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The German Abortion Decisions and the Protective Function in German and Canadian Constitutional Law

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Abstract

In the First and Second Abortion decisions, the German Constitutional Court drew on earlier jurisprudence to hold that the state was under a constitutional duty to protect the fetus from deprivations of its interest in life by the pregnant woman. In this article, we suggest that Canadian constitutional law scholars and reproductive rights advocates would benefit from examining the German abortion decisions despite their highly controversial nature. In our view, the benefits are twofold. First, the German cases demonstrate that recognizing the protective function can help clarify constitutional doctrine by revealing the tensions that underlie many difficult constitutional cases. Second, a synthetic reading of the German and Canadian Courts' abortion jurisprudence generates a more fulsome and nuanced analysis of the issues raised in the those cases, as well as additional critical commentary on the Courts' analyses and conclusions.

Keywords

Abortion; Germany; Canada; Fetus--Legal status; laws; etc.

The German Abortion Decisions and the Protective Function in German and Canadian Constitutional Law

VANESSA MACDONNELL & JULA HUGHES *

In the First and Second Abortion decisions, the German Constitutional Court drew on earlier jurisprudence to hold that the state was under a constitutional duty to protect the fetus from deprivations of its interest in life by the pregnant woman. In this article, we suggest that Canadian constitutional law scholars and reproductive rights advocates would benefit from examining the German abortion decisions despite their highly controversial nature. In our view, the benefits are twofold. First, the German cases demonstrate that recognizing the protective function can help clarify constitutional doctrine by revealing the tensions that underlie many difficult constitutional cases. Second, a synthetic reading of the German and Canadian Courts' abortion jurisprudence generates a more fulsome and nuanced analysis of the issues raised in the those cases, as well as additional critical commentary on the Courts' analyses and conclusions.

Dans ses deux premiers jugements sur l'avortement, la Cour constitutionnelle allemande, se fondant sur une jurisprudence reconnaissant l'obligation pour l'État de protéger d'intervention privée les droits constitutionnels d'une personne, a fait valoir que l'État avait le devoir constitutionnel de protéger le fœtus d'une dépossession de son droit à la vie par la femme enceinte. Dans cet article, nous suggérons que les constitutionnalistes et les défenseurs des droits en matière de reproduction canadiens auraient intérêt à étudier, les jugements allemands sur l'avortement malgré leur nature fortement controversée. Nous faisons valoir que cela représente un double avantage. En premier lieu, la comparaison avec l'Allemagne démontre que la reconnaissance de la fonction de protection peut clarifier la doctrine

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constitutionnelle en dévoilant les tensions qui caractérisent de nombreux cas constitutionnels de nature complexe. En second lieu, une lecture synthétique des jurisprudences allemande et canadienne sur l'avortement permet d'obtenir une analyse plus exhaustive et nuancée des enjeux que soulèvent les cas d'avortement dans chacun de ces pays et de formuler de nouveaux commentaires critiques sur l'analyse et les conclusions des tribunaux.

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IN 1975 AND 1992, THE GERMAN CONSTITUTIONAL COURT (*Bundesverfassungsgericht*) heard successive challenges to the decriminalization of abortion by the German Federal Parliament (*Bundestag*). In the highly controversial First¹ and Second² Abortion decisions, the Court held that the state had a constitutional obligation to protect the fetus³ from deprivations of its interest in life by the

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1. *Schwangerschaftsabbruch I*, (1975) 39 BVerfGE 1 (Fed Const Ct) (Germany) [First Abortion decision] [translated by author, Julia Hughes]. There is no official English translation of this decision. We have relied exclusively on the original German text for our analysis. The Supreme Court of Canada has relied on a translation by Robert Jonas and John Gorby in one of its own decisions on the constitutionality of criminalizing abortion. See Robert E. Jonas and John D. Gorby, "West German Abortion Decision: A Contrast to *Roe v. Wade*" (1976) 9:3 J Marshall J Prac & Proc 605, cited in *R v Morgentaler*, [1988] 1 SCR 30 at para 2, DLR (4th) 385 [*Morgentaler*].
 2. *Schwangerschaftsabbruch II*, (1993) 88 BVerfGE 203 (Fed Const Ct) (Germany) [Second Abortion decision]. An official English translation is available on the website of the German Constitutional Court. See BVerfGE, 2 BvF 2/90 (28 May 1993), online: <http://www.bverfg.de/entscheidungen/fs19930528_2bvf000290en.html>.
 3. Following the Supreme Court of Canada in *Morgentaler* (*supra* note 1), we use the terms "fetus" and "fetal life" throughout, recognizing that they are inaccurate when applied to the first ten weeks of pregnancy following the last menstrual period. The German Constitutional Court uses the term *nasciturus*, which might be better translated as prenatal life. See *e.g.* First Abortion decision, *supra* note 1 at para 119.

pregnant woman.⁴ In doing so, the Court also recognized a broader right to have constitutional interests secured by the state against intrusions by private actors.⁵ It held that where a power imbalance between private actors renders constitutional interests vulnerable to deprivation, the state is required to intervene to protect the interests of the weaker party.⁶

In both decisions, the Court was unanimously of the view that the objective normative framework of the constitution required the state to protect the fetal interest in life. In the First Abortion decision, the majority concluded that the state could only fulfill this obligation using the criminal law. The dissenters rejected the majority's approach, explaining that the criminal law was an unnecessary and inappropriate tool for regulating abortion. In the Second Abortion decision, a majority of the Court resiled from the position of the earlier majority on the necessity of criminalization, and concluded that the state might validly protect fetal life in a range of ways. In reaching this conclusion, the Court adopted aspects of the dissenters' arguments in the First Abortion decision. The dissenters had suggested that the best way of protecting fetal life is often to ensure that women have sufficient social supports.

Canadian academics schooled in the tradition of *Morgentaler*⁷ and the American cases of *Roe v Wade*⁸ and *Planned Parenthood of Southeastern Pennsylvania v Casey*⁹ are likely to regard the German Abortion decisions as unsettling, both jurisprudentially and politically. Indeed, there is much to criticize in the two decisions, foremost among which is the Court's "patriarchal claim that a woman has a moral

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4. For a discussion of the distinction between "rights" and "interests" in this context, see Vanessa A MacDonnell, "The Protective Function and Section 7 of the *Canadian Charter of Rights and Freedoms*" (2012) 17:1 Rev Const Stud 53 at 54-55, n 5 [MacDonnell, "Protective Function"].
 5. By "private actors" we mean any "third-party actor," as that term is used by Mark Tushnet. See Mark Tushnet, "The Relationship Between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, With Reference to Third Party Effect" in András Sajó & Renáta Uitz, eds, *The Constitution in Private Relations: Expounding Constitutionalism* (Utrecht: Eleven International, 2005) 167. For a general discussion of the protective function, see MacDonnell, "Protective Function," *supra* note 4.
 6. Since the First Abortion decision, the protective function has been invoked in a variety of contexts, including terror threats, dangers arising from the technological development of nuclear power and electromagnetic applications, noise generated by air and road traffic, chemical pollution and damage to air and forests, protections of universities, and the maintenance of existing private schools. See Bodo Pieroth & Bernhard Schlinck, *Grundrechte: Staatsrecht II* (Heidelberg: Müller, 2012) at para 111.
 7. *Morgentaler*, *supra* note 1.
 8. *Roe v Wade* (1973), 410 US 113, 93 S Ct 705 [*Roe v Wade*].
 9. *Planned Parenthood of Southeastern Pennsylvania v Casey* (1992), 505 US 833, 112 S Ct 2791 [*Casey*].

obligation, except in extraordinary circumstances, to continue her pregnancy to birth.”¹⁰ This has not stopped scholars in the United States from comparing *Roe v Wade* to the First Abortion decision and *Casey* to the Second Abortion decision.¹¹ Much of this comparative analysis is focussed on judicial outcomes and German scholars writing in English have often struggled to convey the sophistication and nuance of the German decisions.¹² To date, Canadian scholars have not contributed significantly to this comparative scholarship. It may be that Canadian scholars are largely satisfied with the result in *Morgentaler*, or that they are concerned about keeping the abortion issue on the political agenda. Whatever the reasons, it is clear that the First and Second Abortion decisions hold important insights for Canadian constitutional law scholars (especially feminist constitutional scholars¹³), as well as for reproductive rights advocates.

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10. Nanette Funk, “Abortion Counselling and the 1995 German Abortion Law” (1996) 12:1 Conn J Int’l L 33 at 51. See also Reva B Siegel, “The Constitutionalization of Abortion” in Michael Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1057 at 1067 [Siegel, “Constitutionalization of Abortion”]. The Court’s claim in this regard is overt and strongly worded: “The protection of the life of the child *in utero* takes precedence as a matter of principle for the entire duration of the pregnancy over the right of the pregnant woman to self-determination and may not be placed in question for any particular time” (First Abortion decision, *supra* note 1 at para 3). Note that the decisions of the German Constitutional Court are reported in two parts. The first part is titled, “Urteil,” *i.e.* judgment, but is more limited than the word suggests. It is a Court-articulated *ratio decidendi*. The second part is titled, *Begründung*, *i.e.* reasons. The preceding quote is from the first part.
 11. See Siegel, “Constitutionalization of Abortion,” *supra* note 10; Reva B Siegel, “Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage” (2012) 10:2 Int’l J Const L 355; Mark Tushnet & Vicki Jackson, *Comparative Constitutional Law*, 2d ed (New York: Foundation Press, 2006); Jonas & Gorby, *supra* note 1; Richard E Levy & Alexander Somek, “Paradoxical Parallels in the American and German Abortion Decisions” (2001) 9 Tul J Int’l & Comp L 109; Julie George, “Political Effects of Court Decisions on Abortion: A Comparison between the United States and the German Federal Republic” (1989) 3 Int’l J L & Fam 106. For a more extensive list, see Siegel, “Constitutionalization of Abortion,” *supra* note 10 at 1057-58, nn 1-3.
 12. But see Albin Eser, “Reform of German Abortion Law: First Experiences” (1986) 34:2 Am J Comp L 369. Professor Eser is an eminent scholar in the area of comparative abortion law. He headed a multi-year study by the Max Planck Institute for Foreign and International Criminal Law in Freiburg, and a brief he prepared for the German Constitutional Court in the Second Abortion decision proved highly influential.
 13. See Beverley Baines, Daphne Barak-Erez & Tsvi Kahana, “Introduction: The Idea and Practice of Feminist Constitutionalism” in Beverley Baines, Daphne Barak-Erez & Tsvi Kahana, eds, *Feminist Constitutionalism: Global Perspectives* (Cambridge: Cambridge University Press, 2012) 1.

Why should Canadian scholars look for inspiration and guidance to two decisions that appear to be fundamentally at odds with deeply held convictions about both constitutional law and reproductive rights? After all, the protective function invoked by the German Constitutional Court to impose a positive duty on the state to shield the fetus from deprivations of life is hardly consistent with a liberal conception of constitutional rights, which emphasizes the defensive function of negative rights. And while the protective function's focus on protecting the vulnerable might imply that it is a progressive force in constitutional law, the suggestion that the interests of the fetus have constitutional weight is likely to be deeply troubling to feminists, who rightly fear that increased protection of fetal life may erode existing protections of women's reproductive rights.

In this article, we suggest that there are at least two reasons why the German cases warrant careful study. First, the German cases demonstrate that recognizing the protective function can help clarify constitutional doctrine by revealing the tensions that underlie many difficult constitutional cases. While the Supreme Court of Canada has occasionally given effect to claims of a protective character, it has done so either by re-characterizing them in terms of negative rights and resolving them within the standard *Charter*¹⁴ framework, or by recognizing the government's protective function in passing at the "pressing and substantial objective" stage of the *Oakes* analysis.¹⁵ It would be preferable for the Supreme Court to develop a coherent theory of protective rights, and the German example provides a useful guide.

Second, a synthetic reading of the German and Canadian abortion jurisprudence is mutually informing. In each body of jurisprudence, the applicants foreground certain aspects of the constitutional issue in framing their claim, while other aspects are pushed to the margins or surface only weakly. Arguably, one of the major differences between the German and Canadian (and US) cases is not their divergent outcomes, but the way in which the cases came before the courts. In both North American examples, women or advocates on behalf of women challenged restrictive legislative and regulatory frameworks governing abortion. In Germany, progressive political majorities that had liberalized abor-

14. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), c 11 [*Charter*].

15. See *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) [*Oakes* cited to SCR]; Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 Sup Ct L Rev (2d) 501 at 514 [Choudhry, "Legacy of *Oakes*"]; Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2009) at 203-07 [Tushnet, *Weak Courts*].

tion laws were faced with constitutional challenges from conservative opposition parties.¹⁶ By reading the German and Canadian cases together, we get the benefit of a more fulsome and nuanced analysis of the issues, as well as additional critical commentary on each Court's analyses and conclusions. For example, the German Constitutional Court is much more articulate than its Canadian counterpart on the issue of the special relationship between the pregnant woman and the fetus, and the way in which their interests frequently align. It has also demonstrated a greater concern for the impact of pregnancy on women's equality rights. Moreover, the jurisprudence is as illuminating in those moments when the German Constitutional Court falters as it is when it gets it right. While the German Constitutional Court quite usefully explores the conceptual difficulty of having rights without a rights-holder, it does so in response to an innovative, yet unprincipled analysis in the First Abortion decision.

What about the risks of engaging in this analysis? As feminist constitutional scholars, we are not immune to the anxiety associated with engaging the German jurisprudence in a post-*Morgentaler* environment. However, we take some comfort in the fact that German women do not face greater barriers to obtaining an abortion than Canadian women, despite the German Constitutional Court's willingness to recognize that the state should afford certain protections to the fetus. This suggests that successful reproductive rights advocacy may not depend as crucially as is generally thought upon securing judicial support for the proposition that the fetus is a legal nullity. This is a potentially significant insight for reproductive rights advocates and for feminist constitutional scholars. A great deal of effort has been expended advocating for a conception of reproductive rights that largely excludes the fetus from view.¹⁷ This treatment of fetal life may ultimately prove vulnerable because its legal conceptualization strays too far from everyday experience and majoritarian moral intuition. Reading the Canadian and the German jurisprudence together suggests that a more solid constitutional

16. One of the strengths of comparative analysis, both in literature and in law, is that it is inherently demanding of inclusiveness of the Other. A surface reading of the Canadian and German case law suggests that the Canadian decisions are progressive and the German decisions are reactionary. It would be easy to extrapolate from this to viewing the Canadian law as progressive and the German law as reactionary. A close comparative reading reminds us that this view is myopic. Progressive lawmakers in Germany commanded a solid majority both in 1975 and in 1993, while in Canada progress had to be achieved through legal challenge. On the theoretical point, see Steven Tötösy de Zepetnek, *Comparative Literature: Theory, Method, Application* (Amsterdam: Rodopi, 1998) at 17.

17. See LW Sumner, *Abortion and Moral Theory* (Princeton, NJ: Princeton University Press, 1981) at 40; Bonnie Steinbock, *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses* (New York: Oxford University Press, 2011).

foundation might be built upon a doctrine that secures the reproductive rights of women while also accepting the state's interest in protecting fetal life, an interest usually best advanced by recognizing that the interests of women and the fetus are aligned.¹⁸

To be clear, we are not suggesting that the majority's approach in the First Abortion decision should be emulated in Canada. We are certainly not advocating for a dilution of women's reproductive rights. Instead, we argue that constitutional rights litigation often takes place within a space of contest between the protective function on the one hand and the defensive rights of the individual on the other.¹⁹ Understanding constitutional cases in this way makes it possible to give legal recognition and voice to the forces that underlie constitutional discourse. These forces are muted but no less powerful for that muteness in a jurisprudence that insists upon an exclusive focus on defensive rights. What emerges from the German cases and associated commentary is that the best way of reconciling these two aspects of the constitutional doctrine in the abortion context is usually to adopt more "woman-friendly"²⁰ state policies.²¹ In sum, our focus in this article is on constructing a robust conceptualization of the reproductive rights of women, one capable of withstanding the most rigorous constitutional scrutiny, as well as changes in political winds.²² Recent events suggest that such efforts are needed.²³

18. Siegel, "Constitutionalization of Abortion," *supra* note 10 at 1070. Siegel refers to the Second Abortion decision. See *supra* note 2.

19. For a similar view, see Siegel, "Constitutionalization of Abortion," *supra* note 10.

20. See Second Abortion decision, *supra* note 2 at para 170. See also the commentary in note 69, *infra*.

21. For commentary on the German cases, see Siegel, "Constitutionalization of Abortion," *supra* note 10 at 1070; Gerald Neuman, "Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany" (1995) 43:2 Am J Comp L 272, reprinted in Vicki C Jackson & Mark Tushnet, eds, *Comparative Constitutional Law*, 2d ed (New York: Foundation Press, 2006) 129 at 130, 132.

22. On the current vulnerability of Canadian abortion law in changing political climates, see Chris Kaposy & Jocelyn Downie, "Judicial Reasoning About Pregnancy and Choice" (2008) 16 Health LJ 281.

23. In February 2012, Stephen Woodworth, a Conservative Member of Parliament, sponsored a motion in the House of Commons seeking to have a Committee "appointed and directed to review the declaration in Subsection 223(1) of the *Criminal Code of Canada* which states that a child becomes a human being only at the moment of complete birth." See Stephen Woodworth, "Motion 312" (2013), online: <<http://www.stephenwoodworth.ca/canadas-400-year-old-definition-of-human-being/motion-312>>. Many, including the Prime Minister, viewed the motion as an attempt to put the abortion question back on the political agenda. Although the motion failed to pass, it was supported by ninety-one MPs, including eight Cabinet Ministers. See "Tory Backbencher's Abortion Motion Defeated 203-91 despite Support from High-Profile MPs including Jason Kenney" *National Post* (26 September 2012), online: <<http://news.nationalpost.com/2012/09/26/tory-backbenchers-abortion->

The most useful elements of the German approach for Canadian scholars become apparent once the Constitutional Court's formulation of the protective function is pared down to its essential components, and "mediating ideas" are identified to facilitate the task of comparison. By "mediating ideas," we mean concepts that appear to be essential elements of both countries' jurisprudence.²⁴ Mediating ideas emerge most clearly when we consider the dissenting opinion in the First Abortion decision.

This article is structured as follows. In Part I we discuss the First and Second Abortion decisions in some detail. In Part II, we consider the implications of the protective function for Canadian constitutional law. In Part III, we explore how reading the German and Canadian decisions together can assist in developing a doctrine of reproductive rights that accounts more fully for the legal interests and special relationships at stake in these cases, with particular emphasis on the right of access to abortion.

I. THE FIRST AND SECOND ABORTION DECISIONS

The German Constitutional Court's abortion jurisprudence is interesting, if somewhat startling. In the family of liberal democracies whose constitutions feature a catalogue of fundamental rights, it is difficult to find a court whose approach to abortion is more at odds with those of the Supreme Court of Canada and the United States Supreme Court. At the same time, the lived experience of German women is not terribly different than that of their North American counterparts. There, as here, women can access abortion legally, though there is considerable local variation in the administrative hurdles that a woman may face in seeking an abortion.²⁵

motion-defeated-203-91-despite-support-from-several-high-profile-mps>. The death of Henry Morgentaler in May 2013 has also revived discussions about abortion. See "Dr. Henry Morgentaler's Death Highlights Abortion Divide" *CBC News* (29 May 2013), online: <<http://www.cbc.ca/news/canada/story/2013/05/29/morgentaler-death-reax.html>>.

24. We adopt the concept of mediating ideas from comparative literary theory. See Tötösy de Zepetnek, *supra* note 16 at 133-34.
25. Rahman, Katzive, and Henshaw group Germany and Canada in the category of countries with liberal abortion laws. See Anika Rahman, Laura Katzive & Stanley K Henshaw, "A Global Review of Laws on Induced Abortion, 1985-1997" (1998) 24:2 *Int'l Fam Planning Perspectives* 56 at 62. For a similar observation regarding the legal and lived experience dimensions of abortion in the United States and Germany, see Myra Marx Ferree et al, *Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States* (Cambridge: Cambridge University Press, 2002) at 3-4.

A. THE FIRST ABORTION DECISION

As noted above, the abortion issue came before the Constitutional Court in a very different litigation context than it did in Canada. In 1974, the West German federal parliament passed a law decriminalizing abortion in the first trimester of pregnancy, but maintaining the threat of criminal sanction against both physicians and women in the later stages of pregnancy. The proposed legislation was vigorously opposed by the conservative opposition in the lower house and by the members of the upper house who represented *Länder*²⁶ with conservative governments. Having failed to prevent law reform in the democratic process, opposition forces brought the matter before the Constitutional Court, arguing that the state had a duty to protect the unborn and that this duty could only be satisfied through the use of the criminal law.

This position faced three conceptual hurdles. First, there was no legal authority at that time for the proposition that the right to human dignity or the right life extended to the fetus.²⁷ Second, there was no law to be challenged. Abortions in the first trimester had been decriminalized, and abortion did not otherwise involve the state. Since it was thought that the constitution applied only vertically, at least with respect to the right to life, it was unclear how a constitutional challenge could proceed.²⁸ Third, the claimants were asking the Constitutional Court to direct the government to recriminalize abortion. This remedy seemed to extend beyond the Court's functions of constitutional review and invalidation.

To the surprise of the government of the day and even the applicants,

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26. *Länder* refers to the sub-national political units that make up the German federal state. Such units are analogous to US states and Canadian provinces. The singular of *Länder* is *Land*.
27. Section 1 of the German Civil Code states unequivocally: "Die Rechtsfähigkeit des Menschen beginnt mit der Vollendung der Geburt" ("The capacity of a human being to have rights begins with the completion of birth" [translated by author, Julia Hughes]). Bürgerliches Gesetzbuch [BGB] 18 August 1896, Reichsgesetzblatt [RGBl] 195 (Germany), s 1 [Civil Code]. Note that *Rechtsfähigkeit* is sometimes translated as "legal capacity." However, legal capacity in the sense of capacity to incur obligations is defined elsewhere in the German Civil Code as either coinciding with the age of majority, or is set out more specifically for married minors, et cetera. In terms of constitutional law alone, the record of legislative intent regarding Article 2(2) of the Basic Law is ambiguous at best. See Grundgesetz Für Die Bundesrepublik Deutschland [Grundgesetz] [GG] 23 May 1943, BGBl. I (Germany), art 2(2) [Basic Law]; Michael Anderheiden, *Gemeinwohl in Republik und Union* (Tübingen: Mohr, 2006) at 6.
28. Mark Tushnet explains that "[a] constitution operates vertically when it regulates the relation between a government (usually envisioned as 'on top') and citizens, residents, and the like." Tushnet, *Weak Courts*, *supra* note 15 at 196.

the Constitutional Court overcame all three hurdles. It held that life begins at conception or, possibly, at implantation, a decision which has had important implications for the regulation of contraception and prenatal diagnostics but, interestingly, not for abortion. The Court did not commit to a position on whether the fetus was an independent rights-holder.²⁹ Instead, it held that even if the life that came into existence at the time of conception or implantation was not yet a rights-holder as such, the objective normative framework of the Basic Law required its protection.

While a great deal could be said about the Court's characterization of the constitution as an objective normative framework, the basic idea is that the constitution is not merely a vehicle for conferring individual rights; it is also expressive.³⁰ It articulates the state's constitutional commitments and is thus a statement about the kind of state in which Germans live; in this case, a state committed to protecting prenatal life.³¹

It is difficult to overstate the importance of the historical context in which these constitutional commitments first arose.³² The forced abortion and sterilization campaigns of Nazi Germany played a defining role in shaping the normative core of the Basic Law.³³ This is particularly true of the right to human dignity, which the constitutional drafters identified as the primary constitutional commitment from which most other fundamental rights flowed.³⁴ At the same time, the Constitutional

29. This ambiguity has given rise to lively academic debate. See Piroth & Schlink, *supra* note 6 at para 136.

30. For discussion of the notion of a constitution as an objective normative framework (or, in other translations, as an "objective order of values"), see Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16:2 Ratio Juris 131 at 133.

31. One indication of the enduring nature of these commitments can be found in Article 79(3) of the Basic Law, which states that the fundamental rights catalogue cannot be the subject of amendment.

32. Lindsay K Jonker, "Learning from the Past: How the Events that Shaped the Constitutions of the United States and Germany Play Out in the Abortion Controversy" (2010) 23:2 Regent UL Rev 447.

33. Jeffrey C Tuomala, "Nuremberg and the Crime of Abortion" (2011) 42 U Tol L Rev 283.

34. Article 1 of the German Basic Law provides: "Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt." Its official English translation reads: "Human dignity is inviolable. To respect and protect it shall be the duty of all state authority." Kai Möller notes:

The official English translation does not quite capture a subtle difference of language made in the original text: In German legal terminology, there is a distinction between 'inviolable' (*unverletzlich*) and 'untouchable' (*unantastbar*), the former meaning that the state may sometimes interfere with the object of the right, provided that it comes up with a legitimate justification, and the latter meaning that any interference will automatically amount to a violation of the right.

Court's treatment of history in the First Abortion decision was selective. Although there was some liberalization of abortion during the Weimar Republic, it was greatly restricted under the Nazis, and physicians who provided abortions were frequently prosecuted.³⁵ These facts were absent from the Court's analysis.

The application of the constitution to non-state actors had been a controversial issue in Germany. The courts held different views on the matter, informed as much by their respective jurisdictions as by doctrinal thinking about the constitution's place in the law. For example, the Federal Labour Court (*Bundesarbeitsgericht*) had long advocated for direct application of the Basic Law to private actors, while the Federal Court of Appeals (*Bundesgerichtshof*) had taken the classical liberal position that the function of the Basic Law was to regulate the extent to which the state could intrude into the private sphere.³⁶ In its famous *Lüth*³⁷ decision, the Constitutional Court began to develop a theory of the indirect application of the constitution.³⁸ This theory recognized that the Basic Law could serve functions that extended beyond defending the citizen against intrusions by the state.

In the First Abortion decision, the Court explained that liberal constitutional theory was predicated on two related assumptions: that the greatest threats to individual rights emanated from the state, and that the best way to ensure the proper functioning of a liberal democracy was to minimize the role of government. In *Lüth* and *Blinkfüer*,³⁹ two cases that pre-dated the First Abortion decision, the German Constitutional Court struggled with situations that challenged both of these assumptions. In these earlier cases, the Court recognized that where a serious power imbalance exists between private entities, the exercise of fundamental rights can be significantly curtailed by private actors. If one assumes that a liberal

See Kai Möller, "The Right to Life between Absolute and Proportional Protection" (LSE Law, Society and Economy Working Paper 13/2010) at 3, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1620377>.

35. Fridolf Kudlien, "The German response to the birth rate problem during the Third Reich" (1990) 5:3 *Continuity & Change* 225 at 229.
36. Pieroth & Schlink, *supra* note 6 at paras 189-200.
37. *Lüth*, (1958) 7 BverfGE 198 (Fed Const Ct) (Germany). An English translation is available online. See Institute for Transnational Law, University of Texas at Austin School of Law, Foreign Translations, (December 2005), online: <http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1369>.
38. For a discussion of the distinction between the "direct" and "indirect" application of the constitution, see Stephen Gardbaum, "Where the (State) Action Is" (2006) 4:4 *Int'l J Const L* 760.
39. *Blinkfüer*, (1969) 25 BverfGE 256 (Fed Const Ct) (Germany). A partial English translation is available online. See Institute for Transnational Law, University of Texas at Austin School of Law, Foreign Translations, (December 2005), online: <http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=650>.

democracy functions best when the individual's ability to exercise her fundamental rights is maximized, it is possible to conclude that the state should play a role in addressing power imbalances, levelling the playing field, and enabling participation in the marketplace of ideas.

Drawing upon this notion in the First Abortion decision, the majority identified a power imbalance between the fetus and the pregnant woman. In order to give effect to the fetus's rights to human dignity and to life, it would be necessary to bring the law to bear on the actions of both the pregnant woman (characterized, significantly, as the "mother" or "becoming mother" throughout the majority's decision) and her physician. Since the legislature had opted to cease using the general law for this purpose, the constitution would have to be invoked to fill the gap. In this context, the Basic Law was fulfilling a secondary function, that of protecting a weaker party from the actions of a stronger party. This function was necessary where the exercise of the constitutional right would be impossible without state intervention (*chancenloses Grundrecht*). As in *Lüth*, this did not mean that the fundamental rights of the other party (here, the pregnant woman) were irrelevant. Classical liberal theory sufficed, however, to explain how these rights were affected and how they should be reconciled with the newly identified protective duties emanating from the Basic Law.

Having overcome the first two doctrinal hurdles, the Constitutional Court was poised to take the third. It determined that the criminal law was the only effective mechanism for signaling society's disapprobation of abortion and preventing, to the greatest extent possible, its occurrence.

Two justices dissented in the First Abortion decision, and the gap between the North American and German approaches appears much narrower when we consider their reasons for judgment. The starting point for the dissenting judges was the principle of judicial self-restraint, which they described as the lifeblood of constitutional jurisprudence.⁴⁰ They emphasized that the constitution was predominantly, though not exclusively, defensive in nature and cautioned against a more than incremental expansion of the non-defensive aspects of the constitution. They urged their colleagues to consider the impact on defensive rights that might result from the recognition of protective constitutional duties.

This did not lead the dissenters to reject the protective function outright, however. They agreed that the courts have a legitimate role to play in enforcing the protective function, particularly where the state has conferred a benefit (for example, social assistance) that related to a constitutional interest, such as the interest in security of the person. However, as the dissenters noted, the Court's

40. First Abortion decision, *supra* note 1 at para 69.

jurisprudence on this point was in its early stages:

Of course, given the increasing importance of social benefit laws for the realization of constitutional rights, we cannot deny the need for constitutional review in this area; the development of a suitable analytical framework which respects the legislative freedom to design programs may well be one of the chief tasks of jurisprudential development over the next few years.⁴¹

The dissenters were concerned that in the absence of a developed jurisprudence on the limits of constitutional review in protective function cases, the Court might exceed the appropriate scope of judicial review.⁴² They argued that the legislature was owed deference and that the proper role of the Court was usually to identify defects in legislative schemes rather than to cure them.⁴³

The dissenters accepted, as did all parties before the Court, that the constitution protected fetal life.⁴⁴ The right to life and the right to human dignity would be engaged, for example, if the state sought to interfere with a woman's pregnancy through forced abortion. In that scenario, the constitutional protection of unborn life would be as far-reaching as for a born human being:

In so far as the defence against state intrusion is concerned, we may of course not distinguish between prenatal and postnatal developmental stages; the embryo is thus to be protected as a potential constitutional rights holder in the same way as any born human life.⁴⁵

However, the same analysis could not be applied without further thought where the indirect application of the constitution was being contemplated. In that case, additional considerations about the appropriate scope of the constitution became relevant.⁴⁶

Additional considerations were indeed present when the interference with pregnancy was based upon "the woman's refusal to permit the fetal development to

41. *Ibid* at para 72.

42. *Ibid*.

43. The discussion on this point is reminiscent of the decision of the Supreme Court of Canada in *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1.

44. We should not rush to dismiss this as irreconcilable with Canadian law without further analysis. In 1997, two judges of the Supreme Court of Canada were prepared to support the proposition that the state could validly pursue such an interest and that the *parens patriae* jurisdiction of the courts could be invoked in support of this pursuit. See *Winnipeg Child and Family Services (Northwest Area) v G (DF)*, [1997] 3 SCR 925, 152 DLR (4th) 165, Major J. Even the majority suggests that it may well be open to legislatures to enact laws for this purpose as long as they appropriately balance the rights interests involved and ensure that any measure minimally impairs the liberty of pregnant women.

45. First Abortion decision, *supra* note 1 at para 79.

46. *Ibid*.

continue in her own body.⁴⁷ In analyzing the abortion context, the dissenting judges rejected the majority's analogy to homicide. They concluded that the law applicable to homicide, including a possible constitutional directive requiring its criminalization, could never be applied to abortion. The dissenters reached this conclusion for two reasons. First, the legal demand not to have an abortion is unlike the demand not to kill another person. While the latter requires an individual to refrain from certain activity, the former requires the woman to accept fundamental intrusions into her well-being and life planning. Second, the legal objective of protecting human life is best achieved by supporting the woman, who is the primary protector of fetal life. The legislator was therefore entitled to take note of these legal differences, and it was not appropriate for the Court to treat homicide and abortion alike.

Thus, the issue for the dissenting judges was not whether the state had the duty to protect the fetus, but whether the Basic Law required abortion to be criminalized. The dissent's answer to this question was an emphatic "no." Criminalization was a measure of last resort that had to be shown to be both effective and necessary. The record showed that the criminal law was ineffective at preventing abortions.⁴⁸ It was also unnecessary in a constitutional sense. For a protective criminal measure to be constitutionally required, suitable measures of a more moderate kind would have to be either unavailable or demonstrably ineffective. This had not been demonstrated.

B. REACTION AND RESPONSE

The First Abortion decision was widely criticized. It was denounced by women's rights groups as well as by anti-choice groups, who would have preferred no recognition of women's rights at all.⁴⁹ Jurists of all stripes were equally unhappy. Progressives decried the fabrication of constitutional principles and the overextension

47. *Ibid.*

48. Specifically, the dissenters highlighted minimal prosecutions and an even lower conviction rate despite a high incidence of illegal abortions. See First Abortion decision, *supra* note 1 at para 82. For Canadians, this may seem to be a weaker argument than it is in the German context since in that country prosecution of most offences is not considered discretionary, but is instead mandatory once the relevant authorities become aware of the offence (leading to a duty to investigate) and a subsequent investigation leads to a viable case (duty to prosecute). See Uwe Hellmann, *Strafprozessrecht*, (Berlin, Heidelberg: Springer, 2006) at para 51. On the absence of a duty to investigate and prosecute in Canada, see *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129 at para 54; *R v Nixon*, 2011 SCC 34, [2011] 2 SCR 566 at para 21.

49. Eser, *supra* note 12 at 380-83.

of the criminal law,⁵⁰ while conservatives expressed dismay at the decision's doctrinal inconsistencies and the Court's rejection of classical liberal constitutional theory. The authors of the (conservative) constitutional commentary *Maunz Dürig* were particularly critical of the Court's "patchwork quilt" approach to constitutional rights, which, they argued, resulted in the Court drawing upon aspects of multiple rights guarantees to support its reasoning:

[T]he Constitutional Court gains its normative base for the state's protection of unborn life against abortion, apodictically, from the protection of human dignity (Art. 1 of the Basic Law), but determines the required scope of the protection, equally apodictically, from Art. 2 (Right to Life). This jurisprudence sacrifices coherent constitutional doctrine on the altar of result-driven smoothness (likely the price of finding an internal Constitutional Court compromise).⁵¹

Commentators also took issue with the majority's reliance on the concept of human dignity. Based upon the existing jurisprudence, it was not obvious how dignitary rights were engaged absent cruelty or discriminatory motives:

At first blush, it remains unclear why abortion would even affect the dignitary interest. The incursion into life as the "vital base of human dignity" can in itself not found the violation of human dignity - assuming that not all killing affects human dignity. In so far as human dignity is violated, the required degree of respect and protection can only be determined under Art. 1 (*inter alia*, because of the direct horizontal application of the inviolateness formula in Art. 1). Human dignity is not affected by an abortion sought for the simple reason of a rejection of the pregnancy as unwanted. Only when special circumstances are added could abortion affect the human dignity of the foetus. These might include the selection of the foetus on the basis of sex or for eugenic reasons, or because the abortion is carried out to use the aborted foetus for research purposes.⁵²

The commentators emphasized here that the concepts of human life and human dignity ought not to be considered co-extensive. Not all interventions that affect or even destroy human life violate human dignity. By drawing on both concepts without articulating their relationship, the Court generated considerable confusion about the scope of constitutional protection accorded to the fetus.⁵³

50. Pieroth & Schlink, *supra* note 6 at para 436.

51. Theodor Maunz & Günter Dürig, *Grundgesetz-Kommentar*, 8th ed, vol 1, looseleaf (last updated 1 May 2009), (Munich: Beck, 2006) at para 68 [translated by author, Julia Hughes].

52. *Ibid* at para 69.

53. A somewhat analogous issue emerges from the various opinions of the Supreme Court of Canada in *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342 [*Rodriguez*]. In *Rodriguez*, the majority perceives the sanctity of life and the dignity of the individual to be in conflict, while for Justice Cory, the right to life includes the right to a dignified life.

Beginning in 1975 and continuing until 1989, abortion was generally criminalized in West Germany subject to a series of legislative exemptions. In response to the First Abortion decision, the federal parliament enacted a legislative scheme that reconciled the fetal interest in life with the fundamental rights of women with unintended pregnancies. The scheme secured basic abortion access and treated abortions differently depending on the reasons or “indications” for which they were sought (*Indikationenlösung*).⁵⁴ The reasons for seeking an abortion were grouped into four categories: medical, where the health or life of the woman (“mother”) was in danger; eugenic or embryopathic, where a prenatal diagnosis of a significant defect in the fetus was made; social, where the woman faced significant social obstacles in carrying the pregnancy to term because of such factors as her age, income level, or family situation; and criminological, where the pregnancy was the result of rape. Abortions for medical and embryopathic reasons were permitted in the first trimester and sometimes later, whereas abortions for social and criminological reasons were subject to a first trimester exemption only. In all cases, women were required to receive counselling, the nature of which depended on the reason for seeking the abortion.⁵⁵ A liberal interpretation of social reasons in some parts of the country led to a considerable amount of abortion tourism from areas governed by Christian conservative parties. Generally, access to abortion was good, at least in the first trimester, though mandatory counselling and administrative restrictions at the Land level continued to draw criticism from pro-choice groups.⁵⁶

C. THE SECOND ABORTION DECISION

In 1989, a new problem arose in the context of German reunification. Abortion had been legal in the first trimester in East Germany since 1972. As a socialist and atheist state, East Germany attached no legal consequences to having an abortion.⁵⁷ After reunification, the pre-existing East and West Germany abortion

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54. For a discussion of the indications model, see Eser, *supra* note 12. Eser provides an extensive discussion, predominantly from an anti-choice perspective.
55. The German Constitutional Court described the legislative scheme enacted following the First Abortion decision in the Second Abortion decision. See Second Abortion decision, *supra* note 2 at paras 2-30. See also Donald P Kommers, “The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?” (1994) 10:1 J Contemp Health L & Pol’y 1 at 7-8.
56. Lynn Kamenista, “Abortion Debates in Germany” in Dorothy McBride Stetson, ed, *Abortion Politics, Women’s Movements, and the Democratic State: A Comparative Study of State Feminism* (Oxford: Oxford University Press, 2001) 111 at 118.
57. For a discussion of the regulation of abortion in East Germany, see Michael Schwartz, “Emanzipation zur sozialen Nützlichkeit: Bedingungen und Grenzen von Frauenpolitik in der DDR” in Dierk Hoffmann, ed, *Sozialstaatlichkeit in der DDR: Sozialpolitische Entwicklungen im Spannungsfeld von Diktatur und Gesellschaft 1945/49-1989* (Munich:

practices continued on an interim basis in their respective territories, but it was clear that this state of affairs could not continue, particularly since the First Abortion decision suggested that criminalization was constitutionally mandated and the Basic Law now applied to the former East German territory.⁵⁸

Politicians reached a compromise that once again legalized abortion in the first trimester, albeit with mandatory counselling. The German Constitutional Court suspended the new law while it took it under review. In the Second Abortion decision, the Court affirmed the proposition that life begins at conception. It also upheld the protective function as a secondary constitutional function. In a departure from the First Abortion decision, however, it found (somewhat convolutedly) that criminalization was not required in early pregnancy. The majority went on to prescribe a complex regulatory regime to govern abortion, which included directions on the issue of the status of abortions as insured services.

The Court began the Second Abortion decision by characterizing the holding in the First Abortion decision in the following manner:

[The] First Senate of the Court declared that § 218a of the Penal Code [the abortion decriminalization provision] ... is inconsistent with Article 2, Paragraph 2, Sentence 1 in conjunction with Article 1, Paragraph 1 of the Basic Law and is invalid, inasmuch as it exempts pregnancy termination from punishment even if there are no grounds that - in the sense of the grounds for the Judgment - are of lasting duration in the face of the order of values of the Basic Law.⁵⁹

By this technical introduction, the Court distanced itself from its earlier decision, perhaps signalling its awareness of the academic criticism that had followed the First Abortion decision, particularly in relation to the Court drawing on a patchwork of rights. The Court also recast the constitutional holding in terms more consistent with defensive rights by characterizing the operative provision as an exemption from criminalization. Arguably, limiting an exemption is more consistent with defensive rights than forcing the state to criminalize conduct. Again, this seemed responsive to the prior critiques, suggesting that the Court might be prepared to take a more balanced approach between defensive rights and the

Oldenbourg Verlag, 2005) 47.

58. For a more detailed account of this aspect of German reunification, see Michael G Mattern, "German Abortion Law: The Unwanted Child of Reunification" (1991) 13:3 *Loy LA Int'l & Comp LJ* 643; Rosemarie Will, "German Unification and the Reform of Abortion Law" (1996) 3:2 *Cardozo Women's LJ* 399; and Karen Y Crabbs, "The German Abortion Debate: Stumbling Block To Unity" (1991) 6:2 *Fla J Int'l L* 213.

59. Second Abortion decision, *supra* note 2 at para 2. The Second Abortion decision was rendered by the Second Senate of the Court. The emphasis on the prior case having been decided by the "other" Senate signals some distance from that earlier decision.

protective function. Finally, the Court's description of the First Abortion decision implied some doubt as to the validity of the remedial component of the previous decision. It will be recalled that in the First Abortion decision, the Court had not merely declared the reform legislation invalid; it had required Parliament to recriminalize abortion except in limited circumstances. In the Second Abortion decision, this rather dramatic holding was reframed as a limited declaration of invalidity.

Very early in its reasons for judgment, however, the Court renewed its commitment to the protective function. It noted that:

The Basic Law requires the state to protect human life. Human life includes the life of the unborn. It too is entitled to the protection of the state. The Basic Law does more than just prohibit direct interference by the state in the life of the unborn, it enjoins it to protect and support such life, i.e. above all to guard it against illegal interference by third parties The obligation to protect is based on Article 1, Paragraph 1 of the Basic Law, which expressly requires the state to respect and protect human dignity; its object, and following from that, its extent are more precisely defined in Article 2, Paragraph 2 of the Basic Law.⁶⁰

The Court's tone in the Second Abortion decision is distinctly milder, however. The Court recognized that the "obligation to protect life is not so absolute that it even takes priority, without exception, over every other legal value"⁶¹ (*Rechtsgüter*). Accordingly, any decision in this area would require the courts to balance or, more precisely, to "reconcile"⁶² the fetus's right to life and the woman's rights to life, physical integrity, personal autonomy, and to the protection and recognition of

60. *Ibid* at para 145 [emphasis in original] [citation omitted].

61. *Ibid* at para 153. The official English translation likely does not convey the doctrinal gravity of this statement. *Rechtsgüter* are a subset of social values that are legally cognizable, only some of which sound in constitutional law. See *Mutzenbacher*, (1990) 83 BVerfGE 130 (Fed Const Ct) (Germany) [translated by author, Julia Hughes].

62. Konrad Hesse, former judge of the Constitutional Court and professor of constitutional law, captured Parliament's complex task (reviewable by the courts) in reconciling competing rights and interests as follows:

The function of constitutional rights limits is to reconcile these freedoms into a coherent framework of social conditions. Further, they should reconcile these rights with those other social circumstances that are important for the life of the community and which are (or should be) legally protected. This reconciliation of civil liberties and other legally cognizable values is only minimally directed by the constitution itself ... The task of practical reconciliation requires the proportionate concordance of fundamental rights and rights-limiting legal values; ... both have to be brought to optimal effectiveness. ... It must be proportionate in the narrower sense, i.e. there must be a proportionate relationship between the weight and importance of the constitutional right.

Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed (Heidelberg: CF Müller, 1999) at paras 317-18 [translated by author, Julia Hughes].

her dignity. Two related issues thus arose: What is the range of options available to the state in reconciling these rights and interests and what is the appropriate standard of review of its decision?

On the first issue, the Court explained that the defensive rights engaged by the law impose an upper limit on the degree of intrusion into the individual's sphere of liberty that the state could justify. This upper limit is determined by the obligation to give effect to competing constitutional rights and by the requirements of proportionality. Thus, a rule privileging the fetus's right to life without any recognition of the countervailing rights of the pregnant woman could not pass constitutional muster.

Unlike in the Canadian context, the German Constitutional Court also recognized a lower limit, one imposed by the state's protective function. Where the protective function is engaged, the state is required to meet a minimum standard of protection (*Untermaßverbot*). Thus, a legislative rule that left the fetus's right to life exposed to the sole discretion of the woman could not withstand constitutional scrutiny. These upper and lower limits would have to be reconciled. In rights reconciliation, both the defensive rights engaged and the constitutional interests protected are diminished to some degree. Proportionality in this context means that the degree of diminution is determined by first attributing a particular weight to each right and interest and then balancing them in accordance with their relative weight.⁶³

On the second issue, a majority of the German Constitutional Court held that the burden is on the state to assess how best to fulfill its protective function. This assessment could be reviewed on three grounds: the effectiveness of the measure selected, the soundness of the state's factual assumptions, and the reasonableness of the inferences drawn from those factual assumptions. As the Court explained:

It is the legislature's task to determine the nature and extent of protection. The Basic Law identifies protection as a goal, but does not define the form it should take in detail. Nevertheless, the legislature must take into account the prohibition on too little protection ... so that, to this extent, it is subject to constitutional control. What is necessary - taking into account conflicting legal values - is appropriate protection, but what is essential is that such protection is effective. The measures taken by the legislature must be sufficient to ensure appropriate and effective protection and be based on a careful analysis of facts and tenable assessment.⁶⁴

63. For a discussion of this concept of "weighing," see Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford: Oxford University Press, 2006) [Alexy, *Theory*].

64. Second Abortion decision, *supra* note 2 at para 154 [emphasis in original].

Later in the opinion, the Court elaborated that

The legislature has scope to assess, weigh up and create even where, as is here the case, the constitution binds it to undertake effective and adequate measures to protect a legal value. How its scope is limited depends on various types of factors, in particular, on the characteristics of the relevant area, on the possibility of accurately predicting future developments - such as the effects a rule will have - and on the significance of the legal values at stake ... Constitutional examination [judicial review] extends in any case to checking whether the legislature has sufficiently taken the named factors into account and used its scope for assessment in a “justifiable manner.”⁶⁵

Thus, the state is required to base its legal response on “careful” factual determinations and “justifiable” value judgments.

Ultimately, the majority concluded that the state was not constitutionally obligated to criminalize abortion in the first trimester so long as it established a mandatory counselling regime. This counselling would be aimed at encouraging the woman to continue her pregnancy and to make her aware of any supports available to her if she carried the pregnancy to term. Abortions carried out following counselling but in the absence of third-party determination of a constitutionally valid reason could not be covered by medicare (essentially perpetuating the West German “Indikationenlösung” or “indications” model mentioned earlier), but could be covered by social assistance in cases of financial need.

There are some passages in the Second Abortion decision in which the Court seems to renew its commitment to a punitive approach to abortions. As a number of commentators have pointed out, however, this is little more than rhetoric. Horst Dreier explains:

Much more important and ultimately decisive is that the Constitutional Court itself does not sustain the criminalization requirement and even undermines it to such a degree that there is nothing left in the end. To put it bluntly: the rhetoric of the fundamental illegality of abortion is false advertisement.⁶⁶

More interesting for our purposes is that the Court recognized that in order for the state to protect fetal life effectively, the legal regime governing abortion must be responsive to the reasons why women seek abortions. The Court noted that “an unfavorable housing situation, the impossibility of looking after a child parallel to vocational training or working, economic hardship and other material reasons, and in the case of single women, fear of discrimination by the community”

65. *Ibid* at para 176 [citations omitted].

66. Horst Dreier, “Grenzen des Tötungsverbotes – Teil 1” (2007) 62 *Juristen Zeitung* 261 at 268 [translated by author, Julia Hughes].

were all frequently cited reasons for seeking an abortion.⁶⁷ Therefore, whatever the state's obligation to criminalize, it also has an obligation to create conditions that make it easier for women to carry pregnancies to term. This includes targeted measures to assist women with housing, education, or childcare, as well as systemic measures to create a more "child-friendly society."⁶⁸

Moreover, the state's obligation is not limited to measures that it could take of its own accord; it is required to go further and engage society in the pursuit of these goals. This translates into a far-reaching, affirmative obligation to regulate in support of women and children:

[The] state is bound to promote a child-friendly society which in turn also has repercussions for unborn life. The legislature must bear this in mind when making rules, not just in the area of labor law, but also in other private law areas. Thus there are provisions prohibiting the termination of a lease because of the birth of a child as well as provisions regarding consumer loans, their wording and government contract assistance which make it possible or easier for parents to meet their financial obligations following the birth of a child.⁶⁹

Finally, as the Court explained, the state also bears an obligation to measure whether the law is effective. For this reason, the state is required to gather data on abortions and monitor the actual effects of the legislation on an ongoing basis.⁷⁰

Once again, there was a vigorous dissent, this time by two male judges.⁷¹ As in the First Abortion decision, the dissenters neither doubted that life began at conception nor that protection is a constitutional function. Rather, the dissenters disagreed with the majority about the scope of women's defensive rights, arguing that it should be expanded. The dissenters framed the issue in the following manner:

The legal regulation of pregnancy termination grips the innermost area of human life and affects central questions of human existence. One of the fundamental conditions of human life is that sexuality and the desire for children do not correspond. Women have to bear the consequences of this divergence. At all times, and in all cultures, irrespective of differences in moral and religious values, they have looked for and found ways out of the predicament of an unwanted pregnancy.⁷²

The dissenters were of the view that the proposed law evinced an appropriate shift in the understanding of women's equality rights:

67. Second Abortion decision, *supra* note 2 at para 167.

68. *Ibid* at para 170.

69. *Ibid*. We use the term "child-friendly" throughout the article. We also use the terms "woman-friendly" and "pregnancy-friendly" to refer to policies analogous to those described in this passage.

70. *Ibid* at para 299.

71. In the First Abortion decision, one man and one woman dissented.

72. Second Abortion decision, *supra* note 2 at para 373.

[The] counseling regulation is not a frustrated escape from the frustrating failure of the indication solution [i.e. the law adopted in response to the First Abortion decision based on statutory reasons or “indications” for seeking an abortion]. The new regulation is much more the result of an altered understanding of the personality and dignity of the woman. The Judgment’s finding that a woman is capable of a responsible choice regarding the continuation or interruption of her pregnancy must, however, have consequences for the interpretation of the constitution. In our opinion, it forces us to solve the collision between the human dignity of the unborn on the one hand, and the dignity of the pregnant woman on the other, by achieving a balance between the two.⁷³

According to the dissenting judges, the legislative solution under review struck an appropriate balance between the interests of the fetus and the rights of the woman because it was closely tied to the developmental stages of pregnancy. Early in the pregnancy, the woman’s rights were clearly predominant, and the state complied with its protective obligation through mandatory counselling.⁷⁴ Later in the pregnancy, the interests of the fetus became more important, to the point where, at the end of the pregnancy, the state became the ultimate arbiter of whether a pregnancy could be terminated and whether the woman’s right to choose could be subject to review.⁷⁵

A separate, partial dissent by Justice Böckenförde squarely addressed the issue of reconciliation. He stated that reconciliation “requires compromises, which may appear painful when compared to a complete regulatory concept, but which are nonetheless unavoidable. In this sense the counseling concept has its ‘costs’.”⁷⁶ It was the refusal to accept these costs that, in his view, rendered the majority decision precarious. It was not analytically helpful first to accept the diminution of the state’s protective obligations vis-à-vis the fetus to give appropriate effect to the defensive rights of the woman and then to seek to recover the costs of the compromise at a later stage of the analysis. In Justice Böckenförde’s view, the majority’s attempt to enlarge the protection afforded to the fetus by seeking to exclude abortion services from insured medical services, only to find that the constitution required that abortion be covered for many women for poverty law reasons, was the kind of constitutional flip-flop that rendered the majority opinion dubious.

At the end of the day, all three opinions agreed that the constitution imposes

73. *Ibid* at para 380.

74. *Ibid* at para 386.

75. *Ibid* at para 387.

76. *Ibid* at para 433.

protective obligations and that life begins at conception. The justices disagreed on what is constitutionally required to defend the rights of women, what is required for the state to comply with its protective obligations, what degree of deference should be paid to the state's mode of regulation, and how competing rights and interests should be reconciled. This demonstrates that accepting that the state has protective obligations does not necessarily determine judicial outcomes. Similarly, recognizing that the fetus has a constitutional interest in life that must be protected by the state does not determine the weight assigned to this interest when it is reconciled with a woman's rights to self-determination, privacy, autonomy, physical integrity, and equality.

In the decades since 1975, the German Constitutional Court has applied the protective function very sparingly, despite frequent invitations to apply it by constitutional complainants.⁷⁷ Thus, the jurisprudential development of the protective function continues to be somewhat stunted. In denying its application, however, the Court has articulated some of its limits, particularly insofar as it relates to the deference owed to legislative choice.

In the First Abortion decision, deference was not an issue because the Constitutional Court was persuaded that only one form of law—the criminal law—was adequate to the task of protecting fetal life. This view came under attack in the Second Abortion decision for both empirical and doctrinal reasons. The Court held in the Second Abortion decision that deference was owed to the legislature when it designed legislation expecting that it would have a certain effect. At the time of enactment, the legislature was required to make a reasoned guess as to the likely effects of the law, but since neither the courts nor the legislature could know the future, there could be no obligation to be correct. However, once the law had been in place for some time, it could no longer be said that the effects of the law were unknowable, and the rationale for deference was correspondingly diminished.

In the period between the First and Second Abortion decisions, the rate of abortion in West Germany was consistent with that of other Western democracies. Some countries with much more liberal abortion laws had lower rates of abortion, while other countries with even stricter rules saw higher rates. The rate fluctuated in response to demographic and economic factors, but not in response to criminalization. Similarly, public attitudes about abortion had proven remarkably unresponsive to the legal framework.⁷⁸ For this reason, it was impossible to

77. These cases came before the German Constitutional Court by way of constitutional complaint. See Pieroth & Schlink, *supra* note 6 at paras 110-17.

78. Stanley K Henshaw, Susheela Singh & Taylor Haas, "Recent Trends in Abortion Rates Worldwide" (1999) 25:1 Int'l Fam Planning Perspectives 44.

establish an empirical basis for the claim that criminal prohibition was either adequate or necessary to protect prenatal life.

In the Second Abortion decision, the German Constitutional Court also committed to regulatory deference. While the Court might recognize a protective obligation in certain circumstances, the choice of how to effect that protection was left to the state. It was therefore open to the legislature to prefer a mode of regulation grounded in encouragement and public education rather than criminal sanction. Consistent with both the empirical evidence and the principle of regulatory deference, then, the Constitutional Court resiled from requiring criminalization in the Second Abortion decision. Nevertheless, it directed a very detailed regime to govern mandatory counselling.

In its journey from the First to the Second Abortion decision, the German Constitutional Court covered considerable doctrinal and policy ground. The judges struggled to articulate a constitutional theory that reconciled the rights of the pregnant woman and the interests of the fetus and held the state accountable not only for intrusions into the defensive rights of individuals but also for failures to protect constitutional interests. Neither the Court nor the parties doubted that the state had an obligation to protect fetal life, though they disagreed about the appropriate way to implement this obligation.

II. A CANADIAN PROTECTIVE FUNCTION?

Four mediating ideas appearing in the First and Second Abortion decisions facilitate comparison with concepts in Canadian constitutional law. They are judicial restraint, deference, the regulatory competence of the legislature, and a commitment to the rule of law and a liberal and democratic society. The presence of these concepts in Canadian constitutional law suggests that the core constitutional commitments of the German and Canadian jurisdictions are sufficiently similar to permit meaningful comparison.

In the First Abortion decision, the dissent framed its discussion of the protective function in terms of the principles of judicial restraint and deference. It emphasized that the state was competent to develop a regulatory scheme that satisfied its protective obligations. A majority of the Constitutional Court took a similar view in the Second Abortion decision. The Supreme Court of Canada has also emphasized the importance of deference, particularly “[w]here a complex regulatory response to a social problem” is involved.⁷⁹ In both the German and

79. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian Brethren*]. See also *Irwin Toy v Quebec (Attorney General)*, [1989] 1 SCR 927 at para 79, 55

the Canadian contexts, these issues play out against the backdrop of a broader commitment to the rule of law and to a liberal and democratic society.⁸⁰

We suggest that the German decisions present a way of conceptualizing the state's protective obligations that could usefully be applied in the context of the *Canadian Charter of Rights and Freedoms*. At this stage of the analysis, our focus is on the concept of the protective function generally. In Part III, below, we suggest how the specific constitutional issues raised by abortion could be better understood by reading the German and Canadian abortion decisions synthetically.

The Supreme Court of Canada has generally taken a dim view of the idea that the state might have an affirmative obligation to protect individuals from "threats"⁸¹ to their constitutional interests emanating from private sources.⁸² Occasionally, it has found ways of giving effect to protective claims, most often by re-characterizing such claims in terms of negative rights and using standard *Charter* analysis to resolve them, or by identifying them as the "pressing and substantial" objective that justifies a deprivation of *Charter* rights under section 1.⁸³ As a general rule, however, the Supreme Court's point of departure has been the classical liberal view that "the *Charter* does not oblige the state to take affirmative

DLR (4th) 577 [*Irwin Toy*].

80. See e.g. the text of section 1 of the *Canadian Charter of Rights and Freedoms*, which provides that the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." For discussion of the rule of law dimension of section 1, see James McConnell, "Administrative Discretion and Section 1 of the *Charter*: Proportionality, Reasons and the Rule of Law" (2011) (unpublished, copy on file with the author); Joel Bakan et al, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery, 2010) at 766-67; *R v Therens*, [1985] 1 SCR 613, 18 DLR (4th) 655.
81. Dieter Grimm, "The Protective Function of the State," in Georg Nolte, ed, *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 137 at 145 [Grimm, "Protective Function"]. We will use this term throughout.
82. See e.g. *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, 176 DLR (4th) 513. But see *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*]; *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health Services*]; *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*]; *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend*]; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577. See generally MacDonnell, "Protective Function," *supra* note 4.
83. See e.g. *Irwin Toy*, *supra* note 79; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 35 DLR (4th) 1 [*Edwards Books* cited to SCR]; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*Insite*]; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 [*Khadr* SCC]. See also Choudhry, "Legacy of Oakes," *supra* note 15 at 514; Tushnet, *Weak Courts*, *supra* note 15 at 203-07.

action to safeguard or facilitate the exercise of fundamental freedoms.”⁸⁴

Conceptualizing the constitution as an objective normative framework undermines this view of the state’s obligations. As we have explained, the German protective function is rooted in the idea that rights “are expressions of objective values.”⁸⁵ The Supreme Court of Canada explicitly affirmed this conceptualization of the *Charter* in *RWDSU v Dolphin Delivery Ltd.*,⁸⁶ when it concluded that “the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution.”⁸⁷ In reaching this conclusion, the Court acknowledged the broader influence of the *Charter*’s normative value statement and appeared to be saying that the *Charter*’s function was more than merely defensive. It is significant that these very ideas, which were articulated by the German Constitutional Court in *Lüth*, provided the conceptual foundation for the recognition of the protective function in the First Abortion decision.

Governments in Canada regularly enact laws intended to secure interests of a constitutional character. In a state with constitutional commitments of the kind enshrined in the *Charter*, it might be argued that this function derives from the constitution itself.⁸⁸ In other words, it might be argued that the state is constitutionally obligated to identify threats to *Charter*-protected interests posed by private actors and to address those threats in some way, whether by criminal prohibition, regulation, or administrative action. This is a key insight that emerges from the German Abortion decisions: In addition to the state’s duty not to infringe constitutional rights, the constitution may also impose duties of protection on the state.⁸⁹

The German example also tells us something useful about both the utility and the limits of a normative or values-based extension of the constitution. On the one hand, the German example allows us to see that many of the interests typically considered under the “pressing and substantial” branch of the *Oakes* test have constitutional weight and status. On the other hand, in the First Abortion Decision, the normative framework was forced to bear more weight than it could reasonably support, not because the constitution should not or cannot be under-

84. *Dunmore*, *supra* note 82 at para 19. Interestingly, the Court does not appear to decide *Dunmore* in a manner consistent with this decree. For other exceptions, see *Fraser*, *supra* note 82; *BC Health Services*, *supra* note 82.

85. Grimm, “Protective Function,” *supra* note 81 at 144.

86. *Retail, Wholesale and Department Store Union, Local 580 [RWDSU] v Dolphin Delivery Ltd.*, [1986] 2 SCR 573, 33 DLR (4th) 174 [*Dolphin Delivery*].

87. *Ibid* at para 39.

88. See Frank I Michelman, “The Constitution, Social Rights, and Liberal Political Justification” (2003) 1:1 Int’l J Const L 13 [Michelman, “Liberal Political Justification”].

89. Grimm, “Protective Function,” *supra* note 81 at 137.

stood as a normative framework, but because serious difficulties in application arise when the normative framework is forced to operate as a placeholder for a full constitutional rights-holder. Rather than weighing the pregnant woman's rights to autonomy, physical and psychological integrity, privacy, equality, and dignity against the rights of another constitutional rights-holder, the Court weighed them against the full abstract identity of the state. This seriously distorted the analysis. The Court effectively asked whether the rights of an individual could outweigh the interest of the German people in living in a modern democracy that had successfully emerged from the shadows of fascism. On this biased scale, the woman's rights were found to be too light.

This brings us to a second idea that emerges from the German abortion decisions that is relevant to a discussion of the protective function in Canada. Where the protection of one *Charter* interest would infringe other *Charter* rights, the state is required to reconcile the rights and interests engaged. The product of this process of reconciliation (whether a law, a regulatory scheme, or an administrative decision) is subject to judicial review, but it is the state, in the first instance, that must decide how best to reconcile the conflicting rights and interests.⁹⁰ In the context of abortion, for example, the German Parliament had sought to balance the interests of the pregnant woman and those of the fetus both in 1974 and in 1989 by decriminalizing abortion in the early stages of pregnancy. Although the ultimate issue in the First and Second Abortion decisions was whether the state had satisfied its duty to protect the fetus, the judgments fully considered the competing constitutional rights and interests engaged by the act of decriminalization.

The German Court's evolving treatment of the concept of deference is also instructive. The majority's conclusion in the First Abortion decision that the state must use the criminal law to regulate abortion has been criticized on the ground that the Court did not defer adequately to the state's regulatory choice.⁹¹ By contrast, the dissenters' reasons took the concept of deference much more seriously. In the Second Abortion decision, the Court moved to curtail the sweeping nature of its earlier pronouncement. It concluded that deference was warranted in reviewing the effectiveness of the legislative measure, the soundness of the legislature's factual assumptions, and the reasonableness of the inferences it drew from those factual assumptions.

Similar modes of reasoning are visible in *Charter* jurisprudence and scholar-

90. *Ibid* at 140, 149-50.

91. *Ibid* at 150.

ship.⁹² In this Part, we consider how reading the *Charter* case law with an eye to the protective function helps bring added clarity to the jurisprudence. We begin with two early *Charter* cases, *Irwin Toy Ltd v Quebec (Attorney General)*⁹³ and *R v Edwards Books and Art Ltd*.⁹⁴ In *Irwin Toy*, the Supreme Court heard a challenge to provisions of Quebec's consumer protection law that prohibited commercial advertising aimed at children under thirteen. Irwin Toy argued that the provisions violated its right to commercial expression as protected by section 2(b) of the *Charter*. The Court concluded that the law infringed freedom of expression, but a majority went on to hold that the infringement was justified.

Irwin Toy was a challenge to government decision making that had occurred in a policy space populated with competing constitutional rights and interests. The consumer protection scheme banning commercial advertising aimed at children engaged the right to freedom of expression of manufacturers of children's goods. Interests of a constitutional dimension were arguably also engaged by manufacturers' attempts to capitalize on children's "vulnerab[ility]"⁹⁵ in order to sell merchandise. Indeed, at the section 1 stage, the Court identified as a pressing and substantial objective "the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising."⁹⁶ In addition to harming children, the Court explained, such advertising might also have negative "secondary effects" on families.⁹⁷ Thus, the Court recognized as justified the legislature's efforts to advance the interests of children. In light of the German jurisprudence, we could recast *Irwin Toy* as a constitutional challenge to a legislative scheme enacted in satisfaction of the state's constitutional obligation of protection. The scheme, it might be said, advanced children's constitutional interests in equality, freedom of thought and belief, and liberty and security of the person. Note that since children, unlike fetuses, are full rights-holders, the normative framework does not serve as an abstract set of constitutionally protected interests. It merely helps us to recognize the constitutional nature of the interests that underlie the regulation of advertising aimed at children.⁹⁸

92. See e.g. *Oakes*, *supra* note 15 at paras 64-66; Lorraine Eisenstat Weinrib, "The Supreme Court and Section One of the Charter" (1988) 10 Sup Ct L Rev 469 [Weinrib, "Section One"]; Lorraine Weinrib, "Limitations on Rights' in a Constitutional Democracy: Models of Judicial Review under Canada's *Charter*" (1996) 6:1 Caribbean L Rev 428 at 439.

93. *Irwin Toy*, *supra* note 79.

94. *Edwards Books*, *supra* note 83.

95. *Irwin Toy*, *supra* note 79 at para 71.

96. *Ibid.*

97. *Ibid.*

98. For discussions of *Irwin Toy* that raise a similar theme, see Elizabeth Shilton, "*Charter*

Once characterized as an issue of competing constitutional rights and interests, the Court's statements in *Irwin Toy* about the need for deference in evaluating the law become clearer.⁹⁹ "When striking a balance between the claims of competing groups," the Court explained:

The choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.¹⁰⁰

In developing policy, the state is constantly forced to determine how best to meet its obligations to its various constituencies, each of which might have constitutional rights or interests at stake. These decisions are rarely made on the basis of an evidentiary record that points in the direction of one "correct" outcome.¹⁰¹ The legislature is thus best positioned to make these initial decisions, with the courts determining on judicial review whether the decision can be supported under section 1.¹⁰²

Irwin Toy also provides an example of a threat to constitutional interests that can only be meaningfully addressed by the state.¹⁰³ Although parents might have a limited ability to prevent their children from being exposed to advertisements that appear on television, full protection can only be effected by the state, which has the ability to regulate entire industries. Accordingly, the intervention in *Irwin Toy* can quite helpfully be understood through the lens of the protective function.

Similar themes emerge in *Edwards Books*. In that case, a number of store owners charged with operating on a Sunday in violation of the *Retail Business Holidays Act*¹⁰⁴ challenged the statute under section 2(a) of the *Charter*, arguing that their freedom of religion was infringed by the statute's mandated "uniform

Litigation and the Policy Processes of Government: A Public Interest Perspective" (1992) 30:3 Osgoode Hall LJ 501; Patrick J Monahan & Marie Finkelstein, "The *Charter of Rights* and Public Policy in Canada" (1992) 30:3 Osgoode Hall LJ 501 at 530-31.

99. *Irwin Toy*, *supra* note 79 at para 79.

100. *Ibid* at para 89. For a more recent articulation, see *Hutterian Brethren*, *supra* note 79.

101. *Irwin Toy*, *supra* note 79 at para 35. See also Choudhry, "Legacy of *Oakes*," *supra* note 15 at 524; Alexy, *Theory*, *supra* note 63.

102. *Irwin Toy*, *supra* note 79.

103. *Cf* our discussion of the German Constitutional Court's statement in the First Abortion decision that the greatest threats to constitutional interests emanate from the state in Part I(A), above.

104. RSO 1980, c 453.

pause day.”¹⁰⁵ Although the statute contained certain exceptions, the store owners were unable to fit themselves within any of them. A majority of the Court concluded that the statute violated the freedom of religion of store owners and customers who practiced religions with Saturday as their holy day, but upheld the violation under section 1.

In determining whether the violation of section 2(a) of the *Charter* was justified, the majority noted that the government had chosen to enact legislation that applied only to the retail business sector.¹⁰⁶ This choice, it explained, arose because of concerns particular to that sector. Although a “uniform pause day” was in the best interests of all employees, employees in the retail sector tended to be non-unionized, female, uneducated, and working in entry-level positions.¹⁰⁷ They were employees, a provincial Law Reform Commission report had noted, “whose continued earnings are critical for family support, people who have the least mobility in terms of job alternatives and are least capable of expressing themselves to redress their grievances.”¹⁰⁸ For these reasons, they were “especially vulnerable to subtle and overt pressure from [their] employers.”¹⁰⁹ There were, in other words, good reasons for the state to extend protection to these employees. Therefore, not only was creating a “uniform pause day” a pressing and substantial objective within the meaning of section 1 of the *Charter* but the government’s choice of means—a statute aimed at one particular group of employees—was also rationally connected to its broader objective. The majority noted that although it was possible to conceive of other ways in which the legislation might have been drafted, no straightforward minimally impairing alternative could be readily identified. Chief Justice Dickson also issued the following warning:

In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the legislature for determining that the protection of the employees ought to prevail. This is not to say that the legislature is constitutionally obligated to give effect to employee interests in preference to the interests of the store

105. *Edwards Books*, *supra* note 83 at paras 67-69, 120.

106. *Ibid* at para 69.

107. *Ibid* at paras 69, 123, 135-37.

108. *Ibid* at para 135, citing Ontario Law Reform Commission, *Report on Sunday Observance Legislation* (Toronto: Department of Justice, 1970) at 103-04.

109. *Edwards Books*, *supra* note 83 at para 123.

owner for large retail operations, but only that it may do so if it wishes.¹¹⁰

As in the case of *Irwin Toy*, understanding *Edwards Books* through the lens of the protective function brings additional clarity to the majority's ruling.¹¹¹ We do not mean to suggest that the Court in *Edwards Books* found that the *Charter* required the province to enact such legislation. Indeed, the above quote seems to suggest quite the opposite. Nevertheless, protective overtones emerge strongly from the majority's section 1 analysis, though they are not explicitly recognized or weighed as such by the majority.

Elements of the protective function could also be said to be at work in more recent decisions of the Supreme Court. In *Canada (Prime Minister) v Khadr*,¹¹² one of the issues for the Court was the appropriateness of ordering the government to request Omar Khadr's repatriation as a remedy for constitutional violations committed by the Canadian government during his detention at Guantanamo Bay. Rather than providing Khadr with the remedy he requested, a remedy that had been granted by both the Federal Court and the Federal Court of Appeal,¹¹³ the Court concluded that "the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations" made declaratory relief a more appropriate remedy.¹¹⁴

Khadr is another example of a case in which the constitutional rights and interests at stake can only be fully understood when the protective component of the case is fully articulated. Not only did the Canadian government contribute to the deprivation of Khadr's rights, but it also failed to protect him in the face of a credible threat to his constitutional interests by a foreign state. Rather than straining to understand the facts in *Khadr* using the "complicity" framework established by the Court in *Suresh v Canada (Minister of Citizenship and Immigration)*,¹¹⁵ this case is perhaps better understood as a rebuke of the Canadian's government's utter failure to protect a child soldier who was subjected to torture by American authorities.¹¹⁶

110. *Ibid* at para 136.

111. See Choudhry, "Legacy of Oakes," *supra* note 15 at 514.

112. *Khadr* SCC, *supra* note 83.

113. See *Khadr v Canada (Prime Minister)*, 2009 FC 405, [2010] 1 FCR 34 (TD) [*Khadr* FC]; *Khadr v Canada (Prime Minister)*, 2009 FCA 246, [2010] 1 FCR 73 [*Khadr* FCA].

114. *Khadr* SCC, *supra* note 83 at para 2.

115. Sujit Choudhry, "The Significance of Khadr, Part II", *University of Toronto Faculty of Law Faculty Blog*, online: <<http://www.law.utoronto.ca/blog/faculty/significance-khadr-part-ii>>; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.

116. See *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 (joint factum of the interveners, The University of Toronto Faculty of Law – International Human Rights

In the Federal Court hearing of the matter, in fact, the Court concluded that section 7 of the *Charter* imposed on the government “a duty to protect persons in Mr. Khadr’s circumstances.”¹¹⁷ This, in turn, gave rise to a remedial order to repatriate.¹¹⁸

For the Supreme Court, there was no question that the government was obliged to do something to cure the section 7 violation that resulted from Canadian officials furnishing the United States government with evidence obtained from Khadr after he was subjected to sleep deprivation and other forms of torture. However, the Court took a different approach to the section 7 analysis than did the lower courts. It also reached a different result on the question of the appropriate remedy.¹¹⁹ No mention was made of a “duty to protect” Khadr grounded in section 7 of the *Charter*. Instead, the violation of *Charter* rights was framed in strictly defensive terms. The Court did hold, however, that the violation of *Charter* rights was ongoing, suggesting that some action would be required to bring the rights violation to an end.

The difficulty with the Supreme Court’s analysis in this regard is that the remedy granted does not correspond to the rights violation the Court identifies.¹²⁰ Although it could plausibly be argued that the state had violated Khadr’s defensive rights, it was the breach of Khadr’s right to be protected by the Canadian government that seemed to give rise to the remedy. If only defensive rights were violated, it is not clear that declaratory relief of the nature ordered in *Khadr* would be appropriate, even if the effects of the violation “continue[d] to this day and may redound into the future.”¹²¹ The Court explained that its declaration would “provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr,

Clinic and Human Rights Watch), online: David Asper Centre for Constitutional Rights <<http://www.aspercentre.ca>>; *Khadr* SCC, *supra* note 83 at paras 12-22; Audrey Macklin, “Comment on *Canada (Prime Minister) v Khadr* (2010),” (2010) 51 Sup Ct L Rev (2d) 295 at 328. For a discussion of the earlier phases of this litigation from the standpoint of the protective function, see Craig Forcece, “The Obligation to Protect: The Legal Context for Diplomatic Protection of Canadians Abroad” (2007) 57 UNBLJ 102.

117. *Khadr* FC, *supra* note 113 at para 71. The Federal Court of Appeal, affirming the judgment below, concluded somewhat obliquely that the trial judge “did not err in law or fact when he concluded that, in the particular circumstances of this case, the Crown’s refusal to request Mr. Khadr’s repatriation is a breach of Mr. Khadr’s rights under section 7 of the Charter.” *Khadr* FCA, *supra* note 113 at para 60.

118. See *Khadr* FC, *supra* note 113 at para 78. See also *Khadr* FCA, *supra* note 113 at paras 56-60.

119. For a discussion of the problematic remedy aspect of *Khadr*, see Kent Roach, “The Supreme Court’s Remedial Decision in the Insite Decision” (2012) 6 J Parliamentary & Pol L 238.

120. Macklin, *supra* note 116 at 328.

121. *Khadr* SCC, *supra* note 83 at para 31.

in conformity with the *Charter*.¹²² In other words, the Court seemed to say that the government was required to exercise its protective function, though the form of that protection was to be determined by the government, “in conformity with the *Charter*.”

A similar disconnect between right and remedy is present in *Canada (Attorney General) v PHS Community Services Society (sub nom Insite)*.¹²³ In *Insite*, the Minister’s decision not to renew a safe injection facility’s exemption under the *Controlled Drugs and Substances Act*¹²⁴ (the *CDSA*) was challenged under section 7 of the *Charter*. The Court, relying on social science evidence that demonstrated the effectiveness of the facility in reducing harm both to drug addicts and to the broader community, held that the Minister’s decision violated the section 7 rights of patients and employees of the facility. It went on to find that the violation could not be justified under section 1 and that the proper remedy was to order the Minister to renew the exemption.

The Court in *Insite* again took great pains to conceptualize the *Charter* claim in defensive terms, treating the Minister’s failure to renew the exemption as a decision that infringed *Charter* rights. One of the difficulties with this characterization, however, is that the remedy the Court ultimately ordered is not cognizable under a classical liberal theory of rights. On the contrary, the remedy granted can only be rationalized if the state has protective obligations grounded in the constitution. While it is true that the statutory scheme at issue contemplated that exemptions might be made “if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest,”¹²⁵ the Court grounded the obligation to renew the exemption in the *Charter* and concluded that only positive action of a distinctly protective nature could cure the *Charter* breach. Unless the *Charter* imposes an obligation of protection on the state, there could be no constitutional basis for requiring the Minister to exercise his discretion.

If *Insite* is instead viewed as a case about the protective function, it is easier to see how the failure to renew the exemption was problematic from a constitutional standpoint, even under a deferential standard of review. When it enacted the *CDSA*, the government included an exemption scheme that, in the Supreme Court’s own words, “prevent[ed] the *CDSA* from applying where such action would be arbitrary,

122. *Ibid* at para 47.

123. *Insite*, *supra* note 83.

124. SC 1996, c 19 [*CDSA*].

125. *Insite*, *supra* note 83 at para 39.

overbroad or grossly disproportionate in its effects.”¹²⁶ Once the state had exercised its protective function and created a scheme that contemplated an exemption in these circumstances, and the evidence suggested that it was highly effective in securing the constitutional interests of addicts and society more broadly, the government was not permitted to revert to a punitive approach unless criminalization was a valid means of reconciling the various constitutional rights and interests engaged by the scheme. Notably, the punitive model was not an option where the evidence established that only an exemption would fulfill the government’s constitutional obligations. Within the structure of the scheme enacted by Parliament, therefore, the logical remedy was to require the government to grant the exemption.

A. THE PROTECTIVE FUNCTION AND SECTION 1

This re-framing of *Irwin Toy* and *Edwards Books* also sheds new light on the structure and function of the section 1 analysis. As in many countries, constitutional analysis in Canada proceeds in two stages. At the first stage, the claimant must establish that her *Charter* rights have been infringed. Once an infringement has been established, the burden shifts to the state to justify the *Charter*-infringing conduct or legislation.¹²⁷ Unjustified infringements entitle the claimant to a remedy.

When the analysis proceeds to the justification stage, the Court examines whether the violation of *Charter* rights is “demonstrably justified in a free and democratic society.” In *Oakes*, Justice Dickson (as he then was) explained the significance of this phrase as follows:

Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its ef-

126. *Ibid* at para 113.

127. Don Stuart, *Charter Justice in Canadian Criminal Law*, 5th ed (Toronto, Carswell, 2010) at 6-7; Weinrib, “Section One,” *supra* note 92 at 472; Stephen Gardbaum, “Limiting Constitutional Rights” (2007) 54:4 *UCLA L Rev* 789 at 799.

fect, to be reasonable and demonstrably justified.¹²⁸

As Justice Dickson points out, the values that underpin a “free and democratic society” consist largely of the values embodied in the *Charter’s* substantive guarantees.¹²⁹ This observation is significant: What could be a more principled basis for limiting a constitutional right than finding another constitutional interest in need of protection? Yet most *Charter* cases seem to assume that justification involves defending the state’s decision to limit *Charter* rights in the service of important but less than constitutional values and objectives. Since the Supreme Court’s decision in *Irwin Toy*, moreover, courts have been relatively deferential to the legislature at the justification stage if it is legislating in a challenging policy area.¹³⁰ This places courts in the position of deciding whether to uphold laws that defeat our society’s most basic values in the name of objectives that, while important, are not as significant as the constitutional right engaged.

Re-framing cases like *Irwin Toy* and *Edwards Books* to emphasize the protective character of the legislation being upheld has the benefit of strengthening the logic underlying the section 1 analysis in those cases. Rather than deferring to the state’s assessment of when *Charter* rights may be limited so that the state can implement its political agenda, what courts are doing in many cases is allowing elected representatives to determine, within certain boundaries, how to craft policy that most appropriately balances the full range of constitutional rights and interests at stake.¹³¹ This more nuanced understanding of section 1 also suggests that we might want to be somewhat more skeptical about upholding limits on *Charter* rights where no obvious constitutional interest is served by the rights deprivation. Since constitutional rights represent our society’s core values, we might regard with caution state policies that violate constitutional rights without advancing some other interest of constitutional status. Such policies, we might conclude, should less readily be upheld.

B. DEFERENCE AND JUDICIAL ACTIVISM

Somewhat counterintuitively, perhaps, recognition of the protective function would be unlikely to increase, and may even defuse, the spectre of judicial activism in con-

128. *Oakes*, *supra* note 15 at para 64.

129. Weinrib, “Section One,” *supra* note 92 at 471.

130. *Irwin Toy*, *supra* note 79; *Hutterian Brethren*, *supra* note 79. There are notable exceptions to this trend, which we do not explore here. See Choudhry, “Legacy of Oakes,” *supra* note 15; David Wiseman, “Competence Concerns in *Charter* Adjudication: Countering the Anti-Poverty Incompetence Argument” (2006) 51 McGill LJ 503.

131. *Edwards Books*, *supra* note 83 at para 136; *Irwin Toy*, *supra* note 79 at para 79.

stitutional cases.¹³² It is often argued that judicial review is most problematic when it requires courts to determine the scope of affirmative constitutional obligations and to evaluate whether the state has satisfied those obligations.¹³³ However, the benefit of viewing the Court's task in the more holistic manner suggested above is that the state is very clearly the primary institution responsible for deciding how to balance competing constitutional rights and interests. Of course, these choices are made against the background of our constitutive commitments as a society, and so the state is not free to balance constitutional rights and interests in whatever way it deems politically expedient. But it is the *Charter*, not the judges undertaking judicial review, that requires the state to strike the proper balance.

How, then, ought the state to conduct this reconciliation? It is important to distinguish at this stage between "the question [of] whether [the legislature] has done too little in order to protect the endangered right"¹³⁴—that is, whether the state's obligation of protection has been satisfied—and the related question of whether the state has properly balanced the constitutional rights and interests at stake in choosing to enact a new law (or regulation, or in making an administrative decision). This second question arises when the state's laws or actions are challenged on the grounds that they violate an individual's constitutional rights. If the answer to such a challenge is that the state's actions were taken to protect other constitutional interests, then the question properly becomes one of balancing or reconciliation.

It should be noted at the outset that defensive rights have no automatic claim to greater weight in this analysis than the constitutional interests that the state has a constitutional obligation to protect. Rather, the relative weight to be ascribed to a constitutional right or interest must be determined in the context of the particular case.¹³⁵ The use of the term "interest" simply reflects the fact that

132. There is no shortage of academic commentary on the dangers of judicial activism and the corresponding need for greater deference to legislative choice. See *e.g.* Aileen Kavanagh, "Judicial Restraint in the Pursuit of Justice" (2010) 60:1 UTLJ 23; Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126 Law Q Rev 222; Patrick J Monahan, "The Supreme Court of Canada in the 21st Century" (2001) 80 Can Bar Rev 374.

133. For a response to this "democratic objection," see Michelman, "Liberal Political Justification," *supra* note 88. But see Kent Roach, "American Constitutional Theory for Canadians (And the Rest of the World)" (2002) 52 UTLJ 503 at 506; Tushnet, *Weak Courts*, *supra* note 15; Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 2000).

134. Grimm, "Protective Function," *supra* note 81 at 151.

135. Such a "contextual approach" is endorsed in, among other cases, *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 paras 51-52, 64 DLR (4th) 577, Wilson J [*Edmonton Journal*]; *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 87,

the individual has an interest in being protected against intrusion by a private actor, against whom the individual cannot have constitutional rights.¹³⁶

Using the standard Canadian proportionality analysis, the relevant inquiry would proceed as follows. The Court would begin by taking a contextual approach to the *Charter* analysis, which would require the Court to assess, at least in a preliminary way, the weight of the constitutional rights and interests engaged.¹³⁷ The Court would then determine whether the proposed state action was actually protective; that is, whether it satisfied the objective of securing constitutional interests, and whether the means chosen to pursue that objective were rationally connected to the objective. Next, the Court would assess whether the state's efforts to secure constitutional interests were minimally impairing. Finally, the court would inquire into whether the requirements of proportionality had been achieved.¹³⁸ At this last stage, the Court would be required to conduct a final weighing of the rights and interests involved.

The contextual dimension of this inquiry is significant. Despite the frequent admonition that there is no "hierarchy of rights,"¹³⁹ it may not be the case that all constitutional rights and interests ought to be given equal weight in all cases in which they come into conflict.¹⁴⁰ This is not to say that constitutional rights and interests can be placed in a hierarchy independently from the context in which the conflict arises. No single right can be regarded as *prima facie* superior to any other. Rather, in any given situation, it falls first to the state (and ultimately to the courts if the government's actions are judicially reviewed) to determine which rights or interests are to be given precedence.¹⁴¹ These compromises are not easy to make.¹⁴² It is for this reason that the state has the primary responsibility for balancing competing rights and interests.¹⁴³ At the same time, because balancing

159 DLR (4th) 385. See also Alexy, *Theory*, *supra* note 63; Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57:2 UTLJ 383 at 394 [Grimm, "Proportionality"]; Choudhry, "Legacy of *Oakes*," *supra* note 15; Wiseman, *supra* note 129.

136. See MacDonnell, "Protective Function," *supra* note 4.

137. Weinrib, "Section One," *supra* note 92 at 471.

138. See *Hutterian Brethren*, *supra* note 79; *Oakes*, *supra* note 15.

139. *Gosselin (Tutor of) v Quebec (AG)*, 2005 SCC 15, [2005] 1 SCR 238 at para 2. See also Grimm, "Proportionality," *supra* note 135 at 394.

140. See *Edmonton Journal*, *supra* note 135, Wilson J; Alexy, *Theory*, *supra* note 63; Grimm, "Proportionality," *supra* note 135 at 394.

141. Grimm, "Proportionality," *supra* note 135 at 394.

142. *Irwin Toy*, *supra* note 79 at para 79.

143. *Ibid*; See generally Grimm, "Protective Function," *supra* note 81. See also Alexy, *Theory*, *supra* note 63.

engages constitutional rights and interests, the constitution, as supreme law, provides a “framework” within which these decisions are to be made.¹⁴⁴

The reconciliation approach taken by the German Constitutional Court adds additional rigour to the balancing exercise. Through the lens of the German jurisprudence, we can see that the Canadian courts’ existing contextual approach tends to conflate two distinct stages of analysis. First, what is the weight of each constitutional right or interest at play? Second, how can the competing rights and interests be reconciled, given their respective weights? While a variant of this analysis sometimes occurs at the final stage of the *Oakes* analysis, the German jurisprudence suggests that the weight of the rights and interests engaged ought to play a broad, framing role in the process of reconciliation. Though the Supreme Court of Canada has expressed a commitment to a contextual approach, particularly in the freedom of expression context,¹⁴⁵ this aspect of the *Charter* analysis is often insufficiently articulated. What the German experience, and particularly the dissenting opinion of Justice Böckenförde in the Second Abortion decision, shows is that this analytical gain can be squandered if the second stage includes a re-weighting of the rights and interests at stake. Proper balancing (or reconciliation) of rights requires instead that each right be given its appropriate contextual weight prior to engaging in reconciliation. It also requires accepting that each right will need to be diminished in the reconciliation exercise in accordance with this predetermined weight.

Regardless of what role courts play, the protective function helps us to better account for the complex range of constitutional rights and interests engaged when courts evaluate state action for compliance with the *Charter*. The concept of deference invites the state to be the primary actor in deciding the hard question of how to govern in the face of competing basic values. As the Supreme Court explained in *R v Mills*:

Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups ... If constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this court has an obligation to consider respectfully Parliament’s attempt to respond to such voices.¹⁴⁶

144. Alexy, *Theory*, *supra* note 63 at 393. For a comparison of the German and Canadian approaches, see Grimm, “Proportionality,” *supra* note 135.

145. Choudhry, “Legacy of *Oakes*,” *supra* note 15 at 514-15; Richard Moon, “Justified Limits on Expression: The Collapse of the General Approach to Limits on *Charter* Rights” (2002) 40:3 & 4 Osgoode Hall LJ 336.

146. *R v Mills*, [1999] 3 SCR 668 at para 58, 180 DLR (4th) 1. See also *Irwin Toy*, *supra* note 79 at para 79.

Where the government has failed in its duty, the courts will direct the state to fulfill its function.¹⁴⁷ Even here, however, the government is left with a significant degree of discretion.

III. A SYNTHETIC READING OF THE ABORTION DECISIONS

As the German jurisprudence demonstrates, the protective function operates along two dimensions. First, it imposes certain affirmative protective obligations on the state where a constitutional rights-holder is peculiarly vulnerable to the actions of private actors and the state is uniquely positioned to protect core constitutional interests. Second, it identifies as constitutional certain interests pursued by the state through measures that infringe constitutional rights. This second dimension of the protective function often underlies the section 1 analysis in Canadian constitutional law. We argue that making the constitutional nature of rights-limiting purposes explicit helps in properly understanding constitutional balancing under section 1 as a weighing of constitutional rights and interests on both sides of the scales.

Which of these two aspects of the protective function is foregrounded does not depend on doctrinal considerations; rather, it seems to be contingent upon litigation context. In cases where the state is alleged to have failed to fulfill its protective obligations, the first aspect of the protective function shapes the contours of the claim. When the state has taken action to protect constitutional interests and in the course of so doing is alleged to have infringed defensive rights, the second aspect predominates. Considering the abortion decisions of the Supreme Court of Canada and the German Constitutional Court together allows us to see both aspects of the protective function at work and to assess how the protective function interacts with defensive rights.

A synthetic reading of the abortion cases reveals that the same three constitutional issues were before the courts in *Morgentaler*, *Roe v Wade*, *Casey*, and the two German Abortion decisions. First, what is the scope of a woman's right to determine whether she will carry a pregnancy to term? Second, what is the scope of the state's ability or obligation to regulate abortion to protect fetal life? Third, how do we reconcile these rights and obligations?¹⁴⁸ The first issue was foregrounded

147. Grimm, "Protective Function" *supra* note 81; Karin Grafhof, "The Duty to Protect and to Ensure Human Rights under the Basic Law of the Federal Republic of Germany" in Eckart Klein, ed., *The Duty to Protect and to Ensure Human Rights: Colloquium* (Berlin: Berlin Verlag Arno Spitz, 2000) 41 at 48.

148. See Frank I Michelman "The protective function of the state in the United States and

in the North American decisions, while the second issue was foregrounded in the German decisions. In all of these decisions, however, the outcome ultimately depended upon resolution of the third question. This insight emerges clearly only when the decisions are viewed together.

If, as North American courts seem to suggest, judges actually subscribed to a classical liberal view of constitutional rights, there should be no third issue. As Wayne Sumner explains:

The liberal view has the simplest structure possible for a moral treatment of abortion. Since the stake that the fetus has in the decision is entirely discounted, abortion requires no special justification. The liberal thus makes a clean sweep of all moral complications concerning abortion.¹⁴⁹

In the US context, a woman's right to choose would not be subject to any limit, since there is no possible constitutional basis for protecting fetal life, and in the Canadian context there would be no need to reconcile conflicting rights either as part of a balancing exercise internal to section 7 or under section 1.¹⁵⁰ The government would be left to argue that the significance of fetal life, though not constitutionally protected, was sufficiently important to warrant the curtailing of the pregnant woman's rights.

Instead, we know that abortion rights advocacy is immeasurably more complex. Canadian courts do not actually adhere to a classical liberal view of constitutional rights in abortion cases. Rather, they introduce the protective dimension of rights via a division-of-powers analysis (especially involving the criminal law power)¹⁵¹ and via an inquiry into legislative purpose under section 7 or section 1.¹⁵² This protective dimension plays a powerful, albeit under-theorized, role in the courts' reasoning.

Frank Michelman makes a similar point in the context of the American abortion cases.¹⁵³ He suggests that there is a protective dimension to the decisions of the United States Supreme Court in which a woman's right to access abortion is curtailed in the name of protecting the sanctity of life.¹⁵⁴ He concludes that

Europe: the constitutional question" in Georg Nolte, ed, *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 156 [Michelman, "Protective Function"].

149. Sumner, *supra* note 17 at 19.

150. For a discussion of the history of balancing under section 7, see Vanessa A MacDonnell, "*R v Sinclair*: Balancing Individual Rights and Societal Interests Outside of Section 1 of the *Charter*" (2012) 38:1 Queen's LJ 137.

151. See *R v Morgentaler* [1993] 3 SCR 463, 107 DLR (4th) 537 [*Morgentaler* 1993, cited to SCR].

152. See *Morgentaler*, *supra* note 1.

153. Michelman, "Protective Function," *supra* note 147 at 174.

154. *Ibid* at 174-75, citing *Roe v Wade*, *supra* note 8.

in the United States, the protective function is best understood as an “under-enforced constitutional right;”¹⁵⁵ that is, the mere absence of “direct judicial enforcement”¹⁵⁶ is not an indication of the right’s non-existence.¹⁵⁷ Rather, it may simply be that the protective function is directed primarily to the state’s legislative branch, to be taken into account when it makes policy choices, but even to judges “when the principle is invoked in some way other than as a ground for direct judicial enforcement.”¹⁵⁸ This approach, Michelman explains, raises fewer “institutional”¹⁵⁹ concerns than a right to protection that is directly enforceable by the courts.¹⁶⁰

How can comparative constitutional law assist in the development of a robust constitutional theory of reproductive rights? We argue that a synthetic reading of the abortion decisions renders visible the tension between defensive rights and protective obligations that underlies the abortion jurisprudence in all three jurisdictions, though our focus is on Germany and Canada. Comparative inquiry not only explains what Canadian courts are seeking to balance but also makes clear that these competing interests have constitutional weight.¹⁶¹ Like our German counterparts, then, we must account for the implicit protective constitutional aspect of reproductive rights cases. The First Abortion decision demonstrates the risks of failing to do so. There, the (respondents’) liberal defensive rights theory failed German women because it was not responsive to the Court’s focus on protective rights. The gains made in the Second Abortion decision can be attributed in part to an emphasis on the protective interests of women in the abortion context, as well as a clearer articulation of the impact of forced pregnancy continuation on women’s defensive rights. In sum, we argue that the comparative lens might offer two types of insights for Canadian law. First, it might tell us something about the vulnerabilities in the classical liberal position. Second, it might tell us which arguments are not essential in developing reproductive rights advocacy that secures the woman’s interest in reproductive choice.

The German abortion decisions suggest that there are at least three elements of existing reproductive rights advocacy in Canada that may prove vulnerable in the long run. The most important of these is the insistence on conceptualizing the fetus as a legal nullity. The German comparator demonstrates that strong

155. *Ibid* at 175 [quotation marks omitted]. Michelman is building here on a concept developed by Lawrence Sager.

156. *Ibid* at 176.

157. *Ibid* at 177.

158. *Ibid* at 176.

159. *Ibid*.

160. *Ibid*.

161. Choudhry, “Legacy of *Oakes*,” *supra* note 15 at 514.

reproductive rights protection is not dependent on conceptualizing the fetus as a legal nullity. The claim that the fetus is a legal nullity is vulnerable because it removes the legal framework very far from the lived experience of women and from the basic moral intuition of individuals. Constitutional doctrine seems to be most stable when it tracks basic moral intuitions and the lived experience of individuals.¹⁶² One of the key insights of feminism is that we must pay attention to the lived reality and experiences of women.¹⁶³ Women do not experience pregnancy as a nullity, regardless of whether the pregnancy is intended or unintended, and whether the woman wants to carry the pregnancy to term or seeks to terminate it.¹⁶⁴ Women experience pregnancy as highly significant.¹⁶⁵ This is not the same as the anti-choice suggestion that abortion is traumatic or that there are negative mental health effects that result from abortion. For most women, neither is the case.¹⁶⁶ However, reproductive rights advocacy predicated on a claim that a pregnancy should be considered legally equivalent to other minor medical interventions is vulnerable to rejection by courts, even if the medical analogy may be apt.

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162. For a sophisticated analysis of the relationship between law reform and basic moral intuition, see Paul H Robinson & John M Darley, "Intuitions of Justice: Implications for Criminal Law and Justice Policy" (2007) 81:1 S Cal L Rev 1. See also Robert Post & Reva Siegel, "Roe Rage: Democratic Constitutionalism and Backlash" (2007) 42 Harv CR-CLL Rev 373 [Post & Siegel, "Roe Rage"].
163. See e.g. Jennifer S Hendricks, "Pregnancy, Equality, and U.S. Constitutional Law" in Beverley Baines, Daphne Barak-Erez & Tsvi Kahana, eds, *Feminist Constitutionalism* (Cambridge: Cambridge University Press, 2012) 263.
164. The commitment to the notion that the fetus is a legal nullity has complex legal consequences. Because it casts birth as a binary moment before which the fetus is "part of" the pregnant woman and after which it becomes a separate human being with personhood, the law has great difficulty conceptualizing harms done to the fetus and the pregnant woman in the course of giving birth. See *R v Sullivan*, [1991] 1 SCR 489, 55 BCLR (2d) 1. The Supreme Court of Canada recently demonstrated the tenuous nature of this consensus when it concluded that the offence of disposing the dead body of a child included within its ambit a fetus that would "likely have been born alive." *R v Levkovic*, 2013 SCC 25 at para 13, 106 WCB (2d) 51.
165. John Lydon and others have remarked that:
 Being pregnant and having a baby represent clearly defined goals for many women (Lalos, Jacobsson, Lalos, & von Schoultz, 1985; Pervin, 1989), but these same events can be sources of significant stress not only for those who elect to have the baby (Lobel, 1994) but also for those deciding to terminate the pregnancy (Adler, 1992).
- See John Lydon et al, "Pregnancy Decision Making as a Significant Life Event: A Commitment Approach" (1996) 71:1 J Personality & Soc Psychol 141.
166. Gail Erlick Robinson et al, "Is there an 'Abortion Trauma Syndrome'? Critiquing the Evidence" (2009) 17:4 Harv Rev Psychiatry 268 at 269.

A second, related way in which reproductive rights advocacy departs from moral intuition and the way that abortion is experienced concerns gestational stages. If the fetus has no legal cognizance and birth is the binary moment in which a legal non-entity becomes a legal entity, the fetus should be legally irrelevant for the entire pregnancy. Yet courts have shown a distinct willingness to treat early pregnancy differently from later pregnancy. This view accords with women's experience. An abortion performed in week eight of the pregnancy is not the same as one carried out in week twenty-two. The difference arises in part from the different medical impact of the procedure itself, but it is also likely related to the reasons for which the abortion is sought and the degree to which the pregnancy is experienced physically and emotionally.

Again, reading the German and Canadian jurisprudence together and considering their impact on the lived reality of women in both countries, it appears that taking a gestational development approach does not necessarily result in more restricted abortion access, nor does an approach based on a binary constitutional moment of birth result in freedom from gestation-based incursions into reproductive choice. We are of the view that the widespread legislative and judicial preference for gestational approaches is grounded in lived experience and basic moral intuition and may therefore be difficult to unseat. Respecting this fact would therefore appear to be most likely to lead to stable and robust jurisprudence.

Third, there seems to be a frequent confounding of the legal question of who is the appropriate decision maker when it comes to accessing abortion and the moral question of why a woman seeks to access abortion. It is generally assumed that if a woman's decision to terminate a pregnancy is legally hers alone, the reason for which she is seeking to access abortion is removed from the scope of public discourse. While there are compelling reasons for the first argument, the second is neither necessary nor beyond dispute. Women choose abortion because of reasons that are compelling to them, but those reasons may not be compelling to others. Liberal democracies should protect the right of women to be the sole legal decision maker. The question of where, when, and how people might morally disagree with her choices is obviously complex, but not necessarily outside of the realm of permissible discourse.¹⁶⁷

167. The Constitutional Court of South Africa has also made a statement to this effect:

The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.

The question becomes whether it is possible to develop a robust constitutional theory of reproductive rights that reflects the best insights of the abortion jurisprudence in Germany and Canada (and, to a lesser extent, the US). One of the advantages of tackling the tension between women's rights and fetal interests head-on is that we can bring the law's commitment to probing, rational discourse to bear on the issues. A related advantage is that we can consider the question both from the perspective of individual rights-holders and through a more social or systemic lens. We now consider the three issues before the courts in constitutional abortion cases using a synthetic reading of the cases.

A. WHAT IS THE SCOPE OF THE RIGHT OF A WOMAN TO DETERMINE WHETHER TO CARRY A PREGNANCY TO TERM?

Applying basic constitutional principles, there can be no question that a pregnant woman is a full constitutional rights-holder. Her pregnancy in no way diminishes her citizenship or constitutional status. There is no room in constitutional doctrine for "woman as vessel" jurisprudence. While the German decisions demonstrate the difficulties with allocating constitutional rights to an entity that is not fully capable of holding rights, the Canadian jurisprudence shows that the constitutional analysis can be distorted by an incomplete accounting of the constitutional rights of the pregnant woman that are at stake. The constitutional interests of a pregnant woman will likely sound in a variety of individual constitutional rights related to her personhood, autonomy, equality, privacy, health, liberty, psychological well-being, and human dignity. The exact scope of these rights will need to be determined by domestic constitutional law. *Morgentaler*, it will be noted, speaks only to a very few of these rights.¹⁶⁸

Contrary to the experience in Nazi Germany, most states and all Western democracies grant women the absolute right not to have a pregnancy terminated

See *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04), [2005] ZACC 19, 2006 (3) B Const LR 355 (CC) at para 95. Thank you to Iain Benson for pointing us to this source.

168. For critiques of the scope of the *Morgentaler* decision, see Sanda Rodgers, "Misconceptions: Equality and Reproductive Autonomy in the Supreme Court of Canada" (2006) 33 Sup Ct L Rev (2d) 271; Hester Lessard, "Relationship, Particularity, and Change: Reflections on *R. v. Morgentaler* and Feminist Approaches to Liberty" (1991) 36:2 McGill LJ 263; Beverley Baines, "Abortion, Judicial Activism and Constitutional Crossroads" (2004) 53 UNBLJ 157; Moira L McConnell & Lorene Clark, "Abortion Law in Canada: A Matter of National Concern" (1991) 14:1 Dalhousie LJ 81. For a detailed review of the *Morgentaler* judgment, see Lorraine Eisenstat Weinrib, "The *Morgentaler* Judgment: Constitutional Rights, Legislative Intention, and Institutional Design" (1992) 42:1 UTLJ 22.

against her will. This means that the state does not generally claim an interest in, for example, avoiding guardianship obligations or health care costs where the woman may be in a poor position to parent the child or where the child is expected to have significant health challenges. In order to determine the scope of the pregnant woman's right to decide whether to terminate the pregnancy, it is likely important to consider the purpose and effect of the proposed state limit on her decision. Both the German Constitutional Court in the Second Abortion decision and the United States Supreme Court in *Casey* established similar standards for assessing restrictions placed on a woman's ability to choose to terminate a pregnancy, expressed as "exactability" in Germany¹⁶⁹ and "undue burden" in the United States.¹⁷⁰ Without seeking to endorse either of these standards, we are struck by the German Constitutional Court's very limited understanding of what is exacted from a woman who is forced to carry a pregnancy to term and to parent a child. There is a very significant body of psychological, sociological, and medical literature about the impact of pregnancy, childbirth, and parenting on women.¹⁷¹ This needs to become part of the record. In the absence of this kind of evidence, constitutional cases are proceeding without a solid factual matrix for determining whether pregnancy, childbirth, or parenting can ever be exactable. From a principled—not to mention historical and empirical—perspective it is difficult to overstate the impact of pregnancy, childbirth, and parenting on the biographies of individual women and on gendered role allocations in society.

Beyond the individual rights analysis (which tends to be weakened by the frequency of abstract judicial review in abortion litigation), the systemic policy

169. Second Abortion decision, *supra* note 2 at para 123.

170. *Casey*, *supra* note 9 at 877.

171. For the impact of these factors on women's health, see *e.g.* Valerie Beral, "Long Term Effects of Childbearing on Health" (1985) 39:4 *J Epidemiology & Community Health* 343; MF Fathalla, "Contraception and Women's Health," (1993) 49:1 *Brit Med Bull* 2. For their impact on women's psychological well-being, see *e.g.* Nancy Felipe Russo & Kristin L Zierk, "Abortion, Childbearing, and Women's Well-Being" (1992) 23:4 *Prof Psychol: Research & Prac* 269; Ross B Wilkinson, "Changes in psychological health and the marital relationship through childbearing: Transition or process as stressor?" (1995) 47:2 *Aust J Psychol* 86; Margaret A De Judicibus & Marita P McCabe, "Psychological Factors and the Sexuality of Pregnant and Postpartum Women" (2002) 39:2 *J Sex Res* 94; Sofia Gameiro, Mariana Moura-Ramos & Maria Cristina Canavarro, "Maternal adjustment to the birth of a child: Primiparity versus multiparity" (2009) 27:3 *J Reprod & Infant Psychol* 269. For their impact on women's economic well-being, see *e.g.* Amalia R Miller, "The effects of motherhood timing on career path." (2011) 24:3 *J Pop Econ* 1071; Catalina Ameudo-Dorantes & Jean Kimmel, "The Motherhood Wage Gap for Women in the United States: The Importance of College and Fertility Delay" (2005) 3:1 *Rev Econ Household* 17; Hiromi Taniguchi, "The Timing of Childbearing and Women's Wages" (1999) 61:4 *J Marriage & Fam* 1008.

reasons for supporting a woman's right to make these determinations must be made explicit. Here, many of the well-established arguments continue to be relevant. One of the reasons why there are not significant differences in women's ability to access abortion across the three comparator jurisdictions, we suspect, is that the social cost of not making abortion widely accessible in the early stages of pregnancy is extremely high. At the time of *Roe v Wade*, the First Abortion decision, and *Morgentaler*, the memory of the devastating effects of women obtaining illegal abortions was still fresh. A more recent practical limit on the ability of the state to regulate abortion is the fact that medical abortion is widely available and frequently used.¹⁷² The historical record and the current state of medical abortions both point in the same direction: Women will access abortion whether or not the state seeks to regulate it, and it is not in the interest of any state to enact laws that would cause more women to resort to illegal or unsafe abortions.

In the Second Abortion decision, both the majority and the dissent were of the view that a woman was at the very least in the best, if not the only, position to determine whether she was able to carry a pregnancy to term. The majority was concerned, however, that removing a woman's decision from the scope of judicial review altogether while at the same time articulating a legal standard for the decision would undermine the rule of law. In *Morgentaler*, the issue of who was the most appropriate decision maker was replaced by the question of whether a legal mechanism could be devised that allowed for review without imposing undue delay. Clearly, a significant number of judges were concerned that permitting women to make the decision of whether to carry a pregnancy to term without review posed a threat to either good decision making, the authority of the law, or both. The frequent resort to mandatory counselling suggests that legislators often share this concern. The key question is what restrictions, if any, the state may impose on the woman in order to protect fetal life. We examine this question now. To summarize our analysis so far, a synthetic reading of the comparative abortion jurisprudence suggests that the constitutionally required scope of a woman's right to choose is large and should be understood as being anchored in a panoply of core constitutional rights.

172. Maria M Fernandez et al, "Assessing the Global Availability of Misoprostol" (2009) 105 Int'l J Gynecology & Obstetrics 180. But see Joanna N Erdman et al, "Medication Abortion in Canada: A Right-to-Health Perspective" (2008) 98 Am J Pub Health 1764.

B. WHAT IS THE SCOPE OF PERMISSIBLE ABORTION REGULATION AIMED AT PROTECTING FETAL LIFE?

We know from the German decisions that the state can fulfill its protective function in a variety of ways. We can safely assume that the First Abortion decision will continue to be an outlier. It seems inconceivable that a Canadian court would require the re-criminalization of abortion. The inappropriateness of mandatory criminalization is evident from the German jurisprudence in at least two ways. First, the allocation of constitutional rights to an entity that is not considered to be a rights-holder for any other purpose undermines the coherence of the law. Resort to the objective normative framework theory of the constitution is less troubling doctrinally, but makes it difficult to rationalize why the state's protective obligation imposes obligations on individual citizens, especially where this burden has a differential impact on group of citizens who are protected by constitutional and statutory anti-discrimination provisions. Equality arguments might usefully be brought to bear on this discussion.¹⁷³

Second, as the dissenters point out in the Second Abortion decision, criminalization downloads the state's constitutional obligation onto individuals who are themselves vulnerable.¹⁷⁴ Criminalization is thus inappropriate because it allocates individual blame for the state's failure to live up to its own symbolic commitments. On the other hand, imposing a constitutional obligation on the state to promote a child- and pregnancy-friendly society does not raise the same concerns. Moreover, the German experience suggests that the most effective approach to protecting fetal life is to adopt measures that provide robust social supports to women.¹⁷⁵ Recognizing that there may be multiple ways for a government to exercise its protective function, however, our objective here is to canvass the range of possible abortion regulations that a Canadian court giving recognition to the protective function might be prepared to uphold.

We have argued that it would be helpful for Canadian constitutional law to recognize the protective function, in part because it lends coherence to the jurisprudence and in part because it is easier to articulate and weigh the boundaries of an express interest than to respond to an interest that is implicit and amorphous but powerful nonetheless.

173. For criticism of the Supreme Court of Canada's failure to deal with the equality dimensions of the abortion issue, see Rodgers, *supra* note 168.

174. As Hendricks, Rodgers, and Kaposy and Downie point out, this vulnerability has "intersecting" dimensions. See Hendricks, *supra* note 163 at 274; Rodgers, *supra* note 168 at 283; Kaposy & Downie, *supra* note 22.

175. For a discussion of the relationship between the protective function and socioeconomic rights, see MacDonnell, "Protective Function," *supra* note 4.

It should be noted that from a biological perspective, the legal debate about the beginning of life is incongruous. A fetus is not abiogenetic; rather, it is the product of continued growth of living cells from other living cells. The attribution of “life,” or of “not-life,” to this entity, is therefore a legal construct rather than a factual reality. As with any other legal construct, it is subject to policy-based development and revision. The common law position in Canada is clear: A fetus is not a discrete rights-holder unless subsequently born alive.¹⁷⁶ It will be recalled that a very similar legal starting point did not keep the German court from recognizing either that the fetus had a right to life or that the constitution’s normative framework suggested a valid state interest in the fetus.

The dissenting judges in *Morgentaler* similarly had no difficulty recognizing the abortion provisions of the Criminal Code as a valid exercise of criminal law.¹⁷⁷ Moreover, a majority of the Court held that the protection of the fetus was a legitimate state interest,¹⁷⁸ reminding us that the state can protect interests not directly related to constitutional rights-holders. In our view, one of the strengths of recognizing the protective function is that it helps us understand the legal status of protective action by the state. Beyond this, it allows us to impose appropriate limits on it.

It is difficult to conceive of any theory of the protection of fetal life without having recourse to religious tenets or symbolic value statements of the kind the German Court made in the First Abortion decision. The secular state may well have a commitment to contributing to a child-friendly society, but it is difficult to see how it could have a direct and tangible, rather than a symbolic, interest in the outcome of the pregnancy of any one of its female citizens. The onus should be on any state seeking to regulate abortion to articulate a constitutional theory of the protection of fetal life. Counterintuitively, this onus is more likely to be imposed in a constitutional discourse that recognizes a protective function.

In locating the high water mark of possible regulation, it is important to note that the vast majority of abortions are performed in the early stages of pregnancy.¹⁷⁹

176. See *e.g. Dobson (Litigation Guardian of) v Dobson*, [1999] 2 SCR 753 at para 25, 174 DLR (4th) 1.

177. *Morgentaler*, *supra* note 1 at paras 207-10, McIntyre J.

178. Kaposy & Downie, *supra* note 22 at 281.

179. The United States Center for Disease Control most recently reported an incident rate of 1.3 per cent for late-term abortions. See Karen Pazol et al, Centre for Disease Control, Morbidity and Mortality Weekly Report (MMWR), “Abortion Surveillance — United States, 2009”, *Surveillance Summaries* 61(SS08) 1-44 (23 November 2012), online: <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6108a1.htm?s_cid=ss6108a1_w>. This appears to be true internationally. The Law Commission of Victoria cites 0.7 per cent as the incidence of late-term abortions there. Victorian Law Reform Commission, *Law of Abortion: Final Report* (Victorian Law Reform Commission: Victorian Government Printer, 2008) at 36.

At this stage, the state is faced with practical, political, and legal obstacles to regulating abortion. It is worth asking, however, to what extent a court recognizing the protective function would uphold some degree of abortion regulation. While we are not aware of the practice of all abortion providers in Canada, we suspect that the situation at the local Morgentaler clinic is typical: Counselling is offered to all women accessing abortion. It not only includes information about the procedure, but also provides an opportunity to review the decision to terminate the pregnancy and to offer advice on contraception. We believe that if this practice were translated into a regulatory requirement, such a requirement would likely be upheld as a valid use of the protective function.

Justice Wilson indicated in *Morgentaler* that the state's interest in the fetus becomes more "compelling" as the pregnancy progresses.¹⁸⁰ This view is consistent with *Roe v Wade* and with the Second Abortion decision.¹⁸¹ It also aligns with public opinion on abortion, which is more pro-choice in the early stages of pregnancy, while a plurality favours more regulation later in the pregnancy.¹⁸² The constitutional basis for this claim continues to be uncertain if we maintain that the fetus has no legally cognizable status. For some, the issue is viability. If the fetus is viable outside the womb, it should be possible to force the woman to carry the pregnancy to term. This intuition appears to arise from a sense that a viable fetus has some potential existence independent of the pregnant woman and is thus more closely analogous to a constitutional rights-holder.

Reproductive rights advocates have rightly pointed to the misery of women who discover their pregnancy late or have psychological difficulties accepting the reality of their pregnancy as a reason for resisting gestational limits. These cases need to be considered. From the standpoint of the state's protective obligations, however, they may be insufficient to defend a rule that places no limits on late term abortions for psychosocial reasons in adult women who were aware of the pregnancy and who faced no state-imposed or state-tolerated delays or obstacles. On the other hand, gestational limits applied to minors or in situations where the delay or obstacle is attributable to the state would not, it would seem, meet a constitutional standard that appropriately reconciles the interests at stake.

180. *Morgentaler*, *supra* note 1 at para 257.

181. In fact, Justice Wilson cites American case law in her judgment, as do some of the other judges. *Ibid* at paras 200, 258.

182. See most recently, "Canadians Have Mixed Feelings on Abortion, But Shun a New Debate" *Angus Reid* (28 January 2013), online: <http://www.angus-reid.com/wp-content/uploads/2013/01/2013.01.28_Abortion_CAN.pdf>.

Others have expressed concerns that gestational limits would be applied in cases of potential fetal pathology, resulting in the abortion of healthy fetuses prior to the gestational limit because the woman cannot wait for the more reliable, later diagnostic test.¹⁸³ This concern would clearly need to be addressed and a rule that is responsive to diagnostic realities would need to be articulated. While it does not support a principled argument against gestational limits per se, it strongly supports a contextual argument against gestational limits in fetal pathology situations.

From a practical perspective, there are very few late-term abortion providers in North America, and an even smaller number of practitioners who are prepared to perform abortions after twenty-four weeks for psychosocial reasons.¹⁸⁴ Thus, even if a constitutional right to such an abortion existed, it is unlikely to be effective. The question is whether there is sufficient value in the principled argument against gestational limits to warrant a struggle for a right that is likely to be practically illusory.

It seems to us possible that the state would be able to articulate a constitutional theory of protection of the fetus in the late stages of pregnancy that would be consistent with what Robert Post and Reva Siegel refer to as “democratic constitutionalism.”¹⁸⁵ Their basic premise is that “the authority of the Constitution depends on its democratic legitimacy.”¹⁸⁶ Democratic legitimacy does not depend upon majoritarian support of every policy position, but instead suggests that courts ought not to depart so far from majoritarian values that it undermines the democratic legitimacy of the constitution more broadly.¹⁸⁷ Even assuming that the state can validly legislate to protect fetal life in the late stages of pregnancy, there is some question whether the US standard of viability provides a useful measuring stick. Viability is of course subject to medical developments. There is also disagreement about

183. ACG Breeze et al, “Palliative care for prenatally diagnosed lethal fetal abnormality” (2007) 92:1 Arch Dis Child Fetal Neonatal Ed F56 at F57.

184. The Abortion Rights Coalition of Canada (ARCC) reports that there are no providers in Canada who will perform abortions for psychosocial reasons after twenty weeks, but that the occasional Canadian woman seeking such an abortion would be sent to the United States. See Joyce Arthur, “At the Heart of the Abortion Issue” Abortion Rights Coalition of Canada (4-6 February 2006), online: <<http://www.arcc-cdac.ca/editor.html>>. In the United States, only 8 per cent of providers perform abortions after twenty-four weeks for any reason, indicating a recent decline. Rachel K Jones et al, “Abortion in the United States: Incident and Access to Services, 2005” (2008) 40:1 Perspectives on Sexual & Reprod Health 6 at 14, 15. Gestational Limits are a key reason for refusing to provide an abortion. Diana Green Foster, Loren M Dobkin & Ushma D Upadhayay, “Denial of Abortion Care Due to Gestational Age Limits” (2013) 87:1 Contraception 3.

185. Post & Siegel, “Roe Rage,” *supra* note 162.

186. *Ibid* at 374.

187. *Ibid*.

whether the occasional seriously challenged but surviving infant (*e.g.*, born at twenty-two weeks) or the premature but generally surviving infant (*e.g.*, born at twenty-eight weeks) should be the measure.¹⁸⁸

The comparative view thus suggests that criminalization is neither required nor constitutionally valid, but that counselling requirements and some limits on late-term abortions for psychosocial reasons might pass constitutional muster in the absence of other factors such as youth or illness. Procedural requirements should continue to be reviewed both for colourability and for adverse effects.¹⁸⁹ This is consistent with existing abortion practice as well as a developmental view of pregnancy. It is supported by women's experience of pregnancy as well as the existing jurisprudence.

C. HOW DO WE CONSTITUTIONALLY RECONCILE THESE RIGHTS AND OBLIGATIONS?

Where constitutional rights and interests collide, the courts in Canada and in Germany have been clear that one right or interest does not simply trump the other. However, in this case we are not dealing with two constitutional rights-holders. The fetus may fall within the protective sphere of the state, but it is not an independent rights-holder.

In the vast majority of cases, the balancing of rights and interests will need to be resolved in favour of the pregnant woman. This is true in the early stages of pregnancy not only for legal and constitutional reasons but also for practical and political ones. In later pregnancy, the reasons for which an abortion is sought may become relevant, as would the woman's individual life circumstances. The constitutionally protected sphere of girls and young women would have to be greater to account for the differential health and capacity issues of this demographic.¹⁹⁰ Also, the state would have the burden of demonstrating that any delay in obtaining an abortion cannot be attributed to inadequate access, administrative hurdles, or the woman's social disadvantage.

Finally, it is important to note that in the German context, the protective function is embedded within a constitutional framework that also imposes socioeconomic obligations on the state. The German position that the best way to reduce abortions is through the adoption of woman-friendly policies, while difficult to demonstrate empirically, has the advantage of respecting the

188. I Glenn Cohen & Sadath Sayeed, "Fetal Pain, Abortion, Viability, and the Constitution" (2011) 39 *JL Med & Ethics* 235 at 236.

189. *Morgentaler* 1993, *supra* note 151 at para 47.

190. See generally *R v DB*, 2008 SCC 25, [2008] 2 SCR 3.

choice of the individual rights-holder. It also recognizes that the interests of the pregnant woman and the state's interest in the life of the fetus are often aligned. Government policy must take cognizance of this fact. To the extent that a state is committed to protecting fetal life, it ought also to commit to protecting women and to removing, to the extent possible, the social reasons that may result in unwanted pregnancies, such as obstacles to accessing contraception, sexual violence against women, and economic disadvantage.¹⁹¹ While the Supreme Court of Canada has clearly given constitutional weight to fetal interests in the abortion jurisprudence, it has not given adequate weight to the state's obligation to create a woman-, child-, and pregnancy-friendly society. This necessarily impacts upon whether a woman can be forced to carry a pregnancy to term against her wishes and the process of reconciling the rights and interests engaged by this very contentious issue. Any future Canadian jurisprudence on these matters must develop a more nuanced account of the state's protective function, one that is focused not only on prenatal life but also on the social dimensions of pregnancy.¹⁹²

The resulting scope of constitutionally valid regulation appears to be small. It would affect adult women who seek to access abortion for psychosocial reasons at an advanced stage of pregnancy. While articulating legal limits to abortion for this group might be constitutionally possible, it is of no great practical consequence.

IV. CONCLUSION

Despite their controversial nature, the German abortion decisions provide new doctrinal tools that can be brought to bear on a conceptually fraught area of Canadian constitutional doctrine. These tools play an important role in making the case for a robust right of access to abortion that can withstand changes in political fortune. A reproductive rights strategy that depends upon characterizing the fetus as a legal nullity is vulnerable because it avoids the difficult questions around abortion rather than confronting them. By insisting upon a constitutional doctrine that makes visible the full range of constitutional rights and interests at stake, we can begin the project of determining, in a contextually sensitive manner, how to develop advocacy positions that connect with the lived realities of women and at the same time safeguard the significant advances made in securing reproductive freedom for women.

191. Rodgers, *supra* note 168 at 283-84.

192. *Ibid.*