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Douglas G. Morris

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Abortion and Liberalism: A Comparison Between the Abortion Decisions of the Supreme Court of the United States and the Constitutional Court of West Germany†

By DOUGLAS G. MORRIS*


I. Introduction: Abortion and Liberalism ................... 159
   A. The Three Abortion Opinions ........................ 161
   B. The Reasoning of Each Opinion ...................... 162
   D. The State's Separation from Society .................. 168
   E. Three Liberal Traditions: Parliamentary Supremacy, Judicial Review, and German Authoritarian Liberalism ........................................... 170
   F. Liberalism and the Problem of Abortion in the Three Opinions ............................................ 171

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II. Legal Reasoning by Synthesis or Analysis: The German Majority and Dissent
   A. Reasoning by Synthesis or Analysis ................................ 173
   B. Reasoning by Synthesis: The German Majority .............. 174
   C. Reasoning by Analysis: The German Dissent .............. 178
   D. German Authoritarian Liberalism and the German Majority .............................................. 183
   E. The German Judicial Tradition of Subordination ...... 189

III. Legal Reasoning by Synthesis or Analysis: Roe v. Wade and the German Opinions
   A. Reasoning by Analysis: Roe v. Wade .................. 192
   B. Differences Between United States and West German Constitutional Decision-Making .......... 196
   C. The Meaning of Individual Rights ....................... 200

IV. Arbitrary Power or Individual Freedom: The Role of Discretion in the German Majority and Dissent ........ 206
   A. The Proper Balance Between Rules and Discretion ... 206
   B. Discretion, Abortion, and Nazism ....................... 208
   C. The German Majority’s Fear of Discretion .......... 209
   D. The German Dissent’s Acceptance of Discretion ...... 211
   E. The Equitable Principle of Zumutbarkeit in the German Majority .............................................. 212
   F. The Woman’s Conscience in the German Dissent ...... 217

V. Arbitrary Power or Individual Freedom: The Role of Discretion in Roe v. Wade and the German Opinions .... 221
   A. The Role of the Physician in Roe v. Wade and the German Majority .............................................. 221
   B. The Fear of Arbitrary Penal Law in Roe v. Wade and the German Dissent ............................... 223

VI. The Role of Equality ........................................ 226
   A. The Elitist View of Equality: The German Majority .. 226
   B. A Concern About Social Inequality: The German Dissent ................................................................. 231
   C. Discounting the Equality Issue in Abortion: Roe v. Wade ....................................................... 233
   D. Inequality and Ideology: The Three Opinions .......... 234
   E. Social Economic Climate: United States and West Germany ............................................................ 236

VII. Conclusion: Searching for an Optimal Right to Abortion 237
   A. The Nature of the Individual ................................. 237
I. INTRODUCTION: ABORTION AND LIBERALISM

A. The Three Abortion Opinions

In 1973, in the landmark case of Roe v. Wade, the United States Supreme Court struck down a restrictive abortion law that was typical of those in most states. Two years later the West German Constitutional Court (Bundesverfassungsgericht or BVerfG) struck down, by a vote of six to two, part of a national liberalized abortion law. The decisions of both high courts were controversial; Roe v. Wade by making abortion a right, the German decision by insisting that abortion is a crime. The controversy surrounding these two decisions extended beyond the problem of abortion. Perhaps more than any other issue in either the United States or West Germany, these abortion decisions ignited heated debate on the appropriate nature of judicial review in a constitutional democracy. The reason that the debate about judicial review in general has become so closely linked to the problem of abortion in particular is that the problem of abortion exposes tensions at the heart of liberalism.

The comparison here will be among three opinions: first, the majority opinion in Roe v. Wade; second, the German majority opinion; and

4. Liberalism defines the relationship between the individual and state. As the Introduction will discuss, the problem of abortion is a problem of liberal issues, such as the meaning of individuality, which may or may not encompass the fetus; the nature of the liberal state, which should be neutral and fair towards all individuals; and the extent of liberal freedom, which should assure all individuals the right to make decisions without state interference.
third, the German dissent. These three opinions reflect three traditions within liberalism. *Roe v. Wade* reflects the classical liberalism of judicial review, the German dissent reflects the classical liberalism of parliamentary supremacy, and the German majority reflects a nondemocratic form of liberalism historically peculiar to Germany, which will be referred to as German authoritarian liberalism.\(^5\)

**B. The Reasoning of Each Opinion**

Although the three opinions made very different formal legal arguments, one common underlying legal issue can focus attention for comparative purposes: When and under what circumstances is abortion permissible? All three opinions defined a range of legally permissible abortions; they differed on the extent of that range and the reasons for it.

In *Roe v. Wade*, the Supreme Court held that a Texas criminal abortion law, which was typical of abortion laws in most states, violated the due process clause of the fourteenth amendment.\(^6\) The Texas law proscribed procuring or attempting an abortion except on medical advice to save the mother’s life.\(^7\) The Supreme Court held that the due process protection of the right to privacy against state action included a woman’s qualified right to terminate her pregnancy.\(^8\) The Supreme Court defined the possible qualifications of the right in terms of pregnancy’s three tri-

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5. To avoid any confusion at the outset, it should be noted that German authoritarian liberalism is not the same thing as Nazism, although it might have provided the soil in which Nazism grew. For a discussion of the relationship of the German opinions to Nazism, see supra text accompanying notes 364-367. To show how the three liberal traditions reflected in the three opinions approach the tension within liberalism, the comparison must be both specific and abstract. The foundation of the comparison must be specific: it must address legal arguments of the three opinions. That is, the opinions must be presented on their own terms because each opinion tied its legal arguments to the formal legal issues it directly addressed. The very specificity of the formal legal arguments, however, makes their comparison problematical since the Supreme Court and the BVerfG addressed different formal legal issues in reviewing different statutes within different constitutional structures. In addition to this level of specificity, the formal legal arguments reflected certain assumptions and attitudes about constitutional decision-making in these three opinions, and these rise to a level of abstraction in which comparison can take place. The assumptions concern legal reasoning and the attitudes concern politics. Both can be understood in terms of liberalism. Liberalism provides a framework for understanding the legal assumptions and political attitudes about constitutional decision-making in these three opinions, for both liberalism and constitutionalism straddle the realms of law and politics. In short, the comparison takes place on a level of abstraction concerning liberalism, but is based on a level of specificity concerning formal legal arguments in which the comparison itself does not take place.


7. *Id.* at 117-18.

8. *Id.* at 152-54.
During the first trimester, "the abortion decision and its execution must be left to the medical judgment of the pregnant woman's attending physician." After the first trimester, the State may regulate the abortion procedure in ways reasonably related to promoting the State's interest in protecting the mother's health. After the fetus reaches viability, which is approximately at the beginning of the third trimester, the State may regulate abortion, or even proscribe it (unless necessary to preserve the mother's life or health) in order to promote the State's interest in protecting the potentiality of human life.

The law challenged before the BVerfG was the Abortion Reform Act of 1974, which revised section 218 of West Germany's national Penal Code and was passed by the Bundestag, the lower house of West Germany's Parliament. The purpose of the Abortion Reform Act was not to declare abortion a right, but rather to protect fetal life by deterring women from abortion. Deterrence was to be achieved through counsel-

9. Id. at 162-65.
10. Id. at 164.
11. Id. at 163-64.
12. Id. at 163-65. Roe v. Wade stated that it should "be read together with its companion case," Doe v. Bolton. Id. at 165. In Doe v. Bolton, 410 U.S. 179 (1973), the Supreme Court struck down Georgia's abortion law, which, like abortion laws in approximately one-fourth of the states, was patterned after the American Law Institute's Model Penal Code. Id. at 182. The Georgia law proscribed abortion except when necessary, in the judgment of a licensed Georgia physician, to prevent danger to the pregnant woman's life or health; when the fetus would be born with a serious defect; or when the pregnancy resulted from rape. Id. at 183. The Georgia law also required the fulfillment of additional conditions, including, most importantly, that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals (JCAH), that the hospital staff abortion committee approve the procedure, and that independent examinations of the patient by two other licensed physicians confirm the performing physician's judgment. Id. at 183-84. The Supreme Court held that these three conditions violated the fourteenth amendment. Id. at 201. The hospital requirement was held invalid both because it failed to exclude the first trimester and because the State failed to show a legitimate relationship to its interest in protecting the pregnant woman's health. Id. at 193-95. The required intervention of the hospital abortion committee was held invalid because it unduly restricted the pregnant woman's rights without serving any legitimate purpose of either the hospital or State. Id. at 195-97. The requirement of acquiescence by two other physicians was held invalid because it "has no rational connection with a patient's needs and unduly infringes on the physician's right to practice." Id. at 199.
13. Judgment of Feb. 25, 1975, Bundesverfassungsgericht, W. Ger., 39 BVerfGE 1, 2 (1975). In West Germany the debate about abortion is commonly referred to as the debate about section 218.
14. See also Kauper, The Constitutions of West Germany and the United States: A Comparative Study, 58 Mich. L. Rev. 1091, 1097 (1960). The Bundesrat, the other house of West Germany's Parliament, refused its consent to the law. The Bundestag found that the Bundesrat's consent was unnecessary. The BVerfG rejected the claim that the law was invalid because the Bundesrat refused its consent. 39 BVerfGE at 17-18, 33-35.
15. 39 BVerfGE at 11, 12, 24-25, 27.
ing rather than penal sanctions. Thus, the Abortion Reform Act required a pregnant woman to undergo counseling to discourage her from procuring an abortion before an abortion could be legally performed. The Abortion Reform Act curtailed penal sanctions based on the reasoning that these sanctions did not effectively deter abortion and might keep a woman from seeking counseling. An abortion would not be punishable if performed in the first twelve weeks of pregnancy by a licensed physician with the consent of the pregnant woman and thereafter if the abortion was performed for medical reasons (that is, for preserving the woman's life or health), or for eugenic reasons (that is, for averting the birth of a seriously deformed child).

The formal legal issue before the BVerfG in regard to abortion was fundamentally different from the one before the Supreme Court in Roe v. Wade. Roe v. Wade addressed the issue of whether a woman has a constitutionally based right to abortion. The BVerfG did not. Rather, both the German majority and the German dissent agreed with the premise underlying the Abortion Reform Act: human life, including fetal life, requires protection. Having accepted this premise and thereby having rejected a right to abortion, the German opinions addressed a means-oriented issue: whether the means chosen by the legislature to protect human life were legitimate. More particularly, the issue before the BVerfG was whether the best way to protect human life might be the Abortion Reform Act's elimination of penal sanctions for abortion in the first three months of pregnancy while providing for mandatory counseling to discourage abortion.

17. Id. at 4, 5-6 (citing Abortion Reform Act, 5 Gesetz zur Reform des Strafrechts [StrRG] § 218(c), 1974 Bundesgesetzblatt [BGBl] I 1297).
19. Id. at 3-4, 5 (citing Abortion Reform Act, 5 StrRG § 218(a), 1974 BGBl.I 1297).
20. Id. at 4, 5 (citing Abortion Reform Act, 5 StrRG § 218(b)(1), 1974 BGBl.I 1297).
21. Id. (citing Abortion Reform Act, 5 StrRG § 218(b)(2), 1974 BGBl.I 1297).
23. 39 BVerfGE at 20, 68-69, 85, 86. Both decisions agreed further that human life begins twelve days after conception upon implantation. Id. at 14.
24. Id. at 3, 51, 68-69.
25. Id. at 3-6, 51. In the language of the German abortion debate, the German majority and dissent supported an indications solution and a term solution, respectively. An indications solution allows an abortion for reasons or under conditions defined by law, such as medical reasons (medical indication); eugenic reasons (eugenic indication); ethical reasons, as in the case of incest or rape (ethical indication); and social reasons (social indication). A term solution allows an abortion for whatever reason, that is, regardless of an indication, within a given stage of pregnancy. See Gorby & Jones, supra note 3, at 559 nn.3 & 5; Kommers, Abortion and Constitution, supra note 2, at 261 n.28.
that it was not.

The BVerfG declared unconstitutional and invalidated section 218(a), the section of the Abortion Reform Act that permitted abortion upon the woman's request after counseling during the first twelve weeks of pregnancy.26 The BVerfG held that the fetus was entitled to protection under the Basic Law, West Germany's constitution,27 based on article 2, paragraph 2, sentence 1, which states: "Everyone has the right to life and bodily integrity,"28 and article 1, paragraph 1, sentence 1, which guarantees the inviolability of human dignity.29 More importantly, the BVerfG held that the legislature must enact laws that effectively protect the fetus throughout pregnancy against attacks from the state or others,30 including the mother.31 Consequently, the legislature is duty-bound to enact laws that protect fetal life with penal sanctions.32 In effect, the BVerfG directed the legislature to reestablish abortion as a crime sanctioned with punishment under the Penal Code. Until the legislature did so, the BVerfG announced that abortion would be permitted during the first twelve weeks of pregnancy for medical or eugenic reasons, as provided by section 218(b), and for ethical reasons (that is, for pregnancies caused by rape).33 Furthermore, penal sanctions could be withheld at the discretion of the court for an abortion performed during the first twelve weeks of pregnancy for social reasons (that is, for an abortion that was the only remaining measure reasonably expected to relieve the pregnant woman of a grave hardship).34

The German dissent objected to invalidating section 218(a) since, in its view, the real issue was not whether fetal life should be protected, but how it could best be protected.35 That determination, according to the dissent, should be made by the legislature, not the BVerfG,36 and the resulting law should be invalidated by the BVerfG only if the law's method of protection is ineffective beyond a doubt.37 Yet, the dissent concluded that it was not beyond a doubt that penal sanctions would

26. Id. at 1.
27. Graham, New Fundamental Law for the Western German Federal Republic, 43 AM. INT'L L. 494, 496 (1949); Kauper, supra note 14, at 1093.
28. 39 BVerfGE at 2.
29. Id.
30. Id. at 1.
31. Id.
32. Id.
33. Id. at 2-3.
34. Id. at 3.
35. Id. at 68-69.
36. Id. at 69.
37. Id. at 77-78.
protect fetal life more effectively than the Abortion Reform Act. The crux of the dissent's argument was that expanding the number of abortions not subject to penal sanctions within a framework of proper social supports for pregnant women can ultimately reduce the number of actual abortions.

The central disagreement between the German majority and dissent relates to how the state should fulfill its duty under the Basic Law to protect human life in light of the concept in West German constitutionalism of an "objective ordering of values." The objective ordering of values refers to the norms governing the exercise of state power in protecting rights and constructing a socially just political order. The dissent found that, since the objective ordering of values requires positive, affirmative state action to construct a socially just political order—action that properly should be taken by the legislature—the legislature should carry out the state's duty of protecting life. The majority found that the objective ordering of values, including the duty under the Basic Law to protect human life, was more readily amenable to the BVerfG's power of judicial review. In addition, the dissent's highlighting and the majority's subordinating the importance of the legislature in constructing a socially just political order illustrates the dissent's placing more importance than the majority on another concept in West German constitutionalism—that of a free social state. This concept, which is not in the United States Constitution, is that an essential characteristic of freedom is the obligation of a democratic state to take positive, affirmative steps to promote social welfare. Thus, the majority subordinated the impor-

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38. Id. at 87-89.
39. Id. at 89.
40. Id. at 41, 70-71. See generally Kommers, Abortion and Constitution, supra note 3, at 273 n.66. The expression in German—objektive Wertentscheidungen—also translates as "objective value decisions."
42. Kommers, Abortion and Constitution, supra note 3, at 273 n.66; G. Rüpke, supra note 41, at 64.
44. See 39 BVerfGE at 51, 65-67.
45. E.-W. Böckenförde, supra note 41, at 76-81, 244; Häberle, Grundrechte im Leistungsstaat, 30 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 43, 56-57, 92-97 (1972); Kauper, supra note 14, at 1094, 1096, 1136; B. Pieroth & B. Schlink, supra note 41, at 25-26.
tance of the legislature’s passage of laws to promote a free social state to the BVerfG’s protection of human rights through judicial review.

C. The Liberal Dilemma of Constitutional Decision-Making: Power and Freedom

One of liberalism’s most fundamental principles is the rule of law—the concept that laws should accord equal treatment to all individuals.\(^{46}\) By putting into issue when in the process of human development an individual appears who is guaranteed equal treatment under the rule of law,\(^ {47}\) the problem of abortion opens up a dilemma at the heart of liberalism. This dilemma concerns decision-making within a constitutional democracy, for the problem of abortion raises several questions concerning who should make decisions and how decisions should be made. Who should make the decision about the appearance of individuality? Does the decision fall within the woman’s realm of freedom or the state’s realm of power? If or to the extent that the decision falls within the state’s realm of power, which state institution should have the authority to make that decision?\(^ {48}\) This dilemma must be discussed in terms of the interplay between state and society since the state is the realm of law (because the state promulgates, administers, and enforces laws),\(^ {49}\) and society is the realm of individual activity.\(^ {50}\)

This liberal dilemma of constitutional decision-making can be viewed in terms of either power or freedom. The liberal dilemma of power is that the state must exercise power to control the ravages of unrestrained acts of will in society, but the state must also be restrained in its exercise of power to permit the benefits of acts of will in society.\(^ {51}\)

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47. Put another way, when in the process of human development should laws accord the equal treatment guaranteed by the rule of law to all individuals? The problem of abortion is especially powerful because the issue of the origin of individuality it raises is crucial for the liberal rule of law as well as religion and biology.

48. The thesis that the abortion issue opens up a dilemma in the heart of liberalism suggests that the issue will take on more political weight in a constitutional democracy than in a state with another form of government. In a constitutional democracy abortion is likely to expose tensions in liberal law, while elsewhere it remains essentially a question of policy.


50. R. Unger, supra note 46, at 58-60; R. Unger, supra note 49, at 73, 161.

51. The liberal dilemma of power has its origins in liberalism’s appearance as an ideology with the rise of the nation-state. Liberalism had to justify both the existence and benefits of state sovereignty. The existence of state sovereignty depended upon the new nation-state’s
The liberal dilemma of freedom is that the state may not interfere with the freedom of individuals in society to act at will, but the state must interfere with such freedom to prevent its infringing upon the freedom of other individuals in society to act at will. 52

The liberal dilemma of power and freedom is central to each abortion opinion’s definition of individuality under the rule of law. In one way or another, each opinion dealt with the appearance of individuality in terms of the nature of a woman’s act of will in aborting a fetus and the nature of the state’s power in prohibiting abortion in the interest of the fetus. Thus, each opinion addressed the liberal issue of whether a woman’s act of will to abort a fetus infringes upon the self-interest of another individual that the state should protect, and whether the state’s exercise of power to prevent abortions infringes upon a woman’s freedom to act at will without state coercion. 53

D. The State’s Separation from Society

The liberal dilemma of power and freedom is also important for un-
derstanding the three abortion opinions because it leads to the issue of the state’s separation from society. The state unifies a new political entity over and despite the diversities in society. The state also maintains order over those diversities in society, restraining antagonism and protecting against the excesses of self-interest.\textsuperscript{54} It accomplishes these tasks through the rule of law.\textsuperscript{55} To accord equal treatment to all individuals, laws must be written in general and neutral terms and must be applied uniformly.\textsuperscript{56} In both viewing and treating citizens as fundamentally equal under the law, the rule of law sets forth a political ideal of formal equality.\textsuperscript{57} In contrast to the state—with its political ideal of formal equality embodied in the rule of law—society is the domain of conflict among individuals pursuing their self-interest in circumstances of actual social and economic inequality.\textsuperscript{58}

The separation between state and society is inherently unstable, for the state, like individuals in society, acquires its own self-interest. The state must acquire its own coercive force, first to unify the political realm,\textsuperscript{59} and then to enforce laws coercively against individuals whose self-interests exceed their allegiance to the common end of neutral state law.\textsuperscript{60} Because of this concentration of power surpassing any in society itself, the state’s self-interest naturally threatens individual self-interest and freedom.\textsuperscript{61}

The state acquires a further self-interest characteristic of society because its structures of authority emerge from society.\textsuperscript{62} Thus the state can preserve the neutrality and uniform application of laws only through the exercise of political power by participants from society.\textsuperscript{63} The exercise of that political power tends to skew the formation and application of laws towards the self-interest of those in power.\textsuperscript{64} The more that political power is exercised in the self-interest of those in power, the more the state resembles just another self-interested entity in society.

\textsuperscript{54} R. UNGER, supra note 46, at 59; R. UNGER, supra note 49, at 73-75, 84.
\textsuperscript{55} R. UNGER, supra note 49, at 73-75, 84.
\textsuperscript{56} F. NEUMANN, supra note 46, at 28, 50-51; R. UNGER, supra note 46, at 52-54; R. UNGER, supra note 49, at 73.
\textsuperscript{57} Neumann, supra note 51, at 908; R. UNGER, supra note 46, at 54; R. UNGER, supra note 49, at 74, 151.
\textsuperscript{58} R. UNGER, supra note 49, at 74-75, 151, 160-62.
\textsuperscript{59} Neumann, supra note 51, at 923-24.
\textsuperscript{60} R. UNGER, supra note 49, at 73, 75.
\textsuperscript{61} Neumann, supra note 51, at 914-15, 917.
\textsuperscript{62} R. UNGER, supra note 46, at 61; R. UNGER, supra note 49, at 73.
\textsuperscript{63} R. UNGER, supra note 46, at 61, 178-81.
\textsuperscript{64} Id. at 68-69, 221-22; R. UNGER, supra note 49, at 73.
E. Three Liberal Traditions: Parliamentary Supremacy, Judicial Review, and German Authoritarian Liberalism

The three abortion opinions had different approaches to defining individuality under the rule of law and to determining who or which institution should make decisions concerning abortion. These approaches reflect different liberal traditions—traditions that make different evaluations of power and freedom and of the state and society.

In its argument for upholding an abortion law passed by the legislature, the German dissent illustrates the tradition of parliamentary supremacy. This tradition focuses on the state as the framework within which antagonistic interests are represented and reconciled.65 Under parliamentary supremacy, the state’s sovereignty resides in the legislature—the institution of government representing the people.66 Rights are secured and protected by the legislature,67 and these rights are positive in that they are an aspect of self-determination.68

Roe v. Wade, in finding a right to privacy that included a right to abortion free from state encroachment,69 worked within the liberal tradition of judicial review. This tradition highlights the role of the judiciary in protecting the negative—or “juristic”—freedom of individuals against the state.70 Compared with parliamentary supremacy, judicial review pays more attention to constitutionalism, under which a system of norms enforced by the courts limits the power of the state and takes precedence over the positive laws passed by the legislature.71 Rights secured and protected by the courts are negative, or juristic, because they protect a range

65. See R. Unger, supra note 49, at 73.
66. F. Neumann, supra note 46, at 89.
67. Neumann, supra note 51, at 927; Rommen, Natural Law in Decisions of the Federal Supreme Court and the Constitutional Courts in Germany, 4 Nat. L. F. 1, 2 (1959); F. Neumann, supra note 46, at 44, 89. See also Dietze, Natural Law in Modern European Constitutions, 1 Nat. L. F. 73, 77-78 (1956).
68. Neumann, supra note 51, at 915. See also F. Neumann, supra note 46, at 202; R. Unger, supra note 49, at 64, 66, 84.
69. Cf. R. Petchesky, Abortion and Woman’s Choice: The State, Sexuality and Reproductive Freedom (1984) (“Privacy . . . is a historical product; it emerges only when there is a public domain, that is, in relation to the state.”).
70. F. Neumann, supra note 46, at 89. See also Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 781 n.11 (1986) (Stevens, J., concurring) (“The character of the Court’s language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain intrusions on the citizen’s right to decide how he will live his own life intolerable.”).
71. J. Merryman, The Civil Law Tradition 25, 142-43 (1969); Neumann, supra note 51, at 904; F. Neumann, supra note 46, at 89.
of activities by individuals against state intrusion.\(^{72}\)

While parliamentary supremacy stresses rights protected by the legislature and judicial review stresses rights protected by the courts, both traditions are forms of classical liberalism in that they were conceived within a democratic framework.\(^{73}\) In striking down an abortion law passed by the legislature because that law did not uphold the moral values of the state, the German majority carried forward a tradition of nondemocratic authoritarian liberalism,\(^{74}\) which focuses on the state as the ideal realm of law above the antagonism of competing self-interest.\(^{75}\)

In this uniquely German form of liberalism, the state realizes freedom and is the agent of freedom. Consequently, freedom is not focused against the state.\(^{76}\) German authoritarian liberalism focuses on the preliminary liberal notion that the state is a prerequisite for freedom rather than the later liberal notion that the state threatens freedom.\(^{77}\)

F. Liberalism and the Problem of Abortion in the Three Opinions

In defining the range of permissible abortions, each opinion allotted decision-making differently. The German majority gave special attention to the decision of a high court, the German dissent to the decision of a legislature, and *Roe v. Wade* to the decision of a pregnant woman. The German majority thought in terms of an obedient individual enlightened by an ideal state. The German dissent thought in terms of an active individual participating in a social democratic state. *Roe v. Wade* thought in terms of an isolated individual up against a limited state. In contrast to


73. See R. Unger, *supra* note 49, at 88-90. See also Neumann, *supra* note 51, at 901, 910. While *Roe v. Wade* highlighted judicial review for resolving the abortion issue presented to the Supreme Court, there can be little doubt that it also recognized the legitimacy of the coexistent tradition of parliamentary supremacy in general. See generally *Roe v. Wade*, 410 U.S. 113, 153-54, 155, 163-64. Cf. *id.* at 173-74 (Rehnquist, J., dissenting); *id.* at 222 (White, J., dissenting). Similarly, although the German dissent highlighted parliamentary supremacy for resolving the abortion issue presented to the BVerfG, it also recognized the legitimacy of the coexistent tradition of judicial review in general. See 39 BVerfGE 69-73 (1975). See also Krieger, *Europaeischer und amerikanischer Liberalismus*, in *LIBERALISMUS* 158-59, 160 (L. Gall ed. 1985).


77. If it is true, as Petchesky writes, that the formation of the state "has invariably brought drastic changes in the position of women" and the attempt "to reduce women to their procreative capacities," R. Petchesky, *supra* note 69, at 68, then it might not be surprising that the abortion opinion following the liberal tradition most heavily influenced by the needs of state formation was also the opinion most restrictive of abortion.
*Roe v. Wade*, both German opinions gave a more prominent role to the state, although the German majority defined it as above society while the German dissent defined it as an organ of society. In contrast to the German dissent, the German majority and *Roe v. Wade* separated the state from society, although the German majority was suspicious of society, while *Roe v. Wade* was suspicious of the state. In contrast to the German majority, the German dissent and *Roe v. Wade* had confidence in the individual, although the German dissent linked individuals to a larger social democracy, while *Roe v. Wade* separated individuals into self-contained autonomous entities.

In addressing the issues posed by the problem of abortion (that is, the meaning of individuality under the rule of law) in terms of the views of three liberal traditions toward power and freedom and the state and society, the three opinions illustrate that the classical liberalism of either parliamentary supremacy or judicial review is amenable to a wider range of legally permissible abortions than German authoritarian liberalism. Sections II and III discuss how the German majority reasoned by synthesis, as is typical of German authoritarian liberalism, while *Roe v. Wade* and the German dissent reasoned by analysis, as is typical of classical liberalism. In reasoning by synthesis, the German majority formulated issues in terms of abstractions and absolutes, which were inhospitable to justifications for abortion. Both *Roe v. Wade* and the German dissent were sympathetic to larger ranges of legally permissible abortions because their reasoning by analysis was characterized by a democratic respect for moral uncertainty and a diversity of viewpoints and a concern for social realities.

Sections IV and V discuss the fear reflected in all three opinions that arbitrariness in the respective abortion laws threatened the equality necessary for the rule of law. The opinions defined different ranges of legally permissible abortions partly because they feared different types of arbitrariness. The German majority defines the narrowest range partly because German authoritarian liberalism fears the arbitrariness of human decision-making, whether by democratic majorities or individual women. *Roe v. Wade* and the German dissent accepted a wider range of legally permissible abortions because they feared the arbitrariness of coercive state laws rather than human decision-making.

Section VI examines how the range of legally permissible abortions defined by each opinion reflected notions of equality. These notions expose the limits of liberalism in each opinion — perhaps because each opinion reflected the interests of different social classes. The German majority reflected the traditions of a bureaucratic civil service and the
academic elite, *Roe v. Wade* reflected the traditions of bourgeois professionalism, in particular of doctors, and the German dissent reflected the traditions of a variety of classes, including the lower classes and their adherence to social democracy.

II. LEGAL REASONING BY SYNTHESIS OR ANALYSIS: THE GERMAN MAJORITY AND DISSENT

A. Reasoning by Synthesis or Analysis

The abortion opinions expressed three liberal traditions through two different styles of legal reasoning. In other words, the opinions reflected different assumptions, which were characteristic of different liberal traditions, regarding the proper way to resolve legal issues. Those different styles, or assumptions, led to different evaluations of arguments regarding the permissibility of abortion and to different conclusions about the range of permissible abortions. In particular, the German majority expressed German authoritarian liberalism through reasoning by synthesis, and the German dissent and *Roe v. Wade* expressed classical liberalism through reasoning by analysis. Whereas reasoning by synthesis tended to accommodate arguments for restricting the range of permissible abortions, reasoning by analysis accommodated and even generated reasons for permitting abortions.

Analysis is the process of breaking down complex ideas into their building blocks and recombining those and other ideas into more complex and general ideas.\(^78\) The process of breaking down and recombining ideas involves particular elements that are independent and distinct from each other, even when combined into wholes.\(^79\) Thus, the whole is nothing more than the sum of its parts.\(^80\) Synthesis, on the other hand, conceives of wholes as gaining something genuinely new beyond the sum of their parts.\(^81\) Thus, the whole is treated as an indivisible unit.\(^82\) While reasoning by analysis tends towards the investigation of particulars, reasoning by synthesis tends towards the construction of conceptual systems.\(^83\) Not surprisingly, reasoning by analysis, with its focus on particulars and distinctions, directs attention towards social realities, as in the German dissent and *Roe v. Wade*. In contrast, reasoning by synthesis,

79. Id. at 46, 125.
80. Id. at 46, 121.
81. Id. at 47, 121, 123, 125.
82. Id. at 125-26.
83. Id. at 48.
84. Id.
with its focus on ultimate abstract wholes, tends to downplay the significance of social realities in comparison to an ideal state, as in the German majority.

The contrast between the German majority's reasoning by synthesis and the German dissent's reasoning by analysis may be understood as the continuation of a historical dispute between German authoritarian liberalism and democratic liberalism. The history of German authoritarian liberalism is the history of the idea that morality resides in the state, which is an ideal and spiritual concept, and not, as democratic liberalism maintained, in the realms of politics and society. The German majority and dissent disagreed along those precise lines—the majority finding morality in an ideal spiritual state, the dissent finding it in politics and society. The opinions carried forward the dispute within a new framework: the proper scope of judicial review. The Basic Law's establishment of a constitutional court, the BVerfG, and its power to enforce a Bill of Rights through judicial review of laws was unprecedented in German legal history. With this relatively short tradition of judicial review, the majority and dissent conceived of judicial review in terms of German authoritarian and democratic liberalism, respectively.

B. Reasoning by Synthesis: The German Majority

As characteristic of reasoning by synthesis, the German majority resolved issues pertaining to abortion into an ultimate and indivisible concept: one of the highest values in the legal order, if not the highest value, is human life, including fetal life. The concept of human life as one of the highest values in the legal order links the value placed on human life to the state's responsibilities toward life. Thus, the state has a moral obligation to protect human life and to do so by punishing those who take human life.

In reasoning by synthesis, the German majority viewed human life—one of the legal order's highest values—as indivisible and, therefore, an ethical absolute that gives meaning to all other issues pertaining to abortion. The value of human life in the legal order is indivisible and ethically absolute because it is not subject to doubt or analysis. As an
ethical absolute, the value of human life in the legal order provides the source and guidelines for abortion law,\textsuperscript{90} including the proper use of penal sanctions,\textsuperscript{91} the proper relation of law to society,\textsuperscript{92} and the proper role of governmental institutions.\textsuperscript{93} Thus, in dealing with abortion, the law should use nonpenal measures before penal sanctions,\textsuperscript{94} may take into account social circumstances,\textsuperscript{95} and should be devised by the legislature without necessarily being reviewed by the BVerfG.\textsuperscript{96} In each of these instances what is ultimately crucial is that the state protects human life.\textsuperscript{97} In short, the majority required all legal issues pertaining to abortion to be resolved in a way that reaffirmed the ultimate ethical absolute that human life, including fetal life, is one of the legal order's highest values.

As is also characteristic of reasoning by synthesis, the ethical absolute that human life is one of the highest values in the legal order stands at the top of a hierarchically structured argument. The value of human life in the legal order, in the German majority's view, is part of the objective ordering of values,\textsuperscript{98} which gives order and structure to legal issues,\textsuperscript{99} and makes clear that some values are dominant and others subordinate. Thus, the majority found it obvious that within the legal order the value of the fetus is quite simply higher than that of a pregnant woman's right to self-determination.\textsuperscript{100} Similarly, the majority found it obvious that the state's obligation to protect human life is more important than the state's pursuit of social goals.\textsuperscript{101} The majority's requirement that the legislature impose penal sanctions against abortion as a last resort\textsuperscript{102} makes clear that the majority deemed penal sanctions to be superior to nonpenal measures, since penal sanctions could be effective where nonpenal sanctions could not.\textsuperscript{103}

Beyond giving meaning to all legal issues and imposing a hierarchy of importance on them, the German majority's view of the value of

\begin{thebibliography}{99}
\bibitem{90} See id. at 41-42.
\bibitem{91} Id. at 44-47, 52-53.
\bibitem{92} Id. at 36, 59.
\bibitem{93} Id. at 41.
\bibitem{94} Id. at 44-46, 52-53.
\bibitem{95} Id. at 59.
\bibitem{96} Id. at 44, 46, 51, 65, 67.
\bibitem{97} Id. at 46-47, 51, 59, 67.
\bibitem{98} Id. at 36, 41-42.
\bibitem{99} Id. at 41-42, 47.
\bibitem{100} Id. at 42-44, 47, 66.
\bibitem{101} Id. at 59.
\bibitem{102} Id. at 47.
\bibitem{103} Id. at 47, 57-58, 65-66.
\end{thebibliography}
human life in the legal order was characteristic of reasoning by synthesis in that the form of the opinion indicates its drafters' concern with the aesthetic coherence of the text itself. Because the value of life in the legal order is indivisible and ethically absolute, the majority placed importance on reasoning that was internally consistent and complete. Thus, the majority stressed that a "total view" of constitutional norms regarding abortion was necessary\textsuperscript{104} and that the state's protection of human life had to be "comprehensive."\textsuperscript{105} The majority held the Abortion Reform Act unconstitutional because its omission of penal sanctions for abortion left a "gap" in the state's protection of life\textsuperscript{106} and "a realm devoid of law."\textsuperscript{107} The state could protect human life only by imposing penal sanctions to plug the gap.\textsuperscript{108} In short, the majority's drafters seem to have thought that the state's protection of human life must achieve an almost poetic unity and wholeness.

The German majority's concern with the aesthetic coherence of the text is confirmed by its almost parochial reliance upon German sources of law. The majority stressed the importance of Germany's legal tradition.\textsuperscript{109} It found support for the proposition that the right to life pursuant to article 2, paragraph 2, sentence 1 of the Basic Law includes fetuses from the history of that article's origins.\textsuperscript{110} It found support for the proposition that abortion is killing in the fact that abortion historically and consistently has been dealt with in the Criminal Code, currently under the section "Crimes and Offenses Against Life," and previously under the heading "Killing the Fetus."\textsuperscript{111} Finally, the majority insisted that West Germany had to establish its own response to the abortion issue because West Germany had to maintain its own legal standards to repudiate the Nazi past.\textsuperscript{112}

Complementing concern with the aesthetic coherence of the text, the majority downplayed considerations from outside the text. Thus, the majority subordinated the importance of the personal and social problems faced by pregnant women.\textsuperscript{113} The majority ignored empirical

\textsuperscript{104.} Id. at 36. See also id. at 45, 46.  
\textsuperscript{105.} Id. at 42.  
\textsuperscript{106.} Id. at 55. See also id. at 37, 47.  
\textsuperscript{107.} Id. at 44.  
\textsuperscript{108.} Id. at 47. See also id. at 37.  
\textsuperscript{109.} Id. at 45, 46, 57.  
\textsuperscript{110.} Id. at 38-40.  
\textsuperscript{111.} Id. at 46.  
\textsuperscript{112.} Id. at 66-67.  
\textsuperscript{113.} See id. at 43, 56.
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 standards.

The majority's commitment to the indivisible concept and ethical absolute that human life is one of the legal order's highest values and to the aesthetic coherence of the text is also reflected in the majority's view on the state's public stance toward abortion. The majority insisted that the legal order must unequivocally disapprove of abortion, thus making clear to the populace the difference between right and wrong. Consequently, the state must punish abortion as a declaration that the state will uphold human life as the legal order's highest value. Moral standards—as set by the state and understood by the populace—can be indivisible and ethically absolute because ideas (such as the moral standards) and consciousness (such as the ideas' being understood) can be unambiguous and complete.

The German majority's reasoning by synthesis is characteristic of German authoritarian liberalism. The concept that human life is one of the legal order's highest values is an absolute that is central to the legal order and an ideal that must characterize the state. As an absolute, the concept is universal, timeless, and not open to question or contradiction, even from a legislature. As an ideal, the concept is an abstraction that need not bow to social reality. As an absolute and ideal, this concept imposes a hierarchy and form on legal thinking that provides answers to the abortion issue with certainty and finality.

But, the synthesis attained by the majority is more aesthetically pleasing than persuasive. The concept that human life is one of the legal order's highest values holds together the majority's arguments only because the majority read the concept into its hierarchically structured and aesthetically coherent argument and insisted that the concept was indivisible. However, if the concept is not treated as indivisible but is subjected to analysis, then the majority's absolutes might be questioned, its

114. Id. at 53, 60.
115. Id. at 66.
116. Id. at 60, 64, 66.
117. Id. at 44, 53.
118. Id. at 57-59, 65-66. See also id. at 53.
119. See id. at 57-59, 65-66.
120. In contrast, social reality, which cannot have the purity of ideas or consciousness, tends to be relative and ambiguous.
hierarchy might collapse, and its aesthetic coherence might be deemed irrelevant. This was the challenge posed by the German dissent and, in a comparative perspective, by *Roe v. Wade*.

C. Reasoning by Analysis: The German Dissent

If the German majority recognized a relatively narrow range of permissible abortions because of its belief in an ethical absolute in the legal order, the German dissent and *Roe v. Wade* recognized wider ranges of permissible abortions because of their commitments to two values of classical liberalism: political diversity and moral uncertainty. These two values manifest reasoning by analysis in the political realm. In reasoning by analysis, different individuals can arrange ideas in a variety of ways to build a variety of separate and independent arguments. In political terms, such analysis results in political diversity since the possibility of arranging ideas differently leads to a diversity of legitimate viewpoints, and results in moral uncertainty since the variety of arguments leaves uncertain which viewpoint is right. By reasoning by analysis and thus recognizing both political diversity and moral uncertainty, the German dissent and *Roe v. Wade* were both able to accept the legitimacy of reasons for permitting abortions, which the German majority could not.

Whereas the German majority viewed the abortion issue as governed by an indivisible ethical absolute—that the state must protect fetal life like all other human life—the German dissent viewed the issue as unique. The dissent was able to draw out the uniqueness of the abortion issue by breaking down the issue's characteristics and comparable issues into component parts, that is, by drawing distinctions. The dissent distinguished among the following: various types of killings, such as homicide, euthanasia, and abortion; stages in the course of pregnancy; reasons for abortion; and methods of protecting fetal life. These analytical distinctions made clear to the dissent that abortion was unique, for it was different in its essence from all other circumstances in

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123. See text accompanying notes 86-97.
125. Id. at 55, 78-80.
126. Id. at 80-81.
127. Id. at 83-84.
128. Id. at 78-80.
which the state must protect life.\textsuperscript{129}

The analytical distinctions also made clear to the German dissent that the abortion issue was complex\textsuperscript{130} and, therefore, characterized by moral uncertainty. According to the dissent, the majority essentially ignored the uniqueness \textsuperscript{131} and the complexity of the abortion issue,\textsuperscript{132} taking a dogmatic\textsuperscript{133} and rigoristic approach.\textsuperscript{134} In contrast to the majority's belief that answers flowed inevitably from an indivisible premise, the dissent found that a range of factors had to be considered. In further contrast to the majority, which defined the abortion issue from the perspective of an ideal state and aesthetically coherent text, the dissent defined the issue in terms of complex social problems.\textsuperscript{135} In light of these problems, the dissent indicated that finding a solution was difficult;\textsuperscript{136} that no solution could have sure results,\textsuperscript{137} or be gapless, as the majority seemed to think;\textsuperscript{138} that any solution was at best piecework;\textsuperscript{139} and that, thus, a variety of solutions could be legitimate.\textsuperscript{140} Even penal law, according to the dissent, does not represent absolute standards. Rather, it is subject to change. For example, the dissent pointed out that the draft law prohibiting abortion recommended by the federal government in the early 1960s rejected certain exceptions, such as the ethical, eugenic, and social exceptions. Now even the majority accepted these exceptions.\textsuperscript{141} In short, the dissent subjected the majority's premise to analysis, uncovering complexity instead of indivisibility, and uncertainty instead of a moral absolute.

The German dissent's acceptance of uncertainty was integrally related to its commitment to political diversity and, more particularly, to democracy. In the tradition of democratic liberalism, political diversity within the state implied a range of legitimate moral viewpoints, and that range implied that no particular viewpoint could be deemed conclusively

\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.} at 81, 91. \textit{See also id.} at 71-72.
\textsuperscript{131} \textit{Id.} at 69, 78.
\textsuperscript{132} \textit{Id.} at 81-82.
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.} at 90. \textit{See also id.} at 88.
\textsuperscript{135} \textit{Id.} at 69, 81. \textit{See also id.} at 83-85, 87.
\textsuperscript{136} \textit{Id.} at 82, 84-85, 91.
\textsuperscript{137} \textit{Id.} at 91. \textit{See also id.} at 73, 78.
\textsuperscript{138} \textit{Id.} at 87-88.
\textsuperscript{139} \textit{Id.} at 69, 90.
\textsuperscript{140} \textit{Id.} at 71-72, 80, 82, 85, 88, 90-91.
\textsuperscript{141} \textit{Id.} at 74-75. Thus, unlike the majority, the dissent did not contend that punishment is the state's requisite declaration of its commitment to an ethical absolute by disapproving abortion. \textit{See id.} at 92, 93-94.
correct at the expense of the others. However, because issues surrounded by moral disagreement and uncertainty must be resolved, they should be resolved by democratic procedures and institutions, which can take into account a range of viewpoints. In keeping with this tradition, the dissent found that the legislature is best suited to evaluate the complexities of the abortion issue, and is entitled to devise and choose among a variety of solutions. In passing the Abortion Reform Act, in the dissent's view, the legislature examined the essential points of view exhaustively, seriously, and in depth, in a way that surely met the standards of a free democratic state.

Thus, while the German majority believed that authority could be centralized in an abstract idea—the ethical absolute that one of the legal order's highest values is human life—the German dissent believed that authority must be dispersed through democratic procedures and institutions in order to accommodate political diversity and meet moral uncertainty. The democratic dispersion of authority meant not only legislative representation, but more broadly, a separation of powers. The concept of a separation of powers complemented the concepts of moral uncertainty and political diversity by shifting focus from substance to procedure. Thus, the dissent stressed the lines along which powers of particular governmental institutions should be separated. The BVerfG and the legislature each have a specialized competence, with the BVerfG having the authority to decide defensive rights and the legislature the authority to decide issues of the objective ordering of values. The dissent warned of the danger of shifting competence from the legislature to

142. See R. DAHRENDORF, supra note 46, at 11-12.
143. See id. at 11-13.
145. Id. at 72-73, 80, 85, 90-91.
146. Id. at 85. See also id. at 88.
147. See supra text accompanying notes 86-103.
148. The dissent's shift in focus from substance to procedure is also clear in its emphasis that the issue is not whether human life should be protected, but how. See 39 BVerfGE at 69-70.
149. Id. at 69-72.
150. Id. at 70-71. "Defensive rights" and "subjective rights" are the terms used in the German opinions for negative rights. Id. at 41, 70-71. As in the U.S. tradition of judicial review, these rights are subjective insofar as they belong to the individual, and defensive insofar as they protect individual liberty against intrusive actions by the state. See E.-W. BÜCKENFÖRDE, supra note 41, at 224-28; F. NEUMANN, supra note 46, at 23; B. PIEROTH & B. SCHLINK, supra note 41, at 21.
151. 3 BVerfGE at 71-72.
Abortion and Liberalism

the BVerfG,\textsuperscript{152} in particular with regard to the objective ordering of values, which requires active social measures.\textsuperscript{153}

The implication of the German dissent’s belief in dispersing authority is that the liberal state’s moral concern should not be, as the majority seemed to think, with stating correct moral conclusions, but rather with providing appropriate procedures and institutions for devising practical political solutions to moral issues. Taken together, democratic procedures and institutions and a separation of powers perform three complementary functions in dispersing authority: they give expression to political diversity, provide the political mechanism for resolving issues surrounded by moral disagreement, and weaken any sense that moral certainty could underlie the political order.

While the German dissent linked moral uncertainty and political diversity to democracy and a separation of powers, the dissent also linked them to legal diversity. The dissent distinguished among types of law—including constitutional law, legislation, church law, and foreign law.\textsuperscript{154} Having made these distinctions, the dissent drew upon a variety of sources of law. It bolstered its arguments with references to historical sources of abortion law,\textsuperscript{155} foreign judicial decisions on abortion, and abortion law reform in several foreign states.\textsuperscript{156} The foreign states that had passed liberalized abortion laws had constitutional provisions, legal traditions, and social problems similar to West Germany’s, and those states were no less respectful of human life than West Germany.\textsuperscript{157} Juxtaposed to these foreign laws, the Abortion Reform Act, the dissent concluded, could not be deemed wrong in either a legal or moral sense.\textsuperscript{158} Thus, in contrast to the German majority, which asserted an absolute moral stance and relied upon no foreign law, the dissent’s drawing upon diverse legal sources eroded any moral certainty about conclusions drawn from any purported ethical absolute.

The German dissent’s reasoning by analysis gave the opinion an almost centripetal force,\textsuperscript{159} for the dissent pursued arguments that suggested conclusions out of harmony with its explicit premises. The dissent

\textsuperscript{152} Id. at 69-73.
\textsuperscript{153} Id. at 70-72, 78-79, 85.
\textsuperscript{154} Id. at 75-77, 78, 90-91, 94-95.
\textsuperscript{155} Id. at 75-77, 81.
\textsuperscript{156} Id. at 71, 73-74, 81, 93, 94-95.
\textsuperscript{157} Id. at 94.
\textsuperscript{158} Id.
\textsuperscript{159} Reasoning by analysis can have this centripetal effect since it allows the same evidence to be used in a variety of ways and thus possibly to support contrary conclusions. See generally R. Unger, supra note 49, at 48, 121-23.
shifted focus from protecting fetal life to permitting abortion.\textsuperscript{160} Thus, one dissenter, Judge Rupp v.-Brünneck, cast doubt on the assumption that human life begins upon implantation\textsuperscript{161} (which was implicit in the legal posture by which the abortion issue reached the BVerfG\textsuperscript{162}) and considered it legitimate to evaluate abortion differently according to the stages of pregnancy.\textsuperscript{163} More importantly, in addressing the complexity of the abortion problem and the range of solutions, the dissent took into account factors that can be read as arguments for permitting abortion, such as the dangers of illegal abortions,\textsuperscript{164} and the variety of social and individual pressures faced by pregnant women.\textsuperscript{165} In fact, since any protection of fetal life is at best patchwork, the dissent found that the legislature may take into account factors other than protecting life, such as promoting the interests of women.\textsuperscript{166}

Indeed, the German dissent paid much more attention than the German majority to the interests, needs, and rights of women.\textsuperscript{167} The dissent's attention to women's interests reflected its belief in democracy as a way of resolving moral issues, in contrast to the majority's belief in punishment as a way of enforcing a purported ethical absolute. The dissent essentially argued that the best way to protect fetal life is not to impose penal sanctions after an abortion has taken place but rather to encourage a pregnant woman to continue her pregnancy.\textsuperscript{168} The dissent stressed the importance of counseling.\textsuperscript{169} Such counseling includes a large element of persuasion, which, not coincidentally, is the form of presenting arguments in a democracy.

In preferring persuasion to punishment,\textsuperscript{170} the German dissent abandoned the conceptual simplicity of the German majority's argument, in which the wrongful act of abortion induces the state primarily to punish.\textsuperscript{171} Rather, the state is put to the burden of anticipating the possibility of the wrongful act and providing the potential perpetrator with

\textsuperscript{160} See 39 BVerfGE at 80-84, 88-89, 90-91, 94.
\textsuperscript{161} Id. at 80.
\textsuperscript{162} See id. at 14.
\textsuperscript{163} Id. at 80-81.
\textsuperscript{164} Id. at 82-83, 90.
\textsuperscript{165} Id. at 83-84.
\textsuperscript{166} Id. at 90-91, 94.
\textsuperscript{167} See id. at 79-80, 83-86, 88-91, 94.
\textsuperscript{168} See id. at 85-89, 95.
\textsuperscript{169} See id.
\textsuperscript{170} Id.
\textsuperscript{171} The majority also considered possible excuses or mitigation, but that consideration was secondary to punishment. See id.
reasons and ways not to commit the act. Providing women with reasons and ways not to have abortions required an understanding of the pressures that might prompt women to seek abortions. By considering these pressures, the dissent necessarily exposed reasons for permitting abortions.

In suggesting conclusions out of harmony with its premises, the German dissent put itself at a tactical disadvantage vis-à-vis the German majority. In analyzing the concept that the state has an obligation to protect life, the dissent raised enough issues about the means to reach the end of protecting life that it cast doubt upon the end itself, but in general could not question that end explicitly. Thus, the dissent could not elaborate upon certain implications of its own arguments for widening the range of permissible abortions whenever doing so might be at odds with its explicit premise about the need to protect fetal life.

D. German Authoritarian Liberalism and the German Majority

In reasoning by synthesis, the German majority took an approach that was authoritarian, hierarchical, antidemocratic, and idealistic, as characteristic of German authoritarian liberalism.

A key concept in German authoritarian liberalism adopted by the German majority is that the state is not the enemy of freedom, but rather the agent of both order and freedom. This concept was a product of the relatively late but rapid development of the German nation-state. After the French Revolution, the political issue commanding attention in central Europe was state building. Political entities sought to accumulate power and unify authority in order to sustain a viable nation-state against

172. See id. at 83-84, 86-87.
173. Id. at 83-84.
174. See supra text accompanying notes 160-166. The tension in the German dissent between protecting the fetus and permitting abortion, see supra text accompanying notes 167-173, seems to reflect the tension in the parliamentary debates on the Abortion Reform Act between protecting the fetus and securing a woman's right to self-determination. See G. KRAIKER, § 218: ZWEI SCHRITTE VORWÄRTS, EINEN SCHRITT ZURÜCK 43-49 (1983); M. KRIELE, LEGITIMITÄTSPROBLEME DER BUNDESREPUBLIK 174-76 (1977). One might say that in the dissent the contradiction inherent in parliamentary compromises was simply transformed into a judicial form.
175. Cf. 39 BVerfGE at 59.
176. Cf. G. KRAIKER, supra note 174, at 9 (parliamentary proponents of abortion reform in the early 1970s narrowed their own maneuvering room by supporting problematic principles such as the equality or even priority of a basic right of unborn life to a woman's right to self-determination).
177. L. KRIEGER, supra note 76, at 80. See also id. at 5, 44-45, 65, 138, 367.
178. See Krieger, supra note 73, at 154-55.
French rule. Under the circumstances, freedom more clearly benefited than suffered from an increase in state power. Preoccupation with the creation of a viable nation-state did not promote an environment conducive to exploring the menace that state power posed to individual freedom.

German authoritarian liberalism's image of the state as a moral ideal rather than a pragmatic reality—an image adopted by the German majority—was a product of the failure of a German nation-state to emerge immediately after the French Revolution. In the first half of the nineteenth century no political entity was powerful enough to unify the various German ministates into one territorial state. Thus, German Idealism, the intellectual movement between 1770 and 1840 that promoted the concepts of German authoritarian liberalism, conceived of the nation-state as an ideal. The ideal was of a German cultural nation—a state based upon culture and law. This ideal replaced power, which was lacking, with spirit.

In promoting the realm of spirit, German authoritarian liberalism translated the distinction between spirit and power into the distinction found in the German majority between state and society. Turning necessity into a virtue, the German Idealists scorned power, conceiving of society as the collection of conflicting individual wills and passions, and adulated spirit, conceiving of the state as embodying the virtues of the spiritual, cultivated, ideal type of individual and thereby exerting a positive influence upon society.

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180. See also L. KRIEGER, supra note 76, at 39, 69, 152, 207; R. UNGER, supra note 46, at 186.
181. See L. KRIEGER, supra note 76, at 80; J. SHEEHAN, supra note 179, at 39-43.
183. H. HOLBORN, German Idealism in the Light of Social History, in GERMANY AND EUROPE: HISTORICAL ESSAYS 1, 2 (1970); F. STERN, supra note 182, at 6.
184. H. HOLBORN, supra note 183, at 1, 10-11. L. KRIEGER, supra note 76, at 64-65; F. STERN, supra note 182, at 12.
185. F. STERN, supra note 182, at 6-7. One dimension of this ideal of a moral, spiritual state was that freedom meant the internal coherence of the German cultural nation against foreign oppression. See L. KRIEGER, supra note 76, at 207. This dimension finds an echo in the majority's insistence upon applying Germany's own legal standards to the abortion problem without regard to those of other nations. See Judgment of Feb. 25, 1975, Bundesverfassungsgericht, W. Ger., 39 BVerfGE 1, 66-67 (1975).
186. See generally R. DAHRENDORF, supra note 46, at 39, 192; F. STERN, supra note 182, at 21-22.
recognized that the state's actual power might pose a threat to freedom, they conceived of the state as subject to internal moral checks, not those of political institutions. The German Idealists recognized that politics existed, but they thought that politics, like society, should be modeled after the state — the embodiment of culture, law, justice, and morality. The moral teacher of freedom was the state, not society.

In reflecting the influence of German authoritarian liberalism, the majority articulated the world view of a bureaucratic and academic civil servant class, which historically gave rise to this type of thinking. The peculiar class characteristics of German authoritarian liberalism originated in the late eighteenth and nineteenth centuries, when Prussia, as the first seed of the later German nation-state, in contest with the judicial authority of princely estates, centralized administrative and legislative power under the monarch. The economically weak German middle class understood the benefits of centralization and allied itself with the Prussian monarch against the princely estates. As a significant consequence, the middle class exercised the influence it had through the bureaucracy and universities, not democratic political institutions.

That is, the middle class secured the rule of law within the framework of

188. L. KRIEGER, supra note 76, at 70. See generally id. at 53-58.
189. H. HOLBORN, supra note 183, at 1, 10-11, 15-16; L. KRIEGER, supra note 76, at 70; J. SHEEHAN, supra note 179, at 14, 16-18.
190. L. KRIEGER, supra note 76, at 64-65, 69, 117, 122-34, 151-52. See also H. HOLBORN, supra note 183, at 1, 25-26. In an interview with the German magazine Der Spiegel in 1975 soon after the decision, Judge Ernst Benda, the president of the BVerfG, reflected the tradition described in this paragraph by contrasting the inner-oriented contemplative judge — who presumably thereby has better access to the truth — to the legislator:

[H]ow do we [judges] differ from politicians? I believe in two essential ways: We have more time and quiet, more outer and inner distance to evaluate the at times very complex problems concerning the constitutional aspects of a law. . . . Second, the constitutional judge does not belong to a faction requiring loyalty or solidarity like a legislator, but rather can and must decide for himself personally.

Judge Benda's reflections continued:

[T]he process of forming an opinion differs significantly from that in Bonn. I can form my opinion in no other way than working silently by myself in studying the record. And then I go with my opinion into the senate. Here I cannot replace a precise judicial argument, which is expected from each of us, with some sort of profession of loyalty or solidarity like a legislator, but rather can and must decide for himself personally.

Spiegel-Gespräch: Karlsruhe—ein verkappter Gesetzgeber?, DER SPIEGEL, Mar. 3, 1975, 68, 74 (author's trans.).
191. H. HOLBORN, supra note 183, at 1, 3-4, 8-9.
192. R. UNGER, supra note 46, at 183-84; E.-W. BÖCKENFÖRDE, supra note 41, at 102-03.
193. H. HOLBORN, supra note 183, at 1, 10; R. UNGER, supra note 46, at 186. See also R. DAHRENDORF, supra note 46, at 49-50, 91-92.
194. H. HOLBORN, supra note 183, at 1, 9, 11 (1970); R. UNGER, supra note 46, at 186.
absolutism rather than parliamentary government. Unlike England's middle class, which gained power in opposition to the monarchy by entering and reshaping the aristocracy's parliament, the German middle class did not make political demands, seek political rights, or develop a strong political opposition. Failing to develop a tradition of political independence, the German middle class gained strength through the civil service, which was located in the government bureaucracy and universities. Thus, German authoritarian liberalism was an attempt to render the freedom of the economically weak German middle class compatible with the institutional structure of the authoritarian monarchical state.

In reflecting German authoritarian liberalism, the German majority drew upon a tradition which extended beyond the late eighteenth and early nineteenth centuries. As Germany underwent massive, rapid industrialization during the late nineteenth and early twentieth centuries, German authoritarian liberalism maintained vitality with its moral objections to the nature of the new industrialized society. In the tradition of German Idealism's reaction against the French Revolution, conservative German intellectuals rejected Western ideas of parliamentary government, which they thought was characterized by political tactics, compromises, and hypocrisy; scorned mass society, which they deemed artificial, atomizing, and destructive; and idealized the state, which they viewed as able to meet conflict with ultimate solutions from objective authority. German authoritarian liberalism looked to state authority above parties for a synthesis abolishing the conflicts of political and social reality.

195. H. Holborn, supra note 183, at 1, 10-11. See also L. Krieger, supra note 76, at 44-45; R. Unger, supra note 46, at 181-86.
196. R. Unger, supra note 46, at 178, 190.
197. H. Holborn, supra note 183, at 1, 8-9, 11; L. Krieger, supra note 76, at 20.
199. See H. Holborn, supra note 183, at 10; F. Stern, supra note 182, at 11-12.
201. L. Krieger, supra note 76, at 177; F. Stern, supra note 182, at 6.
203. See G. Mosse, supra note 200, at 36; F. Stern, supra note 182, at 21-22. See also L. Krieger, supra note 76, at 187-88.
204. R. Dahrendorf, supra note 46, at 130-31; L. Krieger, supra note 76, at 459-60; F. Stern, supra note 182, at 21.
205. See R. Dahrendorf, supra note 46, at 193-94. See also L. Krieger, supra note 76, at 254.
In reasoning by synthesis, the German majority’s hierarchically structured argument and concern with the aesthetic coherence of the text also reflected the scholarly tradition of German legal science, which complemented and reinforced German authoritarian liberalism within the legal profession.\textsuperscript{206} German legal science arose in the mid-nineteenth century and led to the development of the influential German Civil Code, which took effect in 1900.\textsuperscript{207} Its goal was to develop a legal code that would be complete, coherent, and clear.\textsuperscript{208} To derive general principles from specific legal data, the German Civil Code arranged law from the specific to the general, in progressively increasing levels of abstraction.\textsuperscript{209} German legal scholars were convinced that this arrangement would yield the highest levels of insight possible and the right answers to new problems.\textsuperscript{210} Thus, this method was supposed to achieve authoritative scientific truth.\textsuperscript{211}

The German majority’s concern with the aesthetic coherence of the text also reflected another characteristic of German legal science, namely the method of discovering legal truth through hermeneutics rather than experimentation. Hermeneutics involves discovering truth by interpreting texts rather than relating texts to reality, and by looking at abstractions rather than facts.\textsuperscript{212} In using a hermeneutic method, German legal science focused on purely legal phenomena and values that promoted the autonomy of the law.\textsuperscript{213} Social science theories and data were excluded. Thus, German legal science was noteworthy in insulating itself from social problems.\textsuperscript{214}

In keeping with the tradition of German authoritarian liberalism as well as German legal science, the German majority objected to abortion

\textsuperscript{206} See J. Merryman, supra note 71, at 31-32.

\textsuperscript{207} J. Dawson, The Oracles of the Law 433, 461 (1968); J. Merryman, supra note 71, at 31.

\textsuperscript{208} Rheinstein, The Approach to German Law, 34 Ind. L.J. 546, 548-49 (1959); J. Merryman, supra note 71, at 32, 66. Cf. F. Neumann, supra note 46, at 38.

\textsuperscript{209} Rheinstein, supra note 208, at 546, 550, 552; J. Dawson, supra note 207, at 432-33; J. Merryman, supra note 71, at 52, 68. See also E.-W. Böckenförde, supra note 41, at 18-19; R. Ungar, supra note 49, at 34.

\textsuperscript{210} Rheinstein, supra note 208, at 548-49. See generally U. Wesel, supra note 198, at 92-93.

\textsuperscript{211} J. Merryman, supra note 71, at 67, 98-99.

\textsuperscript{212} R. Dahrendorf, supra note 46, at 229-30; J. Merryman, supra note 71, at 67-68. See also L. Krieger, supra note 76, at 98-99.

\textsuperscript{213} J. Merryman, supra note 71, at 69. See also E.-W. Böckenförde, supra note 41, at 13, 16-17; W. Friedmann, supra note 46, at 251.

\textsuperscript{214} J. Merryman, supra note 71, at 69, 153, 155. See also E.-W. Böckenförde, supra note 41, at 13, 16-17; R. Dahrendorf, supra note 46, at 229.
as a deplorable phenomenon of social life.\textsuperscript{215} The legislature, according to the majority, failed to meet its constitutional duty to protect human life.\textsuperscript{216} By countenancing the destruction of human life, the legislature was merely promoting a social-political goal.\textsuperscript{217} When human life is at stake, said the majority, social experimentation is not allowed.\textsuperscript{218} Above the realm of society and parliamentary tactics, however, stood an ideal state embodied in an objective ordering of values,\textsuperscript{219} which the BVerfG would enforce if the legislature did not.\textsuperscript{220} Thus, by requiring penal sanctions to enforce a woman's obligation to carry a pregnancy to term,\textsuperscript{221} the BVerfG was maintaining the moral and spiritual values of the state.\textsuperscript{222} In addition, the BVerfG was teaching those values to the populace\textsuperscript{223} and implicitly to the legislature.\textsuperscript{224} In short, the BVerfG could express the moral and spiritual values of the state, which stood as a model for politics and society.\textsuperscript{225}

\begin{itemize}
\item \textsuperscript{215} Judgment of Feb. 25, 1975, Bundesverfassungsgericht, W. Ger., 39 BVerfGE 1, 45, 50-51, 55-56, 63-64, 66 (1975).
\item \textsuperscript{216} Id. at 51, 53-54, 59, 65.
\item \textsuperscript{217} Id. at 59, 67. One might note that the earliest predecessor to the law that the majority struck down was a proposal by the SPD (the German Socialist Party) in the Weimar Republic, see id. at 8, 13, (whose constitution, the majority notes, did not contain a right to life, id. at 36), while the origins of penal sanctions against abortion, which the majority wanted to preserve, was in Prussia. See id. at 7. One might also wonder whether the section in the majority on the background to the case suggests that the Abortion Reform Act deserves less respect because it resulted from political maneuverings culminating in compromise. See id. at 15-17. See also Kommers, Abortion and Constitution, supra note 3, at 263.
\item \textsuperscript{218} 39 BVerfGE at 60. Cf. New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Bran-deis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility... It is one of the happy incidents of the federal system that a single courageous State may serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").
\item \textsuperscript{219} See 39 BVerfGE at 41-42.
\item \textsuperscript{220} Id. at 51, 67.
\item \textsuperscript{221} Id. at 44, 50.
\item \textsuperscript{222} See id. at 42, 44, 46-47, 51, 57.
\item \textsuperscript{223} See id. at 44, 53, 57, 65, 66.
\item \textsuperscript{224} See id. at 51, 65-66.
\item \textsuperscript{225} Obviously the German dissent's belief that the legislature should accommodate political diversity and deal with moral uncertainty places it within the tradition of parliamentary supremacy, of which German authoritarian liberalism is so critical. Three aspects of the dissent's view of parliamentary supremacy deserve highlighting. First, while acknowledging the need of judicial review to protect defensive rights, id. at 70-71, the dissent stressed the need to respect the value judgment made by the legislature in carrying out objective value decisions. Id. at 72-73, 78-79, 80, 85, 90-91. This approach reflects the influence of the tradition of parliamentary supremacy from the Weimar Republic, in which the Bill of Rights was programmatic. That is to say, the Weimar Republic's Bill of Rights did not set forth rights enforceable by courts but rather principles for the legislature to follow in passing laws, leaving to the legislature itself the determination of how to follow these principles. See Graham, supra note 27, at 497; Rommen, supra note 67, at 1; Rupp, The Federal Constitutional Court and the
E. The German Judicial Tradition of Subordination

The contrast between the German majority’s reasoning by synthesis and the German dissent’s reasoning by analysis can also be examined in the context of the history of German courts. The two opinions reflected different aspects of the German judicial tradition of subordination.

In deferring to legislative judgment, the German dissent followed in the tradition of German courts’ deference to higher authority, first to the prince or monarch, and later to the legislature. In stressing the importance of a separation of powers, the dissent reflected the tradition of German courts to address issues regarding the competencies of branches of government but not substantive values.

In reasoning by synthesis, the German majority adopted from the German judicial tradition of subordination a style of obedience. Historically subordinate to higher authority, German judges typically have craved authority, acted obediently, and needed certainty.

Constitution of the Federal Republic of Germany, 16 St. Louis U.L. Rev. 359, 365 (1972); von Mehren, supra note 85, at 72. Second, the dissent pointed to a weakness in the Basic Law itself in cautioning against the constitutional procedure of abstract norm control — which allows defeated legislative minorities to bring statutes to the BVerfG for review — from turning the BVerfG into a political arbitration board that chooses between conflicting legislative proposals. 39 BVerfGE at 72 (1975). See also id. at 18; Kauper, supra note 14, at 1164. In pointing to a weakness in the Basic Law, the dissent reflected the tradition of parliamentary supremacy, von Mehren, supra note 85, at 71, 73, for both are created by people. Finally, the dissent focused on the legislature’s attention to the social problems surrounding abortion, including those faced by the poor. 39 BVerfGE at 83-88. In so doing, the dissent upheld a law created by the legislature, that part of Germany’s political structure accessible to the widest range of classes and views. See also R. Dahrendorf, supra note 46, at 249; F. Neumann, supra note 46, at 46.

228. Rommen, supra note 67, at 2-3. Until the Basic Law of 1949, the power of judicial review generally was not accepted in Germany, even during the Weimar Republic. Id. at 2-3, 5; Dietze, supra note 67, at 84-86; von Mehren, supra note 85, at 71-74.
230. See R. Dahrendorf, supra note 46, at 230; F. Neumann, supra note 46, at 44-45. In an interview in the German magazine Der Spiegel in 1975, Judge Ernst Benda said: “The [abortion] decision ... is a decision made by the constitution itself.” Spiegel-Gespräch: Karlsruhe-ein verkappter Gesetzgeber?, supra note 190, at 72 (“Die Entscheidung ... ist eine Entscheidung der Verfassung selber.”) (author’s trans.). The statement reflects the view of German legal science that the judge is nothing more than the mouthpiece of general laws, i.e., that a judge should not create law but only discover its content and apply it. See W. Friedman, supra note 46, at 211; Neumann, supra note 51, at 910, 912; F. Neumann, supra note 46, at 38.
in an ethical absolute, the German majority asserted its authority with certainty and expected obedience from both the legislature and pregnant women.\textsuperscript{231}

The crucial difference between the German majority and the German judicial tradition of subordination is that the majority adopted a style of obedience in order to assert its own authority. The majority's assertion of its own authority can be explained both institutionally and jurisprudentially. Institutionally, the BVerfG was a new tribunal in German legal history: a high court with unquestioned powers of judicial review.\textsuperscript{232} Jurisprudentially, the BVerfG could invoke a nontraditional source of authority: the Basic Law.\textsuperscript{233} While German courts historically have been bound by the positive laws of the monarch or legislature,\textsuperscript{234} the majority exercised the relatively new powers of the BVerfG to interpret a relatively new constitutional law. In interpreting the rather vague constitutional articles at stake—the promulgations of the right to life, human dignity, and the free development of the personality—\textsuperscript{235} the majority essentially asserted natural law. Natural law theory, which replaced legal positivism as the leading German legal theory after the collapse of Nazism,\textsuperscript{236} claimed that there are certain immutable human rights which cannot be destroyed simply because people pronounce laws contravening them.\textsuperscript{237} The majority took precisely that approach: it struck down a law purportedly to protect immutable human rights.\textsuperscript{238} In short, the majority stood the German judicial style of obedience on its head under new circumstances: instead of obeying the authority of a higher institution, the majority expected the obedience of others to the

\textsuperscript{231} See supra text accompanying notes 215-224.

\textsuperscript{232} Dietze, supra note 67, at 84; von Mehren, supra note 85, at 70, 74; K. Schlaich, supra note 85, at 2, 8.

\textsuperscript{233} von Mehren, supra note 85, at 74.

\textsuperscript{234} Rommen, supra note 67, at 2-3; F. Neumann, supra note 46, at 45.

\textsuperscript{235} In the Der Spiegel interview in 1975, Judge Benda said in regard to the BVerfG's reaching a different result on the abortion issue from the U.S. Supreme Court: "Our constitution is much more precise in regard to many things." Spiegel-Gespräch: Karlsruhe—ein verkappter Gesetzgeber?, supra note 190, at 70-71 (author's trans.). Although that statement is generally correct, see Kauper, supra note 14, at 1093; von Mehren, supra note 85, at 76, it is hard to see how it applies to the vague constitutional provisions at stake in the BVerfG's abortion decision. Rather, the statement seems to reflect a judicial style, i.e., a traditional understanding of what judges do despite new circumstances.

\textsuperscript{236} Dietze, supra note 67, at 74-75; Rommen, supra note 67, at 5; J. Dawson, supra note 207, at 493.

\textsuperscript{237} Dietze, supra note 67, at 77-78, 84; Rommen, supra note 67, at 6-7.

\textsuperscript{238} See supra text accompanying notes 26-31, 86-97. The majority understood the objective ordering of values in terms of natural law. See Rommen, supra note 67, at 9-10, 20-22. See also Kauper, supra note 14, at 1102-03; J. Dawson, supra note 207, at 493.
authority that it found in a higher idea—an ethical absolute.\textsuperscript{239} The formerly obedient son became the strict father.

One thing that ran against the grain of the majority, as well as German authoritarian liberalism and the German judicial tradition that it reflected, was the very existence of a dissent. The role of judicial dissent is by now so deeply ingrained in the United States constitutional tradition that its significance is all too easily overlooked. Traditionally, however, German courts announced one decision without any publicly circulated dissent.\textsuperscript{240} In West Germany, judges on courts other than the BVerfG still are not allowed to write public dissents. Even public dissents from the BVerfG’s majority opinion were not allowed until 1970.\textsuperscript{241} Not surprisingly, since then, dissents have been written for proportionately far fewer cases than for the United States Supreme Court.\textsuperscript{242}

The German majority’s problem with dissent in general and the dissent from its opinion in particular was that reasoning by analysis undermined the authority of reasoning by synthesis. Without a dissent, the BVerfG would be speaking with one voice, anonymously and impersonally,\textsuperscript{243} and its decision would carry more authority.\textsuperscript{244} Such a situation would meet the expectation of the majority, which presented its reason-

\textsuperscript{239} Cf. R. Dahrendorf, supra note 46, at 234 ("If the regime is democratic in tendency, [German lawyers] do not hesitate to adduce natural law to remind it of its lack of authority; if the authority of the state is absolute, lawyers become its obedient servants."); U. Wesel, supra note 198, at 92, 108. What this paragraph further suggests is that in the majority, at least to some extent, the new institution of the BVerfG takes the place once taken by the monarch as the embodiment of the state. Thus, the interpretation of the majority presented above, see supra text accompanying notes 89-103, is reminiscent of Hegel’s concept of the state as a self-differentiated organism with the monarch synthesizing the differentiation of state functions in the legislative and administrative branches. See L. Krieger, supra note 76, at 133-34. Cf. Leibholz, The West German Constitutional Court in Federalisme et Cours Suprêmes et l’Intégration des Systemes Juridiques 61-62 (describing the BVerfG as the “Supreme Guardian of the Constitution” because it is the institution with final binding force for both the people and the state, deciding those legal disputes entrusted to it by the Basic Law and causing it to serve the integration of the whole), 64, 67-69 (E. McWhinney & Pescatore eds. 1973).


\textsuperscript{241} R. Lamprecht & W. Malanowski, Richter Machen Politik: Auftrag und Ausbruch des Bundesverfassungsgericht, 17, 49 (1979); K. Schlaich, supra note 85, at 31.

\textsuperscript{242} The persistence of the tradition of unanimous judicial decisions was illustrated by an incident that took place when the BVerfG announced its abortion decision: between the readings of the majority and dissent, a justice from the majority walked out of the courtroom. Zuchtmeister für Bonn und Bürger, Der Spiegel, Mar. 3, 1975, at 62.

\textsuperscript{243} See McWhinney, supra note 240, at 6-7; J. Dawson, supra note 207, at 494; J. Merrymann, supra note 71, at 37.

\textsuperscript{244} See Nadelmann, supra note 240, at 427-28; J. Dawson, supra note 207, at 499 n.65.
ing as absolute, permanently valid, and not open to question. The existence of a dissent could only cast doubt on its assertions.

Characteristic of reasoning by analysis, the existence of the German dissent implicitly challenged the German majority's authority by showing the legitimacy of political diversity and the unlikelihood of moral certainty. The dissent responded to the majority's reasoning and asserted its own arguments, thereby demonstrating the variety of possible ways to resolve a single issue. Furthermore, the dissent's existence made clear that a personal dimension exists in any judicial decision-making. This was illustrated most strikingly by the paragraph representing the views of a single judge who, probably not coincidentally, was the sole woman judge. Of course, the existence of a variety of arguments and personal views suggested that judicial decisions are not certain and permanently valid, but are subject to human fallibility and change.

III. LEGAL REASONING BY SYNTHESIS OR ANALYSIS: ROE V. WADE AND THE GERMAN OPINIONS

A. Reasoning by Analysis: Roe v. Wade

Despite the different legal postures of the abortion issues addressed by the BVerfG and the United States Supreme Court, Roe v. Wade made several legal arguments remarkably similar to those made by the German dissent. Like the dissent, Roe v. Wade analytically distinguished among different stages of pregnancy, sources of law, and medical circumstances. The distinctions led to recognizing the legitimacy of reasons for permitting abortions, in the German dissent indirectly and in Roe v.

245. See supra text accompanying notes 89-103, 117-119, 218-220.
246. Cf. J. Dawson, supra notes 207, at 494; J. Merryman, supra note 71, at 37.
248. Thus, the German dissent remarked that the development of appropriate constitutional judicial controls over social measures enacted to advance basic rights might well be one of judicial doctrine's main tasks in the coming decades. 39 BVerfGE at 72.
249. See supra text accompanying notes 22-25.
250. An analytical approach to a right to abortion is an answer to the "slippery slope" argument against a right to abortion, i.e., to the question: Where can we draw the line in killing human life if we start down this road and allow killing of fetuses? An answer is that we can draw lines by being analytical and making distinctions. Thus, any type of killing must be evaluated separately, and legalizing abortion has no inevitable consequences for legalizing any killing of born persons.
Abortion and Liberalism

Wade directly. They are characteristic of reasoning by analysis and classical liberalism's commitments to political diversity and moral uncertainty.

The holding in Roe v. Wade made distinctions among stages of pregnancy. It distinguished among the first trimester, when a woman has an absolute right to abortion; the second trimester, when the state may regulate the abortion right to protect the health of the pregnant woman; and the third trimester, when the state may restrict the abortion right to protect the potential life of the fetus, unless doing so would endanger the pregnant woman's life or health. Roe v. Wade arrived at this tripartite division of pregnancy through three critical conclusions: first, that the right of privacy extends to abortion; second, that the state may not treat fetal life like born life; and third, that the health risks of abortion are not what they once were.

Roe v. Wade's first conclusion leading to the tripartite division of pregnancy was its holding that the right of privacy, as established in Supreme Court precedent, extended to a pregnant woman's decision to have an abortion. The United States right of privacy is probably not so different from the German right of free development of one's personality. Furthermore, the difference between Roe v. Wade's extending the right of privacy to a pregnant woman's decision to have an abortion and the German majority is probably not so great. The German majority did not deny that the right of free development of one's personality extended to a pregnant woman. Rather, the difference between Roe v. Wade and the German majority is that they drew different consequences from

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251. The two dissents to Roe v. Wade objected to its reasoning by analysis as the basis for a judicially created right, but apparently not as the basis for a legislatively passed law. See Roe v. Wade, 410 U.S. 113, 173 ("The conscious weighing of competing factors [in the Court's opinion ... is far more appropriate to a legislative judgment than to a judicial one."); 174-77 (Rehnquist, J., dissenting); id. at 222 ("This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.") (White, J., dissenting). Thus both dissents indicated that a state legislature could legitimately reach the conclusion that Roe v. Wade did. In short, the whole of Roe v. Wade—its majority opinion, concurrences, and dissents—manifested reasoning by analysis.

252. Id. at 164.
253. Id. at 163, 164.
254. Id.
255. Id. at 163-65.
256. Id. at 152-53. See also id. at 168-70 (Stewart, J., concurring); id. at 209-15 (Douglas, J., concurring).
257. See generally, Kauper, supra note 14, at 1112; Kommers, Liberty and Community, supra note 3, at 377.
the pregnant woman's rights. The reason the two opinions did so is that they determined the value of the fetus differently, which leads to the second conclusion underlying Roe v. Wade's tripartite division of pregnancy.

In regard to the state's interest in protecting fetal life, Roe v. Wade looked at a variety of sources of law and found moral uncertainty about how to value fetal life. Not unlike the German dissent's drawing upon historical sources of law, Roe v. Wade made an historical survey of different legal, philosophical, religious, and medical approaches toward abortion. Even after its conclusion of this historical survey, Roe v. Wade continued to make references to historical positions. Roe v. Wade's historical references illustrated that the abortion issue gives rise not to absolute and certain answers, but to a range of legitimate viewpoints. This range indicated uncertainty about when human life begins since various legal systems, philosophies, and religions historically have endowed the fetus with human value at different points during fetal development. Based upon this, as well as scientific data, Roe v. Wade quite simply doubted whether the time when life begins could be defined precisely.

As in the German dissent, Roe v. Wade also looked to different types of law, finding that the uncertainty about when life begins was reinforced by law that does not equate a fetus with a born person. Thus, the United States Constitution does not—and logically could not—treat the

259. See supra text accompanying note 155.
260. 410 U.S. at 129-47.
261. Id. at 148-49, 151, 160-61.
262. Id. at 150, 159-60.
263. Id. at 159-60. Roe v. Wade linked diversity to historical inquiry at the beginning in quoting Justice Holmes' words, " [The Constitution] is made for people of fundamentally differing views . . . , " immediately after stating that it placed "some emphasis upon medical and medical-legal history and what history reveals about man's attitudes towards the abortion procedure over the centuries." Id. at 117.
264. Roe v. Wade, id. at 113, referred to the belief that the fetus becomes human at conception, id. at 131, 160-61; at forty days after conception for a male, id. at 133 n.22, 134; at eighty to ninety days after conception for a female, id. at 133 n.22, 134; at quickening, id. at 132-33, 134, 136, 138, 160; at viability, id. at 131, 160; and at birth, id. at 160. Interestingly enough, Roe v. Wade made no reference to implantation, which the German decision accepted as the point when life begins. Judgment of Feb. 25, 1975, Bundesverfassungsgericht, W. Ger., 39 BVerfGE 1, 14, 37 (1975). Roe v. Wade also discussed the closely related theme that historically penal sanctions have not always been imposed against abortion, 410 U.S. at 129, 130, 134-36, 140 n.37, and that when they have been, they have been imposed at different points during fetal development, id. at 132, 138, 139, and with varying degrees of severity. Id. at 130, 134-35, 136, 138, 139.
265. Id. at 150, 159, 161. See also id. at 133 n.22, 217-18 (Douglas, J., concurring).
266. See supra text accompanying notes 154-156.
fetus like a person. Furthermore, in circumstances not involving abortion, the law seems to accord only those rights to the fetus that are contingent upon live birth.

As a result of all of the above, Roe v. Wade, in contrast to the German opinions, found that the state may not adopt "one theory of life." If any overarching principle binds together the range of viewpoints and uncertainty in Roe v. Wade, it is something like what Judge Rupp v.-Brünnecke suggested in her separate paragraph in the German dissent, namely that the value of fetal life increases as pregnancy progresses because life's beginning involves a process of development.

Based upon this range of viewpoints and moral uncertainty, Roe v. Wade took a crucial step not taken by the German dissent: it did not accept the premise in the German opinions that the state must protect fetal life. Roe v. Wade found instead that the state is allowed to value fetal life only as potential life. Having taken this step, Roe v. Wade could find — in direct contrast to the German decision — that a woman's right to privacy must prevail over the state's interest in potential life in the first trimester.

267. Roe v. Wade, 410 U.S. at 157-58 & n.54. In a perhaps related thought, the Supreme Court noted the view that abortion has been banned for reasons having nothing to do with protecting fetal life. Id. at 130, 148-51.

268. Id. at 161-62. This paragraph, which referred to areas other than criminal abortion to find that "the law has been reluctant to endorse any theory that life . . . begins before live birth. . . ." id. at 161, might be contrasted with the paragraph in the German majority opinion that looked to the definitions in the Criminal Code to find that abortion is killing. See 39 BVerfGE at 46. Whereas the German majority, in keeping with the concern for the aesthetic coherence of the text, focused narrowly on only criminal law and the relevant code, Roe v. Wade cast its sights in a variety of directions to explore a variety of legal approaches. See also id. at 217-18 (Douglas, J., concurring). The contrast between Roe v. Wade's broad legal overview and the German majority's narrow focus on criminal law is reinforced by the fact that the German majority ignored noncriminal German law, which parallels the U.S. noncriminal law drawn upon by Roe v. Wade. Compare Roe v. Wade, 410 U.S. at 161-62, with G. RÜFKE, supra note 41, at 140 (in German civil law, such as the law of tort or of inheritance, the fetus's rights are conditional upon live birth); id. at 53, 70. See also G. KRAIHER, supra note 174, at 56 (in interpreting the use of the phrase "every person" in the Basic Law's sentence, "[e]very person has the right to life and bodily integrity," the German majority ignored the place where the concept appears most often in German legal usage: section 1 of the German Civil Code, which states: "Legal capacity as a person begins upon birth.").

269. Roe v. Wade, 410 U.S. at 162.

270. 39 BVerfGE at 81.


272. 410 U.S. at 150, 159, 162.

273. See supra text accompanying note 100.

274. 410 U.S. at 153-54, 164.
Roe v. Wade's third conclusion leading to a tripartite division of pregnancy was its finding that the state's interest in protecting a pregnant woman against abortion's medical risks largely had disappeared.275 Advances in medicine made first trimester abortions as safe, if not safer, than childbirth.276 In putting forth this argument, Roe v. Wade reasoned by analysis in a way that had much in common with the German dissent. Like the dissent,277 Roe v. Wade indicated that the legal approach to abortion may legitimately change over time.278 Like the dissent,279 Roe v. Wade looked to data outside the legal discipline, although Roe v. Wade put more stress on medical data.280 And like the dissent,281 Roe v. Wade paid attention to the circumstances of a pregnant woman, although Roe v. Wade put more stress on a woman's personal medical concerns.282

B. Differences Between United States and West German Constitutional Decision-Making

Roe v. Wade's reasoning by analysis can throw light on the German majority's reasoning by synthesis in ways the German dissent cannot because, although both Roe v. Wade and the German dissent dispersed authority, they did so differently. The difference reflects the difference between the liberalism of judicial review and parliamentary supremacy, and, more particularly, the difference between United States and West German constitutional decision-making.283 Although the liberalism of judicial review, like that of parliamentary supremacy, disperses authority through democratic procedures and institutions and a separation of powers, the liberalism of judicial review also disperses authority through the judicial structure. In the United States, the liberalism of judicial review disperses authority in four ways: first, through the appellate nature of the Supreme Court; second, through the so-called case and controversy requirement; third, through the doctrine of stare decisis; and fourth, through federalism.284

275. Id. at 148-49, 151. The medical risks of abortion had been one of the reasons for prohibiting abortion in the nineteenth century. Id.
276. Id. at 149, 151, 163. See also id. at 216-17 (Douglas, J., concurring).
277. See supra text accompanying notes 141, 248 and supra note 248.
278. 410 U.S. at 148-49.
279. See supra text accompanying notes 135, 144, 164-165.
280. Id. at 148-49, 151, 163.
281. See supra text accompanying notes 166-169.
282. Id. at 153. See also id. at 214-15 (Douglas, J., concurring).
284. These four ways of dispersing authority were referred to clearly at times in Roe v.
First, the Supreme Court addresses constitutional issues only after a dispersion of judicial decision-making has taken place, for the Supreme Court acts essentially as an appellate court. In contrast, the BVerfG is a court of original jurisdiction and acts only to resolve constitutional issues. Thus, the Supreme Court addresses constitutional issues only after they have been addressed in a network of courts and refined as they work their way through the judicial structure. In keeping with the Supreme Court’s appellate nature, Roe v. Wade considered the approach of a range of lower court decisions on the abortion issue.

The Supreme Court, as an appellate court, addresses constitutional issues very differently from the BVerfG. The BVerfG uses, inter alia, a procedure known as abstract norm control—the procedure by which the abortion issue reached the BVerfG. In abstract norm control, the BVerfG can decide upon a law’s constitutionality immediately after its enactment but before it takes effect. The BVerfG maintains a monopoly of power in determining a law’s constitutionality. This is supposed to avoid the uncertainty created by diverse decisions among lower courts and preserve legal certainty and unity. Thus, the use of abstract norm control to bring the abortion issue before the BVerfG and the absence of attempts by lower courts to tackle constitutional issues associated with abortion promoted the tendency of the German majority to treat const-

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Wade, see infra notes 287, 293, 301-302, 309, and, even when they were not, provided a general setting for the opinion.

286. McWhinney, supra note 240, at 6; Rupp, supra note 225, at 362-63.
287. 410 U.S. at 154-56.
289. Kauper, supra note 14, at 1164 n.254; Rupp, supra note 225, at 363. There is also a second type of norm control, known as “concrete norm control,” by which the BVerfG passes on the constitutionality of a statute referred to it by a state or federal court, but may not review the case on its merits. Id. at 362-63. Since abstract norm control allows defeated members of the legislature and other political organs to bring a law before it takes effect to the BVerfG for its views, such norm control encourages the BVerfG to make an essentially political decision. Kauper, supra note 14, at 1164, 1181. Thus, when the German dissent accused the German majority of allowing the BVerfG to be used as a “political arbitration board,” 39 BVerfGE at 72 (author’s trans.), the dissent was accusing the majority not only of making a judicial decision with a political dimension, but also of acting like just another contestant in a political struggle. In this regard, it is noteworthy that the majority to a large extent simply adopted the position of those parties opposing the Abortion Reform Act. Compare id. at 35-68 (the reasoning of the German majority) with id. at 15, 20-23; G. Kraiker, supra note 174, at 55-58. Of course, this suggests that the majority’s assertion of an ethical absolute above parliamentary struggles, see supra text accompanying notes 215-224, was really only a smokescreen for its own partisan position.

290. See K. Schlaich, supra note 85, at 63.
291. See id. at 74.
tutional issues generally and abstractly.\textsuperscript{292}

Second, the United States case and controversy requirement (which, of course, was also applied in \textit{Roe v. Wade}\textsuperscript{293}) disperses judicial authority among a variety of cases. The case and controversy requirement provides that a United States court will decide only matters that are suitable for a judicial resolution and that represent a concrete dispute between two or more parties.\textsuperscript{294} Consequently, this requirement limits the Supreme Court's decision of constitutional issues to those arising in the context of actual individualized factual disputes.\textsuperscript{295} The case and controversy requirement embodies a very different principle from abstract norm control. In abstract norm control, the BVerfG can pass on a law's validity after its enactment but before it takes effect and, therefore, before there is any individualized factual dispute.\textsuperscript{296} Thus, abstract norm control separates pure constitutional issues from individualized factual disputes.\textsuperscript{297} Whereas the United States case and controversy requirement tends to limit the breadth of any single constitutional decision and at least leaves related constitutional issues open for later resolution, West Germany's "norm control"\textsuperscript{298} encourages, as the German majority reflects, abstract answers to hypothetical issues.\textsuperscript{299}

\begin{itemize}
  \item \textsuperscript{292} See \textit{supra} text accompanying notes 89-108, 117-120.
  \item \textsuperscript{295} \textit{Id}.
  \item \textsuperscript{297} Kauper, \textit{supra} note 14, at 1164; Rupp, \textit{supra} note 225, at 362-63.
  \item \textsuperscript{298} The BVerfG's norm control—whether the so-called "abstract norm control" or "concrete norm control," see \textit{supra} text accompanying notes 288-289 and note 289—is always abstract to the extent the BVerfG's review always pertains to the constitutionality of a law and never to the particulars of a case. See K. SCHLAICH, \textit{supra} note 85, at 65-66. \textit{Cf}: \textit{Roe v. Wade}, 410 U.S. 113, 171-72 (Rehnquist, J., dissenting) (criticizing the majority for not adhering to the case and controversy requirement, deciding "a hypothetical lawsuit," and formulating "a rule of constitutional law broader than is required by the precise facts to which it is to be applied [citation omitted]").
  \item \textsuperscript{299} In this regard, it is probably no coincidence that approximately fifteen Supreme Court cases concerning abortion have followed \textit{Roe v. Wade}, but not a single significant abortion decision has followed the 1975 BVerfG decision. The only later BVerfG decision dealing with abortion was essentially procedural, holding that an individual member of a public health insurance program has no "standing" to sue to enjoin the program from reimbursing abortions not subject to punishment pursuant to section 218 of the Criminal Code. Judgment of Apr. 18, 1984, Bundesverfassungsgericht, W. Ger., 67 BVerfGE 26 (1985). The contrast between the
Abortion and Liberalism

Third, in Supreme Court decision-making, dispersion of authority through the grounding of cases in particular fact situations results not only from the case and controversy requirement, but also from the common law doctrine of stare decisis. That doctrine disperses legal authority through the various precedents of case law, applying the legal reasoning of earlier cases to similar fact situations or extending such reasoning to new fact situations. Thus, Roe v. Wade found that the constitutional right to privacy applied to abortion by extending precedents applying that right to aspects of marriage, procreation, contraception, family relationships, child rearing, and education. Roe v. Wade distinguished those precedents in allowing limitations on the abortion right in pregnancy's second and third trimesters. Stare decisis, however, is unknown under civil law. The BVerfG, unlike the Supreme Court, issues decisions with statutory force and consequently is supposed to formulate (and extract from earlier decisions) general propositions. In viewing issues independently of precedent, the BVerfG is more likely to believe, as the German majority did, that legal principles should reflect legal tradition, should not change in response to new fact situations, and should be viewed as abstract and timeless.

Fourth, legal authority is more dispersed in the United States than West Germany, since United States federalism leaves more power in the hands of the states than does West German federalism. Consequently, United States courts must often determine whether an issue is a substantive one or one of competing sovereignties. Although Roe v. Wade...
declined to leave the abortion issue to the states, one of the main points
of the dissents to Roe v. Wade was that the abortion issue is one properly
resolved by the states. A federalism dispute, like this one between the
Roe v. Wade majority and its dissents, did not emerge between the Ger-
man majority and dissent. None of the BVerfG justices wished to avoid
addressing directly the abortion issue on federalism grounds, since they
all agreed that the Abortion Reform Act did not, as some state govern-
ments contended, require the approval of the Bundesrat, the upper house
of the West German parliament, which represents the states. Not only
did the German majority lack an argument for dispersing authority on
federalism grounds, but also criminal law in West Germany is a function
of the national penal code, rather than primarily a state concern as in the
United States. Thus, because of the very nature of German criminal
law, the moral dimension inherent in criminal law was raised to a na-
tional level in the German majority. In the eyes of the majority, criminal
law must articulate the moral values of the state.

In summary, the absence from West German constitutional deci-
sion-making of these four factors present in United States constitutional
decision-making—the Supreme Court's appellate nature, the case and
controversy requirement, the doctrine of stare decisis, and the importance
of federalism—illustrates why the majority discussed abortion on such a
theoretical level. West German constitutional principles do not emerge
through a series of decisions from a judicial structure addressing factu-
ally individualized cases. Rather, the BVerfG had to produce a first, full,
and final judgment. The result was a decision on a level of abstraction
characteristic of German legal science and German authoritarian
liberalism.

C. The Meaning of Individual Rights

Reasoning by synthesis and analysis also helped to shape a crucial
concept in the abortion problem—the meaning of individual rights. Yet
at first glance an American lawyer might consider Roe v. Wade closer to
the German majority than the German dissent, since both Roe v. Wade
and the German majority tended to define rights in terms of separate

particular constitutional provisions are essential to due process, but also whether due process
should be the province of the federal government or the states.

309. 410 U.S. 113, 173-77 (Rehnquist, J., dissenting); id. at 222 (White, J., dissenting).

(1975). See also id. at 17-19, 24; Kauper, supra note 14, at 1153-54.

311. STRAFGESETZBUCH [STGB] § 3 (1975) ("The German criminal law applies to acts
committed within the country.") (author's trans.).

312. See supra text accompanying notes 117-119, 221-224.
individuals, while the German dissent treated individual rights as belong-
ing not only to each individual separately, but also to individuals in ag-
gregate.\textsuperscript{313} In contrast to the German dissent’s wish to uphold a law
based on a theory of aggregating rights, both \textit{Roe v. Wade} and the Ger-
man majority struck down a law, and they both did so in order to protect
a right that belonged to an individual—in \textit{Roe v. Wade} to the woman,\textsuperscript{314}
in the German decision to the fetus.\textsuperscript{315} The similarity between \textit{Roe v. Wade}
and the German majority resulted from the tendency in both to separate
the state from society, as is characteristic of a court’s purported
protection of individual rights.\textsuperscript{316} In contrast, the German dissent’s ag-
gregation of rights resulted from its tendency to merge society into the
state, as is characteristic of legislative enactment of rights.\textsuperscript{317}

On more careful consideration, however, \textit{Roe v. Wade} and the Ger-
man dissent were closer to each other in their view of individual rights
than either was to the German majority. What \textit{Roe v. Wade} and the
German dissent had in common was confidence in society and individu-
als as members of society.\textsuperscript{318} This confidence in society went hand in
hand with reasoning by analysis, just as suspicion of it in the German
majority\textsuperscript{319} went hand in hand with reasoning by synthesis.

The German dissent’s confidence in society is evidenced by its ag-
gregation of rights. The dissent aggregated rights by considering the
group holding the same right and then asking what method might best
protect that right for the greatest number of individuals within that
group. While recognizing a right to life for every fetus,\textsuperscript{320} the dissent
also found that, during the first trimester of pregnancy, protecting the
right for some fetuses conflicts with protecting that same right for
others.\textsuperscript{321} More specifically, the rights of those fetuses best protected by
penal sanctions on abortion come into conflict with the rights of those

\begin{footnotes}
\item 313. \textit{See infra} text accompanying notes 320-326.
\item 314. 410 U.S. 113, 153 (1973); \textit{id.} at 168-70 (Stewart, J., concurring).
\item 315. Judgment of Feb. 25, 1975, Bundesverfassungsgericht, W. Ger., 39 BVerfGE 1, 37,
42-43, 58, 65 (1975). The contrast between upholding and striking down a law, however, may
not be so important as the contrast between what underlay \textit{Roe v. Wade}’s and the German
majority’s striking down a law. While \textit{Roe v. Wade} struck down a law as unconstitutional, the
German majority also instructed the legislature that it had an obligation to pass a law with
penal sanctions. \textit{See supra} text accompanying notes 32, 117-119, 221.
\item 316. 39 BVerfGE at 51, 65-67.
\item 317. \textit{See id.} at 69, 94.
\item 318. \textit{See supra} text accompanying notes 8, 142-146, 166-174, and note 12.
\item 320. 39 BVerfGE at 68.
\item 321. \textit{Id.} at 89.
\end{footnotes}
fetuses best protected by preventive counseling.\textsuperscript{322} The reason for this result is that preventive counseling does not prevent a certain group of pregnant women from having abortions, namely those who will not seek counseling if by doing so they will compromise their freedom of choice and potentially expose themselves to penal sanctions if they later decide to have abortions.\textsuperscript{323} Because penal sanctions and preventive counseling are to some extent mutually exclusive methods for protecting fetal life, the imposition of either alternative means destroying the rights of those fetuses better protected under the other alternative.\textsuperscript{324} The dissent would have simply upheld the legislative determination of which alternative would protect the rights of most fetuses.\textsuperscript{325} In short, the dissent treated rights in the aggregate, making a probabilistic determination of the best way to protect the same right for the greatest number entitled to it.\textsuperscript{326}

The German dissent moved beyond balancing protection among those who hold the same right to balancing a variety of rights or interests among each other. Once the dissent recognized that balancing rights within a group context produced no definitive solution, it became willing to throw on the scale a variety of interests.\textsuperscript{327} The dissent, therefore, concluded that the legislature legitimately may consider a range of perspectives. These perspectives include respect for a woman's self-responsibility and personality, the quality of a child's life, and the health risks of illegal abortions. These perspectives also include the preservation of a general legal consciousness that is not undermined by empty penal threats or their trivialized application.\textsuperscript{328}

The German dissent's aggregation of rights was made possible by two factors: the tradition of parliamentary supremacy and the West German constitutional procedure of norm control. First, the tradition of parliamentary supremacy endowed the legislature with the power to protect the rights of the majority.\textsuperscript{329} In keeping with that tradition, the dis-

\textsuperscript{322} Id. at 88-89.

\textsuperscript{323} Id. at 89. The dissent also put this argument another way, namely that if preventive counseling does not protect all fetal life, neither do penal sanctions. Id. at 88-89. Penal sanctions, which have failed to protect fetal life adequately in the past, id. at 87, work ambivalently, driving some pregnant women into isolation and, in the resulting desperation, to have abortions. Id. at 88. See also id. at 56-57.

\textsuperscript{324} Id. at 88-89.

\textsuperscript{325} Id.

\textsuperscript{326} The dissent did not have to discuss balancing rights between the pregnant woman and fetus if the mother's life was threatened since it was not disputed that a threat to the mother's life was grounds for an abortion. See id. at 85.

\textsuperscript{327} Id. at 90.

\textsuperscript{328} Id. See also id. at 82-84.

\textsuperscript{329} See R. DAHRENDORF, supra note 46, at 13.
sent found that the legislature could not realistically hope to advance the individual rights of everyone. However, the legislature could advance the individual rights of the greatest number. Second, norm control can detach constitutional issues from the factual circumstances of any individual case. While this characteristic of norm control allowed the German majority to tend toward abstractions, it allowed the German dissent to address rights in terms of groups rather than separate individuals.

In the envisionment of rights, both Roe v. Wade and the German dissent envisioned rights analytically and in terms of concrete individuals within society, as is characteristic of classical liberalism. Roe v. Wade was analytical in addressing rights in terms of discrete individuals since that approach involved a process of breaking down—that is, separating—individuals into independent entities. The German dissent was analytical in addressing rights in terms of aggregates since that approach involved a process of breaking down groups and recombining individuals into new groups. Furthermore, by analysis, both opinions viewed individual rights as in unavoidable conflict and resolved the conflict by balancing rights. The German dissent saw the rights of some fetuses as conflicting with the rights of other fetuses and resolved the conflict by trying to protect the greatest number possible. Roe v. Wade saw the rights of fetuses as conflicting with the rights of pregnant women and

330. 39 BVerfGE at 88-89. Whereas the dissent found that the legislature could protect the individual freedom of the greatest number, the majority found that protecting each fetal life in and of itself promotes the common good. Id. at 58-59. The difference is between reasoning by analysis and by synthesis. Whereas the dissent's view rested on the assumption that individual freedom can be separated from the common good, the majority's view rested on the assumption that individual freedom and the common good are inseparable.

331. See supra note 298.

332. Whereas norm control facilitated the dissent's treating rights in terms of groups, Roe v. Wade stressed a right to privacy—a right of discrete individuals. Roe v. Wade, 410 U.S. 113, 152-53 (1973). See also id. at 169 (Stewart, J., concurring); id. at 211-15 (Douglas, J., concurring). This approach reflected both the tradition of judicial review, which stresses the negative dimension of rights, i.e., the freedom of each individual from state coercion, see supra text accompanying notes 70-72 and note 52, and the case and controversy requirement, which evaluates rights in terms of individual factual circumstances. See supra text accompanying notes 293-299.

333. Cf. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 776-77 n.4 (1986) (Stevens, J., concurring) ("Similarly, [Justice White's] statement that an abortion decision should be subject to 'the will of the people,' [citation omitted] does not take us very far in determining which people—the majorities in state legislatures or the individuals confronted with unwanted pregnancies." (emphasis in original)).

334. See supra text accompanying notes 320-326.

335. In dealing with the conflict between the rights of fetuses and pregnant women, Roe v. Wade, unlike the German majority, did not view the conflict as one between two constitution-
resolved the conflict by trying to protect the conflicting rights according to their changing weights over time. Finally, both opinions envisioned individual rights within the context of the actual circumstances of women in society who face the abortion problem.

By envisioning individual rights analytically, both Roe v. Wade and the German dissent were able to address an issue central to the abortion problem under liberalism: When do individual rights begin? Roe v. Wade and, to some extent, the German dissent suggested that human life does not have one starting point, but is a gradual process of development. Consequently, individual rights need not appear in full all at once.

In contrast to the analytical societal approach to individual rights of Roe v. Wade and the German dissent, the German majority, as characteristic of German authoritarian liberalism, envisioned individual rights in terms of an abstract individual. Thus, the majority found that upon the appearance of a fetus certain crucial legal rights of an individual attach. Rejecting distinctions characteristic of reasoning by analysis, the majority denied any legal or moral significance to a fetus's biological development.

While the woman's right to privacy is constitutionally based, the fetus's right to potential life is not. Rather, under Roe v. Wade a state has the option of legislatively creating a right of the fetus, which would prevail over a woman's right to privacy at a particular time, i.e., when the state's interest in protecting potential life may be recognized as compelling.
velopment during pregnancy, or to birth (and the newborn infant’s physical discreteness and independence). The abstractness of the majority’s notion of individuality is highlighted by what the majority does not find crucial for such individuality: consciousness, social relationships, or activity. In keeping with its desire for aesthetic coherence and symmetry, the majority found that human life and rights begin, immediately and absolutely, at one precise point—implantation. The majority implicitly juxtaposed life’s precise beginning upon implantation to its disappearance at the moment of death.

The German majority stressed the right of the abstract individual with an absolutism that is foreign to United States constitutionalism in general and Roe v. Wade in particular. Whereas under Roe v. Wade a pregnant woman’s right to privacy prevails until another compelling state interest narrows it, under the German majority the state may never let a pregnant woman’s right to privacy infringe upon the fetus’s

341. Id. See also id. at 40, 43.
342. Id. at 37, 41.
343. Cf. generally R. PETCHESKY, supra note 69, at 341-47 (discussing the relationship between sociability and a fetus’s developing personhood); G. RUPKE, supra note 41, at 123-35, 146-52.
344. 39 BVerfGE at 37. The German majority’s approach toward the fetus is essentially the same as Justice White’s. Thus, the German majority stated:

Life in the sense of the historical existence of a human individual exists according to positive biological-physiological knowledge in any case fourteen days after conception (implantation, individuation) [citations omitted]. The developmental process that then begins is a continuous process, which does not show any sharp turning point and does not permit an exact division among various stages of the development of human life.

Id. at 37 (author’s trans.). Similarly, Justice White has written: “[O]ne must at least recognize, first, that the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species homo sapiens ... and second, that there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being.” Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 792 (1986) (White, J., dissenting). Cf. Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 460-61 (1983) (O’Connor, J., dissenting). Petchesky refers to this type of approach as “biological reductionism,” which supplements or replaces the argument that a fetus is a person because it has a soul with the argument that a fetus is a person because it has a genotype, thereby jumping from the biological fact of genetic identity to the value of human personhood. R. PETCHESKY, supra note 69, at 334-38, 341.
345. See 39 BVerfGE at 36, 38.
346. In addition to the rest of the paragraph in the text, Roe v. Wade, 410 U.S. 113 (1973), suggests at several points that it is exposing absolute or rigid views. See id. at 116, 131-32, 134-36, 150. The contention (which several German law professors have made to me) that Roe v. Wade really is the opinion that is absolute confines decision-making competence with absolutism. Roe v. Wade is not absolute as a result of the woman’s right in pregnancy’s first trimester to decide to abort or the failure to shift any of the decision-making competence for the first trimester to another authority, as the German majority does.
347. Id. at 154, 162-63, 164-65.
right to life. Rather, the woman's right to privacy simply vanishes.\textsuperscript{348} Whereas in \textit{Roe v. Wade}, the right to abortion emerged with the very notion of its curtailment,\textsuperscript{349} in the German majority, the fetus's right to life could countenance no limitation by the state.\textsuperscript{350} Whereas in \textit{Roe v. Wade} the right to abortion was similar but hardly superior to the preservation of other constitutional rights,\textsuperscript{351} in the German majority the right of the abstract individual to life was the precondition for all rights,\textsuperscript{352} a virtual linchpin of the legal order.\textsuperscript{353} Thus, in contrast to \textit{Roe v. Wade} (and the German dissent, for that matter), the German majority, in defining individual rights, could not deal with the possibility of conflict or balancing among competing rights.

* * *

The distinction between reasoning by synthesis, as in the German majority, and reasoning by analysis, as in the German dissent and \textit{Roe v. Wade}, is a distinction between authoritarian and democratic ways of thinking. Whereas reasoning by synthesis leads to moral absolutes, reasoning by analysis accommodates conflict, debate, experimentation, and a variety of pragmatic resolutions to moral issues. Thus, the German majority, in theory at least, prohibited all abortions, while the German dissent and \textit{Roe v. Wade} allowed ever greater ranges of permissible abortions.

Notwithstanding the distinction between authoritarian and democratic ways of thinking, each of the three abortion opinions was liberal. Each was committed to some notion of the rule of law. Not surprisingly, each opinion conceived of the rule of law differently. This Article now turns to that theme.

\section*{IV. ARBITRARY POWER OR INDIVIDUAL FREEDOM: THE ROLE OF DISCRETION IN THE GERMAN MAJORITY AND DISSENT}

\subsection*{A. The Proper Balance Between Rules and Discretion}

Whether within the tradition of German authoritarian liberalism, classical liberalism of parliamentary supremacy or classical liberalism of

\begin{thebibliography}{99}
\bibitem{348} 39 BVerfGE at 42-43, 47, 66.
\bibitem{349} 410 U.S. at 150, 153, 154.
\bibitem{350} 39 BVerfGE at 36, 41-44. \textit{See also id. at} 48-51; \textit{supra} text accompanying notes 105-107, 117-118.
\bibitem{351} \textit{See} 410 U.S. at 152-53, 159.
\bibitem{352} \textit{See} 39 BVerfGE 1, 36-37, 41-43, 46-48, 50-59, 67.
\bibitem{353} \textit{See generally id.}
judicial review, all three abortion opinions were committed to upholding the rule of law. They recognized that the rule of law required the proper balance between rules and discretion. Rules and discretion may have several possible relationships. Rules, being impersonal, can ensure social order through neutrality and fairness. Discretion can represent individual freedom. Arbitrariness, whether attaching to rules or discretion, can upset the balance between the two. Arbitrariness attaches to rules that represent limited interests or are applied too strictly. Arbitrariness attaches to the discretion of decision-making that is exercised without moral restraint. Each of the opinions most clearly expressed its view on what would upset or preserve the proper balance between rules and discretion in terms of discretion, reaching different conclusions on whether particular types of discretion posed the threats of arbitrary power or deserved the protection of individual freedom. Needless to say, the range of permissible abortion acceptable to each opinion was largely a function of its views towards discretion.

In expressing its view on discretion, each of the abortion opinions manifested its reasoning by synthesis or analysis. Under the influence of German authoritarian liberalism, the German majority feared that arbitrary discretion in the hands of legislative authority or individuals would threaten to subvert the rule of law. Thus, the German majority stressed that discretion must defer to the formal rule of law, whose abstract, impersonal, and neutral standards should restrain discretion.

Under the influence of classical liberalism and reasoning by analysis, the German dissent and Roe v. Wade viewed discretion favorably. Discretion is characteristic of freedom, whether of the freedom exercised by legislatures, as the German dissent stressed, or the freedom exercised by separate individuals, as Roe v. Wade stressed. The arbitrariness these two opinions feared was not that of discretion but rather that of rules. Rigid rules could arbitrarily curtail the proper realm of discretion.

354. See Neumann, supra note 51, at 908, 910; J. MERRYMAN, supra note 71, at 50-51; R. UNGER, supra note 46, at 69-70; R. UNGER, supra note 49, at 66-67, 68-69, 70, 71, 73, 84, 88-89.
355. See Neumann, supra note 51, at 927; R. UNGER, supra note 49, at 66, 69, 84.
356. See R. UNGER, supra note 46, at 53-54, 176-79; R. UNGER, supra note 49, at 64-65, 70, 73, 75.
357. See J. MERRYMAN, supra note 71, at 50-51.
358. See W. FRIEDMANN, supra note 46, at 422; R. UNGER, supra note 49, at 64, 66-67.
359. See infra text accompanying notes 369-371.
361. See infra text accompanying notes 378-384.
362. See infra text accompanying notes 256, 314, 442-443, 447, 453.
The two opinions especially feared the potential arbitrariness of the state's devising and enforcing penal law.\textsuperscript{363}

B. Discretion, Abortion, and Nazism

Before exploring in more detail the views of the three abortion opinions towards discretion, a short detour is appropriate to clarify the relationship between this theme and Nazism. In light of modern German history, the two German opinions had no choice but to relate their respective views of discretion and, therefore, abortion, to Nazism. Nazism represented evils that post-war Germany had to repudiate. In particular, West German officials had to make clear that they understood that, as a legal and political matter, a state should not kill innocent people. The impact of the history of Nazi exterminations on the legal concept of protecting life, a concept included in West Germany's Basic Law,\textsuperscript{364} might be compared to the impact of slavery in the United States on the legal concept of equal protection of law. As an abstract ideal, protection of life no more depends upon a history of repressive, inhumane government than equal protection of law depends upon a history of slavery and racial discrimination. However, concepts of protecting life in Germany and equal protection of law in the United States derived special meaning from the particular historical background that gave them their specific constitutional forms. Thus, although in any liberal nation the abortion problem evokes the question of the origins of individuality and can stir up concerns about destroying human life, in West Germany the abortion problem raised those concerns in a nation that had recently shown how the elementary principle against the killing of innocent people can be ignored. This background suggests one underlying reason why the formal legal issue before the BVerfG was not in terms of a right to abortion, as in the United States,\textsuperscript{365} but rather in terms of the best way to protect human life.\textsuperscript{366}

Although the German abortion opinions had no choice but to relate their respective views of abortion to Nazism, the crucial point is that each opinion's view of Nazism was a function of its view toward discretion, not the other way around. The German abortion opinions were not

\begin{itemize}
\item \textsuperscript{363} See infra text accompanying notes 458-464.
\item \textsuperscript{364} Kauper, supra note 14, at 1114. See also Judgment of Feb. 25, 1975, Bundesverfassungsgericht, W. Ger., 39 BVerfGE 1, 36-40 (1975).
\item \textsuperscript{365} See Roe v. Wade, 410 U.S. 113, 129 (1973).
\item \textsuperscript{366} See 39 BVerfGE at 36, 68-69. In light of the history of slavery in the U.S., it should not be surprising that in the U.S. one of the legal arguments against abortion characterized the prohibition of abortion as involuntary servitude.
\end{itemize}
reactions to Nazism but rather fit Nazism into their respective world views. Each opinion found Nazism relevant to abortion to the extent that the type of discretion it associated with abortion appeared in the type of arbitrary power it found characteristic of Nazism. Thus, the German majority, which linked the discretion associated with abortion to arbitrary power under Nazism, limited the range of permissible abortion, while the German dissent, which distinguished the discretion associated with abortion from the arbitrary power under Nazism, allowed a wider range of permissible abortions.367

C. The German Majority's Fear of Discretion

Toward both the beginning and the end of its opinion, the German majority made the general point that the destruction of human life under the Nazis was wrong.368 In keeping with reasoning by synthesis, the majority generalized that point further and drew what it viewed as an obvious lesson from Nazism: the state's obligation to protect rather than destroy human life requires the state to prohibit abortion.369 The Abortion Reform Act, passed in disregard of that lesson, aroused in the majority the fear of discretion in two places: in public power and private will. (Both types of discretion might also have reminded the majority of the evils of discretion, as practiced under Nazism.) As a public matter, the majority feared an arbitrary exercise of power by the legislature in passing the Abortion Reform Act. Characteristic of German authoritarian liberalism, the majority found that the legislature blatantly failed to meet its clear constitutional duty of protecting life by permitting its destruction.370 As a private matter, the majority feared arbitrary acts of will by pregnant women in having abortions as facilitated by the Abortion Reform Act. A woman's personal decision to abort, according to the majority, represented her arbitrary power over the life and death of the fetus.371 Thus, the woman's discretion was implicitly equivalent to the Nazis' exercise of arbitrary power over life and death.

367. Perhaps it is no coincidence that Roe v. Wade, which provided the widest range of permissible abortions, did not relate abortion to Nazism at all.
368. See 39 BverfGE at 36-37, 67.
369. See id. at 41, 42, 47-48, 67.
370. Id. at 51, 53-54, 59, 65-66.
371. Id. at 55-56. See also id. at 42-44, 50-51. One might also infer from the German majority's paternalism, see infra text accompanying notes 500-508, that the majority also feared a pregnant woman's choice to abort a pregnancy because it represented a woman's control over her own reproduction. Indeed, one distinguishing characteristic of abortion as a social phenomenon is that the woman takes control of reproduction in a technically simple and completely effective way and neither needs the cooperation of men, nor is subject to their power to veto it. See R. PETCHESKY, supra note 69, at 29.
Fearing these two types of discretion—the legislative exercise of power and a pregnant woman's act of will\textsuperscript{372}—the German majority thought that discretion must be subject to restraints. These restraints could be provided by requiring that political power be exercised in conformity with certain ideal standards,\textsuperscript{373} or by requiring that acts of will not infringe upon the freedom of others.\textsuperscript{374} Thus, the majority feared that discretion not exercised within the bounds of the rule of law threatened to suspend the rule of law.\textsuperscript{375}

The German majority itself, however, tended to undermine the rule of law. Its fear of arbitrariness and its view of rights as belonging to abstract individuals combined with each other to impose a narrow class-based world view rooted in German authoritarian liberalism and, in particular, to impose a notion of individuality taken from German Idealism. German Idealism set up the ideal of a cultured person who realizes freedom in the private sphere through intellectual and aesthetic contemplation independent of politics.\textsuperscript{376} In keeping with that notion, the majority believed that the pregnant woman's passively gaining insight into her maternal obligations\textsuperscript{377} must take precedence over two forms of activity: first, over the woman's actively shaping her future by deciding whether to continue a pregnancy, and second, over the legislature's actively shaping the social order.

\textsuperscript{372} The majority seemed to have feared that these two types of potentially arbitrary discretion threatened to infect each other. Thus the arbitrary exercise of legislative power would prompt arbitrary acts of pregnant women's wills, see 39 BVerfGE at 53-56, 58, and the wish of some to permit such arbitrary acts of will may have occasioned the arbitrary exercise of legislative power in passing the Abortion Reform Act. See id. at 44, 65-67.

\textsuperscript{373} See id. at 42, 44, 46-47, 50, 51, 53, 57, 65-67. See also Neumann, supra note 51, at 912; F. NEUMANN, supra note 46, at 28, 31, 42, 89.

\textsuperscript{374} See 39 BVerfGE at 42-43, 47, 66. See Neumann, supra note 51, at 912; F. NEUMANN, supra note 46, at 28, 31, 42, 89.

\textsuperscript{375} Cf. Neumann, supra note 51, at 912-14, 917, 919.

\textsuperscript{376} H. HOLBORN, supra note 183, at 9-10; L. KRIEGER, supra note 76, at 167-68, 488-89; F. STERN, supra note 182, at 7-9. The class basis of this notion lay largely in its reflection of the thinking of the university—one of the two institutions in which the German civil servant class (which largely gave rise to German authoritarian liberalism) was based, see supra text accompanying notes 191-199. See H. HOLBORN, supra note 183, at 9-10; F. STERN, supra note 182, at 7-9. See also J. SHEEHAN, supra note 179, at 15, 19-21, 151, 234-35, 255. The German majority's carrying forth of this class-based notion makes sense when one notes that BVerfG judges may not engage in any other professional activities—except teach law at a German university. See Rupp, supra note 225, at 360. Cf. R. LAMPRECHT & W. MALANOWSKI, supra note 241, at 41 (on the disproportion of professional judges and bureaucrats as BVerfG judges).

\textsuperscript{377} See 39 BVerfGE at 43-44, 48-50, 55-56, 61-62.
D. The German Dissent's Acceptance of Discretion

In contrast to the German majority's belief that discretion by its nature tends toward arbitrariness and abuse, the German dissent did not fear discretion. The dissent believed that the Abortion Reform Act did not exemplify either abuse of power by parliamentary government, or unrestrained acts of will by pregnant women. Thus, the dissent did not identify either kind of discretion with Nazism.

In regard to parliamentary government, the German dissent thought that the Abortion Reform Act manifested the virtues of discretion. Implicit in the dissent's view that problems have a variety of solutions is the belief that the solutions devised must result from discretion. According to the dissent, only legislative discretion can resolve the uncertain task of best effectuating the objective ordering of values, realizing rights that come into conflict, and providing the socio-economic support needed to exercise rights. The dissent stressed in general that the legislature should represent conflicting views and resolve them through compromise (that is, by aggregating discretion). The dissent further stressed in particular that the legislative process leading to the Abortion Reform Act was a model of legislative responsibility. The dissent was permeated by the conviction that the legislature can—and here did—exercise moral judgment as effectively as judges.

In regard to a woman's decision to abort a pregnancy, the German dissent thought that it had little to do with the evil of Nazism. The dissent analyzed the general point that Nazi destruction of human life was wrong by distinguishing the specific historical ways in which the Nazis showed disrespect for human life. This analysis led the dissent to conclude that Nazi destruction of life involved issues different from those at stake in the abortion problem. The evil of Nazism, according to the dissent, was the state's organized and systematic extermination of innocent people. The abortion issue before the BVerfG, however, did not involve extermination by the state, but rather the decision of pregnant women to have abortions without state involvement. Thus, the dissent implied that condemning the abuse of state power by the Nazis provides

378. See supra text accompanying notes 140, 142.
379. See 39 BVerfGE at 71-72, 83-84, 85, 88-89, 90.
380. See id. at 71-72.
381. See id. at 88-89. Cf. Neumann, supra note 51, at 914.
383. 39 BVerfGE at 71-72, 75, 84-85.
384. Id. at 82, 85, 88.
385. Id. at 76.
386. Id. at 76, 80. The dissent also suggested that it would be better to have the pregnant
little guidance in evaluating acts of private will by pregnant women to have abortions.387 Furthermore, the dissent pointed out that, as a matter of historical fact, the very Nazis who exterminated innocent people prohibited abortion, indeed, with increasingly severe penal sanctions.388 Thus, the dissent found that the legal status of abortion under the Nazis manifested Nazism's racist population politics,389 which again reveals little about a pregnant woman's act of private will in having an abortion.

Although the German dissent distinguished the discretion pertaining to Nazism from that pertaining to the abortion issue before the BVerfG, the dissent could not escape the impact of Nazism on framing the issue in the first place. The BVerfG's framing of the issue in terms of how best to protect human life,390 coupled with the Bundestag's definition of human life as beginning upon implantation,391 limited the range of arguments available to the dissent.

E. The Equitable Principle of Zumutbarkeit in the German Majority

Although preoccupied with the concern that discretion would undermine the rule of law, the German majority also recognized that the

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387. Cf. L. Tribe, American Constitutional Law 932 n.70 (1978) ("[T]he familiar slippery-slope argument... that permissive abortion laws might lead to disregard for life generally and then to inhumane disposal of the weak and old... deserves a skeptical reception. Permissive abortion laws have not demonstrably led to an orgy of euthanasia or to enthusiasm for destroying the handicapped. Is it wholly irrelevant in this regard that Hitler’s Germany and Vichy France had among the most restrictive abortion laws in Europe?").

388. 39 BVerfGE at 76-77.

389. Id. See also id. at 9. To make the point that the legal status of abortion under the Nazis manifested their racist population politics, the dissent really presented only half an argument. Not only did the Nazis make anti-abortion laws more severe soon after taking power in 1933, increase the number of convictions under those laws, establish a Central Agency for the Struggle Against Homosexuality and Abortion in 1936, and pass a law in 1943 to allow abortion to be punished with death, but the Nazis also introduced a law in 1935 allowing abortions for "defective" pregnancies on grounds of race hygiene, in 1938 allowed Jewish women to have abortions, in 1940 by an official but secret decree granted to the State Health Offices permission to perform abortions on prostitutes, women of inferior character, and women of alien race, and during World War II forced women from conquered and occupied territories to have abortions for the sake of population control. See Bock, Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization, and the State, in When Biology Became Destiny: Women in Weimar and Nazi Germany 276, 283, 286 (R. Bridenthal, A. Grossman & M. Kaplan eds. 1984). The German majority never answered or even addressed a question invariably raised by the preceding: if, as the majority believed, a lesson from Nazism is that abortion must be prohibited, why is not part of that lesson that the prohibition must also cover abortions for eugenic reasons, which the Nazis permitted, as did the majority?

390. 39 BVerfGE at 68-69. See also id. at 70; supra text accompanying notes 23-25, 35-39.

391. Id. at 37. See also id. at 80.
rule of law could coexist with some discretion. With this in mind, the
majority formulated a rationale for permitting exceptions to the prohibi-
tion of abortion. The majority was able to fit the exceptions into its
scheme of thinking by defining which of a pregnant woman’s acts of will
in deciding to have an abortion could coexist with the rule of law. Carv-
ing out this realm of discretion for permissible abortions was no easy
task, of course, because a crucial element in the majority’s hierarchy of
values was that abortion destroys life. 392

The German majority defined the exceptions to the prohibition of
abortion by invoking the principles of Zumutbarkeit. 393 This principle
provides that an act cannot be punished if the person cannot be justly
expected to forego the act. 394 What is crucial about Zumutbarkeit is that
it is an equitable principle. Equity provides an excuse from having to
follow a general rule in order to provide the flexibility to do justice in
individual cases. 395 Thus, for the German majority, Zumutbarkeit pro-
vides a pregnant woman with an excuse for having an abortion on the
grounds of justice. 396 Consequently, the majority was able to link a preg-
nant woman’s exercise of discretion in having an abortion to conscience
rather than arbitrary will. 397 Abortion based on Zumutbarkeit, in the
majority’s view, does not permit that type of act of will that leads to
abuse (and is associated with arbitrary political power), but rather pro-
motes only that type of act of will that secures responsible private ac-
tion. 398 Furthermore, Zumutbarkeit gave the German majority a way to
allow women to have an abortion without implicating the state.
Although the state need not punish a woman who has an abortion as an
act of conscience, 399 the state still may not approve or support the act

392. Id. at 43, 47-48.
393. Id. at 48-51.
394. In German law, Unzumutbarkeit (the opposite of Zumutbarkeit) excuses someone
from guilt for an unlawful act when law-abiding conduct could not be expected in face of
extraordinary personal circumstances. Eser, Justification and Excuse, 24 AM. J. COMP. L.
621, 636 n.79, 637, 637 n.88 (1976). The concept should be understood within the context of
the clear distinction made in German law, but not Anglo-American law, between the objective
justification of an act (which, although otherwise criminal, is deemed lawful because of its
justification) and the subjective, individual excuse of an actor (who has perpetrated a criminal
act but is not blameworthy and is, therefore, exculpated from some or all of its consequences).
Id. at 621-23. See also Ryn, Discussion of Structure and Theory, 24 AM. J. COMP. L. 602, 604-
05 (1976).
395. J. MERRYMAN, supra note 71, at 51-52; R. UNGER, supra note 46, at 205.
396. See 39 BVerfGE at 49.
397. See id. at 48-49.
398. See generally id.
399. Id. at 48-50.
and must continue actively to discourage it. In fact, the majority did not state that such an abortion was not a crime, but only that it may be deemed an act free of penal sanctions.

From the German majority's point of view, however, a problem exists with any equitable principle, namely that it undermines general rules, and the legal certainty accompanying them, through subjective moral judgments. Thus, although it had introduced the equitable principle of Zumutbarkeit, the majority also wanted to limit its use. The particular principle of Zumutbarkeit has a flexibility that was a virtue for the majority's purposes: by its reliance on conscience, the principle is largely self-limiting. Acts of conscience do not threaten to undermine general rules in the way that arbitrary acts of will do, for they justify action contrary to the general rules only in unusual cases and essentially only by appealing to some moral principle. Thus, a woman's having an abortion for reasons of conscience does not undermine the general rule prohibiting abortion since it happens rarely and for reasons that do not threaten the validity of the reasons for prohibiting abortion in general. Furthermore—and this is implicit in the majority's approach even if never explicitly stated—acts of conscience in the abortion context do not threaten general rules in the way that the arbitrary exercise of political power does because abortion is usually a private act without public repercussions. That is, such acts of conscience do not interfere with the state morality that controls excesses in politics. Zumutbarkeit reflects the ideas of German Idealism by moving conflict from society to the internal realm of personality.

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400. Id. at 50.
401. Id. at 48-50. Although the majority used the word “balancing” once in its discussion of Zumutbarkeit, id. at 48, the balancing is not of the fetus’s right to life against the pregnant woman’s interest in determining which of the two should prevail. Rather, it is really the legislature’s determination of whether the woman’s constitutionally protectable interest is weighty enough for the legislature to forego penal sanctions if the woman has an abortion. See id. at 48, 50. Cf. Brugger, supra note 3, at 899 (discussing the majority’s allowing some abortions as balancing the rights of the fetus against those of the pregnant woman as a practical matter).
402. See J. MERRYMAN, supra note 71, at 52 (1969); F. NEUMANN, supra note 46, at 34; R. UNGER supra note 46, at 205; R. UNGER, supra note 49, at 142.
403. 39 BVerfGE at 48-49. See also E.-W. BÖCKENFÖRDE, supra note 41, at 276.
404. See generally 39 BVerfGE at 48, 50-51.
405. See supra text accompanying notes 187-190, 204-205.
406. 39 BVerfGE at 48-49.
407. See supra text accompanying notes 183-187.
408. See id at 50. In permitting those abortions that are acts of conscience, the effect, and perhaps social purpose, of the majority might have been to create problems of conscience, i.e., to encourage guilt feelings among pregnant women considering abortions. Cf. Thornburgh v.
extent that acts of conscience are not just private acts but involve a political dimension, that dimension promotes state morality and the rule of law by encouraging the state to withhold outside force whenever the individual must have the inner freedom to decide. In other words, the majority's exception for acts of conscience provides an individual with a moral basis for resisting a general rule whose application under the particular circumstances would be unjust.

The Abortion Reform Act, in the majority's view, did not rely on the principle of Zumutbarkeit to justify a limited number of exceptions to the rule prohibiting abortions, but rather essentially permitted all abortions in the first three months of pregnancy. This threatened the entire moral basis of the rule of law with collapse. In the majority's view, the reasons justifying abortions that were permitted under the Abortion Reform Act extended beyond conscience to arbitrary acts of private will. Thus, the majority found that the exceptions under the Abortion Reform Act were not subject to clear limits.

The exceptions laid out in the majority, however, are not subject to clear limits either. The majority's theory of exceptions based on Zumutbarkeit is academically neat, as one might expect in light of the majority's concern with the aesthetic coherence of the text. Nonetheless, the majority never explained why the theory of Zumutbarkeit justified exceptions on the basis of a woman's life and health, eugenics, ethics (criminology), or social necessity. Even if the definition, at least, of the first three of these exceptions, seems straightforward, the definition of

American College of Obstetricians & Gynecologists, 476 U.S. 747, 762 (1986) (a state's message to pregnant women discouraging abortion "may serve only to confuse and punish her and to heighten her anxiety. . . ."); R. PETCHESKY, supra note 69, at 365-66 (the gap between certain notions of abstract morality condemning abortion and a woman's immediate circumstances leading her to consider abortion does not stop abortion so much as create problems of conscience). See also Brugger, supra note 3, at 900-01 (praising the German majority for simultaneously maintaining a purely principled constitutional and moral condemnation of abortion as the destruction of potential life, and allowing the judgment of any abortion based on the woman's concrete circumstances).


410. 39 BVerfGE at 53-54.

411. Id. at 55-56. The German majority's objection to a woman's having an abortion as an arbitrary act of private will is conceptually the same as Justice White's transparent contempt for a woman's having an abortion for "convenience"—a word Justice White uses four times in his short dissent to Roe v. Wade. See 410 U.S. 113, 221-22 (1973). Arbitrary acts of will and acts based on convenience are manifestations of the freedom of individuals in society to act without state restraint.

412. 39 BVerfGE at 53-58.

413. See id. at 49-50.
social necessity surely is not. Yet this exception is the most important one since it defines the outer limits for permissible abortions.\textsuperscript{414} Adopting the exception from the Abortion Reform Act itself, the majority rejected the Act's use of that exception to justify a three-month term solution to the abortion problem and offered a new approach of its own: the legislature must structure the exception based on social necessity congruently with the other exceptions.\textsuperscript{415} The approach is, again, academically neat, but the majority left the meaning of congruence, that is, the crucial issue of just how to apply the structure of the other exceptions to the social exception, obscure.\textsuperscript{416}

Such a crucial omission reflects not only intellectual weakness, but also the underlying dilemma in subjecting discretion to the rule of law. General and abstract rules can never remove the element of discretion.\textsuperscript{417} Furthermore, they can never make clear how to distinguish the arbitrary exercise of discretion from the responsible act of conscience.\textsuperscript{418} The German majority, however, simply invited the legislature to try its hand at the problematical task of distinguishing the arbitrary exercise of discretion from the responsible act of conscience, so long, that is, as abortion remained restricted in principle within the guidelines that subjected political power and individual will to state morality. In short, the majority did not place clear outer limits on the range of permissible abortion; it stressed simply that there must be such limits.\textsuperscript{419}

\textsuperscript{414} The German dissent pointed out that the social exception was crucial to the German majority's own premises. The majority conceded that the previous legal circumstances did not adequately protect fetal life because they were not differentiated enough. Since the previous law recognized the medical, ethical, and eugenic exceptions, the truly new differentiation in the Abortion Reform Act was the social exception. \textit{Id.} at 87. The centrality of social reasons, broadly defined, to the abortion problem was also stated at the opening of Justice White's dissent to Roe v. Wade, 410 U.S. at 221: "At the heart of the controversy in these cases are those recurring pregnancies that pose no danger to the life or health of the mother but are, nevertheless, unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc."

\textsuperscript{415} Id. at 87.

\textsuperscript{416} Cf. G. RUPKE, supra note 41, at 48-50.

\textsuperscript{417} See J. MERRYMAN, supra note 71, at 51-52; F. NEUMANN, supra note 46, at 75, 77.

\textsuperscript{418} See F. NEUMANN, supra note 46, at 158-59.

\textsuperscript{419} In redrafting the Abortion Reform Act, the legislature was able to take advantage of the German majority's treatment of the social exception to come up with a new law, passed in 1976, whose impact was less strict than the majority's theoretical framework. The majority did accept the constitutionality of a social exception in principle, see 39 BVerfGE at 49-50, and the revised law provided for one. 5 StrRG § 218a(1) & (2), 1976 BGBI I 1297. The majority posed, as this Article argues, difficult if not impossible problems for defining a social exception, and the revised law defined it simply by tracking the majority's general criteria on the matter. \textit{Id.} Although contrary to its general thrust, the majority included wording that can be construed to mean that the legislature could omit penal sanctions if, \textit{inter alia}, nonpenal sanctions
F. The Woman's Conscience in the German Dissent

The German dissent did not share the German majority's view that the range of permissible abortions must be severely limited. While the majority stressed that discretion often degenerates into arbitrariness and abuse, but is sometimes necessary for equity, the dissent stressed that discretion is often necessary for equity. Thus the dissent shared with the majority the viewpoint that abortion is permissible in terms of equity, that is, that abortion is permissible whenever a woman exercises her discretion to abort as an act of conscience rather than arbitrary will.

Whereas the German majority referred to a limited equity of excuse, the German dissent referred to a broad equity of necessity. Equitable principles, which alone provide the flexibility to do justice in individual cases, must be involved in almost all abortion cases, for the dissent found that the decision to have an abortion regularly arises out of conflict situations based upon a variety of individual circumstances. Furthermore, the dissent found that women normally do not make the decision to have an abortion lightly. Rather, they make the decision only after serious consideration, or, as the dissent put it, in the depths of their personalities. Thus, by defining necessity broadly, the dissent essentially found a conclusive presumption that a woman would decide to have an abortion only if her conscience compelled her to do so. While equitable principles are usually exceptions undermining general rules, the dissent essentially turned a woman's equitable exercise of discretion in de-
ciding whether to abort a pregnancy from an exception into the general rule.

The German dissent justified its presumption that most women would abort a pregnancy only as an act of conscience, not arbitrary will, by putting abortion into a social context. A woman's deep internal conflict on whether to abort a pregnancy, according to the dissent, is exacerbated by the social realities with which she is confronted. Thus, the dissent found that each woman's individual decision is unique, not only because pregnancy and abortion are inherently unique, but also because a variety of social and economic pressures surround almost all decisions to abort a pregnancy. In short, the dissent implied that the only way to assure fairness under so many different circumstances is through equity: allowing free rein to the exercise of discretion and acts of conscience. To do otherwise and apply a general rule prohibiting abortion would run roughshod over a variety of social circumstances and lead to injustice in countless individual cases.

As the preceding paragraph indicates, the German dissent, in contrast to the German majority, viewed conscience generously, finding its presence as often among women as judges or state officials. In fact, any failure of discretion, according to the dissent, lay less with women who choose to have abortions than with a state and society that have failed to address the social conditions that drive women to that alternative. The dissent reasoned further that imposing penal sanctions on abortion is the state's alibi for deficient social assistance. Far from reducing the number of abortions, penal sanctions simply divert attention from the state's failure to provide social support systems that might have reduced the need of women to have abortions. Without such social support a woman's internal conflict is all the more exacerbated by social realities. In short, the dissent found that imposing penal sanctions on abortion, as the majority required, is unjust because it projects onto women the failures of discretion of policy-makers in addressing the social circumstances of pregnant women.

424. See 39 BVerfGE at 81-82.
425. Id. at 88-89.
426. Id. at 83-84.
427. See supra text accompanying notes 125-129.
428. 39 BVerfGE at 83-84.
429. See id. at 84.
430. Id. at 86. See also id. at 87-88.
431. Id. at 87-88.
432. Id. at 86-88.
433. See id. at 83-84.
By allowing a woman the ultimate determination of whether to have an abortion, the German dissent recognized what the German majority did not: a general legal principle provides no insight into the nature of any particular discretionary act and, therefore, offers no help in distinguishing an arbitrary act of will from a responsible act of conscience. The alternatives to a pregnant woman's being the judge of her own conscience would be unacceptable. One such unacceptable alternative would be to allow criminal trials after the fact to distinguish—implicitly arbitrarily—among women who aborted a pregnancy as an act of conscience from those who aborted on other grounds. The dissent apparently found that the danger of an application of the rule prohibiting abortion outweighed the danger of a woman's abusing her discretion.

The German dissent's granting such an important role to women's acts of conscience did not mean that the dissent wanted the principle prohibiting abortion to lose importance in the process of a woman's deciding whether to have an abortion. Rather, the dissent did not want that principle to dictate a woman's final decision whether to have an abortion. The German majority objected to this approach as one permit-

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434. See generally id. at 91, where the dissent noted that a material disadvantage of the indications solution is the difficulty, if not impossibility, of finding an objective, unified criterion for the social indication. See also Neumann, supra note 51, at 913-14.

435. See 39 BVerfGE at 90. See also id. at 91; E.-W. BÖCKENFÖRDE, supra note 41, at 276-77. Another unacceptable alternative would be allowing the rule prohibiting abortion to preclude acts of conscience altogether.

436. Cf. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 781 (1986) (Stevens, J., concurring) (“In the final analysis, the holding in Roe v. Wade presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny.”).

437. See generally 39 BVerfGE at 85-86, 89. The underlying structure of the German dissent's reasoning here is similar to the underlying structure of reasoning in the Supreme Court's abortion funding cases. In Maher v. Roe, 432 U.S. 464 (1977), which set forth the basic reasoning of the abortion funding cases, the Supreme Court held that the equal protection clause of the fourteenth amendment does not require states that are participating in the Medicaid program to fund nontherapeutic abortions for women in financial need, even if the state pays for expenses incident to childbirth. The Supreme Court reasoned that the right to abortion “protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.” Id. at 474-75. The Supreme Court also stated: “The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there.” Id. at 475. Thus, while the German dissent reasoned that the state may omit penal sanctions for abortion but must discourage abortion by other means (i.e., counseling), Maher v. Roe reasoned that the state must omit penal sanctions, but may encourage childbirth by other means (i.e., funding). See also Harris v. McRae, 448 U.S. 297 (1980) (the Hyde Amendment limiting use of any federal funds under the Medicaid program to reimburse the cost of abortions, including medi-
ting abortion by creating a "rechtsfreien Raumes"—a realm devoid of law. The dissent, however, wanted to apply the principle prohibiting abortion when it might be effective, namely in counseling centers where women were supposed to seek assistance before aborting a pregnancy. Accordingly, the dissent would have upheld the Abortion Reform Act, which directly applied the principle prohibiting abortion by imposing penal sanctions against women who failed to seek assistance at a counseling center before aborting a pregnancy. Thus, the dissent tried to strike a delicate balance between a woman’s conscience and enforcement of the law against abortion—a balance that protected against arbitrariness, assured fairness, and preserved the integrity of both conscience and law enforcement.

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438. 39 BVerfGE at 44.
439. See id. at 85-86, 89.
440. See id. at 4, 5-6. See also id at 61-64. It is precisely at this point that the German dissent diverges most sharply from Roe v. Wade. The Supreme Court struck down laws that require outside approval of abortion, Doe v. Bolton, 410 U.S. 179 (1973) (striking down a law conditioning abortion on the approval of a hospital staff abortion committee), and later struck down laws smacking of moral counseling. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (the states may not require that before an abortion a woman be given various written materials and information to intimidate her into continuing a pregnancy and to deter her from making the abortion decision in private consultation with her physician, who is not an agent of the state); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (a state may not adopt regulations requiring a recitation of a lengthy and inflexible list of information to a woman before an abortion, for the state may not try to influence a woman’s informed choice between abortion and childbirth, and may not intrude upon the discretion of the pregnant woman’s physician).
441. The next section will explore Roe v. Wade’s confidence in discretion. Here, however, it is appropriate to note that the reason why confidence in discretion led to an explicit right to abortion in Roe v. Wade but not the German dissent may well have to do with the relationship between equity and the judiciary in the United States and West Germany. Since the common law tradition and its doctrine of stare decisis gives inherent equitable power to judges, see J. Merryman, supra note 71, at 54, the Supreme Court was doctrinally amenable to evaluating the abortion problem in terms of justice in individual cases. But the civil law tradition restricts equitable power in the judiciary and gives it instead to the legislature. See W. Friedmann, Legal Theory, supra note 46, at 517-18; J. Merryman, supra note 71, at 52, 54-55. Thus, the German dissent was doctrinally predisposed to restrain itself from evaluating the justice in individual cases independently of the legislature’s evaluation. The dissent had to go no further than to find that the legislature’s Abortion Reform Act was just. See 39 BVerfGE at 71-72, 85, 87.
V. ARBITRARY POWER OR INDIVIDUAL FREEDOM:
THE ROLE OF DISCRETION IN ROE V. WADE
AND THE GERMAN OPINIONS

A. The Role of the Physician in Roe v. Wade and the German Majority

Like the German dissent but unlike the German majority, Roe v. Wade did not identify the danger of arbitrariness with individual discretion, but was concerned with fairness in individual cases. Roe v. Wade expressed its trust in individual discretion by linking the right to abortion to the doctor-patient relationship. According to Roe v. Wade, the right to abortion resulted, inter alia, from the woman's right to have private and confidential consultations with her doctor and the right of doctors to practice their profession without state or other outside interference. Although the German majority never denied that a doctor’s practice of medicine deserves protection, or that a woman’s privacy includes medical care of her body, it refused to derive from these interests a right to abortion. The reason why Roe v. Wade took that step but the German majority did not was that Roe v. Wade viewed society as a realm of freedom, while the German majority viewed it as a realm of arbitrariness.

If Roe v. Wade trusted the discretion of a pregnant woman acting in consultation with her doctor in society, the German majority, which feared a pregnant woman’s arbitrary act of will and a legislature’s arbitrary exercise of power in society, also feared the social power of those doctors who knew no bounds to their own business interests. Whereas Roe v. Wade expressed confidence that doctors generally have the knowledge, professional experience, and understanding to counsel pregnant women, the German majority found that the Abortion Reform Act
impermissibly allowed doctors to provide social counseling. The German majority reasoned that doctors lack the professional qualifications and time to counsel pregnant women. Furthermore, doctors might suffer a conflict of interest between counseling a woman against abortion and benefiting from the business of performing one. Whereas Roe v. Wade felt sure that the professional ethics of doctors would provide one moral guarantee for the responsible exercise of the right to abortion, the German majority thought that precisely those doctors who are willing to perform nonindicated abortions do so either for their own monetary gain or to assert women’s rights and emancipation themselves. In short, Roe v. Wade viewed doctors as a source of authority within society who could advance freedom and should be protected from the state, but the German majority was suspicious of medical discretion as potentially arbitrary and needing state control. Thus, the German majority thought that freedom is advanced by the state, which controls discretion, while Roe v. Wade thought that freedom is advanced by private professionals, who exercise discretion.

451. 39 BVerfGE at 62.
452. Id. at 63. See also id. at 64. While the German majority found that the Abortion Reform Act’s counseling provisions were insufficient because the very physician who provided counseling could perform the abortion, 39 BVerfGE at 64, Doe v. Bolton struck down a law requiring that the performing physician’s judgement be confirmed by the independent examination of the patient by two other licensed physicians. 410 U.S. at 199. Furthermore, the majority, partly because of its mistrust of physicians, found the Abortion Reform Act’s counseling provisions insufficient because no waiting period for reflection was required between counseling and an abortion, see 39 BVerfGE at 64, while the Supreme Court, partly because of its confidence in physicians, struck down an ordinance requiring a twenty-four-hour waiting period between the time the pregnant woman signs a consent form and the abortion is performed. Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 449-51 (1983). See also Hartigan v. Zbaraz, 107 S. Ct. 267 (1987) (an equally divided Court affirming without opinion the judgment below that a mandatory twenty-four-hour waiting period for minor pregnant women is unconstitutional).
453. 410 U.S. at 165-66; Doe v. Bolton, 410 U.S. at 196-97, 199. See also Roe v. Wade, 410 U.S. at 153, 163; id. at 208 (Burger, C.J., concurring); Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 448 n.39 (1983) (“This Court’s consistent recognition of the critical role of the physician in the abortion procedure has been based on the model of the competent, conscientious, and ethical physician.”).
454. 39 BVerfGE at 63-64.
455. 410 U.S. at 163, 165-66; Doe v. Bolton, 410 U.S. at 197, 199.
456. See 39 BVerfGE at 44, 62-64. See also supra text accompanying notes 451-452.
457. In light of history this result is not surprising. Comparatively speaking, physicians in the U.S. have been socially assertive, while physicians in Germany have been socially imitative. Thus, in the late nineteenth century, physicians in the U.S. consolidated their professional status by presenting themselves as agents of enlightenment and bearers of moral values, largely on behalf of the state. C. LASCH, HAVEN IN A HEARTLESS WORLD 169-71 (1977). Cf. id. at 97-100. Indeed, one vivid illustration of physicians asserting their moral role is the part they played in criminalizing and objecting to abortion. L. GORDON, WOMAN’S BODY, WOMAN’S
B. The Fear of Arbitrary Penal Law in *Roe v. Wade* and the German Dissent

*Roe v. Wade* and the German dissent placed discretion in juxtaposition to the arbitrariness that both opinions feared: the arbitrariness in penal law. The German dissent argued explicitly and *Roe v. Wade* implicitly that the issue in regard to punishing abortion must be whether penal sanctions are permissible, not whether they are obligatory.458 Both opinions stressed that penal sanctions must be drafted narrowly because they restrict freedom.459 The German dissent cautioned against penal sanctions because of the dangers of abuse.460 Similarly, two concurrences to *Roe v. Wade* drew attention to the importance of protecting against unwarranted government intrusion.461 Both the German dissent and another concurrence to *Roe v. Wade* warned of the danger of the

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458. 39 BVerfGE at 69-70, 73-74.

459. *Roe v. Wade*, 410 U.S. at 155, 164; *id.* at 211, 216 (Douglas, J., concurring); 39 BVerfGE at 70, 73-74. The German dissent cited *Roe v. Wade*, without providing page references, for the proposition that limits must be placed on the state's use of its penal powers. *Id.* at 73-74.

460. 39 BVerfGE at 77. *See also id.* at 77-78.

461. 410 U.S. at 168-69 n.2, 169 (Stewart, J., concurring); *id.* at 213 (Douglas, J., concurring). In not requiring governmental funding of abortions for the poor, the Supreme Court's abortion funding cases explicitly highlighted the point that the abortion right protected a woman's freedom to terminate her pregnancy against the severity of criminal sanctions. *See Harris v. McRae*, 448 U.S. 297, 313-14 (1980); *Maher v. Roe*, 432 U.S. 464, 471-72 (1977). *See also Colautti v. Franklin*, 439 U.S. 379, 386-87 n.7 (1979). A reason for disallowing punishment of first trimester abortion, which neither *Roe v. Wade* nor the German dissent argued, but which follows from the objection to unwarranted government intrusion in conjunction with the concept that life is a process of development, *see supra* text accompanying notes 163, 264-265, 270-271, is the fear of the methods that the state would use to enforce effectively a law criminalizing early pregnancy abortions, which can take place discreetly before anyone else even knows that the woman is pregnant. *Cf. Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"); L. Tribe, *supra* note 387, at 931 ("[S]erious enforce-
uncertain implementation of penal sanctions that turn on the personal discretion of experts, judges,\textsuperscript{462} or prosecutors.\textsuperscript{463} In a related point, both the German dissent and \textit{Roe v. Wade} were concerned about the detriment to the individual who must await criminal prosecution for a determination of an abortion's legality after the fact.\textsuperscript{464} In the end, both the German dissent and \textit{Roe v. Wade} objected to the unnecessary imposition of penal sanctions — the German dissent by arguing to uphold as constitutional an Abortion Reform Act free from that infirmity, \textit{Roe v. Wade} by striking down an abortion law infected with that infirmity.

In fearing the potential arbitrariness of penal law, \textit{Roe v. Wade} and the German dissent stood squarely within the tradition of classical liberalism, which aims at restricting penal law to lessen the danger that state power will arbitrarily infringe upon individual freedom.\textsuperscript{465} What is striking here is that, although \textit{Roe v. Wade} fell into the subtradition of judicial review in general, the dissent fell into it as well in regard to penal law. The dissent believed that the legislature should make objective value decisions and that the judiciary has expertise over defensive rights, namely that sphere of individual freedom that must be protected against arbitrary infringement by state power, especially in the area of penal law.\textsuperscript{466}

In dealing with the judiciary's protection of individual freedom against state power in the area of penal law, both \textit{Roe v. Wade} and the German dissent expressed a view toward society vis-à-vis the state that facilitated their acceptance of a relatively wide range of permissible abortions. The two opinions perceived the greatest threat to individual freedom as coming from the state, not from third parties within society.\textsuperscript{467} Thus, both \textit{Roe v. Wade} and the German dissent stressed the need to protect the pregnant woman from the state's potentially arbitrary enforcement of penal law, not the need to protect the fetus from the actions of the pregnant woman.\textsuperscript{468} This view of society and the state explains why \textit{Roe v. Wade} argued that the state may not restrict a woman’s right

\begin{itemize}
  \item 462. 39 BVerfGE at 91.
  \item 463. 410 U.S. at 208 (Burger, C.J., concurring).
  \item 465. See Neumann, supra note 51, at 901, 903, 915, 918.
  \item 466. 39 BVerfGE at 70-72. The German dissent seemingly was prone to circumscribe defensive—or negative—rights more narrowly than a U.S. court might have.
  \item 467. See id. at 74; Roe v. Wade, 410 U.S. at 152-53.
  \item 468. See 39 BVerfGE at 79; Roe v. Wade, 410 U.S. at 157-58 n.54; id. at 169 (Stewart, J., concurring); id at 208 (Burger, C.J., concurring); id. at 216 (Douglas, J., concurring).
\end{itemize}
Abortion and Liberalism

to abortion without a compelling state interest. Similarly, it explains why the German dissent understood the lesson of Nazism to concern the protection of individuals from state tyranny, not, as in the abortion issue before the BVerfG, the protection of fetuses from pregnant women.

Of course, Roe v. Wade and the German dissent could not avoid addressing the underlying point (arising out of suspicion toward society) made by the German majority: the state must prohibit abortion for the same reasons it prohibits homicide—because the state cannot tolerate a society in which people are allowed to kill one another. The response of Roe v. Wade and the German dissent, in keeping with their reasoning by analysis, was that abortion is not like homicide because pregnancy is unique. Roe v. Wade argued that fetuses do not have the same value as born humans. Roe v. Wade also pointed out that, as a legal matter, fetuses have not been treated like born human life and abortion has not been punished like homicide. Placing less explicit stress on the different valuation of fetal from born life, the German dissent argued that abortion must be treated differently from homicide because, unlike any other type of killing, the unique unity between the potential perpetrator and victim during pregnancy has two consequences. First, it imposes burdens on the pregnant woman beyond simply forgoing an act. Second, it provides the best protection to the fetus from the pregnant woman, who can be encouraged to sustain that protection most appropriately by means other than penal sanctions.

The German majority had in common with both Roe v. Wade and the German dissent the view that penal law separates the state from society. However, while Roe v. Wade and the German dissent feared arbitrariness in the state’s use of penal laws, the German majority thought that penal law performs a positive moral function of the state: teaching the populace right from wrong. On this point, the dissent responded that in the case of abortion the problem with penal law acting as a moral

469. 410 U.S. at 153-54, 159, 162-65.
470. 39 BVerfGE at 76. Cf. id. at 42, 47.
471. See id. at 42-43, 47-48.
473. See supra text accompanying notes 260-268.
476. See supra text accompanying notes 23, 161-162.
477. 39 BVerfGE at 79-80.
478. Id. at 79.
479. Id. at 79-80.
480. Id. at 53, 57-58.
teacher is its arbitrariness in practice.\textsuperscript{481} Prosecutions of abortions were carried out irregularly at best, and punishment, when imposed, was mild.\textsuperscript{482} Thus, the punishment of abortion in practice bore little relationship to the important theoretical role the majority gave to the idea of such punishment.\textsuperscript{483}

The German majority, in turn, directed criticism at the German dissent's acceptance of the elimination of penal sanctions for an act still categorized as a crime. Eliminating the punishment for abortion altogether, according to the majority, eliminated the state's moral condemnation of that prohibited act.\textsuperscript{484} The dissent, of course, disagreed that removing penal sanctions means approval,\textsuperscript{485} or that disapproval for its own sake regardless of its effect is constitutionally mandated.\textsuperscript{486} However, as the comparison with \textit{Roe v. Wade} suggests, the German dissent's rationale for why abortion should not be subject to penal sanctions actually did much of the work for showing why abortion should be a right.

VI. THE ROLE OF EQUALITY

A. The Elitist View of Equality: The German Majority

In liberalism, the fear of arbitrariness is complemented by a commitment to equality before the law. Equality before the law requires that legislatures pass general laws that treat people equally by not arbitrarily discriminating.\textsuperscript{487} Although all three abortion opinions focused on the fear of arbitrariness by decision-makers more than in the law, the two German opinions also expressed a commitment to equal laws. However, their views towards equality and arbitrary discrimination were very different. The German majority conceived of an equality in the ideal realm of the state. The German dissent conceived of an equality in the practi-

\textsuperscript{481} Id. at 82-83, 87-88, 90-91.  
\textsuperscript{482} Id. at 82-83.  
\textsuperscript{483} The German majority did not require the legislature to punish abortion like homicide, \textit{id.} at 45, but never explained why punishing the killing of a fetus differently from the killing of a born person does not value fetal life differently from born life. \textit{Cf.} Roe v. Wade, 410 U.S. 113, 130, 132, 134-36, 138-39, 140 n.37 (1973), which may be read to suggest that the types of penal sanctions that historically have been imposed on abortion indicate that the value of fetal life increases as pregnancy progresses.  
\textsuperscript{484} 39 BVerfGE 53-54, 57-58. Some language in the majority could be construed to mean that the legislature could, in theory at least, forego penal sanctions if an equally effective legal sanction were available. \textit{See id.} at 47, 51. The majority, however, never suggests how that might be possible, but dwells exclusively on why it is not the case.  
\textsuperscript{485} Id. at 92-93.  
\textsuperscript{486} Id. at 93-94.  
\textsuperscript{487} \textit{See} Neumann, supra note 51, at 908-10; R. Dahrendorf, supra note 46, at 66-69; W. Friedman, supra note 46, at 422-24; R. Unger, supra note 46, at 53-54.
Abortion and Liberalism

The German majority’s notion of equality was inherent in its notion of abstract individuality.\textsuperscript{488} Abstract individuality includes a notion of equality because individuality, according to the majority, begins with life upon implantation, ends with death, and is of equal value from beginning to end.\textsuperscript{489} Since all individuals are equal before the state, the state must protect their lives with equal effectiveness before and after birth\textsuperscript{490} (even if not always by the same means\textsuperscript{491}). In other words, the state may not arbitrarily discriminate against fetal life by protecting it less effectively than other human life. Furthermore, whatever its practical coverage, the penal law effectuating the protection of fetal life binds everyone equally.\textsuperscript{492} In short, the majority was not concerned with practical equality in society, but rather with abstract equality before the state regardless of social circumstances.

The majority’s concern with abstract equality represented a notion of formal equality—the principle that laws should be general and should treat people as fundamentally equal, regardless of social position or economic inequalities.\textsuperscript{493} Formal equality does not inevitably lead to the majority’s abstract definition of individuality. The majority’s notion of formal equality, including its peculiar definition of abstract individuality, reflected the thinking of the German bureaucracy, with its views of neutrality and universality, as well as of German legal scientists.

Under German authoritarian liberalism, the institution that protected the rule of law and thereby ensured the economic interests of the German middle class was bureaucratic rather than democratic.\textsuperscript{494} The bureaucracy perceived itself as standing neutrally above political controversy and serving the universal public interest.\textsuperscript{495} In promoting the rule of law in aid of centralizing a German state under the Prussian monarch, the bureaucracy promoted neutral and universal rules. These rules, by

\textsuperscript{488} See supra text accompanying notes 340-345.

\textsuperscript{489} 39 BVerfGE at 37, 59. See also id. at 40.

\textsuperscript{490} See id. at 41, 42, 43. Cf. id. at 79, 80-81.

\textsuperscript{491} Id. at 45-46.

\textsuperscript{492} Id. at 57.

\textsuperscript{493} See R. Unger, supra note 49, at 151. See also Neumann, supra note 51, at 907-08, 910. The German majority’s notion of formal equality is related to a religious notion of equality that everyone is equal before God regardless of social circumstances. See R. Unger, supra note 46, at 79-80, 165; R. Unger, supra note 49, at 161.

\textsuperscript{494} R. Unger, supra note 46, at 165, 178. See also J. Sheehan, supra note 179, at 35-36.

\textsuperscript{495} R. Unger, supra note 46, at 165-66, 179, 184-85.
being general and systematic, provided the dependability and predictability needed for rational economic decision-making. Complementing the bureaucracy’s self-image of neutral service of universal interests, adherents of German legal science in the universities believed that jurists, not legislators, manifested popular consciousness, and that they did so by using historical sources of laws to formulate technical legal principles.

In keeping with this bureaucratic and legal scientific view of the rule of law, the German majority presented its notion of formal equality as expressing universal interests and reflecting neutrality. In expressing universal interests, formal equality protects all citizens and human life, including fetuses. In reflecting neutrality, formal equality leads rather than follows the general consciousness of the law.

The bureaucracy and German legal scientists were elite groups. The notions that universal values were announced neutrally above political controversy by the bureaucracy itself and that law was revealed not through democracy but through the legal scholarship of German legal scientists reflected an elitist view. This was a hierarchical and therefore anti-egalitarian view. In a hierarchy, the position of people vis-à-vis each other is not horizontal, in terms of equal social rights, but rather vertical, in terms of dependencies, with obligations running to those above and privileges prevailing over those below. Although by advancing the economic interests of the German middle class, the bureaucracy liberated the middle class from hierarchy, it did so economically. In serving the monarchy, idealizing the state, and depoliticizing the individual, the German civil servant class supported hierarchical and anti-egalitarian thinking about politics and society. This hierarchical and anti-egalitarian thinking left its imprint on the German majority, for the majority’s reasoning by synthesis, with its authoritarian and anti-democratic aspects, is, in fact, a form of hierarchical thinking.

The German majority’s notion of equality was closely linked to its

496. Id. at 184-87. See also L. KRIEGER, supra note 76, at 19-20; F. NEUMANN, supra note 46, at 40-43, 89, 202.
498. See supra text accompanying notes 344-345.
500. H. HOLBORN, supra note 183, at 11; J. SHEEHAN, supra note 179, at 20-21, 239.
501. See R. UNGER, supra note 46, at 190.
502. See id. at 170-73.
503. See Id. at 185-86.
504. See id.
anti-egalitarian hierarchical thinking. The reason is that the most likely consequences of equating all fetal life with born life are the requirement that a pregnant woman carry a pregnancy to term and the view that a pregnant woman's obligation to carry a pregnancy to term is natural. Thus, the majority not only required a pregnant woman to carry a pregnancy to term, but also referred to "natural maternal obligations" and the importance of "reawakening the maternal will to protect the fetus where it has been lost..." This reference to a pregnant woman's natural maternal obligations to protect a fetus reflects hierarchical thinking. By referring to the pregnant woman's obligations as maternal, the majority indicated that a pregnant woman has a proper role, namely as a mother; in referring to those maternal obligations as natural, the majority derived from the natural phenomena of pregnancy the social role of a parent; and in referring to the obligation in the first place, the majority based a pregnant woman's "natural maternal" role on a dependency, namely of the fetus on the pregnant woman. Thus, in keeping with the anti-egalitarian thinking of the German civil servant class, the majority put hierarchical dependencies before equal social rights and treated those dependencies as natural obligations rather than social conventions.

506. Id. at 45.
507. The German majority's view of motherhood derives from an historically conservative view of motherhood, which complements the world view of German authoritarian liberalism. See supra text accompanying notes 177-205. For example, proponents of Mother's Day during the Weimar Republic wanted to strengthen the will of women to strive for the ideal virtues of motherhood and to raise the consciousness of women to their maternal responsibilities and duties. The Mother's Day proponents wanted to do these things in order to reunite the community and nation against the divisive democratic party politics of Weimar and the disintegration and destructiveness caused by industrialization. Hausen, Mother's Day in the Weimar Republic in When Biology Became Destiny: Women in Weimar and Nazi Germany, supra note 389, at 140-41.
508. In light of the German majority's views on hierarchy, nature, and society, one might surmise that, for the majority, abortion represented doctors' artificial intrusion into and interruption of the natural process of pregnancy; one might further surmise that abortion represented the danger of the arbitrary power of those in society who would take control of nature and thereby upset the balance in nature and hierarchy. These surmises would be in keeping with the majority's previously discussed hermeneutic reasoning, as characteristic of German legal science, which looked for answers in texts and purely legal phenomena and values, rather than the experimentation underlying scientific inquiry and technological innovation. See supra text accompanying notes 212-214. These surmises also deepen the contrast between the German majority's and Roe v. Wade's views on doctors. Roe v. Wade's positive view was partly attributable to its confidence in medicine as a science that has positive effects in society. Thus, Roe v. Wade stressed that only medical advances have made abortions safe and safe abortions potentially easily available, 410 U.S. 113, 148-51, 163 (1973); id. at 216-17 (Douglas, J., concurring), and that medical knowledge has contributed to the doubt concerning when human
In advancing German authoritarian liberalism's closely linked notions of formal equality and hierarchical inequality, the majority made clear who might legitimately exercise discretion: the elite that could carry forward such thinking into post-war Germany. On the one hand, carrying forward this form of thinking was not surprising, since the civil servant class continued to exist. Whatever else might have been "Westernized," or "Americanized," in post-Nazi Germany, both the bureaucracy and the university system remained intact, as did the structure and training of the legal profession. On the other hand, carrying forward the civil servant class's thinking was striking because of the new post-war circumstances. The monarchy, which had provided the last political model for hierarchical thinking, had disappeared in 1918 and was replaced, after 1949, by a new democracy. The German middle class, which once had been weak and dependent upon the monarchy, became strong and politically independent.

In light of these post-war circumstances, the German majority's perpetuating an authoritarian form of thought rooted in the civil servant class is politically significant. The majority tried to perpetuate hierarchical values by tying them to the new institution of the BVerfG, rather than the demised monarchy. Although West Germany's constitutional structure was largely shaped by classical liberalism, the Basic Law was still open to interpretations shaped by German authoritarian liberalism. While in the eighteenth and nineteenth centuries the German civil servant class developed German authoritarian liberalism in an attempt to render freedom compatible with the institutional structure of the authoritarian state, in post-war Germany the majority tried to render the idea of freedom of German authoritarian liberalism compatible with the institutional structure of West Germany's democracy.

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511. The German majority's perpetuating an authoritarian form of thought rooted in the civil servant class is also socially significant. The majority tried to perpetuate hierarchical values by way of the family. With the collapse of other hierarchies in face of industrialization and democratization, one of the best places for perpetuating hierarchical values might be the family, for the family is too strong a social institution to crumble quickly and its dependency relationships persist more tenaciously than others in modern industrial society.
B. A Concern About Social Inequality: The German Dissent

The German dissent was concerned that equality before the state be not only abstract, as the German majority stressed, but also real. That is, the dissent was concerned, first, that the state should treat people equally in fact and, second, that the state's treatment should affect people in society equally, largely by eliminating social inequality. The dissent feared that striking down the Abortion Reform Act and reinstating the previous law would undermine the values of equality.

The German dissent's commitment to the state's equal treatment of people appeared in three places. First, the dissent explained that the fetus deserves equal treatment by the state. Thus, as a potential citizen, the fetus must be protected like born persons against infringements from the state, even if not from pregnant women. Second, the dissent found that the social indication, or exception, to the prohibition against abortion is not amenable to definition by objective and uniform criteria. As a result, the official interpretation of the social indication is prone to wide variation depending upon region and the personal predilections of different judges and experts. The result would be legal inequality for the women affected and the doctors involved.

Finally, the dissent found that the state's prosecution under the previous abortion law, which became a matter of pure chance, resulted in unequal and arbitrary treatment. Despite the high number of illegal abortions, prosecutions were rare and convictions even rarer, and the punishments imposed were usually monetary fines or probation. The notion of equality contained in this criticism of chance prosecution is highlighted in the context of West Germany's "legality principle." In contrast to the principle of prosecutorial discretion in the United States, the legality principle in West Germany is a rule of compulsory prosecution, forbidding the prosecutor the discretion not to prosecute when adequate incriminating evidence is available. The legality principle is one

513. Id. Cf. id. at 80-81.
514. Id. at 91.
515. Id.
516. Id. at 82-83. Cf. Roe v. Wade, 410 U.S. 113, 208 (1973) (Burger, C.J., concurring) ("In the face of a rigid and narrow statute... no one in these circumstances should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion.").
517. 39 BVerfGE at 82.
of equality, for the prosecutor's duty to prosecute all legal transgressions manifests the state's even-handed treatment of all people.\textsuperscript{519}

In expressing concern that the state had not treated people equally in enforcing the old abortion law and could not treat people equally in enforcing any indications abortion law, the German dissent was also expressing concern that such laws would have an unequal impact on the access of different women to abortion. Such an unequal impact results not only from unequal treatment by the state, but also from social inequality. Thus, the dissent objected to the social inequality connected with the commercial exploitation of women seeking illegal abortions: wealthier women could more easily procure an abortion performed by a doctor in a safe setting, often by going abroad.\textsuperscript{520} The dissent also found that economic and social circumstances are at the root of conflict situations leading a woman to decide to have an abortion.\textsuperscript{521} Women often fear that the economic and social burdens of parenthood will fall upon them alone.\textsuperscript{522} However, the dissent thought, the unfortunate results of economic and social inequality cannot be prevented by punishing its victims, that is, the pregnant women driven to have abortions. Rather, the inequality can be lessened and the reasons for the abortions removed only by providing these women with effective social assistance.\textsuperscript{523} Thus, the dissent's concern with social inequality merged into its commitment to freedom within a free social state. In a free social state social measures effectuate basic rights, thereby advancing freedom and securing social justice.\textsuperscript{524}

\textsuperscript{519} Hermann, supra note 518, at 470-72; Langbein, supra note 518, at 449; Schram, \textit{The Obligation to Prosecute in West Germany}, 17 AM. J. COMP. L. 627, 630 (1969).


\textsuperscript{521} 39 BVerfGE at 83.

\textsuperscript{522} \textit{Id.} at 84.

\textsuperscript{523} \textit{Id.} at 84, 86.

\textsuperscript{524} \textit{Id.} at 71-72, 85, 87. The German dissent's theme that the state must take effective social assistance measures to remove the effects of economic and social inequality also appears in Justice Brennan's dissent in \textit{Harris v. McRae}, 448 U.S. 297 (1980). In \textit{Harris v. McRae} the Supreme Court upheld the Hyde Amendment, which limited federal funds for abortions, even medically necessary ones. In dissent, Justice Brennan made essentially the same argument as the German dissent — if one ignores the fact that Justice Brennan assumed a right to abortion, while the German dissent did not — namely that the state could influence a woman's decision whether to have an abortion as much through social policy as penal sanctions. Thus Justice Brennan wrote, "[T]he discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions." \textit{Id.} at 334 (Brennan, J., dissenting).
Thus, the German dissent's notion of equality encompassed notions of equal treatment by the state, equal effects of state law, and the state's obligation to eliminate social inequality. In expecting the state to treat fetuses equally to born people, the dissent articulated a notion of formal equality not very different from the German majority's. In objecting to the arbitrary enforcement of laws by random prosecutions, as well as to the unequal application of law in different regions and by different judges, the dissent expressed its notion of equality in terms of the legality principle and, thereby, parliamentary supremacy. The legality principle is an aspect of parliamentary supremacy since it requires that general laws passed by the legislature govern criminal prosecutions, not the discretionary acts of state officials. In objecting to social inequality and expecting the state to counteract it, the dissent reflected the tradition of social democracy. At this juncture, the dissent's notion of equality merged into a notion of inequality, for getting rid of social inequality requires the state to take positive action that treats people in different situations differently. In fact, this notion of inequality—a commitment to basic rights advanced by social measures to eliminate social inequality—is really another side of the dissent's view of an equity of necessity broadly defined. Equity mitigates the rigors of formal equality.

C. Discounting the Equality Issue in Abortion: Roe v. Wade

Roe v. Wade did not share the notion of equality in either German opinion. In reasoning by analysis, Roe v. Wade rejected the German majority's notion that fetal life can be valued equally throughout pregnancy. To the contrary, Roe v. Wade insisted that fetal life may be valued differently at different stages of pregnancy and must be valued differently from born life. Like the German dissent, Roe v. Wade encouraged national

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*See also id. at 333 ("[I]t is not simply the woman's indigency that interferes with her freedom of choice, but the combination of her own poverty and the Government's unequal subsidization of abortion and childbirth."). Cf. Neumann, supra note 51, at 930 (the application of socio-economic sanctions are increasingly undermining personal rights).*

525. 39 BVerfGE at 79.
526. Id. at 82-83.
527. Id. at 91.
528. Hermann, supra note 518, at 470.
529. Neumann, supra note 51, at 931; R. Unger, supra note 46, at 81; R. Unger, supra note 49, at 175; U. Wesel, supra note 497, at 97.
530. See supra text accompanying notes 420-423.
532. 410 U.S. 113, 154, 157-58, 157-58 n.54, 160-65 (1973). See also id. at 218 (Douglas, J., concurring); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747,
uniformity in abortion law—by striking down the laws of all fifty states and setting standards for all revised abortion laws.\textsuperscript{333} However, unlike the German dissent, \textit{Roe v. Wade} was not overly concerned with social equality. \textit{Roe v. Wade} did not rely on a language of equality, nor did it seem motivated by a concern about discriminatory prosecution\textsuperscript{534} or the impact of abortion laws on women of different social circumstances. Quite simply, the holding in \textit{Roe v. Wade} was not based in any way on equal protection of the law.\textsuperscript{535} The principle underlying \textit{Roe v. Wade}'s right to abortion is privacy. A positive notion of equality in \textit{Roe v. Wade} is hard to find.\textsuperscript{536}

\textbf{D. Inequality and Ideology: The Three Opinions}

All three opinions reflected notions of inequality. The notions of inequality reflected hierarchical thinking in the German majority, social democratic thinking in the German dissent, and individualistic thinking in \textit{Roe v. Wade}. In terms of liberalism, the hierarchical thinking of the German majority manifested a pre-liberal dimension; the social democratic thinking of the German dissent manifested a post-liberal dimension; and the individualistic thinking of \textit{Roe v. Wade} manifested liberalism \textit{par excellence}. Furthermore, the respective notions of inequality show that each opinion included a class dimension. The German majority articulated the world view of a bureaucratic and academic civil servant class;\textsuperscript{537} \textit{Roe v. Wade} represented the world view of the middle and upper classes by reflecting an ideology of medical professionalism;\textsuperscript{538}


\textsuperscript{333} See 410 U.S. at 113, 139-40, 140 n.37. See also Doe v. Bolton, 410 U.S. 179, 200 (1973).

\textsuperscript{334} But \textit{cf.} 410 U.S. at 208 (Burger, C.J., concurring).

\textsuperscript{335} See Doe v. Bolton, 410 U.S. at 200-01. See also Harris v. McRae, 448 U.S. 297 (1980) (the denial of Medicaid benefits for abortions, including medically necessary ones, does not violate the equal protection of the laws even though its principal impact falls on the indigent); Maher v. Roe, 432 U.S. 464 (1977) (a state participating in the Medicaid program may pay expenses incident to childbirth but not incident to nontherapeutic abortions without violating the equal protection of the laws).

\textsuperscript{336} Why did \textit{Roe v. Wade} not deal with the issue of equality before the law? Perhaps the answer lay in the way \textit{Roe v. Wade} dealt with the origin of individual rights. Concluding that more and more rights may be associated with the fetus as it develops, but that the rights of a person appear in full only upon birth, \textit{Roe v. Wade} did not go on to discuss rights appearing upon birth since the abortion problem as such disappears then. But it is upon the appearance of a person with full rights that equal protection of the law comes into play. In a liberal state, equal rights appear with individual rights.

\textsuperscript{337} See \textit{ supra} text accompanying notes 191-199, 206-224, 494-504.

\textsuperscript{338} See \textit{ supra} text accompanying notes 442-443, 447, 450, 453, 455, 457. Of course, \textit{Roe v. Wade} should not be reduced to nothing more than a reflection of an ideology of medical pro-
and the German dissent took into consideration the interests of the lower classes.\footnote{539}

The class-based dimension in each opinion is noteworthy because it indicates how well each opinion lived up to the liberal promise that the state should accommodate a range of views without discriminatorily advancing the interests of particular groups. In this regard, \textit{Roe v. Wade} and the German majority shared one class-related attitude toward equality: a disregard of social inequality, that is, an inattention to the needs of the lower classes. In reflecting the ideology of the German civil servant class, the majority reflected its weak social ethic, which disregarded the social circumstances of lower classes.\footnote{540} In promoting an ideology of professionalism and privacy, \textit{Roe v. Wade} addressed the needs of members of the the middle and upper classes, who probably had their own personal physicians, but not the needs of the lower classes, who probably did not.\footnote{541} This aspect of \textit{Roe v. Wade} is confirmed by the Supreme
Court's later decisions in the abortion funding cases, which essentially secured the right to abortion only for those who could afford it. Thus, the German dissent's criticism of the majority applies to Roe v. Wade as well: the practical consequence of each opinion is that the middle class and rich, but not poor, would be assured effective access to safe abortion. In contrast to the German majority and Roe v. Wade, the German dissent paid attention to the needs and values of the lower classes by linking freedom to socio-economic conditions.

The opinions presented the views and interests of particular social classes in a language of liberalism—that is, in a language expressing particular class-based views and interests that provide neutral standards for everyone and represent the essence of freedom. The German majority used a language of liberalism to articulate the views of a narrow, even atavistic elite, Roe v. Wade to articulate the views of the middle and upper classes whose interests have been historically advanced by liberalism, and the German dissent to articulate the views of the widest range of classes, including but not limited to the lower classes.

E. Social Economic Climate: United States and West Germany

The abortion opinions were handed down in the mid-1970s after a decade of social and political upheaval, including a war in Vietnam, student protest, demands by various groups for more rights, and criminal law reforms. In defining different ranges of permissible abortion by using different types of legal reasoning and by striking different balances between rules and discretion, each opinion tried to assure equilibrium and stability in the face of such upheaval. In falling back upon German authoritarian liberalism of the German civil servant class, the German majority rejected such upheaval by asserting an ideology of unchanging authority and a paternalism that would assure that the hierarchical fam-

542. See supra note 437.
543. This paragraph has suggested that Roe v. Wade and the German majority converge in their practical effect on the pace of change in abortion law. Roe v. Wade gave an impetus to change in U.S. abortion law, but was followed by some cases slowing the pace, see supra notes 437, 461, 524, 535, 552, while the German decision set restraints on change in West German abortion law, but was followed by a redrafted abortion reform law that was still more liberal than the prereform law. See supra note 419. Thus, Roe v. Wade might well have provided a surge of energy that was quickly exhausted, while the German majority established boundaries that were pushed to their limits.
544. See supra text accompanying notes 165, 173, 382, 428-433, 520-524 and note 225.
545. The narrow class basis of the German majority is highlighted if, as is my impression, the range of views towards abortion in society as a whole is actually similar in the U.S. and West Germany. Compare R. PETCHESKY, supra note 69, with G. KRAIKER, supra note 174.
ily would remain a model for political authority. In turning to a classical liberalism of judicial review with an emphasis on medical professionalism, Roe v. Wade strove for stability by setting forth a model of health for what some had called a "sick" society. In turning to a classical liberalism of parliamentary supremacy incorporating social democracy, which took into account the needs of the lower classes, the German dissent aimed at preserving stability by encouraging new laws to adjust to socio-economic change as it affects a wide range of people.

VII. CONCLUSION: SEARCHING FOR AN OPTIMAL RIGHT TO ABORTION

A. The Nature of the Individual

The three abortion opinions defined different ranges of permissible abortion because they held different views of freedom. These views of freedom involved different complementary notions of the state and the individual. Committed, at least in part, to liberalism, all three opinions expressed the belief that the state must protect the individual. As with perhaps no other issue, however, abortion poses the problem of how to define the individual receiving the state's protection. The opinions found the essence of individuality in either the fetus or the woman. They did so by conceiving of the individual in terms of either theory or reality and of either passivity or action. Thus, the German majority, within the tradition of German authoritarian liberalism, viewed the fetus, no matter what its stage of development, as a person in theory, and viewed the pregnant woman, usually regardless of her circumstances, as having to accept her plight passively. Roe v. Wade and the German dissent, within the tradition of classical liberalism, viewed the pregnant woman as shaping her own future actively and recognized reality as changing, whether during a fetus's biological development or a society's development. The different types of individuals protected by the state were complemented by the type of liberal state providing the protection — by the theoretically moral state in the German majority, by the active state in the German dissent, and from the potentially dangerous state in Roe v. Wade.

B. Autonomy and Alienation

In order to compare the three opinions, this Article has looked at the nature of the state, the nature of the individual and individual rights,

546. Cf. Judgment of July 29, 1959, Bundesverfassungsgericht, W. Ger., 10 BVerfGE 59 (1959) (finding invalid the provision of the federal family law giving the husband and father the ultimate power to decide matters concerning the control of children).
and the extent to which the state may prohibit or permit abortion. It has not focused on the link between individual rights in general and the right to abortion in particular. Since the German opinions, especially the majority, defined abortion as a crime, different possible forms of a right to abortion have not been compared. However, the German opinions' belief in the state's responsibility to limit abortion need not prevent the continued use of a comparative perspective to inquire into the nature of a right to abortion. Roe v. Wade does not exhaust the possibilities of a right to abortion. Thus, one might ask whether and to what extent views towards freedom from either German opinion might be incorporated into Roe v. Wade's right to abortion. More generally, one might ask what the three opinions' different views towards liberal freedom might suggest for securing an optimal right to abortion.

To determine how Roe v. Wade's right to abortion could be enhanced by views towards freedom contained in either German opinion, one must first determine the limitations of Roe v. Wade. At its core, Roe v. Wade's right to abortion is a right of privacy. Privacy is an ambiguous concept. On the one hand, it respects individual self-determination; on the other hand, it ignores social isolation. Thus, in keeping with its commitment to juristic freedom, Roe v. Wade appreciated the value of individual autonomy. However, this appreciation was also a preoccupation that prevented Roe v. Wade from recognizing autonomy's negative flipside: alienation. Autonomy and alienation have the same basis in society: the separateness of each individual from his or her surroundings and from others. In considering such separateness of individuals, Roe v. Wade valued autonomy by respecting the independence of each woman from the state, but disregarded alienation by ignoring the poten-

547. See 410 U.S. 113, 152-53, 159 (1973); id. at 169-70 (Stewart, J., concurring); id. at 211-13 (Douglas, J., concurring).
548. See generally R. PETCHESKY, supra note 69, at 3-4 (“While privacy ... has a distinctly negative connotation that is exclusionary and asocial ... it also has a positive sense that roughly coincides with the notion of 'individual self-determination.' ”).
549. See supra note 332 and text accompanying notes 256, 333-337, 346-347.
551. See generally 410 U.S. at 213 (Douglas, J., concurring) (“This right of privacy was called by Mr. Justice Brandeis the right 'to be let alone.' ”). Roe v. Wade's preoccupation with autonomy is reinforced, not undermined, by the Supreme Court's later abortion cases dealing with the consent of or notice to parents of minors seeking abortions. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Supreme Court invalidated a parental consent requirement as a condition for a minor's abortion. It did so on the grounds that "the State does not have the authority to give to a third person an absolute and possibly arbitrary veto over the decision of the physician and his patient to terminate the patient's pregnancy . . . ." Id. at 74. The autonomy point is further reinforced in later cases, which evaluated parental consent or notifi-
tial isolation of each woman from those around her in society. In fact, the Court's preoccupation with a woman's autonomy might have diverted attention from her alienation. Indeed, the abortion cases following *Roe v. Wade* put the pregnant woman's right to choose to have an abortion without state interference side by side with a disregard of a pregnant woman's need for social support from her surroundings. Thus, after separating individual women into self-contained autonomous entities, *Roe v. Wade* and later Supreme Court abortion cases left them isolated and alienated, abandoned to tackle as best they could their plight in a complicated society.

Neither of the two German opinions shared *Roe v. Wade*’s refined

cation requirements largely in terms of whether the particular minor is mature, i.e., whether she could act autonomously. See *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion) (invalidating a statute permitting judicial authorization for an abortion to be withheld even from a minor found by the court to be mature and fully competent to make the abortion decision independently); *H.L. v. Matheson*, 450 U.S. 398 (1981) (a statute requiring parental notice—without allowing a parental veto—of a daughter's abortion decision does not violate the constitutional rights of an immature dependent minor); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) (a law requiring an immature minor to secure either parental or judicial consent for an abortion is not unconstitutional); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (an ordinance making a blanket determination that all minors under age fifteen are too immature to make an abortion decision or that an abortion never may be in the minor's best interest without parental approval is unconstitutional because not reasonably susceptible of being construed to create an opportunity for case-by-case evaluation of the maturity of pregnant minors).

552. The statement in the text is not contradicted by *Roe v. Wade*’s statement that "[t]he pregnant woman cannot be isolated in her privacy," 410 U.S. at 159, since that isolation is posited in contrast to the compelling state interests that might qualify the woman's abortion right to privacy. See id.; supra text accompanying notes 8-12. See also Neumann, supra note 51, at 927-32. *Roe v. Wade* did try to overcome the alienation of a pregnant woman by linking her right to abortion to her physician's right to practice medicine, i.e., by encouraging private consultation between the pregnant woman and her physician. See supra text accompanying notes 442-443, 447, 450, 453, 455, 457. Furthermore, abortion cases following *Roe v. Wade* tried to overcome the alienation of an immature minor pregnant woman by encouraging consultation with her parents. See supra note 551. However, as pointed out earlier, the notion of private consultation between physician and patient is largely a middle-class myth that does not apply to the poor. See supra text accompanying notes 541-542. On encouraging an immature minor pregnant woman's consultation with her parents, Justice Marshall has argued that the criminal justice machinery of the state is unlikely to resurrect parental authority that the parents themselves are unable to preserve. See *H.L. v. Matheson*, 450 U.S. at 436-41, 445-54 (Marshall, J., dissenting). See also *Planned Parenthood v. Danforth*, 428 U.S. at 75. Cf. L. TRIBE, supra note 387, at 988 ("Once the State . . . has 'liberated' the child—and the adult—from the shackles of such intermediate groups as the family, what is to defend the individual against the combined tyranny of the state and her own alienation?"). Of course, the Supreme Court's general disregard of the problem of alienation in defining a right to abortion is not so bad as the problem of alienation in illegal abortions. See generally L. GORDON, supra note 457, at 52; R. PETCHESKY, supra note 69, at 156.

553. See cases cited supra notes 437, 440, 461, 524, 535, 551.
understanding of individual autonomy. However, each of the German opinions expressed concern about the problem of alienation. They did so by viewing freedom not just as an issue of separate isolated individuals, but of individuals bonded to others within a community. The German majority overcame alienation by positing a community of shared values. In such a community, penal law protects elementary values and raises the populace's consciousness of the law, and counseling motivates pregnant women to forego abortions. The state's protection of freedom by using penal law as a moral example for bettering social behavior and values reflected an idealized view of the state and a negative view of society. Rejecting that view, the German dissent found that legal consciousness and authority was undermined by empty penal threats. For the dissent, alienation is overcome not by penal threats, which keep pregnant women in the isolation that drives them to abortions in the first place, but by helping pregnant women overcome their difficulties by opening up contacts with their surroundings, namely by providing effective assistance. In light of these two approaches to overcoming alienation, the question of whether and to what extent views on freedom from either German opinion might be incorporated into Roe v. Wade’s right to abortion may be restated as the question of whether it is possible, or desirable, to integrate either German opinion’s views of alienation with Roe v. Wade’s view of autonomy.

554. Justice Stevens’ statement that “[i]t is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign . . . .” Bellotti v. Baird, 443 U.S. at 655 (Stevens, J., concurring), sparks the thought that the two German opinions shared a notion of privacy pertaining to abortion to the extent that the abortions they permitted were removed from state involvement. The German majority's theory of exceptions kept the state separated from any involvement in abortion, see supra text accompanying notes 393-401, and the German dissent always would have forbidden the state's participation in abortion. See supra text accompanying notes 512-513. If the state's distancing itself from any act of abortion itself includes a notion of privacy, that notion of privacy in the German opinions has nothing to do with the state's neutrality toward a woman's decision to have an abortion, for both German opinions found that the state must try to discourage a woman from having an abortion. See supra. It is the state's involvement in a woman's decision to have an abortion that the paragraph in the text addresses.


557. Id. at 53-58, 66.

558. Id. at 61-64. On the Supreme Court's rejection of state counseling, see supra note 440.

559. 39 BVerfGE at 83-84, 90.

560. Id. at 85-88.

561. Id. at 85-86, 87-88.
C. The Weakness in the German Majority's View of Freedom

The German majority's view of freedom is incompatible with Roe v. Wade's view. While both the German majority and Roe v. Wade separated the state from society, the German majority, which, unlike Roe v. Wade, viewed the state positively and society negatively, dealt with social alienation at the expense of individual autonomy. Whereas Roe v. Wade, by locating freedom within society, recognized autonomy and ignored alienation, the German majority, by locating freedom in the state, recognized alienation and denied autonomy. By locating freedom in the state, the German majority placed only minimal weight on an individual woman's personal values, practical realities, or moral responsibility. The majority viewed a woman, in terms of both her control over her own body and her political participation, as preferably passive, that is, nonautonomous. Thus, the majority was able to recognize social alienation only by distrusting society, removing freedom from it, and defining freedom as a characteristic of an ideal state. While denying autonomy, the majority's proposed solution to alienation was a smoke screen: the bonds the majority thought should hold a community together were simply imposed from above, reflecting the narrowly class-based values from an age of hierarchy. As a substitute for the communal bonds that the majority wished were in society, the majority simply offered the fear of penal sanctions.

The German majority's view of freedom serves as a warning on the

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562. For example, the German majority's view of motherhood as natural, see supra text accompanying notes 505-508, denies a woman's autonomy. See generally R. Petchesky, supra note 69, at 373 (referring to the denial of women's claims to individualism for the sake of "a biological or spiritual determinism that relegates them to the realm of nature rather than autonomous will."). One might also detect a denial of a woman's autonomy in the absence of any exploration of the proportionality of a woman's act in aborting and the appropriate punishment. If abortion really is the taking of a full human life, as the German majority insists, why should not a woman, if she is autonomous, not be punished severely for the act?

563. 39 BVerfGE at 48-51. See supra text accompanying notes 100, 118, 348, 371-374, 505-508.

564. 39 BVerfGE at 48-51. See supra text accompanying notes 100, 118, 348, 371-374, 505-508.

565. The German majority's very use of the word "Gemeinschaft" for community, 39 BVerfGE at 46, 48, 57, illustrates the influence of German authoritarian liberalism, for historically German conservatives used the word "Gemeinschaft" positively, and in contrast to the negative connotations of the German word for society: "Gesellschaft." See R. Dahrendorf, supra note 46, at 120-22, 13; G. Mosse, supra note 200, at 36, 121-22.

566. See 39 BVerfGE at 45-47, 55, 57, 65-66. See also R. Unger, supra note 49, at 75. Cf. id. at 305 ("The idea that the disintegration of community makes fear the supreme social bond occurs in the history of conservative attacks on liberalism."). For a viewpoint that finds that the German majority reconciled liberty and community in a way that should serve as a model for the Supreme Court, see Kommers, supra note 3, at 371.
nature of attempts to overturn *Roe v. Wade*. The attacks on *Roe v. Wade* in large part manifest authoritarian premises similar to the German majority’s efforts to place morality in the state and its scorn of society. As in the German majority, the attacks on *Roe v. Wade* in large part show no respect for the legitimacy of other viewpoints, show no understanding for the possibility of moral uncertainty, pay no attention to the needs of a variety of women, and include no commitment to social justice.

D. The Potential in the German Dissent’s View of Freedom

In taking a positive view toward society, the German dissent had more in common with *Roe v. Wade* than the German majority. The dissent’s acceptance of a narrower range of permissible abortions than *Roe v. Wade* allowed was, at least in part, an accident of the formal legal posture of the issues presented to the BVerfG. Applying the dissent’s view towards freedom to a right to abortion suggests a more socially just right than the right established by *Roe v. Wade*. The right, quite simply, would be a broadly based one garnering state support. Its value would emerge from the dissent’s recognition that within society autonomy and alienation exist side by side, and from the dissent’s resulting attempt to construct a notion of freedom that could preserve individual autonomy while overcoming social alienation. Such a notion of freedom would have to protect individual autonomy, as in *Roe v. Wade*, and also build the bonds of a community. The bonds of the community, however, would not be the spiritual bonds reflecting the narrowly class-based values from an age of hierarchy, as in the German majority, but rather socially based bonds in a modern democratic welfare state.

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567. Although the authoritarian premises in the German majority and attacks on *Roe v. Wade* are similar, the historical origins of those authoritarian premises are not. The German majority has origins in a hierarchical past with no parallel in the United States.


570. *See generally 39 BVerfGE at 85-88*. The statement in the text is also supported by the dissent’s view of defensive rights being protected by the BVerfG and an objective ordering of values being advanced by the legislature. *See id.* at 70-73. This view was an attempt to integrate the promotion of autonomy through defensive rights—reflecting a positive view of society with a negative view of the state—with a rejection of alienation through an objective ordering of values—reflecting a positive view of both society and the state (insofar as the state, through the legislature, becomes an organ of society).

571. In its views of defensive rights and the objective ordering of values, the dissent found, like *Roe v. Wade*, that juristic freedom is a necessary condition of freedom. But the dissent also found that, in the modern world, juristic freedom is not alone a sufficient condition of freedom. *See 39 BVerfGE at 70-73, 85-88*. One might restate the dissent’s view as follows: In
However, applying the German dissent's view of freedom to a right to abortion creates two problems. First, the dissent, like the majority, viewed the state positively. Even though the dissent viewed the state as an organ of society, while the majority viewed the state as above society, any positive view of the state contains the danger of paternalism. The dissent's paternalism was most pronounced in its favoring counseling of pregnant women before abortions, in contrast to Supreme Court cases after *Roe v. Wade* rejecting state attempts to force women to undergo counseling as an infringement on the woman's right to privacy. The dissent's favoring of state intervention through social welfare measures was also paternalistic, perpetuating a tradition of state paternalism dating back to Bismarck. Furthermore, the dissent's view of pregnant wo-

addition to juristic freedom, a precondition for freedom is protecting the material conditions of existence; the state is obligated to provide the socio-economic support needed to sustain such material preconditions for freedom; and the pace of socio-economic change in the modern world has raised the material preconditions for freedom and, therefore, the obligations of the state. See generally id. Cf. Neumann, *supra* note 51, at 918, 920, 927-31; W. Friedmann, *supra* note 46, at 411. The dissent's view, as made clear in this restatement, reflects the West German idea of a free social state. See E.-W. Böckenförde, *supra* note 41, at 185-220, 238-39, 244; Hăberle, *supra* note 45, at 43, 53-54, 57 n.53, 92-97.

572. 39 BVerfGE at 85-86. The paternalism in such counseling — which is, of course, yet more pronounced in the German majority — is even more apparent when one remembers that it applies exclusively to women, not men. From a comparative perspective, perhaps no better illustration of the paternalism in the German opinions exists than that the counseling they require of all pregnant women seems to resemble the type of parental advice the Supreme Court has allowed only for immature minors. See *H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (a statute setting out a mere requirement of parental notice does not violate the constitutional rights of an immature, dependent minor partly because "parents have an important 'guiding role' to play in the upbringing of their children . . . which presumptively includes counseling them on important decisions." [citations omitted]); *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) ("As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor."); Planned Parenthood v. Danforth, 428 U.S. 52, 91 (1976) (Stewart, J., concurring) ("[T]he State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.").

573. See *supra* note 440.

574. 39 BVerfGE at 71-72, 84-88 (1975).

575. See R. Dahrendorf, *supra* note 46, at 38, 59-60. One might wonder whether Germany's tradition of state social support partially explains why the German dissent did not take the step to finding a right to abortion. With the realistic possibility that the state could, and even would, provide pregnant women with a certain degree of social support, the dissent did not have to argue that a right to abortion was necessary on the grounds that pregnant women could expect no social support from the state. In the U.S., which does not have as highly developed a tradition of state social support, the Supreme Court could not have reasoned that a right to abortion is unnecessary because pregnant women could probably expect state assistance. See generally R. Petchesky, *supra* note 69, at 103-06. Similarly, with the greater likeli-
men contemplating abortions as victims of social circumstances might include a tendency to neglect seeing such women as autonomous agents who want abortions to shape their own private destinies.\textsuperscript{576}

The second and greater problem in applying the German dissent's view of freedom to a right to abortion, or more precisely, integrating it into \textit{Roe v. Wade}'s right, is that the dissent justified a range of permissible abortions as set forth by a legislature. The dissent's view of freedom was essentially democratic. Except for a limited range of defensive rights, people develop freedom, in the dissent's view, through democratically elected legislatures, not courts.\textsuperscript{577} Thus, one may infer from the dissent that individuals overcome alienation by actively participating in a democratic state and forging political and social bonds.\textsuperscript{578} \textit{Roe v. Wade}'s right to abortion, of course, was judicially created.

Thus, the German dissent suggests that one of the biggest problems with \textit{Roe v. Wade}'s right to abortion is that it was created judicially. The juristic freedom of \textit{Roe v. Wade}—protecting rights against abuse of state power—is a static rather than dynamic notion.\textsuperscript{579} Furthermore, the theory of stare decisis not only leaves issues open for later adjudicating,\textsuperscript{580} but also limits the types of issues open for later adjudication. Thus, \textit{Roe v. Wade}, in serving as a precedent for later abortion cases, set the terms for discussing the right to abortion, but left little room for discussing the right in terms excluded from its approach. It is not surprising that after \textit{Roe v. Wade} gave impetus to change in United States abortion laws, later cases have tended to secure the right without expanding it.\textsuperscript{581}

Because it was judicially created, the \textit{Roe v. Wade} right to abortion cut short the development of a legal view of abortion, which is crucial for a liberal right, namely the view of abortion as a right required by women's equality before the law. As stated in the Introduction, the problem of abortion raises for liberalism this issue: When in the process of human development does an individual appear who is guaranteed equal treatment under the rule of law?\textsuperscript{582} Abortion also raises for liberalism this

\begin{footnotesize}
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\item \textsuperscript{576} \textit{Cf.} generally R. PETCHESKY, \textit{supra} note 69, at 126.
\item \textsuperscript{577} See 39 BVerfGE at 70-73.
\item \textsuperscript{578} \textit{Cf.} Neumann, \textit{supra} note 51, at 918, 920, 927-31.
\item \textsuperscript{579} See Neumann, \textit{supra} note 51, at 918.
\item \textsuperscript{580} See \textit{supra} text accompanying note 300.
\item \textsuperscript{581} See \textit{supra} notes 437, 440, 461, 524, 535, 551-552, 572.
\item \textsuperscript{582} See \textit{supra} text accompanying note 47.
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issue: What is the equality guaranteed all individuals under the rule of law when applied to pregnant women? If the ideal of equality is to extend fully to women, then pregnancy—a condition unique to women—may not be allowed to put women at any disadvantages vis-à-vis men. The German dissent seemed to recognize how crucial this issue is when it noted that the state and society have yet to develop arrangements adequate to facilitate a woman's combining motherhood and family life with equal opportunity for personal fulfillment and a professional career.583

E. The Liberal Dilemma of Power and Freedom

In Roe v. Wade and its progeny, the right to abortion appeared in the form of isolated autonomy, to be used as one wished, if one could. It may well be that an optimal right to abortion does not exist since the liberal dilemma of power and freedom is indeed unresolvable. However, it is a sorry sign of the times that discussion of that right in the United States has been framed by a right-wing attack with authoritarian premises, reminiscent of the German majority. Discussion of the right to abortion in terms suggested by the German dissent, that is, of how to build a more socially fair future, has disappeared. Although those who support a right to abortion must now fear that the Supreme Court will do away with Roe v. Wade, people could then fight through state legislatures to regain a right to abortion, actively shaping it with consideration for social justice and equality.

583. 39 BVerfGE at 84. To elaborate, under the rule of law the law's predictability provides a basis for calculating behavior. Neumann, supra note 51, at 909-10. Abortion, as a back-up for failed or neglected birth control, allows women to control their reproduction with certainty. See R. PETCHESKY, supra note 69, at 29, 189-90. Thus, a right to abortion is necessary if women are to be able to plan their lives and careers rationally, without unwanted random interruption.