1985

Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective

Donald P. Kommers
Notre Dame Law School, donald.p.kommers.1@nd.edu

Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective

*Donald P. Kommers**

Summary of Contents

I. INTRODUCTION

In the mid-1970's the highest courts of several western democracies handed down constitutional decisions concerning legal

*Professor of Law and Professor of Government and International Studies, University of Notre Dame. B.A., 1954, Catholic University of America; M.A., 1959, University of Wisconsin; Ph.D., 1962, University of Wisconsin. The author wishes to express his gratitude to Wendy Carlson and Philömena Saldanha for their comments and assistance in the preparation of this article.

regulation of abortion. *Roe v. Wade*,[1] decided by the United States Supreme Court in 1973, was the first of these decisions. The foreign cases were decided between 1974 and 1978 (four of them in 1975). These included decisions by the Supreme Court of Canada, the Constitutional Court of Austria, the Constitutional Council of France, the Constitutional Court of Italy, and the Federal Constitutional Court of West Germany;[2] subsequently, the European Commission on Human Rights sustained the result in the West German case.[3]

The grounds on which constitutional challenges were made can be divided into two groups. In Austria, Italy, France, and Germany, petitioners challenged liberalized abortion statutes enacted in the early 1970's, claiming that under constitutional guarantees of life, liberty, or human dignity, rights of unborn children were being infringed. On the other hand, in the United States, Canada, and under the European Convention of Human Rights, petitioners challenged stringent abortion policies, claiming that such policies invaded a pregnant woman's right to privacy.

All jurisdictions sustained their abortion statutes except the United States and West Germany. In an extraordinary assertion of judicial power the United States Supreme Court voided stringent abortion statutes of various states. In West Germany, the Federal Constitutional Court moved in an opposite philosophical

---

1. 410 U.S. 113 (1973); *see also* Doe v. Bolton, 410 U.S. 179 (1973).

2. Morgentaler v. The Queen, 53 D.L.R.3d 161 (Can. 1975); Judgment of Oct. 11, 1974, Verfassungsgerichtshof, Aus., [1974] Erklärungen des Verfassungsgerichtshofis 221, *reprinted in* M. CAPPELLETTI & W. COHEN, COMPARATIVE CONSTITUTIONAL LAW 615 (1979) (translation); Judgment of Jan. 15, 1975, Conseil constitutionel, Fr., 1975 D.S. Jur. 529, *reprinted in* M. CAPPELLETTI & W. COHEN, *supra*, at 577 (translation); Judgment of Feb. 18, 1975, Corte costituzionale, Italy, 43 Raccolta ufficiale delle sentenze e ordinanze delle Corte costituzionale [Rac. uff. corte cost.] 201, 98 Foro It. I 515, *reprinted in* M. CAPPELLETTI & W. COHEN, *supra*, at 612 (translation); Judgment of Feb. 25, 1975, Bundesverfassungsgericht [BVerfG], W. Ger., 39 Bundesverfassungsgericht [BVerfG] 1, *reprinted in* M. CAPPELLETTI & W. COHEN, *supra*, at 586 (translation). For a detailed discussion of the French, Austrian, Italian, and German cases, see M. Nijsten, Constitutional Law and Practice: A Comparative European-American Study (1985) (doctoral thesis, Department of Law, European University Institute, Florence, Italy).

3. Brüggemann and Scheuten v. Federal Republic of Germany, 1976 Y.B. EUR. CONV. ON HUMAN RIGHTS 382 (Eur. Comm'n on Human Rights). In their appeal to the commission, the applicants argued that the German decision abridged their right to privacy under the European convention. The commission accepted the application but ultimately sustained the result of the German Court's decision. It reasoned that the right to individual privacy is not absolute and is subject to society's concern for fetal life. In reaching this conclusion, it noted that all countries belonging to the Convention had enacted some form of abortion regulation.

direction by nullifying a recently enacted national abortion statute less rigorous than the previous law. In America, *Wade* generated a series of cases markedly different from cases under German constitutional policy.[4] The extended opinions of the American and German courts, and their contrasting grounds for decision, render them fitting candidates for this comparative analysis of abortion jurisprudence.

Therefore, this article focuses primarily on American and German abortion jurisprudence with an occasional glimpse, where appropriate, at constitutional cases in other jurisdictions. However, this article is not a simple comparison of legal doctrine. As the title suggests, this article considers abortion cases as examples of judicial endeavors to reconcile values of liberty and community in constitutional law. Constitutional republics from Athens to the United States have sought to preserve values of liberty and community in creative tension with one another on the assumption that both are necessary in a properly ordered constitutional polity. The abortion issue illustrates the tension between liberty and community more clearly than any other category of contemporary constitutional adjudication. This is not surprising when one considers that the very definition of life and the human community enters into these cases, a definition profoundly affected by developments in biomedical technology and by deep-seated changes in social attitudes.[5]

This paper unfolds in four stages. It first reviews the meaning of liberty as defined by the United States and West Germany. The paper then examines American cases from *Wade* through the recent round of decisions handed down in 1983, with a specific focus on the tension between liberty and community. The analysis then turns to the German abortion case of 1975, drawing attention to those features of the case varying with American jurisprudence. Finally, the paper seeks to explain the differences in result between the German and American decisions and, by reverting to themes of liberty and community, to

---

4. *See* Simopoulos v. Virginia, 462 U.S. 506 (1983); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); Harris v. McRae, 448 U.S. 297 (1980); Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

5. *See* Meulders-Klein, *The Right Over One's Own Body: Its Scope and Limits in Comparative Law*, 6 B.C. INT'L & COMP. L. REV. 29 (1983).

demonstrate the fertility of a comparative approach to constitutional law.[6]

II. The Concept of Liberty in American and West German Constitutional Law

A. Fourteenth Amendment Liberty

Speaking for the Court in *Meyer v. Nebraska*,[7] Mr. Justice McReynolds uttered the classic statement of the meaning of substantive due process liberty. He remarked that due process liberty, substantively conceived,

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[8]

Justices have repeatedly quoted portions of McReynolds' statement to capture the essence of the liberty protected by the fifth and fourteenth amendments to the Constitution.[9]

Three distinguishing marks identify the character of these rights. The first is their social nature: persons usually "worship God" in *communion* with co-believers; they embrace "home and children" for the sake of a *community* larger than themselves; they obtain "useful knowledge" to advance *confraternity;* they practice "common occupations of life" in *company* with their confrères; and they exercise the "right to contract" to fulfill a

---

6. For other articles comparing the American and West German abortion cases, see Benda, *The Impact of Constitutional Law on the Protection of Unborn Human Life: Some Comparative Remarks*, 6 Hum. Rts. 223 (1977); Gerstein & Lowry, *Abortion, Abstract Norms, and Social Control: The Decision of the West German Federal Constitutional Court*, 25 Emory L.J. 849 (1976); Glenn, *The Constitutional Validity of Abortion Legislation: A Comparative Note*, 21 McGill L.J. 673 (1975); Gorby & Jonas, *West German Abortion Decision: A Contrast to* Roe v. Wade, 9 J. Mar. J. Prac. & Proc. 551 (1976); Kommers, *Abortion and Constitution: United States and West Germany*, 25 Am. J. Comp. L. 255 (1977).

7. 262 U.S. 390 (1923).

8. *Id.* at 399.

9. *See, e.g.*, Hewitt v. Helms, 459 U.S. 460, 485 (1983) (Stevens, J., dissenting); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (White, J., dissenting); Paul v. Davis, 424 U.S. 693, 722 (1976) (Brennan, J., dissenting); Board of Regents v. Roth, 408 U.S. 564, 572 (1972); Griswold v. Connecticut, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring); Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting).

binding *commitment*. These are, of course, personal rights often exercised with cunning and self-interest but nevertheless anchored in family, home, church, school, guild, craft, union, neighborhood, and other forms of fellowship. They are rights of men and women exercised in partnership with other men and women. They speak, fundamentally, to values of sociality and solidarity.

The second distinguishing mark of the liberty protected by the fifth and fourteenth amendments is its pedigree. This liberty extends to "privileges long recognized at common law."[10] It is not confined to Blackstone's teachings or even to privileges set out in the Bill of Rights. Larger than positive law, due process liberty vindicates, in John Marshall Harlan's words, "the basic values that underlie our society."[11] These values are defined by their fundamentality. They embrace principles of justice at the core of American civil and political institutions. These values are worthy of protection because of public and private virtues we, as a community of free persons, wish to foster. Due process liberty relates to privileges, rights, and values embedded in the warp and woof of our national being.

The final mark of due process liberty is that it is subject to regulation in the public interest. Such liberty "is not unrestricted license to act according to one's own will."[12] The Constitution endorses "*orderly* pursuit of happiness by free men"[13] or, as Justice Cardozo remarked in *Palko v. Connecticut,* only those rights "implicit in the concept of ordered liberty."[14] Regulation of due process liberty strives for "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[15] Of course, these demands can get out of hand, tainting regulation with overbreadth or arbitrariness injurious to basic liberties. Nevertheless, as the *Meyer* Court recognized, "the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally *and morally*."[16] In short, liberty is balanced against sociality and

10. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
11. Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).
12. Crowley v. Christensen, 137 U.S. 86, 89 (1890).
13. *Meyer*, 262 U.S. at 399 (emphasis added).
14. 302 U.S. 319, 325 (1937).
15. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).
16. *Meyer*, 262 U.S. at 401 (emphasis added).

bound by long-held and deep-seated community views on private and public morality.[17]

One of this article's arguments is that the creative tension between liberty and sociality in constitutional law existed in the Supreme Court's fourteenth amendment jurisprudence at least down to *Griswold v. Connecticut*.[18] However, in the aftermath of *Griswold* stretching from *Eisenstadt v. Baird*[19] to the abortion cases of 1983,[20] the Court's emphasis slowly began to change, with the tension between liberty and sociality dissolving into a new principle that exalted liberty at the expense of sociality or community.[21]

The concept of liberty emerging from the abortion and birth control cases has often been defined as personal autonomy, a value rooted in contemporary notions of personhood and human dignity.[22] We shall discover that these concepts mean different things in German and American constitutional thought. Finally, in revisiting the American abortion cases, we shall find that the path leading to emergence of the new liberty is strewn with un-

---

17. Due process liberty was also allowed to secure its essential meaning beneath an alluvium of vital institutional constraints. Justice Harlan recognized the importance of these constraints when he counseled a "wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms." Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

18. 381 U.S. 479 (1965).

19. 405 U.S. 438 (1972).

20. Simopoulos v. Virginia, 462 U.S. 506 (1983); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).

21. This thesis is developed at much greater length in my forthcoming book: D. KOMMERS, THE QUEST FOR PUBLIC PHILOSOPHY: A COMPARATIVE STUDY OF THE CONSTITUTIONAL LAW OF THE UNITED STATES AND THE FEDERAL REPUBLIC OF GERMANY.

22. For ardent defenses of liberty as autonomy, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15 (1978); Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445 (1983). In addition, a large number of contemporary constitutional theorists have mounted sturdy arguments in support of the priority of individual rights over sociality. *See, e.g.*, M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982). For a general discussion of Perry and a number of other contemporary rights theorists, see Wiseman, *The New Supreme Court Commentators: The Principled, the Political and the Philosophical*, 10 HASTINGS CONST. L.Q. 315 (1983). The new theorists often argue that the state has no significant role to play in fostering public virtue. Rooted in libertarian theory harkening back to John Stuart Mill, this position asserts that the state may not properly take sides on moral questions, particularly those affecting private behavior, or those which advance any particular conception of the good. For powerful critiques of this position, see A. MACINTRYE, AFTER VIRTUE (1981); M. SANDEL, THE LIMITS OF LIBERALISM (1982).

certainty, raising serious questions even today about the doctrinal stability of the right of autonomy.

B. Liberty in German Constitutional Law

The German Constitution explicitly celebrates values of human dignity and personhood implicit in the concept of fourteenth amendment "liberty" as construed by the United States Supreme Court. Article 1 of the Federal Republic's Basic Law proclaims: "The dignity of man is inviolable. To respect and protect it is the duty of all state authority."[23] The Federal Constitutional Court has repeatedly described the principle of human dignity as the "core of the Constitution's value system"[24] or, alternatively, as the "highest legal value"[25] of the Basic Law. Article 1, as a consequence, permeates the substance and spirit of all other provisions of the German Bill of Rights.

Article 1 is almost always read in conjunction with article 2, the constitutional provision most relevant to the abortion issue. Paragraph 2 of article 2 provides: "Everyone has the right to life and to inviolability of his person."[26] Any right to life of the unborn would clearly emerge from this declaration. On the other hand, any countervailing right of a pregnant woman to abort her fetus would just as clearly emerge from article 2, paragraph 1: "Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code."[27] The personality right of paragraph 1 has been construed to protect personal autonomy,[28] a close equivalent to the privacy right protected by the due process clause of the fourteenth amendment.

The German Constitution also explicitly delineates communitarian restraints imposed on the exercise of liberty. As just

---

23. Grundgesetz [GG] art. 1, para. 1 (W. Ger.). An English translation may be found in W. ANDREWS, CONSTITUTIONS AND CONSTITUTIONALISM (3d ed. 1968).

24. *See* Judgment of Feb. 25, 1975, BVerfG, W. Ger., 39 BVerfG 1, 43; *see also* Judgment of May 29, 1973, BVerfG, W. Ger., 35 BVerfG 79, 135.

25. *See* Judgment of June 21, 1977, BVerfG, W. Ger., 45 BVerfG 187, 227; Judgment of Feb. 24, 1971, BVerfG, W. Ger., 30 BVerfG 173, 193; Judgment of July 16, 1969, BVerfG, W. Ger., 27 BVerfG 6; Judgment of Dec. 20, 1960, BVerfG, W. Ger., 12 BVerfG 45, 53.

26. GG art. 2, para. 2 (W. Ger.).

27. GG art. 2, para. 1 (W. Ger.).

28. *See* K. DOEHRING, DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND 284-92 (3d ed. 1984); B. SCHMIDT-BLEIBTREU & F. KLEIN, KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 151-69 (5th ed. 1980).

noted, in article 2 the "rights of others," the "constitutional order," and the "moral code" constrain free development of personality. These concepts of "moral code" and "constitutional order" require some explanation. In German abortion jurisprudence the moral code embodies society's deepest beliefs about family and sex. A theory of family is actually incorporated into "constitutional order" as defined by article 6 of the Basic Law. Paragraph 1 of article 6 states: "Marriage and family enjoy special protection by the state."[29] According to the Federal Constitutional Court, article 6 "views marriage and family as the germ-cell of any human community, whose significance cannot be compared with any human bond."[30] Moreover, the Basic Law envisions the family primarily as a child-raising institution.[31] The family symbolizes a fundamental commitment to children and thus to the future. Constitutional cases decided under article 6 speak repeatedly of marriage as a commitment.[32] The cases also point out that under the Basic Law, family policy generally—especially that reflected in divorce and alimony legislation—must be applied with the child in mind and in a way that will not diminish the marriage institution.[33]

The term "constitutional order" embraces the concept of *Sozialstaat,* loosely translated as "social welfare state." As construed, the *Sozialstaat* principle, considered in tandem with substantive value judgments under article 6, imposes an affirmative duty on the state to establish an environment within which the family can survive and flourish.[34]

Other provisions of the Bill of Rights similarly constrain fundamental liberties. For example, freedom of expression, by

---

29. GG art. 6, para. 1 (W. Ger.).

30. Judgment of Jan. 17, 1957, BVerfG, W. Ger., 6 BVerfG 55, 71.

31. Article 6 of the Basic Law provides in paragraphs 2 and 3 that:

> (2) The care and upbringing of children are the natural right of the parents and a duty primarily incumbent on them. The state watches over the performance of this duty.
>
> (3) Separation of children from the family against the will of the persons entitled to bring them up may take place only pursuant to a law, if those so entitled fail in their duty or if the children are otherwise threatened with neglect.

GG art. 6, paras. 2-3 (W. Ger.).

32. *See, e.g.,* Judgment of June 15, 1971, BVerfG, W. Ger., 31 BVerfG 194; Judgment of July 29, 1968, BVerfG, W. Ger., 24 BVerfG 119.

33. *See* Judgment of July 14, 1981, BVerfG, W. Ger., 57 BVerfG 361; Judgment of Feb. 28, 1980, BVerfG, W. Ger., 53 BVerfG 224.

34. GG art. 6, para. 1 (W. Ger.).

the terms of article 5, paragraph 2, is limited by "provisions of law for the protection of youth" and by the "right to inviolability of personal honor."[35] The German Constitution itself then, sets forth a balance between individual rights and communitarian values that in American constitutional law has been worked out by constitutional interpretation. In fact, prior to the American abortion cases, an observer would have found a high degree of convergence in the way American and German courts have resolved the tension between liberty and community.

Yet, despite appeal to values of personhood and human dignity, the two courts resolved the abortion issue in different ways. The United States Supreme Court invoked these values to vindicate the constitutional right of a woman to procure an abortion. The Federal Constitutional Court appealed to the same values to vindicate the right to life of the unborn. In the end, different judicial results in the two nations owe less to differences in constitutional language or text than to differences in the philosophical and social theories underlying the meaning of human liberty as defined by the two tribunals.[36] The purpose of this article is to clarify differences in the two nations' constitutional doctrines and to hazard an explanation for these differences.

III. The American Abortion Cases: Liberty as Autonomy

In the United States, abortion liberty has been the subject of three major rounds of doctrinal elaboration: the first round began in 1973 with the seminal cases of *Roe v. Wade*[37] and *Doe v. Bolton;*[38] the second embraced a series of decisions stretching from *Planned Parenthood v. Danforth,*[39] decided in 1976, to *H.L. v. Matheson,*[40] decided in 1981; and the third embraced three major decisions in 1983. Each round extended the right of privacy to new levels of personal autonomy. Yet a close reading of the later cases discloses stirrings of anxiety and even open resistance to broad extension of the autonomy implied in the original cases. Justices on both sides of the abortion dispute

35. GG art. 5, para. 2 (W. Ger.).
36. *See infra* notes 159-85 and accompanying text.
37. 410 U.S. 113 (1973).
38. 410 U.S. 179 (1973).
39. 428 U.S. 52 (1976).
40. 450 U.S. 398 (1981).

seem aware of the conceptual distance the Court has traveled since its classic definition of liberty in *Meyer v. Nebraska*.[41]

A. The First Round: 1973

The first round cases, *Wade* and *Bolton*, need briefly to be situated in the context of the principles and precedents that gave them birth. The key precedent is *Griswold v. Connecticut*.[42] In nullifying a state statute proscribing use of contraceptives, *Griswold* sustained the right to marital privacy. It vindicated a right rooted in the institution of marriage; it did not uphold a purely personal right to use contraceptives. The institutional character of the right and its pedigree were charmingly depicted by Justice Douglas:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[43]

Justice Goldberg rejected Justice Douglas' opinion concerning the textual basis of the constitutional right to marital privacy, but nevertheless agreed that what was being protected here, in light of prior authority, was the "traditional relation of the family—a relation as old and as fundamental as our entire civilization."[44] Marital privacy is thus a protected area of private moral behavior. But Justice Goldberg did not view all private moral behavior as protected by due process liberty. Justice Goldberg asserted in his concurrence that the holding in *Griswold* "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct."[45] The essence of his remark, drawing upon Justice Harlan's dissenting opinion in *Poe v. Ullman*,[46] is that human sexuality is a potentially explosive force the state may wish to channel into the institution of marriage.

---

41. 262 U.S. 390, 399 (1923).

42. 381 U.S. 479 (1965).

43. *Id.* at 486.

44. *Id.* at 496 (Goldberg, J., concurring).

45. *Id.* at 498-99.

46. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting). In *Poe* the plaintiffs sought a declaration that a Connecticut statute prohibiting contraceptive use was unconstitu-

Eisenstadt v. Baird,[47] however, severed the right of privacy from its institutional base in marriage. In sustaining the right of unmarried persons to buy and receive contraceptives, the Court effectively reinterpreted *Griswold.* Justice Brennan, writing for the plurality, declared: "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[48] This sentence is the foundation on which *Wade* was built. But the foundation is weak for three reasons: first, the case was decided on equal protection, not due process grounds; second, the Court never said precisely what right it was vindicating; and third, the decision had less than majority support. Certainly, the Court was protecting an important aspect of personal privacy. But how far would the right to personal privacy be carried and what general principle would be invoked to explain the full scope of the privacy right sustained in *Eisenstadt?*

The first round of abortion cases provides at best only partial answers to these questions. In *Wade,* as in *Griswold* and *Eisenstadt,* the Court emphasized the substantive right of personal privacy based on the fourteenth amendment concept of liberty.[49] But the tug between liberty and sociality continued. On one hand, the Court held this liberty was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[50] On the other hand, the Court refused to make the right to personal privacy absolute. "The pregnant woman," wrote Justice Blackmun for the Court, "cannot be isolated in her privacy."[51] Why? Because "[s]he carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus."[52] "The situation," he continued, "therefore is inherently different from marital intimacy."[53] Jus-

---

tional. The request was denied by a plurality of the Court for lack of justiciability. However, the Court felt chances were slim that the statute would actually be enforced. Justice Harlan reached the merits and would have stricken the law as an unconstitutional encroachment upon the right to family privacy. *Id.* at 551-52.

47. 405 U.S. 438 (1972).

48. *Id.* at 453.

49. *Wade,* 410 U.S. at 152-56.

50. *Id.* at 153.

51. *Id.* at 159.

52. *Id.*

53. *Id.*

tice Blackmun implied that abortion, unlike marital intimacy, is subject to regulation.

The Court then proceeded to define limits to state regulatory power over abortion. In so doing the justices relied heavily on the current state of medical technology. They divided pregnancy into trimesters and laid down a special constitutional standard for each. During the first trimester, the state may not interfere with a woman's decision to have an abortion. At this stage, partially because of the simplicity of the relevant medical procedures, the Court reasoned that government has no valid reason for regulating the abortion decision.[54] Only later in pregnancy would compelling state interests emerge to justify abortion regulation. Accordingly, out of concern for maternal health, the state may regulate abortion procedure but not the abortion decision itself during the second trimester. Finally, during the last trimester, when the fetus is capable of survival outside the womb, the state may protect "potential life," even to the point of banning abortion completely "except when it is necessary to preserve the life or health of the mother."[55] The Court's regulatory scheme hinges on its declaration that the fetus is not a person within the meaning of the fourteenth amendment.[56] The trimester logic of *Wade* is in stark contrast, as we shall see, to the logic used in the German abortion case.

Another striking feature of *Wade* and *Bolton* substantially at variance with German jurisprudence is the emphasis placed on a physician's liberty to practice medicine, a liberty interwoven with the rights of a pregnant woman. In setting forth the first-trimester rule in *Wade,* the Court declared that "the attending physician, in consultation with his patient, is free to determine without regulation by the State, that in his medical judgment, the patient's pregnancy should be terminated."[57] *Bolton* shifted the emphasis even more decidedly away from a woman's privacy right to a physician's liberty. In that case the state had conditioned a doctor's decision to perform an abortion upon approval of a hospital committee and written concurrence of two other physicians. Such certification procedures, the *Bol-*

54. *Id.* at 163.
55. *Id.* at 164-65.
56. *Id.* at 157-58.
57. *Id.* at 163.

ton Court held, unduly burdened the physician's personal liberty interest in practicing medicine.[58]

The physician's liberty in *Bolton* curiously included not only making the "best clinical judgment that an abortion is necessary,"[59] but also rendering a medical judgment "exercised in the light of all factors—physical, emotional, psychological, familial and the woman's age—relevant to the well-being of the patient."[60] This language evokes an image of the omniscient physician, the competent all-around counselor skilled in a range of problems having little to do with clinical judgment as such. *Bolton*'s language also evokes an image of the trusty physician, a caring Dr. Welby moved by compassion, unmotivated by financial gain, and devoted, in the Court's words, to the "physical and mental welfare, the woes, the emotions, and the concern of his female patients."[61]

This focus on the physician's interest prompts one to ask whether the privacy right vindicated in *Wade* and *Bolton* radically redefined "liberty" as that term was understood by the *Meyer* Court in 1926. The creation of an abortion right need not imply destruction of the social or communal character of the liberty protected by the fourteenth amendment. Only with the second round of cases did abortion liberty shade into something resembling a right to personal autonomy.

B. The Second Round: 1976-81

Planned Parenthood v. Danforth,[62] decided in 1976, was *Wade*'s first major offspring. *Danforth* invalidated state statutes conditioning freedom to have a first-trimester abortion on spousal consent or on parental consent when the pregnant woman is an unmarried minor. Rejecting the view of marriage as two in one flesh and family as an integrated moral unit, the Court maintained that abortion liberty is, in the end, a personal right. "[T]he State does not have the constitutional authority," said the Court, "to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient

58. *Bolton*, 410 U.S. at 198-200.
59. *Id.* at 199.
60. *Id.* at 192.
61. *Id.* at 196.
62. 428 U.S. 52 (1976).

to terminate the patient's pregnancy, regardless of the reason for withholding the consent."[63]

Danforth manifested once again the Court's continuing concern for the liberty interest of the practicing physician. His discretion, in fact, reached beyond any limits that might have been implied in the seminal cases. Now the state was forbidden to determine the standard of care to be exercised by a physician even when that standard required the physician to preserve the life and health of a fetus.[64] Additionally, the state was barred from determining a specific point in the gestation period as the stage of viability or from proscribing specific medical techniques for aborting a fetus, unless such regulations reasonably related to the preservation and protection of maternal health.[65]

If after these decisions there was any doubt that the Court was vindicating the right to personal autonomy, whether of the woman or the doctor, that doubt seemed to be resolved in *Carey v. Population Services International,*[66] a watershed decision because of the gloss it placed on abortion cases. In striking down a New York law, Justice Brennan, writing for a plurality of the Court, noted that any substantial limit on access to contraceptives, whether intended for adults or minors, married or unmar-

---

63. *Id.* at 74.

64. The statutory provision at issue in *Danforth* required any physician assisting in an abortion to take all steps necessary to preserve fetal life. Failure to do so would have subjected the physician to criminal penalties for manslaughter. The Court declared this provision overbroad as it failed to distinguish between abortions performed before and after the point of viability. The effect was to preclude abortions at all stages of pregnancy, and this the Court found impermissible. *See id.* at 82-83.

65. In *Danforth* the Court upheld a statutory definition of "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." *Id.* at 63. This definition, said the Court, was sufficiently flexible to comply with the requirements of *Wade.* Moreover, it required a determination of viability to be made on a case-by-case basis. *See id.* at 64-65.

As to the impermissibility of statutory limitations on a doctor's choice of abortion techniques, see Colautti v. Franklin, 439 U.S. 379 (1979). In *Colautti* the Court held unconstitutional a portion of Pennsylvania's Abortion Control Act requiring the doctor to use that technique "which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother." *Id.* at 380 n.1. The Court found this section impermissibly vague as it required "the physician to make a 'trade off' between the woman's health and additional percentage points of fetal survival." *Id.* at 400.

66. 431 U.S. 678 (1977). *Carey* involved a challenge to a New York statute prohibiting distribution of contraceptives to anyone under the age of 16, prohibiting distribution to persons over 16 except by a licensed pharmacist, and banning any contraceptive advertisement or display. The Court struck each of these provisions as impermissible restrictions on an individual's right to use contraceptives.

ried, is invalid if such access is essential to exercise of the constitutionally protected right of "individual autonomy in matters of childbearing."[67] This was the first time the word "autonomy" appeared in a plurality or majority opinion describing the so-called childbearing liberty.[68]

Interestingly, five justices apparently thought the Court was carrying the liberty principle too far in *Carey*.[69] Justice Stevens, who concurred in the result, rejected the argument that a "minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State."[70] Decided in light of the abortion cases, *Carey* nevertheless appeared to reinterpret *Wade* by vindicating the right of any person to control intimate personal decisions regarding his or her own body, and by narrowing state regulation except by the least restrictive means available and in the presence of a compelling state interest.[71]

The print in *Carey* had barely dried when suddenly, and surprisingly, the Court appeared to rethink the basis of its abortion jurisprudence. In two companion cases (the "Medicaid" cases) decided in 1977 by six to three votes,[72] the Court held

---

67. *Id.* at 687-88.

68. Since *Carey*, the Court has used the word autonomy in only one case on childbearing or family liberties. *See* H.L. v. Matheson, 450 U.S. 398, 442 (1981). Interestingly, the Court speaks of "family autonomy," not "personal autonomy" in that case.

69. Justices White, Powell, and Stevens each filed separate concurring opinions while Justices Rehnquist and Burger dissented. The concurring justices disagreed most strongly on the question of contraceptive distribution to minors. Stevens, for instance, said this: "[I] could not agree that the Constitution provides the same measure of protection to the minor's right to use contraceptives as to the pregnant female's right to abort." *Carey*, 431 U.S. at 713 (Stevens, J., concurring). Similarly, Powell expressed reservations as to the Court's extension of fourteenth amendment liberties. "In my view," he said, "the extraordinary protection the Court would give to all personal decisions in matters of sex is neither required by the Constitution nor supported by our prior decisions." *Id.* at 703 (Powell, J., concurring). Rehnquist had an even more biting commentary:

> If those responsible for these Amendments [the Civil War Amendments], by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction.

Id. at 717 (Rehnquist, J., dissenting) (a polite way of saying they would turn in their graves).

70. *Id.* at 713 (Stevens, J., concurring).

71. For an exhaustive discussion of a person's right over his own body, see Meulders-Klein, *supra* note 5.

72. Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).

that federal Medical Assistance (Medicaid) legislation did not compel states to fund nontherapeutic abortions. The teaching of these cases is that a state may deny financial assistance to women choosing abortion.[73] The framework within which these cases were decided could not disguise the significant shift in emphasis, if not doctrine. First, where the *Wade* Court had ruled that the state had no compelling interest in potential life until approximately the third trimester, the Court in the Medicaid cases posited a "significant state interest" in protecting potential life "throughout the course of the woman's pregnancy."[74] Second, the Court applied a minimum rationality rather than a compelling state interest test to the legislative classifications involved.[75] Finally, the Court held that in providing health benefits to its citizens, the state may prefer childbirth over abortion, but such an interest would not justify "unduly burdensome" government interference with the woman's freedom of choice until the third trimester of pregnancy.[76]

The Medicaid cases clearly displayed the Court's uneasiness with the manner in which sociality had been subordinated to liberty in the abortion cases. This uneasiness manifested itself even in *Bellotti v. Baird*,[77] a 1979 case that struck down, with an eight to one plurality, yet another parental consent statute. Over the objection of four justices, Justice Powell undertook to instruct Massachusetts on how it might craft a constitutionally valid parental consent statute.[78] The flaw in the voided statute was the absolute veto power conferred on the parent or guardian over the minor's decision to procure an abortion. Justice Powell

---

73. This doctrine was reaffirmed in Harris v. McRae, 448 U.S. 297 (1980), where by a five to four decision the Court sustained the validity of the Hyde Amendment, which prohibited states from using federal funds to finance abortions "except where the life of the mother would be endangered, or where the pregnancy resulted from rape or incest which was promptly reported." *Id.* at 302 (quoting Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979)).

74. Beal v. Doe, 432 U.S. 438, 446 (1977).

75. *Id.* The Court did not explicitly label Pennsylvania's justification rational basis. It did, however, acknowledge the state's "unquestionable strong and legitimate interest in encouraging normal childbirth." *Id.* at 445. As a second rationale, perhaps, the Court noted that the state had "reasonable justification for excluding from Medicaid coverage a particular medically unnecessary procedure—nontherapeutic abortions." *Id.* at 447 n.11 (Stevens, J., concurring).

76. *Id.*

77. 443 U.S. 622 (1979).

78. *Id.* at 642-44. Justice Stevens, joined by Brennan, Marshall, and Blackmun, concurred in the judgment but rejected Powell's proposed statute. In a parting footnote, Stevens denounced Powell's "advisory opinion." *Id.* at 656 n.4.

opined that an untainted statute would give the minor (particularly one still living at home with her parents) the option of going to court to show that she is mature enough to make her decision independently or that the abortion would be in her best interest.[79] Under Powell's imaginary statute, if the minor is unable to make at least one of the aforementioned showings, the judge may withhold his consent, thus forcing her back into the family's bosom.

In the course of his opinion, Justice Powell composed an ode to the family. Many old cases vindicating family rights—from the 1925 case of *Pierce v. Society of Sisters*[80] to the 1972 case of *Wisconsin v. Yoder*[81]—were resurrected and cited with approval. Parental authority was viewed as basic to individual liberty:[82]

> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.[83]

Two years later, in line with this sentiment, the Court upheld Utah's statute requiring a physician to "notify, if possible," the parents or guardian of a minor upon whom an abortion was to be performed.[84] Chief Justice Burger, speaking for four other members of the Court, justified the law applying to immature unemancipated minors as a legitimate means to enhance family integrity.[85]

Clearly the Medicaid cases marked the beginning of a major skirmish on the Court over the very meaning and application of *Wade*. One could only guess whether in the third round of cases, to be decided in 1983, the counteroffensive launched on behalf of communal values would be extended to adult women as well as to minors. Justices Powell, Burger, White, Stewart, and Rehnquist seemed poised to strike a somewhat different balance be-

---

79. *Id.* at 642-44.
80. 268 U.S. 510 (1925).
81. 406 U.S. 205 (1972).
82. *See Bellotti*, 443 U.S. at 637-39.
83. *Id.* at 638-39.
84. H.L. v. Matheson, 450 U.S. 398 (1981).
85. *Id.* at 411.

tween liberty and sociality from the one approved in *Danforth* and *Carey*.

Justices Brennan, Marshall, and Blackmun, on the other hand, seeking to fortify *Danforth* and *Carey*, unleashed in their Medicaid dissents the full force of the personal autonomy argument.[86] We learned from them, for the first time, that abortion is only one of many methods of limiting family size. Justice Brennan, in dissent, wrote: " '[A]bortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy.' "[87] Thus the state could not adopt the view allowed by the majority that childbirth is morally superior to abortion. In the dissenters' view, both deserve the same level of constitutional protection.

What would the future hold? Would the communitarian thrust of the late second round cases be pressed further as the Court prepared to enter, in 1983, the third round of abortion adjudication? Would the Court legitimate new and proliferating regulations of adult abortions? Or would it confine its recent rulings to cases involving immature minors? The Court seemed free, in terms of its precedents, to travel down either road. The one element of uncertainty was Justice O'Connor's recent appointment to the Supreme Court in the wake of Justice Stewart's resignation.

C. The Third Round: 1983

We need not tarry long on *Simopoulos v. Virginia*,[88] *Planned Parenthood Association v. Ashcroft*,[89] and *City of Akron v. Akron Center for Reproductive Health*,[90] three cases decided in June of 1983. They involved regulations imposed by the city of Akron, Ohio and the states of Missouri and Virginia. In these cases the Court upheld regulations requiring: (1) a pathology report for each abortion performed;[91] (2) parental consent or approval of a juvenile court before an abortion could be performed on a minor;[92] and (3) the presence of a second physician

86. Beal v. Doe, 432 U.S. 438, 448-63 (1977) (Brennan, J., dissenting).
87. *Id.* at 449 (quoting Roe v. Norton, 408 F. Supp. 660, 663 n.3 (D. Conn. 1975)).
88. 462 U.S. 506 (1983).
89. 462 U.S. 476 (1983).
90. 462 U.S. 416 (1983).
91. *Ashcroft*, 462 U.S. at 486-90.
92: *Id.* at 490-93. Although the Court sustained the consent provisions in *Ashcroft*,

during abortions of viable fetuses.[93] The second physician requirement, incidentally, was justified as a reasonable means of furthering a compelling state interest in protecting the lives of viable fetuses, a decision consistent with the potential life theory so strongly endorsed in the Medicaid cases.[94]

More interesting, for our purposes, are regulations struck down by the Court. These included provisions requiring: (1) performance of post first-trimester abortions only in a hospital;[95] (2) parental notification and consent, or a court order, before performance of abortions on unmarried minors under the age of fifteen;[96] (3) prior disclosure of available family planning services, certain fetal characteristics, and certain hazards of abortion;[97] (4) a twenty-four hour waiting period between the time the pregnant woman signs a consent form and the time the abortion would be performed;[98] and (5) disposal of fetal remains by the attending physician in a "humane and sanitary manner."[99] On first impression these rulings marked a reversion to *Danforth* and *Carey* logic, vindicating the Brennan-Marshall-Blackmun theory of autonomous self-determination. The law appeared to be wholly barred from influencing a woman's choice. The rhetoric of community and language of sociality, so it appeared, had again receded into the background.

Yet a closer reading of the third round cases prompts a more cautious view. The conclusory tone of the majority opin-

---

it clearly specified that this type of statute must be narrowly drawn to conform with judicial precedent, particularly Bellotti v. Baird, 443 U.S. 622 (1979). The plurality opinion of *Bellotti* provided that consent provisions must contain a judicial alternative to parental approval. *Bellotti*, 443 U.S. at 643-44; *see also Akron*, 462 U.S. at 416. In *Akron* the Court went further, setting limits on the type of judicial inquiry required. The trial judge is not simply to act as a parental substitute with an absolute veto over a minor's decision. Specifically, the judge must first determine whether the minor is mature enough to make the decision herself, and then if not, whether an abortion would be in her best interests. *Akron*, 462 U.S. at 439-40. The Akron ordinance at issue required women under the age of 15 to obtain written consent of her parents or "an order from a court having jurisdiction over her that the abortion be performed or induced." *Id.* The Court found this unconstitutionally vague as it did not expressly require a case-by-case inquiry into the minor's maturity. In contrast, the Missouri consent statute at issue in *Ashcroft* directed the judge to grant a petition for majority in an appropriate case or to find abortion in the best interests of the applicant. *Ashcroft*, 462 U.S. at 492.

93. *Ashcroft*, 462 U.S. at 482-86.

94. *Id.*

95. *Akron*, 462 U.S. at 431-39; *Ashcroft*, 462 U.S. at 481-82.

96. *Akron*, 462 U.S. at 439-42.

97. *Id.* at 442-49.

98. *Id.* at 449-51.

99. *Id.* at 451-52.

ions may reflect frustration with the force and cogency of O'Connor's dissenting opinions.[100] Joined by Justices White and Rehnquist, she renewed the assault on the rationale and constitutional foundation of *Wade*. The three justices argued that maternal health and potential life are compelling state interests throughout pregnancy and that legislation restricting abortion should be measured by an "unduly burdensome" standard.[101] If the restriction is not unduly burdensome then minimum rationality rather than strict scrutiny is the applicable standard of review.[102] In their view, of course, none of the challenged regulations to which the standard was applied constituted an "undue burden" on the right to secure an abortion.

One regulation struck down in *Akron* required that women after the first three months of pregnancy have their abortions performed in hospitals. Just ten years earlier, in *Wade*, the Court expressly sanctioned such a regulation.[103] The Court in *Akron* noted advances in medical technology since *Wade* and ruled that because of these advances the health of pregnant women in at least part of the second trimester would be safeguarded as easily in an abortion clinic as in a hospital.[104] By so ruling, however, the Court bruised *Wade*'s rationale. As Justice O'Connor wrote:

> The Roe framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception."[105]

Justice O'Connor's remark is compelling. Constitutional law is too important to rest on the state of medical technology, for this is not the way to establish a constitutional tradition marked by coherence and continuity.[106]

---

100. Justice O'Connor wrote separately in all three decisions, dissenting in *Akron* and *Ashcroft* and concurring in *Simopoulos*. All three opinions reflected her disagreement with the trimester approach. She stated her argument in detail in *Akron* and referred back to that dissent in the subsequent two cases.

101. *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting).

102. *Id.* at 462.

103. Roe v. Wade, 410 U.S. 113, 163-65 (1973).

104. *Akron*, 462 U.S. at 435-37.

105. *Id.* at 458 (O'Connor, J., dissenting).

106. *Id.*

Interestingly enough, the majority made no effort to address her argument. Rather, its opinion was a mere incantation of precedent. "[T]he doctrine of *stare decisis*," wrote Justice Powell for the majority, "while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law."[107] One notes in this statement a sense of frustration perhaps shared by Justices Burger and Stevens. Indeed, a close look at judicial thought over time shows that there was far less consensus on the *Akron* Court than on the *Wade* Court. The Court has not yet found the right balance between liberty and sociality. Perhaps comparative constitutional law can provide guidance.

IV. The West German Decision: Autonomy Subordinated to Other Values

A. *Introduction: The Case and Its History*

On June 18, 1974, West Germany's Federal Parliament enacted the Abortion Reform Act, which liberalized the previous law.[108] The new law, section 218a of the Criminal Code, instituted a time-phase rule (*Fristenregelung*) permitting termination of a pregnancy by a physician within the first twelve weeks after conception with the pregnant woman's consent.[109] Before

---

107. *Akron*, 462 U.S. at 419-20.

108. Law of June 18, 1974, 1974 Bundesgesetzblatt, Teil I [BGB1 I] 1297, Fünften Gesetzes zur Reform des Strafrechts [5 StrRG]. For a brief description of abortion reform legislation in Germany, see Gerstein & Lowry, *supra* note 6, at 850; *see also* O. Lee & T. Robertson, "Moral Order" and the Criminal Law: Reform Efforts in the United States and West Germany 225-31 (1973). Details of the parliamentary debate may be found in the Federal Constitutional Court's own account of the legislative actions surrounding passage of the Abortion Reform Act of 1974. *See* Judgment of Feb. 25, 1975, BVerfG, W. Ger., 39 BVerfG 1, 6-19; *see also* Kommers, *supra* note 6.

109. Section 218 of the Abortion Reform Act of 1974, as translated in Gorby & Jonas, *supra* note 6, at 611-12, reads as follows:

§ 218

Interruption of Pregnancy

(1) Anyone who interrupts a pregnancy after the 13th day following conception shall be punished by incarceration up to three years or fined.

(2) The punishment shall be six months to five years if the actor

1. acts against the will of the pregnant woman, or
2. wantonly causes the danger of death or serious impairment of health to the pregnant woman.

The court can set up a supervision authority. (§ 68, Par. 1, No. 2).

(3) If the pregnant woman commits the act, the punishment is incarceration up to one year or a fine.

(4) The attempt is punishable. The woman shall not be punished for an attempt.

performance of the abortion, however, the woman was legally required to seek advice from a physician or counseling agency concerning available public and private assistance for pregnant women, mothers, and children.[110] Any termination of pregnancy performed more than three months after conception was exempt from punishment only if it was performed in the presence of medical or eugenic indications.[111]

As soon as the new law became effective, the Federal Constitutional Court, pursuant to a motion by the State of Baden-Württemberg, issued a temporary order suspending operation of the twelve-week time-phase rule unless termination of the pregnancy was warranted by medical, eugenic, or ethical indications.[112] Meanwhile, 193 members of the Bundestag together with governments of five German states petitioned the Federal Constitutional Court for a review of section 218a, claiming that it was incompatible with the constitution. The petition invoked the Constitutional Court's abstract judicial review procedure under which a state or one-third of the members of the Federal Parliament may ask the court to rule on the validity of a state or federal law concerning which they have constitutional doubts.[113] This procedure sharply contrasts with the case or controversy

---

§ 218a
Freedom from Punishment for Interruption of
Pregnancy in the First Twelve Weeks

An interruption of pregnancy performed by a physician with the consent of the pregnant woman is not punishable under § 218 if no more than twelve weeks have elapsed since conception.

110. *Id.* at 612. Section 218(c) of the Abortion Reform Act reads:

(1) He who interrupts a pregnancy without the pregnant woman:

1. First having, on account of the question of the interruption of her pregnancy, presented herself to a physician or to a counseling center empowered for the purpose and there been instructed about the public and private assistance available for the pregnant women, mothers and children, especially such assistance which facilitates the continuation of the pregnancy and eases the condition of mother and child, and
2. having been counseled by a physician, shall be punished up to one year incarceration or by a fine if the act is not punishable under § 218.

(2) The woman upon whom the operation is performed is not subject to punishment under Paragraph one.

111. *Id.* at 611-12.

112. Judgment of June 21, 1974, BVerfG, W. Ger., 37 BVerfG 324.

113. Federal Constitutional Court Organization Act [Gesetz über das Bundesverfassungsgericht] (BVerfGG) para. 13 (6), 1951 BGBl I 105. *See generally* Rupp, *Judicial Review in the Federal Republic of Germany*, 9 AM. J. COMP. L. 29 (1960).

requirement for the exercise of judicial power in the United States. Eight months later, on February 25, 1975, the Constitutional Court issued its memorable opinion in the abortion case.[114]

The Federal Constitutional Court approached its task, as did the United States Supreme Court, recognizing the delicacy and complexity of the problem before it. The court held: first, the life developing in the mother's womb is an independent legal interest protected by the constitution;[115] second, the state is obligated to protect fetal life against infringement by the state and others, including the mother;[116] third, the protection of fetal life, in principle, takes precedence over the pregnant woman's right to self-determination for the entire period of pregnancy;[117] fourth, lawmakers are obligated to define abortion as a crime if other measures are inadequate for protection of unborn life;[118] and finally, lawmakers may exempt termination of pregnancy from punishment not only where medical, ethical, and eugenic indications are present,[119] but also in situations where extraordinary social burdens on the pregnant woman outweigh the state's interest in preserving developing human life within the womb.[120]

B. Unborn Life as a Constitutionally Protected Value

Crucial to the case is the court's conclusion that the right to life clause of article 2 protects unborn life.[121] The court grounded its holding in biology as well as in the original history of the West German Constitution. In recalling debates of the parliamentary council (constitutional convention), the court found that the right to life clause, drafted in light of the Nazi regime's disrespect for life, was intended by a majority of the

---

114. Judgment of Feb. 25, 1975, BVerfG, W. Ger., 39 BVerfG 1.

115. *Id.* at 36-42.

116. *Id.* at 42-44.

117. *Id.* at 44-51.

118. *Id.* at 45-46.

119. *Id.* at 49-50. The phrase "medical, ethical or eugenic indications" is meant to cover those situations where the pregnancy would either endanger the mother's life or health, was the product of a crime such as incest or rape, or is likely to result in hereditary illness or defect.

120. *Id.* at 48.

121. *Id.* at 37-41. As to the concepts of life and liberty in German constitutional law, see *supra* notes 23-36 and accompanying text.

framers to protect the unborn although some of its framers denied that such protection was part of the original intent.[122]

As the argument proceeded, biological considerations loomed large in the court's reckoning. "Life in the sense of the developmental existence of a human individual," said the court, "begins, according to established biological-psychological findings, on the 14th day after conception."[123] The German tribunal explicitly rejected what the American Court had accepted, namely, the division of pregnancy into zones of interest. Fetal development, said the court,

> manifests no sharp demarcation. Rather, it is a unitary process of development from the shaping of the being in the womb to the emergence of consciousness after birth. The right to life is guaranteed to everyone who "lives"; no distinction can be made between individual stages of developing life before birth or between prenatal and postnatal life."[124]

Thus "everyone" within the meaning of article 2 includes the "unborn human being."[125]

The constitutional courts of Canada, Austria, Italy, and France were less inclined than the Federal Constitutional Court to recognize the right to life of the unborn during early stages of pregnancy.[126] Nevertheless, they were more inclined than the United States Supreme Court to recognize unborn life as a fundamental value deserving constitutional protection. Unlike the German and American tribunals, however, each of these courts showed a great deal of sensitivity toward legislative efforts to resolve the conflict of values between the life of the unborn and the liberty of the pregnant woman. In every case except Canada, the challenged statutes decriminalized abortion when performed by a physician with the pregnant woman's consent in the first ten to twelve weeks of pregnancy. They banned abortions after this period unless medical, eugenic, or ethical indications, properly certified, warranted a pregnancy's termination. In these courts, this time-phase solution did not imply a policy of unconcern or disrespect for unborn life in the first ten to twelve weeks. Taking judicial notice of abortion as a social problem, the courts

---

122. Judgment of Feb. 25, 1975, BVerfG, W. Ger., 39 BVerfG 1, 38-41.
123. *Id.* at 37.
124. *Id.*
125. *Id.*
126. *See supra* note 2.

upheld the time-phase approach as a permissible balance between the liberty of the woman and the right of government to interfere on behalf of unborn life.

In contrast, the Federal Constitutional Court ruled that the state had not only the right but also the *duty* to protect developing life in the womb.[127] The court considered the human dignity clause of article 1 in tandem with the right to life clause of article 2.[128] "Whenever human life exists," said the court, "it merits human dignity."[129] Recall the language of article 1: "The dignity of man is inviolable. To respect and protect it is the duty of all state authority."[130] This duty is reinforced by paragraph 3 of article 1 which establishes constitutional rights "as directly enforceable law" binding on all branches of government.[131] From these provisions the court extracted a theory of rights distinctive to German constitutionalism.

According to this theory, basic rights are not only defensive or negative in the sense of protecting the individual against the state; they also create an "objective order of values" that the state must effectively vindicate or safeguard, even against third parties.[132] The state's duty, moreover, is proportionate to the rank of the right within the hierarchy of objective values. "The higher the legal interest within the order of the values of the Constitution," said the court, "the more seriously the state's obligation to furnish protection must be taken."[133] The state's duty is clear because "human life represents a supreme value within the constitutional order."[134]

Therefore, in the court's opinion, developing life must be protected because, as a general principle, the right to life takes precedence over the woman's right to self-determination or, in article 2 language, "the free development of her personality."[135] Recall that under the Basic Law the right to personality, unlike the right to life, is limited by the rights of others, the constitutional order, and moral law. Thus, since "the *nasciturus* is an independent human being entitled to the protection of the Con-

127. Judgment of Feb. 25, 1975, BVerfG, W. Ger., 39 BVerfG 1, 41.
128. *Id.* at 36-42.
129. *Id.* at 41.
130. GG art. 1, para. 1 (W. Ger.).
131. GG art. 1, para. 3 (W. Ger.).
132. Judgment of Feb. 25, 1975, BVerfG, W. Ger., 39 BVerfG 1, 41-42.
133. *Id.* at 42.
134. *Id.*
135. *Id.* at 42-43.

stitution, termination of pregnancy has a social dimension which makes it accessible to and in need of regulation by the state."[136] There can be no simple compromise—as in the French, Austrian, and Italian cases—between the right to life and the right to personality. *Wade,* of course, permits no balancing of rights at all during the first six months of pregnancy because the woman's right to self-determination is decisive.

This argument of principle, however, yielded to pragmatism. The Constitutional Court was no more willing to make the right to life absolute than was the Supreme Court to make the right of privacy absolute. Even though the Basic Law provides for protection of fetal life over a woman's right to self-determination during the entire course of pregnancy, the Constitutional Court recognized that at certain points the two values clash. "In any balancing process required, therefore," said the court, "both constitutional values must be perceived in their relation to human dignity as the center of the Constitution's value system."[137] The implication is clear: respect for human dignity may require a heavier weight than usual on the self-determination side of the scale.

What then, is the obligation of the legal order under the German constitution's objective value system? Here is the Federal Constitutional Court's answer:

> The legal order may not constitute the woman's right of self-determination as the sole guideline for its regulation. The State must in principle proceed from a duty of bringing the pregnancy to term [and] therefore in principle consider its termination as wrong. The disapproval of the termination of pregnancy must be clearly expressed in the legal order. The false impression must be avoided that termination of pregnancy involves the same social preeminence as say a trip to the physician for the purpose of healing an illness, or even that it involves a legally irrelevant alternative to contraception. Moreover, the State by postulating a legal vacuum cannot escape its responsibility by refraining from any valuation and leaving the decision to the individual's own responsibility.[138]

And so we find that in West Germany's value-oriented constitutional order, the state cannot be neutral. Law must identify

136. *Id.*
137. *Id.* at 43.
138. *Id.* at 44.

abortion for what it is, namely, "an act of killing."[139] But this identification does not mean that the state must safeguard prenatal life in the same manner as postnatal life. "The decisive point is whether the totality of measures of civil or public law—particularly social law or criminal law—in fact guarantees a protection corresponding to the importance of the legal interest to be safeguarded."[140] The court ruled that the new abortion statute failed to satisfy this standard.[141]

Recall that the statute legalized abortion during the first twelve weeks of pregnancy if performed by a licensed physician with the woman's consent, after consultation with a counseling board or physician legally bound to inform her of the available public and private assistance. Criminal penalties continued to operate with respect to abortions performed after the twelve-week period except in the presence of medical, eugenic, or ethical indications. Interestingly, all parliamentary parties embroiled in the abortion controversy acknowledged the state's duty under the constitution to protect the fetus at all stages of pregnancy.[142] Abortion reform was not predicated on any theory of personal autonomy. Legislators regarded the counseling provision of the law as a more effective means of protecting unborn life than criminal sanctions.[143] They adopted time-phase counseling in the face of evidence that women were resorting increasingly to illegal abortions.[144] Thus, the statute was not a ringing affirmation of abortion liberty; it represented instead a cautious parliamentary attempt to adjust legal order to an evolving social reality.[145] The same general view, incidentally, informed the French and Italian statutes, except that they imposed the added requirement of a one-week waiting period between authorization and performance of an abortion.

C. Flaws in the Abortion Reform Act

The Federal Constitutional Court approached its analysis of the Abortion Reform Act by underscoring legislative discretion in determining the necessary measures for protection of the "le-

139. *Id.* at 46.
140. *Id.* at 46-47.
141. *Id.* at 51.
142. *Id.* at 84-85 (dissenting opinion).
143. *Id.* at 15-16.
144. *Id.* at 81-83 (dissenting opinion).
145. *Id.* at 28-29.

gal interest" represented by developing life in the womb. The Basic Law's command to protect that life is directed mainly to Parliament, and so long as legislative measures are appropriate for the protection of unborn life, the judiciary should not intervene.[146] But the Abortion Reform Act fell far short of the Basic Law's command.

What was wrong with the statute? First, it failed to express disapproval of abortion.[147] The court found that the regulatory scheme as a whole, undergirded by abortion funding through state medical insurance programs, conveyed the impression that abortion as well as childbirth was a normal procedure associated with pregnancy. Second, the statute failed to distinguish between valid and invalid abortions, thus ignoring the normative content of the constitutional command to protect life.[148] Third, the counseling procedures were flawed because they failed to deter abortion.[149] "Physicians, on the basis of their professional training," said the court, "have neither the qualifications for such counseling activities nor, generally, the time required for individual counseling."[150] Additionally, the court noted that counseling boards were required only to convey information, not to dissuade women from procuring abortions.[151] Finally, the statute was flawed because the physician who was required to inform the pregnant woman of available social assistance could also perform the abortion.[152]

In light of these statutory deficiencies, the Federal Constitutional Court suspended operation of the time-phase counseling rule pending adoption of a new statute consistent with the value order of the Basic Law.[153] However, the court did instruct parliament that it could allow a woman to procure an abortion for reasons of extreme social hardship. Situations exist, said the court, where "the right to life of the unborn may lead to a burden on the woman which substantially exceeds the measure normally connected with pregnancy."[154] Medical, eugenic, and ethical indications were found to constitute oppressive burdens that

146. *Id.* at 51.
147. *Id.* at 50-51.
148. *Id.* at 55-56.
149. *Id.* at 61-64.
150. *Id.* at 62.
151. *Id.* at 61-62.
152. *Id.* at 62-63.
153. *Id.* at 2-3.
154. *Id.* at 48-50.

a pregnant woman could not reasonably be expected to sustain.[155]

The court, in a legislative frame of mind, added a rule of social necessity. Balancing of rights would be permissible in social "circumstances of extraordinary weight."[156] However, balancing suggests compromise, a golden mean. But that suggestion is misleading. Here it would be possible for the legislator to "balance" the unborn out of existence.[157] "Esteem for prenatal life conflicts with the right of the woman not to be forced beyond reasonable expectations to sacrifice her own life's values in order to foster respect for that [other] legal interest."[158]

V. A Comparative and Normative Assessment

With respect to the abortion issue, Germany's Federal Constitutional Court has achieved a reconciliation of liberty and community that could well serve as a model for other constitutional courts, including the United States Supreme Court. Although Germany's substantive law need not be adopted, thought should be given to the importance of both liberty and community as evidenced by Germany's decision.

Not all commentators agree with this evaluation. One comparative study of German and American abortion cases concluded: "In striking down stringent statutory restrictions the United States Supreme Court provided other jurisdictions, including Germany, with a salutary lesson in balancing conflicting fundamental rights in the light of social reality."[159] This assessment, however, falls wide of the mark. *Wade* failed to recognize any right of the unborn child. It certainly did not endeavor to balance a mother's fundamental rights against the fundamental value of unborn life as did the Federal Constitutional Court which crafted a social indications solution to the abortion problem.

The *Wade* Court recognized the state's compelling interest in protecting potential life, but confined this interest to the last trimester of pregnancy. A compelling societal interest should not

---

155. *Id.*

156. *Id.*

157. *Id.* at 43.

158. *Id.* at 48. The Constitutional Court was actually restoring the "social grounds" exception that appeared in a bill originally sponsored by a minority of Social Democratic representatives. *See id.* at 14.

159. Gerstein & Lowry, *supra* note 6, at 876.

be confused with a person's fundamental rights. Whatever consideration the *Wade* Court might have given to society's interest in protecting the fetus, that interest—and thus all judicial balancing efforts—appears to have disappeared in the solvent of subsequent autonomy jurisprudence.

In any event, comparative legal scholars are naturally curious to know why two major constitutional tribunals of our time, committed to liberal values and applying similar constitutional norms, view the abortion problem through such different lenses. These lenses are, of course, colored by the language and history of written constitutions, cultural and legal traditions, and the judicial background characteristics and political context out of which abortion cases have arisen. Legal realism and social reality dictate some attention to these factors, but such factors alone cannot fully explain why the German tribunal, two years after *Wade,* chose a course so divergent from American constitutional doctrine.

Any search for an explanation of judicial policy may begin with the original history and text of the Constitution, but it certainly cannot end there. The text and history of the two constitutions are markedly different, as we have seen. Yet, as the dissenting opinions in both the American and German cases show, one may plausibly envision decisions by both tribunals upholding the challenged abortion statutes. Legal culture likewise fails to explain the divergence of these cases, if only because abortion has been the subject of rigorous statutory regulation in most legal cultures, including those of Germany and the United States. Indeed, even today, the "liberalized" abortion statutes of several West European democracies, including the statute struck down by the Federal Constitutional Court, are far more strict than the policy enunciated by the Supreme Court in *Wade* and its progeny.

Politics and the background traits of justices are equally unavailing to explain the outcome in the German abortion case. It may be true, as Gerstein and Lowry assert, that in mounting a constitutional challenge against an abortion statute supported by a Social-Free Democratic coalition government, Christian Democratic representatives were engaging in "manipulation of the constitutional process rather than a sincere quest for constitutional interpretation."[160] But a charge of "manipulation" could

160. *Id.* at 860.

be brought against petitioners in any case referred to the Federal Constitutional Court under its abstract judicial review jurisdiction. Such cases are almost always initiated against the government by minority or opposition parties. Once before the court, however, legitimate questions of constitutional law must be addressed, whatever the motivation of the responsible parties.

Gerstein and Lowry also point out that five of the six justices in the majority were identified with the Christian Democratic Party while one of the dissenters was a woman.[161] Some tension on the court along party lines may have existed, but the decision cannot be explained in strictly partisan terms. First, there was no doctrinal disagreement among justices over the right to life of the fetus at all stages of pregnancy. Rather, the judicial split was over the proper scope of judicial review.[162] Second, the "Christian Democratic majority" authorized Parliament to permit abortions during the first twelve weeks on social grounds, a solution originally appearing in a bill introduced by Social Democrats.[163] The point is this: the reductionism inherent in the Gerstein-Lowry analysis overlooks the real complexity of constitutional decision making in the German context, as well as the significance of troublesome intellectual issues facing the Constitutional Court in the abortion controversy.

Gerstein and Lowry have also tried to explain the divergent results reached by the two tribunals by contrasting the "abstract" approach of the Federal Constitutional Court to the "law in action" approach of the Supreme Court.[164] But such characterizations are also not helpful. One person's realism often turns out to be another's abstraction. One could easily describe the trimester rationale underlying *Wade* as an abstraction, as the German court pointed out, wholly at odds with "established biological-physiological findings."[165]

There is, of course, another sense in which the German approach to constitutional analysis is more abstract than the American. The Supreme Court decides only cases and controversies within the context of particular fact patterns and in light of precedent. By contrast, the Federal Constitutional Court is often

---

161. *Id.* at 861.
162. *Id.* at 866.
163. *Id.* at 856-58.
164. *See supra* notes 112-14 and accompanying text.
165. Judgment of Feb. 25, 1975, BVerfG, W. Ger., 39 BVerfG 1, 37.

more systematic in its approach to legal analysis. Trained in the civil law tradition, German judges tend naturally to write like general theorists, a tendency accentuated in abstract judicial review cases where the only issue before the court is the general validity of a particular statute. Whether abstract or utilitarian reasoning is good or bad depends on the intrinsic merit of the argument advanced and upon the validity of the empirical suppositions behind the argument. In any event, the two tribunals' different approaches do not in themselves explain why the two courts reached such divergent conclusions.

A. Personhood, Liberty, and the Role of Law: Contrasting Images

The key to better understanding of doctrinal differences between the German and American courts is more likely to be found in certain background values underlying the abortion jurisprudence of each country. A close reading of this jurisprudence reveals significant differences in each tribunal's understanding of personhood, liberty, and the role of law.

1. Personhood

As was remarked earlier, the Federal Constitutional Court construed the Basic Law as a value-oriented constitutional order, with the right to life and the dignity of man constituting its supreme values. However, Walter Murphy and others have argued that, *as interpreted,* the American Constitution also embodies a hierarchy of values.[166] After all, American constitutional law rings with the rhetoric and language of basic values and fundamental rights. Human dignity and personhood are what strict scrutiny, compelling state interest, and least restrictive means analyses are all about.

In focusing on abortion cases, however, one finds that the two courts really mean different things when they speak of human dignity and personhood. The German court has interpreted those terms in a far less individualistic sense than the United States Supreme Court. In fact, we find in the Basic Law itself social limits on the development of personality that have no equivalent in the United States Constitution. Recall that the

166. *See* Murphy, *An Ordering of Constitutional Values,* 53 S. CAL. L. REV. 703 (1980).

right to free development of one's personality is limited by the "moral code," the "constitutional order," and the "rights of others," constraints implicit in the long-abandoned definition of liberty advanced by Justice McReynolds in *Meyer v. Nebraska.*

This ensemble of German constitutional values underscores the social nature of the human person. For example, the Federal Constitutional Court has written:

> The concept of man in the Basic Law is not that of an isolated sovereign individual; rather the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value.[167]

In saying this the court was not suggesting that autonomy is an unimportant value in German constitutional law. Indeed, autonomy is essential to liberty. But as the Constitutional Court asserted in another context, "the Basic Law is based on the image of man as an autonomous person who develops fully within the social community."[168] Or, as the court noted in a recent case, the "community-bound" and "community-related" individual, of necessity, is a social being.[169]

In American abortion cases, on the other hand, the accent is on man as an autonomous moral agent, unbounded and unbonded—a private being, a totally independent self. The community may not officially impose itself on a pregnant woman, just as law is barred from granting husbands or parents overriding rights with respect to the abortion decision. The ideal society of the abortion cases is a society of individuals free of tradition. These individuals constitute the sole basis for resolving issues of moral significance. The argument here, however, is that the abortion cases have transformed Justice McReynolds' notion of fourteenth amendment liberty into an ideology of unfettered free choice.

2. *Liberty*

When discussing liberty, our attention shifts mainly to the American cases. As just noted, liberty under the aegis of the Su-

---

167. Judgment of July 7, 1970, BVerfG, W. Ger., 30 BVerfG 1, 20.

168. Judgment of Feb. 24, 1971, BVerfG, W. Ger., 30 BVerfG 173, 193.

169. *See* Judgment of Dec. 15, 1983, BVerfG, W. Ger., *reprinted in* 5 HUM. RTS. L.J. 94, 101 (1984).

preme Court has evolved into an ideology of free choice, one that seriously undermines community and sociality in American constitutional thought. In matters of abortion and contraception at least, choice cannot lawfully be limited in the absence of a compelling state reason. The state may not interfere with the character of sexuality or how it is manifested. Why? Because in this area of personal relationships, as in many others, law cannot deal with matters of value. A compelling public interest test usually requires the state to produce some kind of cost-benefit analysis showing beyond doubt that the social benefits of regulation substantially outweigh social costs. Values, tradition, religion, localism, or ideas of "the good" drawn from normative political philosophy do not measurably affect analysis.

It is interesting to note the extent to which this notion of liberty coincides with perhaps the most influential intellectual current in contemporary constitutional theory. That current is reflected in the rights-oriented constitutionalism of scholars like R.S. Dworkin, David Richards, Rogers Smith, and Michael Perry.[170] These scholars, and others, have labored tirelessly to develop theories of human rights based on rational principles of order and universalistic standards of judgment. These theories, rooted in contemporary moral philosophy and heavily Kantian in orientation, are based on a cold rationality that prescinds all human feeling and personal identities. Thus, these theories transcend all the subjectivities which give us our character as persons. Because these subjectivities—commitments, values, families, communities, customs, religions, and habits—are by definition value laden, they are deemed irrational and hence cannot contribute to public policy. The new constitutionalism of the rights theorists would reduce these subjectivities to irrelevance in order that we may experience, in the new constitutional republic of the late twentieth century, a newfound human dignity supported and reinforced by the moral neutrality of rationalistic jurisprudence.[171] In any case, under the new constitutionalism of these scholars, as well as in the Supreme Court's abortion jurisprudence, autonomy as freedom of choice assumes the character of an architectonic principle under which liberty

170. *See* R.S. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); M. PERRY, *supra* note 22; D. RICHARDS, THE MORAL CRITICISM OF LAW (1977); R. SMITH, LIBERALISM AND THE AMERICAN CONSTITUTIONAL LAW (1985).

171. *See* Kommers, *The Supreme Court and the Constitution: The Continuing Debate on Judicial Review*, 47 REV. POL. 113 (1985).

and freedom are to be understood. Liberty takes priority over duty, over fraternity, and over community.

3. *The Role of Law*

Clearly, there is a vast difference in the two tribunals' attitudes toward the appropriate role of law. The objective value order of the Basic Law and the positive concept of rights gleaned from it by the Constitutional Court means that even in the order of personal morality, law has an important and necessary role. In what may appear to many as a conservative and paternalistic decree, the German court ruled that in light of the supreme value of life specified by the Basic Law, the legislature is obligated to express its disapproval of abortion as a general principle. Thus, in German constitutional polity, law plays a crucial educative role. By contrast, in the United States, law must remain morally neutral if free choice is to be given reign.

B. *A New Synthesis of Liberty and Community in American Law*

In assessing the comparative significance of German and American abortion jurisprudence, one must consider some realities. The United States is not a *Sozialstaat.* When Justice Thurgood Marshall spoke of the moral bankruptcy of certain anti-abortionists in the Medicaid cases, he was mindful of the plight of women driven to abortion by the absence of social help or economic aid.[172] But others have shown that the abortion agenda was created not by persons or organizations representing the poor, but by the medical profession, middle-class feminists, and allies in the judicial establishment unconcerned with values of commitment and responsibility in personal relations.[173]

This class-based analysis has been argued even more cogently by Robert Rodes. He argues in a seminal essay that the Supreme Court's liberty jurisprudence corresponds perfectly with interests of the professional and cultural elite who set the tone of American society.[174] Persons benefiting most from this jurisprudence are those "geographically homogeneous and culturally eclectic" Americans "comfortable without the family,

172. Harris v. McRae, 448 U.S. 297, 346 (1980) (Marshall, J., dissenting).

173. This thesis is argued persuasively in NOONAN, A PRIVATE CHOICE (1979).

174. Rodes, *Greatness Thrust Upon Them—Class Bases in American Law,* 28 AM. J. JURIS. 1 (1983).

neighborhood, and subcultural ties on which other Americans depend."[175] By the same token, persons benefiting most from the erosion of sexual standards are those "who are better able to derive satisfaction from organizational and technical accomplishments than from personal relations, middle-aged men who can afford to trade their wives in on expensive new models, and young people who have never had occasion to learn about deferred gratification."[176] This is the class on whose behalf the Supreme Court speaks in the abortion cases, supporting a public world of ideological neutrality, a world in which law has no role in personal morality, in short, effectively creating a world in which law cannot prefer chastity over prostitution.

Most Americans, however, do not live in this world. Rather, they live in settings enlivened and enriched by tradition, family, neighborhood, and other subjectivities. These subjectivities, which law need not ignore or suppress, are part of our objective existence as persons. A decent respect for the pluralistic nature of American society would seem to demand not a one-world view of social morality, but rather an accommodation of competing views of the public good.

This is not to suggest that West Germany's constitutional policy on abortion could or should be adopted in the United States. However, what the German jurisprudence gives us is a richer concept of the human personality. The moral rationality underlying American cases "abstracts persons from the meaningful contexts in which they live their lives and define themselves."[177] In fact, obsessive concern with freedom of choice may damage personality and character, actually inhibiting people from resolving their problems in accordance with their identities.

The abortion liberty vindicated by the Supreme Court has deprived the community of the means to make meaningful and effective choices. Why not allow a state to enact laws designed to encourage a woman to consider the significance of pregnancy and childbirth, and to reflect on the meaning of these events in the life of persons and the community? As the most recent round of abortion cases demonstrates, the Supreme Court seems determined to strike down any and every law crafted to enhance

175. *Id.* at 5.
176. *Id.* at 4.
177. *See* Kommers, *supra* note 171, at 124.

the quality of moral rationality or to encourage exercise of moral choice within a framework of familial, communal, or social relationships.

Our current constitutional policy, so different from that of Germany, arguably drives women into isolation, leaving them to their own devices. The Supreme Court considers requirements like waiting periods, counseling, and instructions mandating a physician to inform a woman about fetal development unduly burdensome and violative of the right to privacy. Yet these devices have been upheld by European constitutional courts as reasonable abortion regulations.[178] And if they are deemed to be reasonable by the high constitutional tribunals of Western Europe, by what standard should they be deemed unreasonable or unduly burdensome in the United States? After all, many states have statutes requiring counseling in divorce cases. In a few of these states, if one party desires counseling, the other can even be forced to participate.[179]

Constitutional law would actually be truer to the human condition if it allowed friendship and fraternity to play a role in the abortion context before seeking to impose some spacious and abstract freedom of choice in the name of privacy. In truth, the values of equal concern and respect for persons would seem to demand nothing less than consideration of the background, identities, and affiliations of women caught up in the abortion predicament.

None of this is to suggest that abortion should be banned altogether, or that law should punish sins of the flesh as it once tried to do, or that the police should monitor what occurs in the privacy of the home. But law can teach and encourage commitment to certain kinds of values treasured by society and tradition. What is troublesome about American constitutional policy is that it gives tremendous support to certain kinds or classes of people, but hardly any support—community support—to those persons who have chosen other values. A constitutional policy may require law to permit abortion, yet not encourage commercialization of abortion, trivialization of sex and family, or an ide-

178. *See supra* note 2.

179. For representative statutes, see CAL. CIV. PROC. CODE §§ 1730-1772 (Deering 1981); IND. CODE ANN. § 31-1-11.5-8 (Burns 1980 & Supp. 1985); IOWA CODE ANN. § 598.16 (West 1981 & Supp. 1985); MD. FAM. LAW CODE ANN. § 7-102 (1984); N.Y. FAM. CT. LAW §§ 911-926 (McKinney 1983).

ology of choice whose own educative effect on the rest of society is corrosive and destructive of values cherished by the majority.

Finally, the comparative perspective allows us to get a better grip on the issue of the fetus' humanity. Recall that after examining various senses in which the term "person" is used in the United States Constitution, the Supreme Court concluded that the unborn child was not a person within the meaning of the fourteenth amendment. The German tribunal, by contrast, felt no need to examine the personhood of the unborn child. Indeed, the court studiously avoided using the term "person" when referring to the unborn. Instead, the court employed terminology such as "prenatal life," "developmental existence," "preliminary phase of human life," and "life developing in the womb."[180] In describing the unborn child as an "independent human being," the court did so in a biological, not an anthropological or psychological sense. The court declined to decide whether the unborn child was itself a bearer of rights, and even refrained from designating the newborn child as a human person since the newly born do not experience "the phenomenon of consciousness specific to human personality."[181] Rather, the unborn child is described as an "independent legal interest" which the state is obligated to protect, not because it is a person, but because it is "developing human life."[182] The Federal Constitutional Court's argument seems based on the supposition that a law permitting abortion on demand would diminish the value of life generally. Potential life is potential life, the court seems to say, and it is no less potential at three or four months of pregnancy than in the last trimester. Thus the state may not cut into pregnancy at any given stage and say that now the fetus is worthy of protection but that earlier it was not.

The legislative policies upheld by constitutional courts of other countries are also of interest. In every case except Austria, unborn human life was deemed worthy of state protection, and the state interest increases with the biological development of the fetus. Even in Austria, which recognized no right to life in the first twelve weeks of pregnancy, abortions are permitted after the first trimester only in the presence of medical or eugenic indications.[183] As the German court indicated, fetal life is linked

180. Judgment of Feb. 25, 1975, BVerfG, W. Ger., 39 BVerfG 1, 36-42.
181. *Id.* at 41.
182. *Id.*
183. *See* M. Nijsten, *supra* note 2.

to complete human life. The latter is not possible without the former. "Existence which satisfies such a biological definition of human life should, it is felt, therefore represent an interest worthy of some protection by the legal system."[184]

One may question the logic of distinguishing between different stages of embryonic life. Justice O'Connor recognized this problem in her assertion that *Wade* is on a collision course with itself. So it is interesting that the Canadian, French, Italian, and German courts recognized the legitimate interest of the state in protecting the fetus in all stages of pregnancy. And while the Austrian and Italian courts rejected the contention that the abortion statutes before them violated the European Convention on Human Rights, it is noteworthy that the European Commission on Human Rights sustained the validity of the Federal Constitutional Court's decision under the convention.[185]

VI. Conclusion

This article has considered different perspectives on liberty and community in German and American constitutional law. In the abortion context these differences are likely exaggerated. Had this article focused on German and American free speech doctrine, differing perspectives on liberty and community, although significant, would have been less sharply drawn. Even in the abortion context, countervailing currents of thought are beginning to run through American cases, evidenced particularly by the Medicaid cases and dissenting opinions of the 1983 abortion decisions. Just as one may point historically to strong communitarian perspectives underlying American federal and state constitutions, there was a time in both American history and law when liberty and community were regarded as complementary. Our constitutional law in recent years, however, has subordinated community to liberty. What is needed now is a new synthesis between liberty and community, a synthesis that the comparative perspective may help accomplish.

---

184. Glenn, *The Constitutional Validity of Abortion Legislation: A Comparative Note*, 21 McGill L.J. 673, 684 (1975).

185. *See* Brüggemann and Scheuten v. Federal Republic of Germany, 1976 Y.B. Eur. Conv. on Human Rights 382 (Eur. Comm'n. on Human Rights).