all citizens the majority's notion of the value of life.

In sum, if we are disposed to cultivate the consciousness of having all been, at one time, embryos and fetuses—clearly not aborted—perhaps we will be in a position to recall that a state that does not consider itself bound to protect those not yet born, and the society that absolves it of that duty, are both founded on a grave injustice incompatible with the essence of law. In a society where something that is manifestly a crime and where a primordial violation of justice is converted into a "right" supported, planned, and administered by the state,[119] interpersonal relations must inevitably suffer serious damage, given that living together in society, a common good *par excellence*, is based precisely on justice.

In order to qualify not only as the claims of persons but also as a genuine legal order, law presumes that people act not only in light of their individual good but also for the good of others *because it is the good of the other*, seeking such a good not so much because it foreseeably results in the long term in my own good, but because it is good for the other person. This

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116. R.M. Hare, "Abortion and the Golden Rule," *Philosophy and Public Affairs* 4 (1975) 201-22.

117. A. Leist, *Eine Frage des Lebens*, 103 ff.

118. See Spaemann, *Sind alle Menschen Personen?*, and Honnefelder, *Der Streit um die Person*.

119. Cf. *Evangelium Vitae*, 11.

basic solidarity in seeking not just the "good for me" but also the good of the other, *because it is good for the other*, reflects the profundity of the golden rule, which is founded on the recognition that the other is a human being as much as I am. This is what we could define as "willful self-transcendence of the subject with respect to the other," which is just what Hobbesian philosophy ends up denying.[120] All of social life is based on this self-transcendence of the person with respect to the other. The logic of "collective advantage," in compensation for the mutual exchange of renunciations of "natural" liberty, is insufficient. The reason for conferring the monopoly of legitimate violence on a sovereign power does not, therefore, contain the whole truth.[121] It can be the basis for the logic of security, but not at the same time for that of living together in society, of interpersonal community, or of mutual trust. If it could be attributed only to *propter retributionem*, it would correspond to "economic," rather than genuinely moral, behavior.[122]

In short, the Hobbesian calculus—and any contractualism of a utilitarian type—is only able to provide the basis for the state's obligation to protect *my* life, but not my obligation to respect and protect also the *life of others*, except insofar as I can foreseeably benefit from it. Thus Hobbes is not capable of providing a basis for solidarity, but only for a calculus directed toward one's own benefit (in the long term).

The mere logic of mutual benefit or "collective advantage" is always open to excluding and discriminating against entire groups from its calculations. It is insufficient for founding an unconditional respect for the other as my equal—unconditioned, that is, by factors such as "not being born," "mentally infirm," "object of heavy treatments that force others to make serious sacrifices." It cannot be denied, however, that true peace and the values of democracy take root at just this level, where moral law and civil law interpenetrate in a fundamental way. I have argued from the outset that the immoral character of a certain way of acting does not constitute a sufficient reason for it being prohibited and suppressed on the part of the civil law and the coercive power of public authority. Nevertheless, once we make clear the connection between the immorality (or, more accurately, the injustice) of the action in question and the common good, understood in terms of specific political ethics, the way is opened for a legal-political argument able to provide the basis for a corresponding intervention of the

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120. ". . . the necessity of nature leads men to will and desire the bonum sibi, that which is good for themselves . . .": Hobbes, *Elements of Law Natural and Political*, I, chap. 14, 6. The search for the good (and right) of others enters into Hobbesian philosophy only as a result of a utilitarian calculus.

121. This is admitted, without offering a solution to the problem, by O. Höffe in *Politische Gerechtigkeit. Grundlegung einer kritischen Philosophie von Recht und Staat* (Frankfurt/M.: Suhrkamp, 1989), 427.

122. See David L. Norton, *Democracy and Moral Development: A Politics of Virtue* (Berkeley, Calif.: University of California Press, 1991), 25-31.

state and the legislator. This is what we have done in these pages, demonstrating that it is a line of argument akin to the one in *Evangelium Vitae.*

VIII. CONCLUSION

State authority and the law are not capable of creating society. They are, however, capable of protecting—or of destroying by means of an irresponsible passivity and tolerance—those premises which are essential for life in society, such as that of the respect for the life of every living individual who belongs to the human species. We are at present in a very peculiar situation. Compared to other eras, we *know* more and we can also *do* much more. We can kill better, in simpler and more painless ways. We also know much more about prenatal life. We are aware that the life of an individual human being—concretely, this or that person—already began even before the mother realized that she was pregnant. Furthermore, we have a knowledge of prenatal life and associated techniques that allow us to do what must not be done, and what is—at least up to now—against the law to do after birth. The weight of our responsibility has increased, sometimes in a way that makes it almost unbearable to resist the corresponding temptations. Nevertheless, modern man has a responsibility for life that is much more extensive with respect to that of every preceding generation. We must learn to assume that responsibility in accordance with our human dignity.

In *Evangelium Vitae*, John Paul II speaks of a "cultural change," in which what he calls a "new feminism," founded on a new sensitivity with respect to the "experience of motherhood," will have a preeminent role. In particular, the encyclical affirms that which seems to be almost a synthesis of what has been said up to this point, namely, that motherhood is a sort of "school of humanity":

> A mother welcomes and carries in herself another human being, enabling it to grow inside her, giving it room, respecting it in its otherness. Women first learn and then teach others that human relations are authentic if they are open to accepting the other person: a person who is recognized and loved because of the dignity which comes from being a person and not from other considerations, such as usefulness, strength, intelligence, beauty, or health. This is the fundamental contribution which the Church and humanity expect from women. And it is the indispensable prerequisite for an authentic cultural change.[123]

We would be blind if we did not see that here is the core of the problem. A new feminism, however, need not reproduce a simple return to forms of disrespect toward women that are typical of a society saturated in a one-

123. *Evangelium Vitae*, 99.

sided way with masculine values. The drama of abortion is a drama caused in large part by men. In this sense, also, the cultural change concerns everyone, engages everyone, and depends on everyone.