Paradoxical Parallels in the American and German Abortion Decisions

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In this Article, Professors Levy and Somek engage in a careful comparative analysis of the leading constitutional abortion decisions in the United States and Germany. This analysis is occasioned by the remarkable convergence of the abortion regulation regimes of the two countries, notwithstanding the diametrically opposed starting points of the United States Supreme Court and the German Constitutional Court. While Roe v. Wade *started from the premise that the fetus had no rights and that the woman's right to privacy encompassed a right to choose abortion free from government burdens, the* First German Abortion Decision *established that the constitutional guarantee of a right to life encompassed the unborn child and required the state to criminalize abortion. Nonetheless, in* Planned Parenthood v. Casey *and the* Second German Abortion Decision, *the respective Courts accommodated nearly identical abortion regimes in which the mother is allowed to have an abortion early in the pregnancy and for specified causes, but the state structures the context of that decision in an effort to persuade her to carry the child to term. The reasoning process by which both Courts have moderated their abortion jurisprudence exhibits three "paradoxical parallels." First, in* Roe *and* The First German Decision, *the Courts constructed a clear hierarchy of constitutional rights to legitimate their involvement in the abortion issue, only to reintroduce previously subordinated interests later in the analysis. Because the reintroduction of these interests is inconsistent with the Courts' constitutional hierarchy of rights and remains largely unexplained, there is a disjunction between the legal framework for and moral balance of the respective decisions. Second, in* Casey *and* The Second German Abortion Decision, *both Courts exploited this disjunction to claim fidelity to precedent while accommodating compromise abortion regimes. Ultimately, however, these new legal frameworks did not rest on any independent constitutional foundation, but rather on the moral balance of the earlier decisions. But even the respective Court's claims to have retained the moral balance of the earlier decisions remained unpersuasive, because their new legal frameworks effectively redefined the moral balance. Third, both Courts reasoned that the locus of the abortion decision has not changed under the new abortion regimes; i.e., that the decision remained with the mother in* Casey *and with the state in* The Second German Abortion Decision. *In both cases, however, this reasoning oversimplified the nature of the abortion decision and ignored the ways in which the state's context-shaping role has, in fact, changed. Because this change is likely to have a significant impact on some substantial number of women, the locus of decision has changed. Ultimately, Professors Levy and Somek assess the implications of these paradoxical parallels for the role of the courts in modern society, suggesting that the example of abortion illustrates the limits of the courts' ability to oppose powerful social forces and the loss of institutional capital that may result from becoming involved in controversial moral questions. This is not to say that the courts should abandon constitutional principle to popular sentiment, but rather that courts must be conscious of their own limits.*

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I. INTRODUCTION: THE CONVERGENCE OF OPPOSING CONSTITUTIONAL REGIMES

There has been a remarkable convergence in the abortion law of the United States and Germany.[1] In their initial abortion decisions, the U.S. Supreme Court (Supreme Court) and the German Constitutional Court (Constitutional Court) (collectively "the Courts") could scarcely have established more diametrically opposed constitutional regimes governing this troubling social issue. In *Roe v. Wade*,[2] the Supreme Court held that the right to choose an abortion is within a woman's fundamental right of privacy, invalidating a state law that criminalized abortion. In *The First German Abortion Decision (Abortion I)*,[3] the Constitutional Court ruled

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

2. 410 U.S. 113 (1973).

3. BVerfGE [Constitutional Court] 39, 1 (1-68) (F.R.G.), *translated in* Jonas & Gorby, *Translation of the German Federal Constitutional Court Decisions*, 9 J. MARSHALL J. PRAC. & PROC. 605 (1976) [hereinafter *Abortion I*]; *see also* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 336-46 (2d ed. 1997). For a comparative discussion of the two countries' abortion regimes after *Roe* and *Abortion I*, see Donald P. Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, BYU L. REV. 371 (1985). *See also* Donald P. Kommers, *Abortion and the Constitution: The Cases of the United States and West Germany*, *in* ABORTION: NEW DIRECTIONS FOR POLICY STUDIES (Edward Manier et al. eds., 1977).

that the state has a constitutional duty to protect the life of the unborn child, and must criminalize abortion.[4] Notwithstanding these diametrically opposed constitutional decisions, however, the current regulatory regimes governing abortion in the two countries are strikingly similar. In both countries, abortion is generally available early in the pregnancy after various informational, counseling and waiting restrictions; and is available later in the pregnancy to protect the life or health of the mother, as well as in cases of serious fetal deformity, rape, or incest.

Both the Supreme Court and the Constitutional Court have accommodated these developments in their subsequent constitutional decisions. After an initial period in which the Supreme Court read *Roe* broadly, a series of cases upheld funding limitations, parental notification with judicial by-pass, and restrictions designed to protect the life of a viable fetus.[5] These developments culminated in *Planned Parenthood v. Casey*,[6] in which the Supreme Court upheld informed consent and waiting period requirements designed to persuade a mother not to have an abortion. In Germany, *The Second German Abortion Decision* (*Abortion II*)[7] indicated that it is permissible to replace penal sanctions

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4. *Abortion I*, *supra* note 3, at 605-84. Nonetheless, *Abortion I* permitted abortions for reasons relating to the mother's destitute financial or miserable psychological situation, but only if the presence of this "social indication" had been determined by representatives of the state. Because of the generosity with which such determinations were made in some of the Länder of the German Federal Republic, it is no overstatement to say that abortion was widely available in practice. *See* Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y 1, 10 (1994).

5. *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (invalidating spousal and parental consent requirements); Bellotti v. Baird, 443 U.S. 622 (1979) (invalidating parental consent requirement); Coulatti v. Franklin, 439 U.S. 379 (1979) (invalidating viability determination and protection requirements).

6. 505 U.S. 833 (1992). *See generally* Martha A. Field, *Abortion Law Today*, 14 J. LEGAL MED. 2 (1993).

7. BVerfGE [Constitutional Court] 88, 203 (203-363) (F.R.G.) [hereinafter *Abortion II*]. Not surprisingly, this decision has been the subject of heated debate. For an instructive overview of the respective positions, see the twenty comments by politicians and scholars in the special issue of the KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT: DAS URTEIL ZU § 218 IN WORTLAUT UND KOMMENTAR (1993). On the subsequent legislative developments, which will not be addressed in this Article, see Albin Eser, *Schwangerschaftsabbruch: Reformversuche in Umsetzung des BVerfG-Urteil*, *in* 45 JURISTENZEITUNG 503 (1994); Sibylle Raasch, *Der Bayrische Sonderweg zum § 218 vor dem BVerfG*, 30 KRITISCHE JUSTIZ 310 (1997). The compromise achieved by *Abortion II* and subsequent federal legislation appears to be stable. Most recently, in the *Schwangerinhilfe* decision, the Court struck down several provisions of a Bavarian statute regulating abortion in part on the ground that they unduly infringed upon the freedom of profession under article 12 of the Basic Law of doctors carrying out an abortion. *See* Schwangerinhilfeentscheidung, BVerfG 27.10.1998, 1 BvR 2306/96, *available at* http://www.bverg.de/entscheidungen/frames/rs19980623_1bur23096 [hereinafter *Abortion III*]. For further discussion of this decision, see *infra* note 189.

with a counseling process and waiting period designed to convey the state's disapproval of abortion, provided that the state continues to express the illegality of abortion in its criminal law.[8] Notwithstanding differences in detail,[9] it can safely be asserted that the marked contrast between U.S. and German constitutional law has been brought to an end. As Gerald Neuman put it:

> [T]he threat of prosecution has been withdrawn. A woman in Germany can now make her own conscientious decision in favor of a first trimester abortion, so long as she participates in a state-regulated counseling process. . . . In practical terms, the situation in Germany now resembles the post-*Casey* situation in Pennsylvania. Abortion is available after burdensome preliminaries.[10]

The convergence of the U.S. and German abortion laws is a striking example of the accommodation of constitutional doctrine to powerful social forces that offers important lessons about the relationship between courts and the societies in which they operate. Both Courts were confronted with the basic problem of establishing the legitimacy of their authority over abortion regulation by anchoring their decisions in constitutional law rather than in an open-ended balancing of moral values. But because the intractable problem of abortion inherently requires a situational balancing of moral values,[11] both Courts had to engage in similar doctrinal contortions to maintain the appearance of consistency and legality in their exposition of constitutional principles.[12]

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8. *Abortion II* has received favorable attention among American scholars. Professor Neuman, for example, argues that although the majority opinion reflects a political compromise, it represents a "cleverly balanced edifice of propositions." Neuman, *supra* note 1, at 291. In a similar vein, Professor Kommers claims that *Abortion II* was undertaken "with remarkable empathy and understanding, to balance the State's interest in protecting life with the women's interest in self-determination." Kommers, *supra* note 4, at 17. As we shall see, there is reason to question such glowing reviews.

9. German law is somewhat more restrictive than the typical state laws in the United States. First, while abortion regulations in the United States typically require that the treating physician provide written information designed to discourage abortion, German law requires face-to-face counseling with a second physician. Second, the typical waiting period in the United States is generally twenty-four hours, while the waiting period in Germany is three days. In other respects, however, abortion may be easier to obtain in Germany. For example, abortion funding for indigent women may be more broadly available in Germany than in the United States. *See* Neuman, *supra* note 1, at 286-87. Overall, while the German system may impose somewhat greater restraints on a woman's decision, the basic approach of the two systems is the same.

10. Neuman, *supra* note 1, at 273.

11. *See, e.g.*, LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 3-9 (2d ed. 1992).

12. For related observations on the abortion regimes of the United States and Ireland, see Sabina Zenkich, *X Marks the Spot While* Casey *Strikes Out: Two Controversial Abortion Decisions*, 23 GOLDEN GATE U.L. REV. 1001 (1993). For a defense of *Casey* based on its doctrinal similarity to other European abortion regimes, see Charles Stanley Ross, *The Right of Privacy and Restraints on Abortion Under the 'Undue Burden' Test: A Jurisprudential*

To illuminate these developments and their implications for constitutional adjudication, we propose in this Article to examine carefully the Courts' constitutional analysis in the abortion decisions.

Our analysis will focus on three noteworthy, and, given their opposing constitutional premises, paradoxical parallels in the U.S. and German abortion decisions. First, as developed in Part II, in each of the initial abortions decisions, the Courts attempted to establish the legitimacy of their decisions through formalistic constitutional analysis that subordinates, but nonetheless incorporates, an intuitive moral balancing. Second, as developed in Part III, *Casey* and *Abortion II* both fundamentally alter the constitutional framework for abortion while professing fidelity to initial abortion decisions,[13] effectively stripping those decisions to their underlying moral balance and according that moral balance new meaning. Finally, as developed in Part IV, both Courts relied on an unrealistic account of the relationship between the individual and the state to claim that the new abortion regimes they approved do not alter the locus of that decision.

After developing these parallels and mutual engagements, in Part V, this Article will consider their broader implications for constitutional adjudication. The convergence between the U.S. and German abortion laws offers a cautionary tale about the limits of the judiciary and the costs of constitutional adjudication that is too far removed from the terms of conceivable democratic compromise. While the Courts' abortion decisions undoubtedly have had a significant impact on the content of abortion law in the United States and Germany, the Courts have not been successful in imposing their respective visions of abortion law on society. Conversely, the effort has not been without political and institutional costs to the Courts, which have not only lost credibility in the eyes of the general public and opened themselves to a more politicized appointment process, but also suffered a distortion and destabilization of constitutional doctrine.

Comparison of Planned Parenthood v. Casey *with European Practice and Italian Law*, 3 IND. INT'L & COMP. L. REV. 199 (1993).

13. In the rhetoric of constitutional legality in the era of constitutional common law, the source of constitutional law is, if anything, precedent. *See* Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 22-24 (1936); *see also* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); Bernhard Schlink, *Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit*, 28 DER STAAT 161, 162-63 (1989). Thus, it is hardly surprising that fidelity to precedent would play a prominent role in each of the decisions.

II. THE ORIGINAL ABORTION DECISIONS: LEGAL FRAMEWORKS AND INTUITIVE MORAL BALANCING

Although *Roe* and *Abortion I* begin with opposing constitutional premises from which they reason to opposing results, the cases exhibit an important methodological similarity. The central problem of abortion is how to achieve a proper balance between the interests of the pregnant woman and the interest in protecting the life of the unborn child.[14] This question is inherently a moral one, but neither the Supreme Court nor the Constitutional Court is supposed to be in the business of making moral judgments for society. The Courts' role is to resolve disputes according to law; in this context, constitutional law.[15] Thus, a central problem confronting both Courts in their initial abortion decisions was to establish that judicial resolution of the abortion question was legitimate by providing a legal foundation for their moral presuppositions. To accomplish this task, both Courts employed a formalistic constitutional analysis under which one of the competing interests (that of the mother in *Roe* and that of the unborn child's life in *Abortion I*) was given superior status in the constitutional hierarchy of rights. From this hierarchy of rights, each Court in turn derived a legal framework under which the laws in question were unconstitutional.[16] If followed to its logical conclusion, however, the extreme implications of this hierarchical analysis were unacceptable. In applying the legal framework, both Courts were forced to take into consideration the very interests that they previously had declared categorically subordinate (i.e., the interest in the unborn child's life in *Roe* and the mother in *Abortion I*). Neither Court, however, fully explained its consideration of these interests. This disjunction between hierarchical legal frameworks and balancing of moral values frustrated the Courts' efforts to establish legitimacy and undermined the stability of the decisions themselves.

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14. We choose this formulation of the latter interest because it is neutral on the question of whether the unborn child itself is the bearer of rights, or whether the state is expressing a more abstract interest in protecting the value of life. *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 18 (1993); NORBERT HOERSTER, ABTREIBUNG IM SÄKULAREN STAAT: ARGUMENTE GEGEN DEN § 218, 93 (1991). Both Courts have struggled with this question. *See infra* notes 58-77 and accompanying text.

15. The perils of the "law" vs. "morals" distinction in the context of constitutional law are discussed broadly in RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION 84 (1996).

16. For discussion of the methodology of finding and ordering rights in U.S. constitutional law, see David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights?: Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J. L. & PUB. POL'Y 795 (1996).

A. The Constitutional Hierarchy of Rights

Both the Supreme Court and the Constitutional Court began their opinions with a formalistic analysis of the rights of the unborn child and the mother, establishing an absolute constitutional hierarchy of rights. This constitutional analysis provides the foundation for the articulation of the legal framework that is used to evaluate the laws in question. Because the Courts resolved the constitutional status of the unborn child differently, their analysis led them to opposing legal regimes governing abortion. Nonetheless, both Courts sought to bolster the legitimacy of their control over abortion regulation through a similar style of reasoning. Each engaged in a formalistic analysis of the constitutional hierarchy of rights, which led them to conclude that their respective constitutions accorded primacy to one set of prospective interests—the rights of the mother in *Roe* and the protection of the unborn child's life in *Abortion I*.

In *Roe*, the Supreme Court concluded that the fetus is not a "person" within the meaning of the Fourteenth Amendment's guarantees of due process and equal protection.[17] The Court reasoned that the usage of the term in various places in the constitutional text, as well as the general legal background, indicated that "person" does not include unborn children, who therefore had no independent claim to constitutional protection.[18]

The Constitutional Court in *Abortion I* concluded that German Law affords the unborn child a constitutional right to life,[19] relying on article 2, section 2 of the Basic Law, which provides that "everyone" has a right to life.[20] The Constitutional Court rejected the argument that the term, "everyone," in its ordinary and legal usage connotes a "completed person."[21] The Court concluded that the sense and purpose of the provision, as well as its legislative history, supported the extension of constitutional protection to "developing" or "germinating" life.[22] On the basis of teleological interpretation and with repeated emphasis on the

17. *See* 410 U.S. 113, 157-59 (1973). This is not to say, however, that the Court completely refused to consider the interests of the unborn child. *See infra* notes 38-43 and accompanying text (discussing incorporation of the state's interest in protecting fetal life into the fundamental rights framework in *Roe*).

18. *See Roe*, 410 U.S. at 157-59.

19. This right is not so clear as the rhetoric of the Court would make it seem. *See infra* notes 65-73 and accompanying text.

20. Basic Law, art. 2, Nr. 2 GG ("Jeder hat das Recht auf Leben . . . .").

21. *Abortion I*, *supra* note 3, at 637.

22. *Id.*

negative example set by Nazi-Germany, the Court asserted that this duty to protect life extends also to the fetus.[23]

The Courts' opposing premises about the constitutional status of the unborn child led them to reach different conclusions about the relative priority of the woman's interest in deciding whether to terminate her pregnancy. Since the Supreme Court in *Roe* decided that the unborn child has no rights, the only relevant question was whether the decision to choose an abortion is within a woman's fundamental right of privacy. Once the Court determined that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"[24] it was inevitable that this interest would be given constitutional priority because the Court did not recognize the unborn child as a person capable of possessing rights.[25] For the Constitutional Court in *Abortion I*, there could be little doubt that abortion restrictions implicate the pregnant woman's right to "free development of the personality" under article 2, section 1 of the Basic Law. Thus, the Constitutional Court, unlike the Supreme Court in *Roe*, engaged in an explicit constitutional balancing of the competing rights at issue.[26] Not surprisingly, given its recognition of the unborn child's right to life, the Constitutional Court concluded that "precedence must be given to the protection of the life of the child about to be born," reasoning that the right of free development of the personality (or self determination, as the Constitutional Court sometimes puts it) is limited by "the rights of others and the moral law," and that preserving the unborn child's right to life maximizes "human dignity, the center of the value system of the constitution."[27]

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23. *Id.*

24. *Roe*, 410 U.S. at 153. This result was not inevitable; indeed many commentators and Justices have disputed it. Nonetheless, the Supreme Court in *Roe* treated this conclusion as much less controversial than subsequent developments would indicate (*Roe* was a 7-2 decision), and even *Planned Parenthood v. Casey* reaffirmed this part of the "core holding" of *Roe*. *See* 505 U.S. 833 (1992). *Casey* is discussed in detail in Parts III and IV of this Article.

25. The Supreme Court in *Roe* did reintroduce concern for the life of the child as a potential state interest to support the criminalization of abortion, but the Court did not balance the pregnant woman's privacy right against the child's right to life in order to determine which constitutional right would take precedence. *See infra* notes 38-43 and accompanying text.

26. For a discussion of the Supreme Court's reluctance to balance competing constitutional rights, see Richard E. Levy, *Dueling Values: Balancing Competing Constitutional Interests in* Pinette, 5 KAN. J.L. & PUB. POL'Y 43 (1996). *See also* Richard J. Fallon, *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 76, 79, 102 n.273 (1997) (noting the Court's reluctance).

27. *Abortion I*, *supra* note 3, at 643; *see also* Basic Law, art. I, Nr. 1 GG ("The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority."). The Constitutional Court also declared that there is no way to arrive at a reasonable balance between the state's duty to protect the fetus and the mother's right to self-determination, because giving effect to the mother's right of self determination would inevitably lead to the "killing" of the

The constitutional hierarchy of rights in turn dictated the legal framework applied by the respective Courts to evaluate the constitutionality of the laws in question. For the Supreme Court in *Roe*, which applied traditional fundamental rights analysis, the conclusion that the right to terminate a pregnancy is within the mother's right of privacy meant that "strict scrutiny" applied to any law burdening that right.[28] To survive strict scrutiny, which almost always results in invalidity,[29] a law must serve a "compelling" interest and must be "narrowly tailored" to further that interest.[30]

For the Constitutional Court in *Abortion I*, the constitutional priority given to the life of the unborn child implied that the state has a constitutional duty to protect the life of each unborn child by preventing abortions.[31] Specifically, the Court reasoned that the state must express its legal condemnation of abortion by means of criminal law, including some threat of punishment. Without the threat of punishment, the legal condemnation can be ignored by women intent on having abortions. Thus, the condemnation of abortion would no longer permeate the consciousness of society.[32]

These legal frameworks result in two opposing abortion regimes that place the locus of the abortion decision in the mother[33] and the state,[34] respectively. *Roe* reflects what we may call the "reproductive autonomy model" of abortion decisions, because it assumes that the mother has a right to make the abortion decision and would prevent state

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fetus. It follows that any attempt to arrive at a reasonable compromise between the State's duty to protect life on the one hand and the woman's right to self-determination on the other was strictly ruled out by the constitution. *See id.* at 643. Conversely, inflicting a criminal penalty on women who have an abortion could not be out of proportion where the state's duty to protect a value of ultimate weight, such as human life, is concerned. *See id.* at 665-66.

28. *Roe*, 410 U.S. at 155.

29. Gerald Gunther, for example, famously observed that strict scrutiny is "'strict' in theory and fatal in fact." Gerald Gunther, *Forward: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

30. *See Roe*, 410 U.S. at 154-55.

31. This is not to say that it is impossible to defend a constitutional right of abortion even if one recognizes the unborn child as a "person" deserving of the full measure of constitutional protection. *See* Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971) (using example of a person involuntarily hooked to another for life support); *see also* Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1977) (elaborating on a similar view).

32. *See Abortion I*, *supra* note 3, at 645-46.

33. *See Roe*, 410 U.S. at 162 (indicating that the state may not, "by adopting one theory of life . . . override the rights of the pregnant woman that are at stake").

34. *See Abortion I*, *supra* note 3, at 647 ("The obligation of the state to protect the developing life" is comprehensive, and applies "against the mother as well.").

interference with that decision.[35] *Abortion I* reflects what we may call the "state permission" model because it requires the mother to obtain the state's approval before having an abortion.[36] Because the Courts' legal analyses rest upon an absolute hierarchy of constitutional rights, these legal frameworks have potentially extreme implications for abortion regulation. Under *Roe*, if the unborn child has no constitutional rights, the woman's right of privacy occupies the field of constitutionally protected interests, and there would be an absolute right to abortion "on demand" at any point in the pregnancy. Under *Abortion I*, the woman's right of self determination, or free development of the personality, must always give way to the unborn child's right to life. Therefore, the state must always prohibit abortion, unless an equivalent constitutional right—the life of the woman—is at stake. Such absolute abortion regimes, of course, are unlikely to satisfy the complex social forces brought to bear on the abortion issue. As will be developed in the next section, even the Courts in *Roe* and *Abortion I* were forced to back away from the extreme implications of their constitutional exegesis.[37]

B. Intuitive Moral Balancing

Although the logic of both Courts' respective hierarchies of constitutional rights would have extreme implications, the Courts in *Roe* and *Abortion I* moderated their application of the legal framework by giving weight to the countervailing interest of the state in protecting the life of the unborn child and the mother's interest in decisional autonomy. This maneuver avoided untenable results, but remained largely unexplained in both decisions. Neither Court clearly identified the constitutional basis of the countervailing interest, or how the Court arrived at the conclusion that the hierarchically superior constitutional interest must nonetheless give way in some cases to an interest that is, in constitutional terms, inferior. The reintroduction of countervailing

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35. *See* Robert D. Goldstein, *Reading* Casey*: Structuring the Woman's Decision Making Process*, 4 WM. & MARY BILL RTS. J. 787 (1996) (describing various models for structuring the abortion decisions, including an informed consent autonomy model).

36. *See Abortion I*, *supra* note 3, at 605-84. Arguably, a "Right to Life Model" would be an equally accurate characterization, but this Article focuses on the locus of decision and the state's role in permitting abortion because of other aspects of the *Abortion I* decision that will be discussed in Part II.B. In addition, the locus of decision characterization facilitates the analysis of this issue in Part IV.

37. *See* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867 (1994) (arguing that the Court commonly backs away from the extreme implications of its rights analysis by declining to find "infringements" and using *Casey* as a rare example of the Court's explicitly doing so); *see also* Robin L. West, Note, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of* Casey, 45 HASTINGS L.J. 961 (1994) (responding to Brownstein's argument).

interests thus undermined the Courts' efforts to legitimize their decisions in terms of a constitutionally derived legal framework, and left the Courts with little more than an intuitive moral balancing.

Although the Supreme Court in *Roe* rejected the claim that an unborn child is a person entitled to constitutional protection, the Court incorporated the unborn child's right to life into the analysis through the famous trimester framework, which was derived from the strict scrutiny test.[38] For the purposes of this Article, the crucial portion of this framework is the Court's conclusion that the state may not ban abortions during the first two trimesters, but that at the point of viability, the state's interest in protecting the unborn child's life becomes compelling.[39] Since the conclusion that a mother has the absolute right, up to the day before delivery, to terminate a pregnancy would offend virtually anyone's moral sensibility,[40] the recognition of some limit to the mother's right of reproductive autonomy is hardly surprising.

In contrast to the Supreme Court's careful explanation of why the unborn child is not a person and why the decision to have an abortion is within the woman's right of privacy, the Court offered little analysis of the state's interest in protecting potential life or why this interest becomes compelling at the point of viability. Having established in an earlier portion of the opinion that one historical purpose of anti-abortion laws was to protect the life of the unborn child,[41] the Court simply declared that:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This was so because the fetus then presumably has the capability of meaningful life outside the mother's

38. *Roe*, 410 U.S. at 162-65. Under this framework, the state may not regulate abortion during the first trimester. During the second trimester, the state's interest in protecting the life and health of the mother becomes compelling because at that point abortions become more dangerous to the mother than carrying the child to term. The state may therefore impose reasonable regulations to protect the mother's life and health. During the third trimester, when the unborn child is viable, the state has a compelling interest in protecting the life of the unborn child and may ban abortions except where necessary to protect the life and health of the mother. *See id.*

39. The state's interest in protecting the life and health of the mother is not part of the underlying moral balance at issue here because this interest would not support restrictions designed to prevent or discourage abortions.

40. Public opinion polls generally indicate that most Americans favor some restrictions on abortion, although a great deal depends upon the phrasing of the questions asked. For a brief summary of polling data emphasizing opposition to unlimited abortion, see Robert P. Casey, *Remarks by Governor Robert P. Casey Delivered at Saint Louis University Conference on Abortion and Public Policy March 11, 1993*, 13 ST. LOUIS U. PUB. L. REV. 1, 1 & nn.1-4 (1993).

41. *See Roe*, 410 U.S. at 150, 159 (stating that "as we have intimated above, it is reasonable and appropriate for the State to decide that at some point in time another interest, that of the health of the mother or that of potential human life, becomes significantly involved").

> womb. State regulation protective of fetal life after viability thus has both logical and biological justification.[42]

As a matter of constitutional analysis, this conclusory assertion left much to be desired. It failed to clarify both the nature of the right and its constitutional significance,[43] and simply did not explain the legal basis for the Court's conclusion. If the viable fetus was not to be recognized as a "person" for purposes of constitutional analysis, there is no constitutional explanation of why the state's interest in protecting his or her right to life should be given parity with the woman's fundamental constitutional right of privacy. As a result, no matter how appealing the point of viability may be as the dividing line between permissible and impermissible abortions, the Court's adoption of it is simply a moral judgment cloaked in the trappings of fundamental rights and strict scrutiny.

Similarly, the Constitutional Court in *Abortion I* purported to give absolute priority to the unborn child's right to life, but tempered this framework by recognizing cases in which the mother's interest in autonomy was sufficient to permit her to choose an abortion. Under the doctrine of *Unzumutbarkeit*,[44] the Court recognized four exceptions to the state's duty to criminalize abortion:[45]

(1) if carrying the child to term would endanger the woman's health;
(2) if the pregnancy originated in a criminal act (i.e., rape or incest);
(3) if the child would likely suffer from a severe birth defect; and
(4) if the woman's social or psychological situation is so deprived that giving birth and raising a child cannot reasonably be expected of her.[46]

The Court indicated that in cases of *Unzumutbarkeit* an abortion would be justified and need not be criminalized by the state.[47] Nonetheless, the

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42. *Id.* at 163.

43. In particular, it left unclear whether this interest involves the state's assertion of the unborn child's right to life or a more abstract state interest in asserting the value of life as part of a just social order. For further discussion of this aspect of *Roe*, see *infra* notes 61-64 and accompanying text.

44. *See Abortion I*, *supra* note 3, at 647. The term has been translated as "unreasonable demands." *See, e.g.*, Neuman, *supra* note 1, at 288-89. However, we are not sure whether this formulation adequately captures the meaning of the German word, which focuses less on the weight of the burden than on the sense that such a sacrifice is simply not to be expected of another human being. We will therefore use the German term without translation.

45. *See Abortion I*, *supra* note 3, at 646-49.

46. The Constitutional Court explained that "the general social situation of the pregnant woman and her family can produce conflicts of such difficulty that . . . sacrifices . . . in favor of the unborn life cannot be compelled with the means of the penal law." *Id.* at 650.

47. *See id.* at 648, 650; *see also Abortion II*, BVerfGE [Constitutional Court] 88, 203 (203-363) (F.R.G.).

law in question was invalid because it removed criminal sanctions and allowed the mother to decide, after counseling, whether to have an abortion.[48] According to the Court, the Basic Law required the state to determine whether an *Unzumutbarkeit* exception applied, and to criminalize all other abortions via the criminal law.[49]

The Constitutional Court, like the Supreme Court in *Roe*, was careful to explain the constitutional hierarchy of rights and the resulting legal framework, but failed to explain the reintroduction of the mother's subordinate interest in autonomy through the doctrine of *Unzumutbarkeit*, leaving the precise scope and significance of the doctrine unclear.[50] The Court stated that there are cases in which it would be unreasonable to expect a woman to carry her child to term because "another interest equally worthy of protection, from the standpoint of the Constitution, asserts its validity with such urgency that the state's legal order cannot require that the pregnant woman must, under all circumstances, concede precedence to the right of the unborn."[51] The Court did not elaborate on what those interests are or why they are of equal weight to the unborn child's interest in life.[52] Rather, the Court simply stated that there must be a "congruence" among the exceptions so that all of the exceptions ought to resemble the model case, in which continuing the pregnancy would involve a severe threat to the woman's life or health.[53]

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48. *See Abortion I*, *supra* note 3, at 661-62.

49. *See id.* at 649.

50. For example, constitutional scholars are divided over whether *Unzumutbarkeit* is a manifestation of the traditional proportionality analysis used in evaluating whether laws violate individual rights. To some scholars, *Unzumutbarkeit* is an expression of the disproportionality between the burden on the individual and the purposes served by a law; i.e., a demand is *unzumutbar* because it is out of proportion to the ends served. Others, however, view *Unzumutbarkeit* as a distinct constitutional concept under which the state simply may not impose certain demands on an individual regardless of the extent to which they serve countervailing state interests. For an overview of the discussion, see RÜDIGER KONRADIN ALBRECHT, *Zumutbarkeit als Verfassungsmaßstab, Der eigenständige Gehalt des Zumutbarkeitsgedankens*, *in* ABGRENZUNG ZUM GRUNDSATZ DER VERHÄLTNISMÄSSIGKEIT (1995).

51. *Abortion I*, *supra* note 3, at 650-55.

52. *See id.* at 649-55. The Constitutional Court also acknowledged that inflicting a penalty is not an end in itself. It is a mere means to an end that could be replaced by another, conceivably even more effective means. In this context, two components in the causal chain that may prevent an abortion were of utmost importance to the Constitutional Court—the actual willingness of the mother to carry her child to term and a stable social consensus that the killing of a fetus is wrong. *See id.* As we shall see, these qualifications opened the path to *Abortion II*, in which the Constitutional Court considered replacing the criminal sanction with a counseling system to be permissible only if abortion is still declared "illegal." *See Abortion II*, BVerfGE [Constitutional Court] 88, 203 (203) (F.R.G.).

53. *See Abortion I*, *supra* note 3, at 648-49; *see also Abortion II*, BVerfGE 88, at 257.

Regardless of its precise meaning, and although the state determines its application, the practical effect of the *Unzumutbarkeit* principle is to balance the unborn child's right to life against the mother's interest in bodily integrity and personal autonomy in a manner fundamentally at odds with the Court's earlier pronouncements regarding the absolute priority of the right to life. The exceptions for the life or health of the mother, rape or incest and severe fetal deformity, were derived from traditional inventory of the criminal law.[54] The fourth exception for deprived social conditions was added by the Court, apparently with an eye to the law under review. Aside from the model case in which the life or health of the mother is jeopardized, it is difficult to see how the interests underlying the exceptions are of equal weight to the life of the unborn child. The idea seems to be that the state may not burden a mother in this way because to do so would violate her basic human dignity or impose too great a burden on her personal autonomy (or the free development of her personality).[55] But, this is the very interest that the Court had declared cannot be balanced against the unborn child's right to life, or more precisely, which was never of sufficient weight to justify the termination of a life.[56]

Thus, both *Roe* and *Abortion I* exhibit a similar discontinuity between the formal constitutional framework employed to legitimize the decisions and the application of that framework to the problem of abortion. Both decisions use the vocabulary of legal formalism in their analysis of constitutional rights, which allows them to lay the foundations of their decisions on an absolute hierarchy of constitutional rights rather than on an intuitive moral balancing.[57] But, given that abortion is an inherently complex moral question, the Courts' tempered their analysis by the very intuitive balancing of moral values that they sought to avoid. This is not to say that either Court abandoned its basic model. For *Roe*, the model of reproductive autonomy prevailed, but it is

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54. *See Abortion I*, *supra* note 3, at 647-49.

55. This underlying rationale is particularly obvious in connection with the "social" exception, but also is implicit in the exceptions for rape and incest or fetal deformity, insofar as having children in such instances may impose a heavier emotional strain on the mother, or the care of the child may involve greater demands.

56. *See Abortion I*, *supra* note 3, at 646-47. In an attempt to avoid this dilemma, the Court made clear that a situation in which a woman may arrive at a "respectable conscientious decision" to choose an abortion cannot arise in the "normal situation" of pregnancy. *Id.* However, in an exceptional case, the very concept of *Unzumutbarkeit* implies that at some point the mother's interest has sufficient weight to override the child's right to life and the state's resulting duty to criminalize abortions.

57. For a broad-ranging criticism of the use of morality and moral theory in legal reasoning, see Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

limited to pre-viability abortions. In *Abortion I*, the Court preserved the model of state permission by requiring the state to decide whether the *Unzumutbarkeit* exceptions apply in a particular case. Consequently, there is a critical discontinuity between the decisions' formal constitutional structure and their ultimate moral balancing.

C. Is the Unborn Child a Person?

The difficulties created by the reintroduction of intuitive moral balancing were magnified by the Courts' failure to answer the fundamental moral question raised by abortion—the nature of the unborn child's moral claim to life. Although the Courts seem to have come to opposing conclusions about the unborn child's right to life, their treatment of this issue was actually much more similar than is commonly assumed. The Courts both recognized a state interest in protecting unborn life, and also left a similar ambiguity as to whether the state's interest in protecting the life of the unborn child reflects the state's assertion of the child's personal right to life,[58] or, as Ronald Dworkin argues, the assertion of an independent state interest in promoting the value of life as part of a just and moral social order.[59] In doing so, both Courts managed to avoid the most troubling moral question raised by abortion; whether (and when) the unborn child is a person.[60]

Roe went to great lengths to avoid this moral question. As previously discussed, in determining whether the unborn child has a constitutional right to life, the Supreme Court treated the issue as a

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58. In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), for example, which upheld a state's heightened evidentiary requirement for the termination of life sustaining treatment for incompetent patients, the Supreme Court emphasized the state's role in protecting the incompetent patient's right to life. *See id.* at 280.

59. *See* DWORKIN, *supra* note 14, at 109, 149-50. The argument that the state may protect the intrinsic value of life, however, is not without controversy. *See* Sarah Stroud, *Dworkin and Casey on Abortion*, 25 PHIL. & PUB. AFF., 140, 146 (1996) (critiquing Dworkin); Tom Stacy, *Reconciling Reason and Religion: On Dworkin and Religious Freedom*, 63 GEO. WASH. L. REV. 1 (1994) (arguing that the only legitimate state interest is the protection of an individual's personal interest in life). The Supreme Court, however, has apparently recognized a legitimate state interest in protecting life even against the wishes of the individual whose life is at issue insofar as it has upheld laws against physician-assisted suicide. *See* Washington v. Glucksberg, 521 U.S. 702 (1997); Quill v. Vacco, 521 U.S. 793 (1997). It is unclear, however, whether any such interest is sufficiently "compelling" to withstand strict scrutiny because *Glucksberg* and *Quill* reject any fundamental right to die and apply the deferential rational basis test. For further discussion of the right to die, see Yale Kamisar, *The "Right to Die": On Drawing (and Erasing) Lines*, 35 DUQ. L. REV. 481 (1996).

60. Even if resolved by recourse to legal argument, this question is, at bottom, a moral one. *See* PETER SINGER, RETHINKING LIFE AND DEATH: THE COLLAPSE OF OUR TRADITIONAL ETHICS 85-93 (1994); F.M. KAMM, MORALITY, MORTALITY: DEATH AND WHOM TO SAVE FROM IT 39 (1993).

matter of pure textual exegesis.[61] Similarly, although the Court concluded that the state's interest in protecting fetal life is of sufficient weight to justify a ban on abortions after the point of viability, it did not explain the nature of this interest.[62] If the interest reflects the state's assertion of the unborn child's personal right to life, the Court effectively decides that an unborn child has sufficient constitutional and moral status as a person to claim such a right. Since the Court was scrupulously silent as to the nature of the state's interest, it is also possible that the Court was endorsing an independent, objective state interest in preserving the value of life.[63] This sort of interest would not implicitly accord the unborn child status as a person capable of holding rights.[64]

Interestingly, notwithstanding its bold and unequivocal rhetoric that the right to life attaches to "preborn" life, the Constitutional Court in *Abortion I* left precisely the same ambiguity regarding the source of the state's resulting duty to protect this right. The Court indicated that the duty follows *immediately* from the Basic Law, article 2, section 2, which provides that everyone has a right to life,[65] but declared that it was not necessary to deal with the question of whether this duty derives from the fetus' right to life or from the objective principle that life must be protected by the state. This question is the result of the two-fold normative effect of basic rights in German constitutional jurisprudence. Basic rights are not only negative rights against the state, but also objective components of an "order of values" to be realized by the state.[66] As objective principles, basic rights are binding even if they are not embedded in an individual claim against the state.[67] Since it was possible to rely on the objectively binding quality of article 2, section 2 of the Basic Law, as the source of the state's duty in *Abortion I*, the

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61. *See supra* notes 17-18 and accompanying text.

62. *See supra* notes 41-43 and accompanying text.

63. *See supra* note 43 and accompanying text.

64. *See* DWORKIN, *supra* note 15, at 117-27. Dworkin distinguishes between the two different justifications for the state's interest in protecting human life—the state's concern is "derivative" if the fetus has a right to life; it is "detached" if the fetus does not. *Id.* at 84.

65. *Abortion I*, *supra* note 3, at 641-42.

66. *See generally* Ernst-Wolfgang Böckenförde, *Grundrechte als Grundsatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik*, *in* STAAT, VERFASSUNG, DEMOKRATIE 159 (1991) (discussing this concept in German constitutional law); Hans D. Jarass, *Grundrechte als Wertentscheidungen bzw. objektivrechtliche Prinzipien in der Rechtsprechung des Bundesverfassungsgerichts*, 110 ARCHIV DES ÖFFENTLICHEN RECHTS 363 (1985).

67. There are different conceivable ways of transforming an objective principle into an individual claim. For example, in *Abortion I* the objective principle of protecting the right to life was transformed into a duty on the part of the state, and the failure to fulfill the duty created an individual claim against the state. Such positive rights claims are foreign to U.S. law, although there are some potential parallels. *See* David P. Currie, *Positive and Negative Rights*, 53 U. CHI. L. REV. 864 (1986).

Constitutional Court did not resolve the question whether the fetus is a legal person and therefore the bearer of a personal right.[68]

Moreover, the *Unzumutbarkeit* principle seems to imply that unborn life is not as valuable as born life, insofar as it permits the abortion of unborn children who could not be killed after birth. The Court expressly indicated that the state need not punish the termination of "preborn" life in the same way that it punishes the killing of "born" life,[69] but if the constitutional right to life of the unborn child is the same as that of a person, it is hard to see why this would be so.[70] The implications of this particular disjunction between the Court's declarations concerning the constitutional priority accorded to life and its intuitive moral balancing are especially troubling in the context of the "eugenic" (fetal deformity) and "criminological" (rape or incest) exceptions, which implicitly accord lesser value to certain kinds of unborn life.[71] These exceptions might be explained because of the particular emotional and other burdens that children impose on the mother. However, such concerns cannot be a complete explanation for why the unborn child's life can be terminated in light of the Court's earlier discussion of the absolute value of life. The Court emphasized that the weight of the interest in life does not depend upon whether the child is born or unborn or upon the stage of fetal development, but rather is constant from conception and outweighs any other interest (except the mother's corresponding interest in life) throughout the pregnancy.[72] The Court's choice of the phrase "eugenic indication" to describe the exception for severe fetal deformity is particularly unfortunate in light of the Court's use of the Nazi past as an abject lesson in the danger of presuming to make judgments about the relative value of lives.[73]

Thus, both Courts avoided the difficult moral question of when the child becomes a person, at the cost of deepening the discontinuity between their formal legal analysis and the intuitive moral balance struck

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68. *See Abortion I*, *supra* note 3, at 641-42.

69. *Id.* at 645.

70. Of course, the interest of the pregnant woman is arguably greater than the interest of a mother after her child is born, since the bodily connection is no longer present. The Court, however, indicated that the mother's interest is clearly subordinate to the unborn child's right to life. To the extent that the mother's interest justifies the lesser protection of unborn life, this analysis, like the rest of the *Unzumutbarkeit* principle, reintroduces that interest through an intuitive moral balancing. *Id.*

71. *See* Anna Lübbe, *Das BVerfG hat gesprochen: Embryonen sind Menschen zweiter Klasse*, 76 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 313 (1993).

72. *Abortion I*, *supra* note 3, at 638; *see also Abortion II*, BVerfGE [Constitutional Court] 88, 203 (254, 256) (F.R.G.).

73. *Abortion I*, *supra* note 3, at 637-38, 647, 662.

by the decisions.[74] As Dworkin explains, the distinction between the state's interest in protecting a right and an objective value matters a great deal. A right is a personal claim grounded in an individual's interest, while an objective value is given weight regardless of whether a particular person has an interest in its realization.[75] Even the highest values, such as the value of human life, can be of lesser weight than a right to the extent that its contribution to human well-being is more remote.[76] In any event, the Courts' failure to explain the nature of the state's interest in protecting the life of the unborn child in terms of a child's ultimate moral status furthers the gulf between legal reasoning and moral balancing in the initial abortion decisions.[77]

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74. Although some might defend the use of "incompletely theorized arguments" in legal thought, in the context of the abortion decisions, the failure to develop critical points of the analysis was a fundamental flaw that undermined the legitimacy of the Courts' involvement and contributed to significant problems in subsequent decisions. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35 (1996).

75. DWORKIN, *supra* note 14, at 11; *see also* JOSEPH RAZ, THE MORALITY OF FREEDOM 180-81 (1986).

76. *See* DWORKIN, *supra* note 14; *see also* F.M. KAMM, CREATION AND ABORTION: A STUDY IN MORAL AND LEGAL PHILOSOPHY (1992); THE ETHICS OF ABORTION (Robert M. Baird & Stuart E. Rosenbaum eds., 1989); THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES (John T. Noonan ed., 1970).

77. Thus, for example, *Abortion II* simply states that the unborn child has a right to life, ignoring the express language of *Abortion I* that left this legal issue unresolved. *See Abortion II*, BVerfGE 88 at 282; *see also supra* note 65 and accompanying text. *Abortion II* referred to a passage in *Abortion I* as establishing that the right to life is guaranteed to everyone who lives regardless of whether he or she is in a certain stage of development or has already been born. *See Abortion I*, *supra* note 3, at 638; *see also Abortion II*, BVerfGE 88, at 252. However, the referenced passage simply referred to article 2, section 2 of the Basic Law, and did not resolve the underlying question of whether the fetus has a right to life or whether the right to life is merely an objective duty of the state. *Abortion II* also asserted that the existence of a right to life for the unborn child is not confined to any particular religious or philosophical doctrine, even though *Abortion I* had explained the meaning of human dignity with reference to the independent value of human life in the order of creation. *See Abortion II*, BVerfGE 88, at 252; *see also Abortion I*, *supra* note 3, at 662 ("*daß der Mensch in der Schöpfungsordnung einen eigenen selbständigen Wert besitzt*").

In addition, *Abortion II* posited a different source of the duty to protect than *Abortion I*. *Abortion I* stated that the "right to life" derives directly from article 2, section 2 of the Basic Law, and mentioned only in passing that the duty also follows (*darüber hinaus auch*) from the guarantee of human dignity under article 1. *See id. Abortion I*, *supra* note 3, at 641. *Abortion II*, however, characterized article 2, section 2 as a negative right protected against state interference, and indicated that the positive duty to protect life from private action is grounded (*hat ihren Grund*) in the protection of human dignity, i.e., article 1. *See Abortion II*, BVerfGE 88, at 251. But the Court offered no explanation of how the right of human dignity performs this heroic task. The Court's reasoning was especially troublesome when it explained that the right to life—without which a right to human dignity would be meaningless—must itself be understood as an implication of human dignity. *See id.* at 251. Under this circular reasoning, human dignity is the source of a right to which it adds special force.

III. *CASEY* AND *ABORTION II*: RECONSTRUCTING THE MORAL BALANCE

The second paradoxical parallel in the U.S. and German abortion decisions is that, after the respective abortion regimes of their initial abortion decisions proved to be unstable, both Courts exploited the discontinuity between the legal framework and moral balancing of those decisions in similar ways to accommodate similar compromise abortion regimes. The reproductive autonomy model of *Roe* and the state permission model of *Abortion I* were too extreme to withstand the weight of the powerful forces surrounding the abortion issue. Social, political, and legislative responses in both countries pulled in the direction of a compromise, which we will call the model of "restrained reproductive autonomy."[78] Under this model, the woman retains the ultimate right to decide whether to have an abortion, but the state structures the context of that decision in an effort to persuade her to carry her child to term. Although this model's restraint component would violate *Roe*, and its reproductive autonomy component would be invalid under *Abortion I*, in *Planned Parenthood v. Casey*[79] and *Abortion II*,[80] the Courts adjusted the legal frameworks of their constitutional jurisprudence to accommodate it. To reinforce their tenuous claims of legitimacy, each Court sought to establish fidelity to its initial abortion decision by claiming to have preserved the moral balance, as opposed to the legal framework, of those decisions. Because the legal framework determines the meaning of a particular moral balance for future cases, however, *Casey* and *Abortion II* actually produced a substantially different moral balance than did *Roe* and *Abortion I*. As a result, *Casey* and *Abortion II* lack any solid foundation in either the legal frameworks, or the moral balancing of the earlier decisions.

A. The Model of Restrained Reproductive Autonomy

The model of restrained reproductive autonomy is not such a surprising compromise between competing social forces surrounding the complex issue of abortion. Under this model, the state accords the woman reproductive autonomy because it does not proscribe abortion, at

78. *See* Alan I. Bigel, Planned Parenthood of Southeast Pennsylvania v. Casey*: Constitutional Principles and Political Turbulence*, 18 U. DAYTON L. REV. 733 (1993); *see also* Frances Olsen, Comment, *Unraveling Compromise*, 103 HARV. L. REV. 105 (1989). For alternative interpretive models of *Casey*, see Goldstein, *supra* note 35. For a discussion of the free speech implications of the restrained reproductive autonomy model, see Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724 (1995).

79. 505 U.S. 833 (1992).

80. *Abortion II*, BVerfGE 88, at 203.

least up to the point of viability.[81] The state attempts to restrain the exercise of that autonomy, however, through information or counseling requirements and waiting periods designed to persuade her to carry the child to term.[82] Although the Courts evolved toward the model of restrained reproductive autonomy from opposing directions, the emergence of this compromise in both countries reflects a similar public reaction to the extreme implications of the initial abortion decisions. The accommodation of the model, moreover, presented the Courts with a similar problem—how to uphold such regulations without being forced to abandon any pretense that their assertion of authority to resolve the abortion issue was grounded in constitutional law.

In the United States, where regulation of abortion is generally within the legislative competence of the states, the model of restrained reproductive autonomy emerged incrementally through legislative action in individual states and the Supreme Court's response to particular types of legislation. In some relatively early decisions the Court simply applied the *Roe* legal framework to invalidate legislation that made abortion more difficult by imposing informed consent, waiting periods, spousal and parental consent, or viability determination requirements; it concluded that the laws in question burdened the right of abortion before the point of viability and failed strict scrutiny.[83] But the political response to *Roe* also included a concerted effort to overturn it by changing the composition of the Supreme Court.[84] While this effort has not been successful to date, the Court has become increasingly receptive to regulation that restrains the woman's reproductive autonomy. The Court upheld the denial of funding for abortions on the ground that such

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81. Abortion may also be available later in the pregnancy if one of several narrowly defined exceptions apply.

82. Other forms of contextual persuasion may also be involved, such as parental notice and consent requirements, legal declarations of the unborn child's right to life or the illegality of abortion (without sanctions), or funding limitations. We will focus on information and counseling requirements and waiting periods because they epitomize the state's persuasive efforts.

83. *See* City of Akron v. Akron Cent. for Reprod. Health, Inc., 462 U.S. 416 (1983) (invalidating informed consent and the twenty-four hour waiting period); *see also* Belotti v. Baird, 443 U.S. 622 (1979) (invalidating without majority opinion a parental consent requirement as construed to provide for judicial bypass); Colautti v. Franklin, 439 U.S. 379 (1979) (invalidating the state's definition of viability).

84. For a discussion of the reconfiguration of the Supreme Court, see EVA RUBIN, ABORTION, POLITICS, AND THE COURTS (2d ed. 1987); HERMAN SCHWARTZ, PACKING THE COURTS (1988); DONALD GRIER STEPHENSON, JR., CAMPAIGNS & THE COURTS 190-217 (1999); TRIBE, *supra* note 11, at 139-94; Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 350-51 (1995).

funding does not burden the right to choose.[85] The Court soon extended this logic to permit abortion restrictions attached to the receipt of public moneys.[86] In addition, after initially invalidating parental consent requirements as too restrictive,[87] the Court upheld consent and notification requirements that contain a prompt "judicial bypass" mechanism to permit minors to obtain abortions with judicial rather than parental consent or notification when good reasons exist to do so.[88] Finally, the Court evaluated more generously state efforts to protect the life of a potentially viable fetus by imposing requirements on physicians who perform late-term abortions.[89] Even before *Casey*, then, political developments had moved the Court a long way toward the model of restrained reproductive autonomy.

Casey, however, represents the final acceptance of that model[90] and appears to have established a new equilibrium in the constitutional jurisprudence of abortion.[91] For present purposes, the critical question in *Casey* was the constitutionality of statutory provisions imposing

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85. *See* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977). *Harris* and *Maher* predate the reconfiguration of the Court, and indicate that even under the reproductive autonomy model the Court was not prepared to require government funding for abortions. This early rejection of a constitutional right to abortion funding reflects the complex issues surrounding the unconstitutional conditions doctrine and the imposition of affirmative constitutional duties. *See infra* notes 158-161 and accompanying text.

86. *See* Rust v. Sullivan, 500 U.S. 173 (1991) (upholding regulation precluding the use of family planning funds for abortion counseling); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (upholding provisions prohibiting abortions from being performed at facilities receiving public funding and prohibiting the use of public funds for abortion counseling).

87. *See* Belotti v. Baird, 443 U.S. 622 (1979) (invalidating the requirement that minors receive parental consent or judicial approval); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (invalidating a parental consent requirement that did not include a judicial bypass).

88. *See* City of Ohio v. Akron Ctr. for Reprod. Health, Inc. 497 U.S. 502 (1990) (upholding the requirement of parental notice with a judicial bypass option); Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) (upholding the parental consent requirement with a judicial bypass).

89. *Compare* Thornburgh v. Am. Coll. of Ob. & Gyn., 476 U.S. 747 (1986) (invalidating the requirements of testing and procedures designed to protect potentially viable fetuses), *with* Webster v. Reprod. Health Serv., 492 U.S. 490 (1989) (upholding similar requirements as interpreted to protect the life and health of the mother).

90. We offer merely a brief summary of *Casey* here. The decision is subject to a much more detailed analysis in the remainder of the Article.

91. *See* STEPHENSON, *supra* note 84, at 217 ("Clinton's appointments of Justices Ginsburg and Breyer (each pro-choice) in 1993 and 1994, replacing abortion antagonists White and Blackmun, respectively, shored up the tenuous 'truce' of 1992."). How long this equilibrium will last is, of course, anybody's guess. With the election of George Bush, it is possible that the balance may shift in favor of overruling *Roe*, although the nomination of any justice who might produce this result would certainly be controversial. Stenberg v. Carhart, 120 S. Ct. 2597 (2000) (invalidating "partial birth" abortion loan under the undue burden test), which a majority of justices subscribed to the *Casey* analysis.

informed consent requirements and a twenty-four hour waiting period.[92] Prior decisions had applied the *Roe* framework to invalidate statutes imposing such requirements,[93] which trigger strict scrutiny because they impose a burden on the right to choose an abortion and are not narrowly tailored to meet a compelling state interest.[94] Determining the constitutionality of these and other statutory provisions at issue afforded the Court an opportunity to reconsider *Roe*, and both the public and the Court focused a great deal of attention on whether *Roe* would be overruled. The Court was badly fractured, with Justices Kennedy, O'Connor, and Souter representing the crucial swing votes.[95] Their controlling plurality expressed support for the "essential holding" of *Roe* as a matter of both first principles and *stare decisis*. However, the plurality rejected *Roe*'s trimester framework and upheld the informed consent and waiting period provisions of the statute at issue, overruling the Court's earlier decisions to the contrary.[96]

In Germany, where abortion is the subject of federal criminal law, the social and political forces pulled in the opposite direction, but the eventual result was similar. Although the criminal law was changed to comply with *Abortion I*,[97] demand for abortion eroded the effectiveness of the state permission model. By the time *Abortion II* was decided, permission for abortion was obtained with relative ease based on a lax application of the *Unzumutbarkeit* exceptions, particularly the exception

92. *See* Casey v. Planned Parenthood, 505 U.S. 833, 881-87 (1992); *see also id.* at 899-901 (upholding a parental notification requirement with judicial bypass, and various record-keeping requirements designed to protect viable fetuses, but invalidating a spousal notification requirement).

93. *See* Thornburgh v. Am. Coll. of Ob. & Gyn., 476 U.S. 747 (1986) (invalidating informed consent and waiting period requirements); *see also* City of Akron v. Akron Cent. for Reprod. Health, 462 U.S. 416 (1983). General requirements of informed consent that applied broadly to various medical procedures and did not impose abortion-specific requirements, however, were permissible. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 65-67 (1976).

94. *See supra* notes 28-30 and accompanying text (discussing strict scrutiny and the trimester framework in *Roe*). The state's interest in protecting the life of the unborn child would not be compelling until after viability. The state's interest in protecting the life and health of the mother would be compelling after the first trimester, but informed consent and waiting period requirements would not be narrowly tailored to meet that interest.

95. Chief Justice Rehnquist and Justices Scalia and Thomas would have overturned *Roe*, and joined the plurality in upholding the informed consent and waiting period, parental notification, and record-keeping provisions of the statute. They dissented from the invalidation of the spousal notice provision. *See Roe v. Wade*, 410 U.S. 113, 171-78 (1973). Justices Breyer, Ginsburg, and Stevens would have recognized a much broader right of reproductive autonomy. They joined the plurality in invalidating the spousal notice provision, and would have invalidated other provisions as well.

96. *See Casey*, 505 U.S. at 871-87.

97. *See* Neuman, *supra* note 1, at 275-76.

for social indications.[98] Since the state permission procedure incorporated a counseling component,[99] the practical situation already approximated the model of restrained reproductive autonomy. The impetus for legislative change, however, came from an extrinsic political event: reunification. In the early seventies, the German Democratic Republic (GDR) adopted a law permitting abortion on demand within the first trimester of pregnancy.[100] In the process preceding reunification, it soon became clear that women in East Germany were not willing to sacrifice that right for the sake of national unity. Accordingly, the Reunification Treaty did not extend the restrictive West German law to the new Länder, but rather deferred a resolution of the differential treatment of abortions to subsequent national legislation. This legislation was drafted by the first common German parliament in the spring of 1992. The Pregnancy and Family Assistance Act (PFAA)[101] permitted women to have an abortion within the first three months of pregnancy, subject to a requirement of counseling—which must be certified—and a three day waiting period after consulting with the physician carrying out the abortion.[102] The counseling procedure outlined by the PFAA Act was relatively more demanding than the comparable provisions that were struck down in *Abortion I*.[103]

This "hard won compromise,"[104] like the more incremental development of abortion law in the United States, reflects the model of

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98. *See id.* at 276 ("In practice, however, the breadth of the 'general situation of need' indication has meant that 'almost every pregnant woman could obtain an indication if she did so with determination.'") (quoting Albert Eser, *Reform of German Abortion Law: First Experiences*, 34 AM. J. COMP. L. 369, 381 (1986)). Even the Court in *Abortion II* acknowledged this reality. *See Abortion II*, BVerfGE [Constitutional Court] 88, 203, (264-65) (F.R.G.).

99. The Constitutional Court held in *Abortion I* that even in the process of evaluating a pregnancy the state has the duty to counsel a pregnant women and to admonish her that the protection of life is at stake. *See Abortion I*, *supra* note 3, at 650. In hindsight, it seems as if the model of restrained reproductive autonomy had been incorporated as a component of the exceptions granted on the basis of *Unzumutbarkeit*.

100. *See* Kommers, *supra* note 4, at 10-11. For a defense of the compromise made by the German legislature, see Georg Hermes & Susanne Walther, *Schwangerschaftsabbruch zwischen Recht und Unrecht: Das zweite Abtreibungsurteil des BVerfG und seine Folgen*, 46 NEUE JURISTISCHE WOCHENSCHRIFT 2337, 2347 (1993).

101. GESETZ ZUM SCHUTZ DES VORGEBURTLICHEN/WERDENDEN LEBENS, ZUR FÖRDERUNG EINER KINDERFREUNDLICHEN GESELLSCHAFT, FÜR HILFEN IM SCHWANGERSCHAFTSKONFLIKT UND ZUR REGELUNG DES SCHWANGERSCHAFTSABBRUCHS (Schwangeren- und Familienhilfegesetz) (Pregnancy and Family Assistance Act) 27.6.1992 (BGBl.I 1398) [hereinafter PFAA].

102. *See* PFAA, *supra* note 101, art. 13 (amending the relevant provisions of the Criminal Code).

103. *See* Kommers, *supra* note 4, at 4-5.

104. Kommers explains:

> Previously in West Germany, a woman had to have a certificate from a doctor indicating that she had met at least one of four conditions specified by law before she could obtain permission to have an abortion free of punishment. Previously in East

restrained reproductive autonomy. It gives the mother a right of reproductive autonomy insofar as it replaces the previous requirement of state permission in individual cases with a counseling process eventuating in a decision by the mother herself.[105] However, it restrains that right by reminding her of the value of human life and moral implications of her choice, thus making abortions emotionally more expensive.[106] Although the Court in *Abortion II* invalidated this legislation,[107] its opinion offered guidance to the legislature as to how it could adopt a substantially similar regime. As long as the state declared through the criminal law that abortions without a state finding of *Unzumutbarkeit* are illegal, the state could dispense with criminal sanctions and employ counseling and waiting periods instead, provided that these measures deter at least as many abortions. Crucially, under this system a woman may have an abortion without receiving the prior permission of the state. Thus, *Abortion II*, like *Casey*, accommodated the model of restrained reproductive autonomy.[108]

In both the United States and Germany, the political processes produced compromise abortion regimes that were ultimately accommodated by the Supreme Court and Constitutional Court. The resulting model of restrained reproductive autonomy attempts to balance respect for the woman's right of self-determination and the intrinsic value of human life by according the woman ultimate decision-making power, while structuring the context of that decision so as to discourage abortion. The respective Courts have constructed this model from different points of departure. In the United States, the restraints operate as exceptions to the right of reproductive autonomy, while in Germany,

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> Germany, a woman could choose to have an abortion on demand at any time and for any reason within the first trimester of pregnancy. The all-German law–a counseling model which incorporated pro-life inducements, but left the ultimate choice to the woman–appeared to split the difference between West Germany's old 'indications' model and East Germany's old "on demand" model.

Id. at 14.

105. *See Abortion II*, BVerfGE [Constitutional Court] 88, 203 (277) (F.R.G.). Indeed, such a decision would not merely be exempt from criminal sanctions, but rather would be considered "justified." *See generally Abortion I*, *supra* note 3.

106. *See* Goldstein, *supra* note 35.

107. *See Abortion II*, BVerfGE 88, at 356.

108. The authors disagree as to the appropriate characterization of the Constitutional Court's accommodation of the restrained reproductive autonomy model. Professor Somek believes that "reluctant acceptance" is the appropriate characterization, in the sense that he believes the Court was essentially forced by circumstances to unwillingly accept the effective decriminalization of abortion early in the pregnancy. Professor Levy, perhaps reflecting his common law perspective of judicial decision-making, believes that the Court went out of its way to advise the legislature how to decriminalize abortion, and in this sense cannot be described as reluctant. We have settled on "accommodation" as a compromise.

reproductive autonomy operates as an exception to the state's duty to protect life—but the final result is the same.[109] The accommodation of the model of restrained reproductive autonomy, moreover, presented the Courts with a similar jurisprudential problem—how to change the constitutional framework for state regulation of abortion while preserving the legitimacy of judicial control over abortion regulation through fidelity to the initial abortion decisions. As will be developed more fully in the remainder of this Article, the Courts attempted to accomplish this task through similar analytical devices which suffer from similar analytical problems.

B. Accommodating Restrained Reproductive Autonomy in Casey *and* Abortion II

To bolster the legitimacy of their decisions through formal legal analysis, both the *Casey* plurality and the Constitutional Court in *Abortion II*, went to great lengths to demonstrate that their decisions were consistent with *Roe* and *Abortion I*. Such a reconciliation presents no easy task because the model of restrained reproductive autonomy is inconsistent with the constitutional framework of abortion established in the initial decisions. Its restraint component is inconsistent with the reproductive autonomy model of *Roe* and its reproductive autonomy component is inconsistent with the state permission model of *Abortion I*. Both Courts attempted to resolve their dilemma by exploiting the discontinuity between the legal framework and intuitive moral balancing in *Roe* and *Abortion I*. Ironically, both Courts claimed fidelity to the underlying moral balance of their initial decisions, while fundamentally altering the legal framework from which that balance is supposed to derive.[110]

The *Casey* plurality began with a lengthy discussion of why *Roe* should be reaffirmed on the basis of both first principles and the doctrine of *stare decisis*.[111] Thus, although the plurality defended *Roe's* recognition of a constitutional right of reproductive autonomy as

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109. *See* Neuman, *supra* note 1, at 293-96, 306. Neuman, for example, characterizes the 1992 Pregnancy and Family Assistance Act as the mirror image of the American framework, with the exception that positive duties on the part of the state are conspicuously absent in American constitutional law. *Id.*

110. As noted above, the legal framework is, at least in part, constitutive of the moral balance. It follows that the alteration of the legal framework reveals an alteration of the moral balance as well.

111. *See* Planned Parenthood v. Casey, 505 U.S. 833, 845-46 (1992) ("After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

correct,[112] it also engaged in an extensive discussion of the conditions that justify overruling prior decisions and why none of them applied to *Roe*.[113] In light of its emphasis on *stare decisis*, it was essential that the plurality explain how the model of restrained reproductive autonomy was consistent with *Roe*. The plurality did so by stripping *Roe* to its "essential holding," which, according to the plurality, consists of three basic propositions:

> First is a recognition of the right of the woman to choose to have an abortion before viability and obtain it without undue interference from the State. . . . Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.[114]

Likewise, later in the opinion, the plurality claimed that its analysis did not disturb the "central holding of *Roe v. Wade* [that] regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[115] These statements suggest that to the plurality, it is the particular moral balance struck by the Court on the facts of the case, not the legal analysis it used to arrive at the balance, that was essential in *Roe*.

Having so characterized *Roe*, the *Casey* plurality explicitly rejected *Roe*'s trimester framework because it was not part of the essential holding.[116] More broadly, the plurality rejected the fundamental rights analysis that had produced the trimester framework, and replaced it with an "undue burden" test,[117] under which an abortion regulation is invalid

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112. *See id.* at 846-53. The plurality's exposition of the constitutional principles supporting *Roe* is in many respects more persuasive than the exposition in *Roe* itself.

113. *See id.* at 854-69. Although the plurality spoke of the combined weight of its "explication of individual liberty" and "the force of stare decisis," there is some tension between the plurality's defense of *Roe* and its reliance on *stare decisis*. *Id.* at 853. If *Roe* was decided correctly as a matter of first principles, then *stare decisis* should not be an issue.

114. *Id.* at 846.

115. *Id.* at 879, 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*.").

116. *Id.* at 873.

117. *See generally id.* at 869-79 (rejecting the *Roe* framework and adopting and explaining the undue burden test). This test would appear to be attributable to Justice O'Connor, who had articulated it previously in concurring opinions, although the phrase had been used by other justices and in some early decisions. *See* Thornburgh v. Am. Coll. of Ob. & Gyn., 476 U.S. 747, 828-29 (1986) (O'Connor, J., dissenting); City of Akron v. Akron Cent. for Reprod. Health, Inc., 462 U.S. 416, 461-66 (1983); *see also Casey*, 505 U.S. at 876. Indeed, the results of *Casey* closely track Justice O'Connor's previously announced positions, including the constitutionality of informed consent and waiting period requirements in *Thornburgh* and *Akron*, and invalidity of

only if its "purpose or effect plac[es] a substantial obstacle in the path of a woman seeking abortion of a nonviable fetus."[118] There are two key differences between this test and the fundamental rights framework of *Roe*. First, the undue burden test tolerates restraints on the mother's right of reproductive autonomy if such restraints do not impose an undue burden or substantial obstacle. Second, the state's interest in protecting potential life is sufficient to justify those restraints even before the point of viability.[119] Applying this test, the *Casey* plurality had little difficulty upholding the informed consent and waiting period,[120] parental notice,[121] and record-keeping provisions of the statute in question,[122] but (as if to prove some fidelity to *Roe*) invalidated a spousal notice provision because it imposed a substantial obstacle.[123]

In effect, the *Casey* plurality reasoned that all *Roe* really decided is the particular moral balance that a state may not prohibit abortions before viability, and that the undue burden test could replace fundamental rights analysis without violating the principles of *stare decisis* because it would produce the same moral balance. Of course, a standard tactic of common law reasoning is to narrow a prior decision to its facts and result and to replace the decision's actual reasoning with an alternative rationale. This tactic has been used elsewhere by the Supreme Court in recent years to narrow the scope of some previously recognized individual rights.[124] In *Casey*, however, the plurality was aided and abetted by the reasoning of *Roe* itself, which virtually invited such treatment by a later Court because of the discontinuity between its legal framework and moral balancing. Even so, the plurality's opinion is ultimately unpersuasive.[125]

Similarly, the Constitutional Court in *Abortion II* reconciled the model of restrained reproductive autonomy with *Abortion I* by exploiting

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some consent requirements. *See* Hodgson v. Minnesota, 497 U.S. 417, 459-61 (1990) (O'Conner, J., concurring in part and dissenting in part) (voting to invalidate a two-parent notice requirement with insufficient judicial bypass because it imposed an undue burden); *but see* City of Akron v. Akron Cent. for Reprod. Health, Inc., 457 U.S. 502 (1990) (upholding parental notice provision with judicial bypass in an opinion authored by Justice Kennedy and joined by, *inter alia*, Justice O'Connor).

118. *Casey*, 505 U.S. at 877.

119. *See id.* at 876.

120. *See id.* at 881-87. The plurality was joined in this holding by those Justices who would overturn *Roe* and reject any constitutional right to an abortion.

121. *See id.* at 899-900.

122. *See id.* at 900-01.

123. *See id.* at 887-98. The plurality was joined in this holding by those Justices who would recognize a broader right to abortion by retaining the fundamental rights framework.

124. *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (reading the free exercise clause cases as requiring strict scrutiny only when laws burdening religious exercise single out religious groups for adverse treatment).

125. *See infra* Parts III.C and IV.B.

the discontinuity between the legal framework and moral balancing of its earlier decision. Demonstrating its fealty to *Abortion I*, the Court in *Abortion II* reiterated that a state must definitively declare that abortions are illegal (except in cases of *Unzumutbarkeit*) and "anchor" that declaration in the criminal law, and invalidated the statute in question because the state had failed in this duty. The Court reasoned that without a determination of *Unzumutbarkeit* by the state, a woman's decision to have an abortion, even after counseling and a waiting period, cannot be made legal by the state, for this would allow women to assume the role of judge in their own case.[126] Provided that the legislature continued to indicate through the criminal law that abortions without a state finding of *Unzumutbarkeit* are illegal, however, the legislature could eliminate the regime of state permission backed by criminal sanctions with one that left the ultimate decision to the mother after counseling and a waiting period.[127] In essence, the Court rejected the legislature's formulation of the compromise between competing positions on abortion, but replaced that formulation with the Court's own version of the compromise that differs little in practice.[128]

Of course, an abortion regime that permits abortions at the woman's discretion after counseling and a waiting period affords a degree of reproductive autonomy that *Abortion I* appears to prohibit as inconsistent with the state's duty to protect life.[129] Thus, although the nature of *stare*

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126. Conversely, the Constitutional Court expressed its strong, but nonetheless highly questionable belief that for every single case the circumstances of *Unzumutbarkeit* could be identified through psychological expertise. *See* BVerfGE [Constitutional Court] 88, 203 (266) (F.R.G.). Having committed itself to this naive belief in the infinite capacities of *erfahrenem Sachverstand* (experienced expertise), the court then had to face the following paradox: Women experience pregnancy as a highly personal affair. *See id.* at 263, 266. If the state requires an evaluation of the circumstances constituting a social indication, as the state did in the aftermath of *Abortion I*, it must be expected that women will generally be reluctant to cooperate or will even manifest recalcitrant behavior (i.e., cheat, dissimulate, or feign the evidence). *See id*. at 266.

127. *Id.* at 274.

128. For a defense of the Court's compromise, see Christian Starck, *Der verfassungsrechtliche Schutz des ungeborenen Lebens: Zum zweiten Abtreibungsurteil des BVerfG*, 48 JURISTENZEITUNG 816, 822 (1993). *See also* Monika Frommel, *§ 218: Straflos, aber rechtswidrig; zielorientiert, aber ergebnisoffen—Paradoxien der Übergangsregelung des Bundesverfassungsgerichts*, 26 KRITISCHE JUSTIZ 324 (1993); Norbert Hoerster, *Das 'Recht auf Leben' der menschlichen Leibesfrucht—Rechtswirklichkeit oder Verfassungslyrik?*, 35 JURISTISCHE SCHULUNG 192, 195 (1995).

129. The Constitutional Court might have reasoned, as two of the dissenting Judges did, that *Abortion I* had effectively recognized a right of reproductive autonomy, albeit a narrow one, under the principle of *Unzumutbarkeit*. Such a reading is not altogether implausible, insofar as the Court in *Abortion I* spoke of the exceptions for *Unzumutbarkeit* as instances in which the choice of an abortion could be a "respectable conscientious decision" (*achtenswerte Gewissensentscheidung*). *See Abortion I*, *supra* note 3, at 647. After all, the very point of the whole counseling regime was to bring about such a decision. And since *Abortion I* also indicates that criminal sanctions are only one means of fulfilling the state's duty of preventing abortions

decisis and the treatment of prior decisions differs in the United States and Germany, it was also necessary for the Constitutional Court in *Abortion II* to explain how its accommodation of the model of restrained reproductive autonomy was consistent with its earlier decision in *Abortion I*. Because of the different styles of legal reasoning and use of precedent in the two systems, the Constitutional Court did not narrow *Abortion I* to its facts and offer an alternative rationale.[130] Instead, the Court focused on the end result of the new abortion regime, reasoning that counseling and a waiting period would fulfill the state's duty because such a regime would prevent the maximum number of abortions.[131] Like the *Casey* plurality opinion, this analysis effectively claimed that the moral balance of the earlier decision had been preserved, while changing, albeit without explicitly rejecting, the underlying legal framework that produced it.

Abortion II's analysis implicitly reflected a different understanding of the state's constitutional duty than *Abortion I*. Under *Abortion I*, the state's constitutional duty to protect life was expressed in terms of the individual life, which required the state to determine in individual cases whether one of the *Unzumutbarkeit* exceptions applies, and to use the criminal law to declare illegal all other abortions. The state could not leave the final decision to the woman in ordinary cases, even after counseling. Indeed, although the Constitutional Court indicated that "[t]he legislature is not prohibited . . . from expressing the legal condemnation of abortion required by the Basic Law in ways other than the threat of punishment,"[132] *Abortion I* expressly rejected the idea that counseling may be substituted for criminal sanctions if that would save more lives: "[T]he weighing in bulk of life against life which leads to the allowance of the destruction of a supposedly smaller number in the

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that do not fall within the *Unzumutbarkeit* exceptions, the state has arguably fulfilled this duty by constraining the mother to make a conscientious decision and then leaving that decision to her. There are, however, two problems with this analysis. First, *Abortion I* made clear that the *Unzumutbarkeit* principle is a very narrow one in which burdens on the mother are of the same order as threats to her life or health, and do not encompass "the normal situation with which everyone must be able to cope." *Abortion I*, supra note 3, at 648. Second, *Abortion I* also made clear that the determination of whether such burdens exist in individual cases must be made by the state or its designated agents. *See id.* at 657.

130. For example, a common law court might have concluded that the cases were distinguishable because the counseling regime in *Abortion II* was much more stringent, and thus the decision in that case was not controlling. *Cf. Abortion II*, BVerfGE 88, at 258 (hinting at such a distinction). Like *Casey*, however, such an analysis would require the Court to articulate an alternative legal framework that explains both decisions.

131. *See Abortion II*, BVerfGE 88, at 264-66.

132. *Abortion I*, *supra* note 3, at 646. The Court declared that "[t]he decisive factor is whether the totality of measures serving the protection of the unborn life . . . guarantees an actual protection corresponding to the importance of the legal value to be secured." *Id.* at 646.

interest of the preservation of an allegedly larger number is not reconcilable with the obligation of an individual protection of each single concrete life."[133] *Abortion II*, however, relied on that very argument to support the removal of penal sanctions and the substitution of counseling and a waiting period for state evaluation under the *Unzumutbarkeit* exceptions: the state could do so because it would be more effective at preventing abortions.[134] Thus, the Court no longer viewed the state's duty in terms of "individual life," but rather as a duty to save the largest number of lives possible.[135] Similarly, although the Constitutional Court sought consistency with *Abortion I* by requiring the state to anchor the new regime with a declaration in the criminal law that post-counseling abortions are illegal,[136] this gesture is still a "bulk" declaration rather than an individualized decision.

The reasoning of *Abortion II* parallels the reasoning of the Supreme Court in *Casey* in the sense that it accommodated, even if only reluctantly, the restrained reproductive autonomy model by focusing on the moral balance struck in the Constitutional Court's earlier decision, while applying a fundamentally different legal framework to produce that balance. The perspective, of course, is somewhat different. *Casey* relies on the moral balance at the "micro" level. The plurality was concerned with the moral balance struck on the particular facts of *Roe*—the state may not criminalize abortion before viability. *Abortion II*, in contrast, was concerned with the moral balance on the "macro" level—the total number of abortions. The legislature could do away with the regime of individualized state permission based on *Unzumutbarkeit* exceptions, and replace it with one in which the mother makes the decision without state permission, as long as the new legal regime would produce fewer abortions. Thus, both Courts pretended that as long as the restrained reproductive autonomy model would produce the same moral

133. *Id.* at 655. The Court also rejected the total protection argument on the grounds that the "penal norm" has an important impact on "the conceptions of value and manner of behavior of the populace," and because a dependable foundation is lacking for a "total accounting" which must be rejected on principle. *Id.*

134. This is the basic paradox of the state's exercise of fetal police power: to invite the cooperation of women for the sake of saving the life of the fetus, the state may refrain from punishing women who obtain an abortion after they have submitted to a counseling procedure. It is more likely that women will choose not to have an abortion if there is "assistance" from the state and if they are given the impression that the matter is one, in the words of the Constitutional Court, in which they have the final responsibility (*Letztverantwortung*). *See Abortion II*, BVerfGE 88, at 270. Apparently, the state has to *pretend* that there is a right to choose where, according to the value order of the Basic Law, there is no such right. It is as if the original duty to protect had to be self-effacing in practice.

135. *See id.* at 265.

136. We will discuss other problems with this reasoning in Part IV.

balance as their initial decisions did, changes in the framework of constitutional analysis designed to accommodate the model do not offend *stare decisis*.

C. The Precipice of Moral Balancing

Paradoxically, for both the *Casey* plurality and the Constitutional Court, the use of the moral balance of *Roe* and *Abortion I* as the focus of fidelity to *stare decisis* actually undermined the Courts' attempts to maintain legitimacy through formal legality by removing any vestige of a legal foundation for the Courts' moral balancing. The source of the Courts' authority to draw a moral balance for society in *Roe* and *Abortion I* is the legal framework established by their constitutional analysis. When the *Casey* plurality and the Constitutional Court in *Abortion II* discarded the legal framework of the earlier decisions, they removed the legal foundations of the very moral balance on which they purport to rely. More fundamentally, by adopting a new legal framework to accommodate the model of restrained reproductive autonomy, both Courts give new meaning to the moral balance they purported to preserve. Even if the moral balance thereby achieved is a more workable social compromise than the extreme constitutional regimes in *Roe* or *Abortion I*, *Casey* and *Abortion II* failed to establish any legal foundation for that moral balance.

By stripping *Roe* to its moral balance (i.e., no ban on previability abortions), and defending the undue burden test as a better legal framework to express that moral balance, the *Casey* plurality reversed the relationship between moral balancing and the legal framework. In *Roe* the moral balance derived, even if imperfectly, from a preexisting and independently articulated fundamental rights framework. The *Casey* plurality adopted an entirely new legal framework constructed solely for the purpose of defending the moral balance the plurality wished to strike. The plurality carefully articulated the constitutional basis of the woman's right of reproductive autonomy,[137] but did not offer any independent constitutional justification for the undue burden test itself, either in terms of constitutional text, history, or doctrine. The plurality cited "undue burden" language from earlier decisions, but none of those decisions had adopted the undue burden standard as applied in *Casey*.[138] Thus, the

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137. *See* Planned Parenthood v. Casey, 505 U.S. 833, 846-53 (1992) (explaining the relationship between abortion and the right of privacy as it pertains to marriage, child rearing, and the family).

138. *See id.* at 874-75. For example, the plurality quoted from *Maher v. Roe*, 432 U.S. 464, 473-74 (1977), in which the Court states that "*Roe* did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right

only foundation for the undue burden test was the underlying moral balance of *Roe*, but since the *Casey* plurality rejected the legal framework that had produced this balance, the only link to legitimacy was a hermeneutic circle that lacked any foundation in constitutional exegesis.

In much the same way, the Constitutional Court in *Abortion II* claimed fidelity to the moral balance of *Abortion I*, while adopting a new legal framework based on a different understanding of the state's constitutional duty. In effect, *Abortion II* characterized *Abortion I*'s moral balance as requiring the state (1) to declare the value of life through the criminal law and (2) to take steps to prevent the maximum number of abortions. Although this balance was explained in *Abortion I* as a product of the state's duty to protect each individual life, *Abortion II* engaged in precisely the kind of bulk weighing of lives that *Abortion I* rejected. This "total life" legal framework is not even acknowledged by the Court, much less explained in terms of any independent legal analysis. The Court might have attempted to do so by explaining the right to life as an objective value rather than an individual claim, thus resolving the ambiguity of *Abortion I*.[139] Paradoxically, however, *Abortion II* concluded that the right to life is a personal right, without ever explaining how the total lives perspective could be reconciled with an individualized conception of the right to life.[140] The Constitutional Court's manipulation of the relationship between moral balancing and legal framework undermines the legitimacy of its abortion decisions. In the absence of any solid legal foundation, the weighing of total lives saved links the content of constitutional law to the social situation rather than to constitutional principles. This analysis comes perilously close to conceding that public reaction may determine constitutional law.[141] In

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protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." But *Maher* deals with the denial of abortion funding and the quoted language is an explanation of why the state has no affirmative duty to make abortions possible. Nothing in *Maher* suggested that a "burden" on the freedom to decide could be sustained on the basis of the state's interest in protecting potential life, or that informed consent or waiting periods would not be an undue burden. In a similar vein, the plurality's citations to language in *Doe v. Bolton*, 410 U.S. 179, 198 (1973), and *Bellotti v. Baird*, 443 U.S 622, 147 (1979), provide scant support for the rejection of *Roe*'s fundamental rights analysis and trimester framework, insofar as both decisions applied that analysis.

139. *See supra* notes 65-68 and accompanying text.

140. *See Abortion II*, BVerfGE 88, at 252.

141. *See supra* note 134. The analysis reasoned that the constitutional regime is ineffective because women resist it, so an alternative constitutional regime is actually better in terms of the practical result. This is akin to conceding–as the Supreme Court refused to do in *Cooper v. Aaron*, 358 U.S. 1 (1958)—that public resistance to school desegregation permits the reintroduction of the separate but equal doctrine on the theory that the ultimate quality of education received by African Americans would be better.

any event, such contextual analysis hardly provides the solid foundation in legal analysis that would legitimize the Constitutional Court's assumption of authority to oversee the moral balance of abortion.[142]

The efforts of the *Casey* plurality and the Constitutional Court in *Abortion II* to rely on the moral balance of their earlier decisions failed for a second and more fundamental reason—the moral balance struck by *Casey* and *Abortion II* is not the same moral balance struck by the Courts' earlier decisions. In the United States, the undue burden test gives greater weight to the state's interest in protecting life relative to reproductive autonomy than recognized in *Roe*.[143] In Germany, the total life conception of the state's duty gives greater weight to the mother's interest in reproductive autonomy than recognized in *Abortion I*, albeit indirectly, as a result of the ineffectiveness of the state permission model.[144] The critical point is that, in both *Casey* and *Abortion II*, the very act of deriving a new legal framework from the moral balance changed the meaning of that balance. A particular moral balance can be defended or explained on various models of order (in the context of law, legal frameworks) that give different weights to different considerations. The meaning of the moral balance of a given case and its implications for other cases can only be determined in reference to the model of order or legal framework that it expresses. In other words, because the meaning of the moral balance struck by *Roe* and *Abortion I* is determined by the legal framework of which they are an expression, *Casey* and *Abortion II* redefine the moral balance by changing the legal framework.

According to the *Casey* plurality, the moral balance of *Roe* is that the state may not prohibit abortions before the point of viability. The implications of this moral balance for counseling and waiting periods (i.e., restrained reproductive autonomy) depends upon the legal framework that produced that balance. This relationship can be expressed as follows:[145]

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142. *See* Richard Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998) (whether or not the results of constitutional decisions might be better if the courts attended more to practical effects as supported by empirical data, courts are not constitutionally selected social engineers, and their decisions cannot be legitimized solely by utilitarian analysis).

143. *See supra* notes 116-121 and accompanying text.

144. *See Abortion II*, BVerfGE 88, at 265. The ineffectiveness of state decision-making is a result of the deeply personal nature of the abortion decision, which (as the Constitutional Court recognized) can be expected to lead to resistance and abuse of the system.

145. *See infra* notes 171-181 and accompanying text. This assumes the plurality's conclusion that there is no undue burden to the contrary. One might argue that informed consent and waiting period requirements do place a substantial obstacle in the path of women seeking abortions, and thus violate the undue burden test.

TABLE 1: LEGAL FRAMEWORKS AND MORAL BALANCING IN *ROE* AND *CASEY*

Model	Legal Framework	Previability Ban (Facts of *Roe*)	Information and Waiting Periods (Facts of *Casey*)
Reproductive Autonomy	Fundamental Rights Analysis	1. Burden on Fundamental Right Triggers Strict Scrutiny 2. Fails Strict Scrutiny Because No Compelling Interest Before Viability	1. Burden on Fundamental Right Would Trigger Strict Scrutiny 2. Would Fail Strict Scrutiny Because No Compelling Interest Before Viability
Restrained Reproductive Autonomy	Undue Burden Test	1. Undue Burden on Mother's Decision Because Ban Creates a Substantial Obstacle 2. Ban Prevents Mother From Making the Ultimate Decision	1. Burden Is Not Undue Because Information and Waiting Periods Do Not Create a Substantial Obstacle 2. Information and Waiting Leaves Ultimate Decision to Mother
Implications For Moral Balance		Moral Balance of *Roe* Is Consistent With Both Fundamental Rights Analysis and Undue Burden Test	Moral Balance of *Casey* Is Inconsistent With Fundamental Rights Analysis But Consistent With Undue Burden Test

Whether the moral balance in *Casey* is consistent with the moral balance in *Roe* (i.e., whether it preserves *Roe*'s central holding) depends entirely on which legal framework *Roe* is understood to express. Under traditional fundamental rights analysis, *Casey* is inconsistent with *Roe*, but under the undue burden test the cases are consistent. Since it is the legal framework that gives the moral balance meaning for future cases, the *Casey* plurality altered the meaning of the moral balance in *Roe* by rejecting its legal framework and replacing it with one that accommodated counseling and a waiting period.

Likewise, because *Abortion II* changed the legal framework used to evaluate abortion regulations by shifting it from an "individual life" to a "total life" perspective, the Constitutional Court gave new meaning to the moral balance struck in *Abortion I*. This new perspective allowed the Court to reorient the legal framework implied by that moral balance. As long as the process provides the same overall level of protection for

unborn children, the legal regime of state decision can be replaced by a regime under which the state broadly permits abortions after counseling and a waiting period. This relationship can be expressed in a similar fashion:

TABLE 2: LEGAL FRAMEWORKS AND MORAL BALANCING IN *ABORTION I* AND *II*

Model	Legal Framework	Legalization of Mother's Choice (Facts of *Abortion I*)	Penal Sanction Replaced With Counseling and Waiting Period (Facts of *Abortion II*)
State Permission	Individual Life Approach	1. Abortion Must Be Illegal Except in Cases of *Unzumutbarkeit* 2. Invalid Because State Does Not Decide *Unzumutbarkeit* in Each Case But Leaves Decision to Mother	1. Removal Of Penal Sanctions Would Permit Abortion In Cases Other Than *Unzumutbarkeit* 2. Would Be Invalid Because State Does Not Decide *Unzumutbarkeit* in Each Case But Leaves Decision to Mother
Restrained Reproductive Autonomy	Total Life Approach	1. Abortion Must be Declared Illegal Except in Cases of *Unzumutbarkeit* 2. Invalid Because Penal Sanctions Have Not Been Replaced By More Effective Means of Persuasion	1. Declaration of Illegality Does Not Require Imposition of Sanctions 2. Valid Because Counseling and Waiting Without Sanctions Will Be More Effective
Implications For Moral Balance		Moral Balance of *Abortion I* is Consistent With Both The Individual and Total Life Approaches	Moral Balance of *Abortion II* is Inconsistent With Individual Life Approach, But Consistent With Total Life Approach

Thus, *Abortion II* altered the meaning of the original moral balance struck in *Abortion I* by altering the underlying legal framework, just as *Casey* altered the meaning of *Roe* by changing the legal framework. The replacement of the individual life analysis of the state's duty with a bulk life perspective enabled the Court to redefine *Abortion I*'s moral balance as one of maximum protection rather than state control of individual

decision-making. This understanding of the moral balance, in turn, permits the replacement of criminal sanctions with counseling and a waiting period.

The adoption of new legal frameworks by the *Casey* plurality and the Constitutional Court in *Abortion II* undermined their efforts to establish legitimacy through fidelity to the initial abortion decisions. The respective Courts not only severed their exercise of moral balancing from any constitutionally-derived legal framework, but also changed the very moral balance on which they purported to rely by reinterpreting that balance as an expression of a new legal framework. As will be discussed in the following section, both the *Casey* plurality and the Constitutional Court in *Abortion II* sought to bolster their problematic claims of fidelity to precedent through analysis of the locus of abortion decision, but this analysis ultimately is unpersuasive.

IV. *CASEY* AND *ABORTION II* REVISITED: FACT AND FICTION IN THE LOCUS OF DECISION

The third paradoxical parallel in the U.S. and German abortion decisions is the Courts' treatment of the allocation of decisional authority, which operates as the essential nexus between the moral balance and legal framework of abortion. Both Courts fail to acknowledge the inherent reality of the dynamics of abortion, in which the mother always makes the ultimate decision, but that decision is always made in a social context that includes the legal regulation of abortion. In *Roe* and *Abortion I*, the Courts ignored this decisional dynamic because the hierarchy of rights dictated a legal framework and moral balance in which decisional authority was allocated to the mother and the state respectively.[146] In order to defend their claims of preserving the moral balance of the initial abortion decisions, it was incumbent upon both the *Casey* plurality and the Constitutional Court in *Abortion II* to demonstrate that their new legal frameworks did not alter the locus of decision. The analysis of this question in both *Casey* and *Abortion II*, however, emphasized one aspect of the decisional dynamic—the ultimate authority of the mother and the state's context-shaping role—but failed to address significant changes in the state's role under the restrained reproductive autonomy model. Both Courts, moreover, relied on a distinction between criminal sanctions and persuasive measures that elevates fiction over fact. A more realistic assessment of the relative impact of criminal sanctions and persuasive measures on individual

146. *See supra* notes 33-36 and accompanying text.

women confirms that in both *Casey* and *Abortion II* the locus of decision has changed.

A. Autonomy and Context in Abortion Decisions

All nominally private decisions, including the decision whether to have an abortion, involve the interplay between the state and the individual. Unless the individual is physically restrained by the state, he or she retains the ultimate power to act. Even when the state declares private conduct illegal and imposes its most severe sanctions, the individual may still choose to act. Conversely, the individual is never completely autonomous in making her decision whether to act, but rather decides in a social context which reflects a variety of considerations that may influence the decision, including its legal implications. Even when the state does not prohibit or otherwise directly regulate private action, individual decisions are made in the context of the general legal background and the legal requirements for, and consequences of, a particular course of conduct. Thus, all private decisions involve the interplay between the ultimate decisional power of the individual and the state's power to shape the context of that decision. This sort of interplay characterizes abortion no less than other private decisions.

Unless a woman is physically restrained to prevent or compel an abortion, as a practical matter the ultimate decision whether to have an abortion always rests with the mother.[147] She does not make this decision in isolation, however, but rather in context. Thus, a variety of factors, such as interpersonal relationships, religious background, or economics establish the context in which her decision is made by defining the costs and benefits (broadly defined) that she must weigh.[148] State regulation of abortion, whatever its form, is an important part of this context, and the state may attempt to use its legal system to influence the decision by altering its costs and benefits, whether by criminalization, persuasion, or funding decisions. Nonetheless, even when abortion is a

147. A similar problem arises in the United States with regard to the differential treatment of prior restraints and ordinary criminal laws for purposes of the First Amendment. Prior restraints are seen as particularly inconsistent with the First Amendment because they "prevent" speech from reaching the "marketplace of ideas." But prior restraints do not physically prevent speech any more than criminal sanctions. They impose a legal prohibition with which the speaker may or may not comply. The difference between the two relates to the consequences attached to a violation, not to the physical possibility of speaking.

148. Consider Catherine MacKinnon's famous, if somewhat hyperbolic, argument that *Roe* did not increase liberty for women, but rather simply removed legal constraints from male domination of them. *See* Catherine MacKinnon, Roe v. Wade: *A Study in Male Ideology*, *in* ABORTION: MORAL AND LEGAL PERSPECTIVES 45 (Jay L. Garfield & Patricia Hennessey eds., 1984).

crime and the mother faces severe penal sanctions, the ultimate decision still rests with her.[149] This point is established beyond dispute by the large number of abortions in the United States before *Roe*, and in Germany after *Abortion I*.[150] A woman may have an abortion notwithstanding criminalization by finding a physician who will certify medical necessity in one form or another,[151] traveling to a place where abortion is legal,[152] or taking the risk of having an illegal abortion.[153] These steps increase the cost of abortion because the mother must consider the expected costs of punishment,[154] abortion is likely to be more expensive,[155] and there may be increased emotional costs. Indeed, that is the point of criminal sanctions—to deter undesirable behavior by increasing the cost of that behavior, although the mother may still decide to have an abortion if she is willing to accept these costs. Thus, the ultimate power to decide remains with the mother even if the government prohibits abortions, although the regulatory context may substantially influence the mother's decision. *Roe* and *Abortion I* failed to acknowledge this complex interaction, and their simplistic locus of

149. *See* Starck, *supra* note 128, at 822. The Constitutional Court has even recognized this reality at the level of constitutional law, although the Court did not follow through with a realistic analysis of abortion decision-making in context. *See infra* notes 186-200, 217-220 and accompanying text.

150. *See* EVERT KEETING & PHILIP VAN PRAAG, SCHWANGERSCHAFTSABBRUCH: GESETZ UND PRAXIS IM INTERNATIONALEN VERGLEICH (1985); CHRISTOPHER TIETZE & STANLEY K. HENSHAW, INDUCED ABORTION: A WORLD REVIEW (1986).

151. *See Abortion II*, BVerfGE 88 [Constitutional Court] 88, 203 (265) (F.R.G.). The Constitutional Court, for example, acknowledged that the system of state certification was rife with abuse. A similar situation was prevalent in the United States before *Roe*. *See* TRIBE, *supra* note 11.

152. *See generally* TRIBE, *supra* note 11. This was a common practice in the United States before *Roe*. The Constitutional Court has also acknowledged the prevalence of "abortion tourism." *Abortion II*, BVerfGE 88, at 266. For a recent report from Europe, see Abigail-Mary E.W. Sterling, Note, *The European Union and Abortion Tourism: Liberalizing Ireland's Abortion Law*, 20 B.C. INT'L & COMP. L. REV. 385 (1997). *See also* Case C-159/90, Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan, 1991 E.C.R. I-4733 (holding that injunction under Irish law prohibiting dissemination of information about abortion services did not, under the circumstances of the case, affect the freedom to supply services and was thus "outside the scope of Community law"); Case 64, Open Door Well Women v. Ireland, E.C.R. 316 (holding that injunction under Irish law prohibiting dissemination of information about abortion services violated freedom of expression under article 10 of the European Convention on Human Rights).

153. The "black market" for abortions in the United States before *Roe* is well known. *See* MARVIN N. OLANSKY, ABORTION RIGHTS: A SOCIAL HISTORY OF ABORTION IN AMERICA (1992); NANETTE DAVIS, FROM CRIME TO CHOICE: THE TRANSFORMATION OF ABORTION IN AMERICA (1985).

154. These costs include the legal penalty discounted by the likelihood that she will be successfully prosecuted.

155. Illegality would reduce the supply of doctors willing to perform abortions. There would also be other costs, such as information costs (e.g., finding a doctor) and opportunity costs (e.g., from extensive travel).

decision analysis laid the foundations for the Courts' subsequent manipulation of the locus of decision.

The fundamental rights framework of *Roe* and the resulting reproductive autonomy model failed to account fully for the state's role in structuring the context of a woman's decision whether to have an abortion. Under the *Roe* analysis, a law that imposed any "burden" on the mother's decisional autonomy triggered strict scrutiny via the trimester framework, and almost certainly would be invalidated.[156] No burdens would be tolerated in the first trimester, and only burdens narrowly tailored to protect the life and health of the mother would be tolerated during the second trimester. Critically, the state could not burden the mother's decisional autonomy in order to protect potential life until the point of viability during the third trimester. While the presence of a burden that interfered with reproductive autonomy was easy enough to identify on the facts of *Roe*, which involved a prohibition on abortion backed by criminal sanctions, this analysis was simply too crude a tool for evaluating the myriad ways in which the state may shape the context of a mother's decision. It provided no guidance for determining what constitutes a burden, and treated all burdens as equally subject to strict scrutiny regardless of their degree.

Thus, even before *Casey*, the Court's assessment of different forms of state regulation proved to be problematic. Shortly after *Roe*, for example, the Court upheld restrictions on public funding for abortions, reasoning that denial of medical benefits do not burden a woman's right to an abortion because the inability to pay was the product of the woman's underlying poverty, not an obstacle imposed by the state.[157] Whatever the merits of the Court's reliance on the common law status quo as a baseline for measuring whether the denial of medical benefits is a burden,[158] this analysis simply ignored the significant practical effect that the denial of funding may have on the mother's decision whether to have an abortion. The extension of the analysis in later cases to permit regulations prohibiting abortions at hospitals receiving public funds,[159] and the provision of information about abortion services by clinics receiving federal family planning funds,[160] only serves to underscore the

156. *See supra* notes 28-30 and accompanying text.

157. *See* Harris v. McRae, 448 U.S. 297 (1980); *see also* Maher v. Roe, 432 U.S. 464 (1978).

158. Critics of *Harris* and *Maher* and their progeny have pointed out that if the baseline for comparison is the government's provision of medical benefits for the indigent, then the denial of funding is indeed a burden. *See* Levy, *supra* note 84, at 409; *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1497-99 (1989).

159. *See* Webster v. Reprod. Health Serv., 492 U.S. 490 (1989).

160. *See* Rust v. Sullivan, 500 U.S. 173 (1991).

Court's failure to account for the state's role in shaping the context of a woman's abortion decision. Conversely, the fundamental rights trimester framework was an imprecise tool for evaluating lesser burdens on a woman's decisional autonomy, because even relatively minor burdens on the right to an abortion triggered the same strict level of scrutiny. *Roe* itself, for example, had to distort traditional fundamental rights analysis to accommodate general health regulations under the trimester framework, indicating that such regulations would be valid if "reasonably related" to maternal health,[161] rather than requiring them to be "narrowly tailored" as is required by strict scrutiny. Similarly, subsequent cases struggled with regulations shaping the context of the abortion decisions by involving spouses or parents, imposing requirements to protect potentially viable fetuses, and imposing informed consent and waiting period requirements.[162]

The Constitutional Court's analysis of the locus of decision in *Abortion I* reflected the opposite problem—the failure to recognize the ultimate power of the mother to make the abortion decision. According to the Court, the state had to control the abortion decision through a state permission process because allowing the mother to make the decision would violate the state's duty to protect each individual potential life.[163] The Constitutional Court assumed that by making abortion without state permission a crime, the state had control over that decision. But, if the mother is determined to have an abortion, she can do so even under a regime of state permission. Indeed, it is to be expected that under a regime of state permission, some women will have incentives to evade the control of the state (e.g., through abortion tourism) or to manipulate the system in order to obtain the state's permission.[164] More broadly, if enough women have strong reasons for wanting an abortion, there will be pressure on the state process to find indications of *Unzumutbarkeit* and to grant permission for abortions. Thus, even before the legislative changes that gave rise to *Abortion II*, the state permission process had

161. *See* Roe v. Wade, 410 U.S. 113, 164 (1973). In fact, this reasoning only applies during the second trimester. In theory, *Roe* would prevent any health regulations that interfere with having an abortion during the first trimester, even though some such regulations clearly must be valid. For example, a law requiring some sort of medical qualifications would have to be constitutional, even if it restricts the number of abortion providers and thereby increases its cost. Perhaps the Court would reason that there was no burden from such laws because the health and safely benefits inuring to women seeking abortions outweigh the increased costs.

162. *See supra* notes 83-89 and accompanying text.

163. *See Abortion I*, *supra* note 3, at 651; *see supra* notes 31-32 and accompanying text.

164. *See Abortion II*, BVerfGE [Constitutional Court] 88, 203 (266) (F.R.G.); *see also supra* note 152 and accompanying text.

become little more than a rubber stamp for the mother's decision to have an abortion.[165]

In sum, both *Roe* and *Abortion I* rested on unrealistic assumptions about the nature of the abortion decision. The reproductive autonomy model of *Roe* ignored the fact that the mother is never perfectly autonomous, but rather makes her decision in a broader social context that includes the state's inevitable role in shaping the legal consequences of those decisions. The state decision model of *Abortion I* ignored the fact that the state can only attempt to shape the context of the abortion decision, and cannot wrest the ultimate decisional power from the mother. The model of restrained reproductive autonomy promises a more complete account of the abortion decision by acknowledging both the state's context-shaping role and the mother's final authority. But, this dynamic of the abortion decision is fundamentally at odds with both *Roe* and *Abortion I*'s conception of the locus of decision. Furthermore, the accommodation of that model required both Courts in *Casey* and in *Abortion II* to change the locus of decision, notwithstanding their claims to the contrary.

B. Criminalization and Persuasion in Abortion Regulation

In light of the Courts' treatment of the locus of decision in *Roe* and *Abortion I*, establishing continuity with their moral balance required both the *Casey* plurality and the Constitutional Court in *Abortion II* to demonstrate that their accommodation of the restrained reproductive autonomy did not change the locus of decision. Paradoxically, although they focused on different aspects of the decisional dynamic of abortion, their analyses of the locus of decision issue reflected parallel difficulties. The *Casey* plurality emphasized the mother's ultimate decisional autonomy, ignoring important changes in the state's context-shaping role, while the Constitutional Court emphasized the state's context-shaping role and ignored the important ways in which the state has accorded the mother greater decisional autonomy. Far from engaging in a more realistic assessment of the decisional dynamic of abortion, both the *Casey* plurality and the Constitutional Court in *Abortion II* relied on a sharp distinction between criminalization and persuasion that elevates fiction over fact and failed to account for the impact of various forms of state regulation on the mother's abortion decision.

The *Casey* plurality's analysis of the locus of decision rested on its view that *Roe* only establishes the mother's "right to make the ultimate

165. *See supra* notes 97-98 and accompanying text.

decision," rather than an absolute right to "abortion on demand."[166] In its exposition of the undue burden test, the plurality explained that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,"[167] thus compromising her ultimate decisional autonomy. More broadly, "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."[168] The plurality's emphasis on the ultimate decision enabled it to distinguish between state laws prohibiting abortions, which were invalid, and laws imposing informed consent requirements and waiting periods, which were valid if they did not create a substantial obstacle.[169] Applying the undue burden test to the statutes at issue in a separate portion of the opinion, the plurality concluded that the informed consent requirements and waiting period did not impose a substantial obstacle and were therefore valid.[170] This effort to reconcile the locus of decision in *Roe* and *Casey*, however, was flawed at several levels.

First and most fundamentally, the *Casey* plurality countenanced an active state role in shaping the decisional context of abortion in order to influence it against abortion.[171] Informed consent requirements and

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166. Planned Parenthood v. Casey, 505 U.S. 113, 877 (1992). As discussed above, this statement is not entirely consistent with the fundamental rights analysis of *Roe*. *See supra* notes 111-123 and accompanying text.

167. *See Casey*, 505 U.S. at 877.

> A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

See also id. ("Regulations which do no more than create a structural mechanism by which the state, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.").

168. *Id.* at 874.

169. *See id.* at 878.

170. *See id.* at 881-87; *see also infra* notes 175-181 and accompanying text; *Casey*, 505 U.S. at 899-90. Likewise, the parental consent (with judicial bypass) and record-keeping requirements were valid, (but the spousal notice requirement was invalid because it placed a substantial obstacle in the path of women by prohibiting an abortion without a signed statement that notice had been provided to a spouse).

171. *See Casey*, 505 U.S. at 875. The plurality claimed that its understanding of the right was more in tune with the correct understanding of *Roe* (quoting language from *Roe* and other early decisions to the effect that the right to an abortion was only a right to be free of "unwarranted" government restrictions). But whatever the correct view of the scope of the

waiting periods change the dynamics of the decision-making process because a woman's assessment of her personal situation must interact with the reasons against abortion offered by doctors or public officials. A woman's ultimate decision is therefore made in a context of justification toward the state. In this manner, the state has taken on a more significant, and at times outcome-determinative, role in the decision-making process that would not have been acceptable under the reproductive autonomy model of *Roe*.[172] When the mother decides in a state-created legal context designed to discourage abortion, it is not so clear who really controls the decision.

Second, while it may be intuitively appealing, the plurality's assumption that a criminal prohibition deprives the woman of decisional autonomy, while persuasive measures do not, went largely unexplained. The plurality apparently reasoned that criminal sanctions have the purpose and effect of imposing a substantial obstacle, while persuasive measures are reasonably related to the state's legitimate interest in protecting the potential life of the unborn child, and their incidental burdens can therefore be tolerated.[173] But, this hardly distinguishes persuasive measures from criminalization. Although persuasive measures appeal to the mother's conscience, rather than threaten punishment, they are designed, like criminal sanctions, to shape the context of the abortion decision so as to deter abortions.[174] As a result, both persuasive measures and criminal sanctions serve the purpose of protecting the life of the unborn child by preventing abortions, and both accomplish this objective by increasing the cost of having an abortion. Thus, criminalization and persuasive measures cannot be distinguished on the basis of whether their purpose is "legitimate" or the burdens they impose are "incidental."[175]

Third, the *Casey* plurality failed to offer a convincing analysis of the extent of the burdens imposed by the respective regimes and whether

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abortion right, the *Casey* plurality adopted a more restrained concept of reproductive autonomy than is implied by the legal framework and actual holdings of other decisions.

172. Thus, the *Casey* plurality had to overrule prior decisions.

173. *See Casey*, 505 U.S. at 877-78; *see also id.* at 874 (stating that a law serving a legitimate purpose is not invalid merely because it imposes an incidental burden on the woman's ultimate choice).

174. The main focus, of course, is on raising the emotional costs by "informing" or "reminding" the mother that an abortion will end the life of her unborn child, which imposes emotional costs that may be increased by multiple trips to the doctor, perhaps including multiple encounters with abortion protesters. Moreover, whether incidental or intended, there may be increased economic costs or health risks from multiple trips.

175. *See supra* note 131 and accompanying text. Indeed, the Constitutional Court in *Abortion II* accepted the premise that persuasive measures are a more efficient means of deterring abortions than criminal sanctions.

they were coercive. The mere fact that abortions are illegal does not, standing alone and without regard to sanctions, disrupt the mother's ultimate decisional authority[176] and cannot provide a basis for the distinction. Furthermore, the impact of persuasive measures would appear to be central to the application of the undue burden test, but the plurality's application of the test to persuasive measures did not offer much analysis of this impact or differentiate it from the impact of criminal sanctions. The plurality simply assumed that informed consent requirements impose no burden at all because the information required was truthful and not misleading,[177] ignoring the potentially coercive effect of the state's effort to increase the emotional costs of abortion and thereby change the mother's decision.[178] The plurality's analysis of the burden imposed by waiting periods was more extensive,[179] but ultimately inconclusive. The plurality accepted the district court's finding that the waiting period increased the costs and risk of delay of abortions,[180] but emphasized that the district court did not conclude that these effects amounted to substantial obstacles.[181] In the end, the plurality equivocated, concluding that, "on the record before us, and in the context of a facial challenge, we are not convinced that the twenty-four-hour waiting period constitutes an undue burden."[182]

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176. Even before *Casey*, the Court apparently would have upheld a declaration that abortions are illegal without any attached sanctions (as in *Abortion II*). *See* Webster v. Reprod. Health Serv., 492 U.S. 490, 511 (1989) (upholding a state declaration that life begins at conception on the ground that it did not burden the right to abortion if no adverse legal consequences attached).

177. *See id.* at 881-85.

178. In some contexts at least, these costs will be as outcome-determinative as the threat of criminal sanctions. One must keep in mind that the decision whether to have an abortion is an emotionally charged one. For the state to inject itself into the woman's decisional processes at a critical juncture will clearly have deterrent effects. Consider the conclusion in *Abortion II* that counseling and a waiting period would actually prevent more abortions than would criminal sanctions. *See supra* note 130 and accompanying text. For further discussion of this conclusion as it relates to the locus of decision, see *infra* notes 183-193 and accompanying text.

179. *See Casey*, 505 U.S. at 885-87.

180. The district court concluded that the twenty-four hour waiting period would be particularly burdensome on "women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others. . . ." Planned Parenthood v. Casey, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990) (quoting *Casey*, 505 U.S. at 886).

181. *See Casey*, 505 U.S. at 886. Likewise, a finding of particularly burdensome effects was insufficient because "[a] particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group." *Id.* at 887. It should not be too surprising that the district court did not inquire into whether there was a substantial obstacle, since at the time the fundamental rights framework was still controlling.

182. *Id.*

The *Casey* plurality's analysis failed to acknowledge that the state's now-accepted role in persuading the mother not to have an abortion represented a change in the abortion dynamic. By arguing that the criminal sanctions invalidated in *Roe* interfered with the mother's ultimate decision, in a way that informed consent requirements and waiting periods did not, the Court diverted attention from the real changes in the state's role that were encompassed in the model of restrained reproductive autonomy. Even on its own terms, the plurality's analysis was unconvincing, because the plurality never fully justified the distinction.

The Constitutional Court's efforts to preserve fidelity to *Abortion I* through its analysis of the locus of decision in *Abortion II* suffered from similar flaws, although the changes in the decisional dynamic operated in the opposite direction. The Constitutional Court therefore emphasized the state's context-shaping role as opposed to the mother's ultimate decisional autonomy. First, the Court required the state to preserve its control over the abortion decision by declaring that abortions are illegal without a state finding of *Unzumutbarkeit*.[183] Without such a declaration, "control over the fetus's right to life, even if only for a limited time, would be handed over to the free, legally unconstrained decision of a third party, even if it is the mother herself."[184] Having thus insured that control over the decision would remain with the state, the Constitutional Court, in a "major departure" from *Abortion I*,[185] indicated that the state need not punish these "illegal" abortions by means of the criminal law.[186] The removal of sanctions was permissible because the Legislature had determined that counseling and a waiting period would be at least as

183. That is, "abortion is to be seen throughout the pregnancy as an unjust act and accordingly is to be prohibited by law." BVerfGE [Constitutional Court] 88, 203 (255) (F.R.G.) ("Hierzu zählt, daß der Schwangerschaftsabbruch für die ganze Dauer der Schwangerschaft grundsätzlich als Unrecht angesehen wird und demgemäß rechtlich verboten ist."). *But see Abortion I*, *supra* note 3, at 644. This declaration was necessary to fulfill the state's duty to protect life and avoid violating the *Untermaßverbot* (prohibition against insufficient measures). *Abortion II*, BVerfGE 88, at 255 ("Soll das Untermaßverbot nicht verletzt werden, muß die Ausgestaltung des Schutzes durch die Rechtsordnung Mindestanforderungen entsprechen.").

184. *Abortion II*, BVerfGE 88, at 255 ("Bestünde ein solches Verbot nicht, würde also die Verfügung über das Lebensrecht des *nasciturus*, wenn auch nur für eine begrenzte Zeit, der freien, rechtlich nicht gebundenen Entscheidung eines Dritten, und sei es auch selbst der Mutter, überantwortet.").

185. KOMMERS, *supra* note 3, at 354; *accord* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 313 (1994) ("In one significant respect, however, the Court modified its position: Article 2(2) did not require that either the woman or her doctor be punished criminally for an abortion during the first twelve weeks of pregnancy if she adhered to her decision after counseling designed to change her mind.").

186. *Abortion II*, BVerfGE 88, at 253 (reasoning that while the law's "behavioral commands cannot be limited to appeals to the free will [and] must be framed as legal commands," the "threat of punishment is not the only conceivable sanction").

effective in deterring abortions as the prior regime of state permission backed by criminal sanctions.[187] In essence, the Court reasoned that as long as the state declared abortions without state permission to be illegal and imposed persuasive measures that would prevent as many abortions as the prior regime of criminal sanctions, the locus of decision remained with the state. This analysis, like that of the *Casey* plurality was flawed at several levels.

First, the Constitutional Court treated the state's efforts to control the *context* of the abortion decision, through declarations of illegality and persuasive measures, as if controlling the context were tantamount to making the decision itself.[188] The Court refused to recognize that the state had relinquished any pretense of control over the ultimate abortion decision and effectively conceded decisional autonomy to the mother.[189] The change in the state's context-shaping role meant that the mother must make her decision in the context of justification vis-à-vis the state, but she no longer came before the state as a supplicant seeking permission. Indeed, as Justice Böckenförde pointed out in his dissenting opinion,[190] the failure to penalize illegal abortions resulted in the following dilemma: since the state refrains from evaluating whether an abortion procured after counseling is justified on the basis of *Unzumutbarkeit*, the state lacks the means to ascertain whether an abortion is indeed illegal.[191] If so, the state has lost its control over the

187. *See supra* note 131 and accompanying text.

188. In other words, *Abortion II* attempted to preserve the state as the locus of decision by severing the state's duty to determine whether an abortion is permissible from the actual abortion decision in individual cases.

189. While it is not directly relevant to this Article, the Constitutional Court's most recent decision touching on the abortion issue, *Abortion III*, has some interesting implications for the recognition of decisional autonomy respecting abortion. *See* BVerfGE, 27.10 1998, 1 BvR 2306/96. The Court invalidated provisions of a Bavarian law that prohibited medical doctors without training as gynecologists from performing abortions, even if these doctors had performed abortions in the past and therefore had the requisite experience. The Court concluded that this change unduly frustrated reliance interests that are protected by article 12 of the Basic Law, which protects the fundamental right to practice one's profession. Thus, transitional rules were constitutionally required to protect the right of these physicians to continue to perform abortions. This latter conclusion does not modify or further elaborate the constitutional regime of *Abortion II*, but the recognition of a reliance-based right of physicians to perform abortions is a sign of how far the Court has come in accommodating some right of autonomy concerning abortion matters.

190. *See Abortion II*, BVerfGE 88, at 360-62.

191. *See generally id.* at 361. Justice Böckenförde rightly contended that the majority's requirement that all after-counseling abortions be declared illegal is overinclusive. While some abortions may not fall within an *Unzumutbarkeit* exception and therefore would be illegal, others may be justified according to the principle of *Unzumutbarkeit*. However, once the majority declared that the abandonment of the evaluation procedure was permissible on constitutional grounds, the legality or illegality of after-counseling abortions could no longer be determined. Therefore, Böckenförde insisted that the majority's rejection of abortion funding cannot be based on the presumed "illegality" of abortions that are procured after the counseling procedure.

legality of the abortion decision, and the locus of decision has been changed.[192] By removing penal sanctions, the state has, in effect, accorded the mother the legal authority to make the ultimate abortion decision.[193]

Second, the Constitutional Court's reliance on a simple declaration of illegality through criminal law as the critical factor in preserving state control over the abortion decision was unpersuasive, because it, like the reasoning of the *Casey* plurality, rested on an unrealistic distinction between criminalization and persuasive measures.[194] Although grounded in the understanding that criminal law is an exercise of the coercive authority of the state,[195] the Court's reasoning actually discounted the coercive character of the criminal law as a basis for distinction. The Court accepted the legislature's judgment that persuasive measures would prevent more abortions than criminal sanctions, but concluded that these measures improperly allocate the abortion decision to the mother.[196] It makes no sense, however, to conclude that this defect can be cured by a declaration of illegality that is not backed by penal sanctions. If persuasive measures in fact deter more abortions than criminal sanctions, such measures must raise the costs of having an abortion to an equal or greater degree than criminal sanctions, and do not leave the mother's autonomy unconstrained.[197] Moreover, insofar as the coercive effect of criminalization rests primarily in the threat of sanctions, it is hard to see how adding a declaration of illegality without sanctions would be significantly more coercive.[198]

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192. *See* Frommel, *supra* note 128, at 331 (expounding on the distinction between abortions that have been counseled and are therefore not subject to criminal sanctions, and abortions that are not illegal on the ground of indications).

193. *See supra* notes 129-131 and accompanying text. The reproductive autonomy accorded women under *Abortion II* is not a right, but merely a refraction of the "total lives" perspective. As will be developed more fully in the following sections, as a practical matter *Abortion II* makes it easier for at least some women to choose an abortion.

194 *See* Hermes & Walther, *supra* note 100, at 2341-42.

195. *See Abortion II*, BVerfGE 88, at 253 ("Such behavioral commands cannot be limited to appeals to the free will, but rather are to be instituted as legal commands.") [Solche Verhaltensgebote können sich nicht darauf beschränken, Anforderungen an die Freiwilligkeit zu sein, sondern sind als Rechtsgebote auszugestalten].

196. *See supra* notes 126-131 and accompanying text.

197. *See supra* notes 171-175 and accompanying text (discussing how persuasive measures increase the emotional and other costs of having an abortion).

198. Even before *Casey*, the Supreme Court held that a state law declaring that life begins at conception was consistent with *Roe* because, in the absence of any sanctions, it did not burden the right to have an abortion. *See* Webster v. Reprod. Health Serv., 492 U.S. 490, 511 (1989). It is true that one consequence of the state's declaration of illegality in *Abortion II* was the denial of state health insurance funding for abortions, but public funding remained available for women who could not otherwise afford it. *Abortion II*, BVerfGE 88, at 321-22; *see also* Starck, *supra*

Third, the Constitutional Court's defense of this distinction focused on the symbolic value of criminalization as an expression of the supreme value of life in the constitutional order,[199] which, even on its own terms, was unpersuasive. The Court expressed concern that the legal protection of the unborn child's life that stems from the prohibition of abortion in the legal consciousness of the woman and society in general would be weakened by the hypocrisy of counseling a woman that abortions are improper in the absence of a determination of *Unzumutbarkeit* but declaring the decision to have an abortion after counseling to be legally valid even though no determination of *Unzumutbarkeit* has been made.[200] But surely, the counseling process, which under the law at issue in *Abortion II* was designed to emphasize the value of life and remind the mother of her duty to protect her unborn child, was also an expression of that constitutional order. Thus, from the perspective of those intended to be affected by the law, this individualized counseling process is likely to be a far more effective means of reinforcing the value of life than an abstract declaration under the criminal law. Indeed, the system embraced by the Court is every bit as hypocritical as the one it invalidates because of the conspicuous gap between the state's pious declarations that abortions are illegal and the lack of criminal penalties, which may do as much to create cynicism and undermine the constitutional value of life in

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note 128, at 821-22. Indeed, under *Abortion II*, funding is more broadly available in Germany than in the United States.

199. *See Abortion II*, BVerfGE 88, at 251-52, 272-74.

200. *See id.* at 278.

> (Die Bewertung eines Schwangerschaftsabbruchs als rechtmäßig auch in Fällen, in denen eine unzumutbare Ausnahmelage nicht festgestellt wird, schwächte zudem den rechtlichen Schutz des ungeborenen menschlichen Lebens, den das prinzipielle Verbot des Schwangerschaftsabbruchs durch die Aufrechterhaltung des Rechtsbewußtseins zu bewirken vermag (positive Generalprävention). Das Rechtsbewußtsein wird durch widersprüchliche rechtliche Bewertungen verunsichert. Ein solcher Widerspruch läge vor, wenn der schwangeren Frau in der Beratung eine rechtliche Orientierung gegeben würde, ihr Schwangerschaftsabbruch sei nur erlaubt, wenn Indikationen vorliegen, andererseits aber ihre Entscheidung für den Abbruch nach Beratung als gerechtfertigt, mithin als erlaubt, angesehen würde, obwohl eine Indikation nicht festgestellt wird.)
>
> [The evaluation of an abortion as "legal" even in those cases in which an exception for "*Unzumutbarkeit*" has not been determined would in addition weaken the legal protection of unborn human life, which the prohibition of abortion in principle achieves by reinforcing the common legal consciousness (positive general prevention). The common legal consciousness is rendered insecure by contradictory legal evaluations. Such a contradiction would occur if the pregnant woman is given in counseling a legal orientation that abortion is permissible only when "indications" are present, but her decision to have an abortion is nonetheless regarded as justified and permitted, although an indication has not been determined.]

the eyes of the general public as to reinforce it.[201] In any event, it is clear that the Constitutional Court was more concerned with form than with practical effect.

Neither the *Casey* plurality nor the Constitutional Court in *Abortion II* confronted the practical reality of criminalization and persuasive measures as alternative abortion regimes. Both assumed that such regimes are materially different for purposes of analyzing the constitutional limits on abortion regulation because criminalization places control over the abortion decision with the state, while persuasive measures do not. In practice, however, both regimes leave the ultimate decision to the mother, while attempting to steer that decision in favor of carrying a child to term by imposing costs that will deter the mother from having an abortion. The real question is how the burdens imposed under these different regimes differ, but neither the *Casey* plurality nor the Constitutional Court in *Abortion II* offered a careful analysis of that issue. As a result, the distinction between criminalization and persuasive measures emerged as little more than a convenient fiction through which the Courts claim consistency with their initial abortion decisions. In the following section, we offer a more careful analysis of competing abortion regimes impact on the ultimate decisions of individual women that highlights the ways in which the decisional dynamics of abortion have changed in the respective systems under the model of restrained reproductive autonomy.

C. General and Individual Impact

Notwithstanding the problems with their legal analysis, the Courts' intuitive judgments about the impact of various abortion regimes are plausible. In general, informed consent requirements and a twenty-four hour waiting period as in *Casey* are probably less burdensome than criminal sanctions. The counseling requirement and three-day waiting period at issue in *Abortion II* probably would prevent at least as many abortions as the previous regime of criminal sanctions for abortions that

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201. The Constitutional Court simply denied any such impact. *See id.* at 280 ("Die Schutzwirkungen, die von dem grundsätzlichen Verbot eines Schwangerschaftsabbruchs ausgehen, indem dieses das allgemeine Rechtsbewußtsein prägt und stützt, gehen dann nicht verloren, wenn Folgewirkungen des Verbots—mit Rücksicht auf sinnvolle andere Schutzmaßnahmen—nur in bestimmten Bereichen der Rechtsordnung eingeschränkt werden, in anderen hingegen Geltung haben.") ["The protective effects achieved by the fundamental prohibition of abortion, insofar as it permeates and supports the general legal consciousness, are not then lost if the consequences of the prohibition—with reference to other meaningful protective measures—are limited only in certain areas of the legal order, but have effect in others."]

have not been approved by the state,[202] given the ease with which state approval could be obtained.[203] Further, a declaration of illegality without sanctions has some value as an expression of the constitutional order and might foster a social consciousness opposed to abortion. But, in using these conclusions as the foundations for their analyses of the locus of decision issue, neither the *Casey* plurality, nor the Constitutional Court addressed the individualized impact of particular abortion regimes.[204] Since abortion is a highly personal decision based on individual circumstances, generalizations about the effect of abortion laws simply will not hold true for some women. For some women under *Casey*, there will be an undue burden. For some women under *Abortion II*, the absence of criminal sanctions will mean that their decisional autonomy is relatively unconstrained. The failure to account for these individual effects further undermined the Courts' reliance on the locus of decision as a means of reconciling the model of restrained reproductive autonomy with their initial abortion decisions.

To illustrate this point, we may divide pregnant women into four groups depending upon the impact of criminal sanctions and persuasion on their ultimate decision.[205] First, some women would carry their child to term under either regime.[206] Second, some women would carry their child to term if faced with criminal sanctions, but would have an abortion if only persuasive measures apply.[207] Third, some women would have an

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202. These two conclusions are not necessarily inconsistent because providing written information and a one-day waiting period (as in *Casey*) is likely less intrusive than face-to-face counseling and a three-day waiting period (as in *Abortion II*). Moreover, these persuasive measures operate in different social and legal contexts.

203. *See supra* note 98 and accompanying text. Of course it is less than clear why the appropriate response to this problem would not be to strengthen the requirements for state approval, as opposed to removing criminal sanctions.

204. *See supra* notes 179-182 and accompanying text. In *Casey*, the plurality recognized that informed consent and especially a waiting period impose a particular burden on some women, but did not explore this effect because the statute had been challenged on its face. *Abortion II* engaged in the very "bulk weighing" of lives that the Constitutional Court had rejected in *Abortion I*, even though the Court proclaimed that the right to life is an individual right. *See supra* notes 132-135 and accompanying text.

205. We use criminal sanctions, rather than criminalization, here because (1) it is the coercive effect of sanctions, not criminalization per se, that underlies the *Casey* plurality's analysis and (2) the crucial difference between the regimes sanctioned in *Abortion I* and *Abortion II* is the presence or absence of sanctions.

206. In the majority of cases, this decision would be based on the mother's natural desire to have children, rather than the state's involvement. But some women who would choose to have an abortion absent the state's involvement will be deterred from doing so under either regime.

207. For these women, criminal sanctions are clearly more burdensome than persuasive measures. That women subject to persuasive measures will have an abortion despite such sanctions does not necessarily mean, however, that the burden involved would not be undue, any

abortion despite criminal sanctions, but would carry their child to term if subjected to persuasive measures.[208] Fourth, some women would have an abortion under either regime.[209] These four groups of women are represented in the following table:[210]

TABLE 3: ABORTION REGIMES AND THE ABORTION DECISION

REGIME/GROUP	1	2	3	4
CRIMINAL SANCTIONS	To Term	To Term	Abortion	Abortion
PERSUASION	To Term	Abortion	To Term	Abortion

The *Casey* plurality assumes that group 2 will be significantly larger than group 3, (i.e., that fewer women will be deterred under persuasive measures than under a regime of criminal sanctions). The Constitutional Court in *Abortion II* assumes that group 3 will be as large, or larger, than group 2, so that at least as many women will be deterred from having an abortion under a regime of persuasion (with a declaration of illegality) as under a regime of criminal sanctions. If we consider the impact of these regimes from the perspective of individual women within each group, however, the analysis is not so simple.

For the *Casey* plurality the problem is that, for at least some women, the deterrent effect of persuasive measures is equal to or greater than that imposed by criminal sanctions. That is, some women will fall into group 3.[211] It follows *a fortiori* that this burden is undue, because it

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more than the decision of some women to have an abortion notwithstanding criminal sanctions means that criminal sanctions do not impose an undue burden on them.

208. For these women, persuasive measures are relatively more burdensome than criminal sanctions. This situation might arise, for example, for a woman who is emotionally troubled by an abortion decision and who would have difficulty explaining her absence. If she has financial resources and is well connected, she might find it relatively easy to locate a doctor who would make the necessary findings and perform an abortion, and relatively difficult to withstand the state's efforts to play on her conscience or to explain her absence.

209. The mother may decide to have an abortion in such cases even though the persuasive measures or criminal sanctions have a significant deterrent effect. It simply means that the costs for carrying a child to term are greater than the costs of an abortion.

210. This analysis is admittedly oversimplified because a variety of factors besides the state's role will affect the ultimate decision. Moreover, the ultimate decision is only a proxy for the coercive effect of a given measure. A regime may be coercive even if a woman chooses an abortion, and may not be even if she chooses to carry her child to term. The model is intended only to illustrate the basic point. We assume (not unreasonably in our view) that there will be a significant number of women in each of the four categories, although it is impossible to say what the respective sizes of each group might be.

211. *See supra* notes 176-182 and accompanying text (noting that although the ultimate decision was made by the mother, this does not mean that there was no burden). In particular, one cannot assume, as the *Casey* plurality did, that because providing information designed to discourage abortions simply "informs" the mother's decision, there is no burden on that decision.

is at least as great as the burden imposed by criminal sanctions, which constitutes an undue burden under the *Casey* plurality's reading of *Roe*.[212] Likewise, for at least some women in group 1, the deterrent effect of persuasive measures is as great as criminal sanctions.[213] Finally, even as to women in groups 2 and 4, persuasive measures may have a significant deterrent effect that is overcome only by very powerful countervailing considerations.[214] Because abortion is an individual right even under *Casey*, all of these women should be able to successfully challenge the application of the informed consent requirement and twenty-four hour waiting period because it imposes an undue burden, insofar as the burden equals or exceeds that of criminal sanctions, regardless of the overall effect of such measures.

The *Casey* plurality offered no analysis of this issue, instead considering only the overall effects of the law in question and emphasizing that the law had been challenged on its face.[215] This qualification leaves open the possibility that the Court might invalidate informed consent and waiting periods as applied in some cases,[216] which would mean that *Casey* was far less clear as to the constitutionality of persuasive measures than its broad language would suggest.[217] In any

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212. Put differently, if the deterrent effect of persuasive measures is the same as criminal sanctions, then such measures must constitute a substantial obstacle.

213. Most women in group 1 would want to bear a child without regard to the government's position on abortion. They do not need to be deterred. But some women in group 1 would have an abortion if the government did not impose either persuasive measures or criminal sanctions. Even discounting those who have a voluntary change of heart because of the information provided by the government (i.e., they would not have desired abortion if they had known the information beforehand), some women would be deterred by either form of government involvement from having an abortion they would otherwise have. For these women, the coercive effect of the government's involvement is essentially the same regardless of its form.

214. *See supra* note 209 and accompanying text. Clearly, the fact that a woman has had an abortion would not preclude her from claiming that her subsequent imprisonment constituted an undue burden. Likewise, even if a woman has an abortion under the laws approved in *Casey*, the consequences of this decision, in terms of increased emotional and financial costs, may nonetheless be an undue burden.

215. *See supra* note 182 and accompanying text.

216. The possibility of an as applied challenge, however, would be of small comfort to individual women. By definition, the suit would be brought by those women who experience most acutely the burdens imposed by informed consent requirements and a waiting period, and the burdens imposed by litigation are likely to be both similar in nature and greater in degree. Similar concerns have prompted the Supreme Court to allow overbreadth arguments to be made in the context of the First Amendment and might provide an appropriate context for considering the individualized impact of the informed consent requirements and waiting period in *Casey*. Another problem with an as applied challenge is that it would be difficult to prove the emotional costs imposed by the requirements, since these costs are by definition experienced subjectively.

217. The plurality declared broadly that "[t]o promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion." Planned

event, the *Casey* plurality did not offer a realistic account of how informed consent and waiting requirements might affect individual women's decision whether to have an abortion. Nor did the plurality explain why, as to those women who were burdened as much or more under a persuasive regime, such a regime did not interfere with their reproductive autonomy. As a result, the plurality's analysis of the locus of decision remained incomplete and unconvincing.

The Constitutional Court's failure in *Abortion II* to account for the individualized impact of abortion regulation gives rise to the same problem, but from the opposing perspective. For some women, the removal of criminal sanctions will leave the abortion decision essentially unconstrained, notwithstanding the counseling requirement and waiting period or the declaration of illegality. In particular, women in group 2 would not have an abortion when confronted with criminal sanctions, but would do so under a persuasive regime.[218] For some women in group 4, who would have an abortion under either regime, the costs imposed by criminal penalties are significantly greater than those under a regime of persuasion and a declaration of illegality.[219] Even if, as the Constitutional Court posited, an equal or greater number of abortions might be prevented by persuasive measures (i.e., group 3 is larger than group 2), the fact remains that the state has accorded greater decisional autonomy to a significant number of individual women, notwithstanding its declaration of illegality. Like the *Casey* plurality, however, the Constitutional Court did not adequately address this issue in *Abortion II*.

Indeed, through its analysis, the Constitutional Court had created an intractable dilemma. Since the Constitutional Court regards the right to life as an individual right, the state should not be able to abdicate its duty to any individual child, even if to do so would result in saving other lives.[220] But, whether the state chooses criminal sanctions or persuasive measures, it must inevitably make such a trade-off between the lives of

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Parenthood v. Casey, 505 U.S. 833, 878 (1992). This statement was followed, however, by the qualification that "[t]hese measures must not be an undue burden on the right." *Id.*

218. This assumes, of course, that these women are deterred by the threat of punishment rather than the simple declaration of illegality.

219. This is the counterpart of the women in group 1 under *Casey*. Although it is less obvious, some women in groups 1 and 3 might be inadequately deterred by persuasion (i.e., counseling, waiting, and a declaration of illegality), but would not have an abortion for other reasons. These women are the counterparts to women in groups 2 and 4 under *Casey*.

220. *See supra* note 133 and accompanying text. The Court in *Abortion I* made this point expressly even though it actually left the nature of the right to life ambiguous. *See supra* notes 134-136. Conversely, *Abortion II* engaged in precisely this kind of weighing of total lives, even though it expressly declared that the right to life was an individual one. *See supra* notes 139-140 and accompanying text.

unborn children.[221] Thus, under an individualized conception of the right to life, whichever regime the state chooses, the state impermissibly fails to fulfill its duty to protect some unborn children in order to protect others. The Court might have avoided this problem by acknowledging the inevitability of the trade-off and incorporating it into the constitutional analysis of the state's duty. Doing so would have undermined the legitimacy of the Court's role in overseeing abortion laws. If such a trade-off is inevitable, then devising the most effective abortion regime inherently involves the weighing of difficult policy questions about the effect of various regulatory measures. These sorts of decisions are poorly suited for judicial involvement, and are certainly not amenable to resolution on the basis of absolute constitutional principles.

Thus, the failure of the *Casey* plurality and the Constitutional Court in *Abortion II* to account for the differing effects of abortion regulations on individual women means that their claims to preserving the locus of decision rang hollow. As shown in the previous section, a purely formal distinction between criminal sanctions and persuasive measures cannot withstand scrutiny of their practical impact on the locus of decision.[222] Since the locus of decision is connected to rights that, under the Courts' own analyses, are individual rights, the impact of competing abortion regimes on the locus of decision must be evaluated from the perspective of individual women. Insofar as the abortion regimes approved in *Casey* and *Abortion II* would lead to different outcomes in some cases, those individual rights have been violated.

V. CONCLUSION: PARADOXICAL PARALLELS AS PARABLE

As we have attempted to demonstrate in this Article, the doctrinal analysis of the Supreme Court and the Constitutional Court with respect to the constitutional law of abortion exhibits three paradoxical parallels. First, notwithstanding their opposing perspectives, the Courts in *Roe* and *Abortion I* sought to establish the legitimacy of judicial resolution of the

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221. This assumes, of course, that the class of children saved under *Abortion I* contains some members who would not be saved under *Abortion II*, and that the class of children saved under *Abortion II* contains some children who would not be saved under *Abortion I*. *Abortion I* entirely failed to appreciate the inevitability of this trade-off because it failed to recognize that the imposition of criminal sanctions involves providing protection to the unborn children in group 2 at the expense of those in group 3. Thus, under the individual lives perspective of *Abortion I*, there is no way for the state to avoid a failure of its duty to protect. The failure to eliminate criminal sanctions (while retaining the declaration of illegality) and to replace them with persuasive measures is a violation of the state's constitutional duty to protect those children who could only be saved under the latter regime in exactly the same way that removing criminal sanctions is a violation of the duty to protect those who can be saved by criminal sanctions.

222. *See supra* notes 173-175, 194-198 and accompanying text.

abortion issue by grounding their analysis in legal frameworks derived from a formalistic hierarchy of constitutional rights, but were forced to moderate the extreme implications of this analysis by reintroducing a form of moral balancing that undermined their legitimacy. Second, in *Casey* and *Abortion II*, both Courts altered the legal framework of their earlier decisions, but attempted to preserve legitimacy through *stare decisis* by claiming to have preserved the moral balance of *Roe* and *Abortion I*, even though their new legal frameworks in fact changed the meaning of that moral balance. Third, both Courts relied on the locus of decision to strengthen their claims of consistency and legitimacy, but this analysis was based on unrealistic assumptions about the respective roles of the mother and the state in the abortion decision. Furthermore, the Courts emphasized a formalistic distinction between criminal sanctions and persuasive measures, and ignored the practical effect of those abortion regimes on individual women.

Our analysis of the Courts' decisions has been critical, not because of our underlying views on abortion (which we have endeavored to place to one side for purposes of this Article), but because we hoped to strip away the rhetoric of the Courts' opinions and thereby illuminate two key points. First, notwithstanding protestations to the contrary, the abortion regimes approved in *Casey* and *Abortion II* represent a significant change in the constitutional limits of state regulation of abortion. Second, judicial involvement in the field of abortion in both countries has been marked by contorted analysis that is incomplete, illogical, and internally inconsistent. Because the Courts confronted similar difficulties and engaged in similar doctrinal contortions, their opposing constitutional premises and differing legal traditions and styles of reasoning suggests that the paradoxical parallels offer some universal lessons about the relationship between courts and society in general and the relationship between legal reasoning and moral balancing in particular.

Legal reasoning tends to be deductive, sweeping, and generalized[223] where moral balancing is intuitive, nuanced, and individualized. Unless courts are to engage in overt moral balancing without the trappings of legal analysis, there are inherent risks in constitutionalizing issues of moral judgment as well as moralizing issues of constitutional law. The broad legal pronouncements that provide the basis for legal deduction are

223. While common law reasoning in some contexts might be characterized as inductive (reasoning from specific cases to general principles) in the context of modern United States constitutional law, judicial reasoning tends to be deductive. In most cases, courts reason from established legal frameworks containing general rules to specific applications based on the facts of a particular case. In this sense, constitutional analysis is largely deductive.

likely to be too inflexible for the difficult task of complex moral balancing. Thus, when courts apply constitutional analysis to difficult moral questions, they may find themselves at odds with powerful social forces. This is not to say that courts must never impose constitutional constraints on the moral balance that emerges from the political process, but rather that such exercises in judicial activism, however necessary, have both institutional limits and institutional costs.

The institutional limits derive from the generally understood, but often overlooked, reality that law is an imperfect tool of social regulation.[224] Law, however "binding" in theory, does not produce perfect compliance. Indeed, the interaction between law and society often leads to a change in the law, rather than in people's behavior.[225] This reality is no less true for judicial pronouncements of constitutional principles than for other forms of law, especially since judicial pronouncements are not self-executing and depend on the acceptance of the political branches and society in general. Respect for the judiciary and the rule of law means that constitutional decisions will carry significant weight, but judicial pronouncements of constitutional principle cannot by fiat overcome powerful social forces. Of course, this insight is not a new one; nor is it limited to the context of abortion.[226] The U.S. and German abortion decisions drive this point home with particular force because social forces essentially compelled the Courts to accept a similar compromise regime even though their original constitutional pronouncements occupied opposite extremes. Neither extreme, decisional autonomy without constraint nor state control without some decisional autonomy, was able to withstand the opposing social forces which drove the Courts inexorably to a compromise position.

This is not to say that *Roe* and *Abortion I* had no impact on the abortion regimes of their respective countries. Abortion was a crime in most states before *Roe* and the law invalidated in *Abortion I* was more

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224. On the imperfection of law as an instrument of social regulation, particularly in the context of abortion, see Owen M. Fiss, *The Unruly Character of Politics*, 29 MCGEORGE L. REV. 1 (1997). *See generally* Jesse H. Choper, *On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-1997 Term*, 19 CARDOZO L. REV. 2259 (1998).

225. Professor Levy uses the analogy of the fifty-five mile-per-hour speed limit, which produced an average highway speed approximately ten miles-per-hour faster. When the limit was changed to sixty-five miles-per-hour, average highway speeds increased (although perhaps not to seventy-five miles-per-hour).

226. Consider, for example, the complex history of school desegregation under *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954). *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 558-61 (3d ed. 1996) (collecting literature and summarizing viewpoints on the efficacy of judicial decisions in regard to racial integration and equality).

permissive than the regime approved in *Abortion II*. Thus, it would appear that the Courts have also had the effect of moderating the society in which they operate.[227] In this sense, the abortion decisions represent a dialogue between the Courts and the societies in which they operate.[228] Through their invocation of constitutional principles, courts can remind society of important values, and thereby affect behavior. This, however, will not necessarily translate into a society that fully comports with those values. Moreover, the dialogue goes both ways. Courts, too, are influenced by the societies in which they operate.[229] If the values they express as a matter of constitutional doctrine depart too far from those of society, courts will be forced to adjust their constitutional doctrine.

This dialogic understanding of the relationship between courts and societies underscores that while judicial decisions of constitutional principle that run counter to powerful social forces may affect the social equilibrium and produce a different balance, there is a corresponding institutional cost. For the Supreme Court, backlash against *Roe* produced a concerted political effort to reconfigure the Court which was to some extent successful, even if the "essential holding" of *Roe* remains intact. As a result, the judicial appointment process and the Supreme Court itself have become increasingly politicized, with a resulting politicization of the Court's decisions.[230] Although the impact of the political response to *Abortion I* on the Constitutional Court is less well documented, to the casual observer *Abortion II* cannot be seen as

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227. Of course, it is impossible to know what the regulation of abortion would look like in the United States and Germany if neither *Roe* nor *Abortion I* had imposed constitutional limits on abortion regulation. It is entirely possible that both countries would have moved to the model of restrained reproductive autonomy regardless.

228. *See generally* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); William N. Eskridge, Jr. & Philip P. Frickey, *Forward: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994). For a wide-ranging discussion of all law as dialogue and the impoverishment of this dialogue through the emphasis in American law on "rights talk," see MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 112-42 (1987). Glendon sees the German Constitutional Court, and continental courts in general, as being more adept in dialogue with their societies than their counterparts in the United States. *See id.* Thus, she regards the differences between *Roe* and *Abortion I* as more important than the similarities. *See id.* at 33-40; *see also* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (developing her Rights Talk critique more fully in her later work.

229. Most obviously, new appointments to the Supreme Court had a significant role in the move from *Roe* to *Casey*. But even without changes in the composition of the courts, judges are members of society and are influenced by social conditions. An example from the U.S. experience is the "switch in time that saved nine" in the 1930s. *See* STONE ET AL., *supra* note 226, at 214-15.

230. As a constitutional law teacher, for example, Professor Levy is forced to tell his students that while doctrine matters, the best predictor of the outcome of pending Supreme Court decisions is the ideological composition of the Court. For a theoretical account of this problem, see Jack Balkin, *Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 U. MO. K.C. L. REV. 392, 428 (1987).

anything other than a political compromise. In any event, as our discussion of the three paradoxical parallels suggests, both Courts have been forced to resort to convoluted and unconvincing analyses in an attempt to claim that their decisions reflect a coherent and consistent exposition of their constitutions.

Courts lack any political power to command allegiance or to threaten the use of force to secure compliance. The effectiveness of their decisions depends upon respect for the judiciary and the rule of law. This is their institutional capital, a valuable resource that must be protected and used wisely. It is perhaps not so paradoxical that for both the Supreme Court and the Constitutional Court, the assertion of judicial authority over the troubling problem of abortion entailed a sizable expenditure of their institutional capital.