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ARTICLES

THE CONSTITUTIONAL LAW OF ABORTION IN GERMANY: SHOULD AMERICANS PAY ATTENTION?*

*Donald P. Kommers***

What I plan to do here is to tell you the story of Germany's legal approach to abortion and offer some tentative conclusions about what we Americans might learn from the German experience. My story centers mainly on the constitutionality of efforts in Germany to remove legal restrictions on abortion. In the United States, the story has a different twist, for there it centers on the constitutionality of efforts to impose legal restrictions on abortion. Both stories are fascinating accounts of constitutional decisionmaking, revealing as much about the values of the two societies as about the role of judicial review in a constitutional democracy. The two stories unfold in the decisions, respectively, of the U.S. Supreme Court and Germany's Federal Constitutional Court.

Before telling my story, however, I want to say a few words about comparative constitutional analysis, the kind of analysis I am about to embark upon. The purpose of this article is not so much to find the right answer to a constitutional problem, but rather to understand and distinguish the competing conceptions of freedom and responsibility that undergird the

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abortion cases in the two countries. What makes comparison in this instance so engaging is that two occidental, post-industrial, secular societies, presumably committed to liberty and justice for all, have embraced, at least temporarily, radically different constitutional positions on abortion. More interesting still is that these divergent outcomes proceed from humane values and constitutional principles common to both societies.

The two stories are also contemporaneous. In 1973, the United States Supreme Court struck down state laws interfering with a woman's right to secure an abortion within the first and second trimesters of pregnancy.¹ Two years later, in 1975, Germany's Constitutional Court struck down an abortion statute that sought to guarantee precisely the fundamental right that the Supreme Court somehow managed to discover.² Both decisions were extraordinary assertions of judicial power. In fact, Justice White's dissenting opinion in *Doe v. Bolton*, deploring what he called "an exercise of raw judicial power,"³ found an equally strong echo in the German dissents. As the German dissenters stated in 1975: "The Federal Constitutional Court must not succumb to the temptation to take over for itself the [function of legislation and thus to] endanger the authority [of this Court]."⁴ Despite these opinions and the commotion they created, both courts, some twenty years later — the Supreme Court in 1992 and the Constitutional Court in 1993 — preserved the essential core of each of their original decisions.⁵

Before turning to Germany, I would like to say more about the value of comparative constitutional analysis. Along with the English comparativist, Basil S. Markesinis, I believe that foreign case law — here constitutional case law — is an important resource in the study of comparative law.⁶ Cases deal with concrete problems of liberty and order in a constitutional democracy. Combining, as they often do, comedy and error with tragedy and pathos, cases form the living skein of law. For Americans, foreign constitutional cases are particularly important because they be-

1. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

2. Judgment of February 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (First Senate) (F.R.G.). For a complete translation of the 1975 German Abortion Case, see Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 551, 605-84 (1976).

3. *Doe v. Bolton*, 410 U.S. at 222 (White, J., dissenting).

4. 39 BVerfGE at 70. Unless otherwise indicated, all translations from this decision, the abortion decision of 1993, and other official documents are those of the author.

5. See, respectively, *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791 (1992); Judgment of May 28, 1993, 88 BVerfGE 203 (Second Senate).

6. Basil S. Markesinis, *Comparative Law — A Subject in Search of an Audience*, 53 MOD. L. REV. 1 (1990).

long to the literature of responsible freedom and limited government, a literature that is both challenging and enlightening: challenging because it forces Americans to confront cherished assumptions about themselves as a people and the deeper meaning of their public values; enlightening because the opinions and insights of foreign case law uncover truths about our own constitutional tradition that we may have only dimly perceived in the past.⁷

Constitutional cases also invite our attention because, by comparing cases handed down by different nations with constitutional tribunals similar to the United States Supreme Court, we can illuminate the process of constitutional interpretation. In deciding cases, judges are called upon to interpret a foundational text⁸ and, in doing so, to draw a delicate line between the poles of judicial supremacy and legislative majoritarianism. American legal scholars currently tearing each other apart over approaches to judicial review and losing sleep at night agonizing over the countermajoritarian difficulty may find more satisfying models of judicial decisionmaking in other constitutional democracies. Finally, through cases we can bring courts into conversation with one another, thereby furnishing us with a window of understanding into the spirit of argument about political foundations and the varying dimensions of freedom that comport with liberal democracy. The office of comparative jurisprudence is not simply to compare constitutional doctrines. Doctrinal description is not, in my view, the heart of the comparative enterprise. Benjamin Cardozo's perspective is on the mark. What is important in understanding judge-made law, he noted, is the "philosophy" behind doctrine that "give[s] direction to thought and action."⁹ What gives direction to thought and action in other societies like our own may move us to identify more clearly the ethos that drives our law. The comparative enterprise may not lead us to a new Jerusalem, nor is it likely to identify any ideal relationship between the values of liberty and community, but it may open our eyes to things we take for granted and encourage us to reflect critically on those things.

In sum, comparative constitutional analysis is an instrument sharp enough to remove the scales of parochialism from our eyes. It helps us to

7. See generally Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685 (1976).

8. Germany's foundational text is known as the Basic Law (*Grundgesetz*) of 23 May 1949 [hereinafter GG]. The terms "basic law" and "constitution" are used interchangeably in this article.

9. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 12 (1921).

see the strengths and weaknesses of a given country's legal ideology and to identify neglected issues and otherwise ignored questions. Listening to the voices of foreign constitutional judges is one way of opening our minds to larger vistas of constitutional argument and insight than may be available in the corpus of a single nation's constitutional jurisprudence. It is possible that we Americans would feel more confident about our own constitutional values by drawing inspiration and knowledge from the work of foreign constitutional courts.

I

For my purposes, Germany's story begins with the Abortion Reform Act of 1974.¹⁰ Until then, the destruction of a human fetus was a punishable offense under section 218 of the Criminal Code,¹¹ except when a licensed physician aborted a fetus to remove a clear danger to the pregnant woman's life or health. Decades of debate over the criminalization and punishment of abortion formed the backdrop to the 1974 statute.¹² This statute's passage was one consequence of the 1972 national election which sent Willy Brandt into the Chancellor's office on the crest of the greatest victory of the Social Democratic Party (SDP) in the postwar era. Social reform marked Brandt's coalition government, and the Abortion Reform Act of 1974 was part of its record. The Act passed after a fierce legislative battle between the ruling coalition and Christian Democrats,¹³ the latter playing the still unfamiliar role of loyal opposition. The vote in the German Bundestag was 247 in favor, 233 against, with 9 abstentions.¹⁴

10. Gesetz zur Reform des Strafrechts (StrRG) of 18 June 1974, BUNDESGESETZBLATT I [BGBL. I] 1297 (F.R.G.).

11. Das erste Gesetz zur Reform des Strafrechts of 25 June 1969, §§ 218-19. The ancestry of these provisions can be traced back to §§ 181 and 182 of the Prussian Penal Code of April 14, 1851. These provisions were later incorporated into the Penal Code for the German Reich. See Strafgesetzbuch für das Deutsche Reich of 15 May 1871 (Reichsgesetzblatt at 127).

12. The Federal Constitutional Court's opinion contains a lengthy description of this background. See 39 BVerfGE at 6-18. See also Albin Eser, *Reform of German Abortion Law: First Experiences*, 34 AM. J. COMP. L. 369 (1986); Michael Quass, COMP. L. Y.B. 41-60 (1983).

13. See Donald P. Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255, 258-64 (1977). The reference here and elsewhere to Christian Democrats embraces members of two political parties, namely, the Christian Democratic Union (CDU) and its Bavarian sister party, the Christian Social Union (CSU).

14. The German Bundestag or Federal Parliament consists of representatives "elected in general, direct, free, equal and secret elections." GRUNDGESETZ [Constitution] [GG] art. 38, § 1 (F.R.G.). Whether the Abortion Reform Act required the consent of the Federal Council or Bundesrat, the high federal organ in which the states are corporately repre-

The core issue in the parliamentary debate was whether to eliminate the penalty for abortion in the early stages of pregnancy altogether — the so-called “time-phase” solution — or to retain it throughout pregnancy except when certain hazardous conditions specified by law are present — known as an “indications solution.” The Abortion Reform Act incorporated the time-phase solution with provisions for social assistance and counseling. Under these provisions, a woman could choose to abort her fetus within the first twelve weeks of pregnancy, but only after consulting a physician and a licensed counselor for information about public and private support for pregnant women.¹⁵ After twelve weeks, a pregnant woman could legally secure an abortion only for a certified medical necessity.¹⁶ She could also legally abort a fetus within twenty-two weeks, again with proper certification, but only to avoid the birth of a seriously defective child.¹⁷ Finally, the physician, not the woman, would feel the law’s sting since the doctor could not legally carry out an abortion within the first twelve weeks unless the pregnant woman could produce a certificate showing that she had received proper medical and social counseling.

Immediately, Christian Democratic lawmakers and five states under Christian Democratic rule petitioned the Constitutional Court for a ruling on the constitutionality of the new law. In Germany, such petitioners may invoke the Constitutional Court’s jurisdiction without presenting a case or controversy as required by American law.¹⁸ Under German law, a state, or *Land* government, or one-third of the Bundestag’s members

sented, was one of the issues before the Federal Constitutional Court. Under the Basic Law, legislation affecting the administration of federal law by the states requires the concurrence of the Bundesrat. In ruling that the Abortion Reform Act changed the substance of federal law rather than its administration by the state, the Constitutional Court sustained the Bundestag’s refusal to seek the Bundesrat’s concurrence. For a discussion of the powers of the Bundesrat, see UWE THAYSEN, *THE BUNDESRAT, THE LÄNDER AND GERMAN FEDERALISM* (1994).

15. StRGR, § 218a.

16. *Id.* § 218b.

17. *Id.* § 218b(2).

18. Like European models of judicial review generally, Germany’s scheme of judicial review separates constitutional from ordinary litigation. The Constitutional Court decides constitutional questions only, and it is the only tribunal empowered to declare laws unconstitutional. In this system, questions arise under the Basic Law by means of various forms of referral, either by courts of law or by high state officials. The purpose of such referrals is not to settle a dispute between litigants, as in the United States, but rather to decide the objective question presented and thus to clarify a doubt or disagreement in the political system over the meaning of the Constitution. After exhausting their legal remedies, individuals may also petition the Court if they believe that one or more of their guaranteed rights have been violated by the state. This procedure is known as a constitutional complaint. While this extraordinary remedy affords individuals the opportunity to vindicate

may test a statute's constitutionality in what is known as an "abstract judicial review" proceeding if doubts or disagreements exist about its constitutionality. Crucial to the German Court's jurisdiction is the question of the validity of the statute, not the predicament of an injured party. In an abstract proceeding the Court simply declares what the Constitution means or requires.¹⁹ The Court's role is to lay down the constitutional rules for the governance of the political system on the particular issue involved, a role that the Court is statutorily obligated to perform. The power of judicial decision under the peculiarity of the German system is enormous because the Court's holdings have the force of law and are absolutely binding on all governing authorities.²⁰ The American situation, of course, is messier because from time to time Congress and the President have denied that they are bound by the decisions of the Supreme Court.²¹

The Christian Democratic challenge to the Abortion Reform Act triggered an immediate judicial response. On June 21, 1974, three days after the passage of the reform statute, the Federal Constitutional Court enjoined its enforcement pending a full hearing on the merits.²² Meanwhile, the old law and its penalties would continue in force. The U.S. Supreme Court decision in *Roe v. Wade* was well-known to the justices, especially President Ernst Benda who was a student at the University of Wisconsin in the 1950s and well versed in American constitutional law. As had the U.S. Supreme Court, the Federal Constitutional Court approached its task fully recognizing the delicacy and complexity of the issues before it.

A brief detour is appropriate to describe the structure of the Federal Constitutional Court. The Court is composed of two senates — the First and Second Senates — with mutually exclusive jurisdiction and personnel. Each senate has eight justices, and each speaks in the name of the Court as a whole. The President or "Chief Justice" of the Federal Constitutional Court presides over the First Senate; the Vice-President presides over the Second Senate. The Bundestag and Bundesrat each elect one-

their basic rights under the Constitution its purpose is also to declare the objective meaning of the Basic Law. Horst Sacker, *Das Bundesverfassungsgericht* 46 (Bonn 1989).

19. See ERNST BENDA & ECKART KLEIN, *LEHRBUCH DES VERFASSUNGSPROZESSRECHTS* 276-77 (1991).

20. Gesetz über das Bundesverfassungsgericht in der Fassung der Bekanntmachung of 12 December 1985, BGBl. I 2229-30, § 31(1),(2) [hereinafter BVerfGG].

21. See, e.g., WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 184-284 (1986).

22. 37 BVerfGE 324 (1975).

half of the members of each senate for a single nonrenewable term of twelve years. Nearly all of the Court's jurisdiction is laid down in the Constitution itself, although the distribution of this jurisdiction between the two senates is set forth in the Federal Constitutional Court Act.²³ The Act, however, authorizes the Plenum — both senates sitting together — to transfer jurisdiction from one senate to another if a gross imbalance in the workloads of the two senates makes such a transfer necessary.²⁴

In returning to our story, the Federal Constitutional Court handed down its abortion decision on February 25, 1975, two years after *Roe v. Wade*. In a six-to-two vote, with Benda in the majority, the First Senate struck down every section of the statute.²⁵ It did so under two clauses of the Basic Law. One of these clauses proclaims the inviolability of human dignity and charges the State with the duty "[t]o respect and protect it;"²⁶ the second declares that "[e]veryone shall have the right to life and to the inviolability of his person."²⁷ With the original history of these clauses in mind, especially against the backdrop of the Nazi experience, the Court ruled that the fetus is "life" within the meaning of the Constitution, and that the state is obligated "to protect and foster this life" even against the wishes of the pregnant woman.²⁸ Finally, the Court defined abortion as "an act of killing" whose condemnation the law must clearly express as a way of educating the nation to the gravity of the evil.²⁹

This strong endorsement of the right to life by the Federal Constitutional Court did not mean, however, that fetal life must always prevail over claims of the pregnant woman. Article 2 (1) of the Basic Law, which embodies the principle of personal self-determination — the closest German equivalent to our right of privacy found in the due process liberty clause of the fourteenth amendment — confers upon everyone the "right to the free development of his [or her] personality in so far as he [or she] does not violate the rights of others or offend against the constitutional order or the moral code."³⁰ The Court acknowledged that for a pregnant woman these clauses pose both a duty and a right, and when they conflict a judicious balancing of interests may be necessary. In accord with this

23. BVerfGG, § 14.

24. *Id.* § 14(4).

25. 39 BVerfGE at 1 (1975).

26. The term "state" as used here refers to legislative, executive, and judicial authority as these terms are used in the Basic Law. See GG arts. 1 § 3 and 20 § 3.

27. *Id.* art. 2, § 2.

28. 39 BVerfGE at 42.

29. *Id.* at 46.

30. GG art. 2, § 1.

process of balancing, an abortion performed by a licensed physician in the presence of a serious and duly certified medical, genetic, or criminological indication need not be punished under the German Basic Law.

Specifically, the Court held that in the presence of serious medical, genetic, and criminological (i.e., rape or incest) indications, all previously recognized by law or judicial decree, the law should not compel a woman to carry her pregnancy to term.³¹ In short, a serious danger to the health or life of the mother, the discovery of a gravely defective fetus, or a pregnancy resulting from rape or incest, may turn out to be so crushing a burden that it would be "beyond reason" to expect the mother to give birth to the child. In addition to these indications, the Court held that the *social* predicament of a pregnant woman might also justify an abortion.³² In order to sanction an abortion for social reasons, however, the distress of the pregnant woman would have to be severe, producing hardships exceeding those normally associated with pregnancy. In addition, a social hardship abortion could only be performed after compulsory counseling, proper certification, and within the first twelve weeks of pregnancy.³³

Having laid down these rules, the Court examined the Reform Act's counseling provisions and found them seriously flawed. Merely imparting in a neutral fashion information about financial assistance or the nature of abortive surgery was insufficient to satisfy the State's constitutional duty to protect human life. Such counseling, said the Court, especially when combined with the woman's freedom to choose within the first trimester, would convey the "false impression" that abortion is like any other operation.³⁴ Accordingly, counselors must stress that abortion is a moral evil in the absence of indications justifying the termination of pregnancy. Moreover, the medical counselor may not be the same person doing the abortion on the assumption that a woman would be improperly advised by a physician with a financial stake in performing the operation.³⁵

Finally, a full understanding of the 1975 decision requires some discussion of what the Germans call an "objective order of values," a concept derived from a gloss that the Federal Constitutional Court has put on the

31. 39 BVerfGE at 48.

32. *Id.* at 50-51.

33. *Id.* at 54.

34. *Id.* at 44.

35. *Id.* at 62-63.

text of the Basic Law.³⁶ The Constitution must be interpreted in the light of public values derived from a reading of the Basic Law as a whole and particularly from its list of guaranteed rights, a list crowned by the inviolate principle of human dignity.³⁷ Under this theory, the Basic Law includes both *individual* rights and *public* values. An individual right is a subjective right that can be asserted against the state and thus capable of judicial vindication. But the right also embodies an objective value (i.e., a public value) and, as such, is said to have an independent force or effect under the Constitution, thereby imposing an affirmative duty on the State to ensure that the public value is realized in practice. An objective value then is an integral part of Germany's general legal order and the state must see to it that this value is maximized to the extent possible.

The German Court has also declared that these objective values arrange themselves in a hierarchy. This can only mean that the Court itself does the arranging. Human dignity, according to the Court, is the Basic Law's supreme value the chief manifestation of which is the right to life. While the right to personality holds an exalted rank in the hierarchy of basic values, it must give way when it conflicts with the prior right to life.³⁸ But what is "life" and when does it begin? Listen to the Court: "Life in the sense of [the] historical existence of a human individual exists according to definite biological-physiological knowledge, in any case, from the 14th day after conception [i.e., at implantation]."³⁹ This pronouncement diverged radically from the U.S. Supreme Court's refusal in *Roe v. Wade* to say when life begins. It was also a radical departure from the American Court's view that a state has no compelling interest in protecting "potential life" until the last trimester of pregnancy. By contrast, the German tribunal emphasized, as did the dissenting opinions in *Roe v. Wade*, that pregnancy "is a continuous process of development that militates against its division into precise stages."⁴⁰

A central question before the Constitutional Court was whether the state's constitutional duty to protect the life of the fetus would require the legislature to criminalize abortion. The Court suggested that the criminal law would have to be employed if that was the only way to deter abortions in situations where pregnant women would be unable to sub-

36. See 6 BVerfGE 32 at 40; see also Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 858-60 (1991).

37. 39 BVerfGE at 42.

38. *Id.* at 43.

39. *Id.* at 37.

40. *Id.*

stantiate the presence of an indication that would justify the termination of a pregnancy. The decisive factor, said the Court, was whether the sum of all legal measures, civil or criminal, would adequately protect unborn life. In brief, the sum of these measures would have to be proportionate to the significance of the protected constitutional value (i.e., life).⁴¹ In the present case, the Court instructed the legislature to reimpose the criminal penalty because the non-penal measures in the Abortion Reform Act of 1974 were, as a whole, insufficient to protect the fetus. Whether any package of non-penal measures would by themselves be sufficient to protect unborn life was an issue the Court left to another day.

The first chapter in our story ends with parliament's adoption of all the instructions and guidelines laid out by the Federal Constitutional Court, including the recriminalization of abortion except in the presence of indications specified by law.⁴² A second chapter might have described how this judicially imposed abortion policy actually worked against the backdrop of a changing political and demographic environment, particularly one that appeared to grow more tolerant of abortion over the years.⁴³ Perhaps it is sufficient to note that most legal abortions occurred in cases of social hardship, but the standards used to determine "hardship" varied from *Land* to *Land*, depending largely on whether Social or Christian Democrats controlled the local government.⁴⁴

II

The next chapter of my story begins in 1990 with German unification. On the day of unity, eighteen million East Germans found themselves subject to West Germany's legal order, including the Basic Law. The unity talks, however, failed to bring about a common policy on abortion.⁴⁵ In 1972, the German Democratic Republic (GDR) had adopted a

41. *Id.* at 46.

42. See *Strafrechtsänderungsgesetz* of 18 May 1976 [The Abortion Reform Act of 1976], BGBl. I 1213, §§ 3, 4.

43. See Joyce M. Mushaben, Paper entitled *The Politics of Abortion in United Germany*, delivered at the 1993 Annual Meeting of the American Political Science Association 14-16 (Sept. 2-5, 1993) (transcript on file with the American Political Science Association).

44. Germany is a federal state. The Basic Law thus divides authority between the states or *Länder* and the national government. It was relatively difficult for a woman to procure an abortion for social reasons in states governed by the Christian Democrats and relatively less difficult in states governed by Social Democrats. See Ursula Nelles, *Abortion, the Special Case: A Constitutional Perspective*, GERMAN SOC'Y & POL., Winter 1991-92, at 114, 114-15.

45. For a discussion of the East-West conflict over abortion, see PETER H. MERKL, GERMAN UNIFICATION IN THE EUROPEAN CONTEXT 176-81 (1993).

law permitting abortion on demand within the first trimester of pregnancy,⁴⁶ a statutory right, according to the delegates of the old GDR, that East German women were not prepared to give up without a struggle. East and West German negotiators broke the deadlock over abortion by agreeing to retain their respective laws until an all-German parliament elected in a unified Germany could work out a compromise acceptable to both sides, the Unification Treaty having specified December 31, 1992 as the deadline for the adoption of an all-German statute.⁴⁷

The Basic Law actually endorsed this settlement. Article 143, a transitional amendment that the Unification Treaty itself put into the Constitution, allowed the new states belonging to the old GDR to "deviate" from certain provisions of the Basic Law.⁴⁸ The eastern states were allowed to do so (i.e., deviate from existing constitutional provisions) pending the adoption, within a specified time, of a common national policy. As applied to abortion, the deviation clause prompted critical constitutional questions, particularly because the Basic Law forbids the passage of any law encroaching on the essence of a basic right.⁴⁹

In addition, the Basic Law disallows any constitutional amendment that offends the principle of human dignity.⁵⁰ Was Article 143, therefore, an unconstitutional amendment to the Constitution for having offended the principle of human dignity as judicially defined? Alternatively, may an amendment to the Constitution authorize the eastern states to ignore, even temporarily, an authoritative judicial ruling interpreting the concept of "life" within the meaning of the Basic Law? Although agitating to constitutional scholars, these issues were never adjudicated. Rather,

46. Gesetz vom 9. März 1972 über die Unterbrechung der Schwangerschaft, GBL DDR I 89. The administration of the East German law was far from ideal. See Margarethe Nirsch, *Abortion as Politics*, GERMAN SOC'Y & POL., Winter 1991-92, at 130.

47. Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity [hereinafter Unification Treaty], Aug. 31, 1990, BGBl. II 889, art. 31, § 4.

48. The new Article 143, § 1 of the Basic Law declares:

[East German law] may deviate from provisions of this Basic Law for a period not extending beyond December 31, 1992 in so far as and as long as no complete adjustment to the order of the Basic Law can be achieved as a consequence of the different conditions. Deviations must not violate Article 19 (2) and must be compatible with the principles set out in Article 79 (3).

See Unification Treaty, art. 4, § 1. The Constitution bans any encroachment on "the essential content of a basic right" guaranteed in the Basic Law. GG art. 19, § 2. The Constitution also prohibits any constitutional amendment that would undermine the basic principles of the Constitution, including the guarantee of human dignity. GG art. 79, § 3.

49. GG art. 19, § 2.

50. *Id.* at art. 1, § 1.

what would be contested at law was whether an all-German statute in conflict with the 1975 abortion decision would survive constitutional analysis.⁵¹

The first all-German parliament elected on December 2, 1990 struggled to find a middle ground between the conflicting abortion policies of East and West Germany.⁵² By May 1992, six months prior to the deadline established by the Unification Treaty for the passage of a new statute governing all of Germany, a severely fractured Bundestag had before it several proposals. These proposals ranged from a plan to increase the severity of West Germany's existing abortion law to a proposal based on unrestricted freedom of choice. Each parliamentary party along the political spectrum put forward a draft bill.⁵³ The Social Democratic Party (SDP) and the Free Democratic Party (FDP) occupied the broad middle ground. After long and painful negotiations stretching over many months, these two parties — one a member of the ruling coalition, the other the main opposition party — broke the logjam and reached a compromise. The settlement — an omnibus bill amending numerous provisions of public law — was sufficiently attractive to win the support of most Christian Democratic representatives from East Germany as well as other East German representatives. Dubbed the "group resolution" (*Gruppenantrag*) because it embodied an agreement transcending party lines, the compromise won by a substantial margin of 357 to 283 votes.⁵⁴

51. The Unification Treaty did not change the jurisdiction or powers of the Federal Constitutional Court. Thus, the Court retains the full power of constitutional review over laws enacted and treaties made under the authority of the Basic Law.

52. In the meantime, the ruling CDU-CSU-FDP coalition in Bonn adopted a resolution denying West German women the right to procure abortions in East Germany under the latter's relaxed rules. This resulted in the anomalous situation where one and the same act in one and the same place would be treated differently under the law, an anomaly that prompted several constitutional scholars, including a former justice of the Federal Constitutional Court, to object to the resolution on equal protection grounds. See *STUTTGARTER ZEITUNG*, Aug. 24, 1990. The equal protection conundrum served to underscore the urgency of finding an all-German solution to the problem of abortion.

53. The German Bundestag had before it seven proposals. The most liberal proposal, advocated by the Greens and the Party of Democratic Socialism (PDS) would have been an outright repeal of § 218. The most conservative proposal, supported by a member of Bavaria's Christian Social Union (CSU), would have permitted abortions only for serious medical reasons. In general, the Greens favored a policy of abortion on demand throughout pregnancy; Social Democrats preferred a "time phase" solution with freedom of choice during the first three months of pregnancy; Free Democrats advocated a time phase solution with compulsory counseling; and Christian Democrats supported abortion only in the presence of indications specified by law, although they were divided among themselves over whether abortions should be permitted for serious social reasons.

54. For details on the passage of the bill, see *DAS PARLAMENT*, July 3, 1992, at 1.

The Pregnancy and Family Assistance Act was the short title of the new all-German statute.⁵⁵ It incorporated a time-phase solution with obligatory counseling. The Act's provisions reflected the spirit of the Unification Treaty, Article thirty-one of which directed the all-German parliament to "ensure [the] better protection of unborn life" and to adopt social policies that would "provide a better solution" to the problem of pregnant women in distress "than is the case in either part of Germany at present."⁵⁶ Accordingly, the Pregnancy and Family Assistance Act embodied detailed provisions amending not only the Criminal Code's provisions on abortion (sections 218-19),⁵⁷ but also sections of laws dealing with social security, medical insurance, child support, vocational training, job placement, welfare assistance, housing and rent control, all for the purpose of producing a package of socioeconomic guarantees that would make it easier for women in distress to carry their pregnancies to term.⁵⁸ Significantly, the main combatants in the legislative arena harbored no doubts about their constitutional duty to protect the life of the unborn. Rather, the struggle centered on how best to achieve this goal. To this extent, the debate over abortion in Germany shaped up very differently than in the United States.

The new statute, however, departed from the constitutional rules laid down by the Federal Constitutional Court in 1975. While as a matter of general policy abortion would continue as a criminal offense under law in a unified Germany, the new amendments to the criminal code cut the heart out of the Abortion Reform Act of 1976. In words that would come back to haunt the Bundestag, the new change in the criminal code declared that the interruption of pregnancy in some circumstances is "not illegal" (*nicht rechtswidrig*).⁵⁹ Specifically, no criminal penalty would attach to an abortion if performed by a licensed physician with the woman's consent within the first twelve weeks of pregnancy after compulsory counseling and a three day waiting period.⁶⁰ But before an abortion

55. Gesetz zum Schutz des vorgeburtlichen/werdenden Lebens, zur Förderung einer kinderfreundlicheren Gesellschaft, für Hilfen im Schwangerschaftskonflikt und zur Regelung des Schwangerschaftsabbruchs (Schwangeren- und Familienhilfegesetz) of 27 June 1992, BGBl. I 1398 [hereinafter SFHG].

56. Unification Treaty, art. 31, § 4.

57. Article 13 of the Pregnancy and Family Assistance Act amended §§ 218-19 of the German Criminal Code. These amended sections (Änderung des Strafgesetzbuches) constitute the Abortion Reform Act of 1992. STRAFGESETZBUCHREFORM [StGBR] art. 13 (1992).

58. SFHG, *supra* note 56, at arts. 1-16.

59. StGBR, § 218a(2).

60. *Id.* § 218(1). Under § 218a(3) an abortion is not punishable if there are medical

could be performed, the woman would have to produce a certificate verifying the place and date of counseling,⁶¹ and the physician-counselor issuing the certificate could not be the same doctor who would perform the abortion.⁶² After the twelfth week of pregnancy, however, the woman could only legally abort her fetus to avert a serious threat to her life or a grave impairment of her physical or mental health.⁶³

The statute's counseling provisions, which would loom large in the ensuing litigation, directed counselors to stress the value of unborn life and to encourage women in distress to make a responsible and conscientious decision. To this end, counselors were obliged to supply women with detailed medical, social and legal advice, including the availability of "practical assistance" designed to mitigate the distress of both mother and child.⁶⁴ The counseling bureau was required to keep a record of each session, but in the interest of privacy and at the woman's request her identity would not be revealed.⁶⁵ Finally, as with the Abortion Reform Acts of 1974 and 1976, the statute banned the commercialization of abortion services.⁶⁶

To summarize: Under the new all-German statute, it was "not illegal" (*nicht rechtswidrig*) for a woman to procure an abortion within three months of pregnancy after required counseling, certification, and a three day waiting period. The new law was a hard-won compromise painfully worked out in the parliamentary trenches and against the backdrop of strong pressures exerted by religious, feminist, and eleemosynary groups. Previously in West Germany, a woman had to have a certificate from a doctor indicating that she had met at least one of four conditions specified by law before she could obtain permission to have an abortion free of punishment. Previously in East Germany, a woman could choose to have an abortion on demand at any time and for any reason within the first trimester of pregnancy. The all-German law — a counseling model which incorporated prolife inducements, but left the ultimate choice to the woman — appeared to split the difference between West Germany's old "indications" model and East Germany's old "on-demand" model.

grounds for believing that the damage to the fetus is so severe that the ensuing burden upon the woman would be such as to obviate the need to continue her pregnancy and its termination takes place between 12 and 22 weeks of conception. *Id.* at § 218a(3).

61. *Id.* § 218b(1).

62. *Id.* § 219b(2).

63. *Id.* § 218a(2).

64. *Id.* § 219(1).

65. *Id.* § 219(3).

66. *Id.* § 219a(1).

III

Now, to the final chapter of my story.

As already noted, the Bundestag passed the new all-German abortion statute on June 26, 1992.⁶⁷ Shortly thereafter, on July 2, 1992, the Bundesrat concurred,⁶⁸ whereupon the Federal President signed the bill into law. Within hours of the signing, and with the backing of Chancellor Helmut Kohl,⁶⁹ 249 Christian Democratic members of the Bundestag, all from the former West Germany, petitioned the Constitutional Court to enjoin the law's enforcement.⁷⁰ Bavaria's state government, claiming that several provisions of the statute were unconstitutional, filed a separate petition.⁷¹ In a preliminary hearing, after a full day of oral argument on August 4, 1992, the day before the law would have gone into effect, the Second Senate, to the surprise of many constitutional scholars and to the chagrin of others, unanimously issued the injunction.⁷²

Composed of seven men and one woman — all West Germans evenly split between Catholics and Protestants, on the one hand, and Christian and Social Democrats, on the other — the Second Senate reinstated the respective abortion laws of East and West, pending a full decision on the merits.⁷³ In an effort to calm the worst fears of lawmakers who had worked so hard to produce a tolerable compromise, Vice-President Ernst Gottfried Mahrenholz, the presiding officer of the Second Senate, announced that the temporary injunction to enjoin the statute would furnish no clue to the outcome of the main proceeding. Speaking for the Court, Mahrenholz stated that it would be contrary to the public interest to allow a statute of this importance to enter into force if there were any chance that it might have to be repealed after a judicial decision on the merits.⁷⁴ He was also reported as having said that a final decision could

67. FRANKFURTER ALLGEMEINE ZEITUNG, June 27, 1992, at 1.

68. All the *Länder* except Bavaria voted in favor of the new law. FRANKFURTER ALLGEMEINE ZEITUNG, July 3, 1992, at 1. In this instance, unlike the situation under the Abortion Reform Act of 1974, the concurrence of the Bundesrat was necessary because of the new administrative responsibilities that the *Länder* would now be required to carry out and finance.

69. FRANKFURTER ALLGEMEINE ZEITUNG, June 30, 1992, at 1.

70. Docket No. 2 BvF, May, 1992.

71. *Id.*

72. Judgment of Aug. 4, 1992, 86 BVerfGE 390 (Second Senate). See also SÜDDEUTSCHE ZEITUNG, Aug. 6, 1992, at 6; DEUTSCHES ALLGEMEINES SONNTAGSBLATT, Aug. 7, 1992, at 11.

73. 86 BVerfGE at 390.

74. SÜDDEUTSCHE ZEITUNG, Aug. 6, 1992, at 1; DIE ZEIT, Aug. 7, 1992, at 1.

be expected in November.⁷⁵

Instead of the predicted three months, however, the Court struggled with the case for another ten months. The nation watched closely as the Court repeatedly postponed decision day amid rumors of deep divisions among the justices.⁷⁶ Meanwhile, outside the Court, Social Democratic members of parliament considered challenging the participation of two Catholic justices because of their known opposition to abortion,⁷⁷ an effort widely seen as a blatant attempt to intimidate these justices in particular and to strike generally at the Court's independence in general.⁷⁸

For a brief moment on May 28, 1993, many Germans held their breath. In an unusual public session broadcast to the nation, the Second Senate invalidated major sections of the new Abortion Reform Act.⁷⁹ The public reaction was predictable. On the one hand, Social Democratic legislators cried foul, protestors took to the streets, and a popular East German female politician denounced the ruling as a "catastrophe" and "a return to the Middle Ages."⁸⁰ For his part, Chancellor Kohl praised the Court for its defense of unborn life, while Germany's Catholic bishops announced that they could live with the ruling.⁸¹

75. STUTTGARTER ZEITUNG, Aug. 6, 1992, at 1.

76. See DER SPIEGEL, Nov. 9, 1992, at 147-50.

77. See FRANKFURTER ALLGEMEINE ZEITUNG, Dec. 2, 1992, at 6; DER SPIEGEL, Nov. 9, 1992, at 16.

78. Under the Federal Constitutional Court Act, a justice's participation in a case may be challenged if there are grounds for believing that he would be unable to render an unbiased judgment. Certain Social Democratic legislators in the federal and state parliaments challenged the participation of Justice Ernst-Wolfgang Böckenförde, a practicing Catholic, because he belonged to a lawyers' right-to-life group from 1986 to 1990. If, in the face of such a challenge, the justice does not recuse himself, the Senate decides the matter in his absence after the challenged justice has submitted a formal statement on his own behalf. See BVerfGG, § 19 (2). In the present case, Böckenförde's seven colleagues on the Second Senate unanimously ruled in his favor. On the basis of the record before them, they declared that his former membership in the right-to-life association was not a ground on which to conclude that he would be unable to render an unbiased judgment. See 88 BVerfGE 17. A touch of irony marked the effort of some Social Democrats to force Böckenförde off the Second Senate in the Abortion Case. First, Böckenförde was himself a Social Democrat. Second, the SPD was responsible for his election to the Second Senate. Lastly, as a professor of legal philosophy at Freiburg University, he had been identified intellectually with the more liberal views of the SPD's left wing. His prolific writings as a legal philosopher, however, also identified him as a leading Catholic intellectual in the German legal academy. This identification, along with his membership in an anti-abortion group, prompted some Social Democrats to doubt his reliability on the issue of abortion.

79. See FRANKFURTER ALLGEMEINE ZEITUNG, May 29, 1993, at 1, 3.

80. Stephen Kinzer, *German Court Restricts Abortion, Angering Feminists and the East*, N.Y. TIMES, May 29, 1993, at 1.

81. See FRANKFURTER ALLGEMEINE ZEITUNG, 29 May, 1993, at 3.

The actual opinion — originally 183 pages in typescript — contrasted sharply with the bombastic rhetoric and combative tone of much of the public commentary immediately following the ruling. When the dust had settled, however, more and more Germans began to realize that the decision was a sensitive and nuanced attempt, undertaken with remarkable empathy and understanding, to balance the State's interest in protecting life with the woman's interest in self-determination. The nub of the decision was this: In the interest of preserving the value of unborn life, abortion must remain illegal, but the State need not punish the illegal act if the abortion takes place within the first three months of pregnancy and after the State has had an opportunity to try to get the pregnant woman to change her mind.⁸²

The Second Senate's opinion begins with a review of the 1975 abortion case, much as the U.S. Supreme Court revisited *Roe v. Wade* in its 1992 decision in *Planned Parenthood v. Casey*. Like the U.S. Supreme Court in *Casey*, the Constitutional Court reaffirmed the essential core of its previous decision. At the core of that 1975 decision lay the Basic Law's clauses on the "right to life" and "human dignity." The right to life enjoyed by the unborn child, declared the Court in the 1993 Abortion Case, "emanates from the dignity of the human being," the validity of which is "independent of any specific religious or philosophical belief."⁸³ Dignity, declared the Court, attaches to the physical existence of every human being, before as well as after birth. Unborn life is a constitutional value that the state is obligated to protect. Indeed, as the Court had declared in 1975, the state cannot escape this responsibility.

Given the assumptions about the value of fetal life and the corresponding duty of the State to protect it, the Court found fatally flawed the statutory language describing the voluntary interruption of pregnancy within the first three months as "not illegal."⁸⁴ These words, said the Court, communicate the wrong message. They treat abortion as a justifiable choice, as a less than serious matter, and as an option on the same constitutional level as childbirth. In declaring unconstitutional the section of the reformed criminal code containing the words "not illegal,"⁸⁵ the Senate ruled that the statute must make clear that as a matter of general principle abortion is in fact illegal and that the pregnant woman has a legal duty, again as a matter of general principle, to carry the child to

82. Judgment of May 28, 1993, 88 BVerfGE 203 (Second Senate).

83. *Id.* at 252.

84. *Id.* at 299.

85. StGBR, § 218a(1).

term.⁸⁶

In further clarifying its 1975 decision, the Senate went on to say that in some situations an abortion may be "justified."⁸⁷ However, it is only in these situations that an abortion may be characterized as "not illegal" (*nicht rechtswidrig*).⁸⁸ Here the Court follows the typical German approach to the analysis of crime and its punishment.⁸⁹ The first step in this analysis is to establish that an offense or illegal act (*Tatbestand*) has taken place. A crime takes place when the objective and subjective elements that define it as a crime are present. Abortion is objectively a crime when someone invades the body of a woman to interrupt a pregnancy. The necessary subjective element is present when the person who commits the act wills it. In the second step, it must be determined whether the wrongful act is illegal (*Rechtswidrigkeit*). The wrongful act will not be found to be illegal if justifiable reasons exist for its commission (e.g., killing someone in self-defense). In the third stage, it must be determined whether the person committing the act is personally blameworthy (*Schuld*). If personal guilt is established, punishment (*Strafe*) usually follows. But there are exceptions to this rule. A penalty might not be imposed for the commission if an illegal act of cogent reasons exist for exempting a person from punishment.

Accordingly, applying this reasoning to abortion, while any deliberate destruction of the fetus after the fourteenth day of conception is an "act of killing," thus satisfying the elements of a criminal act (*Tatbestand*), this act may be "justified" and thus declared "not illegal" (*nicht rechtswidrig*) in some circumstances. These circumstances the Court limits to serious medical, genetic, and criminological indications which a valid law must specify.⁹⁰ In still other situations, as noted below, an illegal act need not be punished if extenuating circumstances of a severe nature diminish the actor's guilt (*Schuld*).

In the Constitutional Court's 1975 decision, a serious social predicament was among the reasons "justifying" an abortion. In its 1993 decision, the Court omits social indications from its list of reasons justifying an abortion, presumably because social reasons are likely to predominate

86. 88 BVerfGE at 253, 273.

87. *Id.* at 270.

88. *Id.* at 270. The Court is referring to abortions carried out for serious medical, genetic, or criminological reasons.

89. Fritjof Haft, *Strafrecht, Allgemeiner Teil*, (5th ed. 1992): 13-17; Johannes Wessels, *Strafrecht, Allgemeiner Teil*, (23rd ed. 1993): 257-61.

90. 88 BVerfGE at 273-74.

under any regulatory scheme that allows the woman freedom of choice within the first trimester of pregnancy after submitting to obligatory counseling. The Second Senate ruled, however, that any non-indicated abortion taking place within the "time-phase" counseling plan must remain illegal (*rechtswidrig*) even though the State may elect not to prosecute such illegal acts.

Adhering to the core of its 1975 decision, the Court declared that any non-indicated abortion must be declared illegal (*rechtswidrig*).⁹¹ Any balance struck between the conflicting interests of the fetus and pregnant woman would have to reflect the overriding importance of the core values of human "dignity" and "life" as these terms are used within the meaning of the Constitution. Given the hierarchical arrangement of the Constitution's "objective values" (i.e., those values the State is constitutionally obligated to defend) the unborn child's right to life precedes the wishes of the pregnant woman unless an abortion is "justified" by some indication specified by law. Abortions not so specified, declared the Second Senate, cannot be justified, for to declare non-indicated abortions "not illegal" and thus justifiable would conflict with the State's constitutional duty to "respect and protect" the "dignity of man."⁹²

Could the State achieve the proper constitutional balance between the "right to life" and "personality" clauses of the Basic Law by other than penal means? In what some commentators thought was a major change in emphasis from its 1975 decision, the Second Senate answered in the affirmative. For the first time, the Court seemed prepared to allow non-indicated abortions obtained in the first trimester of pregnancy to remain unpunished (*straffrei*). The social context had changed radically since 1975. The Court could no longer ignore the reality of abortion-on-demand in East Germany and changing attitudes toward abortion in West Germany. By 1990, public opinion polls were showing that large numbers of West Germans would ease restrictions on abortion in early pregnancy. The Second Senate's problem was to find some way of bringing established constitutional principles into line with social reality, while also trying to shape social reality in accord with those principles.

The Second Senate concluded that a statutory scheme may include a time-phase plan with compulsory counseling (i.e., a plan that would leave the final decision to the pregnant woman) so long as the regulatory

91. *Id.* at 273.

92. *Id.* (citing GG art. 1, § 1).

scheme as a whole “effectively and sufficiently” protects unborn life.⁹³ In other words, the state may validly conclude that in view of the reality of abortion in modern society, the more effective solution to the problem of unwanted pregnancy is to stay the hand of would-be prosecutors, to make an ally and friend of the woman in distress, to forswear threats of punishment, and to induce her to cooperate voluntarily with the state without any fear of retribution or loss of personal integrity.⁹⁴

Under the Court’s 1975 decision, a pregnant woman would have to convince counselors that her social predicament was “severe” before an abortion could be certified as “indicated.” Under its 1993 ruling, the woman need not carry this burden of proof because such a requirement would defeat the purpose of counseling. To shift the burden of proof to the woman would be threatening rather than facilitating, the Court noted, making counselors judges instead of helpers. Counselors, said the Court, are to act with compassion and understanding, to deal sympathetically with the pregnant woman’s “conflict situation” (*Konfliktsituation*), and to insure that she is aware of the significance of the life germinating within her. The Second Senate characterized this process as “preventive protection through counseling.”⁹⁵ Counseling of this nature, the Court emphasized, requires advisors who can be trusted to convey a strong prolife message, to treat women in distress respectfully, and provide them with comprehensive information about available care, facilities and financial support.⁹⁶

At this stage of its lengthy opinion, the Court closely scrutinized the social service and counseling provisions of the Pregnancy and Family Assistance Act, finding several of them constitutionally deficient.⁹⁷ These deficiencies or omissions in the law can be summarized briefly. First, the law failed sufficiently to emphasize the normative goal of abortion counseling. Compulsory counseling, declared the Court, must be oriented toward the constitutional goal of preserving unborn life. At the same time, out of respect for the well-being and dignity of the pregnant woman, the counselors could not legally dictate the outcome of such counseling. But since both doctors and counselors have a legal duty to fortify a pregnant woman’s sense of responsibility to the unborn child, the state must ensure that counselors and doctors are worthy of this trust.

93. *Id.* at 282.

94. *Id.*

95. *Id.*

96. *Id.*

97. SFHG, art. 1, § 2.

Merely to encourage pregnant women to make a conscientious decision after informing them of the care and services that would be available if they carry their pregnancies to term is insufficient. As already noted, counselors must confront the "conflict situation" of the woman, emphasize the value of unborn life, and encourage the woman to continue her pregnancy.⁹⁸

Second, if counseling is to be effective, said the Court, it must be backed up with social assistance and other forms of public support that would enable a woman to carry her pregnancy to term. The Court seemed to suggest that the Pregnancy and Family Assistance Act was a significant step in this direction, but that the legislation would have to be reexamined in terms of its declared purpose. Parliament, said the Second Senate, must consider the present and future living conditions of pregnant women and, if necessary, provide them with needed care as well as with the financial assistance to maintain the wholeness and integrity of their families.⁹⁹ By the same token, counselors must inform the woman of the various and generous forms of assistance available if she carries her child to term. In support of such assistance, the Second Senate invoked Article 6 of the Basic Law. Article 6 places "marriage and family" under the "special protection of the state"¹⁰⁰ and proclaims that "[e]very mother shall be entitled to the protection and care of the community."¹⁰¹ The Court instructed parliament to take these constitutional commands seriously when devising a policy on abortion.

Third, the Court emphasized the need to insure that women and mothers would not lose their jobs or undergo serious financial hardship as a consequence of pregnancy or childbirth. Out of respect for a pregnant woman's right to personality, the state must create an environment of job security and guaranteed welfare that would help her to make a decision in favor of childbirth. "The legislature [must] provide the basis," declared the Court, "for a balance between family activities and gainful employment and guarantee that the task of raising children in a family will not lead to any disadvantage in the workplace."¹⁰² Thus, said the Court, the State is obligated to adopt "legal and actual measures designed to enable both parents simultaneously to raise their children and pursue gainful employment and to return to their jobs without losing the opportunity for

98. 88 BVerfGE at 282-83.

99. *Id.* at 258.

100. *Id.* (citing GG art. 6, § 1).

101. *Id.* (citing GG art 6, § 4).

102. *Id.* at 260.

professional advancement following periods of child care.”¹⁰³ When considered in tandem with the Basic Law’s command that “[m]en and women shall have equal rights,” the “marriage and family” clause serves to reinforce the state’s responsibility to incorporate these protections into public law.¹⁰⁴

Fourth, and continuing in this vein, the Court suggested that the legislature may be required to amend aspects of private law to facilitate a decision in favor of childbirth. For example, the Court proposed that landlords be prohibited from terminating leases because of the arrival of a newborn child in the household. The Court also suggested amending the consumer credit laws to ease the financial burden of women and their families in the aftermath of childbirth.¹⁰⁵

Fifth, a major omission in the Pregnancy and Family Assistance Act was the legislature’s failure to insure that a pregnant woman would not abort her fetus owing to the social pressures of friends and relatives. In fact, counselors may request the participation of the father and close relatives if they are exerting pressure on the woman to abort her fetus. The Court even suggested that the penal law might be used to punish any person — lover, father, husband, mother, friend or employer — who would place undue pressure on a pregnant woman to have an abortion, and thus abet the commission of a crime. If the protection of unborn life is indeed a normative constitutional goal that the State is obligated to defend under the Basic Law, then the State can do no less than to liberate women, to the extent possible, from the social pressures that would undermine this goal.¹⁰⁶

Sixth, and in one of its most controversial rulings, the Second Senate nullified provisions of the Pregnancy and Family Assistance Act permitting non-hardship abortions to be paid from the state’s medical insurance system (*Krankenversicherung*). This ban extends, said the Court, to private medical insurance policies. Since private law must conform to the basic values of the Constitution, a private contract allowing medical coverage for an abortion would to that extent be illegal. Lawful abortions — that is, those duly certified for medical, genetic, and criminological reasons — may be covered by the national health plan, but “illegal” abor-

103. *Id.*

104. *Id.* (citing GG art. 3, § 2). The Second Senate found that the legislature had made a favorable beginning by increasing the monthly allowance for the care of children and providing for additional job security following childbirth. *See id.* (citing SHFG, art. 5).

105. *Id.* at 260.

106. *Id.* at 253, 295.

tions may not be so funded. Financing "illegal" abortions out of the national health insurance plan, declared the Court, would make the State a participant in an unjustifiable act and convey the wrong message about the nature of abortion.¹⁰⁷

At the same time, the Court took the position that the state may not constitutionally deny welfare assistance to a poor woman who is unable to afford a non-indicated abortion but who wants one. If a woman is poor (*bedürftig*) and eligible for help under the Welfare Assistance Act (*Bundessozialhilfegesetz*) then the abortion must be paid out of state welfare funds. The distinction that the Court makes between welfare assistance and medical insurance is more than just a fight about what fund to draw on.¹⁰⁸ Symbolically the distinction is important. Denying medical coverage to a nonpunishable illegal abortion expresses the view of the German legal order that such an abortion cannot officially be sanctioned. The state recognizes, however, that a pregnant woman may face an emergency, especially if she is poor, and if her predicament drives her to end her pregnancy even after the required counseling, the state as a last resort will pay for the abortion in the interest of her health and welfare.

Here the Court spoke with a human voice, as it did when ruling that the state, prior to issuing an abortion certificate, could not force the woman to consult with parents, husband or family. The state must guarantee that "no woman will be prevented from going to a licensed physician to procure an abortion merely because she lacks the financial means to do so."¹⁰⁹ If the counseling system is to work, said the Court once again, a woman in distress must be encouraged to see the counselors, to talk with them voluntarily, and to do so in a non-intimidating context. If the woman insists on having the abortion after the prescribed counseling has taken place, the counselors must provide her with a valid certificate, supply her with the names and addresses of doctors and facilities willing to perform the abortion and, if necessary, pay for the abortion out of general social welfare funds. Any other system, the Court suggested, would drive the woman away from counseling and perhaps into the hands of illegal abortionists. After all, the objective of the counseling system is to put the illegal abortionist out of business.

Seventh, and in keeping with its scrupulous prolife line of reasoning, the Second Senate sustained the ban on commercialized abortion serv-

107. *Id.* at 315-16.

108. John Garvey's query in his letter of 14 February 1994.

109. *Id.* at 321.

ices, even suggesting that legislators consider the French scheme which restricts the number of abortions that can take place in any medical clinic or health facility.¹¹⁰ Under the Court's decision counseling facilities must be certified and supervised by the state, and the *Länder* must ensure that all women have access to counseling facilities. The Court showered its disapproval on abortion facilities such as Pro Familia, a private organization in which a woman could be counseled in one office and then immediately referred to another in the same facility where she would meet the doctor who would perform the operation. Such profit-making operations, suggested the Court, are not likely to respect the constitutional value of unborn life. Accordingly, the Second Senate admonished parliament to separate counseling facilities from institutions with a financial interest in carrying out abortions.¹¹¹ The Court's language was emphatic: "Every material entanglement of counseling agencies with institutions that would encourage or carry out an abortion is [constitutionally] forbidden."¹¹²

Finally, the Second Senate held unconstitutional an amendment to the Federal Statistics Act that dropped the requirement for detailed reports on abortion.¹¹³ The Court ruled that abortion statistics constitute a necessary means of determining whether the counseling system is working, and the Justices instructed parliament to consult these statistics regularly to ensure that the counseling system is working as planned.¹¹⁴

Two dissenting opinions were written in the 1993 Abortion Case. An opinion by Ernst Gottfried Mahrenholz, the Second Senate's "chief justice," in which Justice Sommer concurred, dissented from the majority's view that non-hardship abortions were to be classified as "illegal" in the criminal code. In general, these justices felt that the Pregnancy and Family Assistance Act struck an adequate balance between the rights of life and personality under the Basic Law. Justice Ernst-Wolfgang Böckenförde, whose participation in the case was unsuccessfully challenged by some Social Democrats,¹¹⁵ wrote a second dissenting opinion to question the Court's ban on paying for "illegal" abortions out of the state's medi-

110. *Id.* at 294-95.

111. *Id.* at 287.

112. *Id.* A legitimate counseling agency need not be part of the state bureaucracy. Many are private. In Germany, however, given the indirect effect of basic constitutional values in the private legal sphere, a constitutional tort action could conceivably be brought against a private counseling agency that advocates abortions in violation of the Constitutional Court's rulings.

113. SFHG, art. 15(2). *See also* 39 BVerfGE 209.

114. 39 BVerfGE 309-12.

115. *See supra* note 78.

cal insurance program. Whether abortions performed for serious social reasons should be a part of the national health plan was, in his view, a matter of legislative discretion. But this was a peripheral point.¹¹⁶ On the essential core of the judgment, he voted with the majority in a 6-2 decision.¹¹⁷

What, finally, was the impact of the decision on Germany? Under the Federal Constitutional Court Act, decisions like the Abortion Case of 1993 have the force of law.¹¹⁸ In addition, the Court has reserved to itself the power to lay down general guidelines for the enactment of new legislation incorporating its rulings. Often the Court instructs parliament exactly and precisely what rules must be adopted in new legislation. In some instances, the Court has set a deadline for the passage of such legislation. No deadline was laid down in the 1993 Abortion Case, most likely, as speculation would have it, out of deference to a parliament preparing for a new national election.¹¹⁹ The Court did rule, however, that its decision would enter into force on June 15, 1993 and that it would apply to *all* of Germany. In the meantime, the Court issued an interim list of decrees, many of them seeking to restructure the counseling process in accordance with its prolife views.

116. Gerald L. Neuman takes issue with this statement in his letter of November 15, 1993. He writes:

I am not sure how it is best to think of your description of the court's holding regarding "socially indicated" abortions. On the surface, I disagree with your description — I would rather say (and do say) that the court held that *unevaluated* abortions could not be treated as justified, and held or stated under a counseling regime "socially indicated" abortions could not be evaluated (whether it held this or stated this being a matter of important dispute in Germany now). But I don't think the decision holds that "socially indicated" abortions based on a need which is as intense as the other three indications would not be justified if there were a third-party determination of the need. This is Böckenförde's distinction between material justification and the formal justification; do you dismiss this as a technicality? Nonetheless, maybe all of this is just on the surface, and maybe you are fundamentally right that what the majority is really doing is acting on an unstated rejection in principle of the "social" indication for abortion. If that is true, however, then my own reaction would be that the initial denunciations of the decisions were correct, and I would think at least that praise for the decision would require some explanation of why socially indicated abortions can never be as justifiable as eugenic abortions.

117. Two of the justices in the majority, incidentally, were Social Democrats, one of whom was a woman.

118. BVerfGG, § 31(2).

119. As of this writing, parliament has not amended the Pregnancy and Family Assistance Act of 1992. Several bills designed to incorporate the Court's rulings, however, are now pending before the Bundestag. See FRANKFURTER ALLGEMEINE ZEITUNG, 19 January, 1994, at 1.

IV.

Does the German experience have any relevance for Americans? Many would resist the suggestion that we Americans could or should transplant German constitutional doctrine onto American soil. There are notable differences in our political and legal landscapes that would make wholesale transplantation in either direction difficult, just as there are crucial differences in the roles played by the two high courts when exercising judicial review. On the other hand, to suggest that the German experience has no relevance for us is to take refuge in a mindless and debilitating relativism.

Most commentaries on the German and American abortion decisions emphasize their doctrinal differences. An important similarity, however, tends to be overlooked. Each tribunal seems to employ a "compelling interest" and "narrow tailoring" analysis, a common analytical framework known as "proportionality" analysis in Germany and "strict scrutiny" analysis in the United States. The difference of course is that in Germany the protection of the fetus was found to be a compelling state interest — indeed a compelling interest commanded by the Constitution itself. Under the German Court's brand of strict scrutiny review, the Abortion Reform Act of 1992 was not adequately tailored to protect the state's compelling interest in preserving unborn life.

One general issue in the background of the German and American cases is the way in which the tension between judicial review and legislative majoritarianism has been played out in both countries. For example, we have already seen how the dissenting justices on both Courts rebuked their colleagues for exceeding the limits of judicial power. Yet there are important differences between the American and German cases. In Germany, judicial review extended to a national statute; in the United States, to a variety of state laws. In addition, at least in the beginning, the two situations represented different variants of judicial activism. In *Roe v. Wade*, the laws struck down had been on the books for generations and were kept there through legislative inertia without regard to intervening social change.¹²⁰ In Germany, the Court struck down new laws which had been laboriously forged out of serious discussion, debate and negotiation.

What bothers the critics of the German abortion decision is that the parliamentary debate represented an honest effort on the part of consci-

120. The United States Supreme Court has also struck down a variety of "new" laws on abortion, but nearly all of these statutes were passed in response to *Roe v. Wade*.

entious legislators to balance the life of the fetus with the welfare of pregnant women. Nullifying the result of such a thoughtful legislative effort, as John Ely has suggested,¹²¹ would seem to strike deeply into the heart of a political democracy. The suggestion is that a constitutional court ought to stay its hand when an unbiased and fairminded legislature has made a sincere effort to balance constitutional rights and values. In defending the power of judicial review, American constitutional theorists often resort to functional explanations. They argue that the Court must reserve to itself the power of decision because, unlike the legislature, it is a principled decisionmaker unaffected by the kind of constituency pressures that buffet lawmakers.¹²²

Functional theory would not seem fully to describe the situation in Germany. Only a cynic would suggest that the Abortion Reform Act of 1992 proceeded from the short-term objectives of constituency interests or pressure groups. Yes, interest groups pressed their demands — as is their right, incidentally, in any political system we would wish to call democratic — and they had notable representation in the Bundestag, but the parliamentary result was significantly more than the sum total of these pressures. Important public values were at stake and these values were often at the center of the legislative debate. Abstract principles were invoked by all sides in the debate and a conscious effort was made to define a national policy on abortion arguably compatible with the Federal Constitutional Court's abortion decision of 1975. In many respects, the Bundestag had entered into a conversation with the Constitutional Court, furnishing Americans with an example of creative dialogue across branches of government. *Roe v. Wade*, by contrast, stopped the conversation. It ended the debate over the constitutionality of abortion and on the basis of constitutional language less explicit or commanding than the text of the Basic Law.¹²³ Except for the abortion funding cases,¹²⁴ *Roe* and its progeny over the next ten years or so left the states with no real discretion to control the incidence of abortion in American society. The

121. JOHN ELY, *DEMOCRACY AND DISTRUST* (1980).

122. For a prominent example of functional justification, see MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982); see also Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 83-87 (1989).

123. Susan Burgess takes a slightly different view, arguing that Congress and the Supreme Court engaged in a substantive constitutional debate over abortion. See SUSAN R. BURGESS, *CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES* 28-64 (1992).

124. See *Beal v. Doe*, 432 U. S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

lack of discretion was one consequence of dividing pregnancy into three stages and attaching rather firm constitutional rules to each. In 1975 and 1993, by contrast, the Federal Constitutional Court bounced the ball back to parliament, thus continuing the dialogue that had begun there. In doing so, the Court challenged the representatives of the people to use their intellects and imaginations to write better laws. In *Casey*, the Supreme Court finally rejected *Roe*'s trimester framework of analysis, but it remains to be seen how much discretion *Casey* has given back to the American states.

It is possible of course to exaggerate the degree of discretion the German Court has left to parliament in devising a new abortion law in the aftermath of its 1993 decision. The numerous instructions and guidelines laid down by the Court and which parliament must now follow in enacting a new law are not less "statutory" in nature than the trimester framework laid down by the U.S. Supreme Court in *Roe v. Wade*. So perhaps the dialogue between judiciary and legislature will not be as fruitful as one would hope for. On the other hand, *Casey* may well represent the beginning of an American dialogue, particularly if the centrist position of Justices Souter, Kennedy, and O'Connor gather support in the American political and judicial communities.¹²⁵ Ironically, a decision to overrule *Roe v. Wade* would remove the judiciary from the dialogue and, perhaps as a consequence, provide less protection to pregnant women than the decisions of the Federal Constitutional Court.

Perhaps this comparison is limited because of the very different ways in which the debate over abortion has taken shape in Germany and the United States, a difference that emerges in both legislative and judicial arenas. In Germany, the main contestants did not question the state's duty to protect the life of the fetus at all stages of pregnancy. On this question, the most non-religious Social Democrat could agree with the most religious Christian Democrat. However, such agreement has been largely absent from the American debate. Perhaps when disagreement is over strategy rather than ends, there should be greater judicial reluctance to negate the judgment of the legislature.¹²⁶

How Americans assess the performance of Germany's Federal Consti-

125. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (Souter, Kennedy, O'Connor, JJ.).

126. Perhaps the opposite contention could be made with equal force. When the judiciary and the legislature disagree about ends (i.e., when there is no societal consensus about the morality or propriety of abortion), the judiciary should be advised to stay its hand so as to avoid the imposition of a single constitutional theory on the nation as a whole.

tutional Court probably depends on their own personal views about the morality or propriety of abortion. But surely we Americans must envy the relative civility and integrity of the German debate in both legislative and judicial arenas. We have witnessed there a conversation, one that has sought to build bridges between people of opposing views rather than to burn them. German lawmakers, however, like the members of the Constitutional Court, have been able to talk with one another, and they seem to be making an effort to achieve a genuine consensus about what it means to create a society based on common values about life and human dignity. Many American legislators, by contrast, appear to be arming for battle in an effort to "exterminate" the enemy and to achieve total victory for one side or the other.

One also sees in the German approach a refreshing honesty that owns up to the realities of abortion. There is no pretending that a five month old fetus is not in some sense human life. There is no pretending that all doctors working in abortion clinics have the best interests of their patients at heart. There is no pretending that all women who choose to abort their unborn children are doing so because they have made a responsible choice against the backdrop of all available alternatives. What is impressive about the German Court's performance is its appreciation of the complexity of these issues and its detailed discussion of the many pressures and cross-pressures confronting a pregnant woman in distress. The Justices invited and engaged in argument on all aspects of the abortion process.

The decisions of the U.S. Supreme Court, by contrast, ignored issues and glossed over problems that were crucial to the Constitutional Court. For example, the attitude of the Supreme Court toward the medical profession was one of almost total trust. In *Doe v. Bolton*, the Court noted that the physician's license runs not only to making "the best clinical judgment that an abortion is necessary,"¹²⁷ but also to rendering a medical judgment "exercised in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient."¹²⁸ The German Court declined to cede any such all-embracing role to physicians, in part because they are arguably incompetent to advise patients on the nonmedical aspects of abortion. Indeed, the Constitutional Court suggested that to the extent that physicians have

127. 410 U.S. 179, 192 (1973).

128. *Id.* For a critical treatment of this comment on the physician's role, see Susan F. Appleton, *Doctor, Patients and the Constitution: A Theoretical Analysis of the Physician's Role in 'Private' Reproductive Decisions*, 63 WASH. U. L.Q. 183 (1985).

contributed to the commercialization of abortion they are themselves part of the problem. Given the Supreme Court's extreme deference to the expertise of the medical profession, no American should be surprised that the commercialization of abortion services, banned or curtailed in some western European nations with liberal abortion policies,¹²⁹ has proliferated in the United States. On the other hand, American state governments could probably cut down on commercialized abortion facilities if, like a number of European nations, they were to provide women with the kind of social and financial assistance that would make it easier for them to carry their pregnancies to term.

Profound differences also mark the way in which the two tribunals characterized the human fetus. The question in *Roe* was whether the fetus is a person within the meaning of the Constitution. Putting the question that way was bound to result in a total victory for the pregnant woman. With the fetus categorically declared as a nonperson, all other countervailing social values had to give way to the woman's right to privacy. For the German Court, the personhood of the fetus was not the issue. The Constitutional Court did not have to decide, indeed it refused to decide, whether the unborn child was a bearer of rights. Throughout its opinion the Court described the fetus not as a person but rather as "gestating life," "unborn life," and so on, and characterized that life as a "legal value" of utmost importance, thus meriting the state's protection. It was enough for the Court to posit that human life has significant value even if that life has not yet developed into a full person.

Because fetal life represents an important legal value, the German Court was able to avoid the pitfalls of treating abortion as a right of privacy. *Roe v. Wade* did not convincingly argue that abortion is strictly a private matter between a woman and her doctor. The very idea of fetal life as a public legal value undercuts the privacy argument. Let us not forget that even Justice Blackmun distinguished abortion from the privacy right discovered in *Griswold v. Connecticut*,¹³⁰ and he went on to observe in *Roe*, with a touch of uneasiness, that "[t]he pregnant woman cannot be isolated in her privacy."¹³¹ Why? Because, the Justice continued, "[s]he carries an embryo and, later, a fetus, if one accepts the medical definition of the developing young in the human uterus."¹³² But,

129. See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 17 (1987).

130. 381 U.S. 479 (1965).

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

132. *Id.*

Justice Blackmun backed off, and with a bit of verbal legerdemain, brought *Roe* once again within the scope of *Griswold*.

The different approaches to constitutional interpretation in Germany and the United States have to be understood finally in terms of the underlying ethos that drives constitutional doctrine. In the U.S. that ethos is anti-statist individualism. The image of the human person in American constitutional law is that of an autonomous moral agent unconnected to the larger community in any meaningful sense. It is the image of a woman alone, isolated and independent, and bounded by little more than self-interest. German constitutional law, by contrast, has a strong communitarian orientation, and it tells the story of human solidarity, a story that tries to join public virtue to liberty, one that speaks of social integration and the wholeness of life. As the Court has said in another context:

The image of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value.¹³³

Perhaps there is some instruction in all of this for how we Americans might better resolve the tension between liberty and community.

Earlier, I characterized the German abortion opinion as a conversation. I would like to return to this metaphor in these concluding comments. In describing the German debate as a conversation, I have in mind particularly the two days of hearings before the Second Senate of the Federal Constitutional Court. The hearings transcended the dualism of the standard pro and con arguments so often heard in American courts. The German justices listened patiently for two days to all kinds of people, lawyers and nonlawyers alike. They invited and heard the merits of all competing claims. Doctors, counselors, social workers, women's organizations and charitable societies had an opportunity to inform the Court about the difficulties and procedures faced by pregnant women in distress. Perhaps this is one of the advantages of abstract judicial review; as indicated earlier, the object is not to define the rights of particular parties but to declare the meaning of the Constitution. Abstract review facilitates conversation and helps to avoid the kind of polarization present in the American legal order. The Court helps to build bridges when it honors the competing values on both sides of the abortion debate and acknowledges the various interests of persons with different outlooks.

133. 4 BVerfGE 7 at 15-16 (1954).

Our courts, by contrast, too often engage in the zero-sum game of producing winners and losers.¹³⁴

I think the German experience shows that compromise is possible and that a balancing of interests superior to the balance struck in *Roe* is within our grasp.¹³⁵ Germany is engaged in an exciting experiment and Americans would do well to follow developments there to see how the system works out in practice. Our courts would also be well advised to pay attention to the German experiment. Obviously, we Americans have no judicially enforceable objective order of values, but it seems to me that our courts might begin to *permit* what the Federal Constitutional Court *requires*. If counseling programs, waiting periods, mandated information about fetal development and the like are carried out within a genuine context of public caring and solicitude, there may be reason to think that the abortion battle would begin to play itself out. I could even envision an acceptance of public funding for poor women if they opt to abort within the framework of a system similar to the German. In this respect, *Casey* may just possibly be a step forward; it could be the key to a new American settlement regarding abortion in our society.

134. Robert A. Burt advances a similar view in his insightful comparison of *Dred Scott v. Sandford* and *Brown v. Board of Education*. See Robert A. Burt, *What Was Wrong With Dred Scott, What's Right About Brown*, 42 WASH. & LEE L. REV. 1 (1985). Speaking of *Dred Scott*, Burt notes: "The question purported to settle the antagonism [on the slavery question] by awarding total victory to one side and, concomitantly, by inflicting total defeat on the other." *Id.* at 19.

135. See Generally ELIZABETH MENSCH AND ALAN FREEMAN, *THE POLITICS OF VIRTUE* (1993).