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Book Review. Fetal Protection in the Workplace and At Women's Expense

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Robert Blank, *Fetal Protection in the Workplace: Women's Rights, Business Interests, and the Unborn*. New York: Columbia University Press, 1993. Pp. viii + 225.

Cynthia Daniels, *At Women's Expense: State Power and the Politics of Fetal Rights*. Cambridge, Mass.: Harvard University Press, 1993. Pp. 183.

Reviewed by Julia Lamber

The relative rights of women and the fetuses they carry is one of the most contentious issues of our time. The adequacy of traditional notions of equality—that similarly situated individuals should be treated alike—is also hotly contested. Advances in prenatal diagnosis and prospects of a wide variety of direct surgical interventions tilt the scales toward recognizing the developing fetus as a person. While technologies are making us more aware of the “unborn,” they do so “at the cost of making transparent the mother.”¹ As we reevaluate maternal responsibility for fetal health, we talk about the mother as “host,” diminishing her independence, her desires, and her choices. These maternal-fetal conflicts are part of a larger picture in which we too readily see women as bad, unwilling, or irrelevant mothers, and in which we debate the virtues (and possibilities) of the ideal mother.

Two recent books by political scientists extend the discussion of the consequences of the fetal rights movement and its attendant maternal-fetal conflict. In *Fetal Protection in the Workplace: Women's Rights, Business Interests, and the Unborn*, Robert Blank, of the University of Canterbury, New Zealand, provides an extensive analysis of fetal protection plans in the workplace and the scientific evidence that supports them; he argues for better ways of maximizing fetal health and women's employment choices and minimizing reproductive risks. In *At Women's Expense: State Power and the Politics of Fetal Rights*, Cynthia Daniels, of Rutgers University, examines the new politics of fetal rights and women's relationship to the state through three cases studies of maternal-fetal conflict. Both books take multidisciplinary approaches to an important and complicated topic raised by everyday life. While neither offers a profound or new theoretical lens through which to view it, both books are interesting additions to the literature on maternal-fetal conflict.²

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1. Barbara Katz Rothman, *The Tentative Pregnancy: Prenatal Diagnosis and the Future of Motherhood* 114 (New York, 1986).
2. Classics include Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219 (1986); Hannah Arterian Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 Iowa L. Rev. 63 (1980); Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 Geo. L.J. 641 (1981). See also *Double Exposure: Women's Health Hazards on the Job and at Home*, ed. Wendy Chavkin (New York, 1984); Note, *Maternal Rights and Fetal Wrongs: The Case Against Criminalization of "Fetal Abuse,"* 101 Harv. L. Rev. 994 (1988).

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At Women's Expense

In *At Women's Expense* Daniels uses three case studies of maternal-fetal conflict to illustrate three dimensions of political power: self-sovereignty, political agency, and moral discourse. Forced medical treatment of pregnant women illustrates self-sovereignty, defined by Daniels as "the simple right to bodily integrity." According to Daniels, "the question raised by fetal rights cases is whether the condition of pregnancy (or potential pregnancy) constitutes a legitimate basis for limiting women's right to self-sovereignty" either because women lack capacity for self-governance or because their rights threaten the well-being of another. Employers' attempts to exclude women from work on the basis of their fertility illustrate political agency, defined as "the ability to transform public structures (in work and politics) to reflect one's needs, interests, and concerns" (page 5). According to Daniels, "[f]etal rights cases suggest that public structures of power must be 'degendered' from the social, historical, and biological standpoint of women." Criminal prosecutions of drug-addicted or alcohol-abusing pregnant women illustrate moral discourse, defined as "the ability to legitimate the shared moral norms and cultural beliefs which undergird power relations." The state's use of the criminal law determines "where we assign culpability or blame for a problem and how we define appropriate solutions" (6).

Daniels' discussion of forced medical treatment revolves around the celebrated case of *In re A.C.*³ A.C. was a pregnant twenty-eight-year-old married woman with terminal cancer. She agreed in advance to a caesarean delivery at twenty-eight weeks of gestation, knowing the chances of her child's survival were much greater at that point. Unfortunately, she was near death when she was twenty-five weeks pregnant. The hospital obtained a court order allowing doctors to perform a caesarean delivery at twenty-six weeks. The child died within three hours of delivery; the mother died two days later.

For Daniels, indeed for most of us, forced medical treatment is the clearest case of maternal-fetal conflict. The fetus benefits from some intrusion on the mother's body; there is no corresponding benefit for the mother. Many of us hold a picture of the ideal mother who would naturally consent to surgery or other medical procedures, subordinating her interests (and possibly her life) to her soon-to-be-born child. But even if the mother has a good reason to refuse the medical treatment, a conflict between the mother and her fetus exists. According to Daniels, this "conflict between woman and fetus was not inherent in the technology, but was created by a social climate which increasingly came to see women as reluctant mothers, unwilling to sacrifice themselves, to subordinate their careers, or to suffer medical risks in the interests of their (born and unborn) children" (41).

Daniels describes three primary narratives that influence the debate over forced medical treatment of pregnant women (42). First, narratives characterize women who refuse treatment as bad, negligent, or unwilling mothers who use the medical issue as a way out of an unwanted or unplanned pregnancy.

3. 573 A.2d 1235 (D.C. 1990).

Second, narratives portray women who refuse medical treatment as irrational or ignorant, or as religious zealots unduly suspicious or fearful of modern medical technology. In contrast to the previous two narratives, the third sort of narrative depicts the pregnant women who refuse medical treatment as rational in certain circumstances. These narratives are important because they provide the reason to resolve the maternal-fetal conflict one way rather than another. If a woman is irrational or ignorant, or otherwise lacks the capacity for self-governance, there is legitimate reason for someone else not only to resolve the conflict but also to advance another set of interests.

Portraying the issue of forced medical treatment as an explicit conflict between mother and fetus forces a choice between the attractive claims of mother and fetus. Daniels concludes that women's right to bodily integrity has been upheld only "when the woman's commitment to motherhood is unquestioned," when she is "able to align herself with powerful male organizations," and when she is able to cast the threat to bodily integrity as a problem of all patients, not just women (52). Daniels applauds the ultimate outcome of court decisions such as *In re A.C.*, which held that "in virtually all cases the question of what is to be done is to be decided by the patient—the pregnant woman—on behalf of herself and the fetus."⁴ But she cautions that these successes are biased in terms of class and race: health care providers continue to pressure women into accepting medical treatment if their commitment to motherhood is suspect, if they are unable or unwilling to align themselves with the medical establishment, or if they are deemed to be irrational or ignorant.

Daniels uses the recent Supreme Court decision in *International Union, UAW v. Johnson Controls, Inc.*⁵ as the context in which to examine employer attempts to exclude women from work on the basis of their fertility. Under these policies, employers exclude women from jobs that involve exposure to substances known or suspected to cause harm to fetuses. Johnson Controls excluded all women (except those whose inability to bear children was medically documented) from the jobs in its battery manufacturing division where lead levels were excessive. In 1991 the Supreme Court struck down the company's so-called fetal protection program as a violation of Title VII of the Civil Rights Act of 1964. According to the Court: "The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job."⁶ Because the employer could not offer an acceptable justification for this difference in treatment, the policy was impermissible under the statute.

In this discussion the pregnant worker "symbolizes the antithesis between (female) reproduction and the (male) workplace: women's ability to give birth [is] used . . . to deny women full access to paid labor and economic independence" (58). Most workplace rules, norms, and physical structures assume a male worker. Daniels argues that "[t]he challenge of gender equality

4. *Id.* at 1237.

5. 499 U.S. 187 (1991).

6. *Id.* at 197.

is not simply integrating women into masculine structures of power, but placing what has historically (and biologically) been defined as distinctive about women at the heart of social structures and public debate in politics and work" (59). As Daniels points out, a risk of "going public" with women's reproductive concerns is that it reinforces "essentialist assumptions about women's connection to motherhood, which entail treating them as if they were always pregnant" (59). Fetal protection policies are another such risk. Employers use a concern for the health of the pregnant woman and the fetus she carries as a reason to exclude her and all fertile women from the workplace.

The point of Daniels' discussion is to expose the gendered nature of the policies, the science, and the public discussions. "Why did fetal protection policies emerge when they did . . . ?" Daniels asks (63). Before 1964, Johnson Controls employed no women in its battery production facility. Under pressure from federal statutes and other governmental policies, Johnson Controls began hiring women in the 1970s. In the late 1970s the company instituted a voluntary policy, encouraging women not to take these jobs if they were planning to become pregnant or to transfer from the jobs if they became pregnant. The policy became mandatory in 1982. Daniels notes the familiarity of this pattern in male-dominated industries; she contrasts this workplace history with the lack of fetal protection policies in traditionally female occupations or poor-paying jobs (85).

Casting fetal protection policies specifically in terms of the maternal-fetal conflict, Daniels explores the effects of two assumptions that question women's ability to make their own choices about reproductive health and fetal risks. The first assumption is that women are not capable of controlling reproduction; unplanned pregnancies introduce unpredictability and disruption into the workplace, and fertile women must be eliminated because they cannot be controlled or managed. The second is that women may be unwilling to subordinate their economic interests to the health interests of their unborn children; employers, then, must act as surrogates for the public interest when a mother neglects the interest of her fetus (69).

Interspersed with Daniels' discussion of women's rationality and their ability to make responsible choices about fetal health is the science question. The United Auto Workers, challenging the fetal protection policy, argued that the link between science and politics is made clear by standards of scientific proof that are deeply biased to favor recognition of some kinds of health effects (direct fetal harm) over others (reproductive harm generally to men and women) (77). The key for Johnson Controls was the science-based denial that the fetus can be harmed through its father's exposure to lead before conception (66). For the challenger, it was important to convince the Court that the employer had overstated the harm through maternal exposure and had understated the risk to men and the risks to fetal health through paternal exposure (76).

Daniels labels the *Johnson Controls* decision a feminist victory (90). She concludes that the Court not only refused to affirm fetal protection policies

but also refused to affirm traditional assumptions about women, motherhood, and work: "The decision challenges the traditional dichotomy between family and work concerns, and addresses the ways in which work and motherhood actually intersect and conflict for women" (91). In this way the case also reaffirms Daniels' notion of political agency, transforming work structures to reflect women's needs, interests, and concerns.

The last case study involves criminal prosecutions of drug-addicted or alcohol-abusing pregnant women. Daniels describes prosecutions for furnishing drugs to a minor (through the umbilical cord), possession of illegal substances (based on evidence from the newborn's blood), child abuse or neglect, child endangerment, and even homicide. Although most prosecutions are unsuccessful, legislatures continue to consider new laws criminalizing the particular behavior (e.g., endangering a fetus) or adding such behavior to the list of factors to be considered at sentencing. What is important here is using the moral force of the criminal law to define acceptable and unacceptable behavior rather than simply formulating general statements of good social policy.

While using the criminal law in this way is the least successful of the fetal protection policies, it is perhaps the most understandable. Daniels says that the "birth of an addicted baby violates what we think of as an imperative of human society—that we care for and nurture, if not ourselves, then at least our children" (98). In previous chapters, she argues that women are rational enough to make their own choices about fetal risks and that women (not fathers, employers, or doctors) are in the best position to defend fetal interests. But those very claims are problematic in prenatal substance abuse cases. Abusing dangerous drugs is not rational behavior at any time, and a pregnant woman's substance abuse puts her in clear conflict with her fetus.

Daniels argues that continued prosecutions (even if unsuccessful) of drug-addicted or alcohol-abusing pregnant women are built on notions of crisis, transgression, and retribution (106). Proponents of prosecutions argue that there is an epidemic of drug use by pregnant women calling for dramatic action; that the crisis represents a transgression of fundamental maternal instincts; and that this transgression has demanded retribution rather than rehabilitation: "Pregnant addicts represented not the lost, confused, or misguided mother, but the *anti-mother*" (106).

Daniels then describes the critique of the myth of the pregnant addict and the argument against criminal prosecutions. The critics claim that the number of women abusing drugs has been drastically inflated. They question the representation of the drug-addicted pregnant woman as the anti-mother and argue that women who are addicted can still be caring and loving parents. And they question whether only women are responsible for the health of their children and whether they alone should bear the criminal costs (123). According to this view, it is important to see these prosecutions as illustrating faulty moral discourse. By using the criminal law to define acceptable and unacceptable behavior, we assign culpability to the mother, and we limit appropriate solutions.

At Women's Expense takes on an important issue and examines it with both customary and unusual examples. Daniels writes with a sense of urgency and caring. She displays breadth of knowledge in vastly different spheres, public and private—criminal law, medical treatment, the workplace. Unfortunately, she is sometimes careless about important details. For example, in telling the story of A.C., Daniels never suggests any reason for the hospital to intervene, and the reader gets the impression that this kind of interference is commonplace. Omitted from her retelling is the evidence that there were contradictory indications of what A.C. herself wanted. Daniels also conveys little sense that A.C. is a famous case, much discussed in the literature; it is one of few appellate decisions on the subject of forced medical treatment of pregnant women. Daniels neglects to provide us with the conventional analytical framework in such cases or an alternative view which posits that the mother's and the fetus's interests are the same—the best chance for the child once born to survive—and differ only in the details.

In the chapter on fetal protection policies, Daniels is careless in her discussion of the *Johnson Controls* case. She discusses the scientific evidence introduced and refers to oral testimony in the Supreme Court. One of the most important aspects of *Johnson Controls* is that the case never went to trial: there was no "evidence" and no "testimony," and certainly no testimony before the Supreme Court.

In the chapter on criminal prosecutions of drug-addicted pregnant women, Daniels reverts to overstatement in trying to redirect empathy. "Most pregnant addicted women are also victims of violence and abuse," she tells us, and most "have little or no access to health care or prenatal care" (129). Empirical support for either proposition is lacking; even if true, the propositions do not help resolve the maternal-fetal conflict raised by drug addiction. Moreover, the number of drug-addicted babies she cites is high. While the behavior of these addicted women may be inconsistent with our image of "the good mother," admitting this is not the same as agreeing that we ought to use the criminal law to condemn their behavior.

Fetal Protection in the Workplace

In *Fetal Protection in the Workplace*, Robert Blank focuses more specifically on employer policies that exclude women from work on the basis of their fertility. Challenging the necessity of casting this workplace issue as a maternal-fetal conflict, Blank argues that the focus on fetal hazards has diverted attention from the broader issue of both men's and women's reproductive health in the workplace. He also asserts that fetal protection policies have dominated public and legal debate so as to obscure the need for alternative public policies, such as prenatal care or pregnancy leaves. One purpose of his book is to redirect the policy focus toward "more meaningful strategies for meeting the twin goals of protecting women's rights and the interests of unborn children" (26).

Blank's first two chapters present a brief history of sex discrimination in the workplace and the scientific evidence of workplace hazards to reproductive health and harm to the developing fetus. He tells a familiar story in both

chapters. In his survey of sex discrimination litigation he contrasts modern fetal protection policies with the so-called protective legislation for women that was the subject of litigation at the beginning of the twentieth century—state statutes limiting the number of hours women could work, the number of days in a row they could work, how much weight they could lift, and the jobs they could perform. Blank then summarizes the constitutional framework for determining if this governmental action was impermissible sex discrimination (classifications based on sex must be substantially related to an important governmental interest).⁷ Finally he describes the analytical framework of both Title VII and the Pregnancy Discrimination Act of 1978. It is within this context of the hard-fought efforts to expand women's rights in the workplace over the last half-century that he examines the "new manifestations of protectionism" implicit in fetal protection policies (42).

Blank's survey of the evidence of reproductive hazards in the workplace recounts the broad range of potential hazards, the problems in identifying teratogenic agents in humans, and the difficulty of ascertaining susceptibility of males and females. For fetal protection policies he sees two issues: establishing a causal connection between certain workplace toxins at particular levels and harm to developing fetuses, and determining whether fetuses are at risk through exposed male workers. Blank thinks more research needs to be done on the fetal damage that may be caused by male exposure to teratogens, but the fact that the woman carries the fetus means "the more direct impact is on the mother" (58). Blank agrees with employers who argue that "the critical period of development occurs between the third and twelfth weeks of human gestation" (79); fetal protection policies, if they are to work, must include some women who are not aware that they are pregnant.

According to Blank, concerns for fetal health in the workplace "arise out of a heightened understanding of fetal development and evidence on the potential deleterious effects of the working environment" (42). He turns then to recent fetal protection policies, analyzing their rationales, the criticisms of such policies, and the responses of courts and regulatory agencies. Employers have justified fetal protection policies on two grounds. First, employers argue that "they have a societal and moral obligation to protect future generations from damage imposed through a pregnant woman's exposure to toxicants in the workplace" (87). Second, they are concerned "over the economic costs of possible liability suits from children who are exposed to toxicants through their mother during gestation" (93).

Critics of such policies attack the justifications directly. They argue that the employers' fear of liability is greatly exaggerated, given that no child has recovered a money judgment from an employer because of a parent's exposure to workplace toxins (95). Critics point out that employers have been inconsistent in setting risk levels for exclusion—eager to exclude women from exposure to potentially hazardous substances, but hostile to more general claims of workplace safety for all workers (96). Critics argue that fetal protec-

7. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

tion policies are overinclusive because not all fertile women are going to become (or stay) pregnant and underinclusive because they assume that exposure of only the fertile *female* employee puts the fetus at risk (97).

Blank then looks at judicial challenges to fetal protection policies. Before the Supreme Court's decision in *Johnson Controls*, the outcome of judicial decisions turned on which Title VII analytical framework a court used. If the court saw the fetal protection policies as treating women differently from men in a situation where men and women were similarly situated, the court held that the employer's policy could be justified only by Title VII's statutory defense, the "bona fide occupational qualification." This defense requires the employer to show that the excluded class is unable to perform the duties constituting the "essence" of the job (107). In contrast, if the court saw the fetal protection policies as reasonable, the court would allow the employer to attempt to justify the fetal protection policies as a "business necessity" (104–05).⁸ The Supreme Court's decision in *Johnson Controls* was important not only because it was unanimous in striking down the employer's fetal protection policy but also because it eliminated the analytical confusion that had led to inconsistent decisions by lower courts.

For Blank, "[t]he ultimate impact of *Johnson Controls* will depend on how employers respond in the absence of fetal protection policies and how courts deal with future workplace liability cases" (115). His final chapters address these issues, examining the current system for compensating victims of occupational injuries and alternative policies that are more likely to maximize women's employment choices and minimize occupational hazards to reproduction.

While most discussions of fetal protection policies conclude with questions about the impact of *Johnson Controls*, Blank changes direction to evaluate the two separate and largely exclusive systems for compensating victims of reproductive injury or disease resulting from workplace hazards—worker's compensation and civil torts (123). After analyzing typical state worker's compensation laws, he concludes that reproductive harms are generally not compensated because they fail to meet typical requirements in state schemes (124–26). In contrast, after surveying major changes in the body of law surrounding birth and pregnancy, Blank concludes that a consensus now exists that a child, once born, has the right to bring a common law tort action for injuries suffered before birth (134–35). He notes that the logic that increasingly allows causes of action against third parties for prenatal injuries or fetal death is bound to extend to cases for parental negligence, particularly where a parent knowingly chooses to act in a way that places the unborn child at risk (151–52).

Blank's concluding chapter offers recommendations for revamping the compensation system to better protect the reproductive health of all workers, especially pregnant women and their unborn children, and to reduce the

8. 42 U.S.C. § 2000e-2(k)(1)(A)(i). Typically this defense is reserved for claims in which a facially neutral employment rule has an adverse effect on women that the employer attempts to justify.

possibility of tort action against parents for the employment choices they make. He begins with the proposition that “women must have the opportunity to carry out their pregnancies free from occupational hazards wherever possible” (154). Unfortunately, Blank has no new ideas for making this a reality. He proposes that employers clean up the workplace, educate and give full disclosure to employees about the risks, provide temporary job transfers without loss of wage or seniority, allow paid maternity leave with full benefits and no loss of seniority, and guarantee prenatal health care availability. These are all good ideas that are standard recommendations in the literature, but he does not tell how to implement such reforms. Nor does he estimate the costs of his reforms or compare the costs to the possible benefits. Without such analysis, employers are unlikely to volunteer these additional employment benefits; the government seems unlikely to require them.

While not advancing any new reforms, Blank does remind us that fetal protection policies failed because they created a false dichotomy and forced opponents into an untenable dilemma. The choices about reproductive health were limited to two possibilities: either “women’s reproductive health should be protected from workplace hazards by exclusion” or “women’s reproductive health should not be protected from workplace hazards” (179). Blank’s insight is an important one, especially when we think about ways to maximize women’s employment choices and minimize reproductive risks.

The Dilemma Continues

The trouble with both books is that they do not offer a new way of thinking about an old problem. Mary Becker, Hannah Furnish, and Wendy Williams have said this all before.⁹ Pregnancy has always posed an analytical puzzle. In early cases about the availability of disability benefits for pregnancy, women challenged the exclusion of pregnancy from an otherwise inclusive benefits plan. The Supreme Court upheld the exclusion, reasoning that men and women were treated the same: there were no risks from which men were protected and women were not, and none from which women were protected and men were not.¹⁰ The difference in treatment was between pregnant and nonpregnant people.¹¹ The former group was all female, but the latter group was both male and female. Thus, by treating women and men the same, we risk ignoring the issue of pregnancy altogether.

As a reaction to these early pregnancy cases, Congress amended Title VII by adding the Pregnancy Discrimination Act, which made clear that pregnancy was not a non-event: rather, discrimination on the basis of pregnancy was discrimination on the basis of gender and thus impermissible under Title VII. The Pregnancy Discrimination Act continued the equal treatment model by providing that women affected by pregnancy should be treated, for all employment-related purposes, the same as others not so affected but similar

9. See *supra* note 2.

10. *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974) (constitutional challenge); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 135 (1976) (Title VII challenge).

11. *Geduldig*, 417 U.S. at 497 n.20; *Gilbert*, 429 U.S. at 135.

in their ability or inability to work. The problem with this model is that what happens to pregnant women is determined by what happens to men. As the narratives in both Daniels' and Blank's books aptly show, issues arise for or about pregnant women that simply do not arise for or about men or nonpregnant women.

If we respond to this dilemma by treating pregnancy separately or in a special way, we risk essentializing women, supporting the view that women are inevitably and inescapably mothers. As Blank's history confirms, we have an uncomfortable history of using women's childbearing capacity to justify their separate treatment. We now know that legislation of this sort "protected" women out of jobs by making them less attractive as employees.¹² If we have not settled on a principled way to think about pregnancy, it should come as no surprise that, when the rights of women and the fetuses they carry conflict, we do not have a principled way of settling the conflict.

It is curious that we are so eager to recognize fetal harms and to see the issue in terms of direct maternal-fetal conflict that needs to be resolved one way for all times. For all the controversy and high emotions surrounding efforts toward fetal protection, the rights of women and the fetuses they carry are, for the most part, invisible. For all the furor over fetal protection policies, many women affected by exposure to toxicants in the workplace are not covered by these policies. Women are excluded only when they are viewed as marginal workers in industries where men traditionally hold the positions. For example, despite known reproductive hazards in the clothing/textile industry, in laundry/dry cleaning establishments, for migrant workers, and for hospital workers, fetal protection policies are uncommon in these areas.

Similarly, evidence suggests that the best protection of fetal health is prenatal care and attention to the general health of the mother. Practical issues of fetal welfare arise when the mother cannot get enough to eat, has no warm place to stay, or is not physically safe. But solutions to those problems are not easy or inexpensive. What's interesting is the ease with which policy-makers identify problems as compelling moral crises in need of immediate resolution whenever they can be solved by limiting the freedom of women.

12. See, e.g., Elisabeth M. Landes, *The Effect of State Maximum-Hours Laws on the Employment of Women in 1920*, 88 *J. Pol. Econ.* 476 (1980).

David P. Currie, *The Constitution of the Federal Republic of Germany*. Chicago: University of Chicago Press, 1994. Pp. xviii + 426.

Reviewed by Kenneth F. Ledford

When the members of the Parliamentary Council met in Bonn in 1948 and 1949, they were intensely aware of the problematic nature of their project of providing a framework for the return of self-government to at least some Germans. Recognizing the enormity of the challenges that faced them and their countrymen, including guilt for war and Holocaust, military occupation, economic prostration, and division by the hardening ideological line of the Iron Curtain, they modestly called the document that they produced a Basic Law (*Grundgesetz*), postponing until some unforeseen later time the more permanent task of writing a constitution (*Verfassung*).

Yet in a land of dubious constitutional heritage, the Basic Law prospered along with the Economic Miracle between 1949 and 1989. The May 1989 anniversary of its entry into effect evoked a wave of celebratory conferences, essays, and books lauding its maturation into the first functioning system of democracy and individual rights in German history. And the dramatic events of November 1989 to October 1990, culminating in the previously unimaginable unification of Germany, cemented its permanence and converted the Basic Law legally, if not in name, into the permanent and living constitution that could only be dimly imagined in 1949.

Now one of the leading scholars of the Constitution of the United States has expanded his focus to provide an extraordinarily comprehensive and useful treatise on what he can rightly call the Constitution of the Federal Republic of Germany. Not only is David P. Currie's book now the quickest introduction for an American-trained lawyer to the constitutional structure, doctrine, and jurisprudence of the Federal Republic, but together with Donald P. Kommers's *The Constitutional Jurisprudence of the Federal Republic of Germany*,¹ it should remain the standard work for years to come.

Currie organizes his book in a manner familiar to students in American constitutional law courses. He addresses the specific constitutional provisions and judicial interpretations by the Federal Constitutional Court (*Bundesverfassungsgericht*) of five particular aspects of German law: the structure of the federal system created by the Basic Law; the doctrine of the separation of powers; freedom of expression, including that of political parties, state officials, the media, and the universities; the relationship between church and

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1. Durham, 1989.

state; and a miscellaneous array of fundamental rights including marriage, family, property, occupational freedom, life, liberty (dignity), personality, and equality. Although his text deals almost exclusively with the development of doctrine in Germany, his copious footnotes provide comparison, contrast, and analogy to American doctrine and practice, which proves very helpful to orient those unfamiliar with the German system.

In particular, Currie helps to illuminate three aspects of German constitutional doctrine that prove puzzling to many Americans. First, he explores the nature of federalism as conceived by the Germans. On the surface, federalism in Germany and the United States looks the same, operating as a presumption that in the absence of a specific delegation of power to the central government, sovereign authority remains with the constituent states. But this discussion has the potential to lead to manifold misunderstandings, for in practice the terminology of federalism often means the reverse for Germans of what it means for Americans. In the United States, the "federal government" means the central, national government "inside the Beltway" in Washington; in Germany, the phrase means the government of the particular constituent state (*Bundesland*) in question. Thus, the initial impression is that the Germans take federalism far more seriously than do the post-New Deal Americans, reserving far greater powers to the states.

As Currie points out, what has emerged in Germany is a thickly imbricated tapestry of exclusive national, exclusive state, concurrent, and delegated jurisdictions. The Basic Law explicitly divides certain powers to legislate, but it also delegates execution of national laws to the states and permits the central government to delegate other duties through "framework legislation" (*Rahmengesetz*) that provides latitude to state parliaments to exercise local discretion. Quite obviously, this complexity has led to a lively constitutional jurisprudence to define limits and test particulars, and Currie explains it ably.

Second, Currie steps bravely into the thicket of the legal limitation upon legislative discretion that is provided by the "principle of proportionality" (*Verhältnismäßigkeitsprinzip*). Rooted in eighteenth-century Prussian legal thought about the state ruled by law (*Rechtsstaat*), this principle operates as a substantive limit on the parliament's right to legislate in a realm expressly placed within its jurisdiction by the Basic Law. Even specifically authorized restrictions on freedom must be reasonable, proportionate to the ends sought (page 20). Analogous to substantive due process in the United States, the proportionality principle has proved in the hands of the Federal Constitutional Court a powerful check upon the unbridled sovereignty of a legislature in a parliamentary system.

Third, Currie explores in ample detail the many ways in which German constitutional practice converts a negative prohibition on governmental interference with a citizen's right into an affirmative obligation of the state to promote that right. In ways that again evoke images of substantive due process, German constitutionalism crosses what David Abraham has called the Isaiah Berlin Wall from negative to positive liberty. Part of this practice is based upon the Basic Law's declaration that the Federal Republic is not only a

state of formal liberty, a *Rechtsstaat* (Article 20, Paragraph 3), but also one of substantive liberty, a social state or *Sozialstaat* (Article 20, Paragraph 1). Part is rooted in the fundamental right of the inviolability of human dignity (Article 1, Paragraph 1). And yet another part is grounded upon the guarantee of equality before the law (Article 3, Paragraph 1). Regardless of source, in case after case the Federal Constitutional Court has invalidated legislative action because it infringes upon untouchable but implicit freedoms of the citizen and has required positive legislative steps and support to enable citizens meaningfully to exercise liberties guaranteed to them in the Basic Law.

Currie's helpful and systematic explication of German constitutional law comes despite three weaknesses that crop up periodically. First, and most serious from the point of view of a historian of Germany, Currie's tendency to rely solely upon treatises on constitutional law and history produced by legal scholars deprives him of the insight of newer generations of social and political historians of Germany. The teaching and scholarship of law is far more historically oriented in Germany than in the United States, but scholars in law faculties tend to remain isolated from the work of their colleagues in history departments in the philosophical faculties. It is true that for years "pure" historians underestimated the centrality of law, constitutional and other, to an understanding of political and social conflicts and continuities, but much recent work has helped to rectify this neglect, and Currie does not consider it.

His exclusive and ahistorical focus upon legal scholarship leads Currie into his second error, his uncritical reliance on standard legal treatises. While he takes into account the work of Dieter Grimm and other progressive judge/scholars, Currie should have considered the checkered background of much postwar legal scholarship in Germany. The first generation of scholars after 1949 were men who had been deeply involved in the judicial system during the National Socialist era. Many were de-Nazified, especially in the American zone, in the first years after the war, but after 1949 they again made their way back into positions of power and influence in the judiciary and legal faculties. Constitutional commentators such as Theodor Maunz and historians such as Ernst Rudolf Huber are known to have harbored strongly right-wing and authoritarian views, and their scholarship must be consciously and explicitly interpreted through the lens of that knowledge, a lens that Currie does not bring to bear.²

Finally, the third shortcoming of Currie's book is his irritating habit of periodically injecting into the text his own ideological disagreements with American constitutional jurisprudence. Currie does not like federal funding of higher education and prefers private universities to public (236–37); he believes that Supreme Court decisions in the United States relegate property

2. For Maunz and Huber in particular, both students of Carl Schmitt, see Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, trans. Deborah Lucas Schneider, 42, 241 (Maunz), 42, 82–83 (Huber) (Cambridge, Mass., 1991). After his death in 1993, it came to light that Maunz had actively supported right-wing extremist groups from the early 1970s until his death. See Michael Stolleis, *Juristen: Ein biographisches Lexikon* 416 (Munich, 1995).

rights to an "inferior position" compared to other rights (290); he mourns the passing of economic due process cases in the post-*Lochner* era (302); and he believes that the Supreme Court has "given up" on federalism and the separation of powers (339). All of these are interesting and debatable positions in U.S. constitutional law and well argued in Currie's two respected volumes on that history, but they are strikingly out of place in a work on German constitutional jurisprudence.

Yet these criticisms pale in comparison to the magnitude of Currie's achievement. His book provides American legal scholars with an important vehicle to enter into a fruitful comparative dialog with German constitutionalism (with a helpful translation of the Basic Law that has all amendments up to December 1, 1993, thus including the unification amendments and the May 1993 amendment to the right of asylum). Perhaps more important, it also helps non-Germans have faith that Jürgen Habermas's much-cited call for a "constitutional patriotism" as the proper modulation of a newly assertive German national identity has a suitable constitution in which to anchor itself.