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The Convergence of Abortion Regulation in Germany and the United States: A Critique to Glendon's Rights Talk Thesis

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I. INTRODUCTION

In the 1970s, the Bundesverfassungsgericht (West German Federal Constitutional Court or Constitutional Court) and the U.S. Supreme Court issued almost diametrically opposed judgments on the issue of abortion. In 1973's *Roe v. Wade*, the U.S. Supreme Court extended the right to privacy to a woman's right to terminate a pregnancy.[1] *Roe* gave women the right to decide during the first trimester whether to bring a pregnancy to term. The Court allowed states to regulate abortion during the second and third trimesters to protect the woman's health.

Two years later, in 1975, the Constitutional Court struck down the Gesetz zur Reform des Strafrechts (Abortion Reform Act of 1974 or 1974 Reform Act), that decriminalized abortion.[2] Holding that the state has a duty to take affirmative action to protect the life of the fetus, the court re-established punishment for abortion except under a set of special justifications.

The radically different outcomes of the two decisions aroused the interest of many scholars on both sides of the Atlantic. One of the most recognized comparativists of European and U.S. law is Mary Ann Glendon, a professor at Harvard Law School. Her book, *Abortion and Divorce in Western Law*,[3] compares the U.S.

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1. 410 U.S. 113, 153 (1973).

2. Judgment of Feb. 25, 1975, BverfG, 39 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (F.R.G.).

3. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987).

and German approaches to abortion. Glendon argues that the German communitarian conception of law was superior to *Roe* in its approach to regulating abortion because *Roe* focused too much on a woman's rights to privacy and autonomy.

In a slightly different context, Glendon took up the issue again in 1991. In *Rights Talk*, she describes the U.S. legal discourse as characterized, in part, by "hyperindividualism."[4] Glendon argues that individual rights dominate U.S. society "from the top to the bottom" while German law emphasizes social dimensions in which individual rights exist for society's benefit.[5]

One year after the publication of *Rights Talk*, the U.S. Supreme Court decided on the constitutionality of various provisions of a Pennsylvania abortion statute. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*[6], the Supreme Court substituted an "undue burden" framework for Roe's trimester-viability solution, opening a new path for state regulation of abortion.

One year later, the Constitutional Court declared the Schwangeren und Familienhilfegesetz (Pregnancy and Family Assistance Act of 1992 or Assistance Act) unconstitutional and void because it did not criminalize abortion throughout pregnancy.[7] While the judgment, in general, stigmatized abortion as illegal, it nevertheless allowed renunciation of criminal punishment for abortions obtained during the first three months of pregnancy.[8]

This Article examines Glendon's argument that the legal dialogue in the United States is far more preoccupied by individual "rights talk" than the society-conscious German approach to regulating abortion. Analyzing U.S. and German abortion decisions in the 1970s and 1990s shows the U.S. Supreme Court decisions reflect more societal consciousness than Glendon admits. Furthermore, the language of the German judgments is more influenced by "rights talk" and competing individual interests than Glendon argues. The 1993 Constitutional Court judgment and *Casey* signal a development of abortion regulation in both countries that reflects a convergence rather than divergence.

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4. MARY ANN GLENDON, RIGHTS TALK 75 (1991).
5. *Id.* at 12, 73-74.
6. 112 S. Ct. 2791 (1992).
7. Judgment of May 28, 1993, BverfG, 88 BVerfGE 203-205 (F.R.G.).
8. *Id.* at 296-97.

Part II of this Article describes the central argument of Glendon's *Rights Talk* with respect to abortion. Parts III and IV analyze *Roe* and *Casey* and the German decisions on abortion in light of Glendon's main thesis. Part V shows how abortion regulation in the United States and Germany have converged toward a position that balances both state interests and individual rights. Part VI concludes that U.S. and German abortion law is becoming convergent.

II. GLENDON'S *RIGHTS TALK* AND ABORTION

According to Glendon's central thesis in *Rights Talk,* life in contemporary United States has become a vast school of law where social relationships are expressed almost exclusively in the language of rights. In a special reading of Tocqueville, she analyzes the legalistic culture of the United States.[9] By the middle of the twentieth century, the average U.S. citizen had firsthand contact with the legal system: divorce became a mass phenomenon, more citizens were eligible for jury service, and lawyers were consulted to settle estates or to make wills.[10] The law increasingly expressed and carried the common values of U.S. society.[11] Consequently, legal terms today pervade both political and popular discourse in the United States; almost every controversy is framed as a clash of rights.[12]

While Glendon acknowledges that U.S. influence after World War II spread this rights discourse throughout the world, she argues that the U.S. language of legal disputes is different from its modern European counterparts. In its simplistic U.S. form, the legal dispute knows no compromise: "The winner takes all and the loser has to get out of town. The conversation is over."[13] In its absoluteness, Glendon argues U.S. rights talk promotes conflict and "sporadic crisis intervention over systemic preventive measures" and "particular interests over the common good."[14] Glendon also argues that rights talk inhibits dialogue that might result in a consensus that balances competing values.[15]

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9. GLENDON, *supra* note 4, at 2.
10. *Id.*
11. *Id.* at 3.
12. *Id.* at 3-4.
13. *Id.* at 9.
14. *Id.* at 14-15.
15. *Id.*

Citing the U.S. Supreme Court, which once referred to citizenship as "the right to have rights,"[16] Glendon further concludes that individual rights dominate the notion of citizenship in the U.S. system.[17] In contrast, the French Declaration of the Rights of Man and Citizen emphasizes rights in conjunction with the duties of individuals.[18] The Romano-German legal tradition incorporated the ideas of Kant and Rousseau to the philosophy of natural rights developed by Hobbes and Locke; it does not restrict legal disputes to individual rights but includes communitarian values.[19] Glendon, therefore, believes that the discourse about the idea of civil society in Europe is less rights-centered and individualistic than in the United States. Glendon misses in U.S. society the vision of a republic where citizens are not only bearers of rights but actively take "responsibility for maintaining a vital political life."[20]

In chapter three of *Rights Talk*, subtitled "The Lone Rights Bearer," Glendon prominently relates her main argument to the issue of abortion. *Roe v. Wade*, according to Glendon, focused simply on the privacy and autonomy of the individual woman instead of emphasizing the social interrelationships of the pregnant woman and the unborn fetus within the larger community.[21] In her view, the Supreme Court failed to moderate the clash between a woman's right to freedom from state interference and the value of unborn life. As a result, Glendon concludes, the Court established an absolute right to abortion, and the pregnant woman was left as the lone rights-bearer.[22] While the woman was free to decide whether to have an abortion, she was also left helpless and isolated in her privacy.[23]

Glendon believes that the German approach to abortion, as contained in the 1975 judgment of the Constitutional Court, differs substantially from *Roe*.[24] While U.S. constitutional law defines the right to privacy as the "right to be let alone,"[25] Article 2(1) of

16. Trop v. Dulles, 356 U.S. 86, 102 (1958).
17. GLENDON, *supra* note 4, at 11-12.
18. *Id.* at 11.
19. *Id.* at 68-69.
20. *Id.* at 17.
21. *Id.* at 58-60.
22. *Id.* at 59.
23. *Id.*
24. *Id.* at 64.
25. *See id.* at 61.

the Grundgesetz (Constitution or Basic Law of Germany) provides a right to personality in the context of society: "Everyone shall have the right to free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or against morality."[26]

The principle of Article 2(1) of the Basic Law is an individualistic one that protects "the inner sphere of personality which is in principle subject only to the free determination of the individual."[27] The text of the Basic Law, however, constrains the right of personality in relation to the rights of others, the constitutional order, and the moral code. "The concept of man in the Basic Law is not of an isolated, sovereign individual; rather, the Basic Law resolves the conflict between the individual and the community by relating and binding the citizen to the community, but without detracting from his individuality."[28] Thus, the Basic Law forced the Constitutional Court to pay attention to the social dimension of the abortion issue.

Glendon emphasizes that the social dimension of the individual was not neglected in the ruling of the Constitutional Court but was clearly overlooked in *Roe*.[29] The Supreme Court framed the abortion issue "as pitting two interests against each other in an all-or-nothing contest."[30] In contrast, the Constitutional Court did not rest its decision on the fetus' right to life or on the woman's personal liberty rights.[31] The German court balanced the conflicting interests between the right to personality and the constitutional value of life, paying attention to the principle priority of the latter over personality rights.[32]

Glendon is convinced that the German decision of 1975 allowed for a compromise that resulted in a better solution than

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26. GRUNDGESETZ [Constitution] [GG] art. 2, para. 1 (F.R.G.) (official translation of the Grundgesetz (Basic Law) as provided by the German Ministry of Foreign Affairs). Unless otherwise quoted, all translations from the German text are the author's.

27. Judgment of Feb. 14, 1958, BGH, 26 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 349, 354. Translated by author.

28. GLENDON, *supra* note 4, at 71 (quoting Federal Constitutional Court decision of July 7, 1970, translated in Donald P. Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, 1985 B.Y.U. L. REV. 371, 403 (1985)).

29. *Id.* at 73.

30. *Id.* at 64.

31. *Id.*

32. *Id.* at 65.

that in the United States. According to Glendon, the statute adopted by the West German Parliament as a result of the Constitutional Court's judgment recognized the moral significance of the abortion question for society while allowing for abortions in cases of absolute necessity.[33] In contrast, the Supreme Court took a rigid "rights talk" approach that resulted in the precedent of a woman's right to decide whether to terminate her pregnancy. Thus, Glendon concludes, the image of the lone rights-bearer "has predisposed" U.S. society "to an unnecessarily isolating version of privacy."[34] Too much rights talk and too little societal consciousness in the United States prevented the Supreme Court from resolving the conflict between the individual (the woman) and the communitarian value (the unborn life) by relating it to the community. In other words, Glendon complains that individual rights influence the U.S. legal language much more than the communitarian values that influence the German system.[35]

The following sections question the issue of abortion as utilized by Glendon to support her main argument in *Rights Talk*. The core of this Article's criticism relies on arguments drawn from the language of these courts.

III. THE RECOGNITION OF SOCIAL VALUES IN THE ABORTION DECISIONS OF THE U.S. SUPREME COURT—THE STATES' INTERESTS IN CHILDBIRTH

Throughout the 1970s and 1980s, the decisions of the U.S. Supreme Court on abortion laws since *Roe v. Wade* caused intense social controversies in the United States.[36] This public debate gained a new legal landmark with *Planned Parenthood of*

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33. *Id.* at 65. Glendon, in fact, misinterprets the West German 1976 Abortion Reform Act. A woman did not have the ultimate choice whether to bring the pregnancy to term after she underwent the counseling procedure. Rather, the doctor must confirm the existence of a serious hardship to allow for legal abortion. § 218(a) StGB (translated in Elizabeth J. Kapo, *Abortion Law Reform: The Nexus Between Abortion and the Role of Women in the German Democratic Republic and the Federal Republic of Germany*, 10 DICK. J. INT'L L. 137, 152 n.95). What Glendon describes is actually the counseling model incorporated into the 1974 Abortion Reform Act, which was declared unconstitutional and void. Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 CONTEMP. HEALTH L. & POL'Y 1, 7.

34. GLENDON, *supra* note 4, at 67.

35. *See id.*

36. *Id.* at 57.

Southeastern Pennsylvania v. Casey,[37] which made important alterations to *Roe*.

A. Roe v. Wade

In *Roe v. Wade*, the Supreme Court expanded the right to privacy to include the right to obtain an abortion.[38] The language of the U.S. Constitution does not explicitly mention a right to privacy. In *Griswold v. Connecticut*, the Supreme Court first articulated a constitutionally protected right to privacy in reproductive choices.[39] The Court "inferred this right [to privacy] from various provisions of the Bill of Rights and found it applicable to the states through the Due Process Clause of the Fourteenth Amendment."[40] This decision, however, relies on the historical context of the document, rather than the text of the Bill of Rights itself.

In *Roe v. Wade*, the Court held that the sphere of privacy protected from state interference includes a "woman's decision whether or not to terminate her pregnancy."[41] The fetus could not hold individual rights that would compete with the woman's right to privacy because the *Roe* Court did not consider the fetus a person.[42]

The Court also found that "the pregnant woman cannot be isolated in her privacy" as she "carries an embryo and, later, a fetus."[43] It, however, did consider the social dimensions of childbirth. The majority concluded that the state maintains two important interests: the health of the mother and the potential human life.[44] The Court reasoned that a "woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly."[45] The state must show a compelling interest to interfere with a woman's right to privacy.[46] The

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37. 112 S. Ct. 2791 (1992).
38. 410 U.S. 113 (1973).
39. 381 U.S. 479 (1965).
40. Florian Miedel, *Is West Germany's 1975 Decision a Solution to the American Abortion Debate? A Critique of Mary Ann Glendon and Donald Kommers*, 20 N.Y.U. REV. L. & SOC. CHANGE 471, 491-92 (1993).
41. Roe v. Wade, 410 U.S. at 153.
42. *Id.* at 158.
43. *Id.* at 159.
44. *Id.*
45. *Id.*
46. *Id.* at 162.

majority placed varying values on the competing interests of the state and the woman. In the first trimester, a woman's right remained untouched. In the second trimester, the state could regulate abortion only to protect the woman's health. In the last trimester of pregnancy, however, the Court allowed the state to "go so far as to proscribe abortion" to realize its interest in protecting fetal life.[47] The Court created an exception for threats to the life or health of the mother.[48]

In summary, the *Roe* Court balanced the different interests involved.[49] Hence, *Roe* is not "the winner takes it all" type of ruling that Glendon suggests. Rather, the Court observed the interests of the community by acknowledging the state's interest in the protection of an unborn life as it competes with a woman's right to privacy. The voice of the unborn, however, was not strong enough to be heard during the first two trimesters of pregnancy. The protection of fetal life had to yield to a woman's right to privacy, but it was not totally neglected as Glendon believes.

Despite increasing dissent, the Court reaffirmed the central holding of *Roe v. Wade* several times during the 1970s and 1980s.[50] The Court declared state laws unconstitutional whenever they infringed upon a woman's right to have an abortion. In 1989, however, the Supreme Court upheld a Missouri law that restricted abortions in publicly funded institutions. The Missouri statute, challenged in *Webster v. Reproductive Health Services*, declared that the "life of each human being begins at conception."[51] The Court emphasized that *Roe* never implied a limitation on state authority to make its own value judgment with respect to abortion.[52]

The reasoning of *Webster*, and the plurality's attack on *Roe* and its trimester framework, contained the seeds for more restrictive state abortion laws. In 1992, the Court assessed the first of these laws in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[53]

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47. *Id.* at 163.
48. *Id.* at 164.
49. *Id.* at 165.
50. *See, e.g.*, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 63 (1976); Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 420 (1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 759 (1986).
51. 492 U.S. 490, 504 (1989).
52. *Id.* at 506.
53. 112 S. Ct. 2791 (1992).

B. Planned Parenthood of Southeastern Pennsylvania v. Casey

The Pennsylvania law at issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey* contained five requirements before a woman could legally obtain an abortion:

1. a woman seeking an abortion must give her informed consent prior to the procedure;
2. she must be provided with certain information at least twenty-four hours before the abortion;
3. a minor must obtain parental consent unless a judicial bypass is granted;
4. a married woman seeking an abortion must notify her husband of her intended abortion; and
5. facilities providing abortion services must satisfy certain reporting requirements.[54]

The Supreme Court upheld the constitutionality of all these provisions except spousal notification. While the majority reaffirmed *Roe*'s central holding that the state may not interfere with the right of a woman to terminate her pregnancy before viability, the Court abandoned the trimester system and applied an "undue burden" test to balance the interests involved.[55]

The Court still chose viability as the point where the state's interest in childbirth begins to compete successfully with a woman's right to privacy.[56] Unlike the strict trimester approach, the ambiguous viability concept now offers the state increased opportunities to regulate abortion. *Casey* stated that a woman's constitutional freedom is not so unlimited as to prevent the state from promoting its interest in unborn life and, after viability, from restricting the right to abortion. *Casey*, therefore, puts more emphasis on the social value of the developing life than *Roe*. Indeed, the *Casey* Court reasoned that *Roe's* trimester framework had undervalued the state's interest in potential life.[57] A law that decreases the practical availability of abortion, the Court further ruled, is valid as long as it does not impose an undue burden on a woman's choice to obtain an abortion.[58]

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54. *Id.* at 2833-37. *See also* Miedel, *supra* note 40, at 494.
55. *Casey*, 112 S. Ct. at 2818, 2819.
56. *Id.* at 2816.
57. *Id.* at 2818.
58. *Id.* at 2819.

Thus, in *Casey*, the "undue burden" analysis became the standard to reconcile the state's interests with a woman's right. Applying this standard, the Court upheld the counseling procedure of the Pennsylvania law, which required the woman to receive information about available assistance for childbirth or social support twenty-four hours prior to the abortion. According to the Court, this provision was not unduly burdensome because *Roe* had not established an unrestricted right to abortion.[59]

The language of *Casey* does not support Glendon's argument of pure rights talk without the recognition of social values in contemporary United States.[60] The majority opinion repeatedly explains that the right to privacy is not to be overstated with respect to abortion. Rather, the Court paved the way for increased state activity to promote its interest in childbirth, which Glendon considers the dominating social value at stake in the abortion discussion.

One can argue, of course, that *Casey* was the result of President Ronald Reagan's appointment of conservative Justices to the Supreme Court. The new justices replaced those who had contributed to the majority of the *Roe* decision.[61] Such an argument, however, leads to three critiques of Glendon's analysis in *Rights Talk*. First, does the degree of consciousness for social values in a society depend on the language of majority opinions of constitutional courts? Second, what role should dissenting opinions play in the analysis? Finally, at which level do we "measure" the existence of too much rights talk and too little protection of the common good?

Since *Roe*, the Supreme Court has dealt with state abortion laws for over two decades. If abortion restrictions represent the protection of common values, as Glendon argues, then U.S. societal consciousness exists at least at the state level. Glendon's analysis with respect to abortion, however, focuses merely on decisions by the Supreme Court. While the importance of these judgments is certainly enormous within the U.S. judicial system, they do not necessarily reflect the role of individualism and social relations in

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59. *Id.* at 2826.

60. Of course, *Casey* came after *Rights Talk*. As Glendon's thesis claims validity across time, however, Glendon must accept the comparison of her main argument in respect to abortion with the *Casey* holding rendered only one year later.

61. *See* Miedel, *supra* note 40, at 493 n.168.

U.S. society in every respect. Even if one restricts the analysis of rights talk to the language of the German and U.S. decisions on abortion by the federal constitutional courts, Glendon overemphasizes the lack of communitarian values in U.S. case law. Just as *Roe* struck a balance across trimesters, the Supreme Court in *Casey* developed a framework to balance the value of life, as represented by the interests of the state in childbirth, with the right to privacy of the pregnant woman. The next part contends that Glendon underestimates the role of rights talk and individual rights in the decisions of the German Federal Constitutional Court.

IV. THE GERMAN DECISIONS ON ABORTION AND THE ROLE OF INDIVIDUAL RIGHTS

Consequent to World War II and German Unification, the decisions of the German Federal Constitutional Court on abortion contain important reflections on the history of abortion regulation and individual rights in Germany. Analysis of the German judgments, therefore, requires a brief look at the historical development and discussion of the abortion issue in Germany before turning to the question of rights talk in the language of the decisions.

A. The 1975 Decision of the Constitutional Court

1. Prior to the 1975 Decision

With the end of Nazi Germany in 1945 came the repudiation of the Nazi law on abortion. The *medizinische Indikation*, judgemade law of medical indication developed by the *Reichsgerichtshof* (Supreme Court) in 1927, regained force.[62] It did not punish women if the termination of pregnancy was the only means to avoid danger to the mother's life. The 1962 government draft of a new *Das erste Gesetz zur Reform des Strafrechts* (West German Criminal Code) endorsed this judge-made law. Meanwhile, the medical indication test in practice became responsive to social change.[63] The number of legal abortions increased from 2858 in 1968 to 17,814 in 1974. The number of persons convicted

62. Albin Eser, *Reform of German Abortion Law: First Experiences*, 34 AM. J. COMP. LAW 369, 371 (1986).

63. *Id.*

for illegal abortions dropped from 596 to 94.[64]

Changed attitudes favorable to legalizing abortion in socialist countries, as well as in Scandinavia, fostered a discussion in West Germany that focused on the *Fristenlösung* (periodic model) versus the *Indikationslösung* (indication model).[65] In 1970, Swiss and German criminal law professors released an alternative draft to the 1962 proposal of the German government.[66] Although in agreement with the basic objectives of reform, the panel of professors disagreed on whether the decision to have an abortion should be left to the woman.[67]

The majority of these so-called "alternative professors" favored a periodic model.[68] They suggested legalizing abortion for the first trimester of pregnancy if the woman had consulted a counseling service. Counseling was designed to discourage abortion and to limit it to cases of necessity.[69] The indication solution, on the other hand, allowed for abortion "when the carrying to term of the pregnancy cannot be expected of the mother considering all aspects of her situation," including social reasons.[70]

Both suggestions shaped the discussion on abortion that culminated in a fierce parliamentary battle over the 1974 Reform Act, which was based on the periodic solution.[71] During the first stage of pregnancy, termination was at the discretion of the woman but still illegal if she had not followed a consulting procedure. During the second trimester, abortion was legal in cases of medical necessity or to avoid the birth of a seriously defective child. Both exceptions were subject to mandatory certification.[72]

The German Parliament passed the 1974 Reform Act with 247 votes in favor, 233 against, and 9 abstentions.[73] Even before the 1974 Reform Act came into force, the Christian Democrat

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64. *Id.*
65. *Id.* at 371-73.
66. Michael G. Mattern, *German Abortion Law: The Unwanted Child of Reunification*, 13 LOY. L.A. INT'L & COMP. L.J. 643, 658 (1991).
67. *See* Eser, *supra* note 62, at 372.
68. *Id.* at 373.
69. *See* Mattern, *supra* note 66, at 658.
70. *Id.* at 658, *citing* J. BAUMANN, ALTERNATIVE DRAFT OF A PENAL CODE FOR THE FEDERAL REPUBLIC OF GERMANY § 106 I (J. Darby trans. 1977).
71. Kommers, *supra* note 33, at 4-5.
72. *Id.* at 5.
73. *Id.* at 4.

opposition, as well as five German states,[74] petitioned the Constitutional Court for a ruling on its constitutionality.[75] They claimed that the 1974 Reform Act violated Article 2(2) of the Basic Law, which stated that "everyone has the right to life and to the inviolability of his person."[76] They claimed that the state failed to maintain its obligation to sufficiently protect the unborn life. The Constitutional Court eventually supported the claim and declared the 1974 Reform Act unconstitutional and void.[77]

2. The Reasoning of the Court

With three of eight judges dissenting, the First Senate of the Constitutional Court handed down its decision on February 25, 1975. The court based its judgment mainly on Article 1, which stated that "[T]he dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority," and, on Article 2, sentence 1, of the Basic Law.[78] The opinion addressed the following topics: (1) the legal status of the fetus; (2) the obligation of the state to protect the unborn life; (3) the balance of the rights of the fetus versus the rights of the woman; (4) justification of abortion; and (5) criticism of the 1974 Reform Act.[79]

a. The Legal Status of the Fetus

First, the court recognized that Article 1 of the Basic Law, in conjunction with Article 2, sentence 1, legally established the fundamental value of human life in German law. The Basic Law responded to Nazi policies by explicitly insuring the natural right to life. These policies included the *Vernichtung lebensunwerten Lebens* (destruction of unworthy life), *Endlösung* (final solution),

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74. These are Baden-Württemberg, Bavaria, Rheinland-Pfalz, Saarland and Schleswig-Hohlstein. Judgment of Feb. 25, 1975, BVerG, 39 BVerfGE 1, 18 (F.R.G.).

75. Judgment of Feb. 25, 1975, BVerfG, 39 BVerfGE at 18. Under German law, the jurisdiction of the Constitutional Court may be invoked without an actual case. This test on the constitutionality of an act or statute is known as *abstrakte Normenkontrolle* (abstract judicial review) and stems directly from the Basic Law. GRUNDGESETZ [Constitution] [GG] art. 93, § 4 (F.R.G.). *See also,* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 514 (1989).

76. GRUNDGESETZ [Constitution] [GG] art. 2(2), (F.R.G.) (translated in Kapo, *supra* note 33, at 151).

77. *See* 39 BVerfGE at 2.

78. *Id.* at 19-20.

79. *Id.* at 1.

and *Liquidierung* (liquidation).[80] In light of the moral confrontation with the previous Nazi regime, the court broadly interpreted Article 2(1).[81] The court concluded that the term "everyone" in this provision must include the fetus.[82] Parliamentary statements of both supporters and opponents of the 1974 Reform Act endorsed this point of view.[83] The court further held that, according to common biological-physiological understanding, life starts on the fourteenth day after conception and the development of the fetus is a continuous process that does not distinguish between individual stages of pregnancy.[84] Consequently, the German court had to take into account the value of the unborn life.[85]

b. The Obligation of the State to Protect Unborn Life

The Constitutional Court interpreted the Basic Law in light of an objective hierarchy of values.[86] While the Basic Law grants individual rights, it also embodies objective values that impose a mandatory duty on the federal state to ensure their protection and to maximize the public value.[87] Hence, constitutional rights not only function as a protection against state interference but require state action in order to protect the public values endorsed in the Basic Law. The court concluded that the German state has an affirmative obligation to protect the life of the fetus because the value of human life crowns the hierarchy of objective values of the Basic Law.[88]

The principle of objective values represents the creation of a communitarian value structure. In this respect, Glendon's argument of German individualism limited by social consciousness seems to hold true. In contrast to *Roe v. Wade*, the German court did not have to decide whether the fetus was already a bearer of

80. *Id.* at 36.
81. *Id.* at 36-37.
82. *Id.* at 37.
83. *Id.* at 38.
84. *Id.* at 37.
85. The Supreme Court in *Roe v. Wade* did not view the fetus as a person; thus, the fetus did not have individual rights that would outweigh the woman's right to privacy. 410 U.S. 113, 158 (1973). Accordingly, the Supreme Court focused on the woman's right to privacy as the core value in the *Roe* decision. *Id.* at 153.
86. 39 BVerfGE at 41.
87. *See* Kommers, *supra* note 33, at 9.
88. *See* 39 BVerfGE at 42.

individual rights because the Basic Law protected the unborn life as a value itself. Indeed, the court refused to make that decision:

> [We] need not decide on the controversial question at issue in the present proceedings, as well as in the case law and scientific literature, of whether the nasciturus itself is the bearer of basic rights or whether, because its capacity to exercise legal and constitutional rights is lacking, it is protected "only" by the objective norms of the Constitution in its right to life.[89]

The constitutional obligation of the state to protect unborn life can already be deduced from the objective legal content of constitutional norms.[90] The judges wanted to avoid the difficult question of who would assert the fetus' right. At the same time, however, the Constitutional Court concluded that the Basic Law protects gestating life as a legal value.[91] The court's conclusion does not deny a fetus' individual right to life. Indeed, the qualification of the right to life as an objective, constitutional value requires that every person, including the fetus, have an individual right to life. Otherwise, this objective value would be an empty shell. The language of the court supports this idea when the judges address the fetus' "right to life."[92]

With respect to the outcome of the 1975 decision, it did not matter whether the fetus was granted an individual right to life or was protected as an objective constitutional value. The decision of the Constitutional Court did not rest on the superiority of objective communitarian values over the woman's individual right of personality. Rather, the right to life outweighs the woman's interest.[93] An ideal balance that would guarantee both the protection of the nasciturus as well as the woman's freedom to decide about the termination of pregnancy was impossible. Thus, the court concluded, the objective hierarchy of values in the German constitution commands that the fetus's right to life outweighs the right to self-development.[94] The solution would not differ if the judges had assigned the fetus an individual right to life that would have competed with the woman's individual rights.

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89. *Id.* at 41.
90. *Id.* at 41-42.
91. *Id.*
92. *Id.* at 41. The court explicitly formulated the unborn's individual right to life in 1993.
93. *Id.* at 43.
94. *Id.*

c. The Balance of the Rights of the Fetus Versus the Rights of the Woman

The court further held that Article 2(1) guards the right to uninhibited personal development. A pregnancy is part of the woman's right to privacy and falls under the protection of Article 2(1): "The right of the woman to freely develop her personality . . . that includes the self-responsibility to decide against parenthood . . . is entitled to recognition and protection."[95] Because the fetus is not considered a part of the woman but a separate human being, however, its right to life demands principal priority over the woman's interest to choose her lifestyle freely.

> A solution that guarantees the protection of the nasciturus' life and grants the pregnant [woman] the right to freely decide on the termination of her pregnancy the same time is impossible . . . . The required balancing therefore has to consider both constitutional values in respect to their relations to the dignity of man as the central value of the constitution . . . (and) . . . the protection of the fetus' life is to be given priority . . . .[96]

Thus, the state has no general power to balance the conflict of rights and values in favor of the woman's freedom to develop her personality.

Clearly, the Constitutional Court considered the woman's right of personality as competing with the value of the fetus's life. The latter, however, was not established as an absolute. The German decision therefore contains more discussion of rights than its U.S. counterpart in the sense that the Supreme Court did not take account of any conflicting right of the fetus. The Constitutional Court, in contrast, had to decide which right or value outweighs the other. Thus, in *Roe*, the lack of individual rights of the fetus and inadequate consideration of rights gave priority to a woman's right to privacy; the German court, in contrast, engaged in a discourse of individual rights versus objective values.

d. Justification of Abortion

The Constitutional Court, however, could not disregard the changed reality of abortion practice. While the constitution demanded that general abortion be illegal, the court acknowledged

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95. *Id.*
96. *Id.*

the necessity of abortions in circumstances where it would be unreasonable to expect the woman to carry the pregnancy to term.[97]

First, the court reconfirmed the constitutionality of the medical indication test, which had existed since the 1927 judgment of the Reichsgerichtshof.[98] This well-established exception recognized the woman's own constitutionally guaranteed right to life and the inviolability of the person:

> The continuation of pregnancy is . . . unreasonable . . . [if] . . . the termination of pregnancy is required to protect the pregnant woman from a threat to her life or a serious threat to her health. In this case her own right to life and to physical integrity (Article 2(1)) is at question, and [the woman] cannot be expected to sacrifice this right for the unborn life.[99]

Second, the court reintroduced the "eugenic indication" test for cases in which the examining physician confirmed that the fetus is already incurably deformed or that an incurable birth defect is more than likely.[100] Third, the court recognized a "criminological indication," which allowed abortion when a pregnancy resulted from criminal action, such as rape or sexual intercourse with a minor.[101] Finally, the court recognized a *Notlagenindikation* (social indication) exemption: "[T]he overall social situation of the pregnant woman and her family can generate conflicts of such magnitude that, beyond a certain limit, the measures of the criminal law cannot force further sacrifice in favor of the unborn life."[102] In every case, the stress on the woman must be so severe that the denial of a termination would be unreasonable. "[C]ircumstances must exist which impose extraordinary obstacles [to bring the pregnancy to term], so that it cannot be expected to

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97. *Id.* at 48.

98. Mattern, *supra* note 66, at 667.

99. Judgment of Feb. 25, 1975, BVerG, 39 BVerfGE 1, 49 (F.R.G.).

100. *Compare* Mattern, *supra* note 66, at 667 with 39 BVerfGE at 49. "The court recognized four such indications [justifying non-criminal abortions]: (1) the medical indication; (2) the eugenic indication; (3) the criminological indication; and (4) the social indication." *Id.*

101. Mattern, *supra* note 66, at 668.

102. Eser, *supra* note 62, at 376 (translating 39 BverfGE at 50). The social indication, intended to apply to cases of hardship, would in the following years experience such widespread use that it was labelled a "hidden periodic model." Mattern, *supra* note 66, at 669.

obey the legal duty [to give birth to the unborn]."[103]

The language of the court reveals that the woman's own right to life was important to justify the medical and social indications. The use of the terms "unreasonable" and "sacrifice" signifies that the court balanced the competing values or rights of the fetus and the woman. Hence, individual rights determined the legal discourse as well as the result of the German abortion decision.

e. Criticism of the 1974 Reform Act

The Constitutional Court also faced the question of whether the lack of criminalization of abortion during the first trimester of a pregnancy violated the constitution because it found the state responsible for insufficient protection of the unborn life. The court stated that the sum of legal measures, criminal and civil, is the decisive factor in determining if the fetus is adequately protected.[104] The majority of the court found that the non-penalty measures of the 1974 Reform Act would not sufficiently protect the unborn life. Furthermore, the court criticized the Act for failing to properly express the objective values of the Basic Law by generally disapproving abortions.[105]

In summary, the Constitutional Court emphasized that the German Constitution protects unborn life as an objective value.[106] To allow for the establishment of the fetus's life as an objective value, however, the court implicitly acknowledged an individual right of the fetus. The importance of individual rights in the 1975 decision of the Constitutional Court is obvious from the language the court used to justify the general priority of the unborn life over the woman's right of personality. The balance of competing individual rights or values dominates the court's reasons for the constitutionality of specific exemptions from the general prohibition of abortion. The 1993 decision of the Constitutional Court increased the importance of the role of individual rights in the design of German abortion law.

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103. Judgment of Feb. 25, 1975, BVerG, 39 BVerfGE 1, 49 (F.R.G.).

104. *Id.* at 46.

105. *See* Mattern, *supra* note 66, at 666. *Cf.* 39 BVerfGE at 65-66. The court stated that if the government did not declare abortion to be criminal other than in exceptional situations, the general consciousness would not perceive it as wrong or anti-social. *Id.*

106. 39 BverfGE at 41.

B. The Constitutional Court's 1993 Decision on Abortion

The Constitutional Court's 1993 decision resulted from the need to reconcile, after German reunification, the liberal East German abortion law with the rather conservative West German abortion regulation. The following subsections highlight the process that led to the court's ruling in 1993 and elaborate on the reasoning of that decision.

1. Regulation of Abortion after German Unification

On October 3, 1990, the German Democratic Republic (GDR or East Germany) transformed itself into five Länder,[107] acceded to the Federal Republic of Germany (FRG or West Germany), and ceased to exist. The *Einigungsvertrag* (Treaty for the Creation of German Unity), ratified by the Bundestag and the Volkskammer (the East German Parliament) designated the Grundgesetz as the constitution of all of Germany.[108]

Although the Bundestag added a new section to the Basic Law to allow parts of the East German law to temporarily remain in effect,[109] forty-two years of separation[110] prompted historians and lawyers to doubt the feasibility of merging two different societies by the general adoption of West German law in the Eastern Länder.[111]

One important issue during the negotiation of the Unification Treaty was abortion.[112] The negotiations on abortion law, which

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107. These are Saxony, Thuringia, Mecklenburg-Western Pomerania, Brandenburg, Saxony-Anhalt, and the City of Berlin. Treaty on the Establishment of German Unity, Aug. 31, 1990, F.R.G.-G.D.R., art. 1, *reprinted in* 30 I.L.M. 457, 464 [hereinafter Unification Treaty].

108. Unification Treaty, art. 3, *supra* note 107, at 464.

109. Article 143 Grundgesetz reads:

> (I) Law [in the former East Germany] may deviate from provisions of the Basic Law for a period not extending beyond 31 December 1992 in so far and as long as no complete adjustment to the order of the Basic Law can be achieved as a consequence of the different conditions . . . ; (II) Deviations from sections II, VIII . . . not extending beyond 31 December 1998.

Id. at 465.

110. According to the Potsdam Declaration of 1945, Germany was under the "supreme authority" of the Allies. The four-power Allied Control Council exercised this authority. The Soviet Union's withdrawal in 1948 introduced the division of Germany, which was completed with the foundations of two separate states in 1949. *See* Mattern, *supra* note 66, at 644 n.5.

111. Kapo, *supra* note 33, at 139.

112. *Id.*

almost delayed reunification, lasted until the morning of the day the treaty was scheduled to be signed.[113] The need for negotiations resulted from the fundamental differences between the liberal abortion provisions in the GDR and the rather conservative regulations in the FRG.

In the end, the treaty assigned an all-German parliament, to be elected in the unified Republic, the task of passing a new all-German law on abortion by December 31, 1992. Otherwise, the substantive East German abortion law would continue to be in effect.[114]

2. The Pregnancy and Family Assistance Act of 1992

The conservative-liberal coalition (CDU-CSU-FDP)[115] gained the majority of votes in the elections for the first all-German parliament on December 2, 1990.[116] The abortion question, however, transcended coalition lines. Each political party represented in the Bundestag forwarded its own proposal.[117] The proposals varied from total restriction of abortion except for serious medical reasons (Bavarian Christian Social Union) to complete repeal of all penalties for termination (Greens and the Party of Democratic Socialism (PDS)).[118]

The Social Democratic Party (SPD), as the main opposition party, and the FDP, as the junior partner of the ruling coalition, covered the middle ground. After intensive negotiations, these two parties presented the *Gruppenantrag* (group proposal), which contained an omnibus statute that would amend the penalty law and the public law.[119]

The group proposal attracted not only the votes of the Social Democrats and the Liberals but also the votes of East German Christian Democrats.[120] Contrary to the usual practice of voting

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113. WOLFGANG SCHÄUBLE, DER VERTAG 246-52 (1993).

114. Unification Treaty, *supra* note 107, art. 31, § 4. The latter provision was to ensure that the CDU played an active role rather than waiting for a time limit to expire. After that, the West German law would be adopted for all-Germany. *Id.*

115. The CDU were the Christian Democratic Union. The CSU stood for Bavaria's Christian Social Union. Kommers, *supra* note 33, at 4 n.13. The FDP party stood for Free Democratic Party. *Id.* at 12.

116. *Id.*

117. *Id.*

118. *Id.* at 12 n.53.

119. *Id.*

120. *Id.*

along party lines, where members are not legally obliged but strongly encouraged to vote along the lines of their coalition (*Fraktionszwang*), voting this time was released from the constraints of party discipline. The Assistance Act passed the Bundestag with 357 to 283 votes,[121] with twenty members of the CDU voting in favor of the new law.[122]

The Assistance Act amended sections 218 through 219 of the German Civil Code, *Strafgesetzbuch* (StGB), and "cut the heart out of the Abortion Reform Act of 1976."[123] Abortion, in principle, remained a criminal offense.[124] The provisions introduced by § 218a StGB, however, legalized abortion in some circumstances, including "medical," "eugenic," and "criminological" indications.[125]

While these exemptions existed prior to 1992, the most important amendment concerned the "social indication" regulated in subparagraph 1 of the new § 218a StGB:

> The termination of pregnancy is not unlawful, if:
> 1. the pregnant woman requests the abortion and satisfies the doctor, by means of a certificate in accordance with Paragraph 219 subparagraph 3, sentence 2, that she has allowed herself to be advised at least three days before the operation (advice to the pregnant woman in a crisis or conflict situation),
> 2. the abortion is carried out by a doctor, and
> 3. not more than twelve weeks have elapsed since conception.[126]

The crucial difference from the West German abortion law of 1976 was that the Assistance Act left the final decision of whether to have an abortion to the woman. The solution presented also differed from the East German model. A woman could not obtain an abortion on demand but had to listen to the advice of a physician-counselor. The Assistance Act obliged the counselors to stress the value of the unborn life and to encourage the woman to

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121. *Id.*; *see also* Miedel, *supra* note 40, at 486.

122. *See* Miedel, *supra* note 40, at 487.

123. Kommers, *supra* note 33, at 13.

124. Strafgesetzbuch [StGB] § 218 (as cited in Judgment of May 28, 1993, BVerfG, 88 BVerfGE 203, 215 (F.R.G.)).

125. *Id.*

126. Samuel K.N. Blay & Ryszard W. Piotroweiz, *The Advance of German Unification and the Abortion Debate*, 14 STATUTE L. REV. 171, 181 (1993).

make her own responsible and conscientious decision.[127] Counselors also had to provide detailed medical, social, and legal information, including advice on legal entitlements and the availability of practical assistance designed to help in situations of distress.[128]

Consequently, the Assistance Act embodied a package of socio-economic measures dealing with child support, medical insurance, social security, job placement, and vocational training.[129] The Assistance Act, for example, would entitle children to day care so that their mothers could pursue careers.[130]

Most importantly, the drafters of the Assistance Act paid special attention to the 1975 decision of the Constitutional Court. The drafters intended the Assistance Act, in content and language, to ensure better protection of the unborn life. Its design did not question the duty of the state to protect the fetus. In 1975, the Constitutional Court ruled that the sum of legal measures, whether criminal or civil, is the decisive factor that determines if the fetus is adequately protected.[131] Furthermore, employing the argument that criminal measures had not achieved their goal in West Germany during the last sixteen years,[132] the omnibus bill provided a considerable package of supporting social measures to encourage the women to bring their pregnancies to term.

In the view of the general public, the legislators made an honest effort to take into account both the requirements of the Basic Law, as shaped by the Constitutional Court's 1975 judgment, and the spirit of Article 31, § 4, of the Unification Treaty, which called for a "better solution" to the problem of pregnant women in distress "than is the case in either part of Germany at present."[133] The provisions of the Assistance Act reasonably reflected the social reality and represented a promising attempt to

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127. *Id.* at 181-82.

128. *Id.*

129. *See* Kommers, *supra* note 33, at 13.

130. The court declared that "[t]he legislature [must] provide the basis for a balance between family activities and gainful employment and guarantee that the task of raising children in a family will not lead to any disadvantage in the workplace." *Id.* at 21 (quoting Judgment of May 28, 1993, BVerfG, 88 BVerfGE 203, 260 (F.R.G.)).

131. Judgment of Feb. 25, 1975, BVerG, 39 BVerfGE 1, 46 (F.R.G.).

132. *Cf.* Mattern, *supra* note 66, at 685 (empirical studies of West Germany indicate that abortion rates are higher than other countries with more liberal abortion laws).

133. *See* Kommers, *supra* note 33, at 13 (quoting Unification Treaty, *supra* note 107, art. 31, § 4).

reconcile the differences between West and East with respect to abortion law.

3. The 1993 Judgment

The Assistance Act, passed on June 26, 1992, never went into effect. Backed by Chancellor Helmut Kohl, 249 Christian Democratic members of Parliament, exclusively West Germans, petitioned the Constitutional Court to issue an injunction to enjoin the enforcement of the Assistance Act.[134] The Bavarian government filed a separate petition.[135] On August 4, 1992, the court unanimously ordered the injunction.[136]

After hearings in December 1992, the Second Senate of the Constitutional Court, in a 6-2 vote, declared major provisions of the Assistance Act unconstitutional and void on May 28, 1993.[137] Balancing the competing individual rights, the judges this time paid more attention to a woman's personality rights. The main argument of the lengthy decision,[138] however, focused on two words of the Assistance Act: *nicht rechtswidrig* (not illegal).

a. The "Illegal" but "Unsanctioned" Abortion

The Constitutional Court's reasoning in the 1993 decision began with a confirmation of the 1975 judgment:[139] the unborn life is a constitutional value protected by Article 2, sentence 1, in conjunction with Article 1 of the Basic Law. The state is responsible for ensuring this protection.[140] The infringed right of a woman to self-determination generally does not exempt the pregnant woman from the legal duty to carry the fetus to term: "Basic rights of the woman do not exempt from the general prohibition of abortion. These rights also exist against the right to life of the nasciturus and are to be protected. However, they do not exempt from the legal duty to bring the pregnancy to

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134. *Id.* at 15.

135. *Id.*

136. Judgment of Aug. 4, 1992, BverfG, 86 BVerfGE 390, 393 (F.R.G.).

137. Judgment of May 28, 1993, BVerG, 88 BVerfGE 203, 208-13 (F.R.G.).

138. Volume 88 of the Federal Constitutional Court Decisions Anthology (BVerfGE) contains 163 pages.

139. *See* 88 BVerfGE at 251. The Court was not bound by its 1975 decision. The reinterpretation of Article 2 of the Basic Law, however, which was at the core of the 1975 ruling, could not be expected from a court that admitted to the rule of law and the concept of continuity of law.

140. *See* 88 BVerfGE at 251f.

term . . . in general."[141]

According to the hierarchy of objective values embodied in the Basic Law, a woman's right to free development of her personality must yield to the right to life of the fetus.[142] As in 1975, the court balanced the right of a woman to self determination against the fetus's right to life. This time, however, the court emphasized that the unborn life is not only protected as an objective value but also as an individual right. "The obligation to protect the unborn life is not only related to the [unborn] life in general but to the individual life."[143]

Unlike the 1975 decision, the 1993 decision did not use the terms "unborn life" or "gestating life" exclusively but referred to the right of the fetus to life: "This right to life, which is not given to the nasciturus through acceptance by his mother but is granted to the unborn solely because of its existence, is the most elementary . . . right that departs from the dignity of man."[144] Thus, the court explicitly considered the individual rights of the fetus. Confirming the exceptions of "criminological," "medical," and "eugenic" indications, the court argued that an abortion for a "social indication" could only be justified in cases of serious distress, where it would be unreasonable to expect the woman to carry the fetus to term.[145]

As the court further explained, the new § 218a(1) StGB did not define conditions of such *Unzumutbarkeit* (unreasonable expectation).[146] The state must assess these conditions rather than treat abortion as equal to childbirth. The Second Senate found the language of § 218a(1) StGB, which described the voluntary interruption of pregnancy within the first three months as "not illegal," irreconcilable with the obligation of the state to protect the unborn life.[147] Consequently, the court declared the provision void.

The social reality of 1993, however, differed from that of 1975. Since 1972, East German women had free access to abortion while the West German abortion practice was characterized by an

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141. *Id.* at 255.
142. *Id.* at 253.
143. *Id.* at 252.
144. *Id. See also id.* at 255 (recognizing "the right to life of the nasciturus").
145. *Id.* at 256.
146. *Id.* at 256, 274.
147. *Id.* at 299. *See also,* Kommers, *supra* note 33, at 17.

extensive utilization of the "social indication" justification and abortion tourism.[148] The unconstitutional Assistance Act's provisions reflected both abortion practice in West Germany and the liberal East German abortion law. Thus, after the court had reconfirmed the constitutional principles established in the 1975 decision, the judges had to reconcile their legal standpoint with the social reality that demanded the easing of abortion restrictions.[149]

The court solved the problem by using the "backdoor" provided in the 1975 ruling on abortion. The court had held that the state might express general legal disapproval of abortion in ways other than through criminal punishment.[150] As mentioned above, the court considered the totality of legal measures as the decisive factor in determining whether the unborn life was sufficiently protected.[151]

The court, therefore, adopted the concept of "preventive protection [of the unborn life] through counseling."[152] It ruled that the high constitutional value of the unborn life requires the legislature to clarify that abortion, as a matter of principle, is illegal.[153] An efficient *Beratungskonzept* (counseling concept) that aims at the better protection of the fetus, on the other hand, may require waiving any penalty for abortion.[154] Hence, with a counseling concept, all abortions not justified by one of the acknowledged indications described above must remain "illegal" but can be exempted from criminal punishment at the same time.[155]

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148. *See* GDR Law on the Interruption of Pregnancy of March 9, 1972; Eser, *supra* note 62, at 381. Abortion tourism was a response to limitations that forced a woman to seek abortions abroad. *Id.* at 377.

149. Kommers, *supra* note 33, at 19. Attitudes towards abortion had changed in West Germany. Public opinion polls indicated that West Germans were in favor of easing restrictions. Furthermore, in East Germany, women could obtain abortions on demand. *Id.*

150. *See* Judgment of Feb. 25, 1975, BVerG, 39 BverfGE 1 (F.R.G.).

151. *Id.* at 4-6.

152. Judgment of May 28, 1993, BVerG, 88 BVerfGE 203, 281 (F.R.G.).

153. *Id.* at 273.

154. *Id.* at 300.

155. The typical German analysis of a crime includes the following steps:

a) illegal action (*Tatbestand*): analysis of the action as such on an objective (killing of the fetus or a person) and subjective level (intent to kill);

b) illegality (*Rechtswidrigkeit*): the act is illegal if there is no justification (e.g., medical indication or self defense) exist;

c) personal guilt (*Schuld*): special circumstances (e.g., irresponsibility or insanity) may exclude personal guilt; and

d) punishment (*Strafe*): if (a) through (c) are fulfilled, punishment is the rule; however, a penalty might not be imposed in exceptional cases (e.g., the drunk

b. The Constitutional "Counseling Concept"

The Constitutional Court found that to replace the indication solution with the periodic model (which leaves the final decision on abortion to the woman), the counseling concept as a middle ground must be subject to stringent constitutional standards.[156] The underlying idea of the counseling concept, based on the limitations of criminal law in preventing abortions, is to make the pregnant woman an ally rather than impose the threat of punishment.[157] The purpose of counseling would be defeated if the woman had to carry the burden of proof regarding the severity of her social predicament.[158] Preventive protection through counseling, however, must be oriented actively toward the constitutional goal of protecting the unborn life.[159] Although counseling had central importance within the framework of the Assistance Act, merely *encouraging* the expectant mother to make her own responsible and conscientious decision was insufficient to meet the constitutional standards to protect the fetus.[160] Thus, the Constitutional Court declared the corresponding counseling provision of the Assistance Act (§ 219 StGB) void.[161]

The court argued that the requirement of effective counseling obliges the state to provide support that enables the woman not only to give birth to the child but also to raise it while retaining her right to free development of her personality in a career: "[T]he state and especially the legislature has the duty to provide the basis for a balance between family activities and gainful employment, for the guarantee that the task to educate the children in a family does not lead to any disadvantage in the workplace."[162]

In other words, the court explicitly emphasized the woman's individual right to self-development, which is affected by carrying

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driver is disabled for life and lost his family in the accident).

Thus, the legalistic distinction between illegality and punishment allows the construction of "illegal" but "unpunished" abortion. Kommers, *supra* note 33, at 18.

156. *See* 88 BVerfGE at 281f.

157. *See* Kommers, *supra* note 33, at 20.

158. 88 BVerfGE at 281.

159. *Id.* at 282.

160. *Cf. Id.* at 306f. Counseling should be open ended as to the result and goal, but must be oriented toward protecting the life of the unborn.

161. *Id.* at 208, 270.

162. *Id.* at 260.

a pregnancy to term. Thus, the state would be obliged to compensate the woman for the sacrifices of motherhood. The woman is entitled to positive action by the state because she possesses an individual right to freely determine her future as guaranteed in Article 2(1) of the Basic Law. Glendon argued that, in Germany, "what the pregnant woman can be required to sacrifice for the common value is related to what the social welfare state is ready and able to do to help with the burdens of childbirth and parenthood."[163] She failed to mention, however, that the source of this assistance was rooted in an individual's right against the state. Again, the German solution welcomed by Glendon finds its basis in rights talk rather than the common good.

The court required the Parliament to review the relevant provisions of the Assistance Act and to consider the present and the future living conditions of pregnant women and their families. The Second Senate proceeded to suggest private and public legal measures, including amending consumer credit laws to ensure job security in the aftermath of childbirth, and, to ease the financial burdens on families.[164] These measures extended beyond the provisions of the Assistance Act.

Altogether, the Constitutional Court accepted the constitutionality of the counseling concept if backed by an extensive social policy.[165] Similar to its approach in 1975, the court ordered an interim regulation consistent with its 1993 ruling.[166]

C. The Importance of Rights Talk in the German Decisions

The 1975 Constitutional Court decision and *Roe v. Wade* differed because the U.S. Supreme Court placed too little emphasis on individual rights. The decisive issue in *Roe* was the question of who possessed the individual rights. In contrast, the recognition in the German decision of the fetus' right to life as a value that the Basic Law protects, created the need for rights talk that required balancing competing interests. Because the structure of German constitutionalism allowed the Constitutional Court to protect the

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163. GLENDON, *supra* note 3, at 39.

164. 88 BverfGE at 260-61.

165. The court addressed further important questions such as the abortion funding under the *gesetzliche Krankenversicherung* (state's medical insurance system). An assessment of these issues, however, is beyond the scope of this Article.

166. 88 BverfGE at 209.

potential human being within an objective hierarchy of values, the explicit notion of an individual right of the fetus was not necessary. The 1975 German decision, however, was determined not by the superiority of common values to the woman's individual right but rather by the priority of life over rights to freedom of personality.

Finally, both the 1993 German Constitutional Court and the U.S. Supreme Court in *Roe* and *Casey* defined rights in terms of individuals. Both struck down laws in order to protect rights that belonged to individuals: the fetus in the German case and the woman in *Roe*. Furthermore, the German court explicitly required the state to address fully the problem of the woman's individual right to free development. It required that the woman be compensated for the imposition of a legal duty upon her to bring a pregnancy to term.[167] Hence, the competition between individual rights in the German decisions prevented the court from creating a right to abortion similar to *Roe* and allowed for intensive balancing of competing rights.

V. CONVERGENCE OF ABORTION REGULATION IN GERMANY AND THE UNITED STATES

A comparison of the German and the U.S. abortion decisions is of special interest because "two occidental post-industrial, secular societies, presumably committed to liberty and justice for all, have embraced, at least temporarily, radically different constitutional positions on abortion."[168] In 1973, the U.S. Supreme Court denied individual rights to the fetus, whereas the 1975 German court sought to protect fetal life. Women in the United States could decide for themselves whether or not to carry a pregnancy to term, while abortion in Germany was only legal under certain conditions. Almost twenty years later, both courts preserved the core of their original decisions. *Casey* did not overrule *Roe*'s priority of the woman's right to privacy; abortion before viability remained the woman's choice. The 1993 judgment of the German court expressly confirmed the 1975 ruling: the woman's right to free development of her personality still must yield to the fetus' right to life. The validity of the different constitutional positions taken in the 1970s seemed to be preserved. Without the technical legal language, however, *Casey* and the 1993 German decision

167. *Id.* at 261.
168. Kommers, *supra* note 33, at 2.

represent a convergence on the abortion question.

Roe and *Casey*, as well as the 1993 German court ruling, left the final decision of whether to terminate a pregnancy to the woman. The system of "preventive protection [of the unborn life] through counseling"[169] leaves the general principle of abortion's illegality intact but allows the state to withhold punishment for abortions obtained during the first trimester of pregnancy. The counseling procedure must actively promote the value of unborn life and must encourage the woman to give birth to the child. After hearing the arguments of the state, however, the woman ultimately makes the final decision about abortion.[170]

The legal positions of U.S. and German women may be separated, for example, by utilizing Hohfeld's conception of judicial reasoning.[171] Hohfeld argues for a differentiation among rights, duties, immunity and privileges.[172] Defining privileges as one's freedom from the right or claim of another, he describes immunity as "one's freedom from the legal power or 'control' of another regarding some legal relation."[173] Thus, while *Roe* and *Casey* recognized a woman's privilege to remain free from the state's interference in abortion decisions, the 1993 German decision granted immunity from the legal power of the state in its application of the penalty law to satisfy its obligation to protect unborn life. The differentiation between immunity and privilege, however, is a technical one and does not affect the practical similarities of abortion regulation in Germany and the United States. Both U.S. and German women make the final choice about their pregnancy.

In addition, the constitutional counseling procedure as defined by the German court appears to serve the same goal as the Pennsylvania law at issue in *Casey*. The German court required that the counseling must actively serve the goal of protecting unborn life. The *Casey* court permitted the state to promote its interest in childbirth by requiring that it provide a woman seeking an abortion with information about available social assistance. Thus, in practice, women in Germany and Pennsylvania must listen to advice favoring childbirth before they can obtain a legal

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169. 88 BverfGE at 282.

170. *Id.*

171. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

172. *Id.* at 30-32.

173. *Id.* at 55.

abortion. In both procedures, the counseling must not hinder the woman's final choice: in the United States, the woman has the privilege to be free from undue burdens by the state in her right to decide about abortion; in Germany, because the core of the German concept of prevention by counseling is to make the woman an ally in protecting the unborn life, it emphasizes an informed but unhindered decision.[174]

The main difference in the abortion decisions of the 1990s is that abortion throughout pregnancy is still illegal in Germany. This principal decision will attract Glendon's applause because she believes the moral stand against abortion will serve an educational role that makes for a difference in abortion practice.

The record of abortion practice in Germany after the court's restrictive 1975 decision suggests the existence of a dichotomy between legal theory and practice. The development of abortion practice in West Germany after 1975-76 was characterized by high numbers of legal terminations and decreasing convictions. The total number of abortions reported in Germany from 1976 to 1989 is as follows:

Year	Number of Abortions
1970	4,882
1974	17,814
1977	54,309
1978	73,548
1982	91,000
1988	83,784

[175]

Abortions performed from 1974 to 1977 increased because social indications gained increasing importance. In 1977, social indications counted for fifty-seven percent of all legal abortions, whereas by 1982 the percentage had risen to seventy-seven

174. *See* 88 BVerfGE at 281.

175. For 1970-82 data, see Eser, *supra* note 62, at 381-82. For 1977-78 data, see Bundestags Drucksache 8/3630. For 1983-89 data, see ULRICH VULTEJUS, DAS URTEIL VON MEMMINGEN: VOM ELEND DER INDIKATION 11 (1990).

percent.[176] Not every abortion, however, was reported. Estimates of actual abortions performed in Germany in 1989 vary from 130,000 to 400,000.[177] Many pregnant women obtained abortions in other Western European countries with more liberal laws.

Obviously, a demand for abortion services existed in German society despite the pronouncements of the Constitutional Court. This demand proved to be relatively independent from the legal prohibition of abortion. After the court's 1993 ruling, this demand is likely to be satisfied by the ability to obtain an illegal but unpunished abortion. Furthermore, the distinction between "illegality" of a crime and its punishment represents a concept lawyers have difficulty understanding. This is more true for the average citizen. How illegal is an abortion that goes unpunished not only in exceptional cases but in principle? The illegality of abortion, stressed by the Constitutional Court, may be transformed in reality into an empty legalistic shell. As Laurence Tribe put it:

> [The] codification of a truly empty promise, one whose vision is belied by the people's day-to-day experience, one that is utterly at variance with the substance of the law in which it is contained, can take an unacceptably high toll on confidence in the rule of law and in the integrity of the legal system as a whole.[178]

In summary, the main difference between the U.S. and German approaches to abortion is actually a technical rather than practical one. Thus, the decisions of both the German Constitutional Court and the U.S. Supreme Court in the 1990s represent converging approaches to regulating abortion. The counseling concept accepted by the German court will allow for an availability of abortions obtained in Germany that reflects the real demand for that service. By approving counseling procedures, the *Casey* court allowed the states to protect the common value of unborn life to an extent that equals the constitutional requirements set forth by the German court in 1993. As the German legislators try to liberalize abortion as far as possible, U.S. states, such as Pennsylvania, attempt to restrict the availability of abortion. Similarities, rather than differences, in abortion regulations and practice are likely in the future.

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176. *See* Eser, *supra* note 62, at 381.
177. *See* VULTEJUS, *supra* note 175, at 11.
178. LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 73-74 (1992).

VI. CONCLUSION

Glendon's criticism of the U.S. legal dispute overemphasizes the existence of individualism as the leitmotif of U.S. abortion law. The language of *Roe* and *Casey* did not neglect the value of the unborn life because the Supreme Court recognized the state's interest in protecting it. Furthermore, all of the laws at issue in the Court's abortion decisions sought to protect the nasciturus. Thus, U.S. society is not merely rights-centered but also is aware of the common good of fetal life.

Glendon's preference for unborn life as a public value over the woman's individual freedom leads her to conclude that the German approach to regulating abortion is superior. In Glendon's view, the Constitutional Court's 1975 decision represents a conscious value judgment that favors communitarian values rather than individual rights. Glendon, however, ignores the fact that the protection of the nasciturus in the German decision did not depend on the classification of unborn life as a common good, but rather, on the general priority of life over the right of personality in the German Basic Law. The recognition of fetal life as a communitarian value necessarily implies an individual right to life of the particular nasciturus. Thus, the existence of rights and a more intensive rights talk in the German decision allowed for a balanced judgment in favor of unborn life. Glendon's "rights talk" argument therefore overlooks the reason for the emphasis on the woman's right to privacy in the U.S. abortion decisions in the 1970s.

With respect to *Casey* and the German court's 1993 judgment, the crucial difference remaining is the German law's priority of unborn life over the woman's right of personality. The empirical evidence of a dichotomy between the letter of the law and abortion practice in Germany in the aftermath of the 1975 ruling of the court, however, indicates that the construction of illegal but unpunished abortion by the court in 1993 is likely to fail to communicate its difficult message.

Finally, the Supreme Court in *Casey* permitted what in 1993 the German court required the state to do to protect unborn life. Thus, the convergence rather than radical difference of abortion regulations as reflected in Glendon's *Rights Talk* is likely to be the central feature of the future development of abortion law in the United States and Germany.