pregnancy. East Germany, by contrast, permitted abortion on demand within the first trimester of pregnancy. Stalemated, the two German states agreed to retain their respective abortion policies until an all-German legislature could work out a satisfactory compromise, the Unity Treaty having laid down a December 31, 1992, deadline for the enactment of an all-German law acceptable to both sides.[68]

The first all-German parliament, elected on December 2, 1990, struggled to find a middle ground between the conflicting policies of East and West. By May 1992, a severely fractured Bundestag had before it several proposals ranging from a plan to increase the severity of West Germany's existing policy all the way over to one based on unrestricted freedom of choice. After months of debate and negotiation, the quarreling parties broke the logjam and reached a compromise, passing the Pregnancy and Family Assistance Act by a broad majority (357 to 283 votes).[69]

The act incorporated a time-phase solution with obligatory counseling. The following passage captures the essential features of a detailed and complicated statute:

> The new "counseling model" retained the concept that abortion destroys life and should only be allowed if the continuation of pregnancy would result in an unreasonable burden for the woman. But at the same time it reflected the belief that the State's duty to protect developing life could be better served, in general, by improving the social environment for women and families with children, and in the individual case of unwanted pregnancy, by comprehensive information and counseling, than by threatening punishment and establishing cumbersome procedures for obtaining a permission to abort ("support instead of punishment"). Consequently, the new legislation contained a voluminous package of general social measures on education, birth control, and State assistance in matters of family planning and pregnancy. With respect to the individual woman faced with an unwanted pregnancy, the Act focused on providing not only State assistance in case of financial need but on strengthening the woman's rights and opportunities in education, workplace, career, and housing. Special emphasis was put on "day care."[70]

The new statute departed from the Constitutional Court's earlier ruling in one crucial respect. It decriminalized abortion in the first trimester of pregnancy. In words that would come back to haunt the Bundestag, the new change in the criminal code declared that the interruption of pregnancy in some circumstances was "not illegal" (*nicht rechtswidrig*).[71] Specifically, no criminal penalty would attach to an abortion if performed by a licensed physician after compulsory counseling and a three-day waiting period. If, after such counseling—which would have to be certified in writing and before the twelfth week of pregnancy—the woman still decided that an abortion was in her best interest, a licensed physician could then legally perform the abortion.

7.11 Abortion II Case (1993)
88 BVerfGE 203

[On July 2, 1992, the Bundesrat approved the new abortion reform statute and shortly thereafter the federal president signed it. Within hours of the signing, however, and with the backing of Chancellor Helmut Kohl, 249 Christian Democratic members of the Bundestag—all from the former West Germany—petitioned the Constitutional Court to enjoin the law's enforcement. Bavaria's state government, claiming that several provisions of the statute were unconstitutional, filed a separate petition. In a preliminary hearing, after a full day of oral argument on August 4, 1992, the day before the law would have entered into force, the Second Senate, to the surprise of many constitutional scholars and the chagrin of others, unanimously issued an injunction (86 BVerfGE 390) reinstating the old two-German policy pending a full decision on the merits of the case. In *Abortion II* the court reaffirmed the essential core of *Abortion I* while simultaneously adjusting the character of this protection to meet the needs of post-unification Germany.

The full opinion and two dissenting opinions take up 163 pages of the official reports. The extracts below are limited to the case's headnotes and selected passages from the court's opinion. The headnotes, drafted by the court itself, summarize the main rulings of the decision. Translated by Susanne Walther, the headnotes appear in *German Yearbook of International Law* 36 (1993): 402–4 and are reprinted here with the *Yearbook's* permission.]

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1. Germany's Basic Law places a duty on the state to protect human life, including that of the unborn. This duty of protection is derived from Article 1, subsection 1 GG (Basic Law). The object and scope of this duty is more specifically governed by Article 2 subsection 2 GG. Unborn life is due human dignity. The legal order must guarantee the proper legal foundation for the development of the unborn in terms of its right to life. The unborn's right to life is not predicated on its acceptance by the mother but exists prior to this point in time.

2. The duty to protect the unborn is a duty owed to each individual, not just to human life in general.

3. The unborn is due legal protection even as against its mother. Such protection can be afforded to the unborn only if the legislature passes a law prohibiting abortion and places a basic legal obligation on women to carry pregnancies to term. The bar on abortion and the basic obligation to carry a pregnancy to term constitute two inseparable elements of this constitutionally required protection.

4. Abortions performed at any point during a pregnancy must be fundamentally considered a wrong and, thus, unlawful. The determination of the right to life

of the unborn must not be delegated to the discretion of a third party who is not bound by law, not even where the third party is the mother herself and no matter how limited the time period may be in which such a right may be exercised.

5. The scope of the duty to protect the unborn is to be determined by weighing its importance and need for protection against the conflicting interests of other objects deserving of legal protection. Those interests which conflict with the unborn's right to life include—starting with a woman's right to have her human dignity protected and respected (Article 2 [1])—above all, a woman's right to life and physical integrity (Article 2 [2]) and her right of personality (Article 2 [1]). The constitutional rights of a woman, however, do not go so far as to allow her to claim under Article 4 (1) a fundamentally protected legal right to kill an unborn [child] by means of abortion.

6. The state must fulfill its duty of protection by adopting adequate measures setting legal and factual standards whose objective—in consideration of conflicting legal interests—is to provide for appropriate and effective protection (minimum protection). For this purpose, it is necessary to create a regulatory scheme which combines elements of preventive as well as repressive protection.

7. The fundamental rights of a woman do not mandate the general suspension of a duty to carry out a pregnancy, even within a limited time frame. However, a woman's constitutional rights permit—and in certain cases might require—recognition of exceptional circumstances under which such a duty shall not be imposed on her. It is up to the legislature to determine the specific criteria of these factual exceptions according to a standard of reasonableness. Those burdens shall constitute exceptions which require such a degree of sacrifice of individual needs by a woman that it would be unreasonable to expect this from her.

8. Under minimum protection the state is precluded from freely dispensing with criminal punishment and its protective effect on human life.

9. The state's duty to protect the unborn also includes protecting the unborn from dangers emanating from the influence of the woman's immediate or general social milieu or both her and her family's present and foreseeable living circumstances and, as such, interfering with the woman's willingness to carry out the pregnancy.

10. The state's duty of care furthermore includes maintaining and raising the public's consciousness of the unborn's legal right of protection.

11. The legislature acts constitutionally when it adopts a regulatory scheme for the protection of the unborn which uses counseling as a means of inducing pregnant women in conflict during the early stage of the pregnancy to carry their pregnancy to term. The legislature also acts within constitutional bounds when it dispenses with criminal prosecution for indicated abortions as well as the determination of such indications by third parties.

12. A counseling-based regulation must comply with underlying constitutional

conditions which impose affirmative duties on women for the benefit of the unborn. The state holds full responsibility for implementing the counseling procedure.

13. The state's duty to protect the unborn requires that the physician cooperate not only in the interest of the woman but also to the benefit of the unborn.

14. It is unconstitutional to define by law the existence of a child as a source of damage or harm (Article 1 [1]). For this reason, it is prohibited to acknowledge a maintenance obligation toward a child as a type of damage or harm.

15. Abortions performed in the absence of a determined indication as prescribed by the counseling regulation may not be deemed justified (not unlawful). According to inalienable fundamental principles of law, an exception can have the effect of a legal justification only if it is incumbent on the state alone to establish the criteria necessary to take the act in question out of the general rule.

16. It is unconstitutional to create an entitlement to statutory health insurance benefits for the performance of an abortion whose lawfulness has not been established. By contrast, it is not unconstitutional to grant social welfare benefits for abortions not incurring criminal liability under the counseling regulation where a woman lacks financial means. Continued payment of salaries or wages in the case of an abortion is also constitutional.

17. The administrative power of the *Länder* remains unqualified where a federal law merely prescribes an obligation to be met by the *Länder* and not the specific regulations which can be implemented and enforced by the governmental administrative authorities of the *Länder.*

Judgment of the Second Senate. . . .

D. I. 1. The Basic Law requires the state to protect human life. Unborn life is human life and thus entitled to the state's protection. The Constitution not only supports direct state intervention on behalf of unborn life but also requires that the state protect unborn life from the illegal intervention of others. This *duty to protect* [unborn life] is found in Article 1 (1) of the Basic Law, which expressly obliges the state to respect and protect human life. . . .

(a) Unborn human life possesses human dignity; [dignity] is not merely an attribute of a fully developed personality or a human being after birth. . . .

(b) The duty to protect human life extends to the life of each individual being, not to human life in general. Any ordered life in common within a state requires that this duty be fulfilled. The Basic Law imposes this duty on all levels of state authority (Article 1 [1]); i.e., on the state in all of its functions, particularly in the exercise of its legislative authority. The duty to protect extends also to the adoption of measures designed to ease the burden of pregnancy as well as to [various] rules of conduct.

2. The state imposes rules of conduct to protect unborn life by means of legal obligations, prohibitions, or duties to act or refrain from acting. These rules must also apply to the protection of the unborn child from its mother, regardless of the

stage of this relationship of duality in unity [*Zweiheit in Einheit*]. [But] the unborn child can only be protected from its mother if the legislature prohibits an abortion and imposes a legal duty on the mother to carry the child to term. The fundamental prohibition on abortion and the fundamental duty to carry the child to term are inseparable elements of the constitutionally required protection.

Moreover, [the state must also protect unborn life] against invasion by third parties, not the least of whom are people within the pregnant woman's family or social circle. These individuals may threaten the unborn child directly or indirectly by denying the pregnant woman the assistance they owe her, creating difficulties for her because of the pregnancy, or pressuring her to terminate the pregnancy.

(a) These [legislatively created] rules of conduct cannot be simply voluntary; they must be imposed by law. The right to life is embodied in the norms of the Basic Law. [This right is special] and thus requires special binding rules for its effective realization. [Criminal] penalties, however, are not the only possible sanctions, although they may sway individuals to respect and obey the requirements of law.

Legal rules of conduct must provide for two kinds of protection. On the one hand, where a protected legal value is harmed or threatened, they must include a regulatory scheme that includes individualized preventive measures or punishment. On the other hand, such rules must [be designed to] strengthen and support popular values and concepts of right and wrong; they must promote the public's consciousness [of the unborn child's] legal right to protection [citing the *Life Imprisonment* case].

(b) But since the Basic Law does not elevate the protection of [unborn] life above all other legal values, the right [of the unborn] to life is not absolute. It is not elevated above all other legal values without exception; this is clear from Article 2 (2) . . . Rather, the scope of the state's duty to protect the unborn is to be determined by weighing its importance and need for protection against other conflicting legal values. The legal values affected by the right to life of the unborn include the woman's right to protection and respect for her own dignity (Article 1 [1]), the rights to life and physical integrity, and the right to personal development (Article 2 [1]).

The legislature has the responsibility of determining the nature and scope of the required protection. To the extent that the legislature is constitutionally bound to act in this area, it must provide the minimum protection necessary to safeguard the relevant constitutional value. The required protection may not fall below this minimum standard [*Untermassverbot*]. . . .

(c) So as not to run afoul of this standard of minimum protection, the protection afforded [the unborn] must satisfy the minimum requirements of the legal order.

(aa) This principle requires that abortion be declared illegal [as a general rule] during all stages of pregnancy [citing *Abortion I*]. If the law does not declare abortion to be illegal, the unborn child's right to life would be trumped by the legally unrestrained decision of the mother or other third party, and the legal protection of its life would no longer be guaranteed. The dignity claims of the woman, and her capacity to make a responsible decision, cannot justify such a devaluation of human life. The right to life itself must define the scope and limits of its permissible infringement; this cannot be left to the [complete] discretion of [third] parties.

. . . Although the right of the unborn to life [is the superior value], it does not extend to the point of eliminating all of the woman's legal rights [to self-determination]. [Her rights] can produce a situation in which it is permissible in exceptional cases—and is even required in some—not to impose a legal duty to carry the child to term.

(bb) The legislature is responsible for defining these exceptional circumstances. So as not to fall below the minimal requirement for protecting a basic right, the legislature must recognize that the conflicting legal values cannot be quantitatively balanced. From the perspective of unborn life, the legislature's choice must be for life itself and may not embrace the mere balancing of losses and gains. Because abortion always results in the death of the unborn child, a [balancing act of the kind suggested] is impossible [citing *Abortion I*]. . . .

This does not mean that the only constitutionally exceptional case where the woman need not carry her fetus to term is when her life or health is endangered. Other exceptions are imaginable. This court has established the standard of an unreasonable burden as the basis for identifying such exceptions [citing *Abortion I*] . . . The unreasonable burden standard is justified because in the light of the unique relationship between mother and child, prohibiting abortion does not end with the imposition of a duty to refrain from violating [altogether] the rights of another. There are further duties that affect the woman's entire existence: the duty to carry and bear the child and to care for it many years after its birth. Given these pregnancy-related responsibilities and the psychic conflict they may evoke, it is possible that many women in the early stages of pregnancy may experience serious, even life-threatening distress; in these circumstances, such urgent interests worthy of legal protection arise that the legal order cannot require the woman to value an unborn being's right to life above all else, regardless of broader moral or religious concerns.

An unreasonable burden cannot arise from the circumstances of a normal pregnancy. Rather, [an unreasonable burden] would have to involve such a measure of sacrifice of existential values as could not be expected of any woman. . . .

In addition to defined medical, criminological, and embryopathic indications that would justify an abortion, there may be other situations where an abortion would also be indicated [as justified]. One such scenario would include a condition of such social or psychological distress that a clear case of an unreasonable burden would be demonstrated.

(cc) Although the unreasonable burden standard limits a woman's duty to carry a child to term, it does not relieve the state from its duty to protect unborn human life. It directs the state to support the woman through counseling and assistance and to try to persuade her to carry the child to term. This is the presumption behind Section 218a (3) of the Criminal Code.

(dd) . . . [But] due to its extreme interventionist character, criminal law need not be the primary means of legal protection. Its application is subject to the requirements of proportionality (citing several cases). The criminal law is used as the *ultima ratio* of this protection . . . Where the legislature has enacted constitutionally adequate, noncriminal measures to protect the unborn, the woman need not be punished for having an unjustified abortion in a limited number of [defined] instances so long as the legal order clearly expresses the view that abortion [as a general rule] is to be prohibited. So long as the law makes the general prohibition [of abortion] clear, this may be constitutionally sufficient [to deter abortions] in this limited set of circumstances. . . .

3. The state's duty to protect unborn life is not satisfied merely by defending it against invasion by others. The state must also take measures to confront dangers threatening the present and future real-life relations of the woman and her family. These relations may influence her decision to carry the child to term. This duty to protect [unborn life] implicates the state's duty to protect [marriage, family, and mothers] under the terms of Article 6 (1) and (4) of the Basic Law. It obliges the state to address problems and difficulties that a woman might experience during pregnancy. Article 6 (1) and (4) expresses a binding commitment of protection embracing the entire sphere of public and private law, extending to the pregnant woman. This [task] is consistent with the commitment to treat motherhood and child-rearing activities as in the public interest and worthy of recognition. . . .

(a) The care that the community owes mothers extends to an effort to prevent abortion in cases of existing material need or those that threaten the woman after the birth of the child. An effort needs to be made to remedy the disadvantages to women in education and employment that may result from [pregnancy and childbirth]. . . .

The duty to protect unborn life, to defend marriage and the family (Article 6), and to secure the equality of men and women in employment (Article 3 [2]), together with Articles 3 and 7 of the International Covenant on Economic, Social, and Cultural Rights, obliges the state, and particularly the legislature, to find a way to balance [the needs of] family and employment and to ensure that child-rearing does not lead to disadvantages [for women].

[In a major departure from *Abortion I,* the court declared that non-indicated abortions in the first twelve weeks of pregnancy, while unjustified, need not be punished. A refined system of counseling oriented toward preserving the life of the fetus could now substitute for the criminal penalty. However,

sections of the Criminal Code declaring abortions performed during the first trimester of pregnancy "not illegal" were nullified. Non-indicated abortions must remain illegal even though unpunished. In addition, the court directed the legislature to adopt measures in all spheres of law to support a woman's decision in favor of life over abortion. Sections of the law governing Germany's national health plan, which would have covered abortions not medically indicated, were struck down. Laws mandating that the government keep statistics on abortion in Germany that had been removed from the new legislation were restored. Finally, the court said that the state could not constitutionally deny welfare assistance to poor women who wanted non-indicated abortions but could not afford them.

There were two dissenting opinions. The first, by Ernst Gottfried Mahrenholz, the Second Senate's "chief justice," which Justice Sommer joined, dissented from the majority's view that nonhardship abortions were to be classified as illegal in the Criminal Code. These justices felt that the Pregnancy and Family Assistance Act struck an adequate balance between the rights of life and personality under the Basic Law. Justice Ernst-Wolfgang Böckenförde, whose participation in the case was unsuccessfully challenged by the Social Democrats on the basis of his having once belonged to a right-to-life group, wrote a second dissenting opinion to question the court's ban on paying for "illegal" abortions out of the state's medical insurance program. Whether abortions performed for serious social reasons should be a part of the national health plan was, in his view, a matter of legislative discretion.]

NOTE: AFTERMATH OF *ABORTION II.* In rejecting the 1992 abortion statute, the court tossed the ball back into parliament's court. Until parliament acted to craft a new statute within the guidelines of *Abortion II,* the court's rulings would prevail in all of Germany. It would take parliament another two years to agree on amendments to the 1992 statute. The legislative debate centered on three issues: the nature and extent of obligatory counseling, abortion financing, and the criminal liability of persons within a pregnant woman's social circle who might encourage her to procure an abortion. These issues were being vigorously debated as this volume was going to press.

A compromise bill that commanded the support of a substantial parliamentary majority provided for compulsory counseling along the lines suggested by the Federal Constitutional Court, but it seemed to require less vigorous pro-life counseling than the court had urged. The woman would be informed by a recognized social agency that the unborn child is entitled to the right to life at all stages of pregnancy and that under Germany's legal order a non-indicated abortion, although not punishable if procured after compulsory counseling within the first trimester of pregnancy, would be permissible only in exceptional circumstances. Counselors were