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On the Strength of Its Human Dignity: The Pro-Life 1993 Decision of the German Constitutional Court

Richard Stith
Valparaiso University, richard.stith@valpo.edu

APPENDIX C

[The recent abortion decision by Germany's Constitutional Court received scant attention in the U.S. media; we thank Professor Richard Stith (who teaches law at Valparaiso University in Indiana) for the following summary of the Court's action and its meaning, based on the official texts of both the new and previous (1975) rulings, as well as Professor Stith's conversations with knowledgeable observers of the Court.—Ed.]

"On the strength of its human dignity . . ."

Professor Richard Stith

On May 28, 1993, the German Constitutional Court reaffirmed that "**from the beginning of pregnancy a right to life belongs to unborn human life, on the strength of its human dignity**" ("*... dass dem ungeborenen menschlichen Leben von Beginn der Schwangerschaft an kraft seiner Menschenwürde ein Recht auf Leben zukomme...*"). In this 6-2 landmark decision, the Court struck down a post-unification abortion statute, declaring it insufficiently protective of unborn children.

The stricken statute had required informational counseling and a three-day wait prior to an abortion. The Court found these inadequate to safeguard unborn children from "unlawful attacks." In order to be constitutional, the law must ordinarily either penalize abortion or else protect the child through extensive pro-life counseling and social supports for pregnant women. Abortion cannot be included in a national health insurance scheme, for such inclusion would make this "act of killing" seem normal, in the words of the official court summary of the new decision. (The full, approximately 200-page opinion was not yet available in the U.S. at the time this report was written.)

Back in February of 1975, just two years after *Roe v. Wade*, the West German Constitutional Court first ruled that the constitutional provision, "Everyone has the right to life," includes the unborn. That decision was also 6-2, but with an entirely different panel of judges. The experience of Nazism, according to the Court, had shown the importance of recognizing the inherent dignity of every individual human being. State policy must be one of inclusion rather than exclusion from the human community of respect and concern. Thus the State has a duty in principle to prohibit abortion. The 1975 decision went on to say, however, that where unusual hardships make the continuation of pregnancy "too much to demand" of a woman, abortion need not be punished.

The East German communist regime did not share this commitment to individual human dignity. Abortion was there permitted on demand, though only during the first twelve weeks of pregnancy. German reunification resulted in a new federal statute under which abortion was to be "not unlawful" during the first twelve weeks of pregnancy, as the East Germans had wanted, provided that the pregnant woman first underwent neutral informational counseling and then waited three days before the abortion. The demands of national unity placed intense pressure on the Constitutional Court to uphold this legislation.

In acts of great political courage, the German high court last fall prevented the new statute from going into effect and now has declared it partially unconstitutional. Reaffirming the 1975 decision, the Court held again that the State has "a duty to place itself protectively before unborn life, shielding this life from unlawful attacks by others"—the same kind of language used by non-violent "rescuers" in the United States.

As in 1975, the new decision permits abortion in those situations where the continuation of the pregnancy would impose unusually severe hardships on the mother. These situations include, according to the Court, life of the mother, rape, and cases of serious impairment to the health of the mother or child. For normal pregnancy, however, abortion must remain "unlawful" ("*rechtswidrig*").

In a step that must surprise Americans on both sides of the abortion debate, the Court nevertheless agreed that criminal punishment may not be the only, or even the most effective, means of protecting the unborn. Required waiting periods and pro-life counseling—together with extensive post-birth leave and salary benefits, day-care, and all the other supports possible in a welfare state like Germany—might be better than threats of punishment at convincing a mother that she should let her child live. And, it was urged to the Court, there is no way to have both. If abortion will be punished, women will not come in for government-sponsored counseling, and as a result they may never hear about the facts, principles, and social supports that favor life. The Court concluded that the State, if it wishes, may attempt to curb abortion without penalization, thus leaving even non-hardship abortions unpunished, in the first twelve weeks.

But the State may depenalize early abortion only if it at the same time seeks to eliminate financial and other pressures on women to abort and also requires counseling that is solidly pro-life, rather than merely informational. In order for a woman to reach a responsible decision in conscience, she should know that the unborn child "at every stage of pregnancy has a right to life." Counselors also have a duty to offer help with personal problems, such as finding an apartment or continuing her education, just as private pro-life pregnancy centers do in the U.S.

The State also has a constitutional duty to keep the public conscious of the wrongfulness of abortion. It cannot, for example, include payment for non-hardship abortions as a universal part of any national health care plan, because then abortion would come to seem a normal medical procedure. The Court wants non-hardship abortions to be seen by society as still "unlawful," even though they are not punished criminally.

In what may appear the strangest part of its decision, the Court permits State funding even of non-hardship abortions for poor women who might otherwise seek out a cheaper procedure from a non-physician. Yet the Court claims consistency. The offer of funding might well be necessary to induce a poor woman to come in for counseling, argues the Court, and that counseling is what the Court hopes will convince her to choose life.

Six of the eight judges on the Court joined in ruling that non-hardship abortions

must remain "unlawful." One of the six, however, would nevertheless have permitted non-hardship abortions to be part of a national health plan, arguing that it is not always possible to separate these abortions from lawful hardship abortions. (The majority-minority split was not along partisan or religious lines. For example, the single woman on the Court, a Protestant Social Democrat, joined in the majority.)

Most interesting, perhaps, is the fact that even the two dissenting judges agree that the State has a duty to protect unborn human life from abortion from the beginning of pregnancy. This was also the position of the dissenters in 1975. Both sets of dissenters disagree with their respective majority judges basically only on the means that must be chosen by the State in carrying out its protective duty.

Some abortion rights advocates have suggested that the German constitution might now be amended in order to fully legalize early abortion. That, however, is likely to prove impossible. The provisions guaranteeing protection for human life and dignity, on which the 1975 and 1993 decisions are based, are made essentially non-amendable by the German Basic Law.

The May decision should have a great impact on other nations. German legal theory is very highly respected throughout the world. Moreover, Germany is known to be a highly secularized society, much more so than the United States, so the decision cannot be dismissed as religious. German courts do not base their arguments on religion.

Here in America, it is urgent that we point out to Congress that in Germany even abortion supporters accepted informational counseling, a waiting period, and limits on abortion after the first twelve weeks of pregnancy. The first two regulations also serve to protect the woman from an uninformed choice she may later regret. Yet even these minor protections for child and mother would be invalidated by the truly extremist "Freedom of Choice Act" (FOCA) now under consideration in Washington.

As we continue to endure the frightening absurdities of the U.S. abortion debate, we can draw aid and comfort from the fact that the highest German court has **once again unanimously** agreed that human life exists throughout pregnancy and that the human community has a duty to find appropriate ways to protect this life.