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Introduction to the Translation of the Abortion Decision of the Federal Constitution Court of the Federal Republic of Germany West German Abortion Decision: A Contrast to Roe v. Wade: Introduction, 9 J. Marshall J. Prac. & Proc. 557 (1976)

John D. Gorby

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INTRODUCTION TO THE TRANSLATION OF THE ABORTION DECISION OF THE FEDERAL CONSTITUTIONAL COURT OF THE FEDERAL REPUBLIC OF GERMANY

by JOHN D. GORBY

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INTRODUCTION TO THE TRANSLATION OF THE ABORTION DECISION OF THE FEDERAL CONSTITUTIONAL COURT OF THE FEDERAL REPUBLIC OF GERMANY†

by JOHN D. GORBY*

THE ABORTION QUESTION IN THE HIGH CONSTITUTIONAL COURTS OF SEVERAL WESTERN NATIONS

It is no coincidence that within a period of two years the high courts of the United States, Austria, France, Italy, Western Germany and Canada were called upon to rule on abortion statutes. These high courts have been faced with legal problems of immense complexity and of profound social significance. Improved medical techniques, changes in sexual morality, an increased sense of sexual freedom, greater sensitivity to the problems of unwanted pregnancies and unwanted children, fears of an overpopulated and under resourced world are among the reasons given to explain the politically powerful demand throughout the developed world for relaxed restrictions on abortions. On the other hand, a relaxation of the restrictions on abortion has been viewed as profoundly incompatible with a basic social commitment to respect the dignity of each individual human being as well as the fundamental notions of the rights of man.

Stated briefly, these high courts have held as follows:

United States Supreme Court (January 1973): The United States Supreme Court in *Roe v. Wade*¹ held a statute unconstitutional which proscribed abortions except to save the life of the mother. The Court decided that unborn human life is not of value under the United States Constitution, i.e., the concept of constitutional personhood has only postnatal application, and impliedly held that criminal abortion statutes do not implement constitutional provisions. Furthermore, criminal abortion statutes which restrict abortions for reasons unrelated to the important state interests of protecting maternal health or protecting viable fetal

† [Hereinafter referred to as *Introduction*].

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1. *Roe v. Wade*, 410 U.S. 113 (1973).

life (except to save the life or health of the mother) are unconstitutional because they conflict with the constitutional right of privacy which the Court held to include the decision to abort. In *Doe v. Bolton*,² an abortion case decided the same day as *Roe*, the Supreme Court also held unconstitutional a statute which allowed abortions upon the showing of certain "indications" (indications solution).³

Austrian Constitutional Court (October 1974): The Austrian Constitutional Court, in upholding Section 97, paragraph 1, of the Austrian Penal Code,⁴ which depenalized abortions performed during the first three months of pregnancy (the so-called "term solution"⁵), stated: (1) the concept of personhood in Article 2 of the European Convention on Human Rights and Fundamental Freedoms⁶ does not include unborn persons⁷ and there is thus

2. *Doe v. Bolton*, 410 U.S. 179 (1973).

3. The term "indications solution," a common expression in European countries, and frequently used in this *Introduction* and *Translation*, is literally translated from the German "Indikationslösung." An indications solution allows abortions for certain reasons or under certain conditions which have been legislatively or judicially defined. Examples are abortions for medical reasons (medical indication), eugenic reasons (eugenic indication), ethical reasons such as in the case of rape (ethical indication) and social reasons (social indication). To the extent that a criminal abortion statute allows abortions to save the life of the mother the statute is an "indication solution." One of the debates in the abortion controversy has been over the number of indications the law ought to recognize. Compare "indications solution" with "term solution" discussed in note 5 *infra*.

4. The information concerning the Austrian Constitutional Decision is taken from Pernthaler, *Rechtsprechung des Verfassungsgerichtshofes*, JURISTISCHE BLÄTTER 310 *et seq.* (1975). The official report of the decision was not available at the time of this writing.

5. The expression "term solution," used in contrast to "indications solution" discussed in note 3 *supra*, is also a common expression in Europe. It is used frequently in this *Introduction* and *Translation* and is a literal translation of the German "Fristenlösung." A term solution to the abortion problem allows an abortion upon the decision of the pregnant woman, regardless of the existence of "indications," during an initial term of the pregnancy, usually defined as twelve weeks, three months or first trimester. Some term solutions require a counseling session prior to making the abortion decision; counseling, however, is not necessarily an integral part of a term solution. For all practical purposes, the U.S. Supreme Court decision of *Roe v. Wade* created a "term solution."

6. EUR. CONV. ON HUMAN RIGHTS art. II(1) provides:

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

For text of the European Convention on Human Rights see BASIC DOCUMENTS ON HUMAN RIGHTS 340 (I. Brownlie ed. 1971).

7. The literature with respect to this question is divided. For example, the following scholars believe that article II(1) of the European Convention on Human Rights does not include unborn life: GURADZE, *DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION* 47 (1968); Pfeifer, *Die Bedeutung der Europäischen Menschenrechtskonvention für Österreich*, in *FESTSCHRIFT FÜR HUGELMANN I*, at 424 (1959); von Beber, *Die strafrechtliche Bedeutung der Europäischen Menschenrechtskonvention*, 65 *Zeitschrift für Staatswissenschaft* 342 (1953).

Examples of scholars who believe that article II(1) does include un-

neither an international legal obligation nor a national obligation based on the Human Rights Convention to proscribe abortions; (2) the concept of "habitants" ("Einwohner" in the Austrian version or "habitants" in the standard French text) in Article 63, paragraph 1, of the treaty of St. Germain, which refers to the guarantee of the life and freedom of "inhabitants" of Austria does not embrace unborn human life; and (3) the "equality requirement" of Austrian law is not violated by a statute which distinguishes between different stages of the biological development of fetal life.

French Conseil Constitutionnel (January 1975)⁸: The French Constitutional Court (Conseil constitutionnel) held a French statute relative to the voluntary interruption of pregnancy which allowed abortions in the case of necessity ("cas de necessite") or in a situation of distress ("situation de detresse") following an intensive counseling procedure not to be contrary to the constitution. In so holding, the Conseil constitutionnel said that the statute permits the abortion, as it expressly provides in Article 1, "in the case of necessity and under the conditions and limitations which it defines."⁹ Thus, the French statute appears to have been understood by the Court as an "indications solution"¹⁰ as opposed to abortion on demand.

Italian Constitutional Court (February 1975): On February 19, 1975, the Constitutional Court of Italy held that a provision (Article 546) of the Italian Penal Code, which declared abortion to be punishable, was "partly unconstitutional." Under the decision the Court, although it affirmed in general that the fetus has a right to life, ruled that pregnancy could be interrupted without involving a crime if its continuation endangered the life and health, including mental health, of the mother.¹¹

born human life are: CASTBERG, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 81 (1974); MOSER, *DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION UND DAS BÜRGERLICHE RECHT* 133 (1972); PARTSCH, *DIE RECHTE UND FREIHEIT DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION* 104 (1966); SCHORN, *DIE EUROPÄISCHE KONVENTION ZUM SCHUTZE DER MENSCHENRECHTE UND GRUNDFREIHEITEN* 74 (1975); Marschall, *Grundsatzfragen der Schwangerschaftsunterbrechung in Hinblick auf die verfassungsgesetzlich gewährleisteten Rechte auf Leben*, *JURISTISCHE BLÄTTER* 497 *et seq.* and 548 *et seq.* (1972).

8. The French decision of January 15, 1975, (*interruption volontaire de grossesse*) is found in *DROIT PUBLIC: LES GRAND DECISIONS DU CONSEIL CONSTITUTIONNEL* 356 (Sirey publ. 1975). See also Schnur, *Gelegentliche Rechtsvergleichung: Die französische "Fristenlösung"*, *JURISTISCHE ZEITUNG* 291 (1975).

9. The French decision at 360 and 373 *et seq.*

10. See note 3 *supra*.

11. Information on the Italian decision was obtained from Giovanni Bognetti, Professor of Law at the University of Pavia, Italy, and Visiting Professor of Law at the Case Western Reserve University in Cleveland, Ohio. Professor Bognetti and Professor Donald Kommers are presently preparing a paper on the abortion decisions in Germany, the United States and Italy.

Cf. the information obtained from *Die Rechtslage zum legalen*

Federal Constitutional Court of Western Germany (February 1975): (The subject matter of this paper.) In short, the German Court held that the unborn enjoys the protection of the Constitution and the State has an affirmative duty to protect and foster the unborn.

Supreme Court of Canada (March 1975):¹² In a collateral attack on the constitutionality of Section 251 of the Criminal Code, which prohibited abortions except when a therapeutic abortion committee (of an accredited or approved hospital) "ha[d] by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health,"¹³ the Supreme Court of Canada unanimously held that no case had been presented to require an examination of the constitutional validity of the provision in question or its compatibility with the Canadian Bill of Rights. In a separate opinion, the Chief Justice noted¹⁴ that the regulation of abortion is a legislative matter.

These decisions seem to reflect several possible solutions. At one end of the spectrum is the decision of the U.S. Supreme Court which held that the U.S. Constitution prohibits abortion legislation designed to protect the life of the unborn prior to viability. At the other end of the spectrum is the decision of the West German Constitutional Court which held that the State has an affirmative duty to protect the unborn life at all stages of pregnancy.

The other decisions¹⁵ fall between the American and German decisions:

Schwangerschaftsabbruch in Europa und in den USA, Recht: Informationen des Bundesministers der Justiz, Feb. 25, 1975, at 4. *But see* Hoffman's special report to *The New York Times*, N.Y. Times, Feb. 20, 1975. The latest decisions of the Italian Constitutional Court available to this writer are 1973 decisions. The text of the Italian abortion decision of Feb. 19, 1975, was thus not available.

12. *Dr. Henry Morgentaler v. Her Majesty the Queen*, slip opinion of the judgment pronounced March 26, 1975, of the Supreme Court of Canada.

13. *Id.* at 4.

14. The Chief Justice's exact words are:

What is patent on the face of the prohibitory portion of § 251 is that Parliament has in its judgment decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment. That was a judgment open to Parliament in the exercise of its plenary criminal law power, and the fact that there may be safe ways of terminating a pregnancy or that any woman or women claim a personal privilege to that end, becomes immaterial.

Id. at 8 of the Chief Justice's separate opinion.

15. On the basis of this brief glance at these decisions of western constitutional courts, it appears that *Roe v. Wade*, decided two years before the others, has had little influence on the decisions of the other constitutional courts which have ruled on abortion statutes. None have recognized a woman's fundamental right to decide to have an abortion, a right which the Supreme Court found in the privacy concept. Furthermore,

- 1) The Supreme Court of Canada held that it was entirely a legislative matter;
- 2) the constitutional courts of Italy and France held that the regulation of abortion is primarily a legislative matter and that an "indications solution" in some form is compatible with their respective constitutions;
- 3) the Constitutional Court of Austria held that a statute allowing abortion on the request of the woman during the first three months of pregnancy is not incompatible with the Austrian Constitution or Austrian international obligations.

The disparity in results reflects the times as well as the complexity of the problem. To the extent that these decisions have been based upon positive legal provisions of national constitutions or positive norms of national legal systems, they have, of course, primary legal significance only for the nation which has given the court its judicial authority. The view, however, that judicial decisions by national high courts concerning such matters as the meaning of fundamental human rights which have been declared and given positive legal form in national constitutions and the nature of individual human life at its earliest stages have universal legal significance is not to be lightly dismissed. The two longest, most thought provoking and perhaps most important of these judicial decisions by national high courts are those of the United States Supreme Court¹⁶ and the Federal Constitutional Court of the Federal Republic of Germany of February 25, 1975. That these two high courts reached generally different results only increases their significance and value for comparative purposes both within as well as without the national boundaries of Western Germany and the United States.

THE ABORTION DECISIONS OF THE UNITED STATES SUPREME
COURT AND THE FEDERAL CONSTITUTIONAL COURT OF WESTERN
GERMANY—SEVERAL POINTS FOR COMPARISON AND CONTRAST

A comparison of law is difficult. Differences in language and culture are only two of the most obvious problems. When the issue which gives rise to the judicial decisions to be compared is charged with emotion, the difficulty surely increases. There is no attempt here to minimize the difficulties of the comparative method. Nevertheless, brief mention in the next paragraphs of several legal, historical, political and philosophical factors may be of interest.

all of the constitutional courts, except the German court, indicate that the regulation of abortion, with the possible exception of an abortion to preserve the life and health of the mother, is a legislative matter.

16. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

*Several Differences and Similarities Between the
German and American Constitutional Systems*

The Influence of Roman Law

It has been claimed that civil law bears the imprint of Roman law whereas the common law of England and its American variation has resulted from the judicial decisions in concrete cases of English and American judges, thus reflecting the values and legal consciousness of the English and American cultures. A more accurate statement would be that both the civil and common law systems bear the mark of Roman law, though perhaps in different areas and to different degrees. One writer believes that the common law has been influenced even more by Roman law than has the civil law. He wrote:

[I]t is dangerous to assume, as it is sometimes done, that the concepts and methods of the classical Roman law have been transplanted into modern civil law. Professor Buchland observes that 'it may be a paradox, but it seems to be the truth that there is more affinity between the Roman jurist and the common lawyer than there is between the Roman jurist and his modern civilian successor.'¹⁷

It is beyond the scope of this introduction to explore the impact of Roman law on the two systems. The point here is merely to suggest that this one frequently assumed historical distinction is not of such significance to make a comparison of decisions fruitless.

The Underlying Political Philosophies

Concerning the constitutional documents themselves, it is of some significance that 160 years elapsed between the ratification of the two documents (American Bill of Rights: 1791; Basic Law,¹⁸ which is the constitution of West Germany: 1949). It must also be acknowledged that political philosophies often

17. GUTTERIDGE, *COMPARATIVE LAW* 75 (2d ed. 1949) reprinted in part in SCHLESINGER, *COMPARATIVE LAW* 172 (2d ed. 1959).

18. The Basic Law (Das Grundgesetz) of 1949 of the Federal Republic of Germany has been envisaged from its inception as a provisional constitution, designed to "give to public life a new order for a transition period" (Preamble to the Basic Law). The Preamble to the Basic Law expressly provides: "The entire German people are called upon to complete, in self-determination, the unification and freedom of Germany." The public order created by the Basic Law is considered to be "an exercise of power of the total German State within a limited territoriality." LIEBHOLZ & RINCK, *GRUNDGESETZ: KOMMENTAR AN HAND DER RECHTS-SPRECHUNG DES BUNDESVERFASSUNGSGERICHTS* 382 (3d ed. 1968).

Furthermore, article 146 of the Basic Law provides that the "Basic Law loses its validity on the day on which a constitution enters into effect which has been concluded by the free decision of the German people." There has been, of course, no reunification of Germany; the Basic Law is thus the Constitution.

change within such a period; that the cultural backgrounds and languages of the drafters were different; that the political realities were different (American—several years after a successful revolution; German—several years after a total defeat in war); that the language of the two pertinent provisions is different. The importance of these differences in this context may, however, be subject to question.

With respect to the U.S. Constitution, one could generally say that the Bill of Rights was the outgrowth of a liberal democratic and individualistic natural rights political philosophy and a desire to declare in the form of positive law and to thus guarantee the assumed "unalienable rights, [amongst which] are life, liberty and the pursuit of happiness."¹⁹ Although the world had arguably become more sophisticated by the middle of the 20th century, similar thinking regarding fundamental human rights prevailed during the drafting of the Basic Law of 1949. According to German law Professor Dr. Georg Dahm,²⁰ although the contents and meaning of fundamental rights changed in the course of constitutional development, a natural rights view of fundamental rights was nevertheless accepted by the drafters of the Basic Law of 1949 and the fundamental rights enumerated in the Basic Law were envisaged as declaratory of already existing (supra-positive) rights. That similar thinking, *i.e.*, that human rights documents declare or acknowledge already existing fundamental rights as opposed to creating them, predominated generally during the period after the Second World War and is exemplified by the history of the Universal Declaration of Human Rights of 1948 and the European Convention on Human Rights and Fundamental Freedoms of 1954. Furthermore, both constitutions were in part reactions to a system of oppression and injustice. It could generally be concluded that the political philosophies underlying the statements of fundamental rights in both constitutions, the U.S. Bill of Rights and Article 1 of the Basic Law, were similar, both being liberal democratic and individualistic and oriented toward natural rights. Thus, in spite of the more than a century and a half which elapsed between the drafting of the two documents, the ideals of civil liberties as first conceptualized by the natural rights thinkers were sought to be incorporated in both the Bill of Rights and the Basic Law.²¹

19. See generally CORWIN, *THE HIGHER LAW BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955); quoted material from the American Declaration of Independence.

20. DAHM, *DEUTSCHES RECHT* 291 (2d ed. 1963).

21. Cf., *e.g.*, the following from Professor Dr. G. Leibholz, past justice on the Federal Constitutional Court of West Germany, in his *COMMENTARY ON THE BASIC LAW*:

The Basic Law proceeds from the recognition of certain, highest fundamental values of the liberal democratic constitutional state. These

The United States Supreme Court and the Federal Constitutional Court

— *Constitutional Review in The United States and Germany as it Relates to the Abortion Cases*

In the Federal Republic of Germany as in the United States the judicial branch of the state has the power to control the constitutionality of legislation.²² In Western Germany this power may in general only be exercised by the Federal Constitutional Court which, under the Basic Law, has the competence to rule upon the constitutionality of, *inter alia*, Federal Parliamentary enactments. In the context of the abortion decision, the pertinent provision of Article 93 of the Basic Law provides that:

The Federal Constitutional Court decides . . . in the event of differences of opinion or doubt, the formal or material compatibility of federal law . . . with this Basic Law.²³

This form of judicial control over the constitutionality of legislation in the Federal Republic of Germany has been described as "centralized,"²⁴ i.e., the power of constitutional review is confined to one single judicial organ, the Federal Constitutional Court. This can be contrasted with the American system which has been described as "decentralized," thus indicating that the power of judicial control of constitutionality has been given to all organs of the judiciary.

— *The Jurisdiction of the U.S. Supreme Court and the German Federal Constitutional Court*

The jurisdiction of the United States Supreme Court is referred to as "general jurisdiction"; broadly speaking, the Supreme Court has jurisdiction²⁵ in all "cases" arising under the Constitution, laws of the United States and treaties; in cases concerning admiralty and concerning ambassadors, public minis-

fundamental values determine the liberal democratic basic order, which within the total order of the state, the constitutional order, is regarded as fundamental. Underlying this view of the basic order is ultimately, according to the constitutional political decision made in the Basic Law, the concept that the human being possesses individual intrinsic value and that freedom and equality are continually the fundamental values of the state.

LEIBHOLZ & RINCK, GRUNDGESETZ: KOMMENTAR AN HAND DER RECHTS-SPRECHUNG DES BUNDESVERFASSUNGSGERICHTS 2-3 (3d ed. 1968).

22. See generally Friesenhahn, *Die Verfassungsgerichtsbarkeit in der Bundesrepublik Deutschland*, in VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART (H. Mosler ed. 1962); Rupp, *Judicial Review in the Federal Republic of Germany*, 9 AM. J. COMP. L. 29-47 (1962); Nagel, *Judicial Review in Germany*, 3 AM. J. COMP. L. 233-41 (1954).

23. Article 93 of the Basic Law.

24. The terms "centralized" and "decentralized" are used by CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 46-50 (1971). See articles 93, 94, 99 and 100 of the Basic Law and the Statute of the Federal Constitutional Court.

25. See generally U.S. CONST. art. III, § 2.

ters and consuls; and over "controversies" between states and between a state and citizens of another state. The U.S. Supreme Court is considered a Court of ordinary jurisdiction. In addition, it has appellate jurisdiction over decisions of lower federal courts, which derive all their jurisdiction from acts of Congress. In *Roe v. Wade*, the case originated in a lower federal district court (three judge panel) and came before the U.S. Supreme Court in the Court's exercise of its appellate jurisdiction.

A major restriction on the jurisdiction of the United States Supreme Court results from the "case and controversies" concept. In other words, only adverse litigants presenting an honest and antagonistic assertion of rights or those who have real or substantial interests at stake have "standing" in the Supreme Court to argue and contest legal matters. The United States Supreme Court "will not pass upon the constitutionality of legislation . . . upon the complaint of one who fails to show that he is injured by its operation . . .";²⁶ furthermore, "litigants may challenge the constitutionality of a statute only insofar as it affects them."²⁷ Consequently the United States Supreme Court does not control the constitutionality of legislative enactments in the abstract. In *Roe v. Wade*, for example, the United States Supreme Court held that a physician who was a defendant in a Texas criminal abortion case and who sought to intervene in the *Roe* case, in which the Texas abortion statute was challenged, had no standing since he made "no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions."²⁸ The Supreme Court also held in *Roe* that a childless couple who feared a future pregnancy "because of possible failure of contraceptive measures" had no standing because their position was "speculative" and too indirect "to present an actual case or controversy."²⁹ On the other hand, the Court held that Jane Roe (a pseudonym), as a pregnant woman who was not able to "obtain a legal abortion in Texas," "presented a case or controversy" and thus had standing to sue.³⁰

Although the power of constitutional review is "centralized" in the Federal Constitutional Court, its jurisdiction is also limited, this Court being one of several high federal courts of last resort in the Federal Republic of Germany. Other high

26. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 138 (12th ed. 1964).

27. *Fleming v. Rhodes*, 331 U.S. 100, 104 (1947). See generally CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 137 *et seq.* (12th ed. 1964).

28. 410 U.S. at 126 (1973).

29. *Id.* at 128.

30. *Id.* at 124.

courts are the Federal Court (Bundesgerichtshof) for appeals in ordinary cases; the Federal Labor Court (Bundesarbeitsgericht) for appeals in labor cases; the Federal Financial Court (Bundesfinanzhof) for appeals in tax cases; the Federal Administrative Court (Bundesverwaltungsgericht) for appeals from state administrative cases; and, the Federal Social Court (Bundessozialgericht) for appeals in social security cases. To the extent that the Federal Constitutional Court is entrusted with the power of ultimate decision for all constitutional questions, it is superior to these other courts. The Federal Constitutional Court is, as its name implies, a specialist court for constitutional matters. Its function is to interpret the Basic Law.³¹ On the other hand, if the question presented to the other high courts is other than a constitutional question, the other high courts are the ultimate judicial authority.

The jurisdiction or competence of the Federal Constitutional Court as well as the method of invoking the jurisdiction of the Court is determined in part by Article 93 of the Basic Law and in part by federal statutory law. For example, Article 93(2) of the Basic Law provides in this regard that "the Federal Constitutional Court decides . . . upon petition . . . by the government of a federal state or by a third of the members of the Federal Parliament." In the German abortion case the jurisdiction of the Federal Constitutional Court was invoked through this provision. The 193 persons indicated at the beginning of the translated opinion are those of certain members of the Federal Parliament who entertained doubt about the constitutionality of the new abortion statute enacted by the Federal Parliament and petitioned the Court under the authority of this provision. This case was designated as 1 Federal Constitutional Case 1/74.

Article 93(2), as indicated above, also provides that the governments of the federal states (Länder) may also invoke the jurisdiction of the Federal Constitutional Court in the event of differences of opinion or doubt for a decision on the formal and material compatibility of a federal statute with the Basic Law. In the abortion case, the governments of five federal states (Baden-Württemberg, the Saarland, the Free State of Bavaria, Schleswig-Holstein, and Rhineland-Pfalz) each petitioned the Court and invoked the Court's jurisdiction via this provision. These cases were designated as 1 Federal Constitutional Court Case 2/74, 3/74, 4/74, 5/74 and 6/74, respectively.

31. Although the U.S. Supreme Court is formally a court of ordinary jurisdiction, *see* U.S. CONST. art. III, § 2, it has, at least recently, tended to restrict its activities to important constitutional problems. Thus, practically the U.S. Supreme Court tends to be a "specialist" court for constitutional review. *See* statistics published yearly in the November *Harvard Law Review*.

All six of these cases (1 Federal Constitutional Court Case 1/74 through 6/74) were consolidated for decision.

When members of the Federal Parliament or governments of a federal state invoke the jurisdiction of the Federal Constitutional Court under Article 93 of the Basic Law, the Court is impowered to determine the constitutionality of a statute "in the abstract," i.e., divorced from an actual "case or controversy" as is required by the United States Constitution. This procedure, unfamiliar to the American jurist, is referred to as an "abstract control of norms" and permits a constitutional review of statutes before the statute actually takes effect. In the abortion cases decided by the Federal Constitutional Court this procedure was followed, and the constitutionality of the legislation was tested immediately upon enactment without waiting until an actual "case or controversy" arose involving litigants claiming to be actually harmed by the legislation. In such a case the Federal Constitutional Court functions as a court of "original jurisdiction" for constitutional questions, not as the ultimate court of review for lower court decisions on constitutional questions which have been raised in the context of a "case or controversy." This also explains why the German abortion case is not designated by the names of actual parties such as *Schmidt v. Meyer*.

The Federal Constitutional Court is, as previously mentioned, divided into two senates. The competence of each senate of the Court is different, being determined by Section 14 of the Statute of the Federal Constitutional Court. For example, the "First Senate" is competent to determine the compatibility of a federal statute with the Basic Law,³² whereas the "Second Senate" is competent to decide cases about the realization of fundamental rights.³³ Since the abortion case involved the question of the compatibility of a federal statute with the Basic Law, only the First Senate had the competence to hear the case under the Statute of the Federal Constitutional Court.

—Selection of Judges

Article III of the United States Constitution provides the framework for the "judicial power of the United States." Section I of Article III provides that the judges of the Supreme Court "shall hold their offices during good behavior" which has been interpreted to mean a life appointment. The President of the United States has the power under Article II, Section II, to

32. Sections 13(1) and 14(1) of the Statute of the Federal Constitutional Court (BVerfGG).

33. *Id.* §§ 13(1) and 14(2).

appoint with "Advice and Consent of the Senate" the "Judges of the Supreme Court." The number of judges which sit upon the Supreme Court is determined by statute,³⁴ not the Constitution, and is set at nine. Although the Supreme Court is a judicial tribunal, it exercises such vast and undefined power that both the President and the Senate have traditionally scrutinized the social philosophies of Supreme Court appointees.

Articles 92-104 of the Basic Law provide the framework for the exercise of judicial power in the Federal Republic of Germany. Article 92 provides that the "judicial power is entrusted to the judges; it is exercised by the Federal Constitutional Court, by the federal courts provided in this Basic Law and by the Courts of the Federal States." Article 94 (Federal Constitutional Court) of the Basic Law and Section 2 (Senates) of the Statute of the Federal Constitutional Court determine, *inter alia*, the composition of the Federal Constitutional Court. As mentioned, the Court consists of two senates. The Statute further provides that eight judges shall be elected to each senate.³⁵ Three judges to each senate of the Constitutional Court shall be elected from other high federal courts and shall serve for the period remaining in their other judicial office.³⁶ The remaining judges are elected for a period of eight years.³⁷ A re-election of a judge is permitted.³⁸ The Federal Parliament (Bundestag) and the Federal Council (Bundesrat) each elect one half of the judges.³⁹ In the Federal Parliament the election of judges to the Federal Constitutional Court is indirect, being done by twelve electors who are selected from the membership of the Federal Parliament.⁴⁰ Eight of the twelve electors must vote to elect a judge.⁴¹ In the Federal Council a judge is elected directly with two-thirds of the votes.⁴² In Germany as well as the United States the politics of the selection of judges is of considerable importance. Since great power is wielded, the political bodies which elect the judges are naturally very concerned with potential judges' political and social philosophy.⁴³

34. 28 U.S.C. § 1 (1970).

35. Section 2(2) of the Statute of the Federal Constitutional Court (BVerfGG).

36. *Id.* § 4(1).

37. *Id.* § 4(2).

38. *Id.*

39. *Id.* § 5(1).

40. *Id.* §§ 6(1) and 6(2).

41. *Id.* § 6(5).

42. *Id.* § 7.

43. For an excellent discussion of the mechanics and politics involved in the selection of judges for the Federal Constitutional Court, see KOMMERS, JUDICIAL POLITICS IN WESTERN GERMANY: THE FEDERAL CONSTITUTIONAL COURT 113-44 (1976).

*Several Differences and Similarities Between the
Relevant Constitutional and Statutory Provisions*

The Constitutional Provisions Involved
———*Right to Life Provisions*

The language of the two most pertinent provisions, though different in some respects, is similar, defines conceptually similar spheres, protects similar values and, with respect to the question whether it protects unborn human life, is equally vague and uncertain.

U.S. Constitution:

5th Amendment: . . . nor shall any person be deprived of life, liberty or property without due process of law.

14th Amendment: . . . no state shall deprive any person of life, liberty or property without due process of law.

Basic Law:

Article 2, paragraph 2, sentence 1: Everyone has the right to life. (Jeder hat das Recht auf Leben.)

Specifically, the word "Jeder" (translated "everyone") in Article 2 of the Basic Law neither denotes nor connotes an inclusion of unborn human life to any greater or lesser extent than does the word "person" in the 5th and 14th Amendments to the United States Constitution. The word "Leben" (translated "life") in German means exactly what "life" means in English, thus here again the constitutional provisions are equally vague and indefinite with respect to the question at hand.

———*Other Pertinent Provisions*

Other pertinent provisions of the respective constitutions are:

U.S. Constitution:

Right of Privacy

(Not explicitly mentioned in the Constitution; Mr. Justice Blackmun, however, wrote in *Roe v. Wade*: This right of privacy, whether it be found in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is. . . .)⁴⁴

Basic Law:

Development of One's Personality

Article 2, Paragraph 1.

Everyone has the right to the free development of his personality to the extent he does not infringe upon the rights of others and does not violate the constitutional order or the moral law.

44. 410 U.S. at 153; the fourteenth amendment is set forth in its pertinent parts *supra*.

The Statutory Provisions Challenged

In 1857 the State of Texas enacted its abortion statute. It provided that the procurement of an abortion was a criminal act unless performed to save the life of the mother.⁴⁵

Over a century later, in 1968, the State of Georgia repealed an abortion statute similar to the 1857 Texas abortion statute and in its place enacted a statute which decriminalized abortions when performed by a physician to preserve the life and health of the mother, to prevent the birth of a child with grave and irremedial mental or physical defects, or if the pregnancy resulted from a forcible or statutory rape.⁴⁶ The constitutionality of these statutes was challenged before the Supreme Court in *Roe v. Wade* (Texas case) and in its companion case *Doe v. Bolton* (Georgia case).

The history of abortion legislation in Germany is set forth in some detail in the Part A (I) of the translation.⁴⁷ Prior to the enactment of the reform statute (Fifth Statute to Reform the Penal Law of June 18, 1974) the criminal abortion laws in Germany provided:

Section 218 (Abortion).⁴⁸

(1) A woman who kills her child *en ventre sa mere* or who permits the abortion by another will be punished by imprisonment up to five years.

(2) A person (other than the pregnant woman) who kills the child *en ventre sa mere* of the pregnant woman will be imprisoned up to five years; in particularly aggravated cases the punishment is imprisonment from one year to ten years.

(3) The attempt is punishable.

(4) A person who provides a pregnant woman a means or an object to kill the child *en ventre sa mere* will be punished by imprisonment up to five years; in particularly aggravated cases, by imprisonment from one to ten years.

In spite of the broad coverage of the statutory language, interruptions of pregnancy were by judicial decision or statute considered to be legally justifiable in a large part of Germany if performed to save the life and health of the mother.⁴⁹ In other words, a medically indicated abortion was generally recognized as a non-criminal act. Other indications, *i.e.*, eugenic, ethical and social, including economic, were not recognized as legally justifiable.⁵⁰

45. *Roe v. Wade*, 410 U.S. at 117, 118 (1973).

46. *Doe v. Bolton*, 410 U.S. at 183 (1973).

47. *Translation* at 610 *et seq.*

48. SCHÖNKE - SCHRÖDER, STRAFGESETZBUCH: KOMMENTAR 1151 (17th ed. 1974).

49. *Translation* at 612. See also SCHÖNKE - SCHRÖDER, note 48 *supra*, at 1154 *et seq.*

50. *Id.* SCHÖNKE - SCHRÖDER at 1156.

The new abortion statute,⁵¹ Sections 218, 218a, 218b and 218c of the Fifth Statute to Reform the Penal Law (often referred to as the "reform statute"), changed the old law in several notable ways. First, no abortion performed prior to the 13th day following conception would be punished.⁵² Second, abortions performed during the first twelve weeks of pregnancy would not be punishable if performed by a physician with consent of the pregnant woman.⁵³ Third, abortions performed subsequent to twelve weeks after conception are not punishable if performed by a physician with consent of the woman and medical or eugenic indications are present.⁵⁴ Fourth, before any abortion may be legally performed, the pregnant woman must undergo counseling.⁵⁵

On June 20, 1974, the government of the Federal State of Baden-Württemberg petitioned the Federal Constitutional Court for a provisional order enjoining the effect of the abortion provisions of the Fifth Statute to Reform the Penal Law until a decision could be made by the Federal Constitutional Court on the compatibility of this provision with the Constitution. Although the petition of Baden-Württemberg appears to have been directed at the entire reform statute, the Constitutional Court noted that the provision against which the constitutional questions were particularly directed was Section 218a, which permitted abortions during the first twelve weeks after conception on request of the woman following counseling. The Court allowed the petition⁵⁶ to the extent that the effect of Section 218a (the "term solution" provision) was postponed until after the Court's final decision on the merits. On the other hand, the Court ordered that the "indications" provision, Section 218b, cover the entire pregnancy. The Court also, in its provisional order, added an "ethical" indication to Section 218b.⁵⁷

The Public Debate About Abortion

As is indicated in both the American and German opinions, the abortion question was being fiercely debated in the United States and in Germany. In the United States at the time the abortion cases were argued in the Supreme Court the wisdom and

51. Set forth in *Translation* at 611 *et seq.*

52. Section 218(1) of the Fifth Statute to Reform the Penal Law. See *Translation* at 611.

53. § 218a in *Translation* at 611.

54. § 218b in *Translation* at 611.

55. § 218c in *Translation* at 612.

56. Decision of the First Senate of the Federal Constitutional Court of June 21, 1974, Nr. 21; reference is made to this "stay" in *Translation* at 622.

57. To be discussed in *Introduction* at 586 *et seq.*

necessity of prosecuting abortion was being debated in every session of every state legislature; there was no uniformity of criminal abortion legislation among the states; there were large numbers of illegal abortions, the exact extent of which was unknown; there was considerable abortion "tourism," i.e., trips to states which allowed abortion on demand for the purpose of obtaining an abortion. After the decision, Mr. Justice Blackmun, the author of the Court's opinion in *Roe v. Wade*, was met with unfriendly, hostile demonstrations by pro-life forces nearly everywhere he went in the United States.

In Germany, the political situation was similar. During the 1960s numerous so-called "moral offenses" were punished under the German Penal Code; however, there has been a gradual depenalization of these offenses. Abortion, though, remained punishable. In Germany the problem of abortion was continually and hotly debated; there were large numbers of illegal abortions, the exact extent of which was unknown; there was considerable abortion "tourism." At the time the President of the Court Dr. Ernst Benda publicly read the German decision, the Federal Constitutional Court building in Karlsruhe was heavily guarded; over 1,000 pro-abortion demonstrators staged a protest march in the city center; in other parts of Germany thousands demonstrated, both for and against the decision.⁵⁸

Reaction to the Decisions

Although the decisions on the merits are on opposite ends of the spectrum, both Courts have been criticized for being "activist" and for failing to exercise "judicial self-restraint." In the United States, the *Roe v. Wade* decision has been compared with *New York v. Lochner*,⁵⁹ a case which has come to signify the substitution of judicial wisdom for legislative wisdom as opposed to applying the operative constitutional provisions and which has been repudiated on a regular basis by subsequent Supreme Courts. The gist of the criticism is that the Supreme Court indicated no constitutional standards which could justify the decision, simply ignored the requirements of judicial restraint, and legislated.⁶⁰

58. N.Y. Times, Feb. 26, 1975, at 1. See also DER SPIEGEL, (No. 10), 1975, at 62 *et seq.*

59. *New York v. Lochner*, 198 U.S. 45 (1905).

60. See, e.g., the dissenting opinions of Mr. Justice White in *Doe v. Bolton* and Rehnquist in *Roe v. Wade*. Mr. Justice White wrote:

As an exercise of raw judicial power, the Court perhaps has the authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.
410 U.S. at 222.

Mr. Justice Rehnquist wrote:

In Germany, the Federal Constitutional Court has also been criticized for failing to exercise judicial self-restraint (*Selbstbeschränkung*).⁶¹

The fact that both decisions ruled legislative enactments unconstitutional explains these criticisms in part; in addition, the two Courts affirmatively set guidelines for future legislative action. Nonetheless, the two Courts did reach different results on the merits.

The Decisions

A Brief Summary of the Holdings

—Roe v. Wade

The threshold question presented by *Roe v. Wade* was whether the concept of "person" in the 14th Amendment includes unborn human life. This was clearly indicated by Mr. Justice Blackmun's remark in *Roe* that "[i]f this suggestion [that the fetus is a 'person' within the language and meaning of the 14th Amendment] is established, the appellant's [Jane Roe's] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."⁶² The Supreme Court concluded that the concept of "person" has only postnatal application.⁶³ It thus followed that the only constitutional rights involved in the abortion controversy were those possibly belonging to the woman or perhaps the physician.

With respect to the constitutional rights of the woman, the Supreme Court concluded that the 14th Amendment includes the "right of privacy," the existence of which had been previously established, albeit in a generally undefined manner, and that this right is "broad enough to encompass a woman's decision whether

The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the state may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

410 U.S. at 174. See also Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920 (1973); Tribe, *The Supreme Court: 1972 Term*, 87 HARV. L. REV. 1 (1973).

61. In the German opinion, the dissenting Judges Rupp-von Brünneck and Simon wrote:

The authority of the Federal Constitutional Court to annul the decisions of the legislature demands sparing use, if an imbalance between constitutional organs is to be avoided.

Translation at 664; and

Without prejudice to the legitimate authority of those entitled to petition the Court to resolve constitutional doubt in this manner, the Federal Constitutional Court is unwarily falling in this case into the position of a political arbitration board to be used for the choice between competing legislative projects.

Translation at 666. See also DER SPIEGEL, (No. 10), 1975, at 62-76.

62. 410 U.S. at 156-57.

63. *Id.* at 157.

or not to terminate her pregnancy."⁶⁴ Abortion thus became, for all practical purposes, a fundamental right guaranteed by the Constitution of the United States.

The right to terminate a pregnancy, however, "is not unqualified and must be considered against important state interests in regulation," said the Supreme Court.⁶⁵ The Supreme Court expressly recognized two important state interests which could justify a limitation of the right to decide to have an abortion. According to the Court, "the state does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and . . . it has still *another* important interest in protecting the potentiality of human life."⁶⁶ Thus, the right to decide to have an abortion is subject to limitation by "compelling state interests" and any "legislative enactments" protecting these interests "must be narrowly drawn to express only the legitimate state interests at stake."⁶⁷

Since "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth,"⁶⁸ the state may not proscribe abortion in the name of protecting the "state's interest in the health of the mother." However, "after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."⁶⁹ The "compelling point" for protecting this interest was thus "fixed" at the end of the first trimester.

Concerning "the State's important and legitimate interest in potential life, the 'compelling' point is viability. This is so," said the Supreme Court, "because the fetus then presumably has the capability of meaningful life outside the mother's womb."⁷⁰ The Supreme Court then concluded that the state can, if it so desires, protect fetal life after viability by proscribing abortion during that period, except when necessary to preserve the life or health of the mother.⁷¹

Reduced to its barest essentials, the Supreme Court in *Roe v. Wade* held:

1. The unborn is not a person under the Constitution and thus is not entitled to any constitutional protection for its own sake;
2. The mother's right to privacy includes the abortion decision;

64. *Id.* at 153.

65. *Id.* at 154.

66. *Id.* at 162.

67. *Id.* at 155.

68. *Id.* at 163.

69. *Id.*

70. *Id.*

71. *Id.* at 165.

3. This right to decide to have an abortion is not absolute but can be limited by important state interests, among which are:
 - a. the state's interest in protecting maternal health;
 - b. the state's interest in protecting prenatal life after viability, such state interest being limited by the woman's right to abort a viable fetus if her life or health are endangered by a continuation of the pregnancy.
4. Any state statute which restricts abortions is unconstitutional unless it reasonably relates to the protection of the above important state interests.

———*The German Abortion Decision*

The threshold question presented to the Federal Constitutional Court was also whether prenatal life was entitled to protection under the Basic Law. In the words of the Constitutional Court: "The gravity and seriousness of the constitutional question posed becomes clear, if it is considered that what is involved here is the protection of human life, one of the central values of every legal order."⁷² Concerning the constitutional status of prenatal life, the Constitutional Court concluded: "‘Everyone’ [Jeder] in the sense of Article 2, Paragraph 2, Sentence 1, of the Basic Law is ‘everyone living;’ expressed in another way: every life possessing human individuality; ‘everyone’ also includes the yet unborn human being."⁷³ Thus, with respect to the basic issue posed in the two cases to be compared, the United States Supreme Court and the Federal Constitutional Court reached different conclusions.

Once the Constitutional Court resolved this initial problem concerning the constitutional status of unborn human life, other issues arose, the first of which was whether this constitutional provision protects only against encroachments by the state or whether, in addition, it imposes an affirmative duty upon the state to protect unborn life from attacks by others.⁷⁴ The Constitutional Court decided that "[t]he obligation of the state to take the life developing itself under protection exists, as a matter

72. *Translation* at 637.

73. *Id.* at 638; the dissenting judges agreed with the majority on this point. They wrote:

The life of each individual human being is self-evidently a central value of the legal order. It is uncontested that the constitutional duty to protect this life also includes its preliminary stages before birth.

Id. at 663.

74. *Id.* at 642.

of principle, even against the mother,"⁷⁵ and that this duty exists throughout the pregnancy.⁷⁶

The most vigorously debated issue in the opinion and the issue over which the Court split flowed from the Constitutional Court's initial conclusion and concerned how the state fulfills its affirmative duty to protect unborn human life from others, including the mother. The government as well as the dissenting justices argued that the state could fulfill its obligation to provide protection to the unborn by "preventive" means, *i.e.*, by allowing abortions during the first twelve weeks after conception upon request following counseling and instruction, as opposed to "repressive" means, *i.e.*, penal sanctions. Moreover, the government and the dissenting justices argued that, in light of the large number of illegal abortions and "abortion tourism," the counseling and instruction would as effectively, if not more effectively, protect unborn human life. The Court concluded, however, that the counseling and instruction system provided under the new legislation did not guarantee an actual, effective protection. According to the Court, "[t]he counseling and instruction of the pregnant woman provided under Section 218c, Paragraph 1, of the Penal Code cannot, considered by itself, be viewed as suitable to effectuate a continuation of pregnancy."⁷⁷

It thus followed that Section 218a of the Penal Code, which allowed abortion on request of the woman following counseling during the first twelve weeks of pregnancy, was unconstitutional.

Reduced to its barest essentials the Federal Constitutional Court held:

1. Unborn human life is an independent legal value which enjoys protection under Article 2 of the Basic Law;
2. The state has a duty to protect unborn human life against attacks from the state and from others, including the mother;
3. This duty to protect exists throughout the pregnancy and takes precedence over any rights of the mother to self-determination;
4. The legislature may protect the unborn by non-penal law means; the protection must however be effective;
5. The reformed Section 218a does not provide actual, effective protection to unborn human life and is thus unconstitutional.

75. *Id.*; the dissenting judges agreed with the majority on this point as well.

76. *Id.* at 643.

77. *Id.* at 657.

Several Points for Comparison

—*The Courts' Sense of the Complexity of the Issues*

Both the Supreme Court of the United States and the Federal Constitutional Court of Western Germany clearly indicated their recognition of the great significance and complexity of the constitutional problems involved in the abortion question in several passages in their respective opinions on the compatibility of the abortion legislation with the constitutions of their respective countries. In the words of Mr. Justice Blackmun, writing for the Supreme Court in the 1973 abortion case:

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.⁷⁸

The Federal Constitutional Court made a similar comment in its 1975 decision, thus clearly indicating its awareness of the complexity of the problem:

In fact, this phenomenon of social life [interruption of pregnancy] raises manifold problems of a biological, especially human-genetic, anthropological, medical, psychological, social, social-political, and not least of an ethical and moral-theological nature, which touch upon the fundamental questions of human existence.⁷⁹

Both Courts, however, felt the necessity of emphasizing that their task was essentially legal. As Mr. Justice Blackmun noted for the Supreme Court:

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and predilection.⁸⁰

The Federal Constitutional Court, at the beginning of its analysis of the problem, reflected a similar attitude:

In construing Article 2, Paragraph 2, Sentence 1, of the Basic Law one should begin with its language: Everyone has the right to life . . .⁸¹

and

The decision regarding the standards and limits of legislative

78. *Roe v. Wade*, 410 U.S. at 116.

79. *Translation* at 637.

80. *Roe v. Wade*, 410 U.S. at 116.

81. *Translation* at 638.

freedom of decision demands a total view of the constitutional norms and the hierarchy of values contained therein.⁸²

—The Courts and the Relevancy of Religion

In the courts of the United States as well as in Germany the approved mode of thinking is juridical, not theological; and as indicated in the above cited quotations, both the Supreme Court and the Federal Constitutional Court made an effort in their respective abortion decisions to emphasize this point.

The United States Supreme Court acknowledged that "religious training" is "likely to influence and to color one's thinking and conclusions about abortion,"⁸³ but gave assurance that the issue would be resolved by "constitutional measurement."⁸⁴ Nonetheless, the Court at several points in its long opinion made casual references to religion.⁸⁵ The first amendment to the U.S. Constitution provides, of course, that "Congress shall make no law respecting an establishment of religion" and this provision has been generally construed to require a "separation of church and state" in the affairs of state, including judicial decision making.

Although the Basic Law has a religious freedom clause,⁸⁶ there is no "establishment clause" in the sense of that of the First Amendment to the U.S. Constitution. Nevertheless, there is no indication that religious thinking influenced the German Court in its decision making. Like the U.S. Supreme Court, the Federal Constitutional Court expressed its awareness that the abortion issue raises problems of a "moral-theological nature,"⁸⁷ but emphasized that the statute in question "can be examined by the Constitutional Court only from the viewpoint of whether it is compatible with the Basic Law, which is the highest valid law in the Federal Republic."⁸⁸ Unlike the Supreme Court's

82. *Id.* at 637.

83. *Roe v. Wade*, 410 U.S. at 116.

84. *Id.*

85. *E.g.*, in *Roe v. Wade* the Supreme Court remarked that "[a]ncient religion did not bar abortion" 410 U.S. at 130; that "[t]he emerging teachings of Christianity were in agreement with the Pythagorean ethic [from which the anti-abortion Hippocratic Oath 'echoes']" 410 U.S. at 132; that "[t]he [view that life begins at the moment of conception] is now, of course, the official belief of the Catholic Church" 410 U.S. at 161. The Court also noted writings from St. Augustine. 410 U.S. at 133 n. 22.

86. Article 4 of the Basic Law provides as follows:

- (1) The freedom of belief, of conscience and the freedom of religious and philosophical [weltanschaulich] creeds are inviolable.
- (2) The peaceful exercise of religion is guaranteed.
- (3)

87. *Translation* at 637.

88. *Id.*

opinion, the German opinion in its reasoning in support of the decision made no reference to theological thinking.

The Supreme Court in *Roe*, to the extent that its opinion is contrary to the "official belief of the Catholic Church,"⁸⁹ has been immune to the charge of thinking theologically rather than legally. The question of theological influence has, however, been raised with respect to the German decision. As a careful reading of the German opinion will reveal, the Court's reasoning is based upon legal theory, the preparatory work to the Basic Law, and the Court's sense of socio-political realities of modern Germany. It is also of interest to note that of the six judges on the majority, three are Protestant and three are Catholic.⁹⁰ The President of the Court Dr. Ernst Benda, who voted with the majority, is Protestant.⁹¹ Both of the dissenters are Protestant.⁹² It thus appears that both officially (in the opinion itself) and unofficially (the religious backgrounds of the judges) there is little reason to believe that theological thinking was a factor in the German decision.

—The Main Issue on the Merits: The Unborn and the Constitution

Despite the fact that both the American and German opinions dealt with the constitutionality of criminal abortion statutes at length, the only issue which they actually had in common was the status of the unborn under the respective constitutions. Both courts recognized this to be the central issue in the case. Mr. Justice Blackmun wrote that if the fetus is a person within the language and meaning of the 14th Amendment, the appellant's case collapses, "for the fetus' right to life is than guaranteed specifically by the Amendment."⁹³ The Federal Constitutional Court began its opinion on the merits with a discussion of this issue.⁹⁴ Although an in-depth study and comparison of the manner in which the two courts handled this issue is left to the reader, several points are worth mentioning.

The Supreme Court did not feel adequate to "resolve the difficult question of when life begins."⁹⁵ It wrote:

When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus,

89. 410 U.S. at 161.

90. The source of information on the religious backgrounds of the justices on the German Federal Constitutional Court is Professor Donald P. Kommers of the University of Notre Dame. See note 43 *supra*.

91. HANDBUCH DES DEUTSCHEN BUNDESTAGES, 5. *Wahlperiode*, published by the German Bundestag, Biographical Part at 34.

92. See note 90 *supra*.

93. *Roe v. Wade*, 410 U.S. at 157.

94. *Translation* at 637 *et seq.*

95. *Roe v. Wade*, 410 U.S. at 159.

the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.⁹⁶

The Supreme Court then briefly reviewed the views of Jewish, Protestant and Catholic faiths as well as Aristotelian theories and concluded: "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."⁹⁷

The Supreme Court's hesitancy on this issue is matched only by the Federal Constitutional Court's certainty. The German Court wrote:

Life, in the sense of historical existence of a human individual, exists according to definite biological-physiological knowledge, in any case, from the 14th day after conception (nidation, individuation) . . . The process of development which has begun at that point is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of the human life. The process does not end even with birth; the phenomena of consciousness which are specific to the human personality, for example, appear for the first time after birth.⁹⁸

In construing the constitutional provisions themselves, the two courts approached the problem from different directions. After noting that "person" is not defined in the Constitution⁹⁹ the Supreme Court reviewed in one paragraph the references to "person" in other contexts in the Constitution. The Supreme Court then wrote that "in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application."¹⁰⁰ The Supreme Court then concluded that "all this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person' . . . does not include the unborn."¹⁰¹

The Federal Constitutional Court, on the other hand, focused its attention on the term "everyone" (Jeder) in the constitutional provision "[e]veryone has the right to life"¹⁰²

96. *Id.*

97. *Id.* at 162.

98. *Translation* at 638. It is noteworthy that the initial provision of the reform abortion statute, Section 218(1), by inference provides that no abortions performed prior to the "13th day following conception" shall be punished. *Id.* at 611. The constitutionality of this provision was not challenged by either the 193 members of the Federal Parliament or by any of the Federal States.

99. *Roe v. Wade*, 410 U.S. at 157.

100. *Id.*

101. *Id.* at 158. The fourteenth amendment, of course, did not exist during the major portion of the 19th century, having been ratified in 1868, a time when nearly all states had a criminal abortion statute.

102. First sentence of art. II(2) of the Basic Law.

. . . the protection of Article 2, Paragraph 2, Sentence 1, of the Basic Law cannot be limited either to the 'completed' human being after birth nor to the child about to be born which is independently capable of living. The right to life is guaranteed to everyone who 'lives;' no distinction can be made here between the various stages of life developing itself before birth, or between unborn and born life. Everyone in the sense of Article 2, Paragraph 2, Sentence 1, of the Basic Law is 'everyone living;' expressed in another way: every life possessing human individuality; 'everyone' also includes the yet unborn human being.¹⁰³

Unlike the legislative history of the U.S. Constitution which, as far as can be determined, made no mention of the scope of constitutionality as it relates to the prenatal stage of human existence, the legislative history of the Basic Law shows that the drafters discussed the problem of the constitutional status of the unborn.¹⁰⁴

Thus the legislative history of the Basic Law gave support to the conclusion of the Federal Constitutional Court. After considerable debate and parliamentary maneuvering, it was concluded:

With the guaranteeing of the right to life, germinating life should also be protected. The motions introduced by the German Party in the Main Committee to attach a particular sentence about the protection of germinating life did not attain a majority only because, according to the view prevailing in the Committee, the value to be protected was already secured through the present version.¹⁰⁵

The Federal Constitutional Court also noted that the principles of the Basic Law are to "be understood only in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism."¹⁰⁶

The Supreme Court concluded that "person" in the 14th Amendment has no prenatal application; the Federal Constitutional Court concluded that "everyone" in Article 2, Paragraph 2, has prenatal application. Once this basic decision was made, other issues arose. In *Roe v. Wade*, the next issue to be resolved was the scope of the right to privacy; in the German case, the next issue was whether the state has an affirmative duty under the Constitution to protect the unborn from attacks by third parties. Thus, once the basic decision was made, the two courts were faced with different legal problems.

—The Right to Privacy

Having concluded that the unborn has no rights under the

103. *Translation* at 638.

104. *Id.* at 639 *et seq.*

105. *Id.* at 640.

106. *Id.* at 662.

U.S. Constitution, the Supreme Court considered the other possible constitutional right involved, the right to privacy, and concluded that this right was "broad enough to cover the abortion decision."¹⁰⁷ It deserves mention that the German Government, in defense of Section 218a of the German Penal Code, made an argument similar to the right to privacy argument which prevailed before the Supreme Court. It argued that "Article 6, Paragraph 1, of the Basic Law is to be interpreted in the light of the developing human right of family planning."¹⁰⁸ The Federal Constitutional Court considered this argument in its reasoning, but concluded:

The right of the woman to the free development of her personality, which has as its content the freedom of behavior in a comprehensive sense, and accordingly embraces the personal responsibility of the woman to decide against parenthood and responsibilities flowing from it, can also, it is true, likewise demand recognition and protection. This right, however, is not guaranteed without limits—the rights of others, the constitutional order, and the moral law limit it. *A priori*, this right can never include the authorization to intrude upon the protected sphere of right of another without justifying reason or much less destroy that sphere along with life itself¹⁰⁹

Later, the Court noted that ". . . the legal order may not make the woman's right of self-determination the sole guideline of its rule-making."¹¹⁰

—The Vesting of the Civil Right to Life

Perhaps the single most important legal question in the abortion debate concerns the moment at which the civil right to life vests and becomes a legally protectable interest. As the summaries of decisions and the discussion of the main issue on the merits have indicated,¹¹¹ the Supreme Court and the Federal Constitutional Court came to very different conclusions on this point.

After reviewing several instances in which the term "person" is used in the U.S. Constitution, the Supreme Court wrote: "[N]one [of the instances] indicates, with any assurance, that it has any possible pre-natal application."¹¹² The Supreme Court then referred to its earlier discussion of 19th Century abortion practices and concluded that "the word" person, as used in

107. *Roe v. Wade*, 410 U.S. at 155.

108. *Translation* at 634.

109. *Id.* at 643.

110. *Id.* at 644.

111. See text at 574 *supra* for discussion of the American decision; text at 576 *supra* for discussion of the German decision; and text at 580 *supra* for discussion of the main issue on the merits.

112. 410 U.S. at 157.

the Fourteenth Amendment, does not include the unborn.¹¹³ Of some interest, however, is that the Supreme Court did not indicate when the civil right to life vests. It only stated that it does not vest before birth.

Although the Supreme Court in *Roe v. Wade* did give constitutional significance to the medical concept of "viability"¹¹⁴ because, according to the Court, "the fetus then presumably has the capability of meaningful life outside the mother's womb,"¹¹⁵ this significance is related to the state's constitutional authority to protect its own interests; it apparently has nothing to do with the vesting of the civil right to life. The Supreme Court only held that the state "may go so far as to proscribe abortion," "if [it] is interested in protecting fetal life after viability."¹¹⁶ Viability then is the point at which a state may generally protect fetal life,¹¹⁷ if it wishes to do so. Implicitly, however, there is under *Roe* no constitutional duty to protect a viable fetus, despite the Court's finding that a viable fetus is "capable of [having a] meaningful life. . .". The reason for this is that under the *Roe* decision a viable fetus has no civil right of its own and for its own sake which is recognized by law to protect its life.

The Federal Constitutional Court, on the other hand, wrote:

Life, in the sense of historical existence of a human individual, exists according to definite biological-physiological knowledge, *in any case*, from the 14th day after conception (nidation, individuation). . . . The right to life is guaranteed to everyone who 'lives;' no distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life.¹¹⁸

One could conclude that the civil right to life under the Basic Law vests, according to the Federal Constitutional Court, at implantation. Of interest here is the Constitutional Court's use of the phrase "in any case." Does the Court mean that civil right to life vests at nidation? Or is the Court implying that the civil right to life may vest at an even earlier moment in the gestational process? Since the Federal Constitutional Court was not called upon to rule on this particular point, one can only speculate on the answer to this question under the Basic Law. The reason for this uncertainty is that the constitutionality of Section 218(1) of the Fifth Statute to Reform the Penal Law, which

113. *Id.* at 158.

114. The Court defined "viability" as "potentially able to live outside the mother's womb, albeit with artificial aid." *Id.* at 160.

115. *Id.* at 163.

116. *Id.*

117. Provided the life and health of the mother is not endangered by a continuation of the pregnancy. *Id.* at 165.

118. *Translation* at 638 (emphasis added).

indirectly provides that abortions performed prior to the 14th day following conception are not punishable,¹¹⁹ was not challenged in this litigation. Consequently Section 218a, which under the reform abortion statute was applicable beginning the 14th day after conception, was the only provision before the Court. One can thus only conclude that the civil right to life vests *at the latest* at nidation (14 days after conception) under the Basic Law.

—*Judicial Decision Making and the Employment of Non-Legal Material Dehors Record*

Of particular interest is the nature and source of information which the two Courts used to support their respective conclusions. Both Courts, of course, relied upon typical legal materials: the constitutional and statutory provisions directly involved, their legislative history, previous judicial decisions, etc. The Supreme Court, though, supported its abortion decision in part with essentially non-legal material which had neither been made part of the trial record nor subjected to the normal fact finding process. For example, the Supreme Court discussed Hippocrates and the influence of the Pythagorean thinking upon ancient Greece and on the early and later teachings of Christianity;¹²⁰ referred to Christian theology,¹²¹ the attitudes of Jewish faith, the Protestant community, the "official belief of the Catholic Church," the Aristotelian theory of "mediate animation" and its influence in the Middle Ages, during the Renaissance and on the Catholic Church.¹²² In addition the Court cited the writings of St. Augustine, Gratian and numerous modern writers on ancient attitudes about abortion.¹²³ The Supreme Court also reviewed the "position of the American Medical Association,"¹²⁴ the "position of the American Public Health Association"¹²⁵ and the "position of the American Bar Association."¹²⁶ Moreover, the Supreme Court based its conclusion that the abortion decision prior to the end of the first trimester must be left to the woman and her physician upon its understanding of the significance of certain medical statistics obtained from articles about abortion and public health in England, Wales, Japan, Czechoslovakia, Hungary and Eastern Europe generally.¹²⁷

119. *Id.* at 611.

120. 410 U.S. at 132.

121. *Id.* at 134.

122. *Id.* at 160-61.

123. *Id.* at 133 n.22.

124. *Id.* at 141.

125. *Id.* at 144.

126. *Id.* at 146.

127. *Id.* at 149 n.44.

In support of its decision, the Federal Constitutional Court relied almost completely on legal materials, i.e., the language of the pertinent constitutional and statutory provisions,¹²⁸ their legislative history,¹²⁹ findings about the nature of fetal life from statements made by experts before legislative hearing bodies,¹³⁰ prior Federal Constitutional Court decisions,¹³¹ and legal literature.¹³² The only essentially non-legal materials used by the Court in its reasoning was a report from England. The Court cited this report in determining how effective the proposed counseling centers would be.¹³³ The Constitutional Court also briefly mentioned the relationship between the historical experiences with National Socialism and the principles underlying the Basic Law.¹³⁴

—*The Courts and the Arguments of the Parties*

In its opinion the Federal Constitutional Court devoted two sections¹³⁵ to reciting and paraphrasing the arguments and reasoning of the parties to the litigation.¹³⁶ In contrast, the United States Supreme Court, in its opinion, did not, at least not systematically, recite, summarize or paraphrase the arguments of the parties on the essential points in the litigation. Although in former times the arguments of counsel were frequently given at the beginning of Supreme Court opinions, this practice has been largely abandoned.

Several Comments on the German Abortion Decision

—*The Basic Law, the Legislature, an Indications Solution and "Exactability"*

Although the constitutionality of an indications solution was not directly raised by the petitioners (the 193 dissenting members of the Federal Parliament and the several Federal States), the Constitutional Court nevertheless reflected its inclination to uphold an indications solution in its disposition of the case. The petitioners asked only for a constitutional review of Section 218a

128. *Translation* at 638.

129. *Id.* at 639 *et seq.*

130. *Id.* at 638.

131. *Id.*, *e.g.*, at 641-44, 655.

132. *Id.* at 651.

133. *Id.* at 659.

134. *Id.* at 637-38, 662.

135. *Id.* at 622-27 for the arguments and reasoning of the petitioning members of the German Parliament and the petitioning state governments; and *id.* at 627-34 for the arguments of the Federal Parliament and the Federal Government.

136. *Preface* at 555 for the translation problems involved in this part of the opinion.

of the reform statute,¹³⁷ which allowed abortion during the first twelve weeks of pregnancy on request of the woman following a session of counseling required under Section 218c of the statute. Consequently, the question of the constitutionality of the "indications" provision in the reform abortion statute (Section 218b), which permits abortions for medical reasons and for eugenic reasons,¹³⁸ was not directly before the Constitutional Court. Nonetheless the Federal Constitutional Court, in its disposition of the case, ordered that Section 218b, which was originally intended to apply only after the expiration of twelve weeks after conception, be applied "during the first twelve weeks after conception."¹³⁹ Furthermore, the Court appears to have created, in paragraph 2 of its holding, an additional indication for ethical reasons, an indication not included in Section 218b of the reform statute.¹⁴⁰ One can only conclude that if the constitutionality of Section 218b would have been directly challenged, the Federal Constitutional Court would have found it to be constitutional. Considerable dicta in the Court's opinion also support this conclusion.¹⁴¹

This aspect of the Constitutional Court's disposition of the case deserves comment in light of the position which the Court took with respect to the right to life. The Federal Constitutional Court concluded not only that "Everyone" (in the sense of Article 2, Paragraph 2, Sentence 1, of the Basic Law) also includes the yet unborn human being,¹⁴² but also wrote that:

The degree of seriousness with which the state must take its obligation to protect increases as the rank of the legal value in question increases in importance within the order of values of the Basic Law. Human life represents, within the order of the Basic Law, an ultimate value, . . . it is the living foundation of human dignity and the prerequisite for all other fundamental rights.¹⁴³

137. *Translation* at 622.

138. *Id.* at 611-12.

139. *Id.* at 610; the Federal Constitutional Court's authority for issuing orders of this nature is derived from Section 35 of the Statute of the Federal Constitutional Court which provides: "The Federal Constitutional Court can in its decision determine who executes it; it can also regulate, in individual cases, the form and manner of execution." BVerfGG § 35 (C.H. Beck 1968).

140. *Id.*; the reason for this, it is suggested, is an assumption on the part of the Court that the legislature intended to allow abortions in the case of an ethical indication but felt it unnecessary to create a specific provision to this effect because Section 218a, which allowed abortions under all circumstances during the first twelve weeks, would resolve the problem of pregnancies caused by criminal acts. However, since Section 218a was held void, no opportunity was available for an abortion which is ethically indicated. The Court issued a similar order in its preliminary injunction, *see* decision of the First Senate of the Federal Constitutional Court of June 21, 1974, Nr. 21.

141. *See Translation* at 645-49.

142. *Id.* at 638.

143. *Id.* at 642.

Considering the high position, according to the Federal Constitutional Court, which the right to life occupies in the hierarchy of values protected by the Basic Law, the question arises concerning the compatibility of an "indications solution" with the Court's concept of the right to life as an ultimate value.

How does the Court reconcile its approval of an indications solution with the position it concedes to the unborn's right to life under the Basic Law? This question can best be answered if one bears in mind that the legislature is responsible under the Basic Law for protecting or realizing with its legislation the many values defined in the Basic Law. The first article of the Basic Law provides: "The dignity of the human being is inviolable. To respect and protect it is the duty of all the authority of the state." In theory, the basic or fundamental rights set forth in the Basic Law are derived from or are a necessary condition of the concept of the "dignity of the human being." Consequently, the state authority, including the legislature, is obligated under Article 1 of the Basic Law to "respect and protect" these rights to the extent that they are necessary to the "dignity" concept. These constitutionally protected fundamental rights are often referred to as "values," or "constitutional values" or "values recognized under the Constitution." The reason for this is the view that the drafters of the Basic Law made a "value decision" when they incorporated certain fundamental human rights in the Basic Law. In the event of a conflict, the legislature has an initial responsibility for balancing these values and for seeking a solution which is in accordance with the ordering of values of the Basic Law.¹⁴⁴ In the narrower context of this case, the primary contested issue was whether the legislature in enacting the reform abortion statute, particularly Section 218a, effectively fulfilled its constitutional duty to protect the fundamental values defined in the Basic Law, of which the right to life of the unborn is one.

The Federal Constitutional Court stated that the legislature decides, in the first instance, *how* to effectively protect unborn life.¹⁴⁵ It then wrote that the "legislature is not obligated . . . to employ the same penal measures for the protection of the unborn life as it considers required and expedient for born life."¹⁴⁶ After pointing out the realities of abortion, *i.e.*, that "abortion is an act of 'killing'" and that "the description now common, 'interruption of pregnancy,' cannot camouflage this fact,"¹⁴⁷ the Court noted that "the legal condemnation of abor-

144. *Id.* at 646.

145. *Id.* at 644.

146. *Id.* at 645.

147. *Id.*

tion required by the Basic Law" can be expressed "in ways other than the threat of punishment."¹⁴⁸

The Court next recognized the "incisive effects of a pregnancy on the physical and emotional condition of the woman"¹⁴⁹ as well as the fact that "in individual cases, difficult, even life threatening situations of conflict may arise."¹⁵⁰ The Court then wrote:

The right to life of the unborn can lead to a burdening of the woman which essentially goes beyond that normally associated with pregnancy. The result is the question of *exactability*, or, in other words, the question of whether the state, even in such cases, may compel the bearing of the child to term with the means of the penal law. Respect for the unborn life and the right of the woman not to be compelled to sacrifice the values in her own life in excess of an *exactable* measure in the interest of respecting this legal value are in conflict with each other.¹⁵¹

What the Federal Constitutional Court appears to be saying is that the legislature does not have a duty under the Basic Law to compel or to require a pregnant woman to continue her pregnancy if, under the circumstances, a continuation of the pregnancy would not be "exactable" from her. Thus, to determine the compatibility of an "indications solution" with the Basic Law, one must first explore the concept of "exactability" ("Zumutbarkeit" in German).

As indicated in the *Preface*,¹⁵² difficulty was encountered in translating the adjective "zumutbar" and its noun form "Zumutbarkeit." Although "zumutbar" is prominent in the language of the reform statute, the statute does not provide a definition of the term. When the Federal Constitutional Court used the term, it did so without exact definition. Part of the difficulty encountered in translating "zumutbar" arose from a lack of certainty about the exact sense in which the statute and the Constitutional Court used the term. "Exactable," the term used in the translation, implies the existence of some standard to which conduct will be "exacted" or to which conformity will be demanded. This use also seems to reflect the lay meaning of the idea of "zumutbar." In the context of the abortion decision, "exactability" appears to be a judicially developed constitutional criterion by which the legislature may decide whether it has a duty to condemn abortions with some form of legal sanction and thus compel or require a continuation of pregnancy.

The Federal Constitutional Court wrote:

A continuation of the pregnancy appears to be non-exactable

148. *Id.* at 646.

149. *Id.* at 647.

150. *Id.*

151. *Id.* (emphasis added).

152. *Preface* at 552 *et seq.*

especially when it is proven that the interruption is required 'to avert' from the pregnant woman 'a danger for her life or danger of a grave impairment of her condition of health'¹⁵³

The Court explained why the continuation of pregnancy would be "non-exactable" under this circumstance by writing: "In this case her own 'right to life and bodily inviolability' (Article 2, Paragraph 2, Sentence 1, of the Basic Law) is at stake, the sacrifice of which cannot be expected of her for the unborn life."¹⁵⁴ For this medical indication, the Federal Constitutional Court found constitutional support. This suggests that the standard for determining "exactability" or "non-exactability" is to be found in the Basic Law itself.

With respect to other indications (eugenic, ethical, and social) the Court wrote:

The legislature has a free hand to leave the interruption of pregnancy free of punishment in the case of other extraordinary burdens for the pregnant woman, which, from the point of view of non-exactability, are as weighty as those referred to in Section 218b, No. 1. In this category can be counted, especially, the cases of the eugenic . . . ethical (criminological), and of social or emergency indication. . . .¹⁵⁵

According to the Constitutional Court, in the case of these other indications,

another interest equally worthy of protection, *from the standpoint of the Constitution*, asserts its validity with such urgency that the state's legal order cannot require that the pregnant woman must, under all circumstances, concede precedence to the right of the unborn.¹⁵⁶

Here again the Court found the standard for determining when the carrying of the child to term is "exactable" and when it is not in the Basic Law itself. It can thus be concluded that "non-exactable" cases are those in which an indication is present which reflects an explicit or implicit value recognized under the Basic Law. In such a case, a conflict exists between two constitutionally recognized values—the unborn's constitutional right to life and a constitutional right of the woman.

If the legislature is to fulfill its duties under the Basic Law, it must balance and accommodate the conflicting values. How this is done is, in the first instance, a matter for legislative judgment.¹⁵⁷

If, however, the reasons for which the woman desires an abortion are not reflections of an explicit or implicit value recognized under the Basic Law, the continuation of the pregnancy

153. *Translation* at 648.

154. *Id.*

155. *Id.*

156. *Id.* (emphasis added).

157. *Id.* at 644.

is "exactable." In such a case, there are no conflicting constitutional values for the legislature to balance. Thus, according to the Court, "the interruption of pregnancy remains a wrong deserving punishment."¹⁵⁸

The Constitutional Court seems to say that the unborn's right to life under the Basic Law exists whether or not an indication recognizable under the constitution is present.¹⁵⁹ If this be correct, it would appear that an abortion even in a "non-exactable" (indicated) situation is violative of the constitutional right to life of the unborn. To the extent that constitutional rights are legal rights, one can conclude that in both "exactable" and "non-exactable" situations an abortion is an illegal act. To further conclude, however, that the performance of an abortion is also a criminal act without the act being so defined by the legislature, would be incorrect for several reasons.¹⁶⁰

158. *Id.* at 649.

159. *See id.* at 648-49, where the Court wrote that even in indicated cases "the state will also be expected to offer counseling and assistance with the goal of reminding pregnant women of the fundamental duty to respect the *right to life* of the unborn, . . ." (emphasis added). This is also a logical consequence of the Court's conclusion that "[h]uman life represents, within the order of the Basic Law, an ultimate value . . ." *Id.* at 642.

160. The designation of an act as criminal or as punishable is essentially a function of the legislature, not the Basic Law. Consequently, if the Federal Constitutional Court determines that the legislature has not fulfilled its constitutional obligation, because it failed to enact a criminal or penal provision to protect a value recognized by the Basic Law, the Court in effect is saying that the legislature "ought" to have enacted a criminal or penal provision. This, of course, is not the same as saying that the act of abortion is criminal in the positive sense, because before an act may be accurately described as "criminal" it must be defined as such by a statutory provision. Thus, the legislature alone determines whether an act is criminal, subject perhaps to the Constitutional Court's authority under Section 35 of the Statute of the Federal Constitutional Court. (*See* note 139 *supra*). In the abortion case, although the Court did resort to Section 35 in implementing its judgment, the Court did not make abortion a criminal act. (*See Translation* at 609). Thus, if the act of abortion is criminal in all circumstances, it must have become so by legislative enactment. Did the Federal Parliament in its Fifth Statute to Reform the Penal Law (reform statute) designate abortion to be a crime in all cases? The answer to this question is no. It is true that § 218(1) of the reform statute designates that all abortions "shall be punished." Hence they can be described as criminal. The excepting provisions (§§ 218a and 218b) provide however that an abortion "is not punishable [strafbar] under § 218 if, . . ." certain conditions are present. Hence, they are no longer criminal if those conditions are present. Thus, by the use of punishment, the general provision (§ 218(1)) makes the act of abortion criminal; but, by excepting abortions under certain conditions from punishment, the excepting provisions decriminalize abortions performed under those conditions. If the legislature had intended that abortions performed under § 218a and § 218b were to be "criminal" but not punishable, it would have had to designate the act as "criminal" in a manner other than by an indication that the act is subject to punishment. Under the present legislative scheme no such designation exists. One thus concludes that, although the act of abortion in all cases may involve an element of illegality in the sense mentioned in the text, neither the legislature nor the Court under Section 35 made abortions in all cases criminal. The legislature made abortions not subject to exceptions (§§ 218a and 218b) criminal by subjecting them to

In the situation in which a continuation of the pregnancy cannot be "exacted," there is a conflict between constitutionally recognized values. In such a case, the decision of the legislature to "[forego] the use of penal sanctions . . . is to be constitutionally accepted as a balancing incumbent upon the legislature."¹⁶¹ In such a case, although the unborn's legal right to life may be ultimately violated by the decision to abort, the legislative discretion will be honored and the Constitutional Court will not hold the legislature in violation of its duty to protect those values secured by the Basic Law.

The authority under the Basic Law to "forego the use of penal sanctions," however, may not be interpreted to mean that the legislature has no duties of protection to the unborn or that it may ignore its constitutional duties to the unborn. According to the German Court, if there are "genuine cases of conflict" recognizable under the Constitution, the legislature may remove them "from the protection of the penal law" without "violat[ing] its duty to protect life."¹⁶² Nonetheless, the German Court emphasized:

Even in these cases the state may not be content merely to examine, and if the occasion arises, to certify that the statutory prerequisites for an abortion free of punishment are present. Rather, the state will also be expected to offer counseling and assistance with the goal of reminding pregnant women of the fundamental duty to respect the right to life of the unborn, to encourage her to continue the pregnancy and—especially in cases of social need—to support her through practical measures of assistance.¹⁶³

In brief, the Court said that when there are conflicting constitutional values in the balance, the legislature can fulfill its duties under the Basic Law by requiring a pro-life counseling

punishment. Abortions performed under the exceptions are however not criminal. They thus cannot be analogized to a "suspended sentence" which implies a criminal act without punishment. In fact, the absence of "criminality" or another form of "legal condemnation" in "exactable" situations was a major factor in the Court's decision to declare § 218a unconstitutional. The Court wrote: "The purely theoretical announcement that the interruption of pregnancy is 'tolerated,' but not 'approved,' must remain without effect as long as no legal sanction is recognizable which clearly segregates the *justified* cases of abortion from the reprehensible." (*Translation* at 654) (emphasis added). The Court used the word "justified" in the technical sense that a "justified" act is not criminal. In summary, one could conclude that an abortion under "non-exactable" circumstances is neither a criminal act nor an illegal act under the criminal law. This, however, is not to say that an abortion in "non-exactable" circumstances does not involve a violation of the child's civil right to life under the Basic Law. The Court only concluded that the legislature, by providing counseling in "non-exactable" situations, does not violate its duties under the constitution. If this interpretation be correct, the unborn does have a legal right which could theoretically be protected in a private legal action brought against the mother and physician.

161. *Translation* at 647.

162. *Id.* at 649.

163. *Id.*

as a prerequisite to obtaining an abortion. The legislature thus does not violate its duties under the Basic Law if, in an attempt to resolve the abortion problem, it enacts a statute which permits abortions following a pro-life counseling to the extent that the indications set forth in the statute reflect values recognized by the Basic Law.

The issue facing the Court is very different in situations in which a continuation of pregnancy is "exactable," because there is no conflict of values recognized by the constitution which the legislature must protect and balance in performing its constitutional function. In such a situation, the legislature has only one constitutional value (the right to life of the unborn) which it must protect. Under such a circumstance, the sole issue becomes one of whether the legislature has effectively fulfilled its constitutional function.

The Federal Government argued that the reform abortion statute, Section 218c of which requires counseling, provided as effective, if not more effective, protection to the unborn than did the previous penal provisions. The issue, then, in "exactable" cases was the effectiveness of Section 218a coupled with the required counseling in protecting unborn life. A related issue, of course, is whether the use of a penal sanction is the only effective manner of adequately protecting unborn life. The Court, because of its conclusion that the counseling provision of Section 218c of the reform statute was not adequate to effectively protect unborn life,¹⁶⁴ did not need to decide the more difficult question of whether the penal law can provide the only effective protection.¹⁶⁵ Nevertheless, the Court clearly stated that penal sanctions need not be used in "exactable" cases if the abortion is condemned by the legal order as unjust and the non-penal protections are as effective as penal sanctions.¹⁶⁶ If this be the case, the legislature has fulfilled its duties under the Basic Law to protect unborn life.

The technical effect of the Constitutional Court's decision to declare Section 218a (the term solution provision of the reform statute) unconstitutional and to extend Section 218b (the indications solution provision) to cover the entire length of the preg-

164. *Id.* at 657.

165. The Court did not state what "legal sanctions" are available, other than penal sanctions, which "would clearly bring out the unjust character of the act." *Id.* at 649. Several remarks of the Court could indicate that the Court may not believe that other "legal sanctions" can be "equally effective." For example, the Court wrote that an abortion in "exactable" circumstances is a "wrong deserving punishment." *Id.* at 649. (See also the Court's discussion of this problem at 651 *et seq.* of the *Translation*). The Court, as indicated, did not need to answer the question of the effectiveness of non-penal sanctions in light of its disposition of the case.

166. *Id.* at 649.

nancy was to make abortions in "exactable" situations criminal acts under the general provision (Section 218(1)) and abortions under "non-exactable" situations non-criminal acts (under Section 218b). This disposition, made possible under Section 35 of the Statute of the Federal Constitutional Court,¹⁶⁷ is perfectly consistent with the Court's understanding of the State's obligations under the Basic Law.

—Counseling

As indicated above, the Federal Government argued that the reform abortion statute, with its mandatory counseling (Section 218c), provided greater protection to the unborn than would a penal provision. The Constitutional Court rejected this argument, primarily because the type of counseling required by Section 218c¹⁶⁸ was not sufficiently designed to encourage the pregnant woman to carry her child to term.

The use of counseling in an abortion statute did not originate with the West German Parliament. Other nations¹⁶⁹ have used counseling with some apparent success, although as pointed out by the Constitutional Court, the counseling must be properly structured if it is to be successful.

Assuming that a well structured pro-life counseling can as effectively protect unborn human life as a criminal sanction, one may wonder whether a statutory provision requiring pro-life counseling as a condition precedent to the performance of an abortion could be an acceptable solution to the intense abortion controversy in the United States. Even if such a solution were politically acceptable, the related question arises whether it would be constitutional under the guidelines set by the United States Supreme Court in *Roe v. Wade*. In that case the Supreme Court wrote that the states' important and legitimate interest in protecting "potential life" is at viability.¹⁷⁰ which the Supreme Court suggests begins at 24 to 28 weeks after conception. Does this mean that a pro-life counseling requirement for abortions performed prior to viability would be unconstitutional because it does not reasonably relate to a "legitimate state interest?" If so, this only emphasizes how far the United States Supreme Court in the *Roe* decision has deviated from the constitutional thinking of other highly regarded western constitutional courts, all of which recognize the legislature's authority to protect unborn human life through the normal democratic process.

167. See note 139 *supra* for the text of Section 35.

168. See *Translation* at 612.

169. *E.g.*, France, see text accompanying note 8 *supra*; and Austria; see Pernthaler, *Rechtssprechung des Verfassungsgerichtshofes*, JURISTISCHE BLÄTTER 315 (1975).

170. *Roe v. Wade*, 410 U.S. at 163.