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# DEVELOPMENTS IN GERMAN ABORTION LAW: A U.S. PERSPECTIVE

Deborah Goldberg\*

## INTRODUCTION

On July 27, 1992, Richard von Weizsäcker, the Federal President of the newly unified Germany, signed the Act for Assistance to Pregnant Women and Families (the 1992 Act) which was approved by both houses of the German legislature.<sup>1</sup> This new abortion legislation amended the provisions of the German Penal Code that govern abortion.<sup>2</sup> Under the 1992 Act, an abortion would be legal as long as a woman underwent the statutorily required counseling and a physician performed the abortion within the first twelve weeks of the pregnancy.<sup>3</sup> The law, however, was never enacted. The Bavarian state government<sup>4</sup> and those members of Parliament who originally voted against the law challenged it before the Federal Constitutional Court on the ground

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\* J.D. candidate, UCLA School of Law, 1996; B.A. Brown University, 1990. I would like to thank Professors Dr. Albin Eser and Dr. Susanne Walther, LL.M., for their guidance and for giving me the opportunity to research at the Max-Planck-Institute in Freiburg, Germany. I am grateful to the editors and staff of the UCLA Women's Law Journal for their incredible dedication, patience, and hard work. In particular, I would like to thank Heather Mactavish, Peggy Chen, Geniveve Ruskus, Tessa Schwartz, Cynthia Valenzuela, and Wendy Aron without whom this Recent Development would not have been possible. I am also indebted to Professor Frances Olsen for her insight and direction and to my husband, Daniel Zimmermann, for his never ending support and encouragement.

1. Schwangeren- und Familienhilfegesetz [Act for Assistance to Pregnant Women and Families], 1992 Bundesgesetzblatt [BGBl.] I 1398 (Germ.) [hereinafter the 1992 Act].

2. Article 13 of the 1992 Act replaced certain portions of the Strafgesetzbuch [StGB] dealing with abortion. The 1992 Act, 1992 Bundesgesetzblatt [BGBl.] I 1398 (Germ.).

3. Strafgesetzbuch [StGB] § 218 (as reformed by the 1992 Act).

4. The Bavarian state is governed by a sister party of the conservative Christian Democratic Union (CDU) called the Christian Social Union (CSU).

that it did not meet the minimum constitutional standards for protecting unborn life.<sup>5</sup>

While the Court did recognize a woman's right to choose to have an abortion, it nevertheless struck down central parts of the 1992 Act. On May 28, 1993, the Federal Constitutional Court of Germany recognized for the first time that it is a woman's ultimate responsibility to decide whether to terminate a pregnancy.<sup>6</sup> Although the Court acknowledged this right, the Court determined that the reformed law did not meet the minimum constitutional standards for the protection of life.<sup>7</sup> The German legislature is currently in the process of reforming abortion legislation in order to meet the demands and restrictions of the Court's decision.

Just one year before the German Federal Constitutional Court's landmark decision, the United States Supreme Court set the tone of the American abortion debate. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>8</sup> the Court's holding implies that abortion is no longer a fundamental right.<sup>9</sup> Under *Casey*, state legislatures are permitted to enact abortion regulations that do not place an undue burden on a woman's ability to obtain a pre-viability abortion.<sup>10</sup> *Casey* may return the United States to a pre-*Roe*<sup>11</sup> situation in which state legislatures strive to reconcile competing interests intrinsic to the abortion debate.<sup>12</sup> In the post-*Casey* era of increased opportunity for states to regulate (and restrict) abortion, it is especially impor-

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5. Abstract Judicial Control [*Abstrakte Normenkontrolle*] is the process by which members of Parliament can challenge a law directly before the Constitutional Court. Under this procedure, a law can be challenged without waiting for an affected party to bring a claim after it has been enacted. Such a challenge may be brought by a majority in either part of the legislature [*Bundestag* or *Bundesrat*] or by at least 50% of the members of one of the parties in Parliament [*Fraktion*] if they question the constitutionality of a law. This process allows the Federal Constitutional Court to settle disagreements regarding constitutional interpretation directly. Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y 1, 5-6 (1994).

6. Susanne Walther, *Thou Shalt Not (But Thou Mayest): Abortion after the German Constitutional Court's 1993 Landmark Decision*, 36 GERMAN Y.B. INT'L L. 385, 390 (1993).

7. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203 (1993).

8. 112 S. Ct. 2791 (1992).

9. *Id.*

10. *Id.* at 2819.

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

12. Charles P. Kindregan, *The Dilemma of the Webster Decision: Deconstitutionalizing the Trimester System*, 1990 REP. ON HUM. REPROD. & L. 276, 277.

tant to examine abortion laws and practices in countries where abortion is regulated by legislative act rather than by constitutional mandate.<sup>13</sup> As in many other western nations, including Canada and England, the legislative branch in Germany is responsible for drafting laws that govern abortion.<sup>14</sup> Theoretically, the abortion laws in the United States and Germany seem to rest upon opposing premises. In the United States, abortion laws have been historically grounded on a woman's constitutional right to obtain a pre-viability abortion. In Germany, on the other hand, the state's duty to protect developing life is the guiding principle behind abortion regulations. In practice, these laws may affect a woman's right to choose and to obtain an abortion in a similar manner.

Additionally, there are other factors which make a comparison of developments in abortion law in Germany and in the United States important. First, due to post-World War II developments, the legal cultures of the United States and Germany are quite similar.<sup>15</sup> Second, the recent German reunification necessitated reform of the abortion laws of the former East and West Germany to create one common law. With this reform came an extensive public discussion over the abortion dilemma, which, in many ways, paralleled the abortion debate in the United States. Third, although federal legislative act regulates abortions in Germany, the judicial branch exercises considerable power over the legislative branch in the current reforms. This provides for an especially interesting comparison since the interplay of judicial and legislative control<sup>16</sup> will probably become increasingly common in the United States as a result of the *Casey* decision. In examining the abortion issue, it is important to keep in mind that in the United States abortion is regulated at the

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13. *Id.*

14. *Id.*

15. Winfried Brugger, *Abtreibung-Ein Grundrecht oder ein Verbrechen?: Ein Vergleich der Urteile des United States Supreme Court und des BVerfG*, 1986 NEUE JURISTISCHE WOCHENSCHRIFT [N.J.W.] 896, 896 (1986). The legal cultures of Germany and the United States are similar, due primarily to the fact that after World War II the United States helped set up the political and legal structure in West Germany. After reunification, the Federal Republic's Constitution and most West German federal laws were imposed upon East Germany through the unification treaty. Einigungsvertrag [Unification Treaty], 1990 Bundesgesetzblatt [BGBl.] II 889 (Germ.) [hereinafter Unification Treaty].

16. Jutta Geiger & Claudia von Lampe, *Das zweite Urteil des Bundesverfassungsgerichts zum Schwangerschaftsabbruch: Ein Schritt vorwärts, zwei Schritte zurück*, 1994 JURA 20, 28.

state level, within the parameters of the Constitution, whereas in Germany abortion is legislated on a federal level.

This Recent Development analyzes the evolution of abortion law in Germany and compares it to changes in United States abortion law. Part I traces the historical development of abortion law in Germany. Part II explores the need for reform that arose from the reunification of Germany and from problems encountered in regulating abortion through criminal laws. Part III then examines the German legislature's attempt in the 1992 Act to make abortion accessible by legalizing it in the first trimester of pregnancy. Part IV discusses the Federal Constitutional Court's decision that held portions of the 1992 Act unconstitutional and established strict constitutional boundaries for abortion law. Part V compares the most recent changes in German abortion law with the most recent changes in United States abortion law.

## I. HISTORICAL BACKGROUND OF ABORTION LAW IN GERMANY

In 1871 Section 218 of the German Penal Code criminalized abortion.<sup>17</sup> After World War II and the subsequent division of Germany in 1945, abortion laws in East and West Germany developed independently.<sup>18</sup> As a whole, East German abortion

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17. Under § 218, a woman who obtained an abortion could be punished with up to five years of imprisonment. Those who performed the abortion could receive up to ten years of imprisonment. In 1926 the penalty for pregnant women who obtained an abortion was decreased by statute. 61 Entscheidungen des Reichsgerichts für Strafsachen [RGSt] 242 (1926)(Germ.). At that time, the Reich's Court for Criminal Law held that a woman could be excused from criminal sanctions if she aborted in order to save her life or to prevent health hazards. 1926 Reichsgesetzblatt [RGBl.] I 242 (Germ.). After the National Socialists (Nazis) took power in 1933, they created the *eugenic indication* — allowing an abortion if the child would be born with permanent birth defects — in order to further their fascist program and, in particular, to control the occurrence of genetic deformities. 1933 Reichsgesetzblatt [RGBl.] I 529 (Germ.); 1935 Reichsgesetzblatt [RGBl.] I 773 (Germ.). In 1943 the Nazis increased the penalty and women who obtained abortions could again be penalized with imprisonment. Those who assisted in the abortion procedure could be executed if "the perpetrator harmed the vitality of the German people." 1943 Reichsgesetzblatt [RGBl.] I 140, 169 (Germ.). In 1953, after World War II, the changes that the Nazis had implemented were repealed. See generally BRIGITTE HOLZHÄUER, SCHWANGERSCHAFT UND SCHWANGERSCHAFTSABBRUCH: DIE ROLLE DES REFORMIERTEN § 218 StGB BEI DER ENTSCHEIDUNGSFINDUNG BETROFFENER FRAUEN 6 (1989) (providing a historical overview of § 218).

18. Walther, *supra* note 6, at 388 n.24.

laws were much less restrictive than those in West Germany.<sup>19</sup> A very different picture of women's self-determination over their reproductive rights emerges from the two histories.

#### A. Creation of the "Time-Limit" Model in East Germany

In post-World War II East Germany, abortion laws were strict, permitting abortions only in the first trimester "for medical or social reasons or if pregnancy resulted from a criminal act."<sup>20</sup> In 1950 abortions performed on social grounds (when carrying the fetus to term would result in an unreasonable burden for the woman)<sup>21</sup> were technically prohibited. Consequently, approximately sixty percent of abortions became illegal.<sup>22</sup> However, in 1972 the law was changed to reflect a "time-limit" model [*Fristenlösung*], which commentators consider to be "pro-choice."<sup>23</sup> In this time-oriented approach, the woman was given the statutory right to terminate a pregnancy within the first twelve weeks of her pregnancy.<sup>24</sup> Abortions performed after the first trimester were only allowed in cases where the mother's life was in danger.<sup>25</sup> The preamble of the East German abortion law, unlike that of West Germany, acknowledged the importance of self-determination to the larger goal of gender equality.<sup>26</sup> In addition to allowing women more control over reproductive decisions, the State provided extensive support for families and working women in the form of state-funded nursery schools and kindergartens.<sup>27</sup> After 1972, East German legislative regulation of abortion remained rather stable.

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19. Nanette Funk, *Abortion and German Unification*, in GENDER POLITICS AND POST-COMMUNISM: REFLECTIONS FROM EASTERN EUROPE AND THE FORMER SOVIET UNION 194, 194 (Nanette Funk & Magda Mueller eds., 1993).

20. *Id.*

21. Walther, *supra* note 6, at 386.

22. Funk, *supra* note 19, at 194.

23. Albin Eser, *Abortion Law Reform in Germany in International Comparative Perspective*, 1 EUR. J. HEALTH L. 15, 15, 19 (1994) [hereinafter Eser, *Abortion Reform*].

24. Walther, *supra* note 6, at 388 n.24. See Gesetz über die Unterbrechung der Schwangerschaft, 1972 Gesetzblatt der DDR [GBl.] I 89 (G.D.R.).

25. *Id.*

26. Gesetz über die Unterbrechung der Schwangerschaft, 1972 Gesetzblatt der DDR [GBl.] I 89 (G.D.R.).

27. *Id.*

### B. *Establishment of the "Indication" Model in West Germany*

Despite liberalization efforts in West Germany, Section 218 of the 1871 Penal Code, which criminalized abortion, remained largely unchanged until 1974.<sup>28</sup> After a long political battle, the more liberal political parties<sup>29</sup> passed a radically reformed version of Section 218 which reflected a time-limit model [*Fristenlösung*] similar to that of East Germany. The new law decriminalized abortion in the first twelve weeks of pregnancy.<sup>30</sup> Even in cases where the woman failed to undertake counseling, only the doctor performing the abortion (and not the woman) was guilty of violating the law. In what would become a pattern, the Federal Constitutional Court held that the time-limit model was unconstitutional after it was challenged by the Christian Democratic Union (CDU).<sup>31</sup> The Court held that the 1974 legislation did not fulfill the state's constitutional duty to protect the fetus' right to life and to guarantee the inviolability of human dignity.<sup>32</sup> Finding that life begins with implantation (fourteen days after conception), the Court held that the time-limit model did not provide sufficient protection to the developing fetus.<sup>33</sup> Although the right to self-determination is also a constitutional right in Germany, the Court held that the right of the fetus' life to protection prevails even against the will of the pregnant woman.<sup>34</sup> Although the legislature maintained the prerogative to choose the appropriate means to protect the developing life, the Court required the law to impose criminal sanctions when the minimum constitutional standards for protecting developing life could not otherwise be met.<sup>35</sup> However, in cases where continuing the pregnancy would impose an unreasonable burden on the woman, the Court held that the state could no longer compel the woman to carry the fetus to term.<sup>36</sup>

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28. See *supra* note 17.

29. The parties with a more liberal political agenda are the Social Democratic Party (SPD) and the Free Democratic Party (FDP).

30. Strafgesetzbuch [StGB] § 218(a) (F.R.G.) (proposed change to § 218).

31. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 39 BVerfGE 1 (1975).

32. These guarantees are incorporated into the Constitution [*Grundgesetz*] Article 1(1) and Article 2(2).

33. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 39 BVerfGE 1, 51 (1975).

34. *Id.* at 42.

35. *Id.* at 46-47.

36. *Id.* at 48.

In 1976, in response to the Federal Constitutional Court's order, the West German legislature amended the Penal Code, using what was described as an "indication" model [*Indikationslösung*].<sup>37</sup> The legislature technically criminalized all abortions but provided extensive exceptions, or indications, where continuing the pregnancy would constitute an unreasonable burden on the pregnant woman.<sup>38</sup> The German Penal Code was amended to include four indications: the *medical* indication if the woman's health or life was threatened, the *eugenic* or *embryopathic* indication if the child would be born with permanent birth defects, the *criminological* indication if the pregnancy was the result of rape, and the *general emergency* or *social* indication if carrying the child to term would be an unreasonable burden.<sup>39</sup> In addition to requiring the presence of an indication, the 1976 reform provided that abortions performed by a physician were legal if the counseling requirement had been met,<sup>40</sup> the presence of one of the four indications was confirmed by both an independent physician and the physician performing the abortion, the three-day waiting period was complied with, and the abortion was performed within the statutorily prescribed time period.<sup>41</sup> The statutory time allowances for the performance of an indicated abortion were twelve weeks, if the abortion was based on a criminological or a social indication, twenty-two weeks, if it was based

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37. 15. Strafrechtsänderungsgesetz [StÄG], 1976 Bundesgesetzblatt [BGBl.] I 1213 (F.R.G.).

38. Strafgesetzbuch [StGB] § 218 (F.R.G.).

39. Walther, *supra* note 6, at 386.

40. The counseling could be performed by either a physician or a specialist service like *Pro Familia*. *Pro Familia* is a private organization which advocates women's rights and offers pre-abortion counseling, among other family planning services. Funk, *supra* note 19, at 196. However, the physician performing the abortion could not conduct the counseling. Walther, *supra* note 6, at 386. During the counseling process, "the woman was to be 'advised' before the abortion about help available to mothers and 'especially about such help which facilitates the continuation of pregnancy and the situation of mother and child.'" Eser, *Abortion Reform*, *supra* note 23, at 23 (quoting the former Strafgesetzbuch [StGB] § 218(b) (F.R.G.)).

41. Walther, *supra* note 6, at 386. Several scholars commented on the fact that a birth defect is sometimes only apparent after the 22 week period. However if the woman fulfilled the counseling obligation and the abortion was performed by a physician within the first 22 weeks of the pregnancy, then the woman was not punishable under "personal exclusionary grounds" [*Persönlicher Strafausschließungsgrund*] according to StGB § 218 III Nr. 2. Because this protection applied to the woman and not to the doctor performing the abortion, it permitted "abortion tourism" to other countries where abortion laws were more liberal (e.g., Holland). Such options were available only to women who could afford the travel expenses. Albin Eser, *The Reform of the German Abortion Law: Development and First Experiences*, 30 NAT'L REV. CRIM. SCI. 247, 261-62 (1987) [hereinafter Eser, *Development*].



on embryonic or embryopathological reasons, and any time during the pregnancy, if it was based on a medical indication.<sup>42</sup> Many scholars considered this indication model to be "pro-life" because it made the woman's choice to have an abortion contingent upon a third party's finding that an emergency situation existed.<sup>43</sup>

### C. Criticism of the "Indication" Model

Conservative critics were primarily concerned with the social indication because it allowed a woman claiming a "general emergency" [*allgemeine Notlage*] to terminate her pregnancy. They felt that this indication was too vague and too easily met.<sup>44</sup> Thus, these critics argued that the law provided no real deterrent to pregnant women seeking abortions.<sup>45</sup> They were also very troubled by the fact that the indication model provided public health coverage for the costs of the abortion, including those procedures based on the social indication.<sup>46</sup> In addition, they criticized the state for investigating and prosecuting so few cases of illegal abortion.<sup>47</sup> Finally, they were concerned about the statutory language that described an "indicated" abortion as "nonpunishable" because it was increasingly being interpreted by the public as justified, "implying full legalization and not just exemption from punishment."<sup>48</sup>

At the other end of the political spectrum, the 1976 reforms also met with criticism from women's rights supporters and advocates who felt, along with medical professionals, that the entire procedure was too restrictive and complicated.<sup>49</sup> They considered the process to be arbitrary because it was highly dependent upon the discretion of the three specialists that a woman was le-

42. Strafgesetzbuch [StGB] § 218(a) (F.R.G.).

43. Eser, *Abortion Reform*, *supra* note 23, at 15, 18-20.

44. In fact, over 80% of all abortions were performed under the social indication. This was viewed as a quasi catch-all category for obtaining a nonpunishable abortion. Funk, *supra* note 19, at 196. Many conservative critics saw the social indication as a hidden time-limit model which allowed women to freely choose to have an abortion within a certain period of time. HOLZHAUER, *supra* note 17, at 38. One scholar asserted that "even under an 'indication model' almost every pregnant woman could establish an indication warranting an abortion if she did so with determination." Eser, *Development*, *supra* note 41, at 267.

45. Walther, *supra* note 6, at 386.

46. See *infra* part IV.C (discussing funding issues).

47. Eser, *Abortion Reform*, *supra* note 23, at 27.

48. Walther, *supra* note 6, at 387.

49. *Id.*

gally obliged to consult: the counselor, the physician verifying the existence of an indication, and the physician performing the abortion.<sup>50</sup> Perhaps most problematic for women's rights advocates was the fact that the 1976 abortion law was enforced with disparate degrees of severity.<sup>51</sup> In the northern German states, meeting the indication requirement was easier than in the more conservative southern states. As a result, many women were compelled to seek an abortion in the northern states.<sup>52</sup> In addition to the selective implementation of abortion regulations, the limited availability of medical facilities that performed abortions forced women to travel long distances, incurring great costs and necessitating an explanation of their absences to family members and employers.<sup>53</sup> From either a conservative or liberal vantage point, the 1976 abortion law was due for reform.

Even from a systemic viewpoint, the law was ineffective because in practice, the indication model failed to have any general or specific deterrent effect. Although the laws regulating abortion in Germany were restrictive, there was a large "gap between the number of abortions actually performed (unknown but assumed to be very high) and the small number of convictions."<sup>54</sup> Studies comparing countries with varying degrees of restrictiveness in abortion laws have demonstrated that the degree of restrictiveness of abortion laws has little correlation with the number of abortions in the country.<sup>55</sup> These studies revealed that the discrepancy between the severity of the law and the marked lack of enforcement was especially great in Germany<sup>56</sup> since "[t]he failure to achieve restrictive standards for the regulation of abortion might . . . be connected [to] the divergence be-

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50. *Id.*

51. Eser, *Development*, *supra* note 41, at 268.

52. There are considerable regional differences in the abortion rates in West Germany. For example, in the northern city of Bremen in 1982, there were 830 abortions per 1000 births, whereas in other areas there were as few as 32 per 1000 births. *Id.* These regional differences can possibly be accounted for by the fact that women from conservative states seek abortions in areas where it is easier to obtain an abortion. *Id.* See also ALBIN ESER & G.P. FELETCHER, RECHTFERTIGUNG UND ENTSCHULDIGUNG 265 (1987).

53. Walther, *supra* note 6, at 387.

54. Eser, *Abortion Reform*, *supra* note 23, at 27.

55. *Id.* at 26. This is based on the study by Henshaw & Morrow entitled *Induced Abortion: A World Review*. A very comprehensive study has also been pursued at the Max-Planck Institute of Foreign and International Criminal Law, Freiburg i. Brsg., under Professor Eser. *Id.*

56. Eser, *Development*, *supra* note 41, at 247.

tween strict law and more liberal social attitudes."<sup>57</sup> Many scholars in this area felt that this discrepancy was a result of the social attitude towards abortion.<sup>58</sup>

## II. LEGISLATIVE REFORM OF THE ABORTION LAW IN UNIFIED GERMANY: THE COUNSELING MODEL

The German Unification Treaty of 1990<sup>59</sup> required the Parliament [*Bundestag*] to pass new abortion legislation within two years of reunification. The Treaty also required the German parliament to draft legislation that, "in conformity with the *Grundgesetz* [constitution], would . . . protect . . . unborn life while allowing pregnant women to cope with conflict situations."<sup>60</sup>

In July 1992, the legislators of a reunified Germany re-drafted the abortion laws of the former East and West Germany with a bill that had broad support in both parts of the legislative branch: the Parliament [*Bundestag*] and the Council of States [*Bundesrat*].<sup>61</sup> This bill, the 1992 Act, represents a compromise between the time-limit and the indication models and is known as the "counseling" model [*Beratungslösung*].<sup>62</sup> This amalgam fuses aspects of the other two models. The counseling model is based on the theory that the state can better fulfill its constitutional duty to protect unborn life through counseling the woman and by supporting her decision.<sup>63</sup> Under this model, counselors provide pregnant women with information about the various options available to them. Ultimately, however, the final decision about whether or not to terminate the pregnancy is left with the

57. Eser, *Abortion Reform*, *supra* note 23, at 27.

58. *Id.* The threat of prosecution became more acute in 1989 with the Memmingen trials when a gynecologist, Dr. Theißen, was convicted for terminating pregnancies without following the formalities of the 1976 version of § 218. Walther, *supra* note 6, at 388 n.23. Aside from this isolated event, however, the threat of punishment remained nearly obsolete in Germany and therefore posed no real deterrent. See Walter Wallmann, *für die Fristenlösung*, 38 *DER SPIEGEL* 26, 28 (1991). In 1984, for example, only 160 illegal abortions were prosecuted. From this group, only 18 resulted in convictions. HOLZHAUER, *supra* note 17, at 51.

59. Unification Treaty, 1990 Bundesgesetzblatt [BGBl.] II 889 (Germ.).

60. Walther, *supra* note 6, at 388.

61. The 1992 Act, 1992 Bundesgesetzblatt [BGBl.] I 1398 (Germ.).

62. Walther, *supra* note 6, at 389.

63. *Id.*

pregnant woman.<sup>64</sup> This legislative approach was labeled “support instead of punishment” [*Hilfe statt Strafe*].<sup>65</sup>

The 1992 Act maintained a general prohibition of abortion, but provided that an abortion could be lawful if: (1) the pregnant woman consented to the abortion (an especially problematic issue with minors), (2) she had been counseled at least three days before the procedure, and (3) the abortion was performed by a physician within the first twelve weeks of the pregnancy.<sup>66</sup> Under the 1992 Act, physicians did not need to ascertain the existence of an indication; the woman was free to choose to have an abortion without determining that an indication existed during the first trimester of the pregnancy. An abortion performed after the twelfth week of pregnancy was legal only if it was undertaken “to avert a serious threat to [the woman’s] life or a grave impairment of [the woman’s] physical or mental health,”<sup>67</sup> a requirement similar to the medical indication.

Additionally, the 1992 Act went beyond mere regulation of the abortion procedure and attempted to address the broader issues at the root of the abortion debate. For example, the 1992 Act would have required the state to provide public sex education, family planning, and support during pregnancy.<sup>68</sup> The 1992 Act also attempted to create a child-friendly society [*Kinderfreundliche Gesellschaft*] by providing more daycare facilities for working mothers and by ensuring that every child over the age of four would be entitled to attend a state-run nursery school by the year 1996.<sup>69</sup>

Despite this successful effort at compromise between the German political parties, the 1992 Act was never implemented. The conservative CDU party petitioned to have the law enjoined by the Federal Constitutional Court and on August 4, 1992, just one day before the law would have gone into effect, the Court issued an injunction.<sup>70</sup> Because the Federal Constitutional Court enjoined the enforcement of the 1992 Act, the old law remained in force until the Court handed down its decision.<sup>71</sup>

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64. *Id.*

65. *Id.*

66. Eser, *Abortion Reform*, *supra* note 23, at 28 (translating the legislative reform of § 218 in the 1992 Act).

67. Kommers, *supra* note 5, at 14 (citing Strafgesetzbuch § 218 a II).

68. The 1992 Act, 1992 Bundesgesetzblatt [BGB1.] I art. 1 (Germ.).

69. *Id.* at art. 4.

70. Kommers, *supra* note 5, at 15.

71. *Id.*

### III. THE FEDERAL CONSTITUTIONAL COURT'S RESPONSE TO THE 1992 LEGISLATION

On May 28, 1993, the Federal Constitutional Court, in a 6-2 decision, upheld the constitutionality of the provisions of the 1992 Act that decriminalized abortion and gave women the "ultimate responsibility" to decide whether or not to terminate a pregnancy.<sup>72</sup> By decriminalizing abortions, the 1992 Act ensured that abortions performed by a doctor in the first twelve weeks of the pregnancy and after official counseling would no longer be punishable.<sup>73</sup> The Court also held that an abortion in the first twelve weeks of the pregnancy, while not criminal, was legal only if a serious medical, eugenic or criminal indication existed.<sup>74</sup> The Court did not explicitly recognize the social indication, but explained that an indication exists where circumstances create an "undue burden" for the woman to carry the fetus to term.<sup>75</sup> The court also indicated that the legislature can further define circumstances constituting an "unreasonable burden" and thus left open the possibility of re-establishing the social indication.<sup>76</sup> Because the Court held that an abortion performed by a doctor in the first twelve weeks of the pregnancy and after official counseling cannot be criminalized, this form of abortion is allowable.<sup>77</sup>

Although the Court found that the legislative reforms did not provide the minimum constitutional standards to protect unborn life, it held that the state was not obligated to criminalize all illegal abortions.<sup>78</sup> Instead, the state could create a comprehensive system of counseling with the goal of convincing the pregnant woman to carry the fetus to term.<sup>79</sup> If, after counseling, the woman decided to proceed with a nonindicated (or merely counseled) abortion, within the first twelve weeks of the pregnancy, it would not be considered a criminal offense.<sup>80</sup> Nevertheless, the

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72. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 270 (1993).

73. Eser, *Abortion Reform*, *supra* note 23, at 29. Legal abortions, which are based on an indication, still must be performed within the statutorily indicated time-limits. See *supra* note 42, and accompanying text.

74. Eser, *Abortion Reform*, *supra* note 23, at 29.

75. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 273 (1993).

76. *Id.* at 257.

77. *Id.* at 264.

78. *Id.* at 264.

79. *Id.*

80. *Id.* at 270.

Court held this nonindicated abortion could not be considered justified or legal since it is in direct conflict with the state's constitutional duty to protect unborn life.<sup>81</sup>

In accordance with the Federal Constitutional Court's judicial powers, the ruling created a temporary law.<sup>82</sup> This law combines the constitutional parts of the 1992 Act with the Court's temporary order to replace the unconstitutional sections.<sup>83</sup> Until Parliament enacts a new abortion law which abides by the specific constitutional boundaries established by the Court, this temporary law will remain in effect.<sup>84</sup>

### A. *Balancing of Constitutional Interests*

Through its holding, the Court attempted "to erect a normative bulwark to counteract the impression, conveyed by the frequent practice of abortion, that abortion is socially acceptable."<sup>85</sup> The Court acknowledged that two sets of constitutional rights are involved in every abortion decision: the state's duty to protect the unborn, and the woman's constitutional right to the protection of her dignity, her bodily integrity, and the free development of her personality.<sup>86</sup> However, the Court found that the state has a duty to uphold minimum constitutional standards to protect the unborn fetus,<sup>87</sup> even if they are in conflict with the rights of the pregnant woman, since her rights, although legitimate, are clearly less compelling. The Court used the distinction between illegality and criminality in order to balance conflicting constitutional

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81. *Id.* at 258.

82. Under the provisions of § 35 Bundesverfassungsgerichtsgesetz (BVerfGG), the Federal Constitutional Court can establish a provisional or temporary law to replace the unconstitutional portions of a statute.

83. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 209 (1993).

84. *Id.*

85. Walther, *supra* note 6, at 390.

86. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 254 (1993).

87. The Court asserted that the state's duty begins the fourteenth day after conception at implantation and therefore, the act by the *Bundestag* did not provide the minimum constitutional standards for protecting developing life. *Id.* at 257. Again, as in 1975, the Court held that as of implantation the fetus begins developing as a human being and therefore has a right to life. *Id.* at 251. The Court, in 1975, also supported this decision with an historical argument: since the German *Grundrechte*, or the first nineteen articles of the German Constitution, were created as a reaction to the eugenic politics of the Nazis, the protection of all life must be a constitutional priority. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 39 BVerfGE 1, 67 (1975). See Brugger, *supra* note 15, at 898.

rights, thus finding a compromise. The Court held that in order to fulfill its duty to protect unborn life, the state must consider an abortion without the existence of an indication<sup>88</sup> fundamentally "wrong," although "allowable," and encourage the woman to carry the fetus to term.

### B. *Counseling Requirement*

Although the Court left the legislature the option of creating a new counseling system, it imposed such comprehensive rules and restrictions on the counseling process that the legislature has been left with little freedom to construct a new counseling system.<sup>89</sup>

While preserving the woman's ultimate choice, the Court held that the state cannot allow the woman unrestricted discretion in making the decision whether or not to abort at any point during the pregnancy. Thus, the Court found that there was a need for external review by counselors and doctors in order for the state to fulfill its duty.<sup>90</sup> The Court held that the 1992 Act's rationale for the counseling requirement, to prepare the woman to make "a responsible, conscientious decision of her own" with an emphasis on self-determination, did not provide the necessary constitutional protection for the unborn.<sup>91</sup> In order to do so, the Court asserted that counseling must "encourage" a woman to carry her fetus to term.<sup>92</sup> This encouragement is part of what the Court labels a "goal-oriented," yet "result-open," protection of the unborn because the ultimate choice whether or not to abort remains with the woman.<sup>93</sup>

The Court stipulated that the counseling process must instill in the woman an awareness "of the unborn's own right to life and of the fact that abortion may be considered only in exceptional circumstances where a woman would be burdened beyond reasonable sacrifice."<sup>94</sup> Under the counseling process outlined by

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88. An abortion without an indication is referred to as a "merely counseled" abortion, since the woman had undergone the obligatory counseling although no indication could be ascertained. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 270, 273 (1993).

89. Walther, *supra* note 6, at 397.

90. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 281 (1993).

91. *Id.* at 255.

92. *Id.* at 272.

93. *Id.* at 282.

94. *Id.* at 257.

the Court, the woman is required to disclose her motive for seeking an abortion to the counselor, after which the counselor should attempt to resolve any underlying issues that might allow the woman to continue her pregnancy.<sup>95</sup> The counselor is also obligated to inform the woman of the various support and social services provided by the state and other institutions, such as churches, that are available to her if she needs support during the pregnancy or after childbirth.<sup>96</sup> In addition, the counselors shall reserve the option during the counselling process

to invite persons who are close to the woman and who may have influence on her, provided the woman consents. At the same time they [the counselors] must be wary of possible undue influence exerted by such persons, and if this is feared, ask the woman to come back alone.<sup>97</sup>

It is only after the counselor has determined that the woman has completed "sufficient" counseling that she will receive the certificate of counseling required to obtain an abortion.<sup>98</sup> However, the counselor may not withhold this certificate with the intention that the woman fall outside the twelve-week period.<sup>99</sup>

Under the Court's plan, the state must ensure that all counseling facilities, public or private, comply with these constitutional requirements, and that they are separate from facilities offering abortions.<sup>100</sup> To assist in the state's screening procedure, the counselors are required to prepare a complete record of each counseling session while preserving the woman's anonymity.<sup>101</sup> If the woman decides to proceed with an abortion after counseling, "the counselors must provide her with a valid certificate [and] supply her with the names and addresses of doctors and facilities willing to perform the abortion."<sup>102</sup>

### C. *Funding of Abortions*

One of the most important consequences of the not-criminal-yet-not-legal holding was that public and private insurance ceased to cover nonindicated abortions because they were unlaw-

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95. *Id.* at 270.

96. *Id.* at 285.

97. *Id.* at 286.

98. *Id.* at 286, 292.

99. *Id.* at 286.

100. *Id.* at 286, 287.

101. *Id.* at 288.

102. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 282, 286 (1993), translated in Kommers, *supra* note 5, at 23.



ful.<sup>103</sup> This came as a shock to East and West German women who were accustomed to having all medical procedures, including abortion, financed through public or private insurance.<sup>104</sup> Under the prior West German indication model, a woman's insurance covered her abortion provided that she underwent the obligatory counseling and obtained verification of the existence of an indication.<sup>105</sup> Similarly, under the East German time-limit model, the state covered the costs of abortions.<sup>106</sup>

The woman must now bear the costs of terminating a pregnancy herself unless a medical, criminal, or eugenic indication is established.<sup>107</sup> The Court reasoned that "financing illegal abortions out of the national health insurance plan . . . would make the state a participant in an unjustifiable act and convey the wrong message about the nature of abortion."<sup>108</sup> Funding an abortion with public insurance monies would constitute state involvement in an illegal activity. Likewise, private insurance would also be prohibited from funding illegal nonindicated abortions.<sup>109</sup>

The Court provided, however, that the state could create alternative methods for funding abortions outside of insurance systems.<sup>110</sup> A woman who undergoes an abortion after counseling is still eligible for both unemployment and social welfare benefits. If a woman cannot afford an abortion, she can apply to receive welfare to cover the expenses. In addition, lost work time can be reimbursed with unemployment benefits. By removing abortions from the insurance scheme, two classes of women seeking abortions are created: those who can afford an abortion and those who must try to qualify for welfare money to fund an abortion. Finally, the new holding provides that abortions may be performed on an outpatient basis rather than only in hospitals, as was previously the case. The advantage of this is that abortions

103. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 312 (1993). See discussion *infra* part IV.C.

104. Unlike in the United States, health insurance in Germany is required by law and generally covers all medical procedures.

105. HOLZHAUER, *supra* note 17, at 10.

106. Gesetz über die Unterbrechung der Schwangerschaft, 1972 Gesetzblatt der DDR [GBl.] I 89 (G.D.R.).

107. Walther, *supra* note 6, at 393.

108. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 315-16 (1993), translated in Kommers, *supra* note 5, at 23.

109. *Id.* at 316.

110. *Id.* at 322.

performed on an outpatient basis cost, on average, about half of those performed in a hospital.

D. *Consequences for Medical Professionals and Other Participants in the Abortion Process*

The Federal Constitutional Court's abortion ruling could greatly affect participants in the abortion decision and process, aside from the woman actually undergoing the procedure. For example, the Court's ruling created new responsibilities and uncertainties for physicians.<sup>111</sup> Among them, the doctor is required to further the state's duty to protect the unborn, while at the same time serving the interests of his patient, the pregnant woman.<sup>112</sup>

The Court held that doctors are subject to criminal sanctions if they do not fulfill their duties to: 1) ascertain the woman's reason for obtaining the abortion, 2) ensure that the woman has undertaken the obligatory counseling and complied with the three-day waiting period requirement, and 3) refuse to reveal the sex of the unborn within the first twelve weeks of the pregnancy.<sup>113</sup> Because of the potential for criminal sanctions, the Court also asserted that physicians have the right to refuse to perform an illegal abortion.<sup>114</sup> Additionally, doctors can no longer be held liable for malpractice in cases where a pregnancy was terminated unsuccessfully.<sup>115</sup>

The Court's holding also affected other parties. The Court posited that "the woman's freedom to come to her own decision must be protected against pressures from her family or social environment through the criminal law."<sup>116</sup> Thus, it may be considered a criminal offense for the biological father, the parents of a

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111. *Id.* at 289.

112. *Id.*; *Schwangerschaftsabbruch: Konsequenzen für die Ärzte*, 90 Deutsches Ärzteblatt Heft 25/26, June 28, 1993, at C-1223.

113. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 289, 291, 293 (1993). This last requirement is intended to prevent sex-discriminatory abortions.

114. *Id.* at 292. Although such nonindicated abortions are illegal, the Court established legal validity of the contract for the abortion between the doctor and the woman.

115. *Id.* at 285; Ines Engelmohr, *Das Urteil des Bundesverfassungsgerichts zum Abtreibungsrecht stößt bei Ärzten auf geteiltes Echo*, 34 DER FRAUENARZT at 632, 632 (1993).

116. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 296 (1993).

pregnant minor, or even close friends of a pregnant woman to pressure her to have an abortion.<sup>117</sup>

#### IV. CRITIQUING THE IMPACT OF THE COURT'S ABORTION RULING

The Court's ruling undermines women's rights in many respects but at the same time creates the possibility that the legislature will develop abortion laws that allow women more decision-making power. The fact that the Court granted the fetus full constitutional rights from the beginning of the pregnancy means that women's constitutional rights, which are also implicated in every abortion decision, are essentially rhetorical.<sup>118</sup> However, the Court recognized a limited right to choose in that the legislature has the right to circumscribe criminal sanctions imposed on women who choose abortions (but not on their doctors).

##### A. *Balancing of Constitutional Issues Minimizes Women's Right to Self-Determination*

The Court accepted the liberalization attempts insofar as it upheld the legislative propositions that the woman has the ultimate authority to decide to terminate a pregnancy,<sup>119</sup> that the counseling model is an improvement over the indication model,<sup>120</sup> and that the effectiveness of criminal sanctions in preventing abortions is limited.<sup>121</sup> However, the Court's doctrinal interpretation can be seen as an affront to a woman's dignity. Vesting the final decision-making power in the woman does not appear to be out of respect for her right to personal autonomy.<sup>122</sup> Instead, as one commentator argued, the Court's ruling implied that women could obtain a nonprosecutable abortion after counseling because "[a]ny other system . . . would drive the woman away from counseling and perhaps into the hands of illegal abortionists."<sup>123</sup> Giving the woman the final decision-making power

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117. *Id.* at 297.

118. Walther, *supra* note 6, at 399.

119. *Id.*

120. Eser, *Abortion Reform*, *supra* note 23, at 30.

121. The Court held that criminal sanctions must no longer be imposed if an abortion is performed in the first trimester after counseling. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 264 (1993)

122. Walther, *supra* note 6, at 399-400.

123. Kommers, *supra* note 5, at 23.

thus encourages her to attend counseling and furthers the constitutional interest in protecting the rights of the unborn.

Some observers have commented that the legislative reforms together with the Court's ruling on them can be seen as "one step forward and two steps back" [*ein Schritt vorwärts, zwei zurück*].<sup>124</sup> The Court's holding recognizes the merits of a counseling model, which removes abortions performed in the first trimester from the system of criminal sanctions if the statutory requirements are abided by and gives the woman the final decision-making authority, and therefore represents a step forward. However, the fact that women may have to bear the entire financial brunt of an "illegal" abortion represents a giant step back.

Previously, under the indication model, abortion was criminalized in all but the four exception areas (the medical, embryological, criminal, and social indications), and the ultimate decision-making power lay with third parties: the specialists, counselors, and doctors. Although establishing the existence of an indication could be a complex and arbitrary process, it could be accomplished in nearly every case. As mentioned before, the concept of a social indication was vague and therefore could be applied broadly, especially in a more liberal northern state. Once the indication had been established, the abortion procedure was nonpunishable, funded through the insurance system, and increasingly interpreted as morally and legally justified.

### B. *Counseling Requirement: Coercive and Contradictory*

A biased counseling process, which aims to protect the unborn against the wishes of the woman, undermines a woman's right to self-determination. A major criticism of the Court's judgment focuses on its insensitive approach to the serious dilemma which women face when considering an abortion.<sup>125</sup> Although the Court gives a woman the ultimate decision, it simultaneously requires her to undergo counseling. Furthermore, if she decides to terminate the pregnancy after counseling, it is considered illegal if no medical, embryological, or criminal indication exists. Thus, it is greatly inconsistent for the state to re-

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124. See Walter Gropp, *Das zweite Urteil des Bundesverfassungsgerichts zur Reform der §§ 218 ff.-ein Schritt zurück?* 1994 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 147, 147; Geiger & von Lampe, *supra* note 16, at 28; Margrit Gerste, *Das Karlsruher Urteil zum Paragraphen 218 spricht Frauen Gewissen und Verstand ab: Ein Schritt vor, zwei zurück*, DIE ZEIT, June 4, 1993, at 1.

125. Walther, *supra* note 6, at 399.

quire counseling in order to assist a woman in making a decision but then maintain that if she makes the "wrong" decision that her actions will be considered illegal. By declaring such abortions illegal, the state places both moral pressure and an additional financial burden on the woman.

Obligatory counseling should be a neutral process. The Court, however, set up a counseling process which has as its goal the continuation of the pregnancy. This goal seems to be in conflict with the woman's right to make a free and final decision. As one scholar states, "[t]he hidden assumption behind obligatory counseling is that women are not generally competent or morally trusted to decide for themselves whether to have an abortion or to go for counseling."<sup>126</sup> The methods that will be employed during counseling are coercive and raise disturbing privacy issues. Although the counseling procedure is anonymous, it undermines a woman's autonomy and questions the woman's maturity and ability to reach her own decision. The counselor must tell the pregnant woman that terminating the pregnancy is not only morally wrong but also illegal if no indication exists. Therefore, the counseling procedure has a "pro-life" bias to it, and the counselor is forced to use coercive techniques to pressure the woman to carry the fetus to term.

### C. *Uncertain Consequences of Eliminating Health Insurance Coverage for Abortions*

In its decision, the Court shifted the financial burden of the procedure from the state and the private insurance system to the woman. The costs of abortion may be considerable and may leave some women worse off than they were under the indication model when abortions were routinely financed through the insurance system.

The costs of an abortion in Germany vary from approximately 400 DM (\$267)<sup>127</sup> for abortions performed on an outpatient basis to 800 DM (\$534) for those performed in a hospital. Under the Court's ruling, abortions may now be performed on an outpatient basis. However, many women are forced to obtain a much more expensive abortion in a hospital because some doc-

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126. Funk, *supra* note 19, at 197.

127. These estimates are based on an exchange rate of \$1.00 = 1.50 DM.

tors, increasingly concerned about the legal status of abortion, are not performing them regularly on an outpatient basis.<sup>128</sup>

The Court's ruling is paradoxical because abortions cannot be funded through the insurance system (state funding is not permitted for illegal activities), yet the state can still provide funds in certain circumstances. For instance, the state can provide social welfare monies for those who cannot afford the procedure. Also, the legislature is not limited to developing a financing plan based on welfare, as long as it does not involve health insurance funds.<sup>129</sup> In addition, the Court allows for the development of schemes whereby the Federal Government or individual states may finance abortions.

The individual states can also establish programs for financing abortions. The legislature in the state of Hessen, for example, voted in 1994 to finance all abortions, legal and illegal.<sup>130</sup> This of course could result in dramatic inequalities: women who are residing in more liberal states with comprehensive financing plans will be able to terminate a pregnancy without cost, while women in the more conservative states will have to finance the "illegal" procedure themselves.

The financing portion of the Court's holding is illogical. There is no legal difference between state funding for an illegal act through insurance versus social welfare monies. The contradictory nature of the financing of an illegal but decriminalized abortion shows just how precarious the Court's compromise is.<sup>131</sup> If liberal financing schemes are developed in all regions of Germany, then the new laws could prove to be a true liberalization over the older laws. Thus, the new laws could place the woman in a better position than under the previous indication model because the final decision would rest with her.

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128. Interview with Susanna Schubert, counselor at *Pro Familia*, in Freiburg, Germany (July 4, 1994).

129. Walther, *supra* note 6, at 399.

130. Hessisches Gesetz zur Erstattung von straffreien Schwangerschaftsabbrüchen, 1994 Gesetz- und Verordnungsblatt für das Land Hessen [GVBl.] I 298 (Hess.).

131. Under German welfare law, the state is not paying for an abortion so much as it is compensating a "needy" woman for the financial loss she incurs because of the abortion. Some feel that this illogical outcome is due to the Court's attempt to maintain its questionable differentiation between criminality and illegality and its unwillingness to truly face the repercussions. See Albin Eser, *Aufbruch zu neuem Weg, Halt auf halber Strecke - Erste Einschätzungen zum Schwangerschafts-Urteil des BVerfG vom 28.5.93*, Sonderheft 1 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 134 (1993).

#### D. *The New Role of Physicians and Other Participants in the Abortion Process*

As a result of the Court's opinion, many doctors are unclear about their legal duties and disconcerted by the fact that, even if a woman undergoes the statutorily required counseling, the abortion will still be considered illegal. These doctors are increasingly choosing not to perform elective abortions.<sup>132</sup> The Court allowed the legislature to determine whether there were situations, other than medical, criminal, or embryo pathological, where carrying a pregnancy to term would result in an unreasonable burden to the woman.<sup>133</sup> This leaves open the possibility that a social indication will emerge. If so, doctors would again have to determine if the "vague" social indication standard had been met. This would reopen the possibility of criminal penalties for doctors prosecuted for not applying the standards correctly, as in the Memmingen Trials.<sup>134</sup>

Additionally, the Court's ruling affecting the pregnant woman's friends and family as well as the biological father has the potential to dramatically affect a pregnant woman's reliance on those closest to her for support and assistance in the decision-making process. Such a threat could inhibit necessary discussion at a time when it is most important and when there may already be considerable tension in these relationships.

#### E. *Judicial Activism and a Confusing Legacy?*

The Court's decision confronts the German legislature with such a complex and comprehensive judgment that it has proven to be very difficult to determine how much legislative latitude remains after the Court's restrictions.<sup>135</sup> Commentators have asserted that the Court overstepped its judicial boundaries by acting as a "quasi-legislative body" [*Ersatzgesetzgeber*] — by making the abortion law instead of merely reviewing how effectively the legislative provisions protect unborn life.<sup>136</sup> By regulating the content and procedure of the counseling process, the

132. Interview with Susanna Schubert, *supra* note 128. See *Abtreibungen: Meistens rechtswidrig, aber straffrei*, in 90 DEUTSCHES ARZTEBLATT Heft 23, June 11, 1993, at C-1109.

133. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 326 (1993).

134. See *supra* text accompanying note 58.

135. Walther, *supra* note 6, at 397.

136. Geiger & von Lampe, *supra* note 16, at 28.

Court has not upheld its duty of judicial self-restraint and has overstepped its proper role as established by the separation of powers.<sup>137</sup>

Possibly the greatest frustration with these reforms stems from the fact that Germany, through the ruling of its Constitutional Court, has lost its chance to find a compromise between all concerned parties to one of the most controversial issues of the day. The 1992 Act was a compromise, a "group resolution" [*Gruppenantrag*], because it "embodied an agreement transcending party lines [winning by] a substantial margin of 357 to 283 votes."<sup>138</sup> The Parliament achieved this compromise through its numerous debates and attempts at reconciling all views on the subject. But only two members of the Constitutional Court, in dissent, agreed with the Parliament and embraced this compromise almost in its entirety.<sup>139</sup> It still remains to be seen how the federal legislature will respond to the Court's decision. Although the Court liberalized abortion regulation by decriminalizing it in the first twelve weeks of the pregnancy as long as counseling was obtained, the fact that abortions remain illegal when no indication exists is a perplexing, convoluted legal approach. The ques-

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137. *Id.* (addressing judicial self-restraint). See Walther, *supra* note 6, at 402 (discussing how the Court compromised its duty of separation of powers).

138. Kommers, *supra* note 5, at 12.

139. Vice Chief Justice Mahrenholz and Justice Sommer (as well as Justice Böckenförde in part) dissented in this ruling, while six judges including the only woman on the Court, Justice Grabhof, supported the majority verdict. Both Mahrenholz and Sommer, while agreeing with the majority that the state's duty to protect unborn life starts with the onset of the pregnancy, found that a woman's constitutional rights limit this obligation. Both Justices asserted that "the State's duty to protect unborn life throughout pregnancy does not automatically result in an unqualified duty for the woman to carry the fetus to term." They believed that these two constitutional rights must be balanced against one another. Since the Constitution does not propose a method by which these rights may be balanced, they felt that this must be left to the legislature. The two Justices also concluded that the legislature may grant the ultimate decision-making authority to the woman in the first twelve weeks of pregnancy and that such abortions may be considered legal.

The dissenters viewed the relationship between the fetus and the woman very differently than the majority. The majority viewed the woman and the fetus in conflict with one another; the dissenters viewed the two as a "duality in unity" that continually changes. The two appear as "unity," in the beginning, and appear later on as "duality." Therefore, the dissent proposed that during the early stages of the pregnancy the responsibility for making the decision should be left to the woman since counseling rather than penal sanctions would best fulfill the state's duty to protect the unborn. The dissent therefore believed that the 1992 Act achieved a balance between the competing constitutional interests. *Die Entscheidung des Bundesverfassungsgerichts zum Schwangerschaftsabbruch*, 88 BVerfGE 203, 338 (1993) (Mahrenholz, J. & Sommer, J., dissenting); Walther, *supra* note 6, at 395-96.



tionable distinction between criminality and legality creates many inconsistencies in implementation.

The legislative branch must now redraft the law on abortion within the new constitutional restrictions. The *Bundestag*, where the conservatives have a bare majority, debated and passed a bill that almost mirrored the judicial order. However, in the *Bundesrat*, where the more liberal Social Democrats have a clear majority, the bill was not ratified due to controversy surrounding the funding of abortions and the criminal sanctioning of third parties. The Social Democrats contended that the federal government should directly fund abortions for women who cannot afford abortions rather than, as the conservatives proposed, funding them through welfare.<sup>140</sup> This federal funding proposal would better protect the woman's anonymity since social welfare is apportioned on a local basis while this proposed federal fund could be applied for through the national (nonmedical) insurance system.<sup>141</sup> Following the October 1994 elections for *Bundestag*, the new thirteenth *Bundestag* must re-propose and debate their drafts on abortion legislation and then once again send the bill to the *Bundesrat*.<sup>142</sup>

## V. GERMANY AND THE UNITED STATES

In Germany, the abortion issue appears to be developing more into a constitutional issue, although it is still primarily regulated by legislative act, whereas in the United States, abortion law will probably be increasingly affected by legislative action. Since *Roe v. Wade*,<sup>143</sup> women in the United States have had the constitutional right to an abortion. The recent decisions of *Webster v. Reproductive Health Services, Inc.*<sup>144</sup> and *Planned Parenthood of Southwestern Pennsylvania v. Casey*<sup>145</sup> can be seen

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140. *Sowenig Strafe wie möglich, soviel wie nötig: Die Gesetzentwürfe zu § 218 setzen das Verfassungsgerichtsurteil völlig verschieden um*, SÜDDEUTSCHE ZEITUNG, Jan. 20, 1994, at 4 [hereinafter SÜDDEUTSCHE ZEITUNG].

141. *Id.*

142. This occurs because of the Principle of Discontinuity. GRUNDGESETZ [Constitution] [GG] art. 39 (Germ.); See Wolfgang Leinemann, *Die Parlamentarische Diskontinuität und ihre Wirkungen im Gesetzgebungsverfahren*, 1973 JURIS- TENZEITUNG (J.Z.) 618.

143. 410 U.S. 113 (1973) (holding that a woman's right to privacy and hence abortion is a fundamental right under the Fourteenth Amendment).

144. 492 U.S. 490 (1989) (holding that a state may prohibit the use of public facilities and publicly employed staff in abortions).

145. 112 S. Ct. 2791 (1992).

as opening the issue to legislative regulation.<sup>146</sup> In the United States, abortion regulations are predicated upon a woman's constitutional right to obtain a pre-viability abortion, while in Germany, they are premised upon the state's duty to protect developing life. Although the regulations seem to be based on antithetical theories, in practice they may affect a woman's right to obtain an abortion in similar ways.

*Webster* and *Casey* imply that legislative action in abortion law will now be more in accord with the legal practices of other western nations, including Germany. This is because, as in most western nations, abortion in Germany has been regulated by legislative act and not through constitutional mandate.<sup>147</sup> The two American rulings "return . . . the debate to the pre-*Roe* focus on the development of legislation which attempts to balance the competing interests inherent in the abortion issue."<sup>148</sup> In 1992 the Reporter on Human Reproduction Law noted that

since its decision in the *Casey* case the Supreme Court has declined to review cases on other restrictive state abortion statutes, allowing lower court decisions to stand. . . . This could suggest that the Court is content to allow *Casey* to be the last work on abortion, at least for the present.<sup>149</sup>

Thus, the United States Supreme Court permits individual state legislatures to enact laws regulating abortion so long as they fall within the loose standard of not creating an "undue burden" on a woman's right to choose a pre-viability abortion.<sup>150</sup>

The obstacles that a woman who exercises her right to choose an abortion faces in the post-*Casey* United States are similar to those a similarly-situated woman in Germany faces. Under *Casey*, restrictions which do not place an undue burden upon a woman's right to choose an abortion are no longer sub-

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146. *Webster* has been widely perceived as inviting the legislative branch to rethink the whole abortion issue in the context of a judicial branch being more receptive to accommodating legislatively imposed restrictions on abortion . . .

[Although] it did not repudiate the *Roe* doctrine, [it] invited future challenges to its underlying premises on a case-by-case, statute-by-statute basis.

Kindregan, *supra* note 12, at 276.

147. *Id.* at 277.

148. *Id.*

149. *Louisiana Seeks Supreme Court Review of Abortion Statute*, REP. ON HUM. REPROD. & L., Nov.-Dec. 1992, at 75, 76.

150. Todd A. Lorenz, *Congressional Power and the Right to Choose: A Constitutional Analysis of the Freedom of Choice Act*, 3 B.U. PUB. INT. L.J. 279, 307 (1993).

ject to strict scrutiny.<sup>151</sup> As a result, many state imposed restrictions on abortion which were struck down in the past will probably be allowed.<sup>152</sup> The Court also stated in *Casey* that the states have an interest in preserving potential life throughout the entire pregnancy.<sup>153</sup> In contrast, the Court in Germany has never defined a constitutional right to terminate a pregnancy but rather has established that the state has an "obligation affirmatively to protect human life against wrongful intrusion by others."<sup>154</sup> This duty begins at implantation.

### A. *Funding*

The debate surrounding the financing of abortions, while present in both countries, differs greatly between the United States and Germany.

In Germany, an "illegal" abortion can no longer be financed through public or private insurance. However, qualified German women (who earn under a certain amount each month) will receive public funding for the procedure. In addition, the German states may develop schemes to finance abortions, as in Hessen where all abortions will be covered by state monies.

In the United States, on the other hand, private insurance may pay for an abortion if an individual's plan covers the procedure. The real problem for American women arises for those who have no insurance at all. The United States Supreme Court has held that while the government is permitted to pay for the costs of childbirth, the government may refuse to finance the costs of an abortion where the abortion is nontherapeutic<sup>155</sup> or even where it is a medically necessary procedure.<sup>156</sup> In addition, after *Webster*, a state may prohibit the performance of abortions in public facilities or by publicly employed staff.<sup>157</sup>

Therefore, although in the United States a woman has a constitutional right to procure an abortion, the government need not

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151. *Id.*

152. C. Elaine Howard, Note, *The Roe'd to Confusion: Planned Parenthood v. Casey*, 30 HOUS. L. REV. 1457, 1498 (1993).

153. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 395-96 (1992).

154. Walther, *supra* note 6, at 390.

155. *Maher v. Roe*, 432 U.S. 464 (1977) (holding that a state may refuse to finance nontherapeutic abortions).

156. *Harris v. McRae*, 448 U.S. 297 (1980) (holding that a state may refuse to finance medically necessary abortions).

157. *Webster v. Reproductive Health Services, Inc.*, 492 U.S. 490 (1989).

assist her in exercising this right. In comparison, a German woman does not have a constitutional right to an abortion. The choice, however, is ultimately hers and the state provides the necessary facilities and, at a minimum, financing in those cases where the woman cannot afford the cost of an abortion.<sup>158</sup>

### B. *Counseling*

One striking difference between the United States and Germany is Germany's obligatory counseling and three-day waiting period between counseling and the performance of an abortion. The putative goal of this counseling is to protect the unborn and to encourage the continuation of the pregnancy. The Court recognizes, however, that the decision to terminate the pregnancy is ultimately the woman's. On the other hand, in the United States, the *Casey* standard provides that states may insist that the physician provide certain information to abortion patients.<sup>159</sup> In addition, the twenty-four hour waiting period found constitutional in *Casey* is less of an obstacle relative to the three-day waiting period in effect in Germany. It is possible, however, that after *Casey*, the states may be able to implement more restrictive regulations which more closely resemble the German counseling and waiting period requirements.

Another difference between the two countries in terms of counseling and abortion concerns accessibility. The German Federal Constitutional Court insisted that a woman be able to obtain counseling near her residence and receive a safe abortion by a licensed doctor.<sup>160</sup> Since pregnancies can be terminated in state-funded hospitals, which are located in almost every area of residence, women can often procure an abortion near their homes. In the United States, in contrast, there are no such guarantees. In some states, due to lack of abortion facilities, women must travel great distances to obtain abortions, creating large fi-

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158. Although the financing plan (along with the entire law) has not yet been decided, all proposals include full financial support for women who cannot afford the cost of an abortion.

159. This information includes the nature and risks of the procedure, the alternatives to abortion, the health risks of both abortion and childbirth, the probable gestational age of the unborn child, the availability of state-printed materials which describe the alternatives to abortion, medical assistance benefits available for childbirth and prenatal care, and the father's obligation to pay child support even if he offered to pay for the abortion.

160. Walther, *supra* note 6, at 392.

nancial burdens and the necessity of explaining absences to families and employers.

#### CONCLUSION

The abortion debate is certainly not a new one, but it provokes public interest today more than ever as a result of new medical technology, changing societal roles, and increasing public acceptance teamed with extreme intolerance, on some people's part, of a woman's right to exercise a constitutional right. Given the current challenges in the United States to a woman's constitutional right to an abortion, it is important that Americans not take for granted the legal process which has brought us so far and continue the struggle to preserve this right as an important chapter in the history of women's fight for self-determination. The efforts to balance the conflicting interests inherent in the abortion issue will not only necessitate that Americans look inward and examine society's views on abortion, but also outward to see how other countries have resolved this issue. We can learn from both their successes and failures.

Perhaps one central lesson which America can learn from Germany is that making it possible for a woman to *exercise* her constitutional right is in some ways almost as important as having that right. This is especially apparent in the United States with the lack of financial support given to those women who can not otherwise afford to exercise their constitutional right to an abortion. Giving women the right to obtain an abortion without assisting in achieving that right, or even worse by creating obstacles in the way of her exercising her right, creates a hypocritical situation that undermines the validity of that very right. There must be more of an effort put forth to correlate the legal fiction with the social reality.