THE JUDGE AS MORAL ARBITER?
THE CASE OF ABORTION

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> "One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion. In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem. Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.[1]

Rights have moral content. Both the right to choose to have an abortion and the total prohibition against the procurement of an abortion based on the right to life or personhood of the fetus are steeply embedded in morality. Moreover, constitutional adjudication in general and even ordinary adjudication in many cases -- e.g., should victims of industrial pollution be compensated for their impaired health -- inevitably raise moral questions and call for answers that require making moral judgments or that at least have significant moral implications. The purpose of this essay is to determine whether judges can avoid being moral arbiters; whether they ought to be moral arbiters; or whether inevitable questions of morality tied to the grant and protection of (constitutional) rights ought to be entrusted to others, such as the constituent power, legislators, etc. The paper will test these issues in relation to the existing constitutional jurisprudence relating to abortion gauged from a comparative perspective. Part I will provide a critical assessment of the theoretical debate; Part II, an examination of insights stemming from relevant constitutional jurisprudences on abortion, and, Part III a theory about the optimal apportionment of responsibility

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[1] *Roe* v *Wade,* 410 U.S. 113, 116 (1973).

for determining the moral issues that arise in the context of the recognition, interpretation and implementation of constitutionalized fundamental rights.

Part I.
A Critical Analysis of the Theoretical Debate

1. *Circumventing the Perennial Debate between Naturalists and Positivists*

Some, like Dworkin, argue that law is inextricably linked to morality (and political philosophy)[2] and others, like H. L. A. Hart, postulate that *law as such* is independent from morality[3]. We consider this a metaphysical debate which we want to avoid. For us, phenomenologically, law is an independent practice. When a judge adjudicates a dispute or interprets a law, she is engaged in a legal practice circumscribed by legal rules, conventions, etc. What a judge does is different -- because of the institutional setting, constraints, formalities, etc., and consequences -- than what a theologian, moralist or philosopher does even when treating the *same* moral question. For example, a judge, a philosopher and a theologian may confront the same question: is a right to abortion consistent with respect for human dignity?[4]. Nevertheless, to use a Wittgensteinian analogy, law, morals and theology involve different "languages" or "language games".

2. *Can Judges Avoid Deciding Moral Questions in Fundamental Rights Adjudication?*

Some rights and laws have moral content and raise moral questions and even if the judge engages in a different "language game" she cannot avoid, from the standpoint of content, dealing with morals. Can the judge nevertheless avoid making moral *decisions*? Or more precisely, moral determinations that will have outcome determinative consequences for the legal decision she must render?

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[2] *See* Ronald Dworkin, *Taking Rights Seriously* (1977).
[3] *See* H. L. A. Hart, *The Concept of Law* (1961).
[4] *Cf.* Article 1 of German Basic Law enshrining human dignity as the highest constitutional value.

In theory, a judge could avoid moral decisions. The law or constitutional provision could contain a detailed resolution of the moral question at stake -- meaning the legislator or the constituent power made the moral decision -- and the judge would merely have to apply the morally enshrined standard to the case at hand. If a constitution provides that a woman shall have an absolute right to procure an abortion extending till the very end of pregnancy, that right has moral content and embodies the constituent's decisions regarding certain moral questions. Yet, the judge would not herself have to make moral decisions. She would merely have to accept (for purposes of her work within the "language game" of law) those decisions and vindicate them implicitly in rendering her verdicts.

In practice, however, in any complex legal/constitutional setting, such as that of any contemporary well functioning constitutional democracy, judges cannot avoid making (certain) moral decisions. Laws and constitutions are never completely exhaustive; conflicts among rights raising moral questions cannot be avoided; certain legal standards, such as due process (at least in common law jurisdictions) have moral content and apply across the board[5], etc. The question then becomes: Can judges, or should judges, be constrained when it comes to moral decision making inextricably related to constitutional adjudication?

3. *Not All Moral Decisions are (Legally or Judicially) Alike: Sharpening the Debate*

Since judges cannot avoid making moral choices, it is important to distinguish between those that are problematic from a practical standpoint and those that are not. If there is very wide consensus among society as a whole, theologians, philosophers, politicians, legislators, the press and judges about a particular moral prescription or proscription, then a judicial decision involving the latter ought to pose no practical problem. If there is such consensus, for

[5] Due process standards are a powerful tool that may even be used by judges to temper evil laws edicted by evil regimes, such as the apartheid regime in South Africa. *See generally* David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998).

example, that the death penalty is utterly immoral, then there ought to be no *practical* legitimacy problem (one could always raise purely academic theoretical objections) with a judicial determination, consistent with the relevant moral consensus, that the death penalty violates a constitutional prohibition against "cruel and inhuman punishment".

Where there is no such consensus, one can roughly distinguish between three different principal cases. The first is where there is general agreement in the abstract, disputes concerning application to particular cases, but only judges can (or by far it is preferable for legal institutional reasons that judges) resolve the moral questions as part of their determination of the inextricably related legal questions. For example, there may be a standard of "fairness" applicable to corporate and business dealings[6]. That standard is a legal one, but its meaning depends, in part, on our moral understanding of "fairness". In other words, the broadly conceived legally applicable standard of fairness is one that relies on moral convictions and intuitions concerning where to draw the line between "fair" and "unfair" deals and transactions. Let us assume that the whole polity agrees that fair corporate and business transactions are legally and morally desirable; that there is a disagreement in a private dispute among two individual businesses as to whether one of them acted fairly; and that judicial resolution is called for. In that case, because of institutional considerations, if for no other reason, the judge seems best placed to settle the moral issue embedded in the legal one she must adjudicate. Moreover, implicit in this conclusion, is that because of the close and intertwined nature of the legal and moral judgment involved --albeit in the context of a legal rather than a moral "language game"-- the judge is functionally and institutionally best situated to render the decision.

The second case differs from the first primarily in that the judge does not have *prima facie* any better position due to her institutional role than anyone else in the polity. For example, let us assume that the polity as a whole subscribes to a liberal ideology and that its constitution contains a generally phrased provision protecting the right to private property while being silent on the issue of taxation.

[6] *See, e.g.,* Lawrence E. Mitchell, *Fairness and Trust in Corporate Law,* 43 *Duke L. J.* 425 (1993).

In that context, Nozickian liberals argue that taxation is morally wrong[7] whereas their Rawlsian counterparts maintain that taxation is morally justified to sustain minimum acceptable standards of distributive justice[8]. If we believe that as liberals Rawlsians and Nozickians ultimately share the same moral values, then their dispute is about moral particulars rather than about ultimate moral values or about comprehensive conceptions of the good. If the dispute is about moral particulars (and it is of course plausible to maintain that Rawlsians and Nozickians disagree about overall moral outlook and not only moral particulars), then it should be amenable to solution or to reduction of differences based on moral analysis and dialogue. Judges, however, do not seem better situated than others in the polity to deal with the morality of taxation. They may have to deal with it to resolve constitutional cases before them, but unlike in case one, it is not *prima facie* preferable, as a matter of institutional design, to leave the questions at stake in the hands of judges.

The third case in characterized by a profound split over ultimate moral values, conceptions of the good, and fundamental moral beliefs within the polity. In this case, not only does the judge appear to be in no better position than others to settle moral issues, but the judge cannot avoid become drawn in the moral wars no matter what position she takes or how she justifies her conclusions. For example, in a polity split down the middle among those who consider abortion to amount to murder and those who are convinced that women's right to equality demands that they have a right to an abortion, any decision on the question by a judge will inevitably draw her into the moral wars. This is of course obvious if the constitution at stake is silent on abortion, but is no less true if it prohibits or explicitly affords a right to abortion. For example, should a flat constitutional ban on abortion be interpreted as barring an abortion to save the life of the woman? Or, should an unqualified, plainly stated constitutional right to abortion be interpreted as allowing dismemberment of a fully developed fetus only days away from birth? Moreover, even if a judge decides an abortion case without purporting to deal with the issue on the merits, she will be most likely still

[7] *See* Robert Nozick, *Anarchy, State and Utopia* (1974).
[8] *See* John Rawls, *A Theory of Justice* (1971).

drawn in. Thus, if a judge refuses to recognize an abortion right in the context of a constitution that is silent on the matter, and if that judge bases his decision on the general principle that he espouses a judicial philosophy that requires rejecting recognition of unenumerated rights, he could still be accused by feminists of ruling against women's equality by deliberate omission. In this latter case, the judge's moral role cannot be altogether avoided (unless the issue and all its implications and ramifications are taken out of the hands of judges, but that is inconceivable for it would imply that judges would have to be handicapped in their adjudication of women's equality claims). But the judge's role could be minimized, through drafting extremely detailed constitutional provisions, or through entrusting the subject as much as possible to legislators[9].

Keeping these distinctions in mind, the question is what is the optimal role for judges in relation to inevitable moral questions embedded in fundamental rights legal questions? In part II, we take a close look at diverse jurisprudences on abortion rights, in order to provide a fuller picture of how judges have dealt with moral issues in constitutional cases under the conditions of case three, the most difficult of all the cases distinguished above.

Part II:

The Morality of Abortion: A Comparative Perspective

In this section, we consider salient abortion cases decided in deeply different jurisdictions, with divergent legal traditions and models of constitutional adjudications, namely the USA, Germany, Italy, Colombia, Ireland and the European Union.

In all of our cases, the judges were confronted with a particularly high level of indeterminacy, *i.e.,* the legal system neither provided a clear answer concerning the existence, the content and the limitations of the right to have an abortion, nor

[9] *Cf.* Jeremy Waldron, *Judges as Moral Reasoners,* 9 *International Journal of Constitutional Law* (I-CON) 2,19-20 (2009) (contrasting the thorough address of moral issues surrounding abortion by the British Parliament with the relatively cursory moral discussion in *Roe* v *Wade*, *,* 410 U.S. 113, 153-155, 159-160 (1973)).

did it furnish a clear definition of what has to be regarded as a "person". As a consequence of such indeterminacy the judges had to engage with the moral content of legal provisions.

Moral values may be embedded in constitutions (as in the case of "dignity" in Art. 1 of the German Basic Law), in a country`s traditions, in laws and in constitutional adjudication (as in the U.S.A. in the case of "privacy" thanks to *Griswold v. Connecticut*[10]) as well as in international treaties and conventions, including those protecting human rights.

Wherever judges may draw the moral values that figure in their abortion decisions a review of these decisions reveal that these judges use moral arguments in different ways in the course of adjudicating abortion cases. Often moral arguments are concealed in legal arguments. At other times moral arguments appear freestanding. Furthermore, in many instances the legal conclusions arrived at by judges to not quite seem to fit with the moral arguments expressed in the course of the related opinion. We shall now examine each of these points more closely.

1. Apparently Legal Arguments Concealing Moral Judgments

Some of the arguments made by judges who decide abortion cases sound *prima facie* like legal arguments, but amount ultimately to moral decisions. In some cases, the textual grounds on which the judges build their apparently legal argument are similar to one another, but the moral decisions that emerge from their interpretations go in opposite directions. Interestingly, the Italian Constitutional Court has acknowledged the plurality of moral standards that are applicable to abortion. In a landmark case decided by the Italian Court in 1975, which partially decriminalized abortion, the judges stated that: "The history of abortion-related crimes is connected to the development of religious feelings and to the evolution of moral philosophy, social, legal, political and demographic doctrines. During certain eras abortion was not criminalized, whereas it was

[10] Supreme Court, United States **,***Griswold v. Connecticut*, 381 U.S. 479 (1965).

punished very lightly or very severely in other eras. Moreover, the fetus itself has been conceived in very different terms: “as part of the woman’s body, as potential life, as a person since the beginning or after a certain period from conception”. Finally, the criminalization of abortion has served to protect very different interests: life, family structure, public morals, demographic policies etc.”[11].

In *Roe* v *Wade,* the Court denied that “personhood” can be applied to the fetus on the bases of the text of the Constitution and of a number of laws and precedents in which personhood had exclusively been attributed to born persons. The Court admited that “The Constitution does not define "person" in so many words”; but that in nearly all instances, “the use of the word is such that it has application only postnatally” and that “none indicates, with any assurance, that it has any possible pre-natal application”[12]. The laws and precedents the Court referred to also demonstrate that “the unborn have never been recognized in the law as persons in the whole sense”: legal rights are not generally accorded to the unborn, “except in narrowly defined situations and except when the rights are contingent upon live birth” [13]. However, neither the constitutional provisions, nor

[11] *Final Judgment no. 27/1975* (deposited in the Court's Clerk's Office on February 18th 1975; published in the Official Gazette February 26th 1975, no. 55) (authors’ translation).

[12] “The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, 2, cl. 2, and 3, cl. 3; in the Apportionment Clause, Art. I, 2, cl. 3; in the Migration and Importation provision, Art. I, 9, cl. 1; in the Emolument Clause, Art. I, 9, cl. 8; in the Electors provisions, Art. II, 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, 1, cl. 5; in the Extradition provisions, Art. IV, 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application”. 410 U.S. 113, 158.

[13] “In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held. In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been

the laws and precedents the courts refers to, are applicable to the question at hand, as they never deal with the actual questions of deliberately *harming* pre-born life. In order to apply such provisions and precedents to uphold a right to terminate pregnancy, the judges made a moral leap, as they endorsed the theory --which goes against other conceptions, like the Christian one-- that fetuses are not persons. "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer"[14] Interestingly, the language of *Roe* seems to deny a similar power to the legislature, as the Supreme Court "does not agree that, *by adopting one theory of life*, Texas may override the rights of the pregnant woman that are at stake"[15].

In the German "Abortion I Case"[16] the judges, interpreting the equally vague German Basic Law, endorse a different theory of life. "Everyone" within the meaning of the Constitution is, in their interpretation, "every living human being", or, put differently, every human individual possessing life; "everyone thus includes the still unborn human being" (C. I. 1). What follows is, in their construction, an objective application of constitutional principles. Human life constitutes the supreme value within the constitutional order as well as the pre-requisite for all other fundamental rights, therefore "no balance is possible which would guarantee both the protection of the life of the unborn and the freedom of the pregnant woman to terminate her pregnancy, for the termination of a pregnancy always means the destruction of unborn life".

represented by guardians *ad litem*. Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense". 410 U.S. 113, 162.

[14] 410 U.S. 113, 160.

[15] 410 U.S. 113, 163.

[16] Federal Constitutional Court, Germany, 39 BverfGE 1 (1975).

In a landmark case decided by the Colombian Constitutional Court in 2006[17], the judges drew a sophisticated legal distinction, which relies however on a moral judgment, regarding the value of life in its different stages. The Court recognized the existence of a "constitutional value of life", including fetal life, but drew the distinction between the *value of life* and the *claimed legal right to life*. The legal right to life was ruled to be limited to a born human being, while the constitutional value of life can be protected before a fetus has been born. The Court explained that the state can protect prenatal life, but it may do so only in a way that is compatible with the rights of women, including their rights to life and health protected by the Colombian Constitution as well as by many international treaties protecting human rights.

The Italian judges, in the 1975 judgment mentioned above, also relied on the wording of the Constitution in order to endorse "their" theory of life. According to the Court, the Constitution does protect unborn life, indirectly, through the protection of "motherhood" (art. 31, 2) and directly, as art. 2 recognizes and ensures the inviolable rights of *man,* which must include the legal status of the fetus, albeit that it is endowed with its *sui generis* characteristics. What follows is that the fetus has some human attributes which are of lesser worth than those of a born human being.

2. Straight forward moral arguments

In other cases the judges make straight forward moral arguments. The most vivid example is the German one: "The legal order must clearly articulate its disapproval of the termination of pregnancies…The state may not avoid its responsibility and declare a legal vacuum by not making a *value judgment* and leaving this judgment to individuals" (emphasis added) (II: 3). The U.S. Supreme

[17] Constitutional Court, Colombia, C-355/06 (2006). This decision was the result of the challenge brought by Women's Link Worldwide as part of its project LAICIA (High Impact Litigation in Colombia: The Unconstitutionality of Abortion Law). Before this decision, Colombia had one of the most restrictive abortion laws in the world. At the same time over 350,000 illegal abortions were performed annually, ,endangering the life, health and integrity of girls and women, particularly those in the most vulnerable situations. *See* excerpts of the Court's 600-page decision in English at: <http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf>.

Court decision in *Carhart* is also striking in this respect. In that case, the judges had to decide on the constitutionality of an act of Congress which banned the abortion procedure known as "dilatation and evacuation". The Court advanced two moral arguments. In the first place, the Court stressed that the procedure involved was "gruesome" and that itself called for moral condemnation[18].

Standing against this, however, the doctrinal framework established by *Casey* requires avoiding imposing undue burdens on the choice to have an abortion. The plaintiffs in *Carhart* claimed that by depriving women of this "gruesome" alternative, the state was forcing some women to take unnecessary risks when exercising their right to have an abortion. To overcome this potential hurdle, the Court had recourse to another moral judgment, namely the paternalistic argument that women must be protected against themselves because they are likely to regret their decision of having an abortion, because their nature is to be bonding mothers ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow"). This is reminiscent of 19th century purely paternalistic ideas concerning the role

[18] "In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. It is self evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form". *Gonzales, Attorney General* v. *Carhart et al*. 550 U. S. ____ (2007) p. 29 (Slip Opinion).

of women[19] that many thought were overcome with emancipation and the grant to women of the right to vote.

As an example of a similarly cast moral arguments, but reaching opposite conclusions, namely a moral backing to protect the right to abortion, we can cite the *Grogan* case, where the European Court of Justice had to decide whether abortion could be regarded as a service in the context of the EC Treaty[20]. The Court rejected the argument of the *Irish Society for the Protection of Unborn Children* that abortions are so immoral, involving the destruction of a third party's life, that they cannot be considered a service. Thus, according to the ECJ, the medical interruption of pregnancy, performed in compliance with the law of the member state where it takes place, is a *service.* It would be unthinkable that the Court would reach this conclusion while at the same accepting that the fetus is a full fledged person.

In other cases the judges are less outspoken, but still make morally compelling declarations. In two cases these have to do with the use of human dignity and

[19] See the U.S. Supreme Court decision in *Bradwell v Illinois* 83 U.S. 130 (1872) "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life". 83 U.S. 130, 142. Contrast this with contemporary American feminist attitudes concerning abortion. As Reva Siegel states: "Control over whether and when to give birth is also of crucial dignitary importance to women. Vesting women with control over whether and when to give birth breaks with the customary assumption that women exist to care for others. It recognizes women as self-governing agents who are competent to make decisions for themselves and their families and have the prerogative to determine when and how they will devote themselves to caring for others. In a symbolic as well as a practical sense, then, reproductive rights repudiate customary assumptions about women's agency and women's roles.". Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression,* 56 *Emory Law Journal*, 819.(2007).

[20] *Society for the Protection of the Unborn Children (Ireland) TD* v *Grogan*, Case No. C-159/90. Court of Justice of the European Communities, October 4, 1991. According to Article 50 (ex Article 60) of the Treaty Establishing the European Community(as amended by the Amsterdam Treaty): "Services shall be considered to be "services' within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.
"Services' shall in particular include:
(a) activities of an industrial character;
(b) activities of a commercial character;
(c) activities of craftsmen;
(d) activities of the professions.
Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals".

actually lead to opposite conclusions. The German judges in the "Abortion I Decision" simply assume that "the developing human life is included in the protection of human dignity….where human life exists it merits human dignity; it is not decisive whether the holder of this human dignity knows of it and is able to maintain it by himself. The potential capabilities lying in human existence from its inception are sufficient to justify human dignity" (C. I. 3). It follows that "When using the right to dignity as a standard the decision must favor the protection of the fetus' life over the right of self-determination of the mother" (II.2).

The Colombian Court, in contrast, in the case cited above, regards human dignity (together with liberty and equality), as the basis of women's reproductive rights which are protected by the 1991 Colombian Constitution and Colombia's adherence to international and regional human rights treaties. According to the Court, often, societies have used the occasion of a woman's pregnancy to suspend her human rights. Indeed, in some countries legislatures and some courts continue to use women's pregnancies as an opportunity to subordinate women's human rights in order to demonstrate allegiance to protection of the professed higher value of unborn life. The Court explained that women therefore cannot be treated as "a reproductive instrument for the human race," since women warrant respect as independent agents of their own destiny. In a similar vein, the U.S. Supreme Court emphasized in the *Casey* decision that a pregnant woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society".[21]

3. The Conclusions do not Necessary Match the Judges' Moral Arguments

In all of the cases discussed above, the decisions recognized some legal access to abortion with certain restrictions, regardless of the actual constitutional

[21] *Planned Parenthood of Se. Pa*. v. *Casey*, 505 U.S. 833, 852 (1992).

language, history, or mores of the jurisdiction involved. In fact all the jurisdictions in which these cases were decided, rely on proportionality analysis or judicial balancing, to strike some kind of compromise between the rights of women and those of fetuses. Two explicit examples illustrate this clearly. First, in the Italian judgment mentioned above, the Court announced that it would resolve the case by using the balancing test: "There is no equivalence between the rights to life and health of a full fledged person, and the rights of an embryo which is not yet a person"[22]. And, second, in an Irish case, the Supreme Court announced that "the doctrine of the harmonious interpretation of the Constitution involves in this case a consideration of the constitutional rights and obligations of the mother of the unborn child and the interrelation of those rights and obligations with the rights and obligations of other people and, of course, with the right to life of the unborn child as well"[23]. The case involved a fourteen year old girl who became pregnant as result of rape and who as a result had developed suicidal tendencies. Through the use of balancing, the judges lifted an injunction against the appellant thus enabling her to travel abroad to procure an abortion. This conclusion was reached by weighing Ireland's strong anti-abortion mores and constitutional tradition against the grave threats to the life of the victim.

A consideration of all the cases discussed above reveals that in some instances the actual decision of the judges seem inconsistent with the moral arguments advanced in the course of writing their opinions. For example, in the Colombian decision which is couched in a language that is by far most in tune with feminist theory, the actual result is that abortion must be decriminalized only in three extreme circumstances (when the life or health (physical or mental) of the woman is in danger; when pregnancy is a result of rape or incest; or when grave fetal malformations make life outside the uterus unviable). It is however noteworthy that the Court went on to remark that the legislator was free to enact much more permissive abortion legislation. Conversely, the German Court has strongly condemned abortion on moral grounds, stating the paramouncy of human life

[22] *Final Judgment no. 27/1975* (deposited in the Court's Clerk's Office on February 18th 1975; published in the Official Gazette February 26th 1975, no. 55)
[23] Supreme Court of Ireland *A.G.* v. *X* [1992] 1 IR 1 (5th March, 1992).

and human dignity, but its ultimate decision allowed for broad decriminalization of abortion which in fact resulted in a a law which gave women extensive freedom to procure an abortion[24].

These seeming inconsistencies can be explained if one realizes that moral arguments advanced by judges in the cases discussed above can serve either one of two principal purposes. The first purpose is the straight forward one of expressing a moral proposition for its own sake and to connect it to the legal issue at hand. The second purpose, however, is a rhetorical one whereby the moral proposition uttered is used primarily to advance a persuasive argument in favor of the final judicial decision rather than for the truth of the moral assertion made. The main reason for using this second approach is either to give the impression that the decision is consistent with the broadly accepted moral precepts and mores of the society at stake or to broaden the normative compass to facilitate legitimation of an expansion or restriction of abortion rights in ways that run counter to the accepted wisdom. The two best examples of this are provided by the Colombian and German cases discussed above. In the Colombian case, the relevant country was traditionally so strongly opposed to abortion rights that even a very limited relaxation of standards required strong normative pronouncements in favor of basic women's rights. In contrast, in the German case, the society involved was mainly liberal and permissive, but the Court was obliged to stress respect for life and dignity both in relation to the Nazi past and in recognition of the prevalent religious traditions in certain parts of the country.

More generally, whereas the practice engaged in by judges is a law "language-game" throughout, this practice necessarily incorporates moral arguments but these have different places and weights depending on whether they are asserted for their own sake or for rhetorical purposes above all. In order to properly

[24]In 1976, a year after the constitutional decision , the West German Parliament legalized abortion up to 12 weeks of pregnancy for reasons of medical necessity, rape or serious social or emotional distress, if approved by two physicians, and subject to counseling and a three-day waiting period.

evaluate the place and weight to be attributed to particular moral arguments made by judges in deciding abortion cases, one must place them in their proper context. This context is a complex one that incorporates the relevant history, mores, ideological preferences and controversies as well as the judicial practices and customs of the jurisdiction involved.

Part III

What the decisions discussed in Part II demonstrate is that inevitably judges must engage in moral argumentation and decision-making in the course of deciding abortion cases. More generally, judges cannot avoid controversial moral issues when dealing with fundamental rights disputes. What the analysis in part II reveals is that moral arguments and moral decisions seem virtually inevitable in abortion cases, but that they figure in complex different ways in judicial determinations and judicial opinions on the subject. In all cases, the judicial decision is a legal one, and in all cases that legal decision is inextricably tied to a moral one, either explicitly or implicitly. In some cases, the legal decision reflects the morality of the relevant community (or of the vast majority within that community); in other cases, such as the Colombian one referred to above, the legal decision draws on a morality that seems to run counter to that of the relevant community. In any event, whether the morality involved is shared or opposed by the majority, so long as it is contested within the polity, the key question remains: Ought there be any constraints on judges when dealing with moral questions over which the polity is deeply split?

The answer based on the review of the above discussed abortion decisions and on more general considerations based on concern for fairness and legitimacy is that there ought to be certain constraints, but that in the end there will inevitably remain some element of contestability in the judge's ultimate decision. The constraints come principally from three different sources: 1) international or transnational human rights norms embodied in conventions to which the judge's polity is a signatory or which are so widely accepted as to count as a universal

norm or value (e.g., the prohibition against torture)--a universal norm may be considered to be a legal one, but whether or not it is it, it would still count as a moral norm, and the judge would have to deem herself bound by it even if her polity is split over it; 2)moral principles, values or norms embedded in the judge's own domestic constitution (e.g., dignity in Germany); and, 3) the moral dimension inextricably tied to use of appropriate judicial interpretive tools, primarily the standard of proportionality and judicial balancing.

Whereas adherence to these three types of constraints narrows the scope of judicial discretion with respect to inevitable moral issues, it does not eliminate it and that for both internal and external reasons. From an internal standpoint, there may be disagreements with moral implications regarding universal human rights, constitutionally enshrined norms such as dignity, and the conception and application of the proportionality standard to a particular issue such as abortion. On the other hand, from an external standpoint, even after adhering to all these constraints, there are likely to remain open-ended considerations which must be implicitly or explicitly addressed before reaching a final decision, and which inevitably call for a contestable moral choice. For example, a judge with a liberal Dworkinian outlook is likely to view the entire abortion controversy differently than someone with a communitarian approach that privileges certain deeply held collective values over individual autonomy rights.

With respect to the contestable moral decisions that the judge cannot avoid--and which correspond to case three identified in Part I above--the judge will inevitably have to enter into the realm of moral dispute. Up to a point, particularly when linked to an issue that must be addressed from the internal standpoint, the moral disagreement may become merged into a broader interpretive one. For example, in deciding whether a constitutional right to abortion ought to be inferred in the context of a broadly phrased liberty or privacy right, judges may split according to whether they take a narrow textualist interpretive approach or a broader teological one. Whether or not the judges involved are aware of it, this interpretative divide has moral implications. The strict textualist approach carves out different right-based boundaries then does the teleological one, and each of

these has different moral implications. Thus, if the textualist concludes that there is no constitutional right to abortion, this automatically will have moral consequences in terms of women`s autonomy and rights, just as broad abortion rights under a teleological approach will have different moral consequences in relation to the same rights[25]. Beyond that, the judge cannot avoid the role of moral arbiter and risks being attacked on fairness or legitimacy grounds. If the moral split in society is too deep, the judge will not be able to avoid charges of unfairness or of having imposed contestable moral prescriptions illegitimately. The judge, however, can mitigate this danger in two different ways. The first is institutional. If the constitutional judge has built a solid reputation of professionalism and fairness over time, then occasional embrace of contestable moral positions may do little damage to institutional authority and legitimacy, and may even dampen the animosity of those who embrace a contrary moral position.

The second way in which the judge can mitigate the above mentioned danger is substantive. It is through the adoption of moral pluralism as the morality of judging. Moral pluralism generally commands making room for coexistence of as many diverse conceptions of the good as is compatible with the polity's maintenance of equal conditions of respect for each proponent of a particular conception and for that proponent's pursuit of her own conception[26]. That entails of course certain limitations to the extent that the pursuit of one conception requires interfering with, or thwarting, the pursuit of another such conception. In the particular case of judges, moral pluralism requires that contested moral issues which must be decided in the course of adjudication be treated according to the pluralist ethos. That means that within the constraints imposed by relevant

[25] From a strictly formal standpoint, one may claim that the judges in this example are only intervening in an interpretative dispute, and that any moral consequences that may follow from this should be deemed purely external and contingent. Nonetheless, when the judicial practice and its contemporary constitutional setting are placed in their proper context, the moral dimensions of the disputed positions cannot be disentangled from their legal/constitutional dimensions.

[26] For an elaboration of the moral pluralist position, *see* Michel Rosenfeld, *Just Interpretations: Law Between Ethics and Politics* 199-233 (1998).

international and domestic fundamental rights norms, the judge should try to accommodate all competing and conflicting conceptions of the good implicated in the constitutional dispute that she must adjudicate. Moreover, the judicial tool that seems best suited for this purpose is the principle of proportionality and the practice of judicial balancing associated with it. Moreover, the way in which the judicial embrace of moral pluralism through deployment of the principle of proportionality can serve to mitigate the impact of a morally contestable resolution of a constitutional dispute is basically twofold. First, by engaging in proportionality analysis and judicial balancing the judge is often likely to narrow the scope of morally contestable judicial decision-making. And, second, whatever morally contestable elements remain after application of proportionality and judicial balancing are both inevitable and the minimum without which the judge would abdicate her moral and institutional role as a constitutional adjudicator.

The abortion cases discussed in Part II all involved use of the proportionality principle and of judicial balancing. Whether they conform to the dictates of moral pluralism, and to what extent, is certainly a matter of dispute for a number of reasons. First, what are exactly the international applicable fundamental rights norms (if any)? Second, what are the corresponding applicable national constitutional norms (e.g., how should constitutional silence on abortion impact the judicial application of the pluralist ethos)? Third, what constitutes a proper application of proportionality and balancing in each of the cases involved? And, fourth, did the remaining morally contestable judicially imposed normative component in each of the abortion decisions involved amount to the unavoidable minimum?

In the case of abortion, two general conclusions can be drawn in respect of a judge who confronts the issue from the standpoint of moral pluralism. First, the best possible decision will vary from one context to the next. Indeed such decision will be contingent on the relevant constitutional provisions (e.g., a constitution that explicitly prohibits abortion vs. one that explicitly enshrines it as a right) and the particular conflicting conceptions of the good in play within the relevant polity. Second, whatever the context dependent variables may be, using

proportionality consistent with commitment to moral pluralism would require both the grant of some right to abortion to a pregnant woman and affording some degree of protection to the fetus which would preclude an unlimited right to abortion. Significantly, all the cases reviewed in this essay conform to this broad standard.