Tulsa Journal of Comparative and International Law

Volume 11 | Issue 2 Article 4

3-1-2004

Human Dignity and Individual Liberty in Germany and the United States as Examined through Each Country's Leading Abortion Cases

Marc Chase McAllister

HUMAN DIGNITY AND INDIVIDUAL LIBERTY IN GERMANY AND THE UNITED STATES AS EXAMINED THROUGH EACH COUNTRY'S LEADING ABORTION CASES

Marc Chase McAllister[†]

I. INTRODUCTION

The American Declaration of Independence declares, "[w]e hold these truths to be self-evident, that all men are . . . endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men . . . ."[1] From 1776 forward, America has remained committed to individual liberty as its core constitutional value.[2] Across the Atlantic, Germany has chosen

---

[†] J.D., *cum laude*, University of Notre Dame Law School; B.A., *magna cum laude*, DePauw University; Phi Beta Kappa. The author clerked for Judge Charles Wilson of the Eleventh Circuit Court of Appeals. The author would like to thank the following individuals for their support and guidance in preparing this article: Professor Donald P. Kommers, Professor, University of Notre Dame Law School; Professor Russell Miller, Associate Professor, University of Idaho Law School; Jason Porter Cleveland, friend and mentor; and Keith Alexander and Diane Meyers.

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 42 (2002) [hereinafter DIGNITY AND LIBERTY].

2. *See* U.S. National Archives & Record Administration, National Archives Experience: The Charters of Freedom, *at* http://www.archives.gov/national_archives_experience/declaration.html (last visited Feb. 23, 2004) (declaring that "the Declaration of Independence is at once the nation's most cherished symbol of liberty and Jefferson's most enduring monument.").

human dignity, rather than individual liberty, as the essence of its social order.[3]

The guarantees of liberty in the United States and human dignity in Germany find their roots in each country's constitution. The Fourteenth Amendment of the United States Constitution declares, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[4] The German Basic Law or Grundgesetz (federal constitution), meanwhile, emphasizes the importance of human dignity in Article 1(1), which states, "[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[5]

These two clauses do the heavy lifting in the difficult constitutional cases that have come before the two high courts. Justice Wolfgang Zeidler, former president of the Federal Constitutional Court, states, "[w]hoever controls the [meaning of the] order of values, controls the Constitution."[6] With strong powers of judicial review,[7] the Supreme Court of the United States and Germany's Federal Constitutional Court have a great deal of control over the meaning of their respective constitutions, and individual liberty in America and human dignity in Germany are their primary interpretative tools.

This paper compares the German emphasis on human dignity with the American emphasis on liberty through the lenses of each country's leading abortion cases. Abortion is particularly appropriate for this comparison because the abortion debate boils down to a moral dilemma between preserving the sanctity of life on the one hand and the freedom of choice on the other.[8]

---

3. DIGNITY AND LIBERTY, *supra* note 1, at 42. As Professor Donald Kommers has noted, we can speak of a German constitution of dignity as compared to an American constitution of liberty. *Id.* at 7. "[H]uman dignity is at the top of the Basic Law's value order. It is *the* formative principle in terms of which all other constitutional values are defined and explained. It occupies the position that liberty may be said to play in the American constitutional order." DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 359 (2d ed. 1997) [hereinafter CONSTITUTIONAL JURISPRUDENCE].

4. U.S. CONST. amend. XIV, § 1.

5. GRUNDGESETZ [GG] [Constitution] art. 1(1) (F.R.G.).

6. CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 313 (alteration in original).

7. DIGNITY AND LIBERTY, *supra* note 1, at xii.

8. *Id.* at 162. Edward Eberle posits, "[h]ow to accommodate the proper decisional sovereignty of women with the competing rights of developing life . . . is the central matter of the abortion cases." *Id.* at 165.

Furthermore, a comparison of Germany and the United States is beneficial for several reasons. First, these two countries are among the world's strongest constitutional democracies, both in terms of legal influence and economic power, and both are liberal democracies committed to liberty and personal dignity.[9] As such, their constitutions have greatly influenced the process of constitution making around the world. Second, their highest courts are among the world's most powerful courts of constitutional review, and other national courts frequently cite to the decisions of these two high courts.[10] Lastly, both countries have had several decades to strike a balance between some of the underlying tensions within their legal systems, constantly applying human dignity and individual liberty to new legal situations throughout this process.

Both nations recognize and respect both individual liberty and human dignity.[11] However, Germany has opted for a balance favoring human dignity over individual liberty, whereas the opposite can be said of America. This tension between human dignity and individual liberty is seen in each country's abortion jurisprudence, as each court

---

9. *Id.* at 4. As of 2002, the United States economy was the largest in the world, while Germany's economy was the fourth largest, behind the United States, Japan, and China. *Id.*

10. CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at xii-iv.

11. In America, former Supreme Court Justice William Brennan, Jr. argued that American courts should provide a greater respect for human dignity. For example, with respect to the cruel and unusual punishment clause of the Eighth Amendment, Brennan argued that the "fundamental premise" of the clause is "that even the most base criminal remains a human being possessed of some potential, at least, for human dignity." Raoul Berger, *Justice Brennan, "Human Dignity," and Constitutional Interpretation, in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 129, 130 (Michael J. Meyer & William A. Parent eds., 1992) [hereinafter AMERICAN VALUES] (construing Justice William J. Brennan, Address to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985)), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 24 (Federalist Soc'y 1986); Furman v. Georgia, 408 U.S. 238, 305 (1972)). This argument is very similar to ones advanced by the German Constitutional Court in the *Life Imprisonment Case.* In that case, the Court held that human dignity mandates that the state cannot keep a person in prison for life as a matter of course; rather, the state must consider the particular situation of each prisoner including his capacity for rehabilitation and resocialization. CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 311. The Court stated, "[r]espect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect." Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 45, 187 (F.R.G.), *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 308 (alteration in original).

struggles to find the necessary balance between a woman's liberty interest in deciding whether to have an abortion and the need to protect the life and resulting human dignity of the fetus. Thus, the German and the United States abortion decisions can be pictured as falling somewhere along a continuum, similar to the political continuum, with an absolute guarantee of individual liberty on the left and an absolute respect for human dignity on the right.

Part II of this paper details the origins and importance of both human dignity and individual liberty in Germany. Part III considers America's relative lack of emphasis on human dignity and its clear emphasis on individual liberty. Parts IV and V set forth the rulings and the analysis of each country's two leading abortion cases.[12] Critically comparing the two high courts' reliance upon human dignity and individual liberty in their abortion decisions, Part VI analyzes the constitutional bases of these two rights, and considers the courts' treatment and characterization of the competing interests at stake in the abortion debate. Finally, the conclusion addresses whether and to what extent a synthesis of Germany's human dignity approach and America's individual liberty approach is possible.

II. HUMAN DIGNITY AND INDIVIDUAL LIBERTY IN GERMANY

A. Human Dignity in Germany

The Basic Law of the Federal Republic of Germany follows a pattern similar to the United States Constitution and the constitutions of other liberal democracies. It guarantees individual rights that the state must respect, creates a political system of separate and divided powers, creates an independent judiciary with the power to review legislative acts, and "establishes the Constitution as the supreme law of the land."[13]

Article 1(1) of the Basic Law declares, "[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[14] The wording of Article 1(1) is significant, as it reflects

12. The Supreme Court of the United States decided *Roe v. Wade* in 1973; the Constitutional Court decided *Abortion I* in 1975. In the 1990s, both Courts fundamentally rethought both decisions. In 1992, the Supreme Court decided *Planned Parenthood of S.E. Pa. v. Casey*, and in 1993, the Constitutional Court handed down *Abortion II*.

13. CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 31.

14. GG art. 1(1).

the notion that human dignity, like all other fundamental rights, is anterior to the state and belongs to persons as persons.[15] In addition, human dignity is the highest value in German jurisprudence and the duty of the state to protect an individual's human dignity generally outweighs other constitutional rights. In the *Microcensus Case*,[16] the Constitutional Court stated:

> Human dignity is at the very top of the value order of the Basic Law. This commitment to the dignity of man dominates the spirit of Article 2([1]), as it does all other provisions of the Basic Law. The state may take no measure, not even by law, that violates the dignity of the person beyond the limits specified by Article 2([1]), . . . [which] guarantees to each citizen an inviolable sphere of privacy beyond the reach of public authority.[17]

Another key feature of human dignity in Germany is that a person's human dignity may never be lost, and it therefore may not be ignored by the state in order to further other interests. This is demonstrated by the *Mephisto* case.[18] In *Mephisto*, the Constitutional Court balanced the freedom of speech and artistic liberty in publishing a book against the Basic Law's protection of human dignity implicated because the book at issue dishonored the name and memory of the complainant's deceased father. The Court stated:

> It would be incompatible with the constitutional commandment that human dignity is inviolate . . . if a person, possessed of human dignity by virtue of his personhood, could be degraded or debased . . . even after his death. Accordingly, the obligation that Article [1]([1]) imposes on all state authority to afford the individual protection from attacks on his dignity does not end with death . . . .[19]

---

15. CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 301. The first draft of Article 1 read, "[t]he dignity of man is founded upon eternal rights with which every person is endowed by nature." However, political compromise resulted in the philosophically and religiously neutral formulation that we see in Article 1, "[t]he dignity of man is inviolable." *Id.* at 300-01.

16. BVerfGE 27, 1, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 299.

17. *Id.*

18. BVerfGE 30, 173, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 301.

19. *Id.* at 302-03.

Thus, in Germany, human dignity is permanent and unchanging.[20] Significantly, the fact that the person defamed was dead at the time of the defamation indicates that the German conception of the principle of human dignity is broader than the conception of liberty in the United States.[21]

Both the Constitutional Court and German commentators have identified three theoretical bases of human dignity, all three of which are manifested in the text of the Basic Law as a whole: social democratic thought, Christian natural law, and Kantian ethics.[22] But perhaps the single most important factor leading to the placement of human dignity at the top of all constitutional values in Germany is the failure of the Weimar Republic.[23] At the time the Basic Law was drafted in 1949,[24] the fresh memory of the Holocaust directly impacted the framers of Germany's new legal order. Relying on natural law, the drafters of the Basic Law thus declared that certain objectively ordered principles rooted in justice and equality were "not to be sacrificed for the exigencies of the day, as had been the case during the Nazi era."[25] As Professor Bernhard Schlink observed, "rather than being shattered by the Third Reich, the German belief in law over politics motivated a return to law as it originally and naturally was – a legal renaissance as a natural law renaissance."[26] Out of this design

---

20. The German Federal Constitutional Court would likely agree with Alan Gewirth's statement that

> if inherent human dignity . . . must belong to all humans equally, then it must be a characteristic of criminals as well as saints, of cowards as well as heroes, of fools as well as sages, of mental defectives as well as mentally normal persons, of slaves as well as masters, of subjects as well as lords, . . . of drug addicts as well as persons of self-control . . . .

Alan Gewirth, *Human Dignity as the Basis of Rights*, *in* AMERICAN VALUES, *supra* note 11, at 15.

21. CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 305.

22. *Id.* at 304.

23. DIGNITY AND LIBERTY, *supra* note 1, at 18.

24. The Basic Law, Germany's federal Constitution (the Grundgesetz), was entered into force on May 23, 1949. CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 30. On October 3, 1990, when Germany was reunified, the Basic Law was retained as an all-German constitution. *Id.*

25. DIGNITY AND LIBERTY, *supra* note 1, at 7.

26. *Id.* at 18 (quoting Bernhard Schlink, *German Constitutional Culture in Transition*, 14 CARDOZO L. REV. 711, 724 (1993)).

arose the concept of the unconstitutional constitutional amendment – a concept strangely foreign to Americans.[27]

The drafters of the 1949 Basic Law drew heavily from the ideas of Immanuel Kant, who argued that one should never treat humans as objects of manipulation, but always as ends.[28] Kant explicitly grounded this mandate in terms of human dignity, stating that "man regarded as a *person* . . . possesses . . . a *dignity* (an absolute inner worth) by which he exacts *respect* for himself from all other rational beings in the world."[29] The Court extended this philosophy to the state, declaring that "[t]he state violates human dignity when it treats persons as mere objects."[30]

The Constitutional Court's *Polygraph Case* reveals this Kantian influence. In that case, the Constitutional Court invalidated the use of a polygraph by law enforcement on the basis of human dignity. In Kantian fashion, the court reasoned that "[t]o elicit the truth by attaching a person to a machine . . . is to regard him as an object, and not as a human being capable of telling the truth through ordinary questioning."[31]

Finally, a significant difference between Germany and America that greatly influences the two country's abortion cases is that, unlike the United States, Germany is a *social* welfare state. As a social

---

27. Even political parties that seek to abolish the free democratic order may be declared unconstitutional under Article 21(2). In his recent book, Edward Eberle explains that a "distinguishing trait of modern Germany is the concept of a 'militant democracy' (*streitbare Demokratie*), which obligates the state to resist any threats to the basic democratic order . . . ." This concept is a direct response to the dramatic failure of the Weimer republic. As the German Constitutional Court has stated, "[e]nemies of the Constitution must not be allowed to endanger, impair, or destroy the existence of the state while claiming protection of rights granted by the Basic Law." DIGNITY AND LIBERTY, *supra* note 1, at 20-21 (quoting BVerfGE 30, 1 (19-20), *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 228).

28. CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 301. Kant declared that each man "is obligated to acknowledge, in a practical way, the dignity of humanity in every other man" and in turn that "[e]very man has a rightful claim to respect from his fellow-men." IMMANUEL KANT, THE DOCTRINE OF VIRTUE: PART II OF THE METAPHYSIC OF MORALS 461 (1971).

29. Gewirth, *supra* note 20, at 17.

30. CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 299.

31. *Id.* at 305; *see also* BVerfGE 45, 187, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 306 (declaring that "[r]espect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect"). *Id.* at 308.

state, Germany aims at affirmatively *removing* any social and economic inequalities through direct and proactive state interference.[32] The German emphasis on state involvement is built into the Basic Law, which establishes human dignity as both an objective and subjective right. Human dignity is objective, or positive, in the sense that it mandates an affirmative obligation on the state to establish conditions necessary for the realization of dignity.[33] The concept is subjective, or negative, in the sense that it bars the state from direct interference with individual freedoms.[34] This is in stark contrast to the American Constitution, which is designed to limit government and maximize individual liberty.[35] Thus, as a liberal or individualistic state (rather than a social welfare state), the primary concern in America is with the protection of certain individual rights and freedoms through non-interference by the state.

B. Individual Liberty in Germany

The German Constitutional Court almost always reads the human dignity clause "in tandem with the general liberty interests secured by the personality,[36] inviolability [individual freedom], and right-to-life clauses[37] of Article 2" of the Basic Law.[38] This reflects the structure of the Basic Law whereby the Article 1 and Article 2 provisions are designed to reinforce each other.[39]

As a component of liberty, a general right to privacy is also recognized in Germany, although its importance is much less significant than in the United States. As in America, the German Constitution does not explicitly grant a right of privacy. Three

---

32. *See generally* MAHENDRA P. SINGH, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE (1985).

33. *See* Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y 1, 4 (1993).

34. CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 312.

35. DIGNITY AND LIBERTY, *supra* note 1, at 26. Edward Eberle notes, "Americans are by nature skeptical about the existence and use of government power. Thus, it seems appropriate that the American conception of rights lacks any claim to government action." *Id.*

36. GG art. 2(1). Article 2(1) states, "[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law." *Id.*

37. GG art. 2(2). Article 2(2) states, "[e]very person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law." *Id.*

38. CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 298.

39. *Id.*

provisions, however, protect privacy interests. Most significantly, the personality clause of Article 2(1) declares that "every person shall have the right to free development of his personality," but only "insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."[40]

The *Microcensus Case*[41] best demonstrates how the Constitutional Court applies the personality clause in conjunction with human dignity. In the *Microcensus Case*, the Constitutional Court held that the state "may not treat a person as an object subject to an inventory of any kind. The state . . . must leave the individual with an inner space for the purpose of the free and responsible development of his personality. Within this space the individual is his own master."[42] The Court reasoned that by treating the person as a mere object in violation of the personality clause, the state violates human dignity.[43] Thus, the *Microcensus Case* reveals that individual liberty in Germany is but one component of the overarching principle of respect for human dignity.

Through various cases, both the Federal Constitutional Court and the Federal High Court of Justice have delineated a private sphere of inviolability that the state may not penetrate. Pursuant to these decisions, the "general right to personality" includes "the right to a private, secret, intimate sphere of life," the right "to personal honor and the rightful portrayal of one's own person," and the limited "right not to have statements falsely attributed to oneself."[44]

However, as the German abortion cases reveal, these rights are most often vindicated through the human dignity clause of the German Constitution, rather than through the right to individual

---

40. GG art. 2(1). The other two provisions are the Article 10 provision guaranteeing "[t]he privacy . . . of posts and telecommunications," and Article 13's guarantee of the home's inviolability. GG. Art. 10(1) & 13(1).

41. BVerfGE 27, 1, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 299-300.

42. *Id.* at 299. The Court stated, "[t]he state invades this realm when . . . it takes an action – however value neutral – that tends to inhibit the free development of personality because of the psychological pressure of general public compliance." *Id.* at 299-300.

43. *Id.* Note also how this statement reflects Kantian ethics.

44. *Id.* at 321. According to decisions from both the Federal Constitutional Court and the Federal High Court of Justice, the general right to personality includes the right to a private, secret, intimate sphere of life; the right to personal honor and the rightful portrayal of one's own person; and the limited right not to have statements falsely attributed to oneself. BVerfGE 54, 148, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 321.

liberty, as in America. This dichotomy is largely due to the fact that the right to personality is dispositive only where a governmental action invades a liberty interest vital to the exercise of personality while not implicating some other positive right.[45] But more basically, this results from the fact that, in Germany, arguments grounded in a respect for human dignity carry greater force and legitimacy than those based on individual liberty, a position that arguably contrasts with current American jurisprudence.

III. HUMAN DIGNITY AND INDIVIDUAL LIBERTY IN AMERICA

A. Human Dignity in America

The term *dignity* actually appears quite often in American legal and political rhetoric. The United States Supreme Court has cited human dignity in various contexts, including cases implicating the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments.[46]

Martha Minow points to limits on free speech, rules regarding confrontation of witnesses in criminal prosecutions, trial by jury, and protection against cruel and unusual punishment, as "mark[ing] a constitutional sensitivity to degradation either committed or tolerated by the state."[47] While this argument carries some weight, the degree and concreteness of legal protection that American courts have afforded human dignity in these and other situations is much less significant than in Germany.

---

45. CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 313-14.

46. AMERICAN VALUES, *supra* note 11, at 3 (citing Jordan Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 150, 150-58 (1984)). *See, e.g.*, Chavez v. Martinez, 123 S. Ct. 1994, 2000, 2005 (2003) (noting the Ninth Circuit's view that "the Fifth Amendment's purpose is to prevent coercive interrogation practices that are destructive of human dignity;" also noting that "[c]onvictions based on evidence obtained by methods that are 'so brutal and so offensive to human dignity' that they 'shock the conscience' violate the *Due Process Clause*"); *see also* Hope v. Pelzer, 536 U.S. 730, 737 n.6 (2002) (reiterating the Fifth Circuit's holding that handcuffing inmates to fences and cells for long periods of time "run[s] afoul of the Eighth Amendment, offend[s] contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.") *Id.*

47. Martha Minow, *Equality and the Bill of Rights*, *in* AMERICAN VALUES, *supra* note 11, at 125. The "degradation" refers to the degradation of human dignity.

The concept of human dignity in America grew out of very different circumstances than in Germany. At the end of the eighteenth century, the dominant American notion of human dignity was that it belonged only to men of rank. In this sense, the term "dignity" is *consequent upon* the having of certain rights; it is not the *basis of* rights.[48] Thomas Paine directly challenged this notion of dignity. Paine asserted the idea of the "natural dignity of man" as a status that all people enjoy, not just men of rank.[49] Paine's characterization spilled over into the American Enlightenment. While some Founding Fathers, like James Madison, still spoke of dignity in terms of social status, others like Alexander Hamilton and Thomas Jefferson advanced Paine's conception of human dignity as belonging to all men.[50] In addition, the American Declaration of Independence aspired to create a social order where "all [m]en are created equal."[51] Yet, early America did not fully adopt this conception of human dignity, as women, African-Americans, and other minorities were not afforded the same legal recognition of human dignity as white landowners.

Since the nation's founding, human dignity has certainly played a role in American jurisprudence, but its role has been much less direct and less significant than in Germany. There are several indicators that human dignity does not carry significant weight in American jurisprudence. First, unlike the German Basic Law, the United States Constitution does not make an explicit commitment to respect the dignity of man.[52] Further, although the United States Supreme Court has often cited to human dignity, the Court has never clarified its precise meaning.[53] In addition, in a majority of United States Supreme Court cases citing human dignity, the Court uses it without explanation or citation to other cases.[54] Finally, the Supreme Court rarely, if ever, explicitly bases its decision on human dignity. This is in stark contrast to the use of human dignity by Germany's Federal

---

48. Gewirth, *supra* note 20, at 12.

49. AMERICAN VALUES, *supra* note 11, at 4-5 (citing THOMAS PAINE, THE RIGHTS OF MAN 329-30 (1973)).

50. *See id.* at 5-6.

51. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

52. *Id.* at para. 2-3.

53. *Id.*

54. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730 (2002); United States v. Balsys, 524 U.S. 666, 713 (1998); Farmer v. Brennan, 511 U.S. 825, 852 (1994); Campbell v. Wood, 511 U.S. 1119 (1994).

Constitutional Court, where human dignity is often dispositive of the legal issue.[55]

This differing treatment of human dignity in Supreme Court cases is partly due to the fact that unlike in Germany, the legal protection of human dignity in America was eventually swallowed up by the notion of *equality*, which is clearly expressed in the Equal Protection clause of the Fourteenth Amendment, ratified in 1868 shortly after the Civil War. The explicit guarantee of the "equal protection of the laws"[56] was a significant step toward legal recognition of human dignity to all, but significantly this protection came in the language of "equal protection" – not as an explicit recognition of the "human dignity" of all American citizens. Because the purpose of the Fourteenth Amendment was to secure equal treatment for ex-slaves,[57] the Amendment clearly *could* have been phrased in terms of human dignity rather than equality. The result is that today, cast in terms of both equality before the law and embedded in the general concept of substantive due process, the notion of human dignity in America is narrower and has less direct legal force than in Germany.

B. Individual Liberty in America

Securing civil liberties, not protecting human dignity, was the central formative principle of the American Constitution.[58] Americans today still believe in and protect individual liberty perhaps more than any other value. The recent backlash against the USA Patriot Act, for

---

55. *See, e.g,* BVerfGE 27, 1, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 299; BVerfGE 45, 187, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 306.

56. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that

> [n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

57. GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 676 (10th ed. 1980).

58. David A.J. Richards, *Constitutional Liberty, Dignity, and Reasonable Justification*, *in* AMERICAN VALUES, *supra* note 11, at 75. "The American idea of constitutionalism rests on a normative political theory of equal inalienable rights and a constitutional theory of the constraints on political power required for those rights to be respected." *Id.*

example, is a strong reminder of the American public's continuing concern with securing civil liberties against government intrusion.[59]

The Framers of the United States Constitution reacted to the oppressive English government in a strikingly parallel manner to the way in which the drafters of the German Basic Law responded to the Nazi experience. In America, the experiences of the colonists created a fear of concentrated governmental power. This fear was a significant catalyst in the development of the Constitution's separation of powers.[60] The Framers were also heavily influenced by John Locke's theory "that men formed society primarily to secure their natural rights of life, liberty, and property."[61] In some respects, Locke's views parallel the essential message of Christianity, which recognizes the liberty and equality of all human beings.[62] As David A.J. Richards notes, "Americans, following Locke, thus gave prominence to the right to conscience" based in part on the view that conscience and religious freedom must be protected from state coercion and control.[63] Thus, early Americans primarily revolted against the English oppression of freedom, whereas mid-twentieth century Germans reacted against a gross violation of human dignity.

Certainly, notions of equality and liberty are intimately linked to human dignity. During her struggles to gain equality for women during the nineteenth century, for example, Elizabeth Cady Stanton highlighted the connection between equality and human dignity, noting that equality goes hand in hand with acknowledging the freedom and dignity of every individual.[64] But the argument that universal human dignity was the driving force behind the American emphasis on individual liberty can only go so far. This argument would imply that all individual citizens should enjoy equal public

---

59. *See, e.g.*, Elizabeth Barker Brandt & Jack Van Valkenburgh, *The USA Patriot Act: The Devil is in the Details*, 46 ADVOC. 24, 24 (2003) (noting that "the Act authorizes serious violations of civil liberties"). *Id.*

60. *See* Richards, *supra* note 58, at 93; *see, e.g.*, Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 901 (1990) (noting that "[i]n The Federalist Number 53, [James] Madison expressed horror at the power of the English Parliament to undo its own democratic bona fides by changing the 'most fundamental provisions' of government, such as the requisite frequency of elections"). *Id.*

61. DIGNITY AND LIBERTY, *supra* note 1, at 16.

62. Richards, *supra* note 58, at 80.

63. *Id.* As David A.J. Richards notes, "[t]he specific argument for toleration was that a legitimate state could have no power to enforce sectarian conscience because such power was corruptively biased in ways that cannot impartially enforce the right to conscience." *Id.*

64. Minow, *supra* note 47, at 128.

standing, but that was clearly not the case in early America. While Thomas Jefferson and others believed human dignity to be independent of arbitrary distinctions based on "birth or badge," early American society still retained other degrading distinctions based on race, gender, religion, and property, revealing that human dignity was not the true focal point of the early American legal structure.[65]

Unlike Germany, America still has not adopted Kant's views in their fullest sense. For example, Kant's belief that humans should never be treated as means implies that an individual should not be subjected to overly harsh imprisonment in order to maximize overall freedom in society. Yet, the United States Supreme Court has explicitly recognized that "[i]solation of the dangerous [is] . . . an important function of the criminal law."[66] Thus, the American view of punishment is grounded in part on the concern of securing the liberty of all Americans by isolating the most dangerous individuals, rather than the concern for blind respect of every individual's dignity. This is just one of several examples of America's decision to value liberty above human dignity.

The American rejection of human dignity as a core constitutional value requiring affirmative protection holds true in today's federal judiciary. In 1990, Judge Frank Easterbrook of the Seventh Circuit Court of Appeals argued, "[w]hen we observe that the Constitution . . . stands for 'human dignity' but not rules, we have destroyed the basis for judicial review."[67] This and similar views are endorsed by a large faction of today's American judiciary.[68] Just two years ago, the United

---

65. AMERICAN VALUES, *supra* note 11, at 6.

66. Foucha v. La., 504 U.S. 71, 99 (1992) (J. Kennedy dissenting) ("Incapacitation for the protection of society is not an unusual ground for incarceration." (quoting Powell v. Tex., 392 U.S. 514, 539 (1968) (Black, J., concurring))). *See also* Kan. v. Hendricks, 521 U.S. 346, 379-80 (1997) (Breyer, J., dissenting) ("Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventative. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment" (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 32 (2d ed. 1986))).

67. Raoul Berger, *Justice Brennan, "Human Dignity," and Constitutional Interpretation*, *in* AMERICAN VALUES, *supra* note 11, at 130 n.2.

68. It is clear that even today Americans have still not fully embraced human dignity as an explicit and core constitutional value. Leonard Levy's criticism of Supreme Court Justice William Brennan, Jr. is illustrative:

> Brennan's humanistic activism runs amok and he evinces an arrogance beyond belief.... He believed the ban on cruel and unusual punishments embodies uniquely 'moral principles' that prevent the state from inflicting the death penalty because it

States Supreme Court in *Atwater v. City of Lago Vista*[69] explicitly rejected the need for the state to respect an individual's human dignity if doing so would be inconvenient to law enforcement.

In *Atwater*, a police officer stopped Gail Atwater when he observed that her two children were not wearing seatbelts. Rather than issuing a routine traffic citation, the officer yelled at Atwater frightening her children, denied her the opportunity to leave her children with a neighbor, handcuffed and arrested her, and placed her in a jail cell for an hour before she was released on bond.[70] Atwater challenged the legality of her warrantless misdemeanor arrest as violative of the Fourth Amendment's restriction on unreasonable seizures. By a five-to-four vote, the Supreme Court found no constitutional violation. The majority noted that "the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment" and therefore "Atwater's claim to live free of *pointless indignity* and confinement clearly outweighs anything the City can raise against it specific to her case."[71] However, the Court went on to hold that the arrest and mistreatment of Ms. Atwater, though individually unreasonable, was nonetheless constitutionally permissible.[72] Thus, even after acknowledging that the officer grossly violated Ms. Atwater's dignity, the Court nonetheless found that the need to adopt "clear and simple" police standards outweighed such violations.[73] With a much greater respect for human dignity, the German Constitutional Court would not have reached this result.

> irreversibly degrades 'the very essence of *human dignity*.' What makes this humane opinion so arrogant is that Brennan knows that the Fifth Amendment three times assumes the legitimacy of the death penalty as does the Fourteenth Amendment (no denial of life without due process). Moreover, he also understands that [the] *majority of his countrymen and his fellow Justices disagree with his opinion* . . . .

LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 372 (1988) (emphasis added).

69. 532 U.S. 318 (2001).

70. *Id.* at 368-69 (O'Connor, J., dissenting).

71. *Id.* at 346-47 (emphasis added).

72. *See id.* at 354. The Court reasoned, "we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Id.* at 347.

73. *See id.*

IV. AMERICAN ABORTION JURISPRUDENCE

When America's political goal of limiting governmental power is coupled with its economic emphasis on freely operating markets, the American notion of liberty becomes one where individuals are given maximum ability to determine their own best interests which, when added together, collectively determines the path of society.[74] This notion of liberty is implicated in the leading United States Supreme Court abortion decisions, *Roe v. Wade* and *Planned Parenthood v. Casey*.

A. Roe v. Wade[75]

Roe involved a Texas abortion law making it a crime to "procure an abortion" except "by medical advice for the purpose of saving the life of the mother."[76] This law was similar to many other state abortion laws that were in force at the time this case was decided.[77] A pregnant single woman named Jane Roe and a licensed physician, Dr. Hallford, challenged the Texas statute.[78] Roe asserted that she was unable to obtain a legal abortion in Texas because her life was not threatened by her pregnancy. She therefore argued that the Texas abortion statutes violated her right of personal privacy under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[79] Dr. Hallford asserted similar constitutional claims.[80] The District Court declared the law unconstitutional under the Ninth Amendment, making the statute void.[81] The United States Supreme Court granted certiorari directly from the District Court.[82]

---

74. *See* DIGNITY AND LIBERTY, *supra* note 1, at 6.

75. 410 U.S. 113 (1973).

76. *Id.* at 117-18.

77. *Id.* at 116, 118 n.2.

78. *Id.* at 129. Other challengers dropped out due to lack of standing or non-justiciability. *Id.*

79. *Id.* at 120.

80. *Roe*, 410 U.S. at 121.

81. *Id.* at 122. Specifically, the District Court held that

> the 'fundamental right of single women and married persons to choose where to have children is protected by the Ninth Amendment, through the Fourteenth Amendment,' and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights.

Id.

82. *Id.*

Before reaching the heart of its decision, the Supreme Court carefully considered ancient attitudes on abortion;[83] the history of the Hippocratic Oath;[84] the common law, where abortion performed before "quickening," the first recognizable movement of the fetus in utero usually occurring between the sixteenth and eighteenth weeks of pregnancy, was not punishable as a crime;[85] English statutory law;[86] early American state laws;[87] and the current positions of the American Medical Association, the American Public Health Association, and the American Bar Association.[88] Setting the stage for the adoption of its trimester framework, the Court concluded from this evidence that prior to the late nineteenth century, "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation . . . ."[89] The Court then went on to examine the right to privacy and its effect on the abortion issue.

1. Right to Privacy as a Fundamental Right

According to the Supreme Court, a woman's right to choose whether to have an abortion is grounded in the fundamental right to privacy rooted in the Fourteenth Amendment.[90] The Court admitted that this right is not explicitly mentioned in the Constitution. However, the Court noted that it has recognized this fundamental right to privacy as far back as 1891, and that its decisions "make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this

83. *Id.* at 130.

84. *Id.* at 130-31.

85. *Roe*, 410 U.S. at 132. According to the Court, even abortion performed after quickening was probably not considered a common law crime. *Id.* at 136.

86. *Id.* In 1803, the first English statute concerning abortion made abortion of a quick fetus a capital crime but provided for lesser penalties for the felony of abortion before quickening. Later English law abandoned the death penalty, but characterized abortion as the destruction of "the life of a child capable of being born alive." *Id.*

87. *Id.* at 138-39 (explaining that most of the early state statutes dealt severely with abortion after quickening but were lenient with it before quickening and provided exceptions from punishment for abortions necessary to save the mother's life; by the 1950s, most state laws had abandoned the 'quickening' distinction; and by the early 1970s, about one-third of the states had lessened their restraints on abortion).

88. *Id.* at 141-47.

89. *Roe*, 410 U.S. at 140.

90. *Id.* at 152.

guarantee of personal privacy."[91] The Court then declared that under the Fourteenth Amendment, the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[92] The Court reasoned that a state's refusal to give the pregnant woman this choice would be "detriment[al]" because "[m]aternity . . . may force upon the woman a distressful life and future."[93]

The Court recognized the countervailing state interests in "protecting potential life" and in protecting the health of the mother. Therefore, the Court rejected the claim that the woman's right to terminate her pregnancy is absolute, and hence the Court felt that some state regulation of the woman's right is appropriate.[94] As such, the Court declared that state laws restricting the woman's right to choose are subject to strict scrutiny.[95] Under strict scrutiny analysis, a state may only restrict a woman's right to choose whether to have an abortion if (1) the state has a "compelling interest" in restricting abortion; and (2) the statute is narrowly tailored to fulfill that interest.[96]

2. Trimester Approach

Justice Blackmun divided pregnancy into three trimesters and adopted a different rule for each. During the first trimester, a state may not ban, or even closely regulate, abortions. Instead, the decision of whether to have an abortion is left entirely to the pregnant woman and her physician.[97] During the second trimester, the state may protect its interest in the mother's health by regulating the abortion procedure in ways that are "reasonably related" to her

---

91. *Id.*

92. *Id.* at 153. *See also* U.S. CONST. amend. XIV, § 1. The relevant text of the Fourteenth Amendment reads, "[n]o [s]tate shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.*

93. *Roe*, 410 U.S. at 153.

94. *Id.* at 154. The Court noted that the right of privacy is not absolute when it stated, "[t]he Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate." *Id.* at 153-54.

95. *Id.*

96. *Id.* at 155-56.

97. *Id.* at 163. The Court reasoned that because the mortality rate for mothers having abortions during the first trimester is lower than the rate for full-term pregnancies, the State has no valid (no compelling) interest in protecting the mother's health by banning or closely regulating abortions during this period. *Roe* , 410 U.S. at 163.

health, such as requiring that an abortion take place in a hospital.[98] During this period, the state may only regulate to protect its interest in the mother's health, not its interest in the fetus's life. Finally, the Court held that during the final trimester, the state may regulate or even completely ban abortion because, according to the Court, at the beginning of the third trimester the fetus becomes "viable," and after viability, the state has a "compelling" interest in protecting the fetus. However, abortion must still be permitted if necessary to protect the life or health of the mother.[99]

B. Planned Parenthood of S.E. Pa. v. Casey[100]

The Supreme Court revisited the abortion issue almost twenty years later in *Casey*. The Court reaffirmed the central holding of *Roe* – that viability is the earliest point at which the state's interest in fetal life is constitutionally adequate to justify a total legislative ban on abortions not necessary to protect the life or health of the mother.[101] However, the Court abandoned *Roe*'s trimester framework, instead holding that before viability the state may not place an "undue burden" on the woman's right to choose whether to have an abortion.[102] The Court defined an "undue burden" as one that "has the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus."[103] Under this test, if the State regulations merely "create a structural mechanism by which the State . . . may express profound respect for the life of the unborn" without unduly restricting the woman's right to choose, the regulations will be upheld.[104] *Casey* then held that *after* viability, the state may proscribe all abortions not needed to protect the life or health of the mother.[105] The *Casey* Court noted that viability at the

98. *Id.*

99. *Id.* at 163-64.

100. 505 U.S. 833 (1992).

101. *Id.* at 853, 860. The Court stated, "*Roe* is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to . . . decisions about whether or not to beget or bear a child." *Id.* at 857 (citations omitted).

102. *Id.* at 873-74. The Court stated, "[o]nly where state regulation imposes an undue burden on a woman's ability to make [the decision whether to abort] does the power of the State reach into the heart of liberty protected by the Due Process Clause." *Id.* at 874.

103. *Id.* at 877 (emphasis added).

104. *Casey*, 505 U.S. at 877.

105. *Id.* at 879.

time of *Roe* was set at twenty-eight weeks, but by 1993, viability was possible by as early as twenty-three weeks.[106]

Even while arguably providing greater protection to the developing fetus,[107] the *Casey* Court explicitly reemphasized the woman's liberty interest in choosing whether to have an abortion. According to the Court, the abortion decision should be left to the woman alone. The Court reasoned,

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear . . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[108]

Further, the Court noted that individual liberty is at the heart of its abortion jurisprudence, stating that

> in some critical respects the abortion decision is of the same character as the decision to use contraception, to which [other cases] afford constitutional protection. *We have no doubt as to the correctness of those decisions.* They support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.[109]

In perhaps the most famous passage of *Casey*, the Court stated:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to

---

106. *Id.* at 860.

107. *See infra* note 149 and accompanying text. The Court upheld the following Pennsylvania laws: (1) an informed consent procedure mandating that, at least twenty-four (24) hours before the abortion procedure, a physician must inform the woman of the nature of the procedure, the health risks of both abortion and childbirth, and the probable gestational age of the unborn child; (2) the requirement that women under the age of eighteen (18) may not obtain an abortion without first obtaining the informed consent of one of her parents; and (3) various reporting requirements. All of these requirements would have probably been struck down under *Roe*.

108. *Casey*, 505 U.S. at 852.

109. *Id.* at 852-53 (emphasis added).

> define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[110]

With its overwhelming emphasis on liberty, the *Casey* Court ensured that a woman's right to decide whether to terminate her pregnancy will continue to receive special constitutional protection.

V. GERMAN ABORTION JURISPRUDENCE

A. *Abortion I*[111]

Under the Abortion Reform Act of 1974, Germany granted pregnant women the right to secure an abortion in the first twelve weeks of pregnancy without facing criminal penalties. After twelve weeks, abortion remained a punishable offense as under the old law, with limited exceptions.[112] In *Abortion I*, several members of the German Federal Parliament challenged the Abortion Reform Act of 1974 as violative of Articles 1 and 2 of the Basic Law.

The Constitutional Court struck down the statute because it did not adequately protect the life of the fetus.[113] The Court first found that Article 2, Paragraph 2, Sentence 1 of the Basic Law, declaring that "[e]veryone shall have the right to life," includes the life of the developing fetus.[114] The Court's recognition of the fetus as possessing human dignity was a key step, as it obligated the state to protect the fetus, even against the mother.[115] However, the Court noted the competing right of the woman to the free development of her

---

110. *Id.* at 851.

111. *See* BVerfGE 39, 1, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 336.

112. *See* Kommers, *supra* note 33, at 4. The statute still allowed an abortion when a licensed physician determined that abortion was necessary to remove a clear danger to the woman's life or health. The law before this Act declared that abortion was *always* a punishable offense, except when necessary to remove a clear danger to the pregnant woman's life or health.

113. *See* BVerfGE 39, 1, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 336-37.

114. *See id.* at 337. The Court declared that "[l]ife in the sense of the developmental existence of a human individual begins . . . on the fourteenth day after conception (implantation, individuation)." *Id.*

115. *See id.* at 338.

personality, which also demands state protection.[116] The Court had to balance these competing rights using its proportionality analysis. The Court ultimately found that because human dignity is at the top of the Basic Law's value system, "the decision must come down in favor of... protecting the fetus's life over the right of self-determination of the pregnant woman" for the duration of her pregnancy.[117]

The *Abortion I* Court's discussion of the woman's right to choose whether to terminate her pregnancy is significant. The Court stated,

> [It is true that] [p]regnancy belongs to the intimate sphere of the woman that is constitutionally protected... [and] [i]t is true that the right of a woman freely to develop her personality also lays claim to recognition and protection. [This right] includes freedom of action in its comprehensive meaning and consequently also embraces the woman's responsible decision against parenthood and its attendant duties. But this right is not given without limitation – the rights of others, the constitutional order, and moral law limit it. [The right to personality] can never confer *a priori* the authority to intrude upon the protected legal sphere of another without a justifiable reason, much less the authority to destroy [this sphere] as well as a life, especially because a special responsibility exists precisely for this life.[118]

As seen in this passage, the Court clearly rejected the American approach of granting priority to the woman's right to choose over and above the need to protect the fetus.

In order to adequately protect the life of the developing fetus, the Court found that because termination of pregnancy is an unlawful act of killing, "[t]he use of criminal law to punish 'acts of abortion' is undoubtedly legitimate," even against the pregnant woman.[119] However, the Court later clarified that the legislature is not required to use the criminal law in order to protect the life of the fetus if other similarly effective measures are available.[120] The Court also noted that in "extraordinary" situations such as where the life or health of the pregnant woman is in jeopardy, the state may not subject the

---

116. *See id.* (stating "[i]t is true that the right of a woman freely to develop her personality also lays claim to recognition and protection"). *Id.*

117. BVerfGE 39, 1, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 339.

118. *Id.* at 338-39.

119. *Id.* at 340.

120. *See id.*

woman to criminal sanctions.[121] The state, however, must provide counseling and other forms of assistance to encourage the woman to continue her pregnancy.[122]

The Court found the Abortion Reform Act unconstitutional not only because it did not adequately protect the life of the developing fetus, but because it did not clearly condemn the act of abortion.[123] Stressing that "the legal order exists to instruct its citizens in the moral content of the Basic Law," the Court mandated that the legislature take steps to demonstrate a clear condemnation of abortion, such as educating the public as to the illegality of taking the life of a fetus.[124]

B. Abortion II[125]

After German reunification, Parliament enacted a new abortion law in 1992 entitled the Pregnancy and Family Assistance Act. Like the statute at issue in *Abortion I*, under this new law, a woman could secure an abortion in the first twelve weeks of pregnancy without facing criminal penalties. For instance, abortion in the first twelve weeks was actually deemed "not illegal." After the twelfth week of pregnancy, the woman could only secure an abortion when necessary to avert a serious threat to her life or to her mental or physical health.[126] Within one year, and within a year after *Casey* was decided, the Constitutional Court struck down the law in *Abortion II*.

In *Abortion II*, the Constitutional Court reaffirmed that the state has a duty to protect the life of the fetus at all points in the pregnancy, and that the right to life generally holds priority over the mother's constitutional rights.[127] The Court made clear, however, that the right of the unborn to life is not absolute.[128] Thus, the Court held that the state need not punish the illegal act if the abortion takes

---

121. *See id.* at 340-41.

122. *See id.* at 340 (stating, "[w]hat is determinative is whether the totality of those measures serving to protect prenatal life . . . in fact guarantee protection commensurate with the importance of the legal interest to be safeguarded . . . ."). BVerfGE 39, 1, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 340.

123. *See id.* at 342.

124. *Id.* at 346.

125. BVerfGE 88, 203, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 349.

126. *See* Kommers, *supra* note 33, at 13-14.

127. BVerfGE 88, 203, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 351.

128. *Id.*

place in the first three months and the state has tried to persuade the pregnant woman to change her mind. In the event of an "exceptional situation," the woman need not carry the child to term.[129] According to the Court, an "exceptional situation" exists not only when the mother's life or health is endangered, but also when a woman is asked to sacrifice her own existential values to such an extent that one could no longer expect her to go through with the pregnancy.[130]

Abortion II laid down specific duties the state must perform in order to fulfill its general obligation to protect the life of the fetus. First, the Court ordered the state to "take measures to confront dangers threatening the present and future real-life relations of the woman and her family."[131] For example, the state must enact laws designed to remedy the disadvantages to women in employment and education that often results from pregnancy and childbirth.[132] Second, the Court ruled that rather than employing the criminal law against a pregnant woman who chooses to seek an abortion in the early stages of pregnancy, the state should utilize counseling in order to convince the woman to carry the child to term.[133] In doing so, the Court reemphasized the duty of the state to work together with the woman in order to better protect the developing fetus. Third, the Court held that the state may choose to impose criminal sanctions upon certain third parties, including physicians who fail to ensure that the pregnant woman has followed all required procedures prior to having a legal abortion.[134]

VI. A COMPARISON OF HUMAN DIGNITY AND LIBERTY IN THE AMERICAN AND GERMAN ABORTION DECISIONS

A. *Greater Scope and Significance of Human Dignity in Germany as Compared to Individual Liberty in America*

The notion of human dignity in German jurisprudence is broader and more significant than any analogous right in America. In America, except in very limited circumstances, the Federal

129. *See id.* at 352.

130. *See id.* at 352-53.

131. *Id.* at 354.

132. *See id.*

133. *See* BVerfGE 88, 203, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 354-55.

134. *See id.* at 352.

Constitution takes effect only when the government acts.[135] In Germany, on the other hand, constitutional rights affect both public and private legal relationships.[136] At its core, this difference "demonstrates . . . how the American model of freedom posits private liberty, whereas Germany envisions a public, social dimension to freedom as well."[137]

This feature of the German constitutional order is significant because it both reveals and reinforces a stronger commitment to basic fundamental freedoms than in America. In Germany, "[i]nsofar as they are tangible radiations of human dignity, basic rights . . . might even be viewed as 'permanent ends of the state,' not changeable 'even by constitutional amendment.'"[138] However, in America all fundamental rights are (theoretically at least) subject to constitutional amendment.

B. Treatment of the Fetus Indicates Greater Respect for Human Dignity in Germany

In the German abortion cases, the Constitutional Court recognized the fetus as a living person from just the fourteenth day after conception,[139] and therefore deserving of state protection throughout the pregnancy. Most significantly, the Court in *Abortion I* linked human life to human dignity – the Basic Law's supreme value. The Court declared,

> [w]herever human life exists, it merits human dignity; whether the subject of this dignity is conscious of it and knows how to safeguard it is not . . . decisive . . . . The potential capabilities inherent in

---

135. DIGNITY AND LIBERTY, *supra* note 1, at 29.

136. *Id.* at 27. Rather than adopting either extreme of limiting Basic Law rights to only public action (as in the United States) or of applying to any action, public or private, the German Constitutional Court decided in *Luth* that the Basic Law should apply "indirectly" to private law. This means that constitutional norms "influence" rather than govern private law norms, which, for example, requires ordinary civil courts to consider the Basic Law's objective system of values when interpreting civil law rules. *Id.* at 29-30 (citing BVerfGE 7, 198, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 363 (the Basic Law influences the civil law, no civil law provision may contradict the Basic Law, and all legal provisions must be interpreted consistent with the Basic Law's spirit)).

137. DIGNITY AND LIBERTY, *supra* note 1, at 29.

138. *Id.* at 28.

139. *See* BVerfGE 39, 1, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 336.

> human existence from its inception are adequate to establish human dignity.[140]

Thus, according to the Court, while the pregnant woman's right to personality also holds high rank in the hierarchy of basic rights, it must give way when it conflicts with the fetus's right to life. In short, unborn life is a constitutional value that the state must always protect.[141]

In stark contrast to the rhetoric in Germany, the United States Supreme Court in *Roe* declared, "the unborn have never been recognized in the law as persons in the whole sense."[142] The Court held the state does not have a "compelling" interest in protecting the fetus until the beginning of the third trimester because it is not until this point that the fetus is capable of living outside the mother's womb.[143] Subsequently, the *Casey* Court declared that only at viability does the fetus enjoy even the potential for life outside the mother's womb.[144] Notably, the Supreme Court's use of the phrase "potential life" in describing the fetus implies a lesser respect for the dignity of the developing fetus than in Germany.

Moreover, in both *Abortion I* and *Abortion II,* the German Constitutional Court clearly stated that abortion is fundamentally wrong for the entire duration of the pregnancy. Thus, even though abortion after conception may in some situations be "justifiable," German statutes must clearly state that abortion is always an illegal and immoral act, and various private and public actors must convey this message to the public.[145] This explicit affirmation of the value of the fetus clearly demonstrates a greater commitment to human dignity in Germany than in the United States.

---

140. *Id.* at 338.

141. *See* Kommers, *supra* note 33, at 9, 16.

142. Roe v. Wade, 410 U.S. 113, 162 (1973); *see also* Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 913 (1992) (reaffirming the principle).

143. *Roe*, 410 U.S. at 163-64.

144. *Casey*, 505 U.S. at 860. Notably, as the *Casey* Court acknowledged, "advances in neonatal care have advanced viability to a point somewhat earlier." *Id.* Thus, the actual viability line will probably continue to move to earlier stages in pregnancy. *See* Webster v. Reprod. Health Services, 492 U.S. 490 (1989) (holding that the state may require the doctor of the pregnant woman to use sophisticated tests to determine whether the particular fetus may possibly be viable, and then forbid the doctor from performing the abortion if the tests indicate possible viability). *Id.*

145. *See* BVerfGE 88, 203, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 349, 352-53.

C. *Characterization of a Pregnant Woman's Rights Reveals a Broader Commitment to Liberty in America*

Not surprisingly, the commitment to liberty in the American abortion cases is greater than in Germany's abortion cases. This is highlighted by the fact that in the German and American abortion cases, the courts are weighing significantly different women's rights. The United States decisions are based on the general right to privacy flowing from the constitutional guarantee of individual liberty, while the German decisions are based on the woman's right to self-determination. The American right to privacy is broader than the German right to self-determination. The American right implies the right to freedom from governmental interference ensuring the right to privacy is given an almost absolute character, whereas the German right guarantees the woman the right to develop her personality, but this more specific right is subject to countervailing societal duties and relationships.[146]

By framing the woman's right in such broad terms, the United States Supreme Court has arguably redefined the precise issue at stake in the abortion debate – whether the woman's right to terminate her pregnancy outweighs the fetus's right to survival. As has been noted by previous commentators, the reliance on the broad right to privacy in the United States is subject to several criticisms. First, what the Supreme Court calls "privacy" is not how most people understand the term. Instead, most people think of privacy as simple freedom from official intrusion, such as freedom from official surveillance under the Fourth Amendment.[147] Second, the Supreme Court fails to explain why or how a woman's right to terminate her pregnancy falls back into the line of precedents the Court cited as establishing the general right of privacy. The closest the Court comes to justifying this link is by stating that "the right has some extension to activities relating to marriage."[148] Finally, the O'Connor/Kennedy/Souter plurality in *Casey* justified the recognition of a "right" to an abortion, in part, on its characterization of abortion as among a person's most basic decisions and involves "the most

146. *See* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 314.

147. *Roe*, 410 U.S. at 172 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist stated, "[n]or is the 'privacy' that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy." *Id.*

148. *Id.* at 152.

intimate and personal [choice]."[149] However, this rationale could be applied equally to polygamy, adult incest, and suicide; all of which can constitutionally be proscribed.[150]

VII. CONCLUSION: THE INTERPLAY OF HUMAN DIGNITY AND INDIVIDUAL LIBERTY AND THE POSSIBILITY OF CONVERGENCE

This article has compared Germany's emphasis on human dignity with America's reliance on individual liberty in each country's leading abortion cases. The abortion cases are an excellent vehicle for this comparison because the abortion debate boils down to a moral dilemma between preserving the sanctity of life on the one hand and the freedom of choice on the other.[151] The particular balance struck in each country between individual liberty and human dignity makes sense in light of the events immediately preceding the drafting of each nation's constitution. The American decision to base its government on maximizing individual liberty and limiting state power was a direct response to the oppressive English political system. Conversely, Germany's choice to place the affirmative state duty to respect human dignity at the top of its value structure was undoubtedly a reaction to Nazi Germany's total disregard for the sanctity of human life.

With each country's constitution fueling the analysis, Germany's high court ultimately determined that the unborn child's human dignity and resulting right to life generally trumps the competing rights of the pregnant woman. However, in America's abortion cases, the Supreme Court ruled that the woman's liberty interest predominates over the fetus's *potential* life. Yet, in all four of these decisions, both nations clearly recognized the need to respect and balance *both* individual liberty and human dignity. Accordingly, both courts explicitly declared that the dominant right was not absolute. In *Roe*, the United States Supreme Court rejected the claim that the woman's right to terminate her pregnancy is absolute, and thus found some state regulation of abortion appropriate.[152] Meanwhile, in *Abortion II*, the Constitutional Court declared that the fetus's right to

149. *Casey*, 505 U.S. at 849, 851.

150. *See id.* at 984 (Scalia, J., dissenting).

151. DIGNITY AND LIBERTY, *supra* note 1, at 162, 165.

152. *Roe,* 410 U.S. at 153-54 (stating, "[t]he Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate"). *Id.*

life holds priority over the mother's constitutional rights.[153] Nevertheless, the Court found that the right of the unborn to life is not absolute. Thus, the Court made abortion in the first three months of pregnancy non-punishable as long as the state was given an opportunity to persuade the pregnant woman to change her mind.[154]

As seen in the subtle changes in each country's abortion jurisprudence, there are strong indications that the relative weights given to the competing claims of individual liberty and human dignity in each country are converging. In the United States, the change from *Roe*'s trimester approach to *Casey*'s undue burden standard indicates a shift toward providing greater protection to the fetus at the expense of the mother's right of privacy. After *Casey*, only regulations placing an "undue burden" on a woman's ability to choose whether to abort are unconstitutional. This rule holds true only prior to viability. Significantly, the *Casey* Court did not apply strict scrutiny as the Court had done in *Roe*. Rather, it applied the less restrictive "undue burden" standard, revealing that the decision whether to have an abortion is perhaps no longer a "fundamental right," and that perhaps future restrictions will continue to receive something less than strict scrutiny.

Finally, by marking viability as the watermark, *Casey* ensured greater protection to the developing fetus, as advances in medical technology should continue to push back the point at which a fetus becomes viable to earlier points in the pregnancy.[155] All of this adds up to an increasing protection of the fetus at the expense of the woman's liberty interest in deciding whether to carry her child to term.

As the American high court has moved toward the middle of the human dignity-individual liberty continuum, we also see the German high court moving its country toward the middle by mandating a greater respect for the woman's right to choose. After *Abortion I*, a pregnant woman wanting an abortion in the first twelve weeks had to convince her counselors that her social predicament was "severe." However, the woman no longer has this burden after *Abortion II*. Today, although counseling is required in order to convey a strong

153. *See* BVerfGE 88, 203, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 349.

154. *Id.* at 352; *see also* Kommers, *supra* note 33, at 17.

155. *See* Webster, 492 U.S. 490 (indicating the state may require the doctor to determine through sophisticated tests whether the particular fetus may possibly be viable, and then forbid the doctor from performing the abortion if the tests indicate possible viability).

pro-life message, the ultimate decision of whether to have an abortion rests in the hands of the woman.[156]

With the two countries taking opposite starting points along the human dignity-individual liberty continuum, it is doubtful a full convergence will take place anytime soon. In future abortion cases, the German Constitutional Court will most likely begin where it left off in *Abortion II* by stating that, as a general matter, abortion is an illegal act of killing. Notably, the German Court has less leeway than the United States Supreme Court to change the liberty-dignity balance because the Basic Law does not allow for any action that would offend the principle of human dignity. The Basic Law even prohibits a constitutional amendment, thus solidifying human dignity as the highest value in the German Constitution.[157] Conversely, the United States Supreme Court ensured in *Casey* that a woman's right to decide whether to terminate her pregnancy will continue to receive special constitutional protection by stressing that the abortion decision should be left to the woman alone.

In conclusion, America clings to liberty above all other constitutional values. The image of the human person in American constitutional law remains that of an autonomous individual somewhat separate from the community. On the other hand, Germany remains committed to a strong communitarian orientation and a profound respect for human dignity. Thus, it remains doubtful that the two countries will meet in the middle as long as they continue down their respective paths.

---

156. *See* BVerfGE 88, 203, *reprinted in* CONSTITUTIONAL JURISPRUDENCE, *supra* note 3, at 349.

157. Kommers, *supra* note 33, at 11.