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German Abortion Law: The Unwanted Child of Reunification

The Federal Republic of Germany and the German Democratic Republic—

DETERMINED to achieve, in free self-determination, the unity of Germany, in peace and freedom, as an equal member of the community of nations,

BASED ON THE WISH of the people in both parts of Germany to live together, in peace and freedom, in a legally ordered, democratic, and social federal state,

IN THANKFUL RESPECT to those who, by peaceful means, helped freedom to break through, who held unswayingly to the task of achieving the unity of Germany, and accomplished it,

IN CONSCIOUSNESS of the continuity of German history, and in consideration of the special responsibility, that comes from our past, for a democratic development in Germany, which remains obligated to recognition of human rights and peace,

IN AN EFFORT to contribute to the unification of Europe and the building of a peaceful European order, in which borders no longer separate, and which guarantees all European peoples a trusting coexistence, through the unity of Germany,

IN THE CONSCIOUSNESS that the inviolability of borders and the territorial integrity and sovereignty of all nations in Europe is a basic requirement for peace,

HAVE AGREED to enter into a treaty for the creation of German unity¹

I. INTRODUCTION

On October 3, 1990, the Federal Republic of Germany² (“West

1. *Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands—Einigungsvertrag—(Zweiter Staatsvertrag)* [Treaty on the Creation of German Unity], Sept. 6, 1990, Federal Republic of Germany-German Democratic Republic, preamble, 104 PRESSE-UND INFORMATIONSAMT DER BUNDSREGIERUNG BULLETIN 877 (W. Ger.) [hereinafter Unification Treaty]. Unless otherwise indicated, all translations from original German language sources are by the author, who lived and worked in West Germany from 1980 to 1987.

2. *Bundesrepublik Deutschland*. Before reunification, the Federal Republic of Germany (“FRG”) consisted of the eleven West German states. Following reunification, the five East German states acceded to the FRG. This Comment will use “West Germany” to refer to the eleven West German states *before* reunification. “Former West Germany” will refer to the eleven West German states *after* reunification. “The Federal Republic of Germany” will refer

Germany") and the German Democratic Republic³ ("East Germany") became a single sovereign state.⁴ This historic event ended forty-five years of division following World War II.⁵ German reunification occurred much more rapidly than seemed possible, as recently

to a political entity, which prior to reunification, consisted only of West Germany. Since reunification, the FRG includes both East and West Germany.

3. *Deutsche demokratische Republik*. The German Democratic Republic ("GDR") was not divided into states. When the GDR acceded to the FRG, the GDR was again divided into the five states that existed before Germany's defeat in World War II. These five states became states in the FRG. This Comment will use "former East Germany" to refer to these five East German states. "East Germany" will refer to the area of these five East German states before reunification. "The German Democratic Republic" will refer to a political entity, which consisted of East Germany before reunification, and which has now been dissolved.

4. During nearly 2,000 years of recorded history, Germany was unified for only 74 years, from 1871 to 1945. Comment, *The German Question of Reunification: An Historical and Legal Analysis of the Division of Germany and the 1989 Reform Movement in the German Democratic Republic*, 8 DICK. J. INT'L L. 291, 292 (1990). This period encompassed three phases: Bismarck's Second Reich from 1871 to 1918; the Weimar Republic from 1918 to 1933; and Hitler's Third Reich from 1933 to 1945. *Id.*

5. Germany became an occupied country after its unconditional surrender to the Allies (France, Great Britain, the Soviet Union, and the United States) at the end of the Second World War. Act of Military Surrender, May 7 & 8, 1945, 59 Stat. 1857, E.A.S. No. 502. After Germany's surrender, the Allies asserted "supreme authority" over Germany in the Potsdam Declaration, June 5, 1945, 60 Stat. 1649, T.I.A.S. No. 1520, 68 U.N.T.S. 190. The Allies assigned each of the four occupying powers authority over one of the four zones of occupation, but agreed to administer Germany as a whole through the four-power Allied Control Council. *Id.* On January 1, 1947, the British and United States zones of occupation were joined in an integrated economic area or bi-zone. After disagreements among the Allies, the Soviet Union withdrew from the Allied Control Council on May 20, 1948. In 1948, the British, French, and United States zones joined to create the Federal Republic of Germany. Under the Convention on Relations Between the Three Powers and the Federal Republic of Germany, the three western Allied powers granted the Federal Republic of Germany "the full authority of a sovereign State," while still retaining "the rights and the responsibilities, heretofore . . . held by them, relating to . . . Germany as a whole, including the reunification of Germany . . ." Simma, *Legal Aspects of East-West German Relations*, 9 MD. J. INT'L L. & TRADE 97, 99 (1985) (quoting Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, art. II, para. 1, 6 U.S.T. 4117, 4122, T.I.A.S. No. 3425). The Allies subsequently approved West Germany's constitution, the Basic Law (*Grundgesetz*), and allowed the first parliamentary elections. In response, the Soviet Union created the German Democratic Republic in the Soviet zone of occupation on October 7, 1949. For several years both German states claimed to be the sole legitimate representative of the German people. In fact, the Federal Republic of Germany followed the Hallstein Doctrine, under which it considered any country's establishment of diplomatic relations with the German Democratic Republic to be an unfriendly act. The two German states normalized their relations when they entered into the Basic Treaty, which went into force on June 21, 1973. The Basic Treaty required each government to recognize the legitimacy of the other within its own territory. Treaty on the Basis of Intra-German Relations, Dec. 21, 1972, Federal Republic of Germany-German Democratic Republic, 1973 Bundesgesetzblatt [BGBl] II 421; Comment, *supra* note 4, at 292-96; Simma, *supra*, at 97.

as 1989.⁶ Nevertheless, it required a long and complex series of negotiations.⁷ Helmut Kohl, Chancellor of West Germany, negotiated an agreement with Soviet President Mikhail S. Gorbachev allowing Germany to remain in the North Atlantic Treaty Organization ("NATO") and the European Economic Community ("EEC") after reunification.⁸ West Germany also secured the approval of the reunification plan by the other three occupying Allied powers and the EEC.⁹ The two Germanys and the four occupying Allied powers fi-

6. For a recent article that concluded that "a single Germany still remains a distant prospect," see Comment, *supra* note 4, at 311. Writing of the reunification celebration in Berlin, the German news magazine *Der Spiegel* noted:

[O]n October second, 1989, members of the People's Army and the secret police brutally beat demonstrators who provocatively shouted "we're staying here." On October third, Honecker prohibited travel to Czechoslovakia without visas because thousands were leaving. Exactly one year later, with almost 50 miles of wall already torn down in Berlin, many [East Berlin] policeman already wear the green uniforms of their West [German] colleagues, and many who fled the country back then now stroll through the fair on the "haggler's mile"

DER SPIEGEL, Oct. 8, 1990, at 23.

7. DER SPIEGEL, Sept. 3, 1990, at 19.

8. *Id.* The right of the Soviet Union to have a voice in the future of East Germany is derived from the Soviet Union's status as one of the four occupying powers which asserted control over Germany in the Potsdam Declaration. The Soviet Union retained these rights in the Sovereignty Declaration of the German Democratic Republic of March 25, 1954, and solidified them through numerous friendship and mutual-defense treaties. Goetze, *Die Rechte der Alliierten auf Mitwirkung bei der deutschen Einigung*, 35 NEUE JURISTISCHE WOCHENSCHRIFT 2161, 2162 (1990). The agreement between Kohl and President Gorbachev also provided that the 380,000 Soviet troops in East Germany will return to the U.S.S.R. in three to four years. *Id.* at 25. Germany will pay to build housing for them in the Soviet Union. DER SPIEGEL, Sept. 10, 1990, at 74. No NATO troops will be stationed in East Germany during this period, although those already stationed in East Berlin will remain there. TIME, July 30, 1990, at 25. The German military will be cut from a total personnel of 590,000, consisting of 490,000 in West Germany and 100,000 in East Germany, to 370,000. *Id.* The agreement was finalized in July 1990, when Kohl flew to Moscow for two days of direct talks with Gorbachev. There was some coldness at their first meeting in February 1990, probably caused by Kohl's 1986 remark comparing Gorbachev's public relations skills to those of Nazi Propaganda Minister Josef Göbbels. This coldness seemed to have been overcome when the two went for a walk in the Russian countryside together. *Id.* at 24-26. The press widely circulated pictures of Kohl and Gorbachev walking in the Caucasus mountains wearing cardigans. See, e.g., *id.* at 24-25. Joschka Fischer of West Germany's Green Party sarcastically labelled Kohl's politicking "cardigan diplomacy" (*Strickjackendiplomatie*) in an essay on German unity. DER SPIEGEL, Oct. 1, 1990, at 44.

9. DER SPIEGEL, Sept. 3, 1990, at 19. There are actually three European Communities. The Treaty of Paris, signed on April 18, 1951, established the European Coal and Steel Community. Common Market in Profile, Common Mkt. Rep. (CCH) ¶ 101, at 111 (1987). The Treaties of Rome, signed on March 25, 1957, created the European Economic Community ("EEC") and the European Atomic Energy Commission ("Euratom"). *Id.* ¶ 101, at 114. The six original members of the European Communities are Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, and the Netherlands. *Id.* Since their founding, the European Communities have added six additional members: Denmark, Greece, Ireland, Portugal, Spain,

nalized the agreements in the "two plus four" negotiations.¹⁰ Finally, extensive debate and bargaining occurred between Kohl's ruling conservative coalition and the other West German political parties¹¹ to achieve a parliamentary majority for the final reunification treaty.¹²

Reunification occurred in two stages, consisting of the First Treaty¹³ and the Second Treaty.¹⁴ The First Treaty created an economic and currency union, effective July 1, 1990.¹⁵ The treaty eliminated the East German *Ostmark* as a separate currency and allowed *Ostmarks* to be exchanged for West German *Deutschmarks*.¹⁶ Thus, the *Deutschmark* became the official currency of both East and West

and the United Kingdom. *Id.* The European Communities implement their policies through the European Parliament, the Council of Ministers, the Commission, and the Court of Justice. *Id.* at 162. The goals of the EEC are the "four freedoms": the free movement of goods, persons, services, and capital. Winter, Sloan, Lehner & Ruiz, *Europe Without Frontiers: A Lawyer's Guide*, Corp. Prac. Series, (BNA), at 6 (1989). The member states have recently reaffirmed, through the Single European Act, their commitment to create a common market. *Id.* at 4. They have agreed to accelerate the elimination of trade barriers between the member states by implementing almost 300 legislative proposals suggested in the 1985 White Paper of the European Commission. *Id.* Although the initiative is commonly called 1992, it would be more accurate to call it 1993, because the goal is to have all legislation implemented by December 31, 1992. *Id.*

10. The negotiations' name refers to the parties: the two German states and the four occupying Allied powers. For a discussion of the legal status of the rights of the four allied powers involved in the "two plus four" negotiations, see Goetze, *supra* note 8.

11. The Christian Democratic Union ("CDU"), headed by Helmut Kohl, and the Christian Socialist Union ("CSU") are two closely-aligned parties with essentially the same platform and form the conservative wing of the Federal Republic of Germany's political spectrum. C.C. SCHWEITZER, D. KARSTEN, R. SPENCER, R.T. COLE, D.P. KOMMERS & A.J. NICHOLLS, *POLITICS AND GOVERNMENT IN THE FEDERAL REPUBLIC OF GERMANY: BASIC DOCUMENTS, 195-96* (1984). However, the CSU is active only in Bavaria, and the CDU is active only in the remaining West German states. *Id.* Therefore, Germans often refer to the two parties together as CDU/CSU. *Id.* The Christian Democrats ruled Germany from 1949 to 1969 and from 1982 to the present. *Id.* at 194. The other member of the ruling coalition is the liberal-moderate Free Democratic Party ("FDP"), headed by Hans-Dietrich Genscher. *Id.* at 195-96. The most liberal of the major parties is the Social Democratic Party ("SPD"), which ruled the Federal Republic of Germany from 1969 to 1982. *Id.* at 194. The ecological, alternative Green Party has been a minor political force since its founding in 1979. *Id.* at 194-95.

12. DER SPIEGEL, Sept. 3, 1990, at 19.

13. *Vertrag über die Schaffung einer Währungs-, Wirtschafts-, und Sozialunion (erster Staatsvertrag)* [Treaty for the Creation of a Currency, Economic, and Social Union], May 18, 1990, Federal Republic of Germany-German Democratic Republic, 63 PRESSE-UND INFORMATIONENAMT DER BUNDESREGIERUNG BULLETIN 517 [hereinafter Currency Treaty].

14. Unification Treaty, *supra* note 1.

15. DER SPIEGEL, Sept. 3, 1990, at 19. Kohl signed the First Treaty against the advice of his own Federal Bank. *Id.*

16. The treaty allowed natural persons born after July 1, 1976 to exchange up to 2,000 *Ostmarks* at a rate of one-to-one for *Deutschmarks*. Natural persons born between July 2, 1931 and July 1, 1976, could exchange up to 4,000 *Ostmarks* one-to-one for *Deutschmarks*. Those natural persons born before July 2, 1931, could exchange up to 6,000 *Ostmarks* one-to-

Germany. The First Treaty also eliminated all restrictions on trade and travel between the two Germanys and provided for a completely open intra-German border.

The Second Treaty provided for the complete political unification of Germany, beginning on October 3, 1990.¹⁷ Under this treaty, the German Democratic Republic ceased to exist as a sovereign nation. East Germany acceded to the Constitution of West Germany and became five additional states in the Federal Republic of Germany.¹⁸ The negotiations for the Second Treaty were much more complex than those for the First Treaty, lasting until the early morning hours of the very day of the treaty's scheduled signing.¹⁹ The end result was a complex document over one-thousand pages long.²⁰

The constitution of the Federal Republic of Germany, called the Basic Law,²¹ provided the legal basis for reunification.²² The preamble to the Basic Law stated that the drafters "also acted on behalf of those Germans to whom participation was denied"—a clear reference to East Germany.²³ The Basic Law's preamble further invited "the entire German people . . . to perfect the freedom and unity of Ger-

one for *Deutschmarks*. All other *Ostmarks* were exchanged at the rate of two *Ostmarks* for one *Deutschmark*. Currency Treaty, *supra* note 13, at 529.

17. Unification Treaty, *supra* note 1.

18. The states, which are the same as the pre-war states, are: Brandenburg, Mecklenburg-Vorpommern, Saxony, Saxony-Anhalt, and Thüringen. *Id.* art. 1(1).

19. *Id.* at 20.

20. DER SPIEGEL, Sept. 3, 1990, at 19.

21. *Grundgesetz*.

22. The drafters called this document the Basic Law (*Grundgesetz*) rather than the constitution (*Verfassung*) because they considered it to be only temporary. At the time of its drafting, they planned to replace the Basic Law with a permanent constitution after reunification. See Simma, *supra* note 5, at 99 n.5. Thus, the preamble states that the document is intended "to give new order to political life for a transitional period." GERMAN INFORMATION CENTER, THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY 4 (1962).

23. The preamble to the Basic Law, as first enacted, reads:

Preamble

The German people in the [states] of Baden, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden, and Württemberg-Hohenzollern,

Conscious of [their] responsibility before God and Men, animated by the resolve to preserve [their] national and political unity and to serve the peace of the World as an equal partner in a united Europe,

Desiring to give a new order to political life for a transitional period, [have] enacted, by virtue of [their] constituent power, this Basic Law of the Federal Republic of Germany.

[They have] also acted on behalf of those Germans to whom participation was denied.

The entire German people [are] called on to achieve by free self-determination the unity and freedom of Germany.

many in free self-determination."²⁴ In a 1973 decision, the Federal Constitutional Court, West Germany's highest court,²⁵ held that this passage created a constitutional duty on the part of all members of the West German government to strive for reunification.²⁶ The Basic Law's commitment to German reunification is further demonstrated by its provision for a single German citizenship.²⁷ This provision, combined with the Basic Law's guarantee of freedom of movement to

GERMAN INFORMATION CENTER, THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY 4 (1962).

The states of Baden, Württemberg-Baden, and Württemberg-Hohenzollern merged to form the state of Baden-Württemberg under the federal law of May 4, 1951. 1951 BGBI.I 284; THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW 237 (1987) [hereinafter ESSAYS ON THE BASIC LAW]. The Saarland acceded to the Basic Law under paragraph (1) of section 1 of the federal law of December 23, 1956. 1956 BGBI.I 1011; ESSAYS ON THE BASIC LAW, *supra*, at 237. *Id.*

24. Starck, *Deutschland auf dem Wege zur staatlichen Einheit*, 8 JURISTEN ZEITUNG 349, 350 (1990). The preamble has been changed since reunification to read as follows:

In consciousness of their responsibility to God and humanity, motivated by the will to serve world peace as an equal member of a unified Europe, the German people have enacted, by virtue of their constituent power, this Basic Law.

The Germans in the states of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hessen, Mecklenburg-Vorpommern, Lower Saxony, North Rhine/Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein, and Thüringen have achieved in free self-determination the unity and freedom of Germany. Thus, this Basic Law applies to the entire German people.

Unification Treaty, *supra* note 1, art. 4(1). For a discussion of the issues involved in drafting a new preamble, see Féaux de la Croix, *Zur äußeren Verfassung eines wiedervereinigten Deutschland, Gedanken zur Neufassung der Präambel des Grundgesetzes*, 10 EUROPA-ARCHIV: ZEITSCHRIFT FÜR INTERNATIONALE POLITIK 330 (1990).

25. The Federal Constitutional Court (*Bundesverfassungsgericht*) is equivalent to the United States Supreme Court, except that it deals exclusively with matters of constitutional law. The United States Constitution does not expressly give the Supreme Court the power of constitutional review of statutes. This principle was established by Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In contrast, the Basic Law explicitly gives the Federal Constitutional Court the power of constitutional review over acts of the other branches of government. Statutes may also be reviewed in the abstract. See *infra* note 135. The drafters of the Basic Law gave the Federal Constitutional Court this broad power because, after Germany's experience in the Nazi era, they thought it necessary to emphasize checks and balances as well as to protect individual rights. Comment, *supra* note 4, at 301-02.

26. Spies, *Die Wiedervereinigung Deutschlands nach dem Grundgesetz*, 5 JURISTISCHE AUSBILDUNG 56 (1990)(citing Judgment of July 31, 1973, Bundesverfassungsgericht, W. Ger., 36 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 1, 17-18). This duty also includes the obligation to avoid anything that would interfere with reunification. *Id.*

27. GRUNDGESETZ [GG] art. 116, § 1 (W. Ger.). The leading case interpreting the extent of this single nationality provision is the *Teso* decision of the Federal Constitutional Court of October 21, 1987. In this decision the Federal Constitutional Court held that the acquisition of the citizenship of the German Democratic Republic brought with it the acquisition of the citizenship of the Federal Republic of Germany, even where this citizenship was acquired in a way which would not be possible under the law of the Federal Republic of Germany. Judgment of Oct. 21, 1987, Bundesverfassungsgericht, W. Ger., 77 BVerfGE 137. For a discussion of this case with a summary in English, see Hoffman, *Staatsangehörigkeit im geteilten*

all Germans,²⁸ facilitated the mass emigration of East Germans through Hungary in the summer of 1989.²⁹

The Basic Law provided for two possible methods of reunification. First, "other parts of Germany" could accept the Basic Law and become part of the Federal Republic.³⁰ Second, democratically-elected representatives from all parts of a reunified Germany could draft a new constitution. The Basic Law would then cease to have effect.³¹

Deutschland: Der Teso-Beschluß des Bundesverfassungsgerichts, 49 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 257 (1989).

28. GG art. 11.

29. Starck, *supra* note 24, at 350. In June 1989, Hungary announced that it would no longer prevent East Germans in Hungary from leaving for the West, thereby violating a 1969 bilateral treaty with East Germany. Hungarian border guards dismantled the barbed wire barriers separating Hungary from Austria, allowing East Germans to leave for West Germany via Austria. Hungary officially opened its border on September 10, 1989, when sixty thousand East German vacationers were in Hungary. By the end of 1989, over 170,000 East Germans had fled to West Germany, constituting the largest mass migration from East Germany since the construction of the Berlin Wall. Comment, *supra* note 4, at 291, 308-09.

30. Heintschel von Heinegg, *Der Beitritt "anderer Teile Deutschlands" zur Bundesrepublik nach Art. 23 Satz 2 GG*, DIE ÖFFENTLICHE VERWALTUNG 425 (May 1990) (citing GG art. 23, § 2). Article 23, section 2 had been used once before in 1956, when Saarland, which had been administered by France since the end of the war, voted to join the Federal Republic. Spiess, *supra* note 26, at 57. This article, as drafted, read:

For the time being, this Basic Law applies in the territory of the [states] of Baden, Bavaria, Bremen, Greater Berlin, Hamburg, Hesse, Lower-Saxony, North Rhine/Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden, and Württemberg-Hohenzollern. In other parts of Germany it shall be put into force on their accession.

GERMAN INFORMATION CENTER, *supra* note 23, at 11. Article 23 has now been repealed, as provided in art. 4(2) of the Reunification treaty. Unification Treaty, *supra* note 1.

31. Spiess, *supra* note 26, at 59 (citing GG art. 146). This article, as first adopted, read as follows: "The Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force." GERMAN INFORMATION CENTER, *supra* note 23, at 53.

Article 146 has been changed since reunification to read: "This Basic Law, that applies to the entire German people after the achievement of the unity and freedom of Germany, shall cease to have effect on the day on which a constitution, adopted by a free decision of the German people, comes into force." Unification Treaty, *supra* note 1, art. 4(6).

Although reunification was accomplished by means of section 23, a referendum on the constitution is not a completely moot issue. The Basic Law was never ratified by popular vote since, at the time of its drafting, it was thought to be a temporary measure until reunification. There are several proposals for changing certain parts of the Basic Law. For example, Chancellor Helmut Kohl has proposed allowing the deployment of German troops outside of NATO countries. The Social Democratic Party proposes constitutional guarantees of environmental protection and women's rights.

Minister of the Interior Wolfgang Schäuble has developed a plan for considering such constitutional changes. It would involve negotiations between the major political parties, the parliament, and representatives from the various states. The constitutional changes would then require a two-thirds vote of the parliament, followed by a popular vote. *Achse der Republik*,

German legal scholars have written extensively about these two methods of reunification and have disagreed over which method is preferable.³² When reunification occurred, however, the method was not at issue. Due to "speed and simplicity," both East and West Germany preferred to accede to the Basic Law rather than draft a new constitution.³³

However, extending West German law to East Germany was problematic. East and West Germany were very different due to East Germany's forty-five years as a communist country with a centralized economy.³⁴ The East German leadership, therefore, sought to buffer the potentially-turbulent impact of immediate implementation of all

DER SPIEGEL, Oct. 15, 1990, at 30-31. The reunification treaty calls on "the law-making entities of unified Germany to deal with the questions of changes or additions to the Basic Law, brought in connection with the reunification of Germany, within the next two years . . ." Unification Treaty, *supra* note 1, art. 5. It also specifically mentions the possibility of, but does not require, a popular referendum on a new constitution. *Id.*

32. For a general comparison, see Starck, *supra* note 24; Spies, *supra* note 26; Horn, *Völkerrechtliche Aspekte der deutschen Vereinigung*, 35 NEUE JURISTISCHE WOCHENSCHRIFT 2173 (1990). The issue of which method is preferable has been a frequent subject of articles by German legal writers. Writers favoring accession to the Basic Law under article 23, section 2 include: Heintschel von Heinegg, *supra* note 30; Möschel, *DDR-Wege aus der Krise*, 7 JURISTEN ZEITUNG 306 (1990); Manssen, *Die staatsrechtliche Lage Deutschlands*, 15 BAYERISCHE VERWALTUNGSBLÄTTER 458 (1990). Those favoring a new constitution under article 146 include: Häberle, *Verfassungspolitik für die Freiheit und Einheit Deutschlands*, 8 JURISTEN ZEITUNG 358 (1990); Thieme, *Fragen einer gesamtdeutschen Verfassung*, DIE ÖFFENTLICHE VERWALTUNG 402 (May 1990); Zuck, *Wiedervereinigung*, 4 MDR 304 (1990). Authors favoring a combined approach include: Spiecker, *Wege zur deutschen Einheit*, 9 BAYERISCHE VERWALTUNGSBLÄTTER 257 (1990); Roggemann, *Von der interdeutschen Rechtsvergleichung zur innerdeutschen Rechtsangleichung*, 8 JURISTEN ZEITUNG 363 (1990); Mampel, *Gedanken zu Verfassungsfragen*, 39 STAAT UND RECHT (E. Ger.) 435 (1990) (favoring the use of East Germany's earlier post-war constitution as a transition measure).

33. DER SPIEGEL, Sept. 3, 1990, at 19. This was, therefore, reunification under *Grundgesetz* article 23, section 2. *Id.* Helmut Kohl called the accession to the Basic Law under article 23 the "royal road" (*Königsweg*) to reunification. Häberle disagreed, stating "for the unity of a constitutional nation there can only be *democratic roads* . . ." Häberle, *supra* note 32, at 359. The citizens of East Germany voted on March 18, 1990 for a quick and clear completion of the reunification process and, therefore, for the accession to the Basic Law provided by section 23. Féaux de la Croix, *supra* note 24, at 330.

34. DER SPIEGEL, Sept. 3, 1990, at 19. The differences between East and West Germans, due to their experiences under different systems, have already become visible and have led to some tensions. A West German news magazine recently noted the feelings of West Germans living close to the former East-West border that "somehow they are completely different from us." It also described hostile exchanges between East and West Germans such as this one in front of the cashier at Woolworth's in Lüchow, Lower Saxony:

East German: For forty years we had nothing and you had luxury.

West German: What you're now grabbing, videos, autos and all that, for that we worked hard and saved for years, and didn't just play cards at work.

STERN, Aug. 16, 1990, at 29.

West German laws in former East Germany.³⁵

To ease the transition, the West German Parliament added a new section to the Basic Law which allowed some East German laws to remain in effect until the end of 1995.³⁶ East German laws remained effective where differing conditions between East and West Germany made it impossible to completely conform East German law to West German law.³⁷

Before the signing of the Second Treaty, negotiators determined which East German laws would be retained.³⁸ Negotiations took place between East and West Germany and among West German political parties.³⁹ One of the most difficult and controversial issues was how to reconcile the East and West German abortion laws.⁴⁰ The West German political parties negotiated on the abortion issue until August 31, 1990, the day of the treaty's scheduled signing.⁴¹ Indeed, for a while, the abortion discussions jeopardized the signing of the treaty.⁴²

The negotiations were necessary because of the conflict between East Germany's liberal abortion law and its more conservative West German counterpart. East Germany allowed abortion at a woman's discretion during the first three months of pregnancy.⁴³ West Germany, on the other hand, subjected abortion to criminal sanctions except in certain specified circumstances.⁴⁴ In 1974, West Germany's parliament enacted the Abortion Reform Act, which was similar to East Germany's abortion law. West Germany's highest court, the

35. DER SPIEGEL, Sept. 3, 1990, at 19.

36. The new article 143 of the Basic Law reads:

(1) Law in [former East Germany] can depart from the specifications of the Basic Law until, at the latest, December 31, 1990, as far as and as long as, due to differing conditions, complete conformity with the constitutional order can not yet be achieved. Deviations may not conflict with article 19 § 2, and must be in harmony with the principles contained in article 79 § 3.

(2) Deviations from chapters II, VIII, VIIIa, IX, X, and XI are allowed until December, 31, 1995.

(3) Notwithstanding sections (1) and (2), article 41 of the Unification Treaty and the regulations required to implement it will also continue in effect, in that they specify that interferences with property rights in [East Germany] will not be undone.

Unification Treaty, *supra* note 1, art. 4(5).

37. DER SPIEGEL, Sept. 3, 1990, at 19.

38. *Id.* at 22-25.

39. *Id.* at 19.

40. *Id.*

41. *Id.* at 23.

42. *Id.* at 20.

43. *Id.* at 22-25.

44. *Id.*

Federal Constitutional Court, struck down the Act as unconstitutional in 1975.⁴⁵ The court held that the government had a constitutional duty to prohibit abortion except in certain specified circumstances.⁴⁶ Its holding was based on article 2(2) of the Basic Law, which guarantees everyone the right to life and inviolability of their person. The court ruled that this guarantee applies to the fetus. Therefore, the government had an affirmative constitutional duty to prohibit abortion and protect the fetus.

Due to the emotional nature of the abortion issue, the debates leading to the passage of the Abortion Reform Act and its rejection by the court were bitter and hard-fought. After the passage of the Abortion Reform Act of 1976, based on the Federal Constitutional Court's guidelines, it seemed that the issue of abortion law had been resolved. However, with the advent of reunification fifteen years later, the abortion issue has returned.

Negotiations between East and West Germany and among West German political parties reached a compromise, allowing both East and West German abortion laws to remain in effect simultaneously until the all-German parliament enacts a law for reunified Germany.⁴⁷ If the parliament cannot reach an agreement, the dual abortion laws will continue. However, West Germany's more restrictive law will be easily circumvented, since West German women will be able to obtain abortions in East Germany without fear of criminal repercussions.

An alternative approach could possibly satisfy the interests of both sides in the abortion debate. It involves the use of positive measures to satisfy the government's constitutional duty to protect the fetus while maintaining the woman's freedom of choice in obtaining an abortion. Two basic types of positive measures are involved: first, a woman seeking an abortion must undergo mandatory abortion counseling; second, the government should take economic and social measures to reduce a woman's burden in continuing a pregnancy. Through these measures, this approach seeks to reconcile the fetus' right to life and a woman's freedom of choice.

If Germany can successfully unite pro-choice and pro-life advocates, it will have accomplished an even more remarkable type of

45. Judgment of Feb. 25, 1975, Bundesverfassungsgericht, W. Ger., 39 BVerfGE 1, at 30-31.

46. *Id.* at 1.

47. DER SPIEGEL, Sept. 3, 1990, at 22-25.

reunification. Such a compromise may have a significant impact in the United States, where abortion is such a divisive issue.

This Comment will first describe the history and present state of East and West German abortion law. It will then discuss the compromise, which allows both laws to coexist through 1995, and the political maneuverings and negotiations which led to it. Finally, this Comment will discuss abortion law proposals for a reunified Germany. These proposals attempt to reconcile the fetus' right to life with the woman's freedom of choice by using positive measures rather than criminal sanctions.

II. HISTORICAL BACKGROUND OF GERMAN ABORTION LAW

The Federal Republic of Germany is a civil law country; therefore its system of law is based on Roman law.⁴⁸ Roman law considered the fetus to be part of the mother's body, rather than a separate person.⁴⁹ Thus, Roman law did not punish abortion as a crime until the time of the Roman Caesars.⁵⁰ When punishing abortion, Roman law protected the father's right to his offspring rather than the fetus' right to life.⁵¹ Therefore, Roman law punished only abortions committed by the father's wife.⁵²

Until the end of the nineteenth century, the ecclesiastical law of the Roman Catholic Church regarded abortion as criminal only after the fetus acquired a soul.⁵³ According to ecclesiastical law, this generally occurred on the eightieth day after conception.⁵⁴ This view influenced the secular law of Europe, which considered abortion a crime only after a certain point in the pregnancy.⁵⁵ The progress of science caused the point at which abortion became a crime to be set at the time of quickening—the time when the fetus first started to move.⁵⁶

Prior to 1871, Germany consisted of multiple autonomous states,

48. J. H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 1-2, 6-7, (1985).

49. Eser, *Reform of German Abortion Law: First Experiences*, 34 *AM. J. COMP. L.* 369, 370 (1986).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* Some ecclesiastical writers thought that the time of acquiring a soul occurred earlier for male children—at the fortieth day after conception. *Id.*

55. 39 *BVerfGE* at 30-31.

56. *Id.* at 31.

each having its own laws.⁵⁷ These independent German states differed in their approaches to abortion.⁵⁸ For example, Bavaria⁵⁹ did not proscribe abortion when performed during the first half of the pregnancy.⁶⁰ Other states prohibited abortions, but punished those abortions performed during the first half of the pregnancy less severely.⁶¹

The complete criminalization of abortion in Germany began with the Prussian Penal Code of 1851.⁶² The Prussian state's desire to increase its population resulted in the complete prohibition of abortion.⁶³ The Prussian law thereafter served as a model for the abortion law in the penal code of Bismarck's Northern German Federation.⁶⁴ Following complete unification of the German states under Bismarck, the new German *Reich* enacted the German Penal Code of 1871.⁶⁵ The abortion law of the German Penal Code of 1871 was taken word for word from the penal code of the Northern German Federation, which, following the model of the Prussian Penal Code of 1851, made abortion a crime under any circumstances.⁶⁶

This law remained unchanged for over fifty years.⁶⁷ Around the turn of the century, however, German legal thinkers began to ques-

57. For a list of the states of former West Germany, see *supra* note 23 and accompanying text. For a list of the states of former East Germany, see *supra* note 18 and accompanying text.

58. Eser, *supra* note 49, at 370.

59. Bavaria is a state in southern Germany. Currently the largest state in the Federal Republic, Bavaria was an independent kingdom for most of its history. AMERICAN UNIVERSITY FOREIGN AREA STUDIES, FEDERAL REPUBLIC OF GERMANY: A COUNTRY STUDY, 3-17 (1982).

60. Eser, *supra* note 49, at 370.

61. *Id.* According to Eser, "[t]hese historical examples should caution against invoking seemingly absolute or eternally valid principles." *Id.*

62. STRAFGESETZBUCH FÜR DIE PREUßISCHEN STAATEN 1851 Gesetz-Sammlung 101 §§ 181-82, discussed in 39 BVerfGE at 7; Eser, *supra* note 49, at 369-70.

63. 39 BVerfGE at 31.

64. *Id.* at 7 (citing STRAFGESETZBUCH DES NORDDEUTSCHEN BUNDES, 1870 Bundesgesetzblatt des Norddeutschen Bundes 197).

65. *Id.* (citing STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH, 1871 Reichsgesetzblatt [RGBl] 127).

66. *Id.*; Eser, *supra* note 49, at 369-70. The original version of this law stated:

A pregnant woman, who aborts a fetus or kills it in the womb, will be punished by up to five years in prison.

If there are extenuating circumstances, a jail sentence of not less than six months will apply.

The same sentence will apply to one who, with the permission of the pregnant woman, applied the instrumentality of the abortion or killing to her, or instructed her in its use.

39 BVerfGE at 7.

67. 39 BVerfGE at 7.

tion the criminalization of abortion.⁶⁸ This generated discussions in German jurisprudence as to whether abortion laws protected any legal interest at all, whether exceptions to the general ban on abortion should exist, and how best to measure what the appropriate penalty should be.⁶⁹ Despite these discussions, several proposed drafts of the German Penal Code, published between 1909 and 1919, merely suggested a reduction of the penalty for abortion.⁷⁰

The German parliament considered many proposals for abortion reform during the time of the Weimar Republic.⁷¹ Some proposals involved the complete repeal of the abortion law, while others advocated the legalization of abortion during the first three months of pregnancy.⁷² In 1922, the Social-Democratic Minister of Justice, Gustav Radbruch, made the most significant proposal in his suggestions for a German Penal Code.⁷³ The efforts to implement these proposals in the legislature were, however, unsuccessful.⁷⁴

In 1926, a minor change in the abortion law occurred when the Law for Modification of the Penal Code somewhat lightened the sentence for illegal abortions.⁷⁵ The first significant change, however, occurred in 1927 when Germany's highest court⁷⁶ held that the termination of pregnancy was not a crime when the woman's life or health was in danger.⁷⁷ This exception later became known as the medical indication for abortion, which is still a part of the abortion law in the Federal Republic of Germany.⁷⁸

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. 39 BVerfGE at 8. For example, a proposal by the SPD on July 31, 1920 suggested that abortion be legalized "when undertaken by the pregnant woman or a licensed physician within the first three months of pregnancy." *Id.* For the reasoning of this proposal, see GROTJAHN-RADBRUCH, DIE ABTREIBUNG DER LEIBESFRUCHT (1921), cited in 39 BVerfGE at 8.

73. 39 BVerfGE at 9 (citing RADBRUCH, GUSTAV RADBRUCHS ENTWURF EINES ALLGEMEINEN DEUTSCHEN STRAFGESETZBUCHES 28, § 225 (1922)).

74. Eser, *supra* note 49, at 371.

75. 39 BVerfGE at 7 (citing Gesetz zur Abänderung des Strafgesetzbuchs, 1926 RGBl. I 239). The change consisted of reducing the prison sentences to jail sentences, except for one performing an abortion on a woman for profit. *Id.*

76. The *Reichsgericht* was, at the time, equivalent to the United States Supreme Court. Eser, *supra* note 49, at 371.

77. 39 BVerfGE at 6 (citing Judgment of Mar. 11, 1927, Reichsgericht, Ger., 61 Reichsgericht in Strafsachen [RGSt] 242); Eser, *supra* note 49, at 371.

78. STRAFGESETZBUCH [StGB] § 218 (W. Ger.). For a discussion of the Medical Indication, see *infra* text accompanying notes 178-83.

From 1933 to 1945, when the National Socialists ("Nazis")⁷⁹ ruled Germany, the penalties for abortion severely increased.⁸⁰ Repeat offenders were subject to the death penalty.⁸¹ In line with the Nazi racial doctrines, the abortion laws of this era favored such terms as "protection of the nation's strength,"⁸² "attacks on the life force of the nation,"⁸³ and "attacks on race and heredity."⁸⁴ However, in 1935, the German government passed a law allowing abortion in cases of hereditary defects.⁸⁵ Although the Nazi-era abortion laws were repealed after Germany's surrender in 1945, this law signalled the first appearance of what is now known as the eugenic indication for abortion in the abortion law of the Federal Republic of Germany.⁸⁶

III. ABORTION LAW IN WEST GERMANY

When the Federal Republic of Germany was founded in 1948, the nation once again adopted the pre-Nazi abortion laws.⁸⁷ Abortion was a crime, but mothers and doctors were immune from prosecution when the pregnancy posed a serious threat to the mother's life or health.⁸⁸ In the post-war period, West German legislators began to work on reforming the penal code, including the abortion law.⁸⁹

In 1960, the Federal Ministry of Justice released a proposed pe-

79. Adolf Hitler's National Socialist German Worker's Party (*nationale sozialistische deutsche Arbeiterpartei* ("NSDAP")) ruled Germany from 1933 to 1945. Its platform consisted of doctrines of militarism and racial superiority. The Nazis came to enjoy some popularity in reaction to the chaos in Germany during the time of the Weimar Republic. This chaos, including the hyperinflation of the 1920s, was caused by the severe economic burden imposed on Germany through the Versailles Treaty at the end of the First World War. Hitler was elected chancellor, then consolidated his power by dissolving parliament after the burning of the parliament building—an event he blamed on communists. See Comment, *supra* note 4, at 292-93.

80. 39 BVerfGE at 7 (citing Verordnung zur Durchführung der Verordnung zum Schutz von Ehe, Familie und Mutterschaft, 1943 RGBI.I 169).

81. Eser, *supra* note 49, at 371.

82. 39 BVerfGE at 9.

83. *Id.*

84. *Id.*

85. Gesetz zur Verhütung erbkranken Nachwuchses in der Fassung des Änderungsgesetzes, 1935 RGBI.I 773. This law also codified the Medical Indication already established by judge-made law. 39 BVerfGE at 6. The purpose of the law was to "purify the German race and population." Eser, *supra* note 49, at 371.

86. StGB § 218(a); 39 BVerfGE at 6, 9; Eser, *supra* note 49, at 371. For a discussion of the eugenic indication, see *infra* text accompanying footnotes 184-88.

87. 39 BVerfGE at 8-9; see Eser, *supra* note 49, at 371.

88. Eser, *supra* note 49, at 371.

89. 39 BVerfGE at 9.

nal code based on the work of a penal law commission.⁹⁰ The proposal codified the exception to the prohibition of abortion for a mother whose life or health is endangered. The proposed code also allowed abortion where pregnancy resulted from an illegal sexual act committed upon a woman while she was mentally ill, without will, unconscious, or physically incapable of resistance.⁹¹ This latter proposal was similar to what is commonly referred to as the criminological indication for abortion in the present abortion law of the Federal Republic of Germany.⁹² The draft abortion law that the administration eventually sent to the legislature, however, did not include the Foreign Ministry of Justice's exceptions.⁹³ The legislature considered the proposal in essentially unaltered form in 1962 and 1965 and finally passed it in 1969.⁹⁴ The law removed the possibility of longer sentences for particularly serious cases when the mother performed the abortion herself, and reduced the crime to a misdemeanor when performed by another.⁹⁵

The legislators agreed that this reduction in the penalties for abortion was only an interim measure and that a complete reform of the abortion law would be necessary.⁹⁶ Nevertheless, the law remained unchanged until the parliament passed the Abortion Reform

90. *Id.*

91. COMPARATIVE CRIMINAL LAW PROJECT, THE GERMAN DRAFT PENAL CODE §§ 140-41, 157 (N. Ross trans. 1966). The proposal also allowed abortion where "semen from someone other than the woman's husband was introduced into her against her will." *Id.* § 160. All of these exceptions required substantial reason to believe that the pregnancy resulted from this act, and that the abortion was performed no later than the twelfth week of pregnancy. *Id.*

92. For a discussion of the criminological indication, see *infra* text accompanying notes 189-93.

93. *Cf.* BRDrucks. 270/60, at 38, 278, cited in 39 BVerfGE at 9.

94. 39 BVerfGE at 10 (citing Erste Gesetz zur Reform des Strafrechts [1. StrRG] 1969 BGBl.I 645).

95. *Id.* at 7. The law, as modified in 1969, read:

- (1) A woman, who kills her own fetus or allows it to be killed by another, will be punished by up to five years imprisonment.
- (2) Anyone else killing the fetus of a pregnant woman will be punished by up to five years imprisonment, in particularly serious cases with one to ten years imprisonment.
- (3) The attempt is punishable.
- (4) Whoever supplies a pregnant woman with a method or an instrument for killing her fetus will be punished by up to five years imprisonment, in particularly serious cases with one to ten years imprisonment.

STGB § 218.

96. 39 BVerfGE at 10; *cf.* Ausführungen des Abgeordneten Dr. Müller-Emmert, Deutscher Bundestag, 5. Wp., 144 Sitzung des Sonderausschusses für die Strafrechtsreform, StenBer. 3195, cited in 39 BVerfGE at 10.

Act of 1974.⁹⁷ This law was based on alternatives suggested by certain German legal scholars in 1970.⁹⁸

A. The Alternative Draft: The Periodic Model and the Indication Model

In the spring of 1970, a group of German and Swiss criminal law professors released the "alternative draft"⁹⁹ to suggest improvements in the 1962 draft of the West German Penal Code. German writers sometimes refer to these professors as the "alternative professors" because of their involvement in the development of the alternative draft.¹⁰⁰ The alternative professors usually proposed only the alternative to the present law favored by the majority. However, they were so divided on the abortion issue that they made an exception to the customary practice and, instead, proposed two separate alternatives to the abortion law.¹⁰¹ With the exception of the Nazi period, and the minor alterations of the 1962 draft of the West German penal code, the Federal Republic of Germany's abortion law had not been changed since 1927.¹⁰² Under the 1962 Code, abortion was a criminal act unless the pregnancy endangered the woman's life or health. A majority of the alternative professors rejected this approach. They believed that during the first three months of pregnancy, abortion should be a woman's personal choice.¹⁰³ They proposed that abortion be legal during this period, provided the woman first consulted a counseling service.¹⁰⁴ The purpose of the counseling was to discourage abortions except in cases of necessity.¹⁰⁵ Since this approach divided pregnancy into specific periods of time, it became known as the "periodic model."¹⁰⁶ Laws drafted in accordance with this model are

97. Fünften Gesetz zur Reform des Strafrechts [5. StrRG], 1974 BGBl.I s. 1297, *overturned by*, 39 BVerfGE 1.

98. At that time a stronger recognition of the interests of women, together with a recognition of the futility of preventing abortions through criminal sanctions, caused many countries to reconsider their attitudes toward abortion. Koch, *Recht und Praxis des Schwangerschaftsabbruchs im internationalen Vergleich*, 97 ZEITUNG FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 1043 (1985).

99. J. BAUMANN, ALTERNATIVE DRAFT OF A PENAL CODE FOR THE FEDERAL REPUBLIC OF GERMANY (J. Darby trans. 1977).

100. Eser, *supra* note 49, at 372.

101. STGB § 218; 39 BVerfGE at 10-12; Eser, *supra* note 49, at 372.

102. Eser, *supra* note 49, at 371-72.

103. *Id.* at 373.

104. 39 BVerfGE at 11; Eser, *supra* note 49, at 373.

105. 39 BVerfGE at 11; Eser, *supra* note 49, at 373.

106. Eser, *supra* note 49, at 373.

known as "periodic solutions."¹⁰⁷ Various jurisdictions, including the United States, have adopted periodic solutions.¹⁰⁸

A minority of the alternative professors proposed a second alternative to the existing abortion law. Their approach, although more liberal than the existing law, was more restrictive than the majority's periodic solution approach. Believing that the abortion decision should not be left completely to a woman's discretion, the minority argued that abortion is only justified in certain specific circumstances.¹⁰⁹ They suggested that abortion be allowed only where "the carrying to term of the pregnancy cannot be expected of the mother, considering all aspects of her situation."¹¹⁰ Whether or not the abortion would be permitted, therefore, depended upon certain indications of the woman's situation rather than the specific stage of her pregnancy. This approach is called the "indication model,"¹¹¹ and laws drafted in accordance with this model are known as "indication solutions."¹¹²

107. *Id.*

108. France amended its abortion law on an experimental basis in 1975. The amended law became permanent in 1979. France allows abortion up to the end of the tenth week of pregnancy when a woman's "condition brings her into distress." The woman is allowed to decide for herself if her situation demands an abortion, but she must first undergo counseling. CODE DE LA SANTÉ PUBLIQUE arts. 162-1, 162-3, 16-4 (Fr.).

Since 1975, Austria has allowed abortion at a woman's discretion within the first three months of pregnancy. Koch, *supra* note 98, at 1046-47 (citing StGB § 97 upheld in Judgment of Nov. 11, 1974, Verfassungsgerichtshof, Aus., 1975 EuGRZ 74).

In *Roe v. Wade*, 410 U.S. 113, 164 (1972) the United States Supreme Court held that a woman has the right to an abortion during the first trimester. Germans refer to this as a periodic solution. Eser, *supra* 49, at 373. In *Roe*, a single pregnant woman challenged a Texas law prohibiting abortion except where a woman's life was in danger. 410 U.S. at 120. The Supreme Court held that laws proscribing abortion without taking into account the stage of pregnancy and the interests of the mother violated the right to privacy protected by the due process clause of the fourteenth amendment. *Id.* at 164. The court divided pregnancy into three trimesters, each consisting of one third of the pregnancy, or approximately three months. *Id.* During the first trimester, the decision regarding an abortion was left to the judgment of the woman in consultation with her physician. *Id.* During the second trimester, abortion could be regulated only in ways reasonably related to the mother's health. *Id.* In the third trimester, the period where the fetus was viable—able to live outside of the mother's womb—the state could prohibit abortion, except where necessary to preserve the life or health of the mother. *Id.* at 164-65. The decision was controversial and criticised by abortion opponents. See TIME, July 17, 1989, at 62-63. In fact, present members of the Court have recently expressed disagreement with *Roe's* trimester approach. See *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

109. 39 BVerfGE at 11-12; Eser, *supra* note 49, at 372.

110. 39 BVerfGE at 12; Eser, *supra* note 49, at 372.

111. Eser, *supra* note 49, at 372.

112. *Id.* For example, the English abortion reform of 1967, is considered an indication solution. The English law allows abortion where the continuation of the pregnancy endangers

The alternative draft merely made recommendations and had no legal effect.¹¹³ It was, however, instrumental in shaping the West German legal community's thinking on abortion.¹¹⁴ In fact, the alternative draft's influence was so pervasive that the terms "periodic solution" and "indication solution" are still commonly used by the public at large in Germany when discussing the abortion issue today.¹¹⁵

B. *The Abortion Reform Act of 1974: A Periodic Solution*

In 1974, after a "long and vehement debate,"¹¹⁶ West Germany's parliament passed a bill revising the prior abortion law.¹¹⁷ Based on the periodic model, the Abortion Reform Act of 1974 ("Act of 1974") was very similar to the proposal made by the majority of alternative professors in the alternative draft.¹¹⁸ Like the majority proposal in

either the mother's health or that of her other children and this danger is greater than the danger associated with the abortion. Koch, *supra* note 98, at 1047 (citing Abortion Act of Oct. 27, 1967). Many United States state laws prior to the *Roe v. Wade* decision prohibited abortion except where the mother's life was in danger or in cases of rape. 410 U.S. 118-19 n.2; 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, 163 n.12 (1988). These were also examples of what Germans considered indication solutions. Eser, *supra* note 49, at 373. The Texas law overturned by the *Roe* court resembled the West German law before the 1974 reform. See Morris, *supra*. The West German law was, however, somewhat less restrictive in that it allowed abortion where a woman's health was substantially endangered by continuing with the pregnancy. 39 BVerfGE at 6-7. The Texas law only allowed abortion where the woman's life was endangered. 410 U.S. 113, 117-18 (1972).

113. Eser, *supra* note 49, at 373.

114. *Id.*

115. See, e.g., DER SPIEGEL, Sept. 3, 1990, at 22-25.

116. Brugger, *A Constitutional Duty to Outlaw Abortion? A Comparative Analysis of the American and German Abortion Decisions*, in 1987 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 49.

117. STGB § 218. The abortion law is usually referred to in the Federal Republic of Germany as "section 218." See, e.g., DER SPIEGEL, Sept. 3, 1990, at 22-25.

118. Eser, *supra* note 49, at 373. The relevant parts of the Abortion Reform Act of 1974 read as follows:

Section 218: Termination of pregnancy

(1) Whoever terminates a pregnancy later than on the thirteenth day after conception shall be punished by imprisonment of up to three years or by a fine.

(2) The punishment is imprisonment from six months to a year when the actor:

1. acts against the will of a pregnant woman, or

2. recklessly causes mortal danger or severe damage to the health of the pregnant woman.

The court may order probation under § 68, part one, number two.

Section 218(a): Legality of the termination of pregnancy in the first twelve weeks
Termination of pregnancy undertaken by a physician with the consent of a pregnant woman is not punishable under § 218 when no more than twelve weeks have passed since conception.

the alternative draft, the Act of 1974 intended to reduce the abortion rate.¹¹⁹

Before passage of the Act of 1974, West Germany only allowed abortions where the pregnancy endangered the woman's life or health.¹²⁰ Nevertheless, the number of legal abortions in West Germany substantially increased due to broad interpretations of this exception.¹²¹ For example, from 1968 to 1974 legal abortions increased from 2,858 to 17,814.¹²² These figures do not account for the illegal abortions performed in West Germany nor those performed on West German women in other countries with less restrictive abortion laws.¹²³ The drafters of the Act of 1974, therefore, concluded that the existing abortion laws not only caused women to endanger their health by undergoing illegal abortions, but were also ineffective in deterring abortions.¹²⁴ They believed that the Act of 1974, by allowing

Section 218(b): Indications for the termination of pregnancy after twelve weeks
Termination of pregnancy undertaken by a physician with the consent of a pregnant woman is not punishable under § 218 when, by the findings of medical science:

1. the termination of pregnancy is indicated to avert a danger to the woman's life or a danger of serious damage to her health, and the danger cannot be averted by any other reasonable means, or

2. there is substantial reason to believe that the child, due to a hereditary characteristic or prenatal injury, will suffer from irreparable damage to its physical condition, that is so serious, that the continuation of the pregnancy cannot reasonably be required of the mother, and no more than twenty-two weeks have passed since conception.

Section 218(c): Termination of pregnancy without instruction and counseling of the pregnant woman

(1) Whoever terminates a pregnancy where the pregnant woman has not:

1. previously spoken with a physician or licensed counseling center about her pregnancy, and been advised about available public and private help for pregnant women, mothers, and children, especially about such help as would make the continuation of the pregnancy and the situation of the mother and child less burdensome, and

2. received medical advice,

will be punished by imprisonment of up to a year or by a fine, when the act is not punishable under § 218.

(2) The woman upon whom the procedure is performed is not punishable under clause (1).

Section 219: Termination of pregnancy without expert opinion

(1) Whoever terminates a pregnancy more than twelve weeks after conception, without a competent authority first verifying that the conditions of § 218 b nr. 1 or nr. 2 are satisfied, will be punished by imprisonment of up to one year or by a fine, if the act is not punishable under § 218.

39 BVerfGE at 4-6.

119. 39 BVerfGE at 15-16.

120. Eser, *supra* note 49, at 371.

121. *Id.*

122. *Id.*

123. *Id.* at 372.

124. *Id.*

abortion during the first twelve weeks and providing mandatory counseling, would reduce the total number of abortions performed on West German women.¹²⁵ Through counseling, women would be informed of the alternatives to abortion and, thus, could make informed decisions regarding their pregnancies.¹²⁶ Women who decided to obtain abortions despite the counseling would not have to seek illegal abortions or abortions outside of West Germany.¹²⁷

The Act of 1974, like the *Roe v. Wade* decision, divided pregnancy into three stages.¹²⁸ During the first stage, from the fourteenth day of pregnancy until the twelfth week, a woman could have an abortion at her discretion, following mandatory counseling.¹²⁹ Throughout the second stage of pregnancy, between the twelfth and twenty-second weeks, the Act allowed abortion only in specifically defined circumstances.¹³⁰ It permitted abortion when the pregnancy jeopardized the mother's life or health or when there was substantial reason to believe the child would be born with a serious and irreparable birth defect.¹³¹ In the final stage, which commenced after the twenty-second week, the Act allowed abortion only when the pregnancy endangered the mother's life.¹³²

Following the Act's passage by the West German parliament, but before it could go into effect, the Christian Democratic party and several state governments¹³³ challenged the Act before the Federal Constitutional Court.¹³⁴ Unlike the United States Supreme Court, the Federal Constitutional Court may review a statute in the abstract without the requirement of a concrete "case or controversy."¹³⁵ The

125. 39 BVerfGE at 15-16.

126. The writers of the Alternative Draft explained their rationale for requiring counseling as follows:

The basis of this proposal is that the only way to work against a woman's decision to have an abortion and its realization is to make all possible help available to her to remove the material, social, and family difficulties that push her towards an abortion, and to make a well-considered and responsible decision possible, through personal counseling and open discussion. This goal shall be served by the institution of counseling centers.

Id. at 11.

127. Eser, *supra* note 49, at 372.

128. Brugger, *supra* note 116, at 56.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Eser, *supra* note 49, at 373. The states were Baden-Württemberg, Bavaria, Rheinland-Pfalz, Saar, and Schleswig-Holstein. 39 BVerfGE at 18.

134. 39 BVerfGE at 18.

135. Article III, section 2 of the United States Constitution limits federal court jurisdiction

opponents of the Act of 1974 maintained that it violated article 2(2) of the Basic Law, which provides that "everyone shall have the right to life and to inviolability of their person."¹³⁶ They argued that a fetus is a "person" for purposes of article 2(2) and that by failing to protect the life of the fetus, the Act of 1974 was unconstitutional.¹³⁷ The Federal Constitutional Court agreed and overturned the Act.¹³⁸

C. *The Reasoning of the Federal Constitutional Court*

1. The Legal Status of the Fetus

The basis of the Federal Constitutional Court's decision was its finding that the fetus is not merely potential life but is, in fact, actual life.¹³⁹ As actual life, the fetus came within the constitutional guarantee of life to everyone. The court therefore held that after the fourteenth day of pregnancy,¹⁴⁰ the fetus is protected by article 2(2) of the Basic Law.¹⁴¹

The court maintained that the drafters of the Basic Law adopted article 2(2) in response to Nazi policies including "destruction of life unworthy to live," "final solution[s]," and "liquidations."¹⁴² In light of Germany's history of grave human rights abuses, the court maintained that it must interpret article 2(2) broadly.¹⁴³ The court found additional support for its interpretation of the Basic Law in the legis-

to "cases or controversies." United States Supreme Court decisions have interpreted this clause to mean that federal courts are prohibited from issuing opinions on abstract or hypothetical problems and from issuing advisory opinions. *See, e.g.,* United States v. Freuhauf, 365 U.S. 146 (1961). On the other hand, the Basic Law expressly provides that the Federal Constitutional Court may review the constitutionality of a statute in the abstract. This is called an abstract judicial review. GG art. 93.

136. This section of the Basic Law reads as follows:

(1) Everyone has the right to the free development of [the] personality insofar as [they do] not violate the rights of others or offend . . . the constitutional order or the moral code.

(2) Everyone has the right to life and to inviolability of [their] person. The freedom of the individual is inviolable. These rights may only be encroached upon pursuant to a law.

GERMAN INFORMATION CENTER, *supra* note 23, at 5.

137. 39 BVerfGE at 18. The opponents of the Abortion Reform Act had also maintained that the Act was illegal because it needed the approval of the upper house of parliament. However, the court did not accept this argument. *Id.* at 33-36.

138. *Id.*

139. *Id.* at 36-40.

140. The fourteenth day is generally the time when the fertilized egg implants on the uterine wall. *Id.* at 37.

141. *Id.*

142. 39 BVerfGE at 36.

143. *Id.*

lative history of the Act of 1974. The record of the extensive parliamentary debates¹⁴⁴ at the time of the Act's passage revealed that both supporters and opponents of the Act agreed that article 2(2) protects the fetus.¹⁴⁵ The court further supported its broad interpretation of the Basic Law by invoking the Basic Law's prohibition of capital punishment.¹⁴⁶ According to the court, this prohibition served as an "affirmation of the fundamental value of human life."¹⁴⁷

The court further concluded that no distinctions could be made between the various stages of pregnancy in determining the degree of protection required. The court stated that the development of the fetus is "continuous"¹⁴⁸ and not capable of "precise delimitation."¹⁴⁹ The process of human growth does not end even at birth.¹⁵⁰ Therefore, "no distinction can be made between individual stages of pregnancy."¹⁵¹

2. The Duty of the State

The Federal Republic of Germany's system of constitutional rights includes both guarantees of individual rights and positive obligations on the part of the government to protect those rights.¹⁵² The court could, therefore, find that the state has an affirmative obligation to protect a fetus' fundamental right to life.¹⁵³ This contrasts with the United States' system of constitutional rights, which views individual rights primarily as a defense against the power of the state.¹⁵⁴ For example, the Basic Law expressly provides for social welfare rights.¹⁵⁵ Thus, the Basic Law may require that the government provide financial help to low-income persons.¹⁵⁶ The government has also been held to have an obligation to assure that the mass media provides a

144. *Id.* at 12-18.

145. *Id.* at 39.

146. GG art. 102.

147. 39 BVerfGE at 36.

148. Brugger, *supra* note 116, at 57.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. 39 BVerfGE at 42.

154. Brugger, *supra* note 116, at 58.

155. *Id.* at 58 n.30 (citing GG art. 20[1]).

156. *Id.* at 58. In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) the United States Supreme Court came to a similar result when it held that there is a right to state-appointed counsel for a criminal defendant who cannot afford to pay.

“pluralistic communicative process.”¹⁵⁷ These express constitutional requirements provide precedent in the law of the Federal Republic of Germany for the view that the government has an obligation to protect individual rights from violation by private parties. This differs from United States constitutional law, which requires “state action” in order to present a constitutional issue.¹⁵⁸

3. Balancing the Rights of the Fetus and the Mother

The proponents of the Act of 1974 argued that a woman's right to have an abortion is protected by article 2(1) of the Basic Law. This provision guarantees “everyone . . . the right to free development of the personality.”¹⁵⁹ Everyone living in West Germany therefore has the right to freely choose a lifestyle without fear of government interference. Article 2(1) creates a private sphere beyond the reach of the state similar to the privacy right relied on by the United States Supreme Court in *Roe v. Wade*.¹⁶⁰ However, article 2(1) is an explicit constitutional guarantee; the right to privacy, upon which the *Roe* decision was based, was an implied right.¹⁶¹ The Basic Law qualified

157. Brugger, *supra* note 116, at 58.

158. Civil Rights Cases, 109 U.S. 3, 6 (1883); *see, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1688-98 (2d ed. 1988).

159. 39 BVerfGE at 43.

160. *See supra* note 108 and accompanying text.

161. Brugger, *supra* note 116, at 59. Before *Roe v. Wade*, the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), articulated a right to privacy. In *Griswold*, the Court struck down a Connecticut law making it a criminal offense to use contraceptives or to counsel others in their use. The Court held that the rights guaranteed by the Bill of Rights create a penumbra, and that other rights not enumerated in the text, such as privacy, fall within this penumbra. *Id.* at 483. Subsequently, in *Eisenstadt v. Baird*, 405 U.S. 438 (1975), the Court extended this principle and overturned a law limiting the availability of contraception to unmarried couples. Justice William Brennan's majority opinion emphasized that the right of privacy encompasses “the right of the *individual*, married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child.” *Id.* at 453. The Court further extended this principle when it struck down a law prohibiting the commercial distribution of contraceptives in *Carey v. Population Services International*, 431 U.S. 678 (1977). Professor Lawrence Tribe believes that these subsequent decisions demonstrate that the basis of *Griswold* was what he calls “reproductive autonomy.” L. TRIBE, *supra* note 158, at 1339 (2d ed. 1988). In *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court held that the right to privacy also included the right to marry. The Court invalidated a Wisconsin law prohibiting parents with court-ordered child support obligations from remarrying without a court order. Perhaps the most definitive statement of the nature of this right was that made by Justice Louis Brandeis in 1928 when he described the right to privacy as “the right to be let alone.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). For a discussion of the right to privacy and reproduction, *see* L. TRIBE, *supra* note 158, at 1337-62.

this right, however, by requiring that its exercise "not violate the rights of others or offend the constitutional order or the moral code."¹⁶² The court therefore held that article 2(1) of the Basic Law did not apply to abortion. It concluded that the fetus' right to life was so fundamental that the state could not possibly balance it against the mother's interest in her choice of lifestyle.¹⁶³

4. The Court's Criticism of the Abortion Reform Act of 1974

Because the Federal Constitutional Court found that the Basic Law created a constitutional duty to protect the fetus' life, it held that the government had a constitutional duty to make abortion a crime.¹⁶⁴ The court reasoned that there would be a "gap" in the law if the government failed to make abortion a criminal offense.¹⁶⁵

In the court's opinion, the Abortion Reform Act did not satisfy this duty to protect the life of the fetus despite its objective of reducing the number of abortions.¹⁶⁶ The court articulated two reasons why the Act of 1974 did not fulfill this duty. First, the court maintained that "balanc[ing] life against life" was impermissible.¹⁶⁷ The duty of the state to protect life created an obligation to protect each and every individual life.¹⁶⁸

Second, the court distinguished the positive function of the law from what it described as the "expressive function of the law."¹⁶⁹ The expressive function of the law obligated the government to express its "objective value judgments" by disapproving of certain acts.¹⁷⁰ The law's expressive function, as opposed to its positive function, did not depend on the effectiveness of the law. Instead, the expressive function of the law is a tool for preserving the overriding values of society.¹⁷¹

5. Justifications for Abortion: The Indications

Rejecting the periodic model, the Federal Constitutional Court declared the Act of 1974 unconstitutional in the 1975 Abortion Deci-

162. GERMAN INFORMATION CENTER, *supra* note 23, at 5.

163. 39 BVerfGE at 43.

164. *Id.* at 42.

165. *Id.* at 55.

166. *Id.* at 65.

167. *Id.* at 58.

168. 39 BVerfGE at 58.

169. *Id.* at 66.

170. *Id.* at 41.

171. *Id.*

sion.¹⁷² According to the court, only abortion reform based on the indication model could coexist with the Basic Law.¹⁷³ Thus, the court required that abortion generally be subject to criminal sanctions.¹⁷⁴

The court did, however, recognize the possibility that in certain situations it would be unreasonable to require a woman to continue with a pregnancy.¹⁷⁵ In such situations, the state could constitutionally allow abortion,¹⁷⁶ but only in circumstances where one of the requisite "indications" was present.¹⁷⁷ The court recognized four such indications: (1) the medical indication; (2) the eugenic indication; (3) the criminological indication; and (4) the social indication.

a. *The Medical Indication*

The medical indication is present when a woman requires an abortion to avert a substantial danger to her health.¹⁷⁸ Abortion has been legal in Germany under these circumstances since 1927.¹⁷⁹ The medical indication was codified in the 1962 law that the Act of 1974 was meant to replace.¹⁸⁰ It was, therefore, a well-established exception to the abortion law. Because the situation involved the woman's own constitutional right to "life and inviolability of the person,"¹⁸¹ the court concluded that, in circumstances where the mother's health was threatened, it would be unreasonable to require her to continue with the pregnancy.¹⁸² Other extraordinary circumstances may also be sufficient to justify an abortion.¹⁸³

b. *The Eugenic Indication*

The eugenic indication is present if the fetus is deformed, or if there is a substantial chance that it will be born with a birth defect.¹⁸⁴

172. *Id.* at 1.

173. For a discussion of the indication model, see *supra* text accompanying notes 109-12.

174. 39 BVerfGE at 1.

175. *Id.* at 48. Under the German principle of *zumutbarkeit*, an actor may be excused from punishment for a criminal act due to extraordinary circumstances. Morris, *supra* note 112, at 212-16.

176. 39 BVerfGE at 48.

177. *Id.* at 2-3.

178. *Id.* at 49.

179. This was established by the 1927 Abortion Decision of the *Reichsgericht*. *Id.* at 6 (citing 61 RGSt 242).

180. StGB § 218(b)(1).

181. GG art. 2, § 2.

182. 39 BVerfGE at 49.

183. *Id.*

184. *Id.*

The defect must be both incurable¹⁸⁵ and so severe that it would be unreasonable to require the woman to continue with the pregnancy.¹⁸⁶ The court did not address the issue of how severe the defect must be.¹⁸⁷ Whether a defect is severe enough to qualify as a eugenic indication therefore depends on the judgment of the examining physician, taking into account the woman's perception of what is bearable.¹⁸⁸

c. *The Criminological Indication*

The criminological indication is present when the pregnancy is the product of a criminal act.¹⁸⁹ There must be a criminal act committed upon the woman and substantial reason to believe that the pregnancy results from that act.¹⁹⁰ Criminal acts include sex with a minor,¹⁹¹ rape,¹⁹² or sex with an incapacitated or incompetent woman.¹⁹³

d. *The Social Indication*

The social indication is present when the overall social situation of the woman creates such a conflict that it is unreasonable to expect her to continue the pregnancy.¹⁹⁴ The conflict may involve psychological or financial problems.¹⁹⁵ For example, a woman who already has numerous children to care for may be exempted from the general abortion prohibition.¹⁹⁶ The social conflict may also involve an unusual economic burden or the need to complete an education.¹⁹⁷ A handicapped or mentally incompetent woman who becomes pregnant may also fall within this category.¹⁹⁸

The social indication has, in recent years, been the justification for eighty percent of all abortions performed in West Germany.¹⁹⁹

185. *Id.* at 13.

186. *Id.*

187. StGB § 219b.

188. Eser, *supra* note 49, at 376.

189. 39 BVerfGE at 13-14; StGB § 218a(2)2.

190. 39 BVerfGE at 13-14.

191. StGB § 176.

192. *Id.* § 177.

193. *Id.* § 179.

194. 39 BVerfGE at 50.

195. Eser, *supra* note 49, at 376-77.

196. *Id.*

197. *Id.*

198. *Id.*

199. Köpcke, § 218 StGB: *Ein alter Streit auf neuen Bahnen?* 6 ZEITUNG FÜR RECHTSPOLITIK 161 (1985).

The widespread use of this indication and the ease of establishing it have led abortion opponents to label it a "hidden periodic model."²⁰⁰

D. *The Abortion Reform Act of 1976: An Indication Solution*

The West German parliament responded to the 1975 Abortion Decision by drafting a new abortion reform law.²⁰¹ The Abortion Re-

200. See, e.g., Gropp, § 218a StGB als Rechtfertigungsgrund: Grundfragen zum rechtsmäßigen Schwangerschaftsabbruch, 135 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 1 (1988).

201. 5. StrRG, 1974 BGBl. I 1297 as amended by 15 Strafrechtsänderungsgesetz [15. StÄG], 1976 BGBl. I 1213. The law as amended in 1976 reads as follows:

§ 218. Termination of pregnancy

(1) Whoever terminates a pregnancy shall be punished by up to three years' imprisonment or by fine.

(2) Imprisonment from six months to five years shall be imposed in especially serious cases. As a general rule, an especially serious case shall be deemed to exist if the offender:

1. acted against the will of the pregnant woman; or

2. recklessly caused the danger of death or serious physical injury to the health of the pregnant woman.

The court may order a supervision of conduct (§ 68(1)).

(3) If the pregnant woman herself commits the offense, up to one year's imprisonment or a fine shall be imposed. The pregnant woman shall not be punished under sentence one of this subparagraph if the pregnancy is terminated by a physician after consultation (§ 218b(1) numbers 1 and 2) and at a time when not more than twenty-two weeks have elapsed since conception. The court may refrain from imposing any punishment on the pregnant woman under sentence one if she was in great distress at the time of the act.

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

§ 218a. Justifiable abortion

(1) Termination of pregnancy by a physician is not punishable under § 218 if:

1. the pregnant woman consents and,

2. taking into consideration the present and future circumstances in the life of the pregnant woman, it is medically advisable in order to avert a danger to the life, or the risk of causing serious impairment to the physical or mental health, of the pregnant woman, and the danger cannot be averted in any other reasonably acceptable manner.

(2) The prerequisites set forth in subparagraph (1) number 2 shall be deemed fulfilled if, consistent with medical findings:

1. substantial reasons support the assumption that the child, because of an hereditary disposition or harmful pre-natal contacts, would suffer irremedial damage to its health so serious that the pregnant woman could not reasonably be expected to continue with the pregnancy;

2. an unlawful act falling under §§ 176 to 179 has been committed on the pregnant woman, and substantial evidence supports the assumption that the pregnancy was caused by the offense; or

3. termination of the pregnancy is otherwise advisable in order to protect the pregnant woman from the danger of distress which

(a) is so serious that it would be unreasonable to expect the pregnant woman [sic] to continue with the pregnancy, and

(b) cannot be averted in any other reasonably acceptable manner.

(3) In cases falling under subparagraph (2) number 1, not more than twenty-two weeks may have elapsed from the time of conception; and in cases under subparagraph (2) numbers 2 and 3, not more than twelve weeks.

form Act of 1976 ("Act of 1976") complied with the limits set by the

§ 218b. Termination of pregnancy without first providing counsel to the pregnant woman

- (1) Whoever terminates a pregnancy without the pregnant woman
 1. having seen, at least three days before the operation, a counselor (subparagraph (2)) concerning the termination of her pregnancy, and having been advised there of the types of public and private assistance which are available to pregnant women, mothers and children, in particular those types of aids which make it easier to continue with the pregnancy and which ameliorate the condition of mother and child, and
 2. a physician who himself does not perform the abortion and
 - (a) who, as a member of a recognized counselling center (number one), is entrusted with counselling within the meaning of subparagraph (1) number 1;
 - (b) who is recognized as a counselor by a government agency or by a public law corporate body, institution or foundation; or
 - (c) who has informed himself through consultation with a member of a recognized counselling center (number one) entrusted with counselling within the meaning of subparagraph (1) number 1, or with a social welfare agency or in some other appropriate manner about the various types of assistance available in any individual case.

(2) Subparagraph (1) number 1 shall not be applied if a termination of pregnancy is advisable in order to protect the pregnant woman from an identified danger of physical illness or injury to her life or health.

§ 219. Termination of pregnancy without a medical opinion

(1) Whoever terminates a pregnancy without having seen the written opinion of a physician, who himself does not perform the abortion, on whether the prerequisites of § 218a(1) number 2, subparagraphs (2) and (3) have been met, shall be punished by up to one year's imprisonment or by fine, provided the offense is not punishable under § 218. The pregnant woman may not be punished under sentence one of this paragraph.

(2) A physician may not offer opinions under subparagraph (1) if, because a final judgment convicting him of an unlawful act under subparagraph (1) or §§ 218, 218b, 219a or 219c, or of an unlawful act which he committed in connection with a termination of pregnancy, has been entered against him, he has been prohibited to do so by the cognizant center. The cognizant center may temporarily prohibit a physician from offering opinions under subparagraph (1) if he is being tried for one of the offenses mentioned in sentence one of this subparagraph.

§ 219a. Fallacious medical opinion

(1) Whoever, in his capacity as a physician and with full knowledge of the facts, forms a fallacious opinion concerning the prerequisites of § 218a(1) number 2, subparagraphs (2) and (3) as they pertain to § 219(1), shall be punished by up to two years' imprisonment or by fine, provided the offense is not punishable under § 218.

(2) The pregnant woman may not be punished under subparagraph (1).

§ 219b. Commercial advertising concerning termination of pregnancy

(1) Whoever publicly, in a meeting, or by the distribution of writings (§ 11(3)), either for his own economic advantage or in a grossly offensive manner, offers, advertises or commends:

1. his own or another's services to perform or to assist in arranging an abortion; or
2. the means, objects or procedures likely to induce an abortion, and with reference to this likelihood, or whoever publishes statements of similar content, shall be punished by up to two years' imprisonment or by fine.

(2) Subparagraph (1) number 1 shall not apply to cases where physicians or recognized counselling centers (§ 218b(2) number 1) are informed of which physi-

Federal Constitutional Court in the 1975 Abortion Decision.²⁰² The Act of 1976 was an indication solution²⁰³ and included the four indications deemed permissible by the court.²⁰⁴ The Act of 1976 is currently the law in former West Germany.²⁰⁵

IV. ABORTION LAW IN EAST GERMANY

After World War II, the Soviet Union's occupational authorities repealed the strict Nazi-era abortion laws in East Germany.²⁰⁶ In 1947 and 1948, the Soviets amended the laws of all but one East German state to provide for legal abortions for social reasons.²⁰⁷ However, in 1950 the new government of the German Democratic Republic enacted a law strictly prohibiting abortion.²⁰⁸ This law was part of the government's effort to increase the country's population, which had been decimated during the war.²⁰⁹ A campaign encouraging large families accompanied the law.²¹⁰

Eastern European countries were generally the first to introduce liberalized abortion laws.²¹¹ They followed the lead of the Soviet

icians, hospitals or institutions are prepared to terminate pregnancies under the conditions set forth in § 218a.

(3) Subparagraph (1) number 2 shall not apply if the advertising is directed to physicians or persons authorized to trade in the means or objects mentioned in subparagraph (1) number 2, or is published in medical or pharmaceutical circulars.

§ 219c. Putting into circulation the means of terminating a pregnancy

(1) Whoever, for the purpose of promoting unlawful acts under § 218, puts into circulation means or objects likely to induce an abortion, shall be punished by up to two years' imprisonment or by fine.

(2) The participation of the woman preparing to terminate her pregnancy is not punishable under subparagraph (1).

(3) The means or objects relating to the offense can be confiscated.

§ 219d. Definition

Procedures whose effect takes place before completion of the implantation of the fertilized egg in the uterus shall not be deemed terminations of pregnancy within the meaning of this Code.

STGB §§ 218, 218a, 218b, 219, 219a, 219b, 219c, 219d (translation from THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY 177-81 (J. Darby trans. 1987)).

202. Eser, *supra* note 49, at 374.

203. *Id.*

204. *Id.* at 374-77; see *supra* text accompanying notes 172-200.

205. STGB §§ 218, 219.

206. E. KEEFE, D. BERNIER, L. BRENNEMAN, W. CULP, W. GILOANE & J. MOORE, JR., AREA HANDBOOK FOR EAST GERMANY 77 (1972).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. Koch, *supra* note 96 at 1043-45. This included Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Rumania, and Yugoslavia. *Id.*

Union, which reformed its abortion law in 1955.²¹² Nearly all of these countries, with the notable exception of East Germany, liberalized their abortion law in the late 1950s.²¹³ Some, like East Germany in 1950, have since had a counter-reform, motivated by a desire to increase population.²¹⁴

In 1972, East Germany passed a liberalized abortion law.²¹⁵ The rationale for this law was that

[t]he 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.²¹⁶

Therefore, "[t]o determine the number, the timing, and the time between successive births, in addition to the existing methods of birth control, the woman is granted the right to decide on the termination of pregnancy at her own discretion."²¹⁷ The woman has the right to terminate a pregnancy in a gynecological clinic until the twelfth week.²¹⁸ After the twelfth week, the law permits abortion only where there is a danger to the mother's life or "when there are other grave circumstances."²¹⁹ When an abortion is illegal, only doctors, and not mothers, are subject to criminal sanctions.²²⁰

The East German law is thus a periodic solution²²¹ similar to the West German Abortion Reform Act of 1974 which the Federal Constitutional Court rejected.²²² However, it has no counseling requirement.²²³ It resembles the current state of the law in the United States under the Supreme Court's holding in *Roe v. Wade* more closely than

212. BRUNNER, EINFÜHRUNG IN DAS RECHT DER DDR 204 (1979).

213. Koch, *supra* note 98, at 1044.

214. *Id.* at 1043-44.

215. *Gesetz über die Unterbrechung der Schwangerschaft*, 1972 Gesetzblatt der DDR [GB] I 89 (E. Ger.).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. STRAFGESETZBUCH [StGB] § 153 (E. Ger.).

221. *Id.*

222. 5. StrRG, 1974 BGBl.I 1297, *overturned in* 39 BVerfGE 1.

223. StGB §§ 153-55 (E. Ger.).

the law under the West German Abortion Reform Act of 1974.²²⁴

Therefore, the conflict that has arisen between West and East German abortion law is the same conflict that occurred fifteen years earlier between the legislative and judicial branches of the West German government—the conflict between the indication model and the periodic model.

V. THE PRESENT COMPROMISE

In an effort to ease the process of reunification, the West German parliament amended the Basic Law.²²⁵ This amendment allows certain East German laws which differ from West German laws to remain in effect until the end of 1995.²²⁶ However, the East German laws which remain in effect are still subject to the same constitutional limits as West German laws.²²⁷ Therefore, East German laws may not violate basic rights such as freedom of speech and freedom of religion.²²⁸ They must also be compatible with the constitutional principles of democracy and due process of law.²²⁹

The abortion issue was one of the most controversial issues in the reunification treaty negotiations.²³⁰ East Germany wanted the abortion law included among those East German laws permitted to remain in effect until 1995.²³¹ However, East German abortion laws were based on the periodic solution, which the West German Federal Constitutional Court had declared unconstitutional.²³² Some West Germans, therefore, resisted the idea of allowing the East German abortion law to remain in effect after reunification.²³³

224. This leads to the anomaly that, in this case, East German law is more like United States law than West German law.

225. GG art. 143. An amendment to the Basic Law requires a two-thirds majority in parliament. However, those sections establishing basic individual rights, such as freedom of speech or the right to life, relied on by the Federal Constitutional Court in the Abortion Decision, may not be altered, even by a two-thirds majority. *DER SPIEGEL*, Sept. 3, 1990, at 19-20.

226. *DER SPIEGEL*, Sept. 3, 1990, at 19.

227. *Id.* at 19-20.

228. GG art. 19, § 2.

229. *Id.* art. 79, § 3.

230. *DER SPIEGEL*, Sept. 3, 1990, at 22-25.

231. *DER SPIEGEL*, Aug. 13, 1990, at 28. The East German Parliament had voted to retain the periodic solution. The vote was influenced by popular support for the periodic solution. For example, on the day of the First Treaty's ratification, the East German Parliament received a petition from the Independent Women's Association, signed by 17,000 women, demanding "no reunification without the periodic solution." *DER SPIEGEL*, July 2, 1990, at 70.

232. *DER SPIEGEL*, Sept. 3, 1990, at 25.

233. *Id.* at 28-29. Elections for the all-German parliament were held on December 2, 1990, as specified in the Second Treaty. *Id.*; Unification Treaty, *supra* note 1.

Despite this resistance, West Germany eventually agreed to allowing the East German abortion law to remain in effect after reunification.²³⁴ The more difficult issue, however, was what legal status to give West German women having abortions in former East Germany.²³⁵ The West German penal code states: "[West] German criminal law applies, regardless of local law, to the following acts committed in a foreign country . . . [t]ermination of pregnancy."²³⁶ Arguably, since the law refers to a foreign country, it does not apply to former East Germany after reunification.²³⁷ However, legal experts from the West German justice department concluded that a West German woman having an abortion in East Germany after reunification would be subject to prosecution.²³⁸

The coalition-ruling Free Democratic Party ("FDP") and the opposition Social Democratic Party ("SPD") joined to attack this interpretation in negotiations among the West German political parties.²³⁹ They insisted on a "territorial principle" that made the law of the jurisdiction where the abortion took place controlling.²⁴⁰ Helmut Kohl and his ruling conservative coalition ("CDU/CSU")²⁴¹ needed the votes of the opposition parties to gain a majority to ratify the reunification treaty.²⁴² Therefore, on August 28, 1990, three days before the scheduled signing of the treaty, the CDU/CSU compromised by accepting the "territorial principle." Thus, a West German woman would not be subject to prosecution for an abortion in East Germany.²⁴³ In exchange for this concession, however, the CDU/CSU demanded that the dual abortion laws continue only until the end of 1992 rather than the end of 1995.²⁴⁴ The SPD and FDP objected to this demand.²⁴⁵ They suspected that the CDU/CSU intended to declare the East German law unconstitutional after 1992 and automatically extend the West German indication solution to all

234. DER SPIEGEL, Sept. 3, 1990, at 28-29.

235. *Id.*

236. *Id.* at 28 (citing STGB § 5).

237. *Id.* at 23.

238. *Id.*

239. For a discussion of West German political parties, see *supra* note 11.

240. DER SPIEGEL, Sept. 3, 1990, at 23.

241. The Christian Democratic Union and the Christian Socialist Union make up the coalition. See *supra* note 11.

242. DER SPIEGEL, Sept. 3, 1990, at 23.

243. *Id.*

244. *Id.*

245. *Id.*

of Germany.²⁴⁶ The SPD and FDP insisted that the same time limit apply to all nonconforming laws.²⁴⁷

On the evening before the scheduled signing of the treaty, the CDU/CSU proposed that the general time limit for nonconforming laws be changed from five to two years.²⁴⁸ Laws having a longer time limit would be specifically listed as exceptions to the general rule.²⁴⁹ This proposal satisfied the SPD and FDP because abortion law was no longer segregated from other nonconforming laws.²⁵⁰

The compromise assigned the all-German parliament the task of drafting a new abortion law by December 31, 1991.²⁵¹ However, the opposition obtained an important concession from the ruling coalition. If the all-German parliament was unable to agree on a new abortion law by the end of 1992, the substantive law of East Germany would continue to apply in former East Germany.²⁵²

Furthermore, the two sides agreed on several terms in article 31 of the treaty regarding "families and women."²⁵³ The provocative term, "the protection of unborn children," became "the protection of

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Unification Treaty, *supra* note 1, art. 31(4).

252. *Id.*

253. *Id.* art 31. This part of the treaty, as signed, reads as follows:

Article 31

Families and women

(1) It is the task of the all-German parliament, to further develop the law for equality of men and women.

(2) It is the task of the all-German parliament, in view of the initially differing legal and institutional situations as to the employment of mothers and fathers, to develop the law with the goal of compatibility of family and career.

(3) In order to guarantee the continuation of institutions for the day-care of children in the [five East German states], the federal government will help with the costs of these institutions during a transition period lasting until June 30, 1991.

(4) It is the task of the all-German parliament, to agree on a law, that will better guarantee the protection of prenatal life and the constitutional resolution of conflicts, than is done at the present in either part of Germany, above all through legally assured measures for women, especially through counseling and social help, by, at the latest, December 31, 1992. To accomplish this goal, a comprehensive system of counseling centers, run by various groups, shall be immediately opened in the [five East German states] with federal financial help. The counseling centers shall be provided with enough funds and personnel that they may do justice to their task of counseling pregnant women and providing them with needed help—even after the time of birth. If a law is not agreed upon in the above-mentioned time, the substantive law of [East Germany] will continue in effect.

Id.

prenatal life.”²⁵⁴ All parties also agreed that West Germany would assist in establishing a system of counseling centers for pregnant women in East Germany.²⁵⁵ Thus, they enabled East Germany to establish a periodic solution with counseling. This was precisely the solution contained in the Act of 1974 which was overturned by the 1975 Abortion Decision of the Federal Constitutional Court.²⁵⁶

VI. THE FUTURE OF ABORTION LAW IN A UNIFIED GERMANY

A. *The Political Situation*

The abortion issue in Germany is far from settled. On the one hand, Kohl and the CDU/CSU only grudgingly accepted the continuation of the periodic solution in East Germany. One Christian Democrat complained that now “abortion will become the normal method of birth control.”²⁵⁷ Even before reunification, some West German legal writers criticized the frequent use of the social indication.²⁵⁸ Their suggestions for dealing with the situation ranged from making the social indication more “concrete”²⁵⁹ and instituting stricter controls²⁶⁰ to eliminating the social indication entirely.²⁶¹

On the other hand, the other parties advocate the enactment of an abortion law like the Act of 1974.²⁶² They favor a periodic solution with mandatory counseling.²⁶³ Proponents of the periodic solution argue that it not only gives women freedom of choice, but also results in a lower abortion rate.²⁶⁴ If the all-German parliament cannot agree on an all-German abortion law, then, by default, East Germany will have precisely the solution that the opposition favors: a periodic solution with counseling.²⁶⁵

It is still unclear what effect the new East German parliament

254. DER SPIEGEL, Sept. 3, 1990, at 23.

255. *Id.*

256. *Id.*

257. *Id.* at 25. In reaction to this statement, *Der Spiegel* commented, “as if women would get pregnant for fun and laughs only because they could get an abortion somewhat more easily than in West Germany.” *Id.*

258. Gropp, *supra* note 200, at 30.

259. Koch, *supra* note 98, at 1062-64.

260. Stürner, *Die Unverfügbarkeit ungeborenen menschlichen Lebens und die menschliche Selbstbestimmung*, 45 JURISTEN ZEITUNG 709 (1990).

261. Gropp, *supra* note 200, at 31.

262. The SPD, the FDP, and the Green Party, as well as many CDU members from former East Germany, all support the periodic solution. DER SPIEGEL, Sept. 3, 1990, at 23.

263. *Id.*

264. *Id.*

265. *Id.*

members will have on the controversy. Kohl's conservative Christian Democratic Party became the majority party in East Germany following the all-German parliamentary elections of December 2, 1990.²⁶⁶ However, East German politicians of all parties tend to support the periodic solution.²⁶⁷

B. Criticism of the Indication Solution

Advocates of the present West German indication solution insist that criminalizing abortion is both morally imperative and required under the Basic Law, to which East Germany has acceded.²⁶⁸ However, the Federal Constitutional Court arguably exceeded its power when it interpreted the Basic Law to mandate the use of the indication solution in the 1975 Abortion Decision. Indeed, even accepting the reasoning of the Abortion Decision, the indication solution is no longer imperative. The Abortion Decision expressly left the door open for other solutions and only required that prenatal life be "sufficiently protected."²⁶⁹ Empirical studies show that the indication solution has proved to be ineffective in deterring abortion.²⁷⁰ In fact, it has resulted in higher abortion rates than in some countries with more liberal abortion laws.²⁷¹ Furthermore, the indication solution is socially undesirable because it exacerbates other social problems such as unwanted children, a burdensome governmental bureaucracy, and "abortion tourism," which disproportionately place the burden of the indication solution on lower-income women.

1. Criticism of the 1975 Federal Constitutional Court Abortion Decision

Although the 1975 Abortion Decision of the Federal Constitutional Court was welcomed by abortion opponents and the Christian Democratic Union, critics from both inside and outside of West Germany have expressed their disapproval of the decision. Perhaps the most cogent statement of the weaknesses of the 1975 Abortion Decision is the dissenting opinion which accompanied the majority decision.²⁷²

266. *Id.* at 22-25.

267. *Id.*

268. DER SPIEGEL, Jan. 14, 1991, at 33.

269. *Id.*

270. Koch, *supra* note 98, at 1044.

271. *Id.*

272. 39 BVerfGE at 68.

a. *The Dissent*

German courts do not normally write dissenting opinions.²⁷³ In fact, the Federal Constitutional Court has only published dissenting opinions since 1971, and lower German courts still do not publish them.²⁷⁴ The mere fact that the court published a dissent in the Abortion Decision indicates the serious division among the justices.²⁷⁵

The dissent agreed with the majority's position that the protection of human life is an important value and that prenatal life is also entitled to protection.²⁷⁶ However, the dissent stated that the issue in the case was not *whether* prenatal life was to be protected, but *how* it was to be protected.²⁷⁷ The legislature had intended to reduce the number of abortions by instituting a periodic model with mandatory counseling based on "the unrebutted assumption that the current law was ineffective."²⁷⁸ The dissent found that the Basic Law in no way required the criminalization of abortion at each stage of pregnancy.²⁷⁹ The court left the decision of how best to accomplish the goal of protecting prenatal life to the parliament.²⁸⁰ Judicial interference in this situation would be contrary to the principle of "judicial self-restraint."²⁸¹

Furthermore, the dissent contended that the purpose of constitutional review is to defend individual rights against government encroachment.²⁸² Criminal sanctions are the most serious way for a state to limit individual rights.²⁸³ Therefore, the inquiry regarding criminal sanctions should be limited to *whether*, under the circumstances, the state may punish. The majority had decided that the state *must* punish—an unprecedented step in constitutional law²⁸⁴—contrary to the dissent's view that the judiciary's objective in constitutional review is to set limits on the use of the government's power, not

273. *Morris*, *supra* note 112, at 191.

274. *Id.* As a matter of fact, one judge from the majority walked out before the dissenting opinion was read. *Id.* at 191 n.242.

275. *Id.* Five justices voted with the majority and three dissented (including, significantly, the only woman on the court). *Eser*, *supra* note 49, at 374.

276. 39 BVerfGE at 68.

277. *Id.* at 68-69.

278. *Id.* at 70-71.

279. *Id.* at 69.

280. *Id.*

281. *Juristische Selbstbeschränkung*. The English term appeared in parentheses in the opinion, indicating its roots in Anglo-American law. 39 BVerfGE at 69.

282. *Id.* at 70-71.

283. *Id.* at 73.

284. *Id.* at 70.

to mandate that use.²⁸⁵

The majority referred to Germany's experience during the Nazi era to justify its broad reading of the constitutional protection of life.²⁸⁶ The dissent argued that the lessons of the Nazi era commanded the opposite conclusion.²⁸⁷ The Nazi crimes involved the "organized and systematic extermination of innocent people"²⁸⁸ by the state. Such mass murders, the dissenters maintained, were necessarily very different from a woman's private decision as to an occurrence within her own body.²⁸⁹ This distinction is underscored by the Nazis' extremely harsh penalties for abortion.²⁹⁰

The majority stated that criminal sanctions were the "last resort."²⁹¹ To the dissent, this implied that the state should first resort to other methods of limiting abortions.²⁹² Only when the other means of protecting fetuses proved inadequate should the state resort to criminal sanctions.²⁹³ Judicial restraint was especially appropriate to the dissent when a legislative act was being challenged.²⁹⁴

Finally, the dissent found the majority's approach far too simplistic.²⁹⁵ By focusing on the constitutional guarantee of life, the majority ignored the fact that a voluntary abortion is very different from a crime such as murder or manslaughter.²⁹⁶ The majority's approach also ignored the multitude of sociological factors that cause a woman to decide on an abortion²⁹⁷ and the demands placed on a woman by forcing her to continue with a pregnancy. These demands include changes in her health and her body, changes in her lifestyle, and the obligation to care for a child.²⁹⁸

b. German and United States Views of the 1975 Abortion Decision

Numerous articles have been published on the "still controver-

285. *Id.* Here the dissent probably follows more closely the United States view of constitutional rights. See Morris, *supra* note 112.

286. 39 BVerfGE at 36-37.

287. *Id.* at 76-77.

288. Morris, *supra* note 112, at 211.

289. 39 BVerfGE at 76-77.

290. *Id.*; see also *supra* text accompanying notes 79-84.

291. 39 BVerfGE at 77.

292. *Id.* at 71-72.

293. *Id.*

294. *Id.* at 77-78.

295. *Id.* at 81-82.

296. 39 BVerfGE at 78-79.

297. *Id.* at 83-84.

298. *Id.* at 79-80.

sial" Abortion Decision.²⁹⁹ The decision is often contrasted with the United States Supreme Court's 1972 decision in *Roe v. Wade*,³⁰⁰ because the Abortion Decision is like a "mirror image" of *Roe*. In *Roe*, Texas legislators prohibited abortion, but the United States Supreme Court found that the Constitution prevented states from prohibiting abortion during the first three months of pregnancy.³⁰¹ In the 1975 Federal Constitutional Court decision, legislators wanted to permit abortion during the first three months of pregnancy, but the West German court found that the constitution required the government to prohibit abortion during this period.³⁰² This disparity is even more remarkable when one considers that the system of basic rights contained in the Basic Law is modelled, to a great extent, on the United States Constitution.³⁰³

Winfried Brugger, a German legal scholar compared the 1975 Abortion Decision favorably to *Roe v. Wade*, finding the Federal Constitutional Court's "arguments more balanced and from a constitutional point of view more acceptable and consistent than *Roe v. Wade*."³⁰⁴ However, he criticized the Federal Constitutional Court's reasoning.

First, Brugger commented on the court's "institutional encroachment."³⁰⁵ He contended that the majority overemphasized the law's expressive function by concluding that the expressive function demanded the criminalization of abortion.³⁰⁶ The majority thereby ignored the legislature's finding that more lives would be saved through

299. Frommel, *Strategien gegen die Demontage der Reform der §§ 218 ff. StGB in der Bundesrepublik*, 9 ZEITUNG FÜR RECHTSPOLITIK 351 (1990).

300. 410 U.S. 113 (1973).

301. *Id.* at 164.

302. 39 BVerfGE at 2-3.

303. There have been numerous articles comparing *Roe v. Wade* to the Abortion Decision of the Federal Constitutional Court. This Comment will discuss two articles written by a German writer and two articles written by a United States writer. Interestingly, the German writer believes that the Federal Constitutional Court's decision was the better reasoned of the two, where the United States writer finds the United States Supreme Court decision to be better reasoned. The articles by the German writer are Brugger, *supra* note 116 and Brugger, *Abtreibung—ein Grundrecht oder ein Verbrechen? Ein Vergleich der Urteile des United States Supreme Court und des BVerfGE*, 14 NEUE JURISTISCHE WOCHENSCHRIFT 896 (1986). The articles by the United States writer are Morris, *supra* note 112 and Morris, *Die Strafbarkeit des Schwangerschaftsabbruchs nach der Rechtsprechung des Supreme Court der USA und des Bundesverfassungsgericht der Bundesrepublik Deutschland in Vergleichender Sicht*, 99 ZEITUNG FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 888 (1987). For a further list of articles comparing the two decisions, see Morris, *supra* note 112, at 161 n.3.

304. Brugger, *supra* note 303, at 899; *see also* Brugger, *supra* note 116.

305. Brugger, *supra* note 116, at 62.

306. Brugger, *supra* note 303, at 899.

a periodic solution with mandatory counseling, since that affected only the positive function of the law.³⁰⁷ However, as the dissent pointed out, where there is uncertainty, the legislature, not the judiciary, must choose between the positive function and the expressive function of the law.³⁰⁸ Brugger concluded that "no clearly discernible constitutional mandate [exists] for the court to strike down a statute that in its normative approach and choice of means basically reflects the fundamentality of the unborn child's interest."³⁰⁹

Brugger then criticized the internal inconsistency of the Abortion Decision.³¹⁰ The court held that even if the legislature's belief that more lives could be saved through the Act of 1974 was correct, it would be improper to "balance life against life."³¹¹ However, in its discussion of the indications, the court balanced the fetus' right to life against the mother's right not to be unreasonably burdened.³¹² If the fetus is indeed a person whose right to life is constitutionally protected, and if the fetus' life may not be balanced against other interests, taking into account a woman's mere interest in her lifestyle should be irrelevant.³¹³

Douglas Morris, a United States writer, states that the majority opinion in the Abortion Decision is based on "a nondemocratic form of liberalism historically peculiar to Germany, . . . German authoritarian liberalism."³¹⁴ Morris believes that this German authoritarian liberalism originated in the late, but rapid development of the German state.³¹⁵ As Bismarck centralized governmental power, first in the Prussian nation-state and later in the German *Reich*, the middle class sided with him against the princely estates.³¹⁶ A German tradition of idealizing the state developed and Germans began to look to

307. Brugger, *supra* note 116, at 61.

308. *Id.* at 61-62.

309. *Id.* at 62.

310. *Id.*

311. *Id.* at 61-62.

312. *Id.*

313. *Id.*

314. Morris, *supra* note 112, at 171. Morris' analysis treats *Roe v. Wade*, the majority opinion in the 1975 Abortion Decision, and the dissent in the Abortion Decision as representing three different traditions of liberalism. Morris understands *Roe v. Wade* to represent "the classical liberalism of judicial review." The dissent in the Abortion Decision represents "the classical liberalism of parliamentary supremacy." *Id.* at 171.

315. Morris, *supra* note 112, at 183.

316. Compare England, where the middle class gained power by opposing the monarch and the aristocracy. *Id.* at 185.

government authority for the solution to social problems.³¹⁷

Morris speculates that "in the majority, at least to some extent, the new institution of the [Federal Constitutional Court] takes the place once taken by the monarch as the embodiment of the state."³¹⁸ According to Morris, the majority decision reflects an attitude inherent in the idealization of authority.³¹⁹ The idea that the fetus is human life is an absolute and an ideal.³²⁰ As an absolute, the idea is "universal, timeless, and not open to question . . ."³²¹ As an ideal, it "need not bow to social reality."³²²

The majority's opinion in the Abortion Decision also reflects certain traditions of German legal science.³²³ Traditionally, German legal scholars discovered truth by studying and analyzing texts in terms of purely legal values.³²⁴ This pure legal analysis did not take into account social science data.³²⁵ The majority was therefore "concern[ed] with the aesthetic coherence of the text"³²⁶ and it emphasized that the lack of criminal sanctions created a gap in the law.³²⁷ The majority "seem[s] to have thought that the state's protection of human life must achieve an almost poetic unity and wholeness."³²⁸ Therefore,

the majority downplayed considerations from outside the text. Thus, the majority subordinated the importance of the personal and social problems faced by pregnant women. The majority ignored empirical data unless the data refuted arguments for abortion reform. In insisting that West Germany had to maintain its own legal standards, the majority deemed the recent liberalization of abortion laws in other Western democracies irrelevant to West Germany, and referred to foreign abortion laws only to show how they did not meet West Germany's standard. . . . [T]he synthesis attained by the majority is more aesthetically pleasing than persuasive.³²⁹

317. *Id.*

318. *Id.* at 191.

319. *Id.* at 184.

320. *Id.* at 177.

321. *Id.*

322. *Id.*

323. *Id.* at 187.

324. *Id.*

325. *Id.*

326. *Id.* at 176.

327. *Id.*

328. *Id.*

329. *Id.* at 176-77.

*c. The Legal Status of the Fetus in Other Areas
of West German Law*

In rendering the 1975 Abortion Decision, the Federal Constitutional Court relied on its position that the fetus is a person for constitutional purposes and is therefore protected by the Basic Law's guarantee of the right to life for "everyone."³³⁰ The court reasoned that failure to include the fetus within this guarantee would create an impermissible "gap" in the law.³³¹ However, since the law treats the fetus differently from a person after birth, it already has many such gaps. Moreover, the Federal Constitutional Court, after asserting that the fetus has a constitutional right to life, proceeded to balance the fetus' right to life against the mother's interests.³³²

West German courts have interpreted the sections of the Federal Republic of Germany's Penal Code dealing with homicide and the infliction of bodily harm to apply only to a person after birth.³³³ The abortion law applies only to the deliberate killing of the fetus.³³⁴ Therefore, there is no criminal law that applies to the negligent killing of or injury to a fetus, whether by a physician or someone else.³³⁵ Even where gross negligence is involved, injury or death of a fetus is not covered by the sections of the penal code which would apply to a person's injury or death after birth.³³⁶

The tort law of the Federal Republic of Germany does allow a separate cause of action for negligently-caused prenatal injuries, but requires that the fetus be born alive.³³⁷ A West German court of appeals, holding that a child had a cause of action for prenatal injuries suffered in an auto accident, based its decision on the fact that the fetus "is destined to enter life as a human being" and is therefore "identical with the child born subsequently."³³⁸ The liability of the defendant is therefore based on the fetus' identity with the child sub-

330. 39 BVerfGE 1.

331. *Id.* at 55.

332. *See supra* text accompanying notes 310-13.

333. Eberbach, *Pränatale Diagnostik-Fetaltherapie-selektive Abtreibung: Angriffe auf § 218 a Abs. 2 Nr. 1 StGB (embryopathische Indikation)—ein streitbarer Beitrag zur Abtreibungsdiskussion*, 7 JURISTISCHE RUNDSCHAU 265, 267 (1989).

334. *Id.*

335. *Id.*

336. *Id.*

337. B. MARKESINIS, *A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORTS*, 96 (1986).

338. *Id.* at 94 (citing Judgment of Jan. 11, 1972, Bundesgerichtshof, W. Ger., 58 Bundesgerichtshof in Zivilsachen [BGHZ] 48).

sequently born and not with the status of the fetus itself. This view of the civil remedy is inconsistent with the Federal Constitutional Court's position that the fetus enjoys the same constitutional protection as a person after birth. The fetus has a fundamental right to life, but is accorded no civil remedy to protect the wrongful taking of that life.

Even where a doctor's gross negligence in diagnosis or treatment causes the death of the fetus, this negligence is not punishable under criminal law.³³⁹ However, the doctor is criminally liable for undertaking an illegal abortion with the mother's consent.³⁴⁰ Therefore, the Federal Constitutional Court's concern that failing to criminalize abortion would create a gap in the law is less than convincing, since there are already such gaps in the law.

2. The "Back Door" in the 1975 Abortion Decision

Monika Frommel, a German legal writer, recently wrote that the Federal Constitutional Court's decision overlooked article 4(1) of the Basic Law, which guarantees that "freedom . . . of conscience . . . shall be inviolable."³⁴¹ The court expressly stated in the Abortion Decision that a woman's decision regarding an abortion is a "decision of conscience deserving respect."³⁴² Therefore, both prenatal life and a woman's freedom of conscience are constitutionally protected.³⁴³ The Federal Constitutional Court also stated that "resolving difficult personal conflicts through the threat of criminal sanctions is generally inappropriate."³⁴⁴ Frommel suggests that the court recognized that the criminal law must be limited, even in this decision, in which the court places such a high value on unborn life.³⁴⁵ Beyond this limit, the woman is free to make her own "decision of conscience."³⁴⁶ Thus, a periodic solution, even without mandatory counseling, is consistent with the principles of the Abortion Decision.³⁴⁷

In a recent editorial in the German news magazine *Der Spiegel*, Rudolf Augstein also argued that adopting the periodic solution at

339. Eberbach, *supra* note 333.

340. *Id.*

341. Frommel, *supra* note 299. Section 4(1) reads in full: "Freedom of faith, of conscience, and freedom of creed, religious or ideological, shall be inviolable." GG § 4(1).

342. 39 BVerfGE at 48.

343. Frommel, *supra* note 299, at 352.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

the present time would not be inconsistent with the Federal Constitutional Court's Abortion Decision.³⁴⁸ Augstein first stated that politicians insisted on criminal sanctions for abortion because of an exaggerated deference to religious views not held by all Germans.³⁴⁹ Further, the hypocritical, present law should not be imposed on five new states but, rather, should be replaced by the periodic solution, which would provide much more clarity in the law.³⁵⁰ The Federal Constitutional Court presently has an opportunity to react to the renewed ethical discussion by issuing a new decision that takes into account the experiences of the fifteen years that have passed since the 1975 Abortion Decision. This is possible because the court left open a "back door" in the decision when it stated that "the legislature can express the constitutionally mandated legal disapproval of abortion in other ways than through the threat of punishment. The deciding factor is whether the totality of the measures for the protection of prenatal life affords protection corresponding to the importance of the right to be protected."³⁵¹

The legislature is therefore free to select another solution when changed circumstances or a demonstrated lack of efficiency in protecting prenatal life make the present indication solution undesirable. Changed circumstances are present today in the form of German reunification and the East/West split on the abortion issue. East Germany's retention of a periodic solution enables West German women to legally obtain abortions. East Germany's law does not even include the counseling requirement contemplated in the periodic solution of the Abortion Reform Act. Furthermore, empirical studies in West Germany indicate that abortion rates are as high or higher than nations with more liberal abortion laws, demonstrating the indication solution's lack of efficiency.³⁵² Finally, the problem of unwanted children and the disproportionate burden on low-income women make the indication solution socially undesirable.

3. Empirical Studies of the Indication Solution

Critics of the indication solution argue that it unnecessarily subjects women to a meaningless bureaucratic process and deprives them

348. Augstein, *Der § 218 muß weg!*, DER SPIEGEL, July 30, 1990, at 24.

349. *Id.*

350. *Id.*

351. 39 BverfGE 1.

352. See *infra* text accompanying notes 364-67.

of their freedom of choice.³⁵³ Furthermore, it fails even to effectively accomplish its own goal of protecting prenatal life.³⁵⁴

Under present West German law, before a woman may have an abortion, a doctor must interview and examine the woman and attest to the presence of an indication.³⁵⁵ A recent empirical study of abortion in West Germany showed that ninety percent of women seeking abortions were able to find a doctor to attest to a social indication.³⁵⁶ However, only fifty percent of all women polled were able to obtain an attestation of indication of their first visit to a doctor.³⁵⁷ Ten percent of the women questioned had to visit three or more doctors.³⁵⁸ Of the women who failed to find an attesting physician, about half obtained illegal or foreign abortions. The rest continued the pregnancy to term.³⁵⁹

The study also indicated that a high percentage³⁶⁰ of West German women travel to other West German states to have abortions.³⁶¹ For example, sixty percent of the women from Baden-Württemberg³⁶² go to another state, usually Hessen, to have an abortion.³⁶³ This "abortion tourism" will likely increase in a reunified Germany since East Germany will retain the periodic solution.

Many West German women also go to other countries with more

353. In some cases, women may be subjected to even more than a meaningless bureaucratic exercise. The 1989 Memmingen process demonstrates the inequities that may result from the indication solution. The district attorney seized the files of a physician in the Bavarian city of Memmingen, anonymously accused of tax evasion. The records of abortions performed on women who did not have the required indication attested to by another physician were used to convict not only the physician, but 156 women who had received abortions as well. Because Bavaria only allows abortions in a hospital and not in a physician's office, despite the fact that most other West German states do, the physician and his patients were convicted of illegal abortions. The women not only received fines, but were questioned, sometimes in open court, about intimate areas of their lives. Furthermore, they all now have police records. *Hexenjagd in Bayern (Witch Hunt in Bavaria)*, DER SPIEGEL, Sept. 19, 1988, at 24-32.

354. Der Spiegel, July 30, 1990, at 24.

355. StGB § 218.

356. Häusler & Holzauer, *Die Implementation der reformierten §§ 218 f. StGB*, 100 ZEITUNG FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 817, 831 (1988).

357. *Id.*

358. *Id.*

359. *Id.*

360. "Significantly more than half." *Id.* at 837.

361. *Id.*

362. Baden-Württemberg, a state in the southwest of the Federal Republic of Germany, was one of the states that opposed the 1974 Abortion Reform Act. 39 BVerfGE at 18.

363. Häusler & Holzauer, *supra* note 356, at 837.

liberal abortion laws, usually the Netherlands.³⁶⁴ However, the Netherlands has a low abortion rate despite its permissive abortion laws.³⁶⁵ In some years, three times as many West German women receive abortions in the Netherlands as Dutch women.³⁶⁶ Dutch experts attribute this to the excellent contraceptive education in the Netherlands.³⁶⁷

4. The Problem of Unwanted Children

Women who are unable to obtain an abortion because they lack an indication or cannot find a doctor who will attest to an indication, are forced to continue their pregnancies to term. This results in a great number of unwanted births and the social problems associated with them. A recent West German study³⁶⁸ indicates that unwanted children have problems in nearly every aspect of their lives.³⁶⁹ The study found that "being unwanted is for many children the cause of behavior problems, difficulties in social contact, and health problems including [early] death."³⁷⁰

Almost half of all pregnancies in former West Germany are unwanted.³⁷¹ One-third of the mothers admitted to feelings of hatred for their children after giving birth.³⁷² Sixty-six percent of abused children were unwanted, according to their parents.³⁷³ Sadly, abuse begins even before birth. Women who do not want to be pregnant more frequently use tranquilizers, alcohol, and cigarettes, even when they are aware of the consequences for the child.³⁷⁴ Crib death occurs more often among unwanted children.³⁷⁵ Furthermore, these children are sick more often, teachers evaluate their intellectual and social skills less favorably, and they are more likely to be rejected by their

364. Koch, *supra* note 98, at 1072.

365. *Id.*

366. *Id.*

367. *Id.*

368. The study focused on children who were born because of their parents' failure to use birth control, because of their parents' lack of knowledge about birth control, or because of the birth control's ineffectiveness.

369. DER SPIEGEL, Sept. 10, 1990, at 109 (citing G. AMENDT & M. SCHWARZ, DAS LEBEN UNERWÜNSCHTER KINDER (1990)). The study was originally commissioned by officials who wanted to increase acceptance of the abortion laws. The officials never released the results, however, because they undermined their position. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

peers.³⁷⁶ One psychologist has referred to these children as those "for whom abortion begins after birth."³⁷⁷

VII. RECOMMENDATIONS

There are serious problems and inconsistencies in the current abortion laws of West Germany. Empirical studies show that the indication solution does not discourage abortions as it purports. It merely subjects women to a meaningless bureaucratic process. While wealthier women can bypass the procedure and obtain abortions in other countries with more liberal laws, other women may be forced to visit several doctors to obtain the necessary attestation of an indication. Because the five East German states that are now part of a reunified Germany retain a periodic solution, the indication solution is effectively unenforceable in West Germany. Women will be able to obtain a legal abortion in East Germany without going through West Germany's bureaucracy.

Even opponents of abortion in West Germany express dissatisfaction with the present abortion law. Some German abortion opponents recommend "making the social indication more concrete"³⁷⁸ by narrowing the standards for indication so that abortion is available to fewer women. This effort would, however, be futile because West German women can now obtain legal abortions in East Germany.

A more sensible and effective approach is to adopt a periodic solution with mandatory counseling, similar to the 1974 Abortion Reform Act rejected by the Federal Constitutional Court.³⁷⁹ A close reading of the Federal Constitutional Court's 1975 Abortion Decision reveals that the overturning of the Abortion Reform Act of 1974 did not foreclose other approaches to the problem.³⁸⁰ Although the court instructed the legislators to first try the indication solution, it left open the possibility of other alternatives.³⁸¹ The indication solution has been the law in West Germany for fifteen years, yet studies indicate that it is ineffective in discouraging abortion.³⁸² In addition, reunification presents new challenges to the indication solution.

The approach suggested by some members of the West German

376. *Id.*

377. *Id.*

378. Koch, *supra* note 98, at 1062-64.

379. 39 BVerfGE at 4-6 (citing 5. StrRG, 1974 BGBl.I 1297).

380. *Id.* at 1.

381. *Id.*

382. Häusler & Holzhauser, *supra* note 356.

parliament is more rational. This approach obeys the Federal Constitutional Court's instruction that the parliament protect prenatal life, but it does so without threatening pregnant women with criminal sanctions. This approach uses positive measures to protect prenatal life, but lets the woman make the final decision regarding abortion.

Two main types of positive measures exist. Mandatory abortion counseling similar to that suggested in the alternative draft and the Act of 1974 is one type. The Alternative Draft envisioned four functions that might be served by abortion counseling.³⁸³ First, medical advice could inform the woman of the health risks associated with abortion.³⁸⁴ A majority of the alternative draft writers thought that, with such advice, many women would choose not to have abortions.³⁸⁵ Women might be dissuaded by a serious risk to their health, the fact that future pregnancies are unlikely, or that the last opportunity to conceive might be lost through the abortion.³⁸⁶ Second, psychological advice might inform women of the likelihood of severe psychological trauma resulting from abortion.³⁸⁷ The majority stated that a "commercial criminal abortionist is surely not going to advise her on this."³⁸⁸ Third, legal advice could provide the woman with information regarding her legal rights and the illegitimate child's legal rights.³⁸⁹ Finally, the woman could be advised of the social consequences of her decision, including the possibility of adoption and the availability of public and private financial help for single mothers.³⁹⁰

The second type of positive measure contemplated is a social one, designed to ease the burden on women who decide to carry pregnancies to term. Rather than relying on threats of criminal punishment to discourage abortions, these measures attempt to lessen the mother's social problems. Such measures could include better education in the use of contraceptives. The contraceptive education available in the Netherlands has proved quite effective in reducing the number of abortions.³⁹¹ Help for economically disadvantaged and

383. J. BAUMANN, *supra* note 99.

384. *Id.* at 90.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

391. Schlingensiepen-Brysch, *Schwangerschaftsabbruch—Versuch einer Bestandaufnahme*, 6 ZEITUNG FÜR DIE RECHTSPOLITIK 224, 227 (1990).

single parents could also reduce the demand for abortions.³⁹² This could include financial help in childrearing and improved access to daycare.³⁹³ The availability of parental leave or part-time employment for mothers would also be helpful.³⁹⁴ German universities could change their regulations to enable women to complete their education after childrearing.³⁹⁵ These educational opportunities are not presently available in Germany, and their absence may increase the number of women seeking abortions.³⁹⁶ Laws forbidding discrimination in apartment rentals against families with children, a common practice in West Germany, have also been proposed.³⁹⁷ Such practices increase the difficulties of German families with children and thereby increase the demand for abortion.³⁹⁸

Given the poor performance of the indication solution and the Federal Constitutional Court's statement that the criminal law is a "last resort,"³⁹⁹ a periodic solution offering such positive measures could well withstand a second constitutional challenge. There are currently two proposals in Germany incorporating such measures.⁴⁰⁰ One is backed by a ruling coalition member, the Free Democratic Party, the other by a coalition of women's groups and the Social Democratic Party.⁴⁰¹

The proposal by women's groups recommends that counseling not be mandatory, but merely available for pregnant women.⁴⁰² Such counseling would not attempt to inform the woman as to "the importance of the protection of life," but would only help her to resolve her emotional and social conflicts.⁴⁰³ It is, however, "the height of optimism," as one FDP official said, to believe that the Federal Constitutional Court would accept this scheme.⁴⁰⁴ The FDP proposal is therefore probably the most viable alternative to the indication model since it is much more likely to survive a constitutional challenge.⁴⁰⁵

392. *Id.* at 228.

393. *Id.*

394. *Id.*

395. DER SPIEGEL, Sept. 3, 1990, at 23.

396. *Id.*

397. *Id.*

398. *Id.*

399. 39 BVerfGE at 47.

400. DER SPIEGEL, Oct. 29, 1990, at 31.

401. *Id.*

402. *Id.* at 32.

403. *Id.*

404. *Id.*

405. *Id.*

The FDP proposal is called the "Proposal for a Draft of a Law for the Protection of Prenatal Life, for the Furtherance of a Child-Oriented Society, and the Regulation of Abortion (Law for the Assistance of Pregnant Women and Families)."⁴⁰⁶ The proposal notes that article 31, section 4 of the Unification Treaty requires the all-German parliament

to agree on a law, that will better guarantee the protection of prenatal life and the constitutional resolution of conflicts than is done at the present in either part of Germany, above all through legally assured measures for women, especially counseling and social help, by, at the latest, December 31, 1992.⁴⁰⁷

The proposal notes that this constitutes both a duty and an opportunity.⁴⁰⁸ It is an opportunity "to develop a law that, based upon [West Germany's] experience with the indication solution, [East Germany's] experience with the periodic solution, as well as the experiences of foreign countries, especially the Netherlands, will do justice to the government's duty to protect life and also to the needs of women in conflict."⁴⁰⁹

The proposal maintains that neither the West German indication solution nor the East German periodic solution has provided effective protection for prenatal life. West Germany has had 80,000 abortions per year, excluding illegal abortions.⁴¹⁰ East Germany has had a similar rate, based on its population and birth rate.⁴¹¹ Since "history has shown that even the severest criminal penalties cannot prevent abortions," the FDP proposes to curb abortions by creating "satisfactory conditions for women and families with children that makes it easier for women to say yes to children, as well as a child-oriented society."⁴¹²

The FDP's approach to abortion is a "modified periodic solution with mandatory counseling."⁴¹³ The woman may have an abortion at

406. Free Democratic Party (FDP), Bonn, Germany, *Vorschlag für den Entwurf eines Gesetzes zum Schutz des werdenden Lebens, der Förderung einer kinderfreundlichen Gesellschaft, und zur Regelung des Schwangerschaftsabbruchs (Schwangeren-und Familienhilfegesetz)*, Umdruck Nr. 11/278 (Oct. 26, 1990) [hereinafter *Law for the Assistance of Pregnant Women and Families*].

407. *Id.* at 1, citing Unification Treaty, *supra* note 1, art. 31, § 4.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.* at 3.

413. *Id.* at 5.

her discretion within the first twelve weeks of pregnancy after visiting a counseling center and waiting three days.⁴¹⁴ The counselling will inform the woman of the "physical and psychological effects of an abortion, and of the available practical help for pregnant women, so that she will be in a position to make a responsible decision of conscience."⁴¹⁵ If the woman so desires, the counseling may be done on an anonymous basis.⁴¹⁶ After the first three months of pregnancy, an abortion is only allowed where there is "serious danger to the woman's life or limb" or "foreseeably permanent birth defects."⁴¹⁷

Both proposals envision a wide-ranging collection of positive measures to help pregnant women and single parents.⁴¹⁸ The positive measures in the FDP proposal include improved access to birth control information and sex education.⁴¹⁹ Health insurance would cover contraception and contraception counseling.⁴²⁰ The proposal would attempt to improve the situation of women and families with children.⁴²¹ To do so, the proposal would guarantee working women access to day-care and kindergarten facilities.⁴²² Working parents would be able to take a three-year parenthood leave of absence and return to work afterwards.⁴²³ It would allow women to continue higher education on a part-time basis.⁴²⁴ Finally, the proposal would offer financial help to single mothers and raise the rate of tax deductions for families with children.⁴²⁵ These measures, taken together, are meant to provide the protection of prenatal life which the Federal Constitutional Court demands, through positive help rather than criminal sanctions.⁴²⁶

414. *Id.* at 17.

415. *Id.* at 19.

416. *Id.*

417. *Id.* at 17.

418. DER SPIEGEL, Oct. 29, 1990, at 32.

419. *Law for the Assistance of Pregnant Women and Families*, *supra* note 406, at 5.

420. *Id.* at 9.

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.* at 1-5. This would not necessarily be the end of the matter. Alois Glück of the CSU has stated that "[a] periodic solution is out of the question for the CSU, even if the Federal Constitutional Court were to unexpectedly declare it compatible with the Basic Law." *Klare Position der CSU zum Paragraph 218*, AUS DEM MAXIMILIANEUM, DIE CSU-FRAKTION IM BAYERISCHEN LANDTAG INFORMIERT, Jan. 22, 1991, at 8.

Not all Christian Democrats agree. Rita Süßmuth of the CDU has proposed what she calls a "third way" as an alternative to both the periodic and the indication solution. R.

The FDP proposal was completed in October 1990 and its drafters intend to bring it before the all-German parliament in early 1991.⁴²⁷ Kohl attempted to block discussion of the proposal in recent coalition talks by maintaining that no abortion law proposals could be discussed until Bavaria's suit in the Federal Constitutional Court on the abortion issue was settled.⁴²⁸ Bavaria had filed suit a year earlier claiming that the excessive use of the social indication was unconstitutional because the fetus was not receiving the constitutionally-mandated protection.⁴²⁹ The Federal Constitutional Court has since announced that due to the numerous constitutional issues generated by reunification there is no opportunity to hear Bavaria's suit before 1992.⁴³⁰ Therefore, before any rehearing of the abortion issue, the Federal Constitutional Court would like to have before it a new all-German abortion law.⁴³¹ Thus, Bavaria's suit is no longer an obstacle to renewed parliamentary debate on a new all-German abortion reform law.⁴³²

VIII. CONCLUSION

The German experience in abortion law, if successful, may perhaps serve as a model for the United States. Abortion is currently a major source of controversy in the United States. The positions of the pro-life and pro-choice forces appear irreconcilable. Pro-life advocates insist on the sanctity of the fetus' life and the necessity of criminalizing abortion. Pro-choice advocates insist on a woman's right of freedom to decide what will occur within her own body. The

SÜSSMUTH, SCHULTZ DES UNGEBORENEN LEBENS IM GEEINTEN DEUTSCHLAND, EIN DRITTER WEG (1990). Her proposal would first amend article 2(2) of the Basic Law, the basis of the 1975 Abortion Decision. It would add to the language guaranteeing "life and inviolability of the person" for "everyone" the following: "the unborn, the handicapped, and the dying are especially protected by the power of the state." *Id.* at 4. The proposal also includes social help and sex education measures similar to the FDP proposal. *Id.* at 6-8. It retains the indications, although it shortens the period during which an abortion under the eugenic indication is permissible from 22 weeks to 12 weeks, since the longer period is "no longer medically necessary." *Id.* at 10-11. However, the proposal provides that, under the social indication, a woman may decide on an abortion at her discretion, following compulsory counseling and a 3-day waiting period. *Id.* at 11. The Süßmuth "third way" has found little support. DER SPIEGEL, July 30, 1990, at 23-25. It has been strongly criticized by other CDU/CSU members as providing insufficient protection for unborn life and by other parties as hypocritical. *Id.* at 25.

427. DER SPIEGEL, Jan. 14, 1991, at 33.

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

landmark decision of *Roe v. Wade*,⁴³³ establishing a woman's right to an abortion in the first three months of pregnancy, has been narrowed by the Supreme Court and attacked by abortion opponents.⁴³⁴ The recent Senate confirmation hearings on Justice David Souter focused more on abortion than on any other issue.⁴³⁵ Clashes between pro-life and pro-choice activists have been increasingly bitter and violent.⁴³⁶

The German experience suggests that a solution is available that neither criminalizes abortion nor allows it on demand. This approach recognizes both the sanctity of human life and the value of free choice. It recognizes a woman's right to choose whether or not to continue with a pregnancy and emphasizes the value of human life, not by the threat of criminal punishment, but rather by the institution of positive measures. The positive measures ensure that women make an informed choice, with full knowledge of the alternatives available. If Germany succeeds in finding an approach to abortion law that satisfies the rights of both the mother and the fetus, perhaps the United States could do the same. Unless the forces on both sides in the United States are already too polarized, this could serve as a step in the United States' own "reunification."

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433. 410 U.S. 113 (1974).

434. TIME, May 1, 1989, at 20-24.

435. TIME, Aug. 6, 1990, at 16-18.

436. TIME, July 17, 1989, at 62-63.

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