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ABORTION AND WOMEN'S LEGAL PERSONHOOD IN GERMANY: A CONTRIBUTION TO THE FEMINIST THEORY OF THE STATE

D.A. JEREMY TELMAN*

The unified Federal Republic of Germany has one of the world's most complex and confusing laws governing abortion.¹ Abortion law in the pre-unification Federal Republic ("West Germany") was already quite complicated. The unification process gave rise to further complexities as German lawmakers attempted to reconcile the relatively permissive abortion regulations of the German Democratic Republic ("East Germany") with West Germany's more restrictive laws. Beginning in 1972, East Germany granted women unrestricted access to abortion in the first trimester, an approach known as the "periodic model."² In contrast, since 1976, West Germany had allowed abortion only after the pregnant woman, having undergone mandatory counseling, had procured from a medical professional a certificate indicating that there were legitimate grounds for ending the pregnancy, an approach known as the "indications model."³

Under current law, both abortion and attempted abortion are generally prohibited.⁴ A woman can procure a legal abortion, however, in certain circumstances. First, the woman seeking an abortion must undergo mandatory counseling. The counseling must take place at a recognized

* B.A., 1985, Columbia University; Ph.D., 1993, Cornell University; J.D., 1999, New York University School of Law (expected). While formulating the ideas for this essay, I benefited greatly from conversations with Professors William E. Nelson, Molly Nolan, Sylvia Law, and Dieter Grimm. New York University's Summer Seminar on Legal Scholarship, taught by William E. Nelson and Larry Kramer, enabled me to get an early start on the essay and helped furnish the intellectual and temporal space in which the essay was written. I am especially grateful to William E. Nelson for the attention he gave to my work and for his helpful criticisms. The student note editors, Josh Maximon and Gabi Kupfer, and numerous staff editors at *The Review of Law and Social Change* provided tremendous support in addition to critical insights. Special thanks to Michael Schunck at *Social Change* for general expertise in all things German and for not letting that expertise dampen his enthusiasm for this project.

1. The abortion laws are found within the German Penal Code, §§ 218-219 STRAFGESETZBUCH [StGB]. Unless otherwise indicated, translations from the German are my own.

2. Gesetz über die Unterbrechung der Schwangerschaft v. 3.9.1972 (Gbl. I Nr. 5 S.89) [Law on the Discontinuation of Pregnancy of March 9, 1972] (E. Germany) [hereinafter GB-DDR].

3. 1976 BUNDESGESETZBLATT, TEIL I [BGBl. I] S.1213.

4. Section 218 Absatz. [hereinafter Abs.] 1 StGB defines pregnancy to begin with implantation of the fertilized ovum in the uterine wall. Abortions under special, aggravating circumstances are punishable under section 218 StGB with incarceration from six months to five years. Section 218 Abs. 4 exempts pregnant women from criminal penalties for attempted but not completed abortions in contravention of the law.

counseling center, and the counselor may not perform the abortion procedure. This counseling is not neutral, but "serves to protect unborn life."⁵ The counselor gives the woman a certificate that allows her, after a three-day waiting period, to request an abortion.⁶ A doctor may then perform a legal abortion in the first twelve weeks after conception if the woman's life or health is endangered or if the woman has become pregnant as the result of a crime of which she was the victim.⁷ Moreover, the law specifically exempts from punishment women who procure abortions without the proper certificates.⁸

Germany's new abortion law is one indication of the status of women in the new German state. Although the current abortion regulatory regime will prevent few German women from getting abortions, abortion-rights activists consider the new law more of a defeat than a victory. Critics stress that, by assigning women certain duties as child-bearers, and by requiring that they undergo counseling before making decisions about their own bodies, the law has ramifications for women's status as legal persons in other areas of the law.⁹

Part I of this note reviews the history of Germany's statutes criminalizing abortion and discusses the attitudes towards women that gave rise to these statutes. Those attitudes changed in the course of the twentieth century, and, as a result, Germany's criminal abortion statute increasingly came under attack as the century progressed. This historical background raises the question of the extent to which contemporary abortion regulatory regimes are still dependent on antiquated assumptions regarding women's social roles. Abortion was most severely restricted in Germany during periods when the government pursued policies designed to discourage women from seeking paid employment and to encourage them to focus their energies on their household duties, including the duty to bear and

5. § 219 Abs. 1 StGB.

6. *Id.* (referring to the waiting period); § 219 Abs. 2, Satz 2 StGB (referring to the issuance of counseling certificate).

7. *See* § 218a Abs. 1, Satz 2 (relating to situations in which a doctor may perform a legal abortion); § 218a Abs. 1, Satz 3 (relating to situations in which life or health are endangered); § 218a Abs. 3 iii (relating to situations in which the woman is a victim of crime under §§ 176-179 StGB).

8. § 218a Abs. 4; *see also infra* note 308 and accompanying text (regarding exemption from punishment for abortions performed during a time of special distress [besondere Bedrängnis]).

9. *See, e.g.,* Christine Bergmann, *Das Karlsruher Urteil*, in 76 KRITISCHE VIERTELJAHRSSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 124 (special issue 1993) [hereinafter KVGR] (taking especial note of the consequences of the new law for East German women who previously had a constitutional right to an abortion in the first trimester); Erhard Denninger, *Halb und Halb?*, in KVGR 128, 130 (noting that the law treats women as adult subjects capable of taking responsibility for their actions only so long as they do not decide to have an abortion). This special edition of KVGR is a compilation of responses to the German Constitutional Court's second abortion decision from 1993. For the text of the decision, see *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 88, 203.

raise children. Since World War II, East and West German women have been increasingly integrated into political and economic life, but abortion law has not always facilitated that process.

In Part II, this note relates the differing regulatory schemes that arose in the two post-war German states to their political and economic systems, giving special attention to the status of women in the two German societies. Views regarding women influenced the development of abortion law in post-war Germany, but other factors also played a role. Having accepted responsibility for the actions of the Nazi government,¹⁰ West Germany had to have an abortion policy consistent with its aim of distancing itself from the policies of Nazi Germany, especially from that regime's rejection of the view that all human life is equally valuable and worthy of the state's respect and protection.¹¹ East Germany, on the other hand, did not accept responsibility for the actions of Hitler's government.¹² Its abortion policy was thus more heavily influenced by the ideology, economics and policies of the East Bloc. Abortion regulation inevitably touches on the question of women's rights to control their own bodies, and the criminalization of abortion thus has consequences for a theory of women's legal personhood. Regardless of the two German states' articulated aims in regulating abortion as they did, women in the two Germanys drew their own conclusions regarding their legal status and rights to self-determination as a consequence of the abortion regulatory schemes under which they lived. The significance of the differences in the two regulatory systems and the importance to women of reproductive freedom became especially clear with the unification of Germany in 1990 and with the battles in the 1990s over the creation of a new law on abortion for all citizens of the unified German state.

Part III of this essay explores the controversy that erupted over Germany's abortion law when these two separate cultures were suddenly

10. This acceptance of responsibility is well-established as an element of West Germany's foreign policy. The earliest statement on the matter is to be found in the Basic Law for the Federal Republic of Germany, Grundgesetz [GG]. The original Preamble to the Basic Law begins with the words: "Conscious of their responsibility before God and mankind and resolved to guarantee their unity as a nation as a state and to serve world peace as a member, endowed with equal rights, of a united Europe . . ." See also GG arts. 120, 135a.

11. The Constitutional Court made explicit reference to the Nazi past as an influence on Germany's abortion law in the 1975 abortion decision, BVerfGE 39, 1 (67).

12. While West Germany voluntarily made reparation payments to Jews who lived abroad, thus accepting responsibility for crimes committed by the previous regime, East Germany made no such payments. The East Germans provided pensions for "victims of fascism" residing in East Germany. That category included Jews who remained in East Germany. HARRY G. SHAFFER, *WOMEN IN THE TWO GERMANYS: A COMPARATIVE STUDY OF A SOCIALIST AND A NON-SOCIALIST SOCIETY 169-70* (1981). For a history of the very different ways the two post-war German states commemorated the Nazi past, see JEFFREY HERF, *DIVIDED MEMORY: THE NAZI PAST IN THE TWO GERMANYS* (1997).

thrown together and evaluates the Constitutional Court's most recent abortion decision in light of feminist theory. East Germans generally acquiesced to the superiority of the West German political and economic systems, but there were elements of their own society to which they clung. Their preferences cannot be understood in terms of a provincial attachment to the familiar. They were, rather, the product of a firm conviction that their East German society, flawed though it was, provided fundamental protections of human rights and individual freedoms that were not guaranteed by West Germany's Basic Law.¹³ Reproductive freedom is one area in which women felt their interests were better protected under East German law.

I.

GERMAN ABORTION REGULATION: FROM THE CULT OF DOMESTICITY TO POST-WAR SOCIETY

Germany's abortion policy developed as part of a broader system of laws aimed at controlling or encouraging population growth; regulating the institutions of marriage and the family; regulating sexuality, including the sex trades, sexual orientation, and extramarital sex; and establishing the proper role and legal status of women in relation to the political and economic public sphere.¹⁴ The evolution of Germany's abortion regulatory regime reveals the extent to which such regulation is still indebted to theories of women's legal status and to policy aims that no longer correspond with social consensuses regarding those theories and policies.

Although there is a rich literature on the theories that informed the criminalization of abortion in the United States,¹⁵ there is no comparable

13. West Germany's Basic Law plays a role in German jurisprudence similar to that of the Federal Constitution in the United States. It is called the Basic Law and not a constitution because the division of Germany and the establishment of the West German government were seen as a temporary measures. A permanent constitution was thus seen as inappropriate. Since unification, however, it has become clear that the Basic Law is no temporary document but effectively the constitution of the unified German state. For a full discussion of Germany's constitution, see DONALD KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 35-36 (1989); Donald Kommers, *German Constitutionalism: A Prolegomenon*, 40 *EMORY L.J.* 837 (1991) [hereinafter Kommers, *German Constitutionalism*].

14. My conception of the public sphere is shaped by JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger & Frederick Lawrence trans., MIT Press, 1989) (1962). Habermas's theory is updated, expanded, and challenged from numerous perspectives, including feminist perspectives in *HABERMAS AND THE PUBLIC SPHERE* (Craig Calhoun ed., 1992).

15. The standard historical and political analyses include: LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: BIRTH CONTROL IN AMERICA* (Penguin, 1990) (1976). ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* (1984); KRISTIN LUKER, *ABORTION AND THE POLITICS OF*

history of abortion laws in Germany in the nineteenth century.¹⁶ The historical evolution of Germany's abortion-regulatory scheme remains to be written. Drawing on the American literature, this section sketches the modes of historical analysis appropriate for a consideration of the development of abortion regulation in Germany. That literature argues that constitutionally offensive attitudes played an important role in the nineteenth-century campaign to criminalize abortion. Abortion rulings made today must be carefully scrutinized to assure that they are not motivated by such constitutionally offensive attitudes, that is, attitudes that deny women opportunities to exercise their rights as citizens to the fullest possible extent.¹⁷ American courts have tended to rule on abortion based on arguments concerning women's bodies rather than on consideration of the gender role assigned to women as mothers and primary care-givers.¹⁸ Although we must be mindful of significant differences between American and German abortion debates, this American perspective on abortion law can usefully be applied to the German context as well.¹⁹ Contemporary German abortion law must be consistent with constitutional guarantees of equal rights

MOTHERHOOD (1984); JAMES MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 1800-1900* (1978). For a superb critique of Supreme Court rulings in the area of abortion that includes a detailed summary of historical perspectives, see Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261 (1992).

16. Thanks to the work of American scholars, we know what sorts of attitudes regarding pregnancy, the role of women in society, and the proper role of medical professionals in relation to reproductive functions influenced the development of abortion-regulatory systems in the United States. James Mohr's work demonstrates the influence physicians had in shaping and influencing public views of abortion. While abortion was common and unregulated throughout the nineteenth century, physicians began to lobby for anti-abortion statutes after white, Protestant, native-born, middle-class, married women began availing themselves of abortion services beginning in the 1840s. MOHR, *supra* note 15, at 46-47. Crucial to the moral component of the physicians' anti-abortion arguments was the claim that the fetus is an individual person, with interests that can be considered separately from those of the mother. Siegel, *supra* note 15, at 290. As we shall see, such views have played a decisive role in both of the German Constitutional Court's abortion decisions. Reva Siegel characterizes the history of abortion regulation in the United States as a process whereby a group of men, interested in establishing their professional authority, encouraged others to assert political authority over women's role in reproduction. Siegel, *supra* note 15, at 318.

17. Siegel, *supra* note 15, at 279.

18. *Id.* at 265. Siegel names such reasoning "physiological naturalism."

19. This note touches on broader issues of how the state's more general regulation of sexuality reflects a theory not only of gender but also of sexual identity. Governments' regulation of abortion reflects broader policies on sexuality, the gendered division of labor, marriage, and, poignantly in the German context, race. It is impossible to treat all of these issues thoroughly in the confined space of this note, especially as the history of abortion regulation in Germany has not been given the exhaustive treatment that American historians have provided for their own history of abortion regulation. In the discussion that follows, however, it will be necessary to allude on occasion to the crucial relationship between abortion regulation and other areas of state regulation that affect the articulation of gendered and sexual identities. For an excellent framework for the discussion of this topic, see ISABEL V. HULL, *SEXUALITY, STATE, AND CIVIL SOCIETY IN GERMANY, 1700-1815*

for men and women²⁰ and of the rights to self-determination²¹ and bodily integrity.²²

A. *The Advent of Abortion Regulation in Germany*

The law that would eventually become modern Germany's statute criminalizing abortion was originally promulgated in Prussia in 1851.²³ In 1870, when the states of northern Germany were consolidated into the North German Confederation, the Prussian law became the law of that Confederation.²⁴ In 1871, when Germany's unification process culminated with the crowning of the Prussian King Wilhelm as Kaiser Wilhelm I of Germany's Second Empire (the "*Kaiserreich*"), Prussia's abortion policy became section 218 of the Imperial Penal Code.²⁵

Given the energy devoted to abortion rights litigation since the 1960s, it may seem surprising that Germany, as well as much of the newly-industrialized West, got along without statutes regulating abortion until the middle of the nineteenth century.²⁶ The official position of the Roman Catholic Church was that abortion was criminal only eighty days after conception, when ensoulment was said to occur.²⁷ European law generally followed the Catholic lead until new scientific evidence of independent fetal movement brought about the criminalization of abortion from the time of quickening, when the fetus first starts to move.²⁸ Prussia criminalized abortion in 1851, at a time when the role of women was being redefined in terms of domesticity, motherhood, and the private sphere.²⁹

(1996). Hull's history ends in 1815, however, and it is beyond the scope of the present essay to pick up Hull's line of argument.

20. GG art. 3(2).

21. *Id.*, art. 2(1).

22. *Id.*, art. 2(2).

23. BVerfGE 39, at 7 (citing Prussian Criminal Code, 1851 Gesetz-Sammlung at 101).

24. *Id.* (citing 1870 Bundes-Gesetzbuch des Norddeutschen Bundes at 197).

25. Strafgesetzbuch für das deutsche Reich, 1871 Reichsgesetzblatt [RGBl.] S.127.

26. The first laws passed in the United States restricting abortion were passed by state legislatures in the 1820s. More comprehensive bans on abortion followed beginning in the 1840s. MOHR, *supra* note 15, at 25-27.

27. BVerfGE 39, at 30. According to medieval accounts, the Irish Saint Kieran performed an abortion on a woman who had been abducted from her convent and impregnated by a petty king. He acted quickly so as to abort the fetus before it had become endowed with a soul. See DAVID HERLIHY, *MEDIEVAL HOUSEHOLDS 31-32* (1985), cited in Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 118 n.65 (1988).

28. BVerfGE 39, at 30-31. Until the middle of the nineteenth century, the vast majority of Americans believe there was nothing morally or legally wrong with abortions carried out prior to quickening. MOHR, *supra* note 15, at 16.

29. In pre-industrial societies, there was a gendered division of labor, but it did not produce a dichotomy in which women were consigned to the private or domestic sphere. Women engaged in productive work, although their tasks were usually different from those of men. In the German context, see the brilliant and thorough analysis in a book that is far broader in scope than its title indicates, DAVID SABEAN, *PROPERTY, PRODUCTION, AND FAMILY IN NECKARHAUSEN, 1700-1870* (1990). As male identity came to be increasingly associated with the world of work, female identity was increasingly linked to household

The original Prussian prohibition on abortion was remarkably simple compared to the current German law. The Prussian Penal Code threatened with imprisonment any woman who aborted her fetus or allowed an abortion to be performed on her. In especially serious cases, the Code called for confinement in a penitentiary. Attempted abortion was also punishable. The law imposed penalties of up to five years imprisonment on any person who performed an abortion, aided a woman in procuring the means for an abortion, or allowed one to be performed on her.³⁰ This abortion provision was adopted in its entirety in section 218 of the Penal Code of the *Kaiserreich*.³¹ The law allowed abortion under no circumstances, even if the woman's life was in danger, although the criminal sentence could, in exceptional circumstances, be reduced to six months.³² While the Prussian decision to criminalize abortion is generally explained in terms of the need to spur population growth,³³ the timing of the statute criminalizing abortion is best understood as a product of a new consensus in industrializing societies regarding the proper role of women as mothers, wives, and guardians of the household.³⁴

responsibilities, motherhood, and the moral or spiritual sphere. The ramifications of this phenomenon, known alternatively as the "cult of domesticity" or the "cult of true womanhood," has received its fullest treatment in the American context. The classic works in this area include, CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* (1980); NANCY COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835* (1977); Barbara Welter, *The Cult of True Womanhood*, 18 AM. Q. 151 (1966). For a striking argument regarding the cult of domesticity among middle-class women in nineteenth-century France, see BONNIE G. SMITH, *LADIES OF THE LEISURE CLASS: THE BOURGEOISES OF NORTHERN FRANCE IN THE NINETEENTH CENTURY* (1981). German scholars have tended to focus on differences between the experiences of working-class and middle-class women. UTE FREVERT, *WOMEN IN GERMAN HISTORY: FROM BOURGEOIS EMANCIPATION TO SEXUAL LIBERATION* 61-147 (Berg, 1988) (1986) [hereinafter FREVERT, *WOMEN IN GERMAN HISTORY*].

30. Rosemarie Will, *German Unification and the Reform of Abortion Law*, 3 CARDOZO WOMEN'S L.J. 399, 402 (1996) (citing 1851 Gesetz-Sammlung §§ 181, 182 at 101). See also BVerfGE 39, at 7.

31. Donald P. Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255, 260 (1977) (citing German Penal Code of 1871, § 218 at 114). The full text of section 218 is provided in BVerfGE 39, at 7.

32. BVerfGE 39, at 7, cited in Flora Miedel, *Is West Germany's 1975 Abortion Decision a Solution to the American Abortion Debate?: A Critique of Mary Ann Glendon and Donald Kommers*, 20 N.Y.U. REV. L. & SOC. CHANGE 471, 473-74 (1994).

33. Michael G. Mattem, *German Abortion Law: The Unwanted Child of Reunification*, 13 LOY. L. A. INT'L & COMP. L. J. 643, 654 (1991).

34. UTE FREVERT, "MANN UND WEIB UND WEIB UND MANN": GESCHLECHTER-DIFFERENZEN IN DER MODERNE 150-65 (1995); see generally, BÜRGERINNEN UND BÜRGER. GESCHLECHTSVERHÄLTNISS IM 19. JAHRHUNDERT (Ute Frevert ed., 1988) [hereinafter BÜRGERINNEN UND BÜRGER]. Jonathan Sperber, in reviewing some recent collections of essays on the history of the German upper middle class (*Bürgertum*) in the nineteenth century, remarked on the "lack of attention. . . to the importance of women and the family for the *Bürgertum*." Sperber notes the abstract nature of recent historical studies of middle class women and the inattention in studies devoted to the history of middle-class women to those women's actual lives. Jonathan Sperber, *Bürger, Bürgertum, Bürgerlichkeit, Bürgerliche Gesellschaft: Studies of the German (Upper) Middle Class and Its Sociocultural World*, 69 J. MOD. HIST. 271, 282 (1997).

B. *Abortion Regulation and Domesticity in the Kaiserreich, 1870-1918*

This process whereby women were consigned to a depoliticized private sphere took somewhat longer in the German states than it did in France or England.³⁵ By the middle of the nineteenth century, however, the rhetoric and politics of the separate spheres was a part of German culture. In 1900, the cult of domesticity achieved legal expression in the fourth volume of the Civil Code (Bürgerliches Gesetzbuch—"BGB").³⁶ The BGB empowered the husband to make all joint decisions for the family, including the choice of a home and its location.³⁷ There was one significant exception to the power of the husband to make all important decisions for the family: the BGB specifically "entitled and obligated" women to care for the common household. This section of the Code entitled the husband to expect that his wife not work, if working prevented her from performing her domestic duties.³⁸ Although a husband was obligated by law to care for his wife according to his abilities and resources, a wife was obligated to work if her husband's earning power was insufficient to support the family.³⁹ Their rights having been subsumed under those of their husbands, married women were regarded in the public sphere as legal "non-persons."⁴⁰

Given the ascendancy of the separation of spheres in Germany beginning in the middle of the nineteenth century, there was no interest in women's bodily integrity or related concepts to protect when the Prussian Penal Code criminalized abortion. Hermine de Soto argues that the *Kaiserreich* supplemented its "ethnonationalist citizenship principles" with section 218 as part of a conscious effort to use women in the construction of national identity.⁴¹ While such an argument might be made about German abortion policies in the twentieth century, it is misplaced when applied to the politics of German unification in the nineteenth century. However widespread ethnonationalist views might have been among the German populace as a whole, Bismarck and the Hohenzollerns did not intend to

35. It is thus not surprising that England and France criminalized abortion earlier than did the German principalities. The English Parliament passed its first criminal abortion statute in 1803. GORDON, *supra* note 15, at 57. Napoleon's Penal Code of 1810 included criminal sanctions for abortion. Bonnie Hertberg, *Resolving the Abortion Debate: Compromise Legislation, An Analysis of the Abortion Policies of the United States, France, and Germany*, 16 SUFFOLK TRANSNAT'L L. REV. 513, 545 (1993).

36. HANDAUSGABE DES BÜRGERLICHEN GESETZBUCHS FÜR DAS DEUTSCHE REICH, with commentary by Dr. Hugo Neumann (1905) [hereinafter HANDAUSGABE]. The BGB is no longer in force or in print. The HANDAUSGABE is a secondary source in which the BGB is reprinted in full with annotations.

37. *Id.*

38. *Id.*

39. *Id.*, discussed in SHAFFER, *supra* note 12, at 28.

40. Dirk Blasius, *Bürgerliche Rechtsgleichheit und die Ungleichheit der Geschlechter. Das Scheidungsrecht im historischen Vergleich*, in BÜRGERINNEN UND BÜRGER, *supra* note 34, at 67, 68.

41. Hermine de Soto, "In the Name of the Folk": Women and Nation in the New Germany, 5 UCLA WOMEN'S L.J. 83, 89 (1994).

found a national state whose citizens were unified on the basis of some racial or ethnic heritage.⁴² Their inclusion of regulations that encouraged reproduction and discouraged women with children from playing a role in the economy are far more likely a product of their general acceptance of the view that women and men should occupy separate spheres within society. Men were to play the active role in the public sphere of politics and economics while women were to oversee the raising of children, the maintenance of proper morals, and the stability and presentability of the home.

The notion that women had a role to play in the biological definition and perpetuation of the nation arose somewhat later, before and especially during World War I. In the years before the war, German government officials increasingly adopted the pronatalist position that Germany needed to increase its population in order to demonstrate the nation's vitality, spur economic growth, and insure a supply of young soldiers for the coming war.⁴³ Because pronatalists saw pregnancies as a sign of national vitality, they attempted to increase population by encouraging pregnancy rather than by promoting policies supportive of childcare.⁴⁴

With the threat of huge population losses during World War I, children became a prized national resource. The government pursued a pronatalist policy, combining material incentives to produce more children with punitive sanctions against abortion and contraception.⁴⁵ Beginning in 1915, contraceptives (except condoms) and abortifacients could be neither advertised nor sold. Three bills, introduced towards the end of the war, attempted to control sexually transmitted diseases among prostitutes, to suppress contraception (except condoms) and abortifacients, and to strengthen prohibitions on abortion and sterilization.⁴⁶ During the war, pronatalists associated Germany's low birth rate with cultural decline, decadence, hedonism, and an inappropriate individualism among women. They deemed pregnancy to be women's active service and called into question the morals and motivations of women who refused to breed.⁴⁷ The

42. Historians generally reject the view that Bismarck and the Hohenzollerns were motivated at the time of unification by some sort of nationalist ideology. See Thomas Nipperdey, *Deutsche Geschichte, Vol. II 1866-1918* 14-15 (1992) (arguing that Bismarck moved slowly from a politics aimed at expanding Prussia to German national politics but that Bismarck and the Hohenzollerns merely used the national movement to pursue more narrow, dynastic ambitions); Two monumental and authoritative political biographies of Bismarck both stress his opposition to conventional German nationalism and his commitment to the pursuance of a more narrow, Prussian politics. OTTO PFLANZE, *BISMARCK AND THE DEVELOPMENT OF GERMANY: THE PERIOD OF UNIFICATION, 1815-1871* (2d ed., 1990); LOTHAR GALL, *BISMARCK: DER WEISSE REVOLUTIONÄR* (1980).

43. CORNELIE USBORNE, *THE POLITICS OF THE BODY IN WEIMAR GERMANY: WOMEN'S REPRODUCTIVE RIGHTS AND DUTIES* 4 (1992). Osborne defines pronatalism as "the conviction that a nation's military, economic and cultural influence was essentially derived from the size of its population."

44. *Id.*

45. *Id.* at 16-17.

46. *Id.* at 21-22.

47. *Id.* at 17-18.

pronatal policies failed, however, as measured by the birth rate, which in 1918 was half of what it had been in 1913.⁴⁸ Convictions for criminal abortion increased rapidly towards the end of the *Kaiserreich*,⁴⁹ indicating a significant increase in the rate of illegal abortion. Doctors estimated that 200,000 to 400,000 abortions were performed annually during World War I.⁵⁰ Moreover, while the original criminal abortion statute was conceived with unmarried or widowed women in mind, by the end of World War I, it was clear that married, middle-class women were procuring abortions.⁵¹ The medical establishment was horrified to discover that women who lived within the protective realm of the family were nonetheless seeking abortions. In their eyes, the sacrifice of "quality children" during the war could only be a product of the calculating rationality of selfish, materialistic women.⁵²

The incentive side of the pronatalist program included *Kriegwochenhilfe*, entitling wives of servicemen to a state maternity benefit, a weekly allowance for eight weeks after delivery, and an additional breast-feeding bonus. In 1915, the same benefits were extended to unmarried mothers who could prove that the fathers of their children were in active service. But the allowance was insufficient during the crisis years of the war, and other plans for providing economic incentives for child-bearing were never implemented.⁵³

By the end of the war, the *Kaiserreich* was developing a strong pronatalist policy, under which women were to be subjected to numerous laws preventing them from freely determining the number and spacing of the children they were to bear. At the same time, economic incentives encouraged women to bear children, even if they did so out of wedlock. While pronatalist policies aimed to shape reproductive behavior with a mixture of sanctions and incentives, the incentives were rarely implemented. The main effect of the pronatalist policies was thus to emphasize critical views of women's reproductive behavior by stigmatizing women who did not bear children.

By the end of the *Kaiserreich* it was clear that the regulation of abortion had to be tied in with the broader regulation of sexuality and of employment. Further governmental policies providing social and economic incentives for women to bear children would be ineffective absent general

48. *Id.* at 19.

49. Hilde Benjamin, *Mitteilungen der juristischen Arbeitskommission im Zentralen Frauenausschuß*, in ENDE DER SELBSTVERSTÄNDLICHKEIT? DIE ABSCHAFFUNG DES § 218 IN DER DDR DOKUMENTE 41-42 (Kirsten Thietz ed., 1992) [hereinafter THIETZ]. Benjamin provides the following figures on prosecutions of women for illegal abortions: 1882: 191; 1890: 411; 1910: 760 1914: 1,678. After World War I, convictions for illegal abortion continued to increase: in 1921, there were 4,248 convictions, and in 1926, 7,457. *Id.*

50. USBORNE, *supra* note 43, at 22.

51. *Id.* at 182.

52. *Id.*

53. *Id.* at 20.

economic conditions conducive to the viability of nuclear families fully supported on the income of one full-time working adult. The pronatalist regime established during the war was ineffective largely because the social and economic uncertainties that the war created made it unworkable. During the Weimar Republic, it also became clear that the pronatalist position was motivated by a view of women that women and others found unacceptable.

C. *Early Challenges: Abortion Law in the Weimar Republic, 1919-1933*

The Weimar Republic produced the so-called "New Woman," known for exploring social roles previously shunned by respectable women. The sight of women asserting unwonted independence and freedom provoked a predictable backlash. These New Women aroused the ire of the pronatalists because they focused unacceptably on their own lives and thus neglected their duty to reproduce.⁵⁴ The government responded to this perceived threat to the German nation with proposals for a complete ban on both contraception and abortifacients.⁵⁵

The Weimar Republic, however, did witness the first attempt on the level of mass politics to reform or abolish Germany's criminal abortion statute. The Social Democratic Party (*Sozialdemokratische Partei Deutschlands*—"SPD") and the Communist Party (*Kommunistisches Partei Deutschlands*—"KPD") played leading roles in the reform movement, but cries for reform also came from grass-roots organizations led by medical professionals that often united people across party lines.⁵⁶ While the KPD explained section 218 and pronatalism in terms of the needs of capital to insure the reproduction of soldiers and workers necessary to the maintenance of the existing mode of production,⁵⁷ the SPD pushed for reform because of the economic difficulties that working-class families faced in the 1920s. While the KPD took a principled and categorical position in opposition to abortion, the SPD position focused on the very real threats that the existing abortion policy posed for working-class families. The positions of these parties are important not only for the role they played in the Weimar Republic but also for the ways in which they helped shape later thought and debate on abortion in Germany. The SPD, which was at times represented within the numerous ruling coalitions of the Weimar Republic, was

54. *Id.* at 11.

55. *Id.*

56. *Id.* at 156-201; Atina Grossman, *Abortion and Economic Crisis: The 1931 Campaign Against Paragraph 218*, in *WHEN BIOLOGY BECAME DESTINY: WOMEN IN WEIMAR AND NAZI GERMANY* (Renate Bridenthal, Atina Grossman, Marion Kaplan eds., 1984) [hereinafter *WHEN BIOLOGY BECAME DESTINY*]; ATINA GROSSMAN, *REFORMING SEX: THE GERMAN MOVEMENT FOR BIRTH CONTROL AND ABORTION REFORM, 1920-1950* [hereinafter *GROSSMAN, REFORMING SEX*].

57. East German politicians developed this line of argument with special stridency. See, e.g., Benjamin, *supra* note 49, at 41.

clearly better positioned to push through reforms. The KPD, as an opposition party, developed its position in support of reproductive freedom without the pressures of coalition government.

Since 10% of all new mothers in the Weimar Republic were unmarried, the left-wing parties wanted to make it easier for such women to end pregnancies if they could not afford to care for a newborn baby.⁵⁸ Similarly, these groups attempted to make it easier for such women to support their babies, if they decided to complete the pregnancy. Working-class women protested against a legal system that prevented a woman who had gained a divorce from an adulterous husband from having decisive control over her children, while the same system allowed a husband to prevent his wife from using contraception. In addition to lobbying for the abolition of section 218, socialist women also advocated abstinence and the increased availability of birth control.⁵⁹

Both parties proposed legislation calling for reform of the criminal abortion statute.⁶⁰ These legislative efforts rarely fostered debate at the parliamentary level, but they provided substantive positions around which the forces favoring reform could rally. In 1920, the SPD politician Gustav Radbruch co-sponsored a motion for abortion on demand in the first trimester. The motion had the support of over half of the SPD members of the Reichstag, but was never debated by that body.⁶¹ Two years later, when Radbruch was Justice Minister, his draft for a comprehensive reform of Germany's penal code did not include any provisions for the reform of section 218. Although this seeming duplicity outraged the sex-reform movement, it was clear that any attempt at abortion reform would have jeopardized the success of this long-overdue reform of Germany's penal code.⁶²

The approach of the SPD was still largely paternalist and patriarchal. The SPD viewed maternity as women's main social task and saw familial duties as belonging exclusively to women.⁶³ In any case, the SPD's approach to the issue of reproductive freedom derived not from a concern with women's rights but from a concern with the living conditions of working-class citizens of both sexes.⁶⁴ The SPD's collectivist focus prevented the party from advocating a right to self-determination or to control one's own body. As Radbruch put it in 1921:

58. CLAUDIA KOONZ, *MOTHERS IN THE FATHERLAND: WOMEN, THE FAMILY, AND NAZI POLITICS* 109 (1987).

59. *Id.*

60. USBORNE, *supra* note 43, Appendix 2, at 217-19. This appendix summarizes all parliamentary bills and motions for abortion reform brought during the Weimar Republic.

61. *Id.* at 166-67, 217; BVerfGE 39, at 8.

62. USBORNE, *supra* note 43, at 169.

63. *Id.* at 58.

64. *Id.* at 159.

We are far from espousing the individualist idea advanced by bourgeois feminists. . . that everyone should be master of his/her body and have the right of self-determination. The socialist idea demands responsibility towards the community even where our bodies are concerned.⁶⁵

The SPD valued women's duties to the community over their right to control their own bodies. Such collectivist views later led Radbruch to abandon his opposition to abortion penalties.⁶⁶

It is thus ironic that the, if anything, more collectivist-oriented KPD adopted the popular slogan, "*Dein Körper gehört Dir!*" ("Your body belongs to you!"). For a party that rejected the notion of private property, however, the adoption of such a slogan could have only tactical significance.⁶⁷ The slogan, and the position it stood for, was sufficiently broad to support the rights of women to abortion, even if the rights in question were those of middle-class women not faced with the sorts of material constraints that generally fuel the argument for abortion based on social considerations. The KPD was thus in the odd position of defending the rights of its class enemies to abortion on demand.⁶⁸ The KPD did articulate a far more comprehensive strategy than the SPD, however, for the protection of women's reproductive rights and for the integration of women into the workforce. As early as 1922, the KPD tabled a motion to abolish section 218 as well as section 219, which made it a criminal offense to procure an abortion for money, while retaining section 220, which regulated abortions performed without consent and those that resulted in death. Following the model of the Soviet Union, the KPD wanted to link reproductive freedom to provisions for state support for maternity and child-welfare.⁶⁹

While the SPD wanted abortion reform in order to make the enforcement of the criminal abortion statute more consistent, rational, and fair, the KPD was committed to the view that abortion was not criminal. For the KPD, the combination of section 184.3,⁷⁰ restricting the advertising of contraceptives, and the criminal abortion statute constituted a tyranny of forced childbearing.⁷¹ The strength of the KPD's position on this issue derived in part from its rejection of the traditional gendered ascription of

65. *Id.* at 180 (citing GUSTAV RADBRUCH & ALFRED GROTHJAHN, *DIE ABTREIBUNG DER LEIBESFRUCHT* 31 (1921)).

66. USBORNE, *supra* note 43, at 180.

67. *Id.* at 180-81.

68. GROSSMAN, *REFORMING SEX*, *supra* note 56, at 94; Grossman, *Abortion*, *supra* note 56, at 77.

69. USBORNE, *supra* note 43, at 167-68.

70. Section 184.3 of the *Strafgesetzbuch für das Deutsche Reich (1871)* prohibited the public exhibition of any "object intended for immoral purposes." The Law for the Combat of Sexually Transmitted Diseases of 1927 amended the Penal Code to specifically extend the prohibition against public display to "objects, articles or means serving for the protection against venereal diseases." 1927 RGBI. I S.61, 63.

71. GROSSMAN, *REFORMING SEX*, *supra* note 56, at 83.

socio-economic roles. As it was put at one KPD women's conference: "We women refuse to let ourselves be regarded as baby machines and then additionally to serve as slaves in the production process. . . . Our slogan is not "back into the family," but equal wages for equal work."⁷²

Despite its attempt to use the abortion issue to reach out to new constituencies, the KPD continued to view abortion as a class issue. But the presence of middle-class women at KPD rallies against section 218 indicates the extent to which the KPD in this case assumed a leadership role on an issue that cut across class lines.⁷³

This was quite a remarkable development for a party that regarded women with considerable suspicion. Although Marxist theory provided grounds for viewing women as an oppressed group, the KPD distrusted women, especially housewives, as basically conservative voters and as a negative influence on their communist husbands. Because women were not unionized or politically active to the extent that men were, the KPD considered them dangerously spontaneous, disorganized, and undisciplined.⁷⁴ It is thus not surprising that the KPD failed to produce a coherent approach to the politics of reproduction. KPD calls for the decriminalization of abortion were not based on a theory of women's rights as legal persons but on a theory of need. Need was analyzed not on an individualized basis, but as a matter of collective welfare. The KPD aimed to reduce the number of unwanted pregnancies as well as the number of abortions through decriminalization and increased access to contraception.⁷⁵

In trying to recruit women, the left-wing parties had their work cut out for them, because women's organizations, especially the large, middle-class Confederation of German Women's Organizations (*Bund Deutscher Frauenvereine*—"BDF"), steered clear of the abortion issue. The BDF was committed to women's continued exercise of moral authority and familial responsibility outside the traditional political and economic public spheres.⁷⁶ During the Depression years at the end of the Weimar Republic, membership in women's associations that focused on the protection of women's status as wives and mothers rapidly increased. The BDF included 80 women's organizations and had 500,000 members, but the organizations

72. Grossman, *Abortion*, *supra* note 56, at 72, quoting from a security agent's report on the Second Imperial Women's Conference of International Workers Aid in 1931.

73. Grossman, *Abortion*, *supra* note 56, at 74. There was also clearly an opportunistic element to the KPD-led campaign against section 218. In the competition with the SPD for left-wing voters, the campaign against section 218 gave the KPD a means of gaining legitimacy among women voters whose antipathy to Bolshevism might otherwise have precluded support for the KPD. *Id.* at 78.

74. GROSSMAN, *REFORMING SEX*, *supra* note 56, at 112.

75. *Id.* at 94-95.

76. The history of the German women's organizations is well covered in FREVERT, *WOMEN IN GERMAN HISTORY*, *supra* note 29, *passim*.

pledged to remain nonpartisan and to protect Germany from cultural decline, sexual deviance, and communism. Many women nonetheless found the BDF too radical, merely by virtue of the fact that its activities drew women out of the home and into the public sphere. Such women joined church-related organizations with more traditional agendas.⁷⁷

Believing women would be reduced to sexual objects if their sexual roles were not defined in terms of familial relations, the BDF endorsed the trinity of "love, marriage and motherhood" and advocated the containment of female sexuality within the family. The family provided women with a base from which they could realize their role in society, which was defined for them by the BDF as the protection of their children and the preservation of the national culture.⁷⁸ By the end of the Weimar Republic, the BDF was less concerned with the happiness of individual women than it was with their collective "responsibility in maintaining and improving the biological substance of the Volk."⁷⁹

In addition to the reform efforts of the left-wing parties, the Weimar Republic also witnessed the rise of independent movements for the reform of laws governing abortion, contraception, sterilization, and state-sponsored health programs. Despite its deceptively traditional name, Helene Stöcker's League for the Protection of Motherhood pursued a radical agenda calling for eugenic education, birth control, legal abortions, divorce reform, and aid for mothers, whether or not they were married. Stöcker's movement also supported research into methods to enhance the enjoyment of sexual relations.⁸⁰ By 1931, the Ministry for Social Welfare ran over 200 centers that counseled citizens on marriage and procreation. Sex reformers pointed to this statistic as evidence of the state's duty to counsel citizens on contraception and even abortion, as part of a comprehensive national health program.⁸¹ The sex reform movement argued for the abolition of section 218 on two very different grounds. On the one hand, they adopted a feminist position similar to that of the KPD, criticizing state policies that forced women to become mothers. On the other hand, they called for the protection of mothers and children in order to assure "high quality offspring and the preservation and encouragement of the ethical power of the family to preserve the state."⁸² Although it would be grossly unfair to exaggerate the continuities between progressive calls for abortion reform in

77. KOONZ, *supra* note 58, at 104.

78. USBORNE, *supra* note 43, at 92.

79. *Id.* at 93.

80. KOONZ, *supra* note 58, at 35-36. For more on Stöcker and her movement, see Amy Hackett, *Helene Stöcker, Left-Wing Intellectual and Sex Reformer*, in *WHEN BIOLOGY BECAME DESTINY*, *supra* note 56, at 109-30; Ann Taylor Allen, *Mothers of the New Generation*, Adele Schreiber, *Helene Stöcker, and the Evolution of a German Idea of Motherhood*, 20 *SIGNS* 418 (1985).

81. GROSSMAN, *REFORMING SEX*, *supra* note 56, at 47.

82. GROSSMAN, *Abortion*, *supra* note 56, at 76 (citing 38 *DIE FRAU* 439-40 (April, 1931) (the journal of the BDF)).

the Weimar Republic and the repressive policies of the Third Reich, the sex reform movement anticipated some of the eugenic arguments that were central to the abortion policies of the Third Reich.

The efforts of the sex-reform movement led to a new law in 1926 that reduced the crime of abortion to the level of misdemeanor and began the movement towards the indications model of abortion regulation, according to which women were entitled to legal abortions if a doctor determined that acceptable grounds existed for the abortion request.⁸³ The new section 218 achieved far less than the reformers had hoped, but it was nevertheless a significant accomplishment. Although attempted abortion remained an offense, the sentence for criminal abortion was reduced from penal servitude to ordinary jail sentences both for women who had undergone abortions and for their accomplices. At the same time, the law strengthened existing sanctions against those who performed abortions without the woman's consent.⁸⁴

As amended in 1926, section 218 allowed abortions only in the case of strict medical necessity.⁸⁵ The reform horrified the denominational parties and other clerical groups because, by allowing for abortions in certain circumstances, it failed to accord to the fetus the full rights accorded to living persons. More practically, since abortion was a misdemeanor, women accused of obtaining illegal abortions would be tried before lay assessors, who tended to be sympathetic to defendants, rather than before juries.⁸⁶

The movement for abortion reform won another important victory in 1927 when the Supreme Court (*Reichsgericht*) officially recognized the legality of abortions performed to protect the life or long-term health of the mother, so long as they were performed with the woman's consent and by competent medical practitioners.⁸⁷ This decision established the principle that abortions performed to preserve the mother's life constitute "extra-legal emergencies" and thus can be reconciled with broad principles of criminal law.⁸⁸ This principle continues to inform contemporary German abortion policies.⁸⁹ Because it gave legal validity to a long-standing practice, the decision came as a great relief to the medical profession. There was still some ambiguity in the law, however, since the extent to which

83. de Soto, *In the Name*, *supra* note 41, at 89-90.

84. USBORNE, *supra* note 43, at 173.

85. The reform did nothing to alter section 184.3, which outlawed the advertising, display, and publicizing of contraceptives, while allowing their sale and manufacture. GROSSMAN, *REFORMING SEX*, *supra* note 56, at 8. Grossman notes that divorce was rare and expensive at the time. Given the marital rape exception, the difficulty in gaining access to reliable contraception and the strict medical requirement for legal abortion in the Weimar Republic, it is not remarkable that many middle-class women found recourse to illegal abortion the least objectionable option.

86. USBORNE, *supra* note 43, at 174.

87. *Entscheidungen des Reichsgerichts in Strafsachen* [RGSt] 61, 242.

88. Kommers, *supra* note 31, at 260-61.

89. BVerfGE 39, at 6.

doctors, in determining whether or not medical grounds for abortion were available to their patients, could consider the woman's social or psychological conditions.⁹⁰

While the policies of the Weimar Republic were, on the whole, less repressive and coercive than those of the *Kaiserreich*, the general assumption that women's prime duty was to maternity and that work was an impediment to the fulfillment of that task still prevailed.⁹¹ Pronatalist policies took the form of the Law for the Protection of Mothers, promulgated on July 16, 1927. This law entitled women workers to a maternity allowance equivalent to three-quarters of their ordinary wage for four weeks prior to and six weeks after delivery. But economic conditions in Weimar Republic were such that, even in the period of relative stabilization between the inflation years and the Great Depression, few women felt they could take advantage of the opportunity to take time off from work. The law also strengthened regulations on the licensing and training of midwives, thus enhancing the medical profession's power over pregnant women.⁹² As the new law made it more difficult for midwives to get the accreditation they required, women increasingly had to turn to physicians when seeking help and advice regarding their pregnancies.

The Weimar Republic constitutes a crucial chapter in the history of Germany's regulation of abortion. This period witnessed the rise of left-wing opposition to criminal abortion statutes as well as the continued articulation of arguments based in nationalist ideology and eugenic concerns. The arguments propounded by the left-wing parties would later provide a basis for calls for abortion reform in the post-war era. But those parties' commitments to women's rights and to the critique of patriarchy were incomplete. As we shall see, the failure of the German left to develop a satisfactory critique of patriarchy created problems for the East German government when it attempted to represent itself as a guardian of women's rights in the realm of reproductive freedom. The eugenic arguments in favor of abortion rights articulated by the sex reform movement form the link between the abortion reform movements of the Weimar Republic and the Third Reich. While the sex reformers of the Weimar Republic wanted women to be able to choose to abort their genetically deformed children, the Nazis employed eugenic arguments to justify abortions coerced by the state.

D. *Mothers in the Fatherland: Abortion in the Third Reich*

The Nazis immediately suppressed their political enemies, the SPD and the KPD, as well as the women's organizations associated with these

90. See USBORNE, *supra* note 43, at 177.

91. GROSSMAN, *Abortion*, *supra* note 56, at 53.

92. GROSSMAN, *REFORMING SEX*, *supra* note 56, at 12.

left-wing parties. The Nazis also banned non-partisan women's organizations, such as the Women's League for Peace and Freedom and the League for the Protection of Motherhood.⁹³ Given that the Nazis "co-ordinated" all nonpartisan organizations into the Nazi movement, a process known as "*Gleichschaltung*,"⁹⁴ it is not surprising that the Nazis shut down the autonomous sex reform movement. It is more significant, however, that they actively persecuted its leaders, forcing many activists and doctors into exile.⁹⁵

The Nazi position on abortion must be placed in the broader context of the Nazi view of women in general. The Nazis fully endorsed and significantly sharpened the separation of spheres. One of their first acts, after taking power, was to pass new laws encouraging women to leave the work force and take up their roles as mothers, wives, and guardians of the household. According to Nazi propaganda, "German women want to be wives and mothers. . . . They have no longing for the factory, no longing for the office, no longing for the Parliament. A cozy home, a loving husband, and a flock of happy children is closer to their heart."⁹⁶ Upon taking power in 1933, the Nazis immediately attempted to purge married women from public employment on both the national and local levels.⁹⁷

If women were to work, Nazi policies called for them to restrict themselves to traditional women's work such as domestic service, retail sales, and farm work.⁹⁸ Women were excluded from leadership positions in the Nazi Party as early as 1921, and the Party platform called for material incentives to protect motherhood. Gregor Strasser went so far as to advocate rewarding women for procreating by giving them multiple votes, a privilege that ranked them on a par with soldiers in the Nazi political hierarchy.⁹⁹

93. KOONZ, *supra* note 58, at 141.

94. *Gleichschaltung* generally involved forcing independent organizations to either join Nazi organizations that promoted similar interests or disband. Groups as diverse as labor unions, professional organizations, singing clubs, and athletic teams faced a choice between ceasing their activities and joining Nazi organizations. For general discussions of *Gleichschaltung*, see DAVID SCHOENBAUM, *HITLER'S SOCIAL REVOLUTION: CLASS AND STATUS IN NAZI GERMANY 1933-1939* (Norton, 1980) (1966); KARL DIETRICH BRACHER, *THE GERMAN DICTATORSHIP: THE ORIGINS, STRUCTURE AND EFFECTS OF NATIONAL SOCIALISM* (Holt, Rinehart & Winston, 1970) (1969). The classic study of Nazism on the local level also contains a detailed discussion of *Gleichschaltung*: WILLIAM SHERIDAN ALLEN, *THE NAZI SEIZURE OF POWER: THE EXPERIENCE OF A SINGLE GERMAN TOWN 1922-1945* (2d ed., 1984). Documents pertaining to the *Gleichschaltung* are collected in *INSIDE HITLER'S GERMANY: A DOCUMENTARY HISTORY OF LIFE IN THE THIRD REICH 125-57* (Benjamin Sax & Dieter Kuntz eds., 1992).

95. GROSSMAN, *REFORMING SEX*, *supra* note 56, at 136.

96. SHAFFER, *supra* note 12, at 6 (citing *THE ABC OF NATIONAL SOCIALISM*).

97. *NAZISM 1919-1945: A HISTORY IN DOCUMENTS AND EYEWITNESS ACCOUNTS. VOLUME I: THE NAZI PARTY, STATE AND SOCIETY 1919-1939* 465 (Jeremy Noakes & Geoffrey Pridham eds., 1990) [hereinafter *NAZISM*]; Law for the Restoration of the Professional Civil Service of April 7, 1933, 1933 RGBL I S.175.

98. SCHOENBAUM, *supra* note 94, at 179.

99. *Id.*

The Nazis' rigorous enforcement of section 218 followed logically from the high regard they had for motherhood. In the first five years of the regime, convictions under section 218 increased by 50%, while birth control centers were shut down and access to contraception was curtailed.¹⁰⁰ During World War II, the Nazis called for the death penalty for repeat offenders against section 218.¹⁰¹ While the Nazis imposed a very strict anti-abortion scheme for healthy "Aryans," they allowed and encouraged abortion if either of the parents was believed to carry hereditary defects.¹⁰² The Nazis further undermined family planning by strictly enforcing existing prohibitions on the display and advertising of contraception.¹⁰³ On May 26, 1933, the Nazis re-introduced the prohibitions on publicity or education regarding abortion or abortifacients that had been abolished during the Weimar Republic. Doctors were understandably anxious about referring patients for therapeutic abortions in such circumstances, and the number of referrals declined from about 44,000 in 1932 to 4,131 in 1937.¹⁰⁴

The Nazis took pronatalism to new heights. Reversing the popular slogan of the Weimar Republic, Nazi pamphlets stated: "Your body does not belong to you, but to your blood brethren [Sippe] and your . . . Volk."¹⁰⁵ The Nazis capitalized on fears that had surfaced towards the end of the Weimar Republic that Germany's declining birthrate would leave it defenseless against the onslaught of the prolific Slavs.¹⁰⁶ Within months of the Nazi seizure of power, the new government offered a massive incentive program for German couples to marry and have children. Section 5 of the Law for the Reduction of Unemployment of June 1, 1933,¹⁰⁷ granted marriage loans of "up to 1,000 Reichsmarks (or about a fifth of an average worker's annual salary)"¹⁰⁸ to any couple, if the woman had worked in the last two years of the Weimar Republic and gave up work upon entering the marriage and the husband earned at least 125 Reichsmarks a month. The loans came in the form of vouchers that could be used to purchase household goods. They were interest-free and were to be repaid at a rate of one percent per month. On June 20, 1933, the Nazis added a supplementary decree reducing the amount to be repaid by one-quarter for each child born. Both the man and the woman had to have no Jewish blood for two

100. NAZISM, *supra* note 97, at 450.

101. BVerfGE 39, at 7 (citing Verordnung zur Durchführung der Verordnung zum Schutz von Ehe, Familie und Mutterschaft, 1943 RGBl. I S.140, 169).

102. Gesetz zur Verhütung erbkranken Nachwuchses in der Fassung des Änderungsgesetzes, 1935 RGBl. I S.773.

103. RGBl. § 184.3.

104. GROSSMAN, REFORMING SEX, *supra* note 56, at 149.

105. KOONZ, *supra* note 58, at 149.

106. NAZISM, *supra* note 97, at 450.

107. 1933 RGBl. I S.326-27.

108. KOONZ, *supra* note 58, at 149.

generations.¹⁰⁹ In 1937, due to a labor shortage, the requirement that the woman not work was dropped.¹¹⁰

The aim of this legislation was not merely to encourage motherhood but also to remove women from the labor force and thus to help to reduce unemployment. The marriage loan program was supposed to remove 800,000 women from the work force by 1937, while the subsidies were to induce consumption and thus create employment for 200,000 men in the production of household goods.¹¹¹ Although the new law did encourage many women to leave their jobs, most women still bore only one or two children.¹¹²

As statistics on convictions under section 218 indicate, Nazi pronatalist propaganda and their incentive programs were no more successful in stimulating a rise in the German birthrate than earlier pronatalist policies had been. From 1933 to 1939, recipients of marriage loans had about 360,000 babies, but estimates of abortions performed in the period range from 500,000 to one million per year.¹¹³ The number of children born per 100 marriages was actually lower in Nazi Germany than it had been in the "decadent" Weimar Republic.¹¹⁴ The Nazis attempted a new strategy in 1938 when they introduced a divorce reform law that expanded the acceptable grounds for divorce to include adultery, refusal to procreate, immorality, venereal disease, a three-year separation, mental illness, racial incompatibility, and eugenic weakness.¹¹⁵ Of 30,000 divorces filed under the new law, 80% were initiated by the husbands. The divorce rate increased during the Third Reich more rapidly than did the marriage rate.¹¹⁶ Moreover, the new law subordinated women's roles as wives and guardians of morality within the family to the reproductive imperative. The Nazis were committed to the family only to the extent that it contributed to the sort of race-specific reproduction that was the Nazis' main concern. The Nazis expressed through their laws their estimation of women's worth as citizens. They valued "Aryan" women as bearers of genetic material and of offspring. Women's rights within marriage could be rescinded if they failed to reproduce.

But pronatalism is only one side of the story. Gisela Bock, a historian of the Nazi sterilization and euthanasia campaign, has called attention to

109. *Id.* at 150.

110. NAZISM, *supra* note 97, at 451.

111. SCHOENBAUM, *supra* note 94, at 180-81.

112. ROBERT G. MOELLER, PROTECTING MOTHERHOOD: WOMEN AND THE FAMILY IN THE POLITICS OF POSTWAR WEST GERMANY 15-16 (1993).

113. KOONZ, *supra* note 58, at 186-87.

114. EVA KOLINSKY, WOMEN IN WEST GERMANY: LIFE, WORK AND POLITICS 16 (1989).

115. *Id.* at 192 (citing Das Gesetz über Eheschliessung und Ehescheidung of July 6, 1938, 1938 RGBI. I S.807). For further discussion of this law, see NAZISM, *supra* note 97, at 467-69.

116. KOLINSKY, *supra* note 114.

the racism that informed Nazi policies on reproduction.¹¹⁷ Bock argues that this racism affected not only the “inferior” women, who were subjected to sterilization, but also the “Aryan” women. The latter, as a result of Nazi policies that reduced the birthrates significantly among groups of women deemed “unworthy” of reproduction, were subjected to increased pressure to reproduce, to raise children, and to subject themselves to the father’s authority within the family.¹¹⁸ The Nazi abortion policy thus imposed heavy sanctions on healthy, racially “valuable” women who sought abortions, while subjecting the racially undesirable and “unfit” to coercive abortions or sterilization.¹¹⁹

The Law for the Prevention of Hereditarily Diseased Offspring of July 14, 1933, allowed for sterilization if medical experts believed there to be a strong probability that the offspring would suffer from “serious hereditary defects of a physical or mental nature.”¹²⁰ Chronic alcoholics could also be sterilized. The sterilizations could be voluntary or requested by a legal guardian. If a medical officer requested the sterilization, it could be carried out involuntarily. Nearly 200,000 sterilizations were carried out by 1937.¹²¹ Eventually, up to 400,000 people were subjected to involuntary sterilization during the twelve-year Nazi regime.¹²²

While most German historians have, since the 1960s, tended to stress the continuities in modern German history, the Nazi period was a disjuncture in the history of Germany’s approach to the regulation of reproduction. While the Weimar Republic witnessed the slow liberalization of Germany’s criminal abortion statute and of some related legislation regulating contraception, the Nazi period saw a return to the most restrictive policies of the *Kaiserreich*, this time harshly enforced and with a new racial and eugenic bias. The post-war era saw a return to the trajectory established during the Weimar Republic, but the two Germanys developed different views on the state’s role in abortion regulation. West German views on the appropriate role of the state in this area were strongly influenced by a sense of responsibility for the excesses of the Nazi era.

II.

WESTERN SOCIAL MARKET CAPITALISM, SOVIET-STYLE COMMUNISM, AND THE FEMINIST THEORY OF THE STATE

Political entities the size of states rarely produce coherent views on matters as complex as the legal status of women. It is thus no surprise that

117. Gisela Bock, *Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State*, in *WHEN BIOLOGY BECAME DESTINY*, *supra* note 56, at 271, 273.

118. Bock, *supra* note 117, at 287.

119. GROSSMAN, *REFORMING SEX*, *supra* note 56, at 153.

120. 1933 RGBL I S.529.

121. *NAZISM*, *supra* note 97, at 457-58.

122. GROSSMAN, *REFORMING SEX*, *supra* note 56, at 149.

neither German state fully articulated its view of women's legal status and did not fully implement the view of women's legal status that it did articulate. East Germany needed to integrate women into its economy. East German women were saddled with a double burden: they continued to be primarily responsible for domestic chores and for raising children, but they were now also expected to have paying jobs. The periodic model, allowing for abortions in the first trimester of pregnancy, made sense in the context of a society that wanted to make it as easy as possible for women to continue to participate in economic life. The East German government supplemented its liberal abortion policy, however, with liberal labor laws, enabling women to have children without sacrificing their careers.

West Germany's abortion law must be understood in terms of the multiple pressures and influences upon the establishment of the Federal Republic. The Catholic traditions of West Germany's Christian Democratic Union ("CDU"), the ruling party in the first two decades of West Germany's existence, coupled with a constitutional imperative, inspired as a reaction to the atrocities of the Nazi regime, to protect all human life, established substantial barriers to the establishment of a periodic model in the West. These barriers might have been overcome, however, if West Germany had not also developed a very different set of laws and cultural practices defining the status of women as legal persons. While East German women were given special incentives to join the labor force and participate in political life, West German women were encouraged to focus on the family and the home. They were legally and socially defined as wives and mothers, and it is thus not surprising that the West German Federal Constitutional Court defined the status of the pregnant woman vis à vis her fetus in terms of the duties of motherhood rather than in terms of women's responsibilities as members of the labor force and as citizens endowed with constitutional rights.

A. *The Two Germanys*

In the immediate aftermath of World War II, neither German state recognized the other. While the West German government claimed exclusive authority to speak for the German people,¹²³ the East German government attempted to build a new national identity for its people, one identified with the Soviet-style communism to which the ruling Socialist

123. The pre-unification preamble to the Basic Law read, in part, "It [the Basic Law] also functions for every German who was denied the opportunity to participate. The entire German people is encouraged, in the spirit of free self-determination, to realize the unity and freedom of Germany." Article 23 made the Basic Law applicable to the existing states of West Germany and to each German state that joined the Federal Republic. Article 116, section 1 provides for a single German citizenship. In 1973, the Federal Constitutional Court held that the Basic Law creates a constitutional duty on the part of the West German government to strive for reunification. BVerfGE 36, 1 (17-18). Mattern, *supra* note 33, at 647-48.

Unity Party ("SED") adhered.¹²⁴ The general expectation was that the division of Germany would be short-lived. West Germany chose Bonn, a sleepy provincial town, as its capital, precisely so as not to appear to make any claim to permanence.¹²⁵ West Germany adopted a Basic Law, rather than a constitution, based on the assumption that the entire German people would create a new constitution after unification.¹²⁶ The early East German constitutions harbored similar assumptions, although they expressed their belief in German unity in different terms. According to the 1968 East German Constitution, Germany would eventually be free from "the division of Germany imposed on the German nation by imperialism" and Germany would eventually be unified on a democratic and socialist basis.¹²⁷ But the 1974 revision of the East German constitution reflected a new rejection of unity, focusing instead on closer cooperation with the Soviet Union.¹²⁸

In the 1950s, East German foreign policy called for the unification of Germany as one socialist state.¹²⁹ Once West Germany's first social-democratic chancellor, Willy Brandt, initiated his opening to the East ("*Ostpolitik*"),¹³⁰ West Germany adopted the position that Germany was still one nation divided into two states.¹³¹ *Ostpolitik* had some ironic ramifications. Since it facilitated the acceptance of East Germany into the family of nations, *Ostpolitik* enabled the SED to pursue its policy of establishing some distance between East Germany and the Federal Republic (*Abgrenzung*). At the same time, however, *Ostpolitik* allowed for increased contact and

124. East Germany's ruling Social Unity Party (Sozialistische Einheitspartei—the "SED") promulgated three significantly different constitutions. The SED was formed through a forcible union of the two previously existing left-wing parties, the SPD and the KPD. For a discussion of the formation of the SED and East Germany's party structure, see DIETRICH STARITZ, *GESCHICHTE DER DDR 16-20* (2d ed. 1996).

125. Gerald Kleinfeld, *The German Question, Yesterday and Tomorrow*, in *THE FEDERAL REPUBLIC OF GERMANY AT FORTY* 19, 22 (Peter Merkl ed., 1989) (noting that the choice of Bonn as capital was clearly provisional) [hereinafter *GERMANY AT FORTY*].

126. Donald Kommers, *The Basic Law of the Federal Republic of Germany: An Assessment after Forty Years*, in *GERMANY AT FORTY*, *supra* note 125, at 133 (1989).

127. E. GERMAN CONST. of 1968, art. 8.

128. See Shaffer, *supra* note 12, at 169.

129. See STARITZ, *supra* note 124, at 84-85. The 1949 constitution declared Germany an "indivisible democratic republic" consisting of German states. E. GERMAN CONST. of 1949, art. 1. The 1968 constitution, written during an intense period of the Cold War, declared East Germany a "socialist state of the German nation." E. GERMAN CONST. of 1968, art. 1.

130. Willy Brandt's *Ostpolitik* involved a series of pathbreaking trips to Eastern Europe. Brandt expressed his contrition for German atrocities committed during World War II and initiated negotiations for cultural, economic, and political cooperation between West Germany and its Eastern European neighbors. One of the most important elements of *Ostpolitik* was movement towards improving relations between the two German states. For a good introductory discussion, see MARY FULBROOK, *THE DIVIDED NATION: A HISTORY OF GERMANY 1918-1990*, FONTANA HISTORY OF GERMANY 207-10 (1992).

131. WILLY BRANDT, *PEOPLE AND POLITICS: THE YEARS 1960-1975* 367 (1978) (stating that "[e]ven if there exist two states in Germany, they cannot be foreign countries to each other.").

exchange between East and West Germans and thus encouraged hopes of an eventual unification.¹³² As *Ostpolitik* facilitated a rapprochement between the two Germanys, East Germans also began to think of their German past as a constitutive aspect of their national identity. The new East German Constitution of 1974 embraced the idea of a German nation but subordinated the desire for unity to the larger aim of socialist equality.¹³³ During their forty years of separate existence, the two Germanys had indeed come to be two nations, with different ways of relating to their common past and with different attitudes regarding numerous contemporary economic, social, and political issues, including the rights of women to reproductive freedom and self-determination. These differences became especially clear after the unification of October 3, 1990.

The original constitutions of the two states contain almost identical language guaranteeing women equal rights and prohibiting discrimination.¹³⁴ But the East German government eventually concluded that providing equal rights for women would not be adequate to overcome the deeply-ingrained cultural stereotypes to which women were subject. The 1968 constitution thus added a special provision calling for the encouragement (*Förderung*) of women, particularly in the realm of professional qualification.¹³⁵ Significantly for the discussion of abortion regulation, the later East German constitutions did not guarantee the right to life.¹³⁶ Lacking such a constitutional provision, East German legislators, in considering regulation of reproductive rights, did not have to overcome the same constitutional obstacle that faced the West German Constitutional Court.

In fact, the last East German constitution reflected the growing separation of the two German states. Germany had been arbitrarily divided between the Western allies and the Soviet Union in 1949, but, by the 1970s, the two German states had developed very different political systems and cultures. While West Germany's political system was shaped by the western powers that oversaw its creation,¹³⁷ East German politics was controlled and often dictated by the Soviet Union, which regarded the division of Germany as a violation of the Potsdam treaty and an effect of capitalist

132. Polls conducted in East Germany in 1972 at the height of the policy of *Abgrenzung* indicate that most Germans still believed Germany should be unified. STARITZ, *supra* note 124, at 288.

133. Werner Weidenfeld, *Die Identität der Deutschen — Fragen, Positionen, Perspektiven*, in *DIE IDENTITÄT DER DEUTSCHEN* 11, 31-32 (Weidenfeld ed., 1983).

134. GG article 3(2) reads simply, "Men and women have equal rights." Article 8 of the East German Constitution of 1949 reads similarly, "Man and woman have equal rights."

135. E. GERMAN CONST. of 1968, art. 20(2) ("The encouragement of women, especially in professional qualification, is the responsibility of the state and the society."). See also SHAFFER, *supra* note 12, at 12.

136. Will, *supra* note 30, at 411.

137. KURT SONTHEIMER, *THE GOVERNMENT AND POLITICS OF WEST GERMANY* 26-29 (1973). Ralf Dahrendorf offers the provocative and extremely influential thesis that post-war West Germany, despite its liberal exterior was still dominated by an elite imbued with illiberal attitudes and committed to authoritarian modes of governance. RALF

imperialism.¹³⁸ One area in which the divergence of the two German states was most pronounced was in the policies affecting the lives of women and in their resulting roles in the economy and politics of the two cultures.

1. *The status of women in East Germany*

East German law enabled women to shape their private lives while also participating in the economic and political public spheres. Although these laws partially liberated women from the claustrophobic cult of domesticity, East German women eventually came to feel that their society was asking them to shoulder a double burden. While women were supposed to be mothers, responsible for childcare, as well as workers, men were never asked to take on special fatherly duties in addition to their work-related responsibilities. East Germany's laws were extremely enlightened regarding the status and role of women, but the laws were insufficient to overcome deeply-ingrained cultural assumptions regarding the proper role of women in society. Moreover, although feminist scholars generally acknowledge the value of East Germany's early legislation granting women equal rights, many argue that the motivation behind the laws was economic expediency rather than a true commitment to equality for women.¹³⁹

Scholars specializing in the status of women in East Germany are divided on whether East Germany's policies towards women were a product of progressive attitudes towards women's legal status or merely an expression of economic necessity.¹⁴⁰ If the decision to decriminalize abortion was motivated by progressive attitudes regarding women's rights, those attitudes may have derived from positions articulated by Germany's leftist parties in the 1920s,¹⁴¹ or they may have been the result of more pragmatic views prevalent in Eastern Europe regarding the necessity to integrate women as fully as possible into the economy.¹⁴² In any case, by the time of unification, East German women had enjoyed nearly two decades without restrictions on abortion in the first trimester, and they viewed that state of affairs as saying something about their substantive rights as legal persons.

DAHRENDORF, *SOCIETY AND DEMOCRACY IN GERMANY* 435-50 (1967). Dahrendorf's thesis informs one of the most sophisticated American discussions of the Federal Constitutional Court's 1975 abortion decision: Douglas Morris, *Abortion and Liberalism: A Comparison Between the Abortion decisions of the Supreme Court of the United States and the Constitutional Court of West Germany*, 11 *HASTINGS INT'L & COMP. L. REV.* 159 (1988).

138. SONTHEIMER, *supra* note 137, at 37.

139. Barbara Einhorn, *Women in the New Federal States after the Wende: The Impact of Unification on Women's Employment Opportunities*, in *WOMEN AND THE WENDE: SOCIAL EFFECTS AND CULTURAL REFLECTIONS OF THE GERMAN UNIFICATION PROCESS* 18, 20-21 (Elizabeth Boa & Janet Wharton eds., 1994).

140. On this topic, see the essays by Barbara Einhorn, Dinah Dodds, Georgina Paul, Rachel Alsop, & Sabine Bergmann-Pohl in *WOMEN AND THE WENDE*, *supra* note 139.

141. THIEZ, *supra* note 49, at 18.

142. Einhorn, *supra* note 139, at 18, 21.

Socialist ideology called for a strategy that would promote gender equality in East Germany, and, throughout the 1960s and 70s, the government passed resolutions and laws promoting the education and training of women. The government aimed to encourage women to take active roles in both the economy and society.¹⁴³ Recognizing that women could not achieve equality in these areas without support in the home, however, the SED-led government also sought to equalize relationships and responsibilities within the family. In addition to the constitutional provisions guaranteeing women political equality and economic opportunity, the East German constitution also emphasized that men and women are of "equal standing" regarding marriage and family.¹⁴⁴ The adoption of a new Family Law Code in 1965 furthered this constitutional aim. The new Family Law Code replaced the sections of the BGB of 1900 governing family law, which remained in effect in West Germany until 1977. The new code gave both parents joint responsibility for the care of the home and the children, and it obligated husband and wife to support each other's educational and career goals.¹⁴⁵

Some observers see the East German policies that supported equal rights for women, and even gave women preferential treatment in some areas,¹⁴⁶ as a product of socialist ideology.¹⁴⁷ Others argue that the labor shortage and the need for women workers and for population growth motivated East German politicians to devise laws that encouraged women to reproduce while also making it possible for them to continue working. Both of these perspectives have some truth to them, but the importance of the East German's motivations in promulgating these laws recedes in importance before the fact that women interpreted these laws as endowing them with political and economic rights comparable to those enjoyed by East German men.

The 1972 Law on the Discontinuation of Pregnancy aimed to encourage women to contribute to the economy without neglecting their families. The new measures included: maternity leave increased to 26 weeks, 21 days off per year for working women with three children or more (after 1977, the measure was extended to apply to women with only two children), one day off per month for housework for mothers with children under 18, one day off per month for women over 40 and for single fathers, and laws requiring that working women with children under six not be

143. Elizabeth Kapo, *Abortion Law Reform: The Nexus Between Abortion and the Role of Women in the German Democratic Republic and the Federal Republic of Germany*, 10 DICKINSON J. INT'L L. 137, 146 (1991).

144. E. GERMAN CONST. of 1949, art. 30; E. GERMAN CONST. of 1968, art. 38(2).

145. SHAFFER, *supra* note 12, at 30-31.

146. *See id.* at 161 ("[East Germany] has legislated what in practice amounts not merely to affirmative action but to extensive reverse discrimination, referred to in the GDR itself as 'differentiation' and described in one West German book as 'discrimination in favor of women so that discrimination against women can be eliminated.'").

147. *E.g.*, Kapo, *supra* note 143, at 156-57.

asked to work late shifts or overtime. In 1975, the government introduced the "baby year." Beginning with their second child, women could take a year off from work at 65-90% pay and with a guaranteed right to return to their job with accumulated seniority.¹⁴⁸ State-supported day care was guaranteed at a cost of one East German Mark per day. After 1986, the baby year could be taken by either the mother or the father or could be divided between them, but fathers rarely availed themselves of this opportunity. The state also made a one-time payment of 1,000 Marks, or about one month's average salary, at the time of a child's birth and additional monthly payments for each child.¹⁴⁹ If, for some reason, child care was unavailable, the baby year could be extended for up to a total of three years.¹⁵⁰

As a result of this legislation, 91% of East German women had paying jobs, mostly full-time. In addition to East Germany's extremely high divorce rate, 30% of children in East Germany were born to single mothers. Without this legislation supporting working mothers, many East German women would have had to devote themselves full-time to caring for their children. The government enabled women to be both mothers and workers by providing kindergarten for all children beginning at the age of three, which 94% of the children in East Germany attended. Public facilities also provided for the care of 80% of East German children under three.¹⁵¹ In West Germany, by contrast, only 4% of the children under three were in nurseries.¹⁵² The East German facilities were not ideal. They were overcrowded, dilapidated, and poorly staffed, but they clearly served their purpose of enabling women to have children and to continue to pursue their careers.

These laws and institutions oriented towards enabling women to participate in economic life in East Germany, as well as the commitment of resources they entailed, were not enough to guarantee women equal treatment in East Germany. Despite legal equality, women did not achieve emancipation in East Germany. Women were fully integrated into the East German economy, but they were still expected to take the leading role in maintaining the household and raising the children. Men were, as a result, relatively more free to take on professional responsibilities.¹⁵³ The

148. *Id.* at 145 (referring to the labor law of East Germany § 243, Abs. 1).

149. Dinah Dodds, *Women in East Germany: Emancipation or Exploitation*, in *WOMEN AND THE WENDE*, *supra* note 139, at 107, 109.

150. Myra Marx Ferree, *The Rise and Fall of "Mommy Politics": Feminism and Unification in (East) Germany*, 19 *FEMINIST STUD.* 89, 94 (1993).

151. Sabine Klein-Schonnefeld, *Germany*, in *ABORTION IN THE NEW EUROPE: A COMPARATIVE HANDBOOK* 113, 118 (Bill Rolston & Anna Eggert eds., 1994).

152. Einhorn, *supra* note 139, at 22.

153. Sabine Bergmann-Pohl, *Frauen im vereinten Deutschland: Wertewandel oder Verzicht?*, in *WOMEN AND THE WENDE*, *supra* note 139, at 6, 12.

gendered division of labor thus persisted in East Germany, limiting women's career opportunities.¹⁵⁴ East German women were more likely to work part-time than were their male counterparts; consequently, they advanced more slowly and tended to have lower wages. Their lower wages were not simply a product of a failure to break through the glass ceiling, however. In East Germany, as in the West, women tended to be employed in feminized sectors of the economy where wages were lower than they were for positions traditionally occupied by men.¹⁵⁵ By the 1980s, East German women could not enter over one half of East Germany's 289 formally recognized skilled trades, and over 60% of all girls entered apprentice programs in one of only 16 of these trades.¹⁵⁶ In 1987, women earned 762 marks per month while men earned 1,009, but East German women's earnings still accounted for 40% of family income, while West German women's earnings accounted for only 18%.¹⁵⁷

Lower wages were seen as the price women paid for the maternity leave and other benefits they enjoyed as part of East Germany's permissive "mommy politics," but women came to resent the assumption that they would take responsibility for child care and many complained of the isolation they suffered during the "baby year."¹⁵⁸ Lacking recognition of the positive contributions of unpaid reproductive labor, East German policy makers could not create a system that rewarded labor related to reproduction or that encouraged men to perform economic functions traditionally assigned to women.¹⁵⁹ Because the socialist state never developed an independent ideological justification for treating women as citizens endowed with equal status, its laws and regulations were inadequate to alter deeply ingrained social practices and assumptions regarding the gendered division of labor and the separation of spheres of influence. As one critic of the SED-regime put it:

In short, the state expanded the opportunities for women within traditionally prescribed gender roles, but continued actively to promote the location of women within the family sphere which is characteristic of patriarchal society.¹⁶⁰

154. Ferree, *supra* note 150, at 109.

155. Rachel Alsop, *Women, Work and the Wende: Regional and Sectoral Perspectives, Political and Individual Responses*, in *WOMEN AND THE WENDE*, *supra* note 139, at 30, 30-32.

156. Ferree, *supra* note 150, at 93.

157. *Id.*

158. *Id.* at 95-96. Although women talked among themselves about their feelings of loneliness and isolation experienced during the baby year, their resentment never took the form of active protest or political organization. We know of these feelings mostly through the work of social scientists who interviewed East German women and whose research was published after German unification.

159. *Id.* at 110.

160. Georgina Paul, *Über Verschwiegenges sprechen: Female Homosexuality and the Public Sphere in the GDR before and after the Wende*, in *WOMEN AND THE WENDE*, *supra* note 139, at 226, 226-27.

Many East German women eventually came to see the "emancipation" offered them by the government as superficial, because basic attitudes regarding men's and women's roles in society never changed.¹⁶¹

Despite the system's flaws, however, East Germany's abortion regulatory regime was imbedded in a system of laws that enabled women to control the number and spacing of their children and to avoid a painful choice between motherhood and a career. The East German government may have done little to alter traditional attitudes on the gendered division of familial responsibilities, but statistics on the role of East German women in the economy and politics suggest that East German laws effected an erosion of some attitudes regarding the gendered division of labor more generally. East German women were not entirely satisfied with their lot, but when unification came, they realized that their position in the East German economy and society was better protected than it would be in the Federal Republic.

2. *The status of women in West Germany*

Debates over the status of women in West Germany began with the discussions among the framers of the Basic Law. While Social Democrats pushed for complete equality in all spheres, the CDU stressed the need for a society based on Christian values.¹⁶² For Konrad Adenauer, West Germany's first Chancellor and the leader of the CDU, the preservation of the nuclear family was necessary to the establishment of a Christian democratic society.¹⁶³ As a result, West Germany created a gendered society in which women were primarily assigned roles as housewives and mothers.¹⁶⁴ While Article 3 of the Basic Law guaranteed women equal rights with men, Article 6 emphasized the family as a fundamental pillar of society, and provided for special protection for mothers.¹⁶⁵ Until 1977, West Germany maintained clauses of the BGB allowing a woman to work only if her husband's income was inadequate to the family's needs.¹⁶⁶

One of the early challenges for West Germany's political leaders was to implement the provisions of the Basic Law in tension with the BGB. The first attempt to revise the BGB in 1952 represented a set-back for women. On the one hand, it eliminated paternalistic provisions for dowry rights and legal entitlements to maintenance after divorce.¹⁶⁷ On the other

161. Dodds, *supra* note 149, at 107.

162. MOELLER, *supra* note 112, at 38-75; KOLINSKY, *supra* note 114, at 44.

163. MOELLER, *supra* note 112, at 78.

164. de Soto, *supra* note 41, at 86.

165. MOELLER, *supra* note 112, at 71-72; GG art. 6(4).

166. SHAFFER, *supra* note 12, at 29-30; KOLINSKY, *supra* note 114, at 48-50.

167. KOLINSKY, *supra* note 114, at 46.

hand, it left intact a 1950 Civil Service Law that required that married women be dismissed from positions in the public sector.¹⁶⁸ Only under the Social-Democratic government in 1977 was the BGB revised to include the concept of partnership in marriage.¹⁶⁹

But women never achieved full social equality in West Germany, and political and cultural practices conspired to make it impossible for them to do so. For example, the retail economy in West Germany served nuclear families consisting of a wage-earning husband and a housewife. German shops routinely closed at 6 P.M., making it impossible for working people to shop in the evenings. The failure of the SPD to embrace a theory of women's legal personhood is most evident here, as, true to its male-dominated labor-union constituency and aiming to protect workers from shift work and overtime, the SPD had not pushed for longer shop hours.

Women in West Germany consistently performed traditional women's work. Between 1975 and 1984, the top ranking choices for women undergoing vocational training were courses in sales assistance and hairdressing.¹⁷⁰ Although management/economics was the most popular subject studied by West German women at the universities in the school year 1985-86, subjects such as German, education, English, and French, pursued in preparation for traditional teaching roles, all ranked in the top ten for women but not for men.¹⁷¹ The majority of women who worked full time worked as unskilled or semi-skilled office workers, as skilled office staff, or as sales personnel.¹⁷² Women continued to dominate traditional women's occupations, accounting for 99% of all doctor's assistants (receptionists), 98% of all dressmakers and housekeepers, 97% of all cleaners and copy-typists, 96% of all nursery nurses, 95% of all seamstresses, 91% of all laundry workers and pressers, 85% of all nurses, and 84% of all sales assistants.¹⁷³

The structure of higher education in Germany also made it more difficult there than elsewhere for women to pursue academic careers. West German universities require two dissertations, a doctoral dissertation and a *Habilitation*, as a prerequisite for full-time faculty appointments. As a result, people pursuing academic careers usually live as students into their thirties or forties. Women who want to become professors are thus generally faced with a choice between having families and pursuing their chosen

168. *Id.* at 47.

169. *Id.* at 50; see BGB §§ 1356-1360, in *HANDAUSGABE*, *supra* note 36.

170. *KOLINSKY*, *supra* note 114, at 273.

171. *Id.* at 274-75.

172. *Id.* at 277.

173. *Id.* at 277-78.

career. The pressures created by this choice help explain the under-representation of women in the West German academy.¹⁷⁴ Despite public pronouncements in favor of equal rights for women, West Germany's main political parties had fewer women in leadership positions in 1980 than they did in 1919. Only when the new Green Party shamed the mainstream parties by sending more women than men to the Bundestag in 1987 did the Christian Democrats, Social Democrats, and Free Democrats ("Liberals") make serious efforts to promote the candidacy of women.¹⁷⁵ These structural elements that made it difficult for women to realize equality in West Germany have all been imported into the newly unified Germany.

B. Abortion Regulation in the Two Germanys

While East Germany's policies on abortion could not fail to be influenced by its broader policies promoting economic and social advancement for independent women, West German policies could not fail to be informed by general cultural practices oriented toward encouraging women to retreat from full-time employment and into the household, where they would take up traditional roles as housewives and mothers.

1. Origins of the East German rejection of section 218

As early as the founding of East Germany in 1949, its abortion policy was informed by pragmatic concerns, in line with the SPD position from the Weimar Republic. The SED focused not on the central question of women's control over their own bodies, as articulated in the KPD position from the Weimar Era, "Your body belongs to you!", but on the impoverished conditions of working-class women and the dangers of illegal abortion.¹⁷⁶ The SED's socialist rhetoric generally echoed that of nineteenth-century socialist humanism: gender issues were treated, if at all, as secondary to class.¹⁷⁷ As Catherine MacKinnon explained in one of her landmark essays:

To Marx, women were defined by nature, not by society. To him, sex was within that "material substratum" that was not subject to social analysis, making his explicit references to women or to sex largely peripheral or parenthetical. . . .

174. For a discussion of the structure of the academic discipline of history, see WOLFGANG WEBER, *PRIESTER DER KLIO: HISTORISCH-SOZIALWISSENSCHAFTLICHE STUDIEN ZUR HERKUNFT UND KARRIERE DEUTSCHER HISTORIKER UND ZUR GESCHICHTE DER GESCHICHTSWISSENSCHAFT 1800-1970* (1984); D.A. Jeremy Telman, *Clio Ascendant: The Historical Profession in Nineteenth-Century Germany* (1993) (unpublished Ph.D. dissertation, Cornell University) (on file with author). The story is similar for other academic disciplines.

175. KOLINSKY, *supra* note 114, at 221-23.

176. Donna Harsch, *Society, the State, and Abortion in East Germany, 1950-1972*, 102 *AM. HIST. REV.* 53, 56-57 (1997).

177. Chris Weedon, *Changing Subjectivities? Women and Identity*, in *WOMEN AND THE WENDE*, *supra* note 139, at 115, 118-19.

Engels, by contrast, considered women's status a social phenomenon that needed explanation. He just failed to explain it.¹⁷⁸

The SPD, throughout its history, was influenced by August Bebel's bestseller, *Women under Socialism*,¹⁷⁹ which assumed women's emancipation would follow from the overthrow of capitalism. Engels also argued that the liberation of women could be achieved through socially productive paid work. Marx and Engels believed that the marriage relationship could evolve into a truly loving one only after the economic incentives characteristic of bourgeois marriage were removed.¹⁸⁰ Leninist strategy likewise called for the emancipation of women from the drudgery of domestic labor through their incorporation into the productive labor force.¹⁸¹ Such views led to the creation of admirable employment laws regarding women, but the gendered division of labor remained.¹⁸² Before any such policy could be implemented, however, East Germany had to recover from the disaster from which it emerged.

Toward the end of World War II, Eastern Germany had been bombed and then overrun by the Red Army, whose objective was not simply victory but revenge. One means by which the Soviet forces exacted revenge was the rape of German women.¹⁸³ Mass rapes occurred in Berlin from April 24 to May 5, 1945, as the Soviet forces secured Berlin. Perhaps 500,000 women were raped in Berlin, and estimates run as high as two million rapes perpetrated by the advancing Red Army against German women.¹⁸⁴ The ruling authorities suspended section 218 in order to allow women to abort the resulting pregnancies. In the first years after the war, several provincial legislatures within the zone occupied by the Soviets replaced section 218 with an "indications model" approach that allowed for abortions based on medical, ethical, or "social" grounds, with social grounds including economic distress.¹⁸⁵

In 1950, citing the need to increase population while also guaranteeing the health of the mother,¹⁸⁶ the East German government introduced the Law for the Protection of Mother and Child and the Rights of Women and

178. Catherine MacKinnon, *A Feminist Critique of Marx and Engels*, in *TOWARDS A FEMINIST THEORY OF THE STATE* 13 (1989).

179. AUGUST BEBEL, *WOMEN UNDER SOCIALISM* (Daniel DeLeon trans., 1904).

180. Hermine de Soto, *Equality/Inequality: Contesting Female Personhood in the Process of Making Civil Society in Eastern Germany*, in *THE CURTAIN RISES: RETHINKING CULTURE, IDEOLOGY AND THE STATE IN EASTERN EUROPE* 289, 289-90 (Hermine de Soto & David G. Anderson eds., 1993).

181. de Soto, *supra* note 180, at 291.

182. Weedon, *supra* note 177, at 119.

183. For a thorough discussion of the Red Army's systematic policy of raping German women, see NORMAN M. NAIMARK, *THE RUSSIANS IN GERMANY: A HISTORY OF THE SOVIET ZONE OF OCCUPATION, 1945-1949*, 69-140 (1995).

184. GROSSMAN, *REFORMING SEX*, *supra* note 56, at 193.

185. Harsch, *supra* note 176, at 56-57.

186. THIETZ, *supra* note 49, at 19.

ended this liberal regime of abortion regulation. Section 11 of the new law allowed abortion only if the life or health of the mother was endangered or if either parent suffered from a severe hereditary defect. Reasoning that the end of the post-war economic crisis alleviated economic pressures experienced by young women, the new regulation limited the social indication.¹⁸⁷ Section 11 was extremely unpopular with East German women, and its introduction met with protests from within the SED.¹⁸⁸ Legal abortions declined from 26,400 in 1950 to 5,000 the following year. By the mid-1950s, with about 1,000 legal abortions being performed annually, East Germany had one of the lowest legal abortion rates in the world. The slim chance of having a desired abortion approved prevented many women from even applying.¹⁸⁹ The result was predictable: between 70,000 and 100,000 illegal abortions took place annually in East Germany in the first five years after the implementation of section 11.¹⁹⁰ In the 1960s, the illegal abortion rate remained about the same. Approximately 60 women died every year due to botched illegal abortions, making such abortions the leading cause of maternal mortality.¹⁹¹

The full text of the Law for the Protection of Mother and Child and the Rights of Women makes it clear, however, that the law was designed largely to ease the economic burdens on young mothers. Its provisions called for one-time payments to mothers for each child, for monthly allowances for mothers with more than three children,¹⁹² and for the placement of the children of single mothers in nurseries.¹⁹³ The law authorized funding for nurseries and daycare facilities,¹⁹⁴ and for counseling centers for mothers,¹⁹⁵ thus enabling new mothers to join the work force. The law established institutes to care for sick pregnant women and to provide extra rations for mothers.¹⁹⁶ Maternity leaves were also extended.¹⁹⁷ While the new law allowed abortions only in the case of medical or embryological indications,¹⁹⁸ requests for abortions were not simply evaluated by a doctor, but rather by a panel including three physicians, a representative (usually female) of the Health Ministry, and an envoy of the official East German women's movement, the Democratic Women's League.¹⁹⁹ The

187. *Id.* at 19.

188. GROSSMAN, REFORMING SEX, *supra* note 56, at 198.

189. Harsch, *supra* note 176, at 60.

190. *Id.* at 59.

191. *Id.* at 63; THIETZ, *supra* note 49, at 96.

192. Gesetz über den Mutter und Kinderschutz § 2 [Law for the Protection of Mother and Child], reprinted in THIETZ, *supra* note 49, at 70-75 [hereinafter Mother and Child].

193. Mother and Child § 3.

194. *Id.* §§ 4, 5.

195. *Id.* § 6.

196. *Id.* § 7.

197. *Id.* § 10.

198. *Id.* § 11.

199. Harsch, *supra* note 176, at 57.

idea was that the woman's perspective, as well as medical perspectives, should be considered in each abortion request.

Numerous pressures on the SED leadership contributed to the decision in 1950 to impose the relatively restrictive policy on abortions. The Soviet Union had banned abortions in 1936 in an effort to encourage population growth. Evidence suggests that East Germany's leaders were pressured to follow a similar course.²⁰⁰ It was especially easy for the SED to follow such a course, given that the conservative gynecologists who dominated the East German academic faculties well into the 1950s wanted access to abortion to be restricted and were especially vocal in their opposition to the social indication.²⁰¹ But private behavior was largely unaffected by the ban on the social indication. Women sought out illegal abortions and forced the government to amend the law in order to bring it into line with popular behavior patterns.²⁰²

But the movement for abortion reform was also spurred on by external pressure: this time from both the communist East and the capitalist West. The Soviet Union abandoned its prohibition on abortion after World War II, and East Germany lagged behind its East Bloc partners in terms of the liberalization of abortion laws. While the others had largely decriminalized abortion by the late 1950s, East Germany followed the wave of abortion reform that swept through the West in the 1960s and 1970s.²⁰³ Perhaps influenced by such external developments, East German medical professionals developed new approaches to the abortion issue. While abortion discussions in the 1950s focused on the dangers of illegal abortion and the need to provide women with alternatives to such risky procedures, by the 1960s doctors and party functionaries were beginning to link the human cost of botched abortions to arguments for increasing access to legal abortions. The discourse of the 1960s was thus a reversion to the SPD position of the Weimar years, a position that focused not on women's rights but on their social needs.²⁰⁴

East German women helped facilitate this change in the discourse, or reversion to an older discourse, and their important position in the East German economy and polity contributed to their ability to influence policy decisions. A new generation of gynecologists and physicians, who were more likely to be female and much more likely to be working class, knew first-hand of the hardship women faced in post-war Germany. Untainted by the Nazi ideology of racial eugenics and opposition to "Aryan" abortion, these doctors were more positively disposed to abortion reform.²⁰⁵ The historian Donna Harsch argues that the consciousness of abortion as a

200. *Id.*

201. *Id.* at 57-58.

202. *Id.* at 55.

203. *Id.* at 53.

204. *Id.* at 64.

205. *Id.* at 66-67.

right was forged in the "discursive process itself." East German advocates of reproductive rights availed themselves of traditional socialist humanitarian arguments and pointed to the language in the East German constitution guaranteeing them equal rights; they also drew on the Western discussion.²⁰⁶ The fact that East German women could have an impact on political discourse in the public sphere is a remarkable indication of the progress women had made there. As women came to play increasingly important decision-making roles in East German politics and in the East German economy, they contributed to the erosion of the separation of spheres. Women could also play central roles in the decision-making processes that affected them most directly, those applying to the regulation of the private sphere.

The political savvy of East German women is evident in the petitions they wrote protesting the government's refusal to grant their requests for abortions. While women in the 1950s wrote very personal letters, stressing their working-class background or refugee status, women in the 1960s stressed the importance of their roles in the economy and denounced section 11 as inconsistent with DDR policies and with abortion laws in other Communist countries. Women's rights are explicitly mentioned in about 20% of the letters of the late 1960s.²⁰⁷

In 1965, acting on the recommendations of a newly-created working group on problems concerning abortion, the Ministry of Health revised its instructions for the implementation of section 11. The new instructions allowed the termination boards that determined whether or not to permit abortion procedures to consider multiple factors in addition to medical or eugenic grounds. The factors included the woman's age, the number of children the woman already had to care for, the spacing of the births, and criminological grounds for the abortion. Women who procured illegal abortions were no longer to be subject to criminal penalties but were to be "condemned or castigated by public shame."²⁰⁸ Word of the new instructions must have spread rapidly, as applications for legal abortions rose dramatically. The ratio of legal abortions to live births rose from 2.7 per 1,000 in 1964 to 89 per 1,000 in 1967. The number of legal abortions performed annually between 1966 and 1970 rose to about 21,000.²⁰⁹

It nonetheless came as a surprise when the East German legislature (the "Volkskammer") suddenly announced its new Law on the Discontinuation of Pregnancy of March 9, 1972.²¹⁰ Sections 153 through 155 of the Criminal Code, providing for penalties for those convicted of performing illegal abortions, remained in force, but the new law now explicitly granted

206. *Id.* at 83.

207. *Id.* at 73-76.

208. *Id.* at 62-63.

209. *Id.* at 79-80.

210. GB-DDR I S.89.

women a right to abortion in the first twelve weeks of pregnancy.²¹¹ The abortion had to be performed by a doctor, and the law called upon the doctor to consult with the woman. But the consultation served the purpose of informing the woman of the nature of the abortion procedure and of the availability of contraception.²¹² Women in East Germany thus enjoyed an unrestricted right to an abortion in the first trimester from 1972 until the new law was promulgated in 1992.

The most unique thing about the 1972 Law on the Interruption of Pregnancy is that it adopted the language of equality that East German women only rarely ventured to express. The law justified the liberalization of abortion regulations by stressing that:

The equality of the woman in education and career, marriage and the family, requires that the woman be able to decide for herself about pregnancy and its continuation. The realization of this right is inseparably connected with the increasing responsibility of the socialist state and all its citizens for the constant improvement of health care for the woman, for the furtherance of the family and love of children.²¹³

Language guaranteeing women equal rights and even preferential treatment had been incorporated into the East German constitution from the very beginning, but words and deeds did not always correspond. East German women were not naive. They knew of the economic constraints behind the government's decision on abortion law. Based on their experiences with the abortion law and their role in East German society, women fashioned a system of beliefs concerning their legal status. They came to view themselves as having a right to bodily integrity and self-determination as evidenced by twenty years of reproductive freedom.

2. *West German abortion law and women's legal status*

West Germany's abortion law developed according to a different dynamic than that of East Germany. Western Germany faced economic crisis in the immediate post-war years, but women in western Germany had not been subjected to systematic rapes. Women who were impregnated as a result of rape were allowed abortions in the immediate post-war period.²¹⁴

211. Will, *supra* note 30, at 412.

212. Rainer Frank, *Federal Republic of Germany: Three Decisions of the Federal Constitutional Court*, 33 U. LOUISVILLE J. FAM. L. 353, 354 (1995).

213. Mattern, *supra* note 33, at 672 (citing § 153 StGB (E. Germany 1972)).

214. de Soto, *supra* note 41, at 90. While the invading allied armies committed rapes throughout Germany, only the Soviet Army engaged in systemic rape of German civilians. "[W]omen in the Eastern Zone. . . shared an experience for the most part unknown in the West, the ubiquitous threat and the reality of rape, over a prolonged period of time." NAIMARK, *supra* note 183, at 107. Nonetheless, due to the mass migrations following World War II, German rape victims, although most heavily concentrated in the East, could be found throughout Germany.

Aware of the atrocities committed during the Third Reich, however, West Germany felt moral as well as political pressure from the Western allies to safeguard life.

Abortion law was nonetheless liberalized in the western zones. The new government gave effect to the judge-made law of the Weimar Republic, allowing for abortions if the woman's life or health was endangered.²¹⁵ In 1962, the first reform of the West German criminal code officially adopted the so-called "medical indication." But the medical indication was broadly interpreted to include grounds for abortion usually understood under the social indication, and the number of legal abortions performed in West Germany jumped from under 3,000 in 1968 to nearly 18,000 in 1974. At the same time, prosecutions for illegal abortions declined from nearly 600 to under 100 per year.²¹⁶

From 1965 to 1972, there were numerous attempts to reform West Germany's abortion law. Suggestions ranged from reforms expanding the grounds on which women could procure legal abortions to the periodic model, like the one adopted in East Germany in 1972.²¹⁷ In 1970, a group of German and Swiss law professors released their "alternative draft" for reform of the West German penal code, in which they expressed their support for a periodic model, combined with a mandatory counseling provision. A minority of the professors favored the indication model, arguing that some decisions could not be left to the woman's discretion.²¹⁸

Public opinion also clearly played a role in pushing the Bundestag to reform West Germany's abortion law. The popular magazine, *Der Stern*, published a cover article in which 375 prominent women announced that they had had abortions.²¹⁹ German prosecutors took no action against these women, saying their confessions did not constitute sufficient evidence to support an indictment.²²⁰ Given that the criminal abortion statute was not being enforced, the Social Democratic government proposed in 1974 that West Germany emulate East Germany as well as many Western states and allow unrestricted access to abortion in the first trimester of pregnancy.

Years in the making, West Germany's Fifth Law for the Reform of Penal Law included a new abortion provision introduced by the Bundestag

215. Udo Werner, *The Convergence of Abortion Regulation in Germany and the United States: A Critique of Glendon's Rights Talk Thesis*, *Abortion Regulation in Germany & the U.S.*, 18 *LOY. L.A. INT'L & COMP. L.J.* 571, 581-82 (1996).

216. Werner, *supra* note 215, at 582; Albin Eser, *Reform of German Abortion Law: First Experiences*, 34 *AM. J. COMP. L.* 369, 371 (1986).

217. Kommers, *supra* note 31, at 261-62.

218. Mattern, *supra* note 33, at 656-60.

219. Joyce M. Mushaben, *Feminism in Four Acts: The Changing Political Identity of Women in the Federal Republic of Germany*, in *GERMANY AT FORTY*, *supra* note 125, at 76, 91.

220. Hartmut Gerstein & David Lowry, *Abortion, Abstract Norms, and Social Control: The Decision of the West German Federal Constitutional Court*, 25 *EMORY L.J.* 849, 853-54 (1976).

on June 18, 1974.²²¹ Although abortion remained illegal, section 218a provided for an exception in the first twelve weeks after conception for abortions performed by a doctor with the woman's consent.²²² Section 218b allowed for abortion after the first trimester in the case of medical or embryological indications, although section 219 required that women procuring such abortions secure certificates of indication. The doctor performing the abortion otherwise could be punished with imprisonment for up to one year.²²³

The conservative parties in West Germany, as well as state governments led by those parties, called upon the Constitutional Court to engage in "abstract norm control" and review the law. The Constitutional Court has the authority to examine, on the request of a state, the federal government or one-third of the members of the Bundestag, the constitutionality of any federal or state statute to ascertain if it is in conformity with the Basic Law. Such jurisdiction is compulsory.²²⁴ The Constitutional Court has exclusive authority to decide constitutional issues, and its decisions are final and binding on all German courts.²²⁵

For reasons to be explored below, the Constitutional Court struck down this reform of the abortion law as inadequately protective of the life of the fetus and thus in conflict with Article 2(2) of the Basic Law, which protects the right to life and physical integrity.²²⁶ The new law, adopted in 1976, allowed abortions performed by doctors, provided one of the four indications were present and the pregnant woman had undergone mandatory counseling.²²⁷ This system of abortion regulation remained in place in West Germany until the unification, and the indication model provided the basic format for the new abortion law adopted in the unified Germany.

Coming as it did just two years after the United States Supreme Court's decision in *Roe v. Wade*,²²⁸ the West German Constitutional Court's abortion decision of 1975 has been the subject of numerous comparative essays.²²⁹ It is indeed striking that, while the United States

221. BVerfGE 39, at 3.

222. *Id.* at 4-5. The twelve weeks are measured from the time of implantation in the uterine wall and are equivalent to the first trimester of pregnancy.

223. *Id.* at 5-6.

224. Kommers, *German Constitutionalism*, *supra* note 13, at 840-42. Unlike the United States Supreme Court, which requires a "case or controversy" before it can engage in judicial review of a statute, the German Constitutional Court is empowered to engage in abstract review of new legislation at the request of members of the Bundestag or if asked to do so by state governments.

225. *Id.* at 840.

226. BVerfGE 39, at 36-41.

227. 1976 BGBl. I S.1213.

228. 410 U.S. 113 (1973).

229. Most of the essays are polemical in nature, defending one decision or the other as "correct." Arguing on behalf of the German Constitutional Court are: Winfried Brugger, *A*

Supreme Court acted to prevent states from banning abortion in most circumstances, the West German Constitutional Court struck down legislation decriminalizing abortion in the first trimester. In both cases, the courts concluded that the legislation in question exceeded the limits of constitutionality, and, in both cases, the decisions have been criticized as inappropriate ventures into judicial law-making.²³⁰ A number of elements of the 1975 decision were path-breaking and have significant ramifications for the legal status of women.

It may be misleading, however, to try to compare the West German Constitutional Court's decision to that of the Supreme Court in *Roe*. In addition to the significant differences in the fundamental rights guaranteed by the United States Constitution and the German Basic Law, the Constitutional Court was also constrained by the burdens of German history and the attendant imperative for special protections for human life. The Constitutional Court's jurisprudence is informed, moreover, by a theory of liberty that diverges from that of the Western European tradition. Basically Kantian in orientation, the Basic Law attempts to reconcile individual and communitarian interests, rather than seeing individual liberty as something that needs to be protected from an intrusive state.²³¹ As the Court stated in an early decision: "[t]he concept of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on the commitment to the community, without infringing upon a person's individual value."²³²

The elements of the majority's decision are easily summarized. First, the court ruled that the fetus must be treated as a life in being beginning with implantation in the uterine wall.²³³ The court allowed for no differentiation of stages once the life exists.²³⁴ Second, the court held that the fetus, as a life, is endowed with the right to life, protected under Article 2(2) of the Basic Law,²³⁵ and that that right predominates over the mother's right to the free development of her personality under Article 2(1) of the Basic Law.²³⁶ Finally, the Constitutional Court ruled that the state's duty

Constitutional Duty to Outlaw Abortion? A Comparative Analysis of the American and German Abortion Decisions, 36 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 49 (1987); Kommers, *supra* note 31. Defending the result, if not the reasoning, in *Roe* are: Gerstein & Lowry, *supra* note 220; Miedel, *supra* note 32; Morris, *supra* note 137.

230. Such criticisms of *Roe* begin with John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). The dissenting judges on Germany's Constitutional Court made the same accusation. BVerfGE 39, at 95. Brugger, *supra* note 229, at 66, criticizes both courts for assuming too much power.

231. Kommers, *German Constitutionalism*, *supra* note 13, at 873.

232. *Id.* (citing BVerfGE 4, 7 (15-16)).

233. BVerfGE 39, at 37.

234. *Id.*

235. *Id.* at 36. The Court did not decide the issue of whether the fetus is a bearer of other basic rights. The Basic Law protects only its right to life. *Id.* at 41.

236. *Id.* at 42-44.

to protect life was not passive but that the state must actively intervene to safeguard the fundamental rights enshrined in the Basic Law.²³⁷ This part of the ruling marked a departure from earlier decisions. It was the first time the Constitutional Court had adopted a positive rights interpretation of the rights to life and to bodily integrity. The ruling thus paved the way for litigants to claim that the state had a duty to protect life and health in a variety of other contexts.²³⁸ The Court allowed, however, that the Bundestag might seek out measures short of criminal prosecution in order to achieve the Court's mandate to regulate abortion in a manner in keeping with Article 2(2) of the Basic Law.²³⁹ The Court also acknowledged the legality of abortion in cases in which the pregnant woman's life or health are endangered and allowed the Bundestag discretion to determine other circumstances in which it would be unreasonable to expect the woman to continue the pregnancy.²⁴⁰ In such cases, abortions could be procured without the fear of penalties.

Striking in the Court's decision were its conclusion that there is no distinction between prenatal and postnatal life and its refusal to recognize any distinctions in the individual states of what the Court called "nascent life" [*das keimende Leben*].²⁴¹ The Court defended this view as consistent with the constitutional discussions that led to the adoption of Article 2(2) of the Basic Law.²⁴² The Court interpreted the sweeping inclusion of the "self-evident" right to life, along with the abolition of the death penalty,²⁴³ as a reaction to the disregard for life during the Third Reich.²⁴⁴ In response to objections that the right to life is meant to apply only to the "complete human person" [*fertige menschliche Person*], the Court maintains that the protection of human life against transgressions by the state would be incomplete if it did not also include unborn life.²⁴⁵ This reasoning rests on the assumption, rejected by feminist scholars, that unborn life has inherent value. Frances Olsen argues that the value of life is culturally created, resting on social meanings and sexual politics. "The value of fetal life is a social attribute that arises from the totality of social relations regarding

237. *Id.* at 42.

238. Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273, 297 (1995).

239. BVerfGE 39, at 52-53.

240. *Id.* at 48-51.

241. Frances Olsen criticizes this view of potential human life as "simplistic and untrue to the experience and common sense of most women and men." Olsen continues: "An early miscarriage is very different from a stillbirth. Birth control that prevents implantation of a blastocyst is different from a first trimester abortion. Most people experience the loss suffered from a miscarriage as less severe than the death of a newborn baby." Olsen, *supra* note 27, at 127.

242. BVerfGE 39, at 38-41.

243. GG art. 102.

244. BVerfGE 39, at 36.

245. *Id.* at 37.

reproduction.”²⁴⁶ What the Court accepts as self-evident has only become so in the twentieth century, and, feminist scholars maintain, the “self-evident” value of fetal life is tainted by assumptions that negate women’s rights to self-determination.

Feminists also criticize the view, accepted by the Court in this decision, of the fetus as a life whose interests can be considered separate from those of the mother. According to Reva Siegel, until the rise of the anti-abortion movement, “tradition and common law both viewed the unborn as ‘part and parcel’ of the pregnant woman.”²⁴⁷ The Court acknowledged that the fetus and the pregnant woman partake of a “natural union” for which there is no parallel in other existing relationships. Although it thus recognized that pregnancy belongs to the woman’s intimate sphere, the majority held that the Basic Law requires the state to protect nascent life and thus necessitates the regulation of pregnancy.²⁴⁸ In keeping with its view that the termination of pregnancy always means the destruction of human life, the Court declared it impossible to establish a right to abortion.²⁴⁹ The woman’s right to self-determination is qualified; for the majority it seems to guarantee her only the right to decide not to become pregnant.

The majority’s synopsis of the legislative history behind Article 2(2) indicates that the desire to protect unborn life is not reflected in the Basic Law only because its inclusion was thought unnecessary, as the Penal Code dealt with both nascent life and the death penalty.²⁵⁰ It is unclear from the debates at the time, however, if the motion to include language protecting nascent life failed because the majority agreed that such language was superfluous given the Criminal Code or because the majority simply opposed the inclusion of such language on grounds that were not articulated at the time.²⁵¹ Given this argument, moreover, the majority needs to explain why the abolition of the death penalty remained in the Basic Law. More fundamentally, however, and this goes to the heart of the dissenting judges’ argument, the question is not simply whether or not the Basic Law demands the safeguarding of nascent life but whether criminal sanctions are necessary to or an effective means of safeguarding such life.²⁵² This is especially the case since the members of the Bundestag who voted for the reformed abortion law agreed with the Court that nascent life is entitled to the protections afforded by Article 2(2).²⁵³

246. Olsen, *supra* note 27, at 128.

247. Siegel, *supra* note 15, at 290.

248. BVerfGE 39, at 42.

249. *Id.* at 43-44.

250. *Id.* at 39.

251. *Id.* at 39-40. Compare the dissenting judges’ reading of the legislative history, *id.* at 75-77.

252. *Id.* at 68-69. As the dissenters put it, the question is not whether, but how nascent life is to be protected.

253. *Id.* at 40-41 (citing the REPORT OF THE SPECIAL COMMITTEE FOR CRIMINAL LAW REFORM 5 (BTDrucks. 7/1981 neu)).

The Court did not want to be placed in the position of balancing one constitutionally-protected right against another. Instead, the Court attempts to rule in accordance with the "structural unity" of the Basic Law so that all of its elements are in "practical concordance." These principles require that legal values be harmonized in the event of their conflict. They must be preserved in creative tension with one another.²⁵⁴ But commentators point out that, contrary to its intentions, the majority nonetheless balances the woman's right to self-determination against the fetus's right to life. The question then becomes the relative status of these two rights.²⁵⁵ The Basic Law establishes a hierarchy of rights atop which sits the right to the protection of human dignity. The Court concluded that the fetus's dignity interest was implicated in the abortion decision and thus outweighed the woman's interest in self-determination.²⁵⁶ But a feminist theory of legal personhood could well argue that the woman's human dignity suffers serious harm when she is denied the legal authority to make decisions about the continuation or termination of her pregnancy.

The two dissenting judges did not really differ from the majority in terms of the nature of their analysis. They merely concluded that the Basic Law provided no clear grounds for declaring the decision of the legislature to be invalid.²⁵⁷ The dissent accuses the majority of abrogating to itself decision-making powers that are incompatible with the freedom-oriented character of constitutional norms.²⁵⁸

Douglas Morris, in an extended essay on the 1975 decision, distinguishes between the abstract reasoning that informs the majority's reasoning and the more concrete analysis undertaken by the dissent.²⁵⁹ Morris criticizes the majority for resolving issues on the basis of ultimate values, such as the value of life.²⁶⁰ Adopting the language favored by critical German social historians since the 1960s, Morris argues that the majority's reasoning is "characteristic of German authoritarian liberalism."²⁶¹ Morris thus links the majority to the Prussian civil service in the nineteenth century, which attempted enlightened rule while resisting the establishment of

254. Kommers, *German Constitutionalism*, *supra* note 13, at 851.

255. Brugger, *supra* note 229, at 64.

256. Kommers, *German Constitutionalism*, *supra* note 13, at 859-60.

257. BVerfGE 39, at 68-69.

258. *Id.* at 69.

259. Morris, *supra* note 137, at 174-83.

260. *Id.* at 174-75.

261. *Id.* at 177. Morris cites DAHRENDORF, *supra* note 137 (on the continued dominance of German politics by professional elites imbued with anti-democratic prejudices), and LEONARD KRIEGER, *THE GERMAN CONCEPTION OF FREEDOM* (1957) (stressing the German focus on the state as the creator of positive freedoms). The analysis also is clearly indebted to the ideas of HANS ROSENBERG, *BUREAUCRACY, ARISTOCRACY, AND AUTOCRACY: THE PRUSSIAN EXPERIENCE 1660-1815* (1958) (discussing the notion of bureaucratic absolutism), and of REINHART KOSELLECK, *PREUßEN ZWISCHEN REFORM UND REVOLUTION. ALLGEMEINES LANDRECHT, VERWALTUNG UND SOZIALE BEWEGUNG VON 1791 BIS 1848* (1967) (describing the further development of the notion of liberal absolutism).

democratic institutions. He faults the majority for subordinating the rule of the legislature to its own ability to identify the legal order's highest values.²⁶² Morris characterizes the majority's thinking as hierarchical and anti-egalitarian. He praises the dissent, on the other hand, for recognizing that general legal principles do not provide clear guidelines for any particular discretionary act. The dissent will allow pregnant women to use their discretion and expects them to give effect to responsible acts of conscience. The majority suspects that women will engage in arbitrary decisions and procure abortions in circumstances not covered by the indications model.²⁶³

While Morris's criticisms of the Constitutional Court are overdrawn, there is some value to his analysis. He identifies a fundamental difference separating the American and German legal traditions and criticizes the latter from a perspective with which many Germans have expressed sympathy. Morris argues that the majority's reasoning is mired in the German liberal tradition, according to which the state is the creator of a realm in which freedom can be enjoyed.²⁶⁴ As Morris sees it, rather than stressing negative liberties that protect the individual from state interference, the Court creates for the state a positive role in protecting life and making possible the enjoyment of liberties. But one could just as easily characterize the Court's decision as giving sweeping interpretation to the negative freedom, guaranteed in the Basic Law, protecting individuals from state interference with their right to life.

It is, moreover, the Court's function to protect the norms embodied in the Basic Law. It is thus not an abuse of power or an exercise of elitist judgment when the Court rules that a law passed by the Bundestag violates such a norm. To paraphrase Donald Kommers, while in the common law tradition, freedom precedes the law, in the German system, law serves as a guide to freedom. "[A]t the risk of over-simplification," Kommers continues, "the Anglo-American legal mind is content to let law evolve over time as reality unfolds, whereas the civilian public mind seeks to specify reality in comprehensive codes of law."²⁶⁵ Moreover, unlike the Justices of the United States Supreme Court, members of the Constitutional Court are elected by Parliament for single, non-renewable terms of 12 years.²⁶⁶

262. Morris, *supra* note 137.

263. BVerfGE 39, at 91, *cited in* Morris, *supra* note 137, at 219.

264. Morris, *supra* note 137, at 171. This theory of German liberalism's focus on "positive freedom" is best articulated in KRIEGER, *supra* note 261.

265. Kommers, *German Constitutionalism*, *supra* note 13, at 850.

266. "Half of the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat." GG art. 94(1). The Bundestag's 12-member Judicial Selection Committee elects the Constitutional Court's members selected by that body. Representation on the Committee is determined according to the proportionate strength of each party in the Bundestag as a whole. Kommers, *German Constitutionalism*, *supra* note 13, at 844.

Therefore, they are more likely than the American Justices to be in step with the legislature.

It is inappropriate to single out an individual decision of the Constitutional Court as indicative of a general tendency towards elitism and authoritarianism. In general, one would be hard put to argue that the rulings of the West German Constitutional Court have been any more elitist, hierarchical, anti-democratic, or authoritarian than were those of the United States Supreme Court in the post-war era. Still, Morris is not alone in concluding that the Constitutional Court's reasoning in this case is mired in traditional, conservative assumptions about the nature of childbearing and the appropriate role of women as mothers. The majority treats women paternalistically, reasoning at one point that if abortion did not remain a crime, the public might become confused and think it sanctioned by the state. Abortion must remain criminal, the Court implied, because women might otherwise be unable to tell right from wrong.²⁶⁷

Reva Siegel has criticized American abortion decisions for what she calls "physiological naturalism;" that is, a mode of analysis that focuses on physical facts of sex rather than on social questions of gender.²⁶⁸ According to Siegel:

More than any doctrinal factor, it is the physiological framework in which the Court reasons about reproductive regulation that obscures the gender-based judgments that may animate such regulations and the gender-based injuries they can inflict on women. When abortion-restrictive regulation is analyzed in physiological paradigms. . . , the inquiry focuses on questions concerning gestation. By contrast, if restrictions on abortion are analyzed in a social framework, they present questions concerning the regulation of motherhood, and, thus, value judgments concerning women's roles.²⁶⁹

Value judgments are, in the end, inevitable, but Courts often adopt the supposedly neutral language of medical science in an attempt to mask such value judgments. Crucial links in the German Constitutional Court's logic are provided by questionable assertions about the nature of human life and reproduction. Although the Court does a better job than its American counterpart in considering the myriad social factors that determine the circumstances under which women conceive and raise children,²⁷⁰ it still treats motherhood and child-rearing as the natural occupation of women.

For Siegel, however, not only are the scientific theories proposed by nineteenth-century physicians suspect, but the courts also err when they

267. Gerstein & Lowry, *supra* note 220, at 869.

268. Siegel, *supra* note 15, at 264.

269. *Id.* at 265.

270. *See id.* for a discussion of these social factors.

attempt to adjudicate abortion-rights cases in terms of any version of physiological naturalism, because such an approach assumes the premises of the legal regime that created criminal abortion statutes.²⁷¹ In Siegel's view, the issue before the Court is not the nature of pregnancy but the question of whether the Constitution permits the state to compel women to bear unwanted children.²⁷² Siegel's arguments are especially forceful with respect to the German Constitutional Court, since the Basic Law explicitly guarantees equal rights for men and women.²⁷³ The Court's references to "natural maternal obligations," and its justification of the counseling provision in terms of "reawakening the maternal will to protect the fetus where it has been lost" reflect the majority's traditional views regarding women's roles in society.²⁷⁴ The language indicates a normative position. Women are deficient if they lack a sense of maternal obligation, and it is the duty of the state somehow, through counseling, to stimulate such a maternal sense in the abnormal cases in which it has been lost.²⁷⁵ Following Siegel's analysis, it is not the place of a court to dictate to women the nature of the feelings they should have regarding their familial roles or the relationship they ought to have with the fetuses they carry.

But one should not go too far in attempting to apply American standards to the decision of the German Court. The Constitutional Court rightly concludes that Germany's past imposes on the current state a special duty to safeguard all life:

The Basic Law is founded upon principles of state organization that can only be understood in the light of historical experience and the spiritual-ethical confrontation with the preceding system of National Socialism. In contrast to the omnipotence of the totalitarian state, which asserted for itself limitless domination over all realms of social life, and which, in the pursuit of its political aims, gave in principle no consideration to the life of individuals, the Basic Law establishes a system based in values, in which the individual human being and his dignity stands at the center of all regulations.²⁷⁶

The 1975 abortion decision must be read in the light of the German past. The dissent points out, however, that it is misguided to assert the need to protect life against mass destruction by the state as a justification for a ruling that would prevent a pregnant woman herself, or, with her

271. *Id.* at 348.

272. *Id.* at 350.

273. GG art. 3(2).

274. BVerfGE 39, at 56, 45, *cited in* Morris, *supra* note 137, at 228-29.

275. The Court articulates a normative position that consigns barren women to a sort of metaphysical incompleteness. Such women are assumed to have maternal instincts that they can never realize. Their physical inability to bear children becomes a spiritual deficiency.

276. BVerfGE 39, at 67.

consent, a third party, from aborting her fetus.²⁷⁷ In fact, the dissent reminds us, the Nazis imposed very harsh penalties on those responsible for the abortion of "Aryan" fetuses. If the majority really wants to give effect to the Basic Law by disassociating its principles from those of the National Socialist regime, it may best do so by limiting the use of the criminal law in an area in which its retributive force was so recently abused.²⁷⁸

West Germany thus developed one of the more restrictive abortion laws in Europe. West Germany maintained section 218 but allowed for exceptions if, in a doctor's opinion, an abortion was necessary for a woman who had undergone counseling based on one of four "indications": the medical indication (if the mother's life or health were endangered), the criminological indication (if the pregnancy resulted from a criminal act such as rape or incest), the embryological indication (if the fetus suffered from some severe developmental defects), and the social indication (if, due to the woman's economic or psychological conditions, it would be "unreasonable" to ask her to complete the pregnancy).²⁷⁹ The dissent and others expressed concern that the criminalization of abortion is not an effective deterrent and thus fails to achieve the constitutional aim of protecting nascent life.²⁸⁰ As Albin Eser points out, the indication model created by the court and codified in the 1976 Revised Abortion Act²⁸¹ provides not merely an "excuse" or a "personal exemption from punishment." The indication provides a "justification" for the abortion,²⁸² and, since these indications can be very broadly interpreted, abortion foes argue that the West German abortion law of 1976 actually provides relatively little protection of nascent life.

Indeed, based on West Germany's experience with the indication rule, it is difficult to argue that a more liberal abortion rule would lead to an increase in the total number of abortions performed on German women. The total number of legal abortions performed was about the same in both East and West Germany throughout the 1980s,²⁸³ but since West Germany's population was four times that of East Germany, this would seem to suggest that abortion was far more prevalent in the East than in the West. These numbers do not include statistics on women who traveled

277. *Id.* at 76.

278. *Id.* at 77.

279. §§ 218-219 StGB (1989). These indications were accepted by the Constitutional Court, see BVerfGE 39, at 49-50. The Court, and many commentators, prefer to call the "social indication" the "general emergency indication," so as to indicate that this exception is not available to any woman who simply would prefer not to have a child.

280. BVerfGE 88, at 82.

281. § 218a StGB.

282. Eser, *supra* note 216, at 375.

283. Will, *supra* note 30, at 413-14. The annual number of abortions performed in East and West Germany generally ranged between 70,000 and 100,000.

abroad to procure legal abortions.²⁸⁴ Even before the liberalization of the abortion law of 1974, estimates for the total number of abortions performed on West German women every year ran as high as 300,000.²⁸⁵ It is also likely that West German women had better access to contraception than did East German women. In any case, the birth rate per 1,000 women between the ages 15 and 49 was higher in East Germany than in West Germany between 1970 and 1989.²⁸⁶

Although there were regional variations, in some parts of Germany abortions were essentially available to all women in the first trimester, because the social indication was liberally interpreted. Critics of the abortion law pointed with alarm at signs that women and pro-abortion physicians were manipulating the indications model. While the social indication accounted for 57 percent of all legal abortions in West Germany in 1977, by 1982, it accounted for 77 percent. The medical indication declined in the same period from 37 percent to 19 percent.²⁸⁷ The social indication, however, was not the only source of the alleged manipulation. The eugenic indication could be employed up until the 22nd week.²⁸⁸ This indication did not need to be based on the existence of an actual inherent defect; abortion was allowed if the mother regarded the expected abnormality as unbearable. A pregnant woman, whose motivation for seeking an abortion was truly grounded in the social indication, could thus conspire with a sympathetic doctor and get an abortion after the first trimester on eugenic grounds.²⁸⁹ After 22 weeks, the medical indication, which could be employed until the time of delivery, could be used to justify abortions performed on women who would not otherwise qualify for an indication, since the impact on the woman excused by the medical indication could be physical or psychological.²⁹⁰ For these reasons, abortion critics faulted the indications model as allowing the feminist claim of a woman's right to

284. The law was rarely enforced, and regional differences were pronounced. While women in northern Germany could generally find a doctor willing to give them a certificate of indication, women in the Catholic south had difficulties and often had to resort to "abortion tourism," traveling to the north or abroad to Holland or Austria, where they could procure legal abortions. By 1982, an estimated 110,000 German women traveled to the Netherlands each year for abortions. Since only relatively well-off women could undertake such trips, the law effectively discriminated against poor women who lacked means to engage in such abortion tourism. Eser, *supra* note 216, at 377, 382. Sixty percent of women from the predominantly Catholic southern state of Baden-Württemberg who officially registered for an abortion went to the north-German state of Hessen to have the abortion. Women who traveled abroad for an abortion and skirted the counseling requirement were liable for criminal prosecution in West Germany upon their return. Klein-Schonnefeld, *supra* note 151, at 120.

285. BVerfGE 39, at 82.

286. Will, *supra* note 30, at 413-14.

287. Eser, *supra* note 216, at 381.

288. § 218a Abs. 3 StGB.

289. Eser, *supra* note 216, at 376.

290. § 218a Abs. 2 StGB, *discussed in* Eser, *supra* note 216, at 375-76.

reproductive freedom to slip in through the back door. The threat of prosecution was no deterrent, since the rates of criminal investigation and prosecution were extremely low.²⁹¹

On the other side of the debate, the Court's critics targeted the counseling requirement provided for in the 1976 law.²⁹² The implementation of the counseling provision forced women to consult three different authorities: the counseling center, the doctor who assessed the request for an indication, and the doctor who performed the abortion, who must also verify the existence of the indication. Because of the great regional variations in the availability of abortion services, many women had to travel extensively, subjecting them to added financial burdens and to the difficulty of explaining their absences to their families and/or employers. Many physicians, moreover, felt that they were not qualified to assess the availability of the social indication.²⁹³ The counseling provision required that women wait three days after the counseling before having the procedure performed.²⁹⁴ This was an extremely cumbersome system. In addition, some women objected to the required counseling in principle because it required that third parties, rather than women themselves, decide if an emergency condition existed justifying the resort to abortion.²⁹⁵

Defenders of a woman's right to abortion thus did not consider the indications model to constitute an adequate vindication of women's rights. The Basic Law guarantees women both equality with men and a right to the free development of their personalities. But, as affirmed in numerous international human rights agreements to which West Germany was a signatory, quality of life and self-determination are compromised when a woman is unable to control the number and spacing of her children.²⁹⁶ Women are thus constrained by the 1975 Constitutional Court decision precisely because of the Court's interpretation of the Basic Law as conferring upon nascent life constitutional protections that can be enforced against the interests of the mother. When East German women considered the prospects of unification, they were concerned that the Constitutional Court's decision would have ramifications for their legal status as well.

291. Susanne Walther, *Thou shalt not (but thou mayest): Abortion after the German Constitutional Court's 1993 Landmark Decision*, 36 GERMAN Y.B. INT'L L. 385, 386-87 (1993).

292. § 218b StGB.

293. Walther, *supra* note 291, at 387.

294. § 218b StGB.

295. Deborah Goldberg, *Developments in German Abortion Law: A U.S. Perspective*, 5 UCLA WOMEN'S L.J. 531, 538 (1995).

296. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (*entered into force* Sept. 3, 1981). Article 16.1 reads, in part, "States Parties shall . . . ensure, on a basis of equality of men and women . . . (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to information, education, and means to enable them to exercise these rights."

III.

ABORTION LAW IN THE NEW GERMANY

As argued above, the 1975 decision can be defended in terms of West Germany's Basic Law and the connection between West Germany and the Third Reich, a connection assumed by the government and in the West German culture more generally. East Germany, however, was different from West Germany in two important respects. First, East Germany did not view itself as a successor state to the Third Reich. On the contrary, the myth of resistance, according to which the citizens of East Germany were leftist heroes who resisted Nazism, was a crucial ideological pillar upon which the legitimacy of the new government was based.²⁹⁷ Second, by the time the unified Germany arrived at a consensus on a new abortion law, East German women had been living under a periodic model regime for abortion regulation for a generation. The 1993 decision of the German Constitutional Court was thus, in some ways, more challenging than was the one from 1975. In addition to all the issues considered in 1975, the Court now also had to weigh the costs of stripping East German women of what they viewed as a constitutionally protected right.

A. *Unification and the Abortion Debate: The Problem and the Interim Solution*

The East German team that negotiated the Unification Treaty (the "Treaty") made clear from the start that they would not accept the wholesale replacement of the East German periodic model with the West German indications model. The introduction of the West German abortion regulatory regime into East Germany would have constituted a return to criminalization and to discrimination against women. East Germans entered unification talks expecting democratization and an increase of freedom; they would not accept a loss of self-determination in a realm where it had been taken for granted.²⁹⁸ While East German women expressed ambivalence about the double burden they carried in East German society, they were unequivocal in their attachment to East Germany's abortion-regulatory regime. They viewed the West German model as a radical threat to individual autonomy, at least as important as many of the restrictions placed on the exercise of individual freedoms under East German Communism.²⁹⁹ The Treaty thus assigned to the joint German legislature the task of coming up with a new abortion law by December 31, 1992. The Treaty specified that the new law must provide for "better guarantees than are currently in place in both parts of Germany for the defense of pre-natal life and for coming to terms with the conflict-situation of pregnant women

297. STARITZ, *supra* note 124, at 66. On the East German confrontation with the Nazi past, see HERF, *supra* note 12, at 106-200.

298. Will, *supra* note 30, at 400.

299. Weedon, *supra* note 177, at 122.

in conformity with the constitution.”³⁰⁰ Until the new law went into effect, the East German states would maintain their abortion-regulatory regime, and the West German states would do the same.³⁰¹

East German women were especially concerned about the introduction of a new abortion-regulatory regime because they considered the West German child-care facilities and maternity-leave packages to be inadequate. While most East German women worked full-time, most West German women who worked did so only part-time, and, consequently, most child-care facilities in West Germany were open only part-time. As a result of post-unification legislation, East German women also lost their “baby-year.” It was replaced with a flat-rate payment of 600 Deutsch Marks per month for six months. While East German women previously had received six weeks of paid sick leave per year to look after sick children, in post-unification Germany the sick leave set aside for such purposes was reduced to six days.³⁰² West German women generally faced the choice between having children and having a career. Twenty-six percent of West German women were childless, and 80 percent of those who had children quit their jobs in order to raise their children. Nearly 90 percent of East German women had children, and their rate of employment was no different from that of East German women without children.³⁰³

If East German women were suspicious before the unification, the economic effects of unification did nothing to ease their minds. Unemployment in the states that were formerly East Germany jumped from zero before the unification to 15.1 percent in 1993. In addition, the unemployment rate for East German women was 20 percent compared to only 11 percent for men. Women had comprised 49 percent of the East German workforce, but by 1993 they accounted for nearly two-thirds of the region’s unemployed.³⁰⁴

The Bundestag eventually hammered out a compromise agreement, the Aid for Pregnant Women and Families Act [the “Act”], after a dramatic all-night parliamentary session.³⁰⁵ “Support instead of punishment” [*Hilfe statt Strafe*] was the slogan of the new abortion-regulatory regime. The Act was a compromise between the indications and the periodic models and attempted to protect unborn life through counseling and by supporting the woman in her decision.³⁰⁶ The key innovation of the Act was to declare abortion “not unlawful” [*nichts rechtswidrig*], if requested by a woman who had undergone the mandatory counseling at least three days prior

300. UNIFICATION TREATY, art. 31(4).

301. Elizabeth Clements, *The Abortion Debate in Unified Germany*, in *WOMEN AND THE WENDE*, *supra* note 139, at 38.

302. Einhorn, *supra* note 139, at 22.

303. *Id.* at 28.

304. *Id.* at 19.

305. 1992 BGBI. I S.1398; *see* BVerfGE 88, at 224-30.

306. Goldberg, *supra* note 295, at 540-41.

to the procedure, and if the procedure were performed by a doctor in the first 12 weeks of pregnancy.³⁰⁷ But the Act went further still in the direction of support instead of punishment for the pregnant women in holding that a woman who procured an abortion in the first 22 weeks of pregnancy could not be punished, so long as she had undergone the mandatory counseling and had the abortion performed by a doctor. Even after 22 weeks, the Act would allow a court to refrain from punishing the woman if, at the time of the procedure, she found herself in special distress [*besonderer Bedrängnis*].³⁰⁸ The new counseling provision called for informative counseling, intended to make the pregnant woman aware of all of her options, including contraceptive methods, sex education, family planning, and abortion methods.³⁰⁹

Supplementary legislation associated with the Act allowed state health insurance to cover abortions so long as they were "not unlawful."³¹⁰ The Aid for Children and Youth Act was also supplemented with a provision calling for funding for pre-school for all children between the ages of three and six by the year 1996.³¹¹ There was some concern that the counseling provision was cumbersome and would be difficult to implement in the cash-strapped former East German states. Still, the new provision did allow women to make their own decisions regarding abortion and to assume responsibility for those decisions without the threat of criminal punishment. The law instead attempted to encourage women to carry their pregnancies to term through incentives such as improved child care facilities.³¹² When the economy soured, however, it was clear that the facilities were not going to materialize.

B. *The Bundesverfassungsgericht's Decision of 1993*

Germany's current abortion law closely follows a model outlined by the Constitutional Court in its 1993 ruling on the abortion law³¹³ passed by the Bundestag in 1992.³¹⁴ Although some praised the Court's decision as a victory for women and for "unborn life," others denounced it as a "return to the Middle Ages."³¹⁵ While such criticisms are clearly exaggerated, the decision may betray the persistence of conventional views of women as child-bearers and child-rearers that have informed debates on the regulation of reproduction since the nineteenth century.

307. BVerfGE 88, at 227.

308. *Id.*

309. *Id.* at 228.

310. *Id.* at 218-19.

311. *Id.* at 225.

312. Walther, *supra* note 291, at 389.

313. BVerfGE 88, 203.

314. Aid for Pregnant Women and Families Act of July 27, 1992, 1992 BGBl. I S.1398.

315. Ursula Männle, *Ein nicht leicht umzusetzendes Urteil*, in KVGR, *supra* note 9, at 171, 171.

As in 1975, representatives of the conservative CDU and their coalition partners, the Christian Social Union, as well as the state government of Bavaria, called upon the Federal Constitutional Court to review the Act for conflicts with provisions of the Basic Law.³¹⁶ The Constitutional Court proved unwilling to overturn the central holdings of the 1975 decision. A 6-2 majority held substantial sections of the Act to be in conflict with the fundamental right to life enshrined in Article 1(1) and Article 2(2) of the Basic Law. Absent one of the indications provided in the 1976 law, the Court held that an abortion continues to be an unlawful act.³¹⁷ The Court reasserted the 1975 Court's holding that the fetus's categorical right to life trumps the woman's right to self-determination.³¹⁸ The Court continued to allow for exceptions to the prohibition on abortion, provided the woman's life or health is endangered or if, for some other reason, it would impose an unreasonable burden on the woman if she were to carry the pregnancy to term.³¹⁹ The Court thus did not explicitly include the social indication among the grounds for justifiable abortion, but its language left open to the legislature the possibility of including it as an indication of unreasonable burdens upon the pregnant woman.³²⁰ The Court could not accept, however, as the Act suggested, that the woman should be allowed to decide on her own whether or not her case permitted a justifiable abortion.³²¹

The Court did not merely strike down the new law; it also laid out the contours of an acceptable abortion law to replace the abortion regulatory scheme provided for in the Act. The Court created a category of abortion that, while unlawful, was not criminal. The number of abortions was to be reduced through counseling and through the refusal of the state insurance to pay for abortions that were not indicated. The aim was to establish basic norms through means other than criminal penalties.³²² While the Court could not accept the Act's contention that abortions in the first trimester would no longer be considered unlawful, the Court did allow for the elimination of criminal penalties against women who abort their fetuses in the first trimester. The only punishment contemplated for women who obtain abortions without undergoing the mandatory counseling and without receiving a certificate of indication is that their abortions ordinarily will not be covered by state medical insurance³²³ (although the Court allowed for an exception to this rule in the case of women who would otherwise be

316. BVerfGE 88, at 205-206.

317. *Id.* at 251.

318. *Id.* at 252.

319. *Id.* at 256.

320. Miedel, *supra* note 32, at 489; Goldberg, *supra* note 295, at 542.

321. BVerfGE 88, at 266.

322. Walther, *supra* note 291, at 390.

323. BVerfGE 88, at 315-20. The German Court thus avoided the problem created by the United States Supreme Court's holding in *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the constitutionality of the "Hyde Amendment," which eliminated federal Medicaid funding for most abortions).

unable to pay for an abortion).³²⁴ The Court also established specific guidelines prescribing the nature of the counseling all women considering abortions must undergo.

Parts of the Court's decision incorporate some of the essential features of the Act it struck down. The Court held that abortions carried out by a doctor within the first twelve weeks of pregnancy are not subject to criminal punishment, so long as they are done at the request of the pregnant woman and following a counseling session.³²⁵ In order to avoid establishing a system that encouraged women who could afford it to go abroad to procure unlawful-but-not-punishable abortions, the Court extended decriminalization to the doctors who performed the abortions as well. The result is a practical acknowledgment, despite the Court's refusal to make a theoretical concession,³²⁶ of the woman's right to make her own decision regarding her pregnancy. The decision also gives effect to the Act's other aims of the decriminalization of abortion in the first trimester and of the introduction of a periodic model accompanied by mandatory counseling.³²⁷

Commentators seem to agree that the most significant practical difference between the recommendations of the Court and the Act will be the fact that women who can afford to pay for their own abortions will do so if they cannot get an indication.³²⁸ This decision is consistent with the Court's view that abortion violates the Basic Law and cannot be supported by the state. It would be inappropriate for the Court to allow the state to finance unlawful abortions. The Court concluded that the counseling system could function without state financing of unlawful abortions, and it feared that if such state funding were permitted, people might draw the erroneous conclusion that the abortions were lawful.³²⁹ Similarly, the financing of unlawful abortion by women who were incapable of paying for them themselves was necessary to insure that such women would make use of the counseling system and would not endanger their health by attempting to procure illegal abortions.³³⁰

In general, the Court's compromise solution was motivated by the desire to make the counseling model work as well as possible. Since the Court still holds to its 1975 ruling that it is impossible to demarcate the stages of a life, it might seem inconsistent for the Court to allow the decriminalization of abortion in the first trimester. The Court here responds however to the empirical fact that it is impossible for outsiders to perceive a pregnancy during the first trimester. The state thus has no choice but to rely on the woman's exercise of autonomy during that period.

324. BVerfGE 88, at 317, 322.

325. *Id.* at 282-92.

326. *Id.* at 266.

327. Clements, *supra* note 301, at 46.

328. Frank, *supra* note 212, at 357.

329. BVerfGE 88, at 315-20.

330. BVerfGE 88, at 321, *cited in* Neuman, *supra* note 238, at 286-87.

Decriminalization is intended to encourage women to attend counseling and consult with physicians, even if they are determined to have abortions, because such interactions with medical professionals provide the authorities with opportunities to persuade the woman of the importance of respecting the fetus's right to life. Ultimately, the Court would treat questionable abortions as lawful in circumstances where such treatment is necessary to the success of the counseling system.³³¹

The question of the Court's institutional competence to review legislation of this type is even more pressing with respect to the 1993 decision than it was for the 1975 decision.³³² Ordinarily the Court would take a deferential view of an act of the Bundestag, but, in this case, the Court's determination that the fetus is a "legal interest of the highest significance"³³³ pushes the analysis into the realm of strict scrutiny.³³⁴ This time, however, the Court has engaged in extraordinary feats of judicial activism in an attempt to find alternatives to criminal punishment that will still provide adequate protections of the fetus's right to life. As a result, the Court rewrote the German criminal code in extraordinary detail. The Court's specifications on the nature of the counseling requirement are especially extensive.³³⁵ In addition, the Court specified the conditions under which physicians would be subject to criminal penalties and indicated, without quite spelling out, when family members could be subject to criminal penalties for pressuring a woman to abort a fetus or for withholding support.³³⁶ The implementation of an abortion-regulatory regime following the Court's design will be very expensive, given the need to establish counseling services in the new German states, and the Court is understandably of little help in advising the legislature on financing the system.³³⁷ Critics of the decision point out that very few women will benefit from counseling, as most women will be capable of making a decision on their own. Given the economic problems Germany is currently facing, such critics argue that the counseling requirement is wasteful and burdensome.³³⁸

331. Neuman, *supra* note 238, at 291.

332. Jürgen Habermas comments on the Court's "unfortunate role" in exercising what he calls a "subsidiary legislative function" in this case. Habermas, *A Conversation About Questions of Political Theory*, in JÜRGEN HABERMAS, *A BERLIN REPUBLIC: WRITINGS ON GERMANY* 131, 155 (1997). Commentators supporting the Court's ruling point out that the Court acts well within its constitutional power, in keeping with the principle of the balance of powers, when it invalidates an act of the Bundestag on the grounds that it is inconsistent with constitutional principles. Mathilde Berghofer-Weichner, *Stellungnahme der Bayerischen Staatsministerin der Justiz zur Entscheidung des Bundesverfassungsgerichts zur Neuregelung des Abtreibungsrechts*, in KVGR, *supra* note 9, at 121, 123.

333. BVerfGE 88, at 262-63.

334. Neuman, *supra* note 238, at 300.

335. BVerfGE 88, at 282-92.

336. BVerfGE 88, at 293, 298, 308-309, *cited in* Neuman, *supra* note 238, at 294.

337. Neuman, *supra* note 238, at 314.

338. Monika Frommel, *Kommentar zur Entscheidung des Bundesverfassungsgerichts vom 28 Mai 1993*, in KVGR, *supra* note 9, at 142, 143.

Finally, critics note the sweeping nature of the Court's view of the fetus's status. While the previous decision was content to declare the fetus "an object of moral value" and an object of legal protection,³³⁹ the 1993 decision took the further step of declaring the fetus a legal subject and a bearer of rights protected by the Basic Law.³⁴⁰ Such a view of the fetus's status does not seem to accord with the rest of the German legal system, according to which a baby becomes a holder of rights only after being born alive.³⁴¹ The sections of the Penal Code dealing with homicide and the infliction of bodily harm, for example, apply to a person only after birth. In fact, the killing or injury of a fetus is not covered by the criminal law, as one would think it should be if the fetus were a bearer of rights protected by the Basic Law. In addition, German tort law provides no remedies for pre-natal injuries. If the fetus has a right to life, then there ought to be a civil remedy for injuring or taking that life.³⁴² It is peculiar, then, that the fetus should have rights vis á vis the pregnant mother but not in relation to anyone else. The inconsistency is best explained in terms of the Court's traditional assumptions regarding the proper role of women and the nature of the maternal relationship.

C. Implementation and Criticisms of the New Section 218

The Bundestag eventually drafted a new law in accordance with the Constitutional Court's specifications. The new law, giving permanent effect to the 1993 decision, came into effect on January 1, 1996. In terms of the recognition of women's abilities to make decisions about their own pregnancies, the new law is a clear improvement over the previous West German law.³⁴³ When compared with the East German law, however, the new law may be a practical victory for women faced with an unwanted pregnancy, but it is not a victory for women's rights. At no point in its decision does the Court address the possible consequences of its decision for East German women.³⁴⁴ The practical victory results not from the Court's acknowledgment that women have a dignity interest in maintaining

339. BVerfGE 39, at 41.

340. Nanette Funk, Patriarchal Morality vs. Democracy: The 1993 German Constitutional Court Decision, 9 (revised version of an essay that appeared in *POLITICS FORWARD, GENDER BACKWARD: WOMEN IN EAST AND CENTRAL EUROPE* (Barbara Wejnert & Metta Spencer eds., 1996)) (on file with the *New York University Review of Law & Social Change*).

341. Klein-Schonnefeld, *supra* note 151, at 128.

342. Mattern, *supra* note 33, at 683-84.

343. Some critics of the decision see it as a set-back for women's emancipation, however, viewing the decriminalization of abortion as a purely paternalist concession. Christine Landfried, *Paternalistisches Mißtrauensvotum*, in KVGR, *supra* note 9, at 160. But other commentators point out that the final decision now lies with women. Maria Michalk, *Klares Votum für den Schutz des Lebens*, in KVGR, *supra* note 9, at 175, 176.

344. Bergmann, *supra* note 9, at 125.

control over their bodies but from the Court's conclusion that allowing women to accept the ultimate responsibility for their abortion decisions is necessary to the efficacy of the counseling provision.³⁴⁵

The required counseling, the content of which is dictated by the Court,³⁴⁶ undercuts any real acknowledgment of self-determination. The counseling is intended to assist the woman in making her decision, but if, according to the indications model, she makes the "wrong" decision, her actions are illegal, although not punishable.³⁴⁷ Nanette Funk echoes East German feminists who criticize the decision as embodying a "patriarchal conception of women," informed by "patriarchal reasoning."³⁴⁸ The dissent actually sees this decision as establishing a regime that is worse for women than was the old indications model, because it robs women of the knowledge that their decision, taken after mandatory counseling, is lawful. The law indicates to women that they ought to follow a certain course of action (i.e. undergo mandatory counseling) and yet may still find their behavior wanting. According to the dissent, such a circumstance reduces women to a state of legal minority.³⁴⁹ The majority views women as mothers with an obligation to continue the pregnancy and endowed with a (sometimes dormant) desire to have a child. The Court promotes the stereotype of the dependent woman who, unable to make her own moral decision, must undergo counseling provided by the state.³⁵⁰

Such an image of women can have deeply debilitating effects on the participation of women in the public sphere. The Court subordinates women's rights as citizens to their duties as childbearers. Some commentators characterize the Court's language as obligating women to become mothers and as an attempt at the redomestication of the East German women who had ventured into the world of work.³⁵¹ East German women may have been defending themselves against this backlash when, in the aftermath of unification, there was a marked drop in the birthrate. Women, it seems, went not only on a birth strike but on a conception strike.³⁵² Hermine de Soto views the decision as part of the century-old German tradition of subordinating the rights of women as citizens to the cultural imperative of safeguarding the German nation.³⁵³

345. Walther, *supra* note 291, at 399-400.

346. § 219 StGB.

347. Goldberg, *supra* note 295, at 549-50.

348. Funk, *supra* note 340, at 8.

349. BverfGE 88, at 353-54. Erhard Denninger points out that the ruling seems to allow women to make their own decisions but then treats the decision for an abortion as an unjust act. The ruling thus does not treat women seriously, says Denninger, but treats them "like a partner who has just betrayed the common cause." Denninger, *supra* note 9, at 128, 130.

350. Neuman, *supra* note 238, at 292.

351. Funk, *supra* note 340, at 19.

352. Klein-Schonfeld, *supra* note 151, at 119.

353. de Soto, *supra* note 41, at 87.

The Court's decision need not have such sinister implications. The 1975 decision basically laid out the constitutional principles the Court had to follow in this case. Supplementing the periodic model with a mandatory counseling provision cannot adequately safeguard the right to life under Basic Law Article 2(2), so long as the Court continues to consider nascent life protected under that Article and so long as the Court refuses to acknowledge significant stages in the development of the nascent life. The Court acknowledged, however, the impossibility of deterring illegal abortions through the threat of criminal penalties. It has thus introduced a system that grants women the greatest allowable freedom consistent with the Court's views of the applicable constitutional principles, while also providing procedures that should encourage but not coerce women to eschew abortion.

Building on previous case law, however, the Court could not avoid addressing the problem in terms that are already tainted with views of women and of their appropriate roles in society and in the family that prevent them from achieving due regard as legal persons endowed with equal rights in a democratic society. As a result, the Court failed to give full effect to the Basic Law's requirement of gender equality. The effects of unification on the employment of East German women is evidence that the regime they are now joining will not accord them equal rights as workers and citizens.

East German women were, on the whole, less than enthusiastic about the legal system under which they lived, even about those aspects of that legal system that were supposed to foster their professional development. But what East German women criticized about the East German regulations was that they continued to assume that women would be the primary care-givers in the family and would assume chief responsibility for the maintenance of the household. Because of the Court's acceptance of gender stereotypes, the effect of the new abortion-regulatory regime established for the newly-unified Germany is to re-assert those aspects of the law that East German women felt were most detrimental to their advancement as full members of the socio-economic public sphere. All German women are additionally hampered by the Court's treatment of them as people who are not to be trusted with the responsibility to make decisions regarding their own bodies.

CONCLUSION

The aims of this note have been threefold. First, it provides explanations grounded in both history and ideology for the very different abortion regulatory systems that arose in the two Germanys. Second, it argues that women in the two Germanys adjusted their attitudes and behavior in a manner consistent with the belief that these regulatory schemes helped define their status as legal persons. Finally, the note concludes that the role

the abortion debate played in the experience of German unification is indicative of the extent to which forty years of separate existence produced distinct cultures in the two Germanys. Differences in attitudes regarding women's reproductive rights and self-determination are important indicators of the distinct cultural and political assumptions separating East and West Germans.

Germany's new abortion law seems certain to face legal challenges in the coming years.³⁵⁴ The persistence of controversy surrounding abortion in the united Germany is not at all surprising. The new law is based on West Germany's legal and historical traditions. Yet the law also regulates the reproductive freedom of East German women who grew up under a different system and had come to have different attitudes regarding their rights to self-determination and to maintain control over their own bodies. The new abortion law is a compromise that reflects the general lack of social consensus in the united Germany. Abortion foes as well as the advocates of reproductive freedom thus find parts of the new version of section 218 objectionable.

The real challenge for the newly unified Germany, however, goes beyond the rather narrow question of abortion regulation. Such regulation reflects attitudes regarding the appropriate role of women in political and economic life, as well as their status as legal persons. Because of the way women interpret their rights and act in light of abortion regulation, such regulation also contributes to the further development of notions regarding that status. As the two German cultures merge, men and women in the new Germany will have to reach a consensus regarding the status of women as legal persons, and the regulation of abortion is merely one indicator of the relative weight the state accords to women's rights to self-determination and control over their bodies.

354. There have already been two major controversies over the new law. One involved a statute passed by the Bavarian state government prohibiting any physician from deriving over 25% of her income from abortion and requiring that women state clear reasons for terminating their pregnancies. Two doctors immediately warned that they would challenge the law before the Constitutional Court. Dennis Staunton, *Abortion Law Tightened*, THE GUARDIAN (LONDON), Aug. 1, 1996, at 1, available in 1996 WL 4036976. Since there are very few physicians willing to perform abortions in that hostile environment, those who do often make it the main focus of their practice. The law thus aimed at making the provision of abortion services still more difficult in the Catholic south. More recently, the Roman Catholic Church instructed German bishops to stop providing certificates for mandatory counseling services. Since the aim of the counseling is to encourage women to continue their pregnancies, German Catholics felt it appropriate that the Church participate in the process. But since the certificates are a necessary step toward an abortion, the Pope objected to the practice. William Drozdiak, *German Bishops Study Abortion Law; Catholics Seek Way to Offer Counseling Without Issuing State Certificates*, WASH. POST, Jan. 28, 1998, at A14, available in 1998 WL 2464401.