A Tale of Two Countries: German and American Attitudes to Abortion Since World War II

John J. Hunt

From the fall of 1946 to the spring of 1949, the American military, in the American zone of occupation in Germany, held twelve war crimes trials of some 185 lesser-known Nazis. In trial number 8, the RuSHA or Greifelt Case, held from October 10, 1947 to March 10, 1948, the tribunals condemned Nazi use of abortion as a war crime and crime against humanity. While the Nazis were convicted of forcing abortions on conquered peoples, the tribunal even condemned the encouragement of abortions as a war crime and crime against humanity.[1] In its summation of the RuSHA Case the prosecution had even strongly implied that two Nazi laws of the 1930s legalizing the practice, and a Weimar law of the 1920s liberalizing the practice, should not have been passed.[2]

In the U.S. after World War II this attitude toward abortion expressed at Nuremberg continued. In fact, post-World War II America experienced the famous "baby boom." Between 1945 and 1964 some 75,000,000 children were born in America. This averaged out to 312,000 a month, 10,000 per day, every month and day for almost twenty years. In 1957, the highpoint, the average American family had 3.77 children.[3] In the same year, graduates of Smith College, class of 1942, filled out a questionnaire after fifteen years away from the campus. The results indicated that 89% of the graduates were housewives, only between 2-3% were divorced; they averaged almost three children each, and 85% said that sex was less important than it used to be.[4]

As Americans entered the 1960s, however, attitudes toward large families and toward legalized abortion began to shift. The civil rights struggle of the first half of the decade and the Vietnam War in the second half were domestic and foreign events, respectively, that led to severe criticism of some of America's fundamental institutions, such as government (state), religion (church) and marriage-children (family).

In this atmosphere there were also some milestones in the change of attitudes specifically about abortion. In 1962 a number of deformed children were born because of the use of thalidomide (an

anti-nausea drug) during pregnancy. The case of Sherri Finkbine, a woman carrying a thalidomide child, who had to go to Sweden for an abortion because she could not get one anywhere in the U.S., received much publicity. This situation repeated itself in 1964 when deformed children were born because of a rubella epidemic and, again, there was no legal abortion available.[5] After these two events, pressure for liberalizing the laws in the fifty states grew. Starting with Colorado in 1967, thirteen states (more would follow) changed their laws in various combinations to allow abortions in cases of deformity, rape, incest, or to save the life and protect the health of the mother.[6] The liberalized laws allowed abortion in just a few cases, and, roughly speaking, the situation in the U.S. was similar to that of West Germany at the time.

By the early 1970s, however, a few states — Hawaii, Alaska, New York, Washington — had legalized the practice, making it possible for women to get abortions upon request, without having to satisfy any criteria.[7] Thus the period from 1967 to the end of 1972 saw liberalization of abortion laws in many states and legalization by a handful of states. The sources of this pressure for liberalization or legalization of abortion were wide and varied, and went far beyond thalidomide and rubella. Many civil rights activists wanted change, believing that controlling quantity of life would improve quality of life for hard-pressed minorities who were still victims of racism a century after emancipation.[8] Young people wanted liberalization in order to maximize their personal freedom in the anti-establishment, post-Vietnam age. Ecologists approved of legal abortion, viewing it as a check on overpopulation, which they believed strained natural resources and the environment. The emphasis, they argued, should be on the quality and not the quantity of children, in order to ensure a qualitative environment for all.[9] Feminists desired liberalization of abortion to have it serve as a "backup" to birth control. Birth control would enable women to regulate home and family size. This, in turn, would allow the pursuance of careers beyond, or instead of, mother-homemaker and insure a sense of equality with males in the modern world.[10] The awareness of numerous grievances over centuries has made feminists to this day the most ardent foes of the criminalizing of abortion.

Calls for liberalization soon gave way to calls for outright legalization. To justify legalization, advocates offered numerous arguments but the chief are five:

1) *Public opinion supported legalization* — Proponents of

legalization pointed to polls which stated that one-fourth of the American people approved of legal abortion in any circumstances and another one-fourth in certain circumstances.[11]

2) *Public opinion supported legalization to avoid illegal, "back-alley" abortions* — Proponents argued that thousands of women aborted when the practice was illegal, that many died, that the law was unenforceable, and that something so many people desired should be legal.[12]

3) *No one could say when human life begins* — Proponents contended that polls showed that while one-third to one-half of Americans believe that life begins when the male sperm unites with the female egg, many placed the beginning of human life at various times between this and birth, and that many put it at birth itself.[13]

4) *One could not legislate one's own moral position into law* — Proponents maintained that the western world today is pluralistic, encompassing numerous religious and ethical positions on a variety of issues. Hence, it was the height of arrogance to enshrine into law a particular moral position on a controversy; neutrality was the best path, as the fiasco of Prohibition had amply illustrated.[14]

5) *One could not enforce anti-abortion laws without Big Brotherism* — Proponents insisted that since abortion was being legalized and was generally accepted, no matter what arguments could be made against it, it would be impossible to control it without massive invasions of government into private lives. They raised the scenario of government bureaucrats invading the bedroom and demanded respect for the constitutional right of privacy.[15]

On January 22, 1973 the U.S. Supreme Court legalized abortion[16] for all fifty U.S. states, relying on the arguments above, especially 3) and 4).[17] By a 7-2 vote *Roe v. Wade* held that in the first trimester the abortion decision is strictly between the woman and her physician; no governmental interference at this stage would be tolerated. During the second trimester the state could regulate the abortion decision, but only to protect the life and health of the mother. During the last trimester the Court acknowledged the state's right to restrict abortion, except where necessary to protect the life and health of the mother.[18] Since "health" could be interpreted broadly by various state legislatures and state medical societies, the decision in effect allowed abortion on demand for the whole country.

A generation after the Nuremberg RuSHA case, in which the U.S.

roundly condemned abortion as a toll of the Nazi holocaust, the U.S. legalized abortion for virtually any reason, at any point in pregnancy. Our legal stance on abortion is one of the most permissive in the world. The war crimes and crimes against humanity segments of the Nuremberg Judgements, which had often been quoted by those opposed to the Vietnam War, were forgotten after 1973. Was it a coincidence that America was out of that war in the very same month that *Roe v. Wade* was formulated?

West Germany, which embraced two-thirds of the land area and three-fourths of the population of post-World War II Germany, continued, for its law on abortion, a 1935 Nazi decree. This had allowed abortion only if there was danger to the life and health of the mother, and these "medical indications" would be reviewed by a panel of physicians. If an abortion was approved, it would be performed only by physicians. Stripped from the law were aspects of a 1933 decree which had reflected Nazi ideology. The word "health" in the 1935 decree was strictly interpreted during the 1950s and 1960s. In 1970, for example, only 4,883 legal abortions were approved in a nation of approximately 60 million.[19] However, as the agitation in America for liberalization began in the late 1960s, and as the legalization slowly begun in the early 1970s in the U.S. became complete in January 1973, West Germany began to consider a more liberal law.

West Germany's abortion law reform was a very complex process that involved numerous proposals, and lasted from the spring of 1970 to the spring of 1974. The arguments given were roughly the same as those given in the U.S., and just slightly later in time.[20] On almost a straight party-line vote, with Social Democrats and Free Democrats in favor and Christian Democrats (CDU) and Christian Socialists (CSU) opposed, the Bundestag (Parliament) passed a law on April 26, 1974 which amended Section 218 of the German Penal Code of 1871 to allow abortion on demand during the first trimester of pregnancy.[21] The vote of 247 to 233 with 10 abstentions (Social Democrats), did not constitute an absolute majority in the Bundestag and was passed without a clear popular mandate.[22]

On June 21, 1974, as the law was officially published, 193 CDU/CSU members of the Bundestag challenged the constitutionality of the law, and the Federal Constitutional Court (equivalent to the U.S. Supreme Court) issued a temporary

injunction. Two weeks later, five of the ten state governments — Baden-Württemberg, Bavaria, Rhineland-Palatinate, Schleswig-Holstein, and the Saarland — joined the 193 Bundestag deputies in complaining to Germany's highest court.[23]

The Federal Constitutional Court heard arguments in November and issued its decision (*Entscheidungen des Bundesverfassungsgerichte*) on February 25, 1975. The Court interpreted the law according to West Germany's Constitution, or Basic Law.

In its decision the Court stated that the law, which allowed abortion on demand during the first trimester, violated the Basic Law, specifically Article 2, Section 2, which stated that "Everyone shall have the right to life and to the inviolability of his person." It then made a statement when life begins: "Life in the sense of the historical existence of a human individual exists according to definite biological-physiological knowledge in any case from the 14th day after conception."[24] The Court stated that life was a continuum:

> The process of development which has begun at that point ... is a continuous process which cannot be sharply demarcated and does not allow for a precise division of the various stages in development of human life.[25]

The Court continued, stating that the legal value of unborn life was to be respected in principle with that of born life. The law of April 1974 was struck down because it did not balance the interest of the unborn evenly with the mother. Pregnancy involves privacy, which is protected by the Basic Law, but to use this to allow abortion would be to upset the balance of born and unborn and thus engaged in an intellectual contradiction. The right of privacy was qualified in the case of pregnancy.[26] The Court emphasized that "abortion is an act of killing that the law is obligated to condemn."[27] The Court also stated that the "bitter experience" with Nazism had led it to value human life highly, and that in other countries where abortion had been legalized it led to increase in abortions.[28]

Only three of the eight justices were Catholics. They were all on the majority with three Protestants in a 6-2 vote. This majority did not talk about "ensoulment" but about science and human experience when they declared that life begins fourteen days after the male sperm and the female egg are united. Religion might have had some influence on the majority's concern with "life" and

"human dignity" but was remote (cultural), not proximate (denominational).[29] Even the two dissenting (female) justices, after noting changing social morality such as an increase in sexual activity, illegal abortions, and the widespread opinion that life in the early months of pregnancy differed from born life (which were the chief reasons for their dissent), nevertheless upheld the importance of unborn human life and said that the state was obliged to protect it.[30]

Hence, while in the U.S. most state legislatures either banned abortion outright or had restrictions on abortion, all of which were overturned by the U.S. Supreme Court on January 22, 1973; in West Germany we had just the opposite. Here the national legislature legalized the practice in 1974 but this legislative action was overturned by that country's highest court on February 25, 1975. A generation after the Nuremberg Trials, *Roe v. Wade* reflected the values of individualism, privacy and minimal state interference in the matter of abortion, while the West German High Court's decision (which had no name), reflected societal concerns and limits on individualism and privacy.[31]

The Federal Court's decision, however, did not end the matter. The German High Court also stated that laws protecting prenatal life did not apply with equal vigor when it was a question of protecting post-natal life.[32] The Court said that abortion was permitted in four cases:

1) *Medical* — danger to the life or health of the woman. This had essentially been the grounds for abortion in Germany from 1935 to 1975.

2) *Eugenic* — an "irremediable defect" that would make continuation of the pregnancy "unreasonable." Abortion in this case could be up to twenty-two weeks.

3) *Ethical* — a pregnancy that was the result of rape or incest. Abortion here would only be allowed up to twelve weeks.

4. *Emergency Situation* — this was, even more so than the "health" indication of reason #1, a catch-all condition. It justified abortion on the grounds of a "hardship" from pregnancy. However, in actuality, the emphasis of the High Court on the right to life of the unborn child tended to limit greatly the application of this provision.[33] The Bundestag then drafted a bill that allowed abortion under these four conditions. On February 12, 1976, almost a year from the German High Court's decision, this law passed by a vote of 234 to 181, although 75 fewer members were present for this 1976 vote than

for the 1974 vote. Again, it was a party-line vote similar to 1974. The law took effect on June 21, 1976.[34]

What has been the result of legalization in both countries? The answer is that the High Court in West Germany, by declaring abortion to be killing and wrong for most reasons, and linking it to Nazi activities toward human life, reduced the number of German women aborting, compared to the U.S.

In 1979 there were 82,788 abortions in West Germany,[35] in a population of 60 million.[36] This works out roughly to an abortion for every 723 people. In 1980 there were almost 1.3 million abortions in the U.S.[37] in a population of 226 million.[38] This works out roughly to an abortion for every 173 people. Comparing these numbers one can see that the West German rate per population is less than one-fourth the American rate.

In late 1990 West and East Germany united for the first time in 45 years. The Basic Law of West Germany became the constitution for the united Germany, and the laws of the West took precedence over the laws of the East.[39] This meant that the East Germans ("Ossies"), who had had abortion on demand, initially at least, found themselves under the stricter 1976 abortion law of (former) West Germany. All Germany was under an abortion law stricter than that of the U.S. The Ossies resented this and, since they had representatives in the new Bundestag, were able to have the law changed. In June 1992 Germany made abortion on demand legal for the first trimester. The limit of three months was a compromise as was the requirement that there be three days of counseling before the abortion.[40] The constitutionality of this 1992 law was in doubt from the start because it was similar to the 1974 law which had been held unconstitutional by the (former) West German Supreme Court, which was not the supreme court for all of Germany.

This situation raised a number of questions. On the one hand, would the German nation follow the experience of the U.S. and let the experiences of the Ossies take it to a more liberal stance on abortion? On the other hand, might the German people stand as an example of a more conservative stance on abortion than the U.S.?

The latter experience prevailed when, on May 28, 1993, the German High Court, again by a 6-2 vote, declared the 1992 law unconstitutional. The Court ruled that the state has an obligation to protect human life and that human life begins at conception. It did allow abortions during the first trimester in cases of a threat to the

mother's life, a serious threat to the mother's health, rape, and genetic abnormalities of the unborn. This much of the ruling was roughly similar to the 1975 Court ruling.

But the Court also stated that abortion for reasons other than the above would not be punished if the woman had attended counseling weighted in favor of convincing her to carry the baby to term. In practice, therefore, the Court left the decision to the woman during the first trimester but stated that she must receive advice strongly affirmative of life.[41] The Court then, as in 1975, ordered new legislation to reflect the main points of its decision and to tighten up the law again.[42]

Excerpts from the high points of the 1993 decision illustrate strongly the German Supreme Court's concern for protecting life in the womb:

> 1) The Basic Law [the German Constitution] mandates the state to protect humankind, including unborn children. This protection has its basis in Article 1, Section 2 of the Basic Law; it is more clearly spelled out in Article 2, Section 2.... The proper approach for the law must be to accept the unique right to life during the unborn child's development. This right to life is not established simply by its acceptance by the mother.
> 3) Proper protection due to the unborn child works frequently against its mother. Such a protection is possible only if legislators forbid basic abortion practices and with this impose [on the mother] the basic duty to carry the child to term....
> 4) Abortion must be viewed as being basically wrong for the entire length of the pregnancy and accordingly be forbidden (Confirmation, Federal Constitutional Court, 39, 1 [44] = Basic European Laws, 1975, 126 [140])....
> 13) The state's protective obligation makes it necessary that the woman and the physician both work together for the protection of unborn life.[43]

Germany will, most likely, continue to restrict abortion far more than the U.S. Its highest court has basically condemned the practice twice in less than twenty years, and has drawn parallels between abortion and Nazi attitudes toward life. The U.S. used to think this way. When the subject of abortion is considered in the context of the Nuremberg Judgements, where the U.S. condemned the Germans for their use of it during World War II, and even condemned abortion *per se*, the inescapable conclusion is that America has no monopoly on virtue and Germany has no monopoly on vice.

Notes

Bulletin — publication by the West German Federal Gov't.
Kommers — translation of the chief points of the 1975 German Supreme Court decision on abortion.

1. The Tribunal stated: "The acts and conduct as substantially charged in the indictment [encouraging and compelling abortions] constitute crimes against humanity ... and ... war crimes." See *Trials of War Criminals before the Nürnberg Military Tribunals, October, 1946-April, 1949*, vols. IV-V, "The RuSHA Case" (Washington, D.C.: U.S. Gov't. Printing Office 1949) IV, 610, 613, V, 153, 160-61, 166. These volumes cover the published testimony (c. 800 pages) of the case.

2. Ibid., IV, 686. See also Records of the U.S. Nürnberg War Crimes Trials, U.S.A. v. Ulrich Greifelt et al. (Case VIII), October 10,1947-March 10, 1948; The National Archives, Washington, D.C., Microfilm Publication 894, Roll 31, pp. 13-14; see also pp. 37-42. This microfilm covers the entire testimony (c. 5400 pages) of the case. Here the prosecutor James McHaney referred to Section 218 of the German Penal Code of 1871 which forbad the practice. For Hitler's legalization of the practice for "unfit" Germans and for non-Germans, see West German Federal Republic, Press and Information Office, *Bulletin 6, May 27, 1980* (Bonn: Deutsche Bundesverlag GmBH) 13. Cited hereafter as *Bulletin*. Germany, *Reichgesetzblatt* I, No. 86 (Berlin 1933) 530. Richard Grunberger, "The Family in Nazi Germany" in *Everyman in Europe: Essays in Social History*, vol II, *The Industrial Centuries*, ed. Allan Mitchell and Istvan Deak (Englewood Cliffs, NJ 1974) 304-5 and n.4. William Brennan, *The Abortion Holocaust: Today's Final Solution* (St. Louis: Landmark Press 1983) 18-19. For Weimar's liberalization, see *Bulletin* 13-14; Grunberger 305; Clarissa Henry and Mark Hiller, *Of Pure Blood*, tr. Erich Mossbacher (NY: McGraw-Hill 1976) 36.

3. Landon Jones, *Great Expectations: Americans and the Baby-Boom Generation* (NY: Ballantine 1980) 396.

4. Betty Friedan, *The Feminine Mystique* (NY: W.W.Norton 1963) 357-58.

5. Jimmye Kimmey, "How Abortion Laws Happened," *Ms.* (April 1973) 49, 118.

6. Ibid., 118.

7. Ibid.

8. The U.S. Dept. of Health and Human Services and the Center for Disease Control report that blacks, who are 12% of the U.S. population,

obtain 30% of the abortions in the U.S. See *The World Almanac and Book of Facts, 1990* (NY: World Almanac-Scripps Howard 1991) 846. Cited hereafter as *World Almanac*.

9. See Francis Williamson, "Population Pollution" in *Population Crises: An Interdisciplinary Perspective*, ed. Sue Titus Reid and David Lyon (London: Scott, Foresman and Co. 1972) 118-19; Bernard Berelson, "Beyond Family Planning," ibid., 177-91; Garrett Hardin, "The Tragedy of the Commons," ibid., 192-200; William Oltmans (ed.), *On Growth* (NY: Capricorn 1974) 104-7.

10. Lawrence Lader, *Abortion II: Making the Revolution* (Boston: Beacon 1973) 34-35.

11. Sally Rosleff and Toni Carabillo, "Women Have Power Ten Years After Roe" in *The Hartford Courant* (Jan. 22, 1985) editorial page. At the time of writing the authors were past presidents of the Los Angeles chapter of the National Organization of Women (NOW). This article was syndicated from the *Los Angeles Times*. See also Raymond Adamek, "Abortion and Public Opinion in the United States," supplement in *The National Right to Life News* (April 22, 1982) table 4, p.4. This article explained how the proponents' figures were misleading.

12. Rosloff and Carabillo; Roberta Graz, "Never Again" in *Ms.* (April 1973) 44-45.

13. Adamek, table 7, p.6. While this argument is made, even those advocating legalized abortion are uncomfortable with late term abortion. They concentrate on the mother's rights and not the unborn's. See Robert Ratermann (ed.), *Oral Arguments in the Supreme Court Abortion Decision* (St. Louis: Gateway 1976) 10-11, 15, 83.

14. Lawrence Lader, *Abortion* (NY: Bobbs-Merrill 1966) ch.9; Simone de Beauvoir, *The Second Sex*, tr. H.M.Parshley (NY: Vintage 1952) 133-135.

15. Rosloff and Carabillo; Graz 48. John T. Noonan, *A Private Choice: Abortion in America in the Seventies* (NY: Free Press 1979).

16. *Roe v. Wade*, 410 U.S. 113 (1973). 17. Noonan 20-21, 30.

18. *Roe v. Wade*, 410 U.S. 113, 163-64. 18. *Bulletin* 14.

20. Ibid., 15-17. 21. Ibid., 16-17.

22. Ibid., 17. Donald D. Kommers, "Abortion and the Constitution: the

Cases of the United States and West Germany" in *Abortion: New Directions for Policy Studies*, eds. Edward Manier, William Liv and David Solomon (Univ. of Notre Dame Press 1977) 89-90. Kommers has a translation of the chief points of the decision. A complete translation of the summary of the decision can be found in Harold O.J. Brown, *The Human Life Review* (Summer 1975) 75-85.

23. *Bulletin* 17.

24. Kommers 94.

25. Ibid.

26. Ibid., 94-95.

27. Ibid., 97. The Court also stated that striking down the abortion law was in accord with the abolishment of capital punishment in West Germany (Article 102). Ibid., 94.

28. Ibid., 98. *The New York Times* (Feb. 26, 1975) 1-2.

29. Kommers 104-105.

30. Ibid., 97, 100. These two judges also mentioned the lack of enforceability.

31. Ibid., 106-8.

32. Ibid., 96.

33. Ibid., see also *Bulletin* 17-18.

34. *Bulletin* 18. A copy of the law (revisions of Section 218) can be found on p. 12.

35. Ibid., 9.

36. *World Almanac* 712. The West German population hovered at this figure for years.

37. Ibid., 846. The figures are again from the U.S. Dept. of Health and Human Services and the Center for Disease Control.

38. Ibid., 552-53.

39. David Childs, *Germany in the Twentieth Century* (NY: Icon Editions, Harper Collins 1991) 259-60.

40. *The Hartford Courant* (June 26, 1992) A2. The vote was 356 to 283 with 18 abstentions. A more restrictive law proposed by Chancellor Helmut Kohl was defeated.

41. *Europaische Grundrechte Zeitschrift* (June 4, 1993) IX-X, 229. Cited hereafter as EuGRZ. The entire decision covers pp. 230-275. I am indebted to Helmuth Krause of the Connecticut Pro-Family Committee for help in this translation. See also *National Right to Life News* (June 14, 1993) 6.

42. *The Hartford Courant* (May 29, 1993).

43. EuGRZ, IX-X, 229.