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**Individual Rights vs. Collective Value in Paragraph 218:
The Role of Political Tradition in the Development of German Abortion Policy**

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Introduction

Within any given government, policy formation represents the states' contention between individual rights and collective interest. Democracies strive to find a balance that protects individual freedoms while serving the interests of the whole, a balance that will inherently be forced to adapt to social and political evolution. Policies surrounding abortion have been subject to extensive development over the past half century and, undoubtedly, have faced much resistance in the process, as it remains an issue polarized by personal convictions, religion, and political ideologies. In the end, however, abortion policy is framed by the same contention between individual rights and collective interest, and understanding this balance can inform an understanding of a state's ultimate interests and priorities. My work engages with this contention within the development of abortion policy in Germany and seeks to unpack the forces that ultimately contributed to contemporary abortion policy created during German Reunification. In conducting this analysis, I hope to draw out the conflicting conceptions of individual rights and collective value reflected in the abortion policies of the socially conservative, capitalist Federal Republic of Germany and the socialist German Democratic Republic. Ultimately these contradictory approaches to abortion rights would be forced to find a middle ground, and the process resulted in an incredibly complex approach to abortion regulation and remains (largely) the same today.

I model my analysis of German abortion policy off of a subfield of political science APD, or American Political Development, that traces mechanisms identified through historical analysis that come to shape the evolution of particular policy or political trends. In doing so, I hope to demonstrate the importance of recognizing political tradition in analyses of German policy

development. APD is a relatively new approach to political science and unsurprisingly, given the name, is focused on analyses of American policy. I contend, however, that this methodological approach is particularly appropriate for this topic as it accounts for a political culture and overarching ideology that plays a role in policy development even in the many varying systems of governance applied in 20th century Germany. Given this history, it is easy to fall into the trap of analyzing German policy in their distinct eras without contending with value systems and ideologies that outlast governments but my work will trace a political tradition through the 20th century and assess its impact at each intervention point. Furthermore, as American political scientist Rogan Kersh explains, “APD focuses on the causes, nature, and consequences of key transformative periods and central patterns in American political history”¹. In my analysis of German abortion policy, this is the process that I will be undertaking in order to “build theories about political change”².

By tracing the history of abortion policy, I identify the political tradition that informs the creation of German abortion law, specifically Paragraph 218 of the Grundgesetz, the Basic Law of the German Constitution: the framing of abortion rights as an issue of collective value. The contention with the philosophies of individual rights and broad social value is clearly demonstrated by the political Zeitgeists of the Weimar Republic and National Socialist Era and resulting abortion laws that are reflective of these states’ interests, ultimately revealing this political tradition. In breaking down the legal text and political rhetoric surrounding the adoption of abortion regulation in the GDR and FRG, their respective grappling with a shared political tradition reveals both the states’ broader goals and their view of women’s roles in their society. The resulting contradictory policies that offered divergent rights to those seeking abortions, in

¹ Kersh, Rogan. “The Growth of American Political Development: The View from the Classroom.” *Perspectives on Politics* 3, no. 2 (2005): 335–45. <http://www.jstor.org/stable/3688034>.

² Ibid.

turn, created the framework for one of the most contentious policy debates during the German reunification process beginning in 1989. The newly unified Germany, in fact, could not reach an agreement and consequentially, the issue of abortion was delayed to 1992, only to have the policy struck down by the German Federal Constitutional Court. Court intervention required that the *Bundestag*, the German parliamentary body, alter the 1992 law to more accurately reflect the state's constitutional obligation to protect unborn life, identified by the Court in 1976 and reaffirmed as a cornerstone of abortion law in 1993. However, these state interests clashed with those prioritized by the GDR in 1972 that recognized women's right to abortion access and a newly unified Germany was presented with the challenge of adhering to Western legal tradition while not stripping away the rights of East German women.

In the merging of individual rights and social value to develop policy, a process performed by all governments, Germany has a history of framing abortion rights as an issue of collective value. I argue that a comprehensive grasp on modern German abortion law articulated in Paragraph 218 and colored by Paragraph 219 that emerged from the Reunification in 1995 must grapple with the arduous process that combined the East and West's contradicting approaches to the adherence to political tradition surrounding reproductive policy. In breaking down the intervention points of 1972-1976 and 1990-1995—both of which involved conflicts between the legislative body and the Court—, the legislative rhetoric and application of abortion policy offer valuable insight into the interests of the state that policy serves³. By identifying the mechanism of a German political tradition that frames abortion rights as an issue of collective value in the transformative periods of the Weimar and Nazi eras, I trace a through line of the contentions with this framework to a comprehension of contemporary German abortion policy that underscores the interests of the state.

³ I use the term intervention points, to label periods of major legislative reform to abortion policy.

The Basics of German Abortion Policy: Introducing Paragraph 218 and the FCC

Since the unification of Germany under Kaiser Wilhelm and Otto von Bismarck in 1871, the regulation of abortion has been outlined in Paragraph 218 of the Criminal Code. This work will analyze the changes made to the legal text over the course of the twentieth century, coming to the Paragraph 218 that emerged from the Wiedervereinigung and still serves as Germany's policy on abortion today. Unsurprisingly, the first iteration of Paragraph 218 in 1871 criminalized its procurement and performance, stating:

§ 218

(1) Eine Schwangere, welche ihre Frucht vorsätzlich abtreibt oder im Mutterleibe tötet, wird mit Zuchthaus bis zu fünf Jahren bestraft.

(2) Sind mildernde Umstände vorhanden, so tritt Gefängnißstrafe nicht unter sechs Monaten ein.

(3) Dieselben Strafvorschriften finden auf denjenigen Anwendung, welcher mit Einwilligung der Schwangeren die Mittel zu der Abtreibung oder Tödtung bei ihr angewendet oder ihr beigebracht hat.⁴

Importantly, the original version of Paragraph 218 places the same degree of onus on the procurer and performer of an abortion, automatically securing the responsibility of reproductive choices in the hands of the medical community in addition to those with reproductive capabilities. In this way, the right to abortion is not a matter of the individual but rather, is to be decided by doctors serving the broader interests of the community. It is also notable that policy regarding abortion falls within the Criminal Code of German law, designating it as a crime, not a right, from the outset.

Within the narrative of abortion policy development in Germany, the Federal Constitutional Court plays a transformational role, and explaining its power is key to any

⁴ Januar 1872: Gesetz vom 15. Mai 1871.

cohesive comprehension of the evolution of Paragraph 218. Over the course of the 20th century, the development of German abortion policy was greatly affected by the push and pull relationship between respective legislative bodies and the court. This tug of war between the constitutional foundation originally established at unification in 1871 and the varying state interests represented by a wide range of governments in a short time span embodies the value and limitations of this democratic balance of powers in a complex and unique situation. The FCC's propensity to adhere to legal traditions and the constitutional text perhaps allows for the preservation of values that had previously been tossed aside, but it also prevents progress in the law that corresponds to the evolution of the electorate. This dynamic can call into question the role that a federal judiciary *should* play in a democracy⁵. As dictated by Article 21, Paragraph 4 of the Grundgesetz, or Basic Law, the Federal Constitutional Court has the enumerated power of judicial review of any law passed by the *Bundestag*, so long as state government or one third of the *Bundestag* calls for it⁶. Known as abstract judicial review, this influence, unlike in systems like the United States', does not require contradictory rulings by lower courts to judge the constitutionality of a law and therefore greatly expands the power of the FCC⁷.

This enumeration of powers, as well as a grasp of the Basic Law's approach to individual rights in relation to the state, is central to the evolution of Paragraph 218. Law professor and scholar Dr. Jeremy Telman views the Basic Law as an "attempt[] to reconcile individual and communitarian interests, rather than seeing individual liberty as something that needs to be protected from an intrusive state," citing a case in which the Court asserted that "Basic Law has decided in favor of a relationship between individual and community in the sense of a person's

⁵ Similar questions are arising in the United States and interestingly, also as the result of abortion rights

⁶ Artikel 21, Absatz 4 GG

⁷ The power of individual judges or those who appoint them is not necessarily as extensive as in systems like the United States, however, as judges serve only one 12 year term.

dependence on the commitment to the community”⁸. Throughout the many attempts at reform of Paragraph 218, this conception of the relationship between the individual and the state will be prevalent both in legislation and court rulings.

Section I

Identifying Political Tradition:

Abortion Policy in the Weimar and NSDAP Eras

Paragraph 218 in the Weimar Era: Prioritizing Quality over Quantity

Following the end of World War I, the fall of the German Empire, and the shaky establishment of Germany’s first democratic government struggling under the conditions of the Treaty of Versailles, the population faced a social and economic blight that shaped new policies, specifically progressive policy from the Left that prioritized the quality of life of the working classes. Policy and political rhetoric of the Weimar Era was largely polarized, dominated by socialists and communists on the Left and social conservatives and increasingly radical groups on the Right. This environment left little room for democrats and proponents of individual rights—the Weimar Republic is often jokingly referred to as a republic without republicans. However, the era introduced a spirit of individuality, particularly for women, that previously had little to no influence on the political landscape.

As a critical period for the development of German political tradition, female identity, and democratic experimentation, the Weimar Era offers many valuable insights into understanding policy development. My analysis employs this rich period very specifically for its

⁸ Jeremy D.A. Telman, “*Abortion and Women's Legal Personhood in Germany: A Contribution to the Feminist Theory of the State*”, 24 N.Y.U. Rev. L. & Soc. Change 91 (1998), 129.

dealings with abortion policy and the political tradition that underscored it. For this reason, I will mainly engage with one text and its discussion of the political environment surrounding abortion and female bodily autonomy during the Weimar Era.

In her 1995 book, *The Politics of the Body in Weimar Germany: Women's Reproductive Rights and Duties*, Cornelia Osborne aims to “illustrate the changing relationship between state and society” during the Weimar Republic by exploring the social and political contestations “between *Frauenkörper*, the bodily concerns of individual women, and the *Volkskörper*, the body politic”⁹. In her analysis, Osborne sets up the dichotomy of social value and individual rights but specifically identifies how state regulations surrounding population reveal the state’s contention—or rather, lack thereof—with this dichotomy. By framing policy reform and political rhetoric in the conflicting interests of *Volkskörper* and *Frauenkörper*, Osborne contextualizes how “the tactics which the German state and its agencies used to regulate the size and balance of populations...accord with their social, economic, and political beliefs rather than with the views and wishes of individuals”¹⁰. Central to Osborne’s overall argument is the correlation of pro-natalist population policy in the Wilhelmine, Weimar, and Nazi eras that centered communal interest in policy development and reform rather than identifying the Weimar period as a contradiction to its predecessor and successor. While this value judgment determined by the degree of ‘service to the German Volk’ manifested itself differently in each respective era and was influenced by different social factors, the tradition nonetheless defined established abortion policy and the forces calling for its reform. In fact, asserts Osborne, the Weimar Era demonstrated the degree to which “the discourse of population rarely concerned itself with individuals but saw fertility predominantly in terms of the German people as a collectivity [and]

⁹ Cornelia Osborne, *The Politics of the Body in Weimar Germany: Women's Reproductive Rights and Duties* (Ann Arbor: Univ. of Michigan Press, 1995), xvi.

¹⁰ *Ibid*, xi.

personal reproductive decisions were judged almost exclusively by their influence on the nation,” despite strong female political and medical voices, new social realities, and a less rigid perception of female identity¹¹.

Under the imperial government, especially during the First World War, policy regarding reproduction was centered around population growth for the benefit of the German “Volk”. Already declining birth rates and the unimaginable toll of the war on the male youth required a policy, in the eyes of the government, that prioritized high birth rates unencumbered by birth control and abortion. The Penal Code of 1871 strictly prohibited and criminalized abortion as a threat to the health of the community and with the norm established under the imperial government, Weimar legislators deemed state intervention in reproductive matters as sufficiently consequential to “the greater good of the community” to justify state intervention¹². However, the intention behind proposed reform, driven now by ideals from the Left, shifted focus from a prioritization of “quantity” to one of “quality”. Osborne identifies this shift as the way in which progressive ideology was applied to the political and cultural tradition of ‘common good’, asserting that “while imperial planners were too obsessed by the specter of depopulation to consider 'selective breeding', the economic and social crisis after the First World War persuaded policy-makers to turn increasingly to cost-effective negative eugenics to improve public health and quality of the next generation”¹³. Even so, as in the Wilhelmine Era, reproductive policy remained a tool of the state employed to bolster national power and the communal strength of the population, all the while maintaining a sense of “individual biological responsibility towards the *Volk*”¹⁴.

¹¹ Ibid, 1.

¹² Ibid, 35.

¹³ Ibid, 204-205.

¹⁴ Ibid.

The emphasis on quality over quantity was made a clear priority early in the formation of the state as demonstrated by the Population Policy Committee of the Prussian Assembly's commitment to "'improving the quality of individual citizens, especially of the coming generation', rather than attempting to stimulate the birth-rate" in its first meeting in March 1919¹⁵. In its progressive nature, this prioritization created an avenue through for which a more lenient abortion law could be advocated , as it would allow for both social and eugenic justifications. Both the KPD and SPD parties pursued Paragraph 218 reform under this framing of liberalizing abortion policy as it aligned with their effort to improve the quality of life of the working class. This political strategy of "'fewer and better' children" from the Left was justified "in the presumed interests of the wider community [and] in deference to the growing preoccupation with eugenics, for which abortion was a useful device"¹⁶. Essentially, advocacy for increased accessibility to abortion through the reform of Paragraph 218 was not only politically popular in its increasing of individual choice but also ideologically justifiable—both by holding to established political tradition around population policy and to the values of Marxist ideals— in its commitment to the overall betterment of the body politic. The sentiment of the SPD is demonstrated clearly by legal scholar and SPD party member Gustav Radbruch's explanation of his party's stance on the issue, "We are far from espousing the individualist idea advanced by bourgeois feminists...that everyone should be master of his/her body and have the right to self-determination. The socialist idea demands responsibility towards the community even where our bodies our concerned"¹⁷.

Socialist emphasis on reproductive choice for the benefit of the community, however, was not the only advocacy for abortion reform in the Weimar Era. Among all of this political

¹⁵ Ibid, 40.

¹⁶ Ibid, 181.

¹⁷ Ibid, 180.

deliberation, voices of female doctors and politicians prioritizing individual rights served as an activist wing for this push to liberalize abortion rights. The feminist approach to abortion rights taken by female doctors, legislators, and activists is a reflection of a broader social and political reality of the Weimar Era— the presence of the *Neue Frau* identity that emerged during the social and economic challenges of World War I and challenged preconceived notions of gender roles and duties. The devastation of World War I and the implementation of a democratic government in the form of the Weimar Republic prompted a critical opening for the expansion of women's rights and emergence of female voices. Despite the ever-present culture of domesticity, early Weimar years saw increasing female representation in the workforce, including as doctors, in the Reichstag, and in positions of cultural influence. In the realm of population policy, the birth-rate crisis itself helped drive this expansion of female power as “policy-makers before the war, worried about dwindling national strength, were only too keen to offer material incentives to women in return for more babies”¹⁸.

Increased political and social power allowed women to articulate messaging in support of abortion reform that, contradictory to other lines of argument, recognized reproductive rights as an issue of individual rights of women and not population policy subject to dehumanizing methods of state intervention. In her assertion, “Instead we must grant people freedom to develop and give women control over their own bodies”, Anna-Margarete Stegmann, a female doctor and representative for the SPD in the Reichstag, articulated a stance in support of abortion liberalization contradictory to the predominant SPD messaging¹⁹. This rhetoric, while not indicative of the broader SPD political platform, nonetheless found it had a place in the political and social discourse and was seemingly not so radical as to be censored. In her discussion of

¹⁸ Ibid, 210.

¹⁹ Ibid, 39.

these voices, Usborne outlines four general positions held by female doctors at the time, justifying their feminist approach to abortion reform:

- (a) they were better qualified to judge abortion than men;
- (b) women's well-being was of overriding importance;
- (c) pronatalist concerns were irrelevant;
- (d) abortion did not signify moral corruption.²⁰

Although not necessarily “mainstream”, these assertions reveal the presence of positions on abortion rights that centered the individual rights of women and rejected the notion that reproductive capabilities were a communal asset. The qualification of views advocating individual female autonomy as “activist” is necessary to our understanding that despite the presence of these views and arguments for abortion access, they did not serve as the driving justification for or intention behind Paragraph 218 reform. Despite female doctors’ attempts “to place women at the centre of the [abortion] debate and at times use[] feminist arguments similar to those used today”, the predominant messaging “stressed its social dimension, some emphasizing national-moral, others class implications,” as indicated by SPD and KPD positioning²¹.

After years of attempts at reform, the SPD were able to table a motion moderate enough to be adopted in the polarized Reichstag. Despite being a far cry from the legalization of abortion that many on the Left advocated for, the amended law of May 18th 1926 made “Germany’s abortion law the most lenient in Western Europe,” much to the chagrin of conservatives²². The text of the reformed Paragraph 218 read:

²⁰ Ibid, 193.

²¹ Ibid, 209.

²² Ibid, 174.

§ 218

(1) Eine Frau, die ihre Frucht im Mutterleib oder durch Abtreibung tötet oder die Tötung durch einen anderen zulässt, wird mit Gefängnis bestraft.

(2) Ebenso wird ein anderer bestraft, der eine Frucht im Mutterleib oder durch Abtreibung tötet.

(3) Der Versuch ist strafbar.

(4) [1] Wer die im Abs. 2 bezeichnete Tat ohne Einwilligung der Schwangeren oder gewerbsmäßig begeht, wird mit Zuchthaus bestraft. [2] Ebenso wird bestraft, wer einer Schwangeren ein Mittel oder Werkzeug zur Abtreibung der Frucht gewerbsmäßig verschafft. [3] Sind mildernde Umstände vorhanden, so tritt Gefängnisstrafe nicht unter drei Monaten ein.²³

Consolidating Paragraphs 218-220 of the 1871 Penal Code, the new version of Paragraph 218 removed the punishment of penal servitude and, along with a decision by the Supreme Court of March 1927, recognized the validity of therapeutic abortions in situations potentially lethal to the mother. Furthermore, these changes “implied that termination of pregnancy was henceforth a medical prerogative”, placing more power into the hands of doctors who often saw themselves as “custodians of population strength” and espoused an “awareness of responsibility not only towards the patient but also towards the future of the Volk”²⁴. This articulation of medical priorities exemplifies the degree to which the political tradition of the ‘common good’ allows for social value to outweigh individual rights, even as policies regarding individual issues such as abortion are liberalized.

Once again reaffirming Osborne’s argument of the contention between the individual and the state, the rhetoric and reform around abortion policy in the Weimar Era reveals “the placing of the *Volkkörper* before the *Frauenkörper*, the body politic before the body female”²⁵. In this way, Osborne asserts, Weimar abortion policy aligns the progressive beliefs of the Left from the

²³ 8. Juni 1926: Gesetz vom 18. Mai 1926, Art. 71 der Verfassung des Deutschen Reichs vom 11. August 1919, Reichsgesetzblatt 1919 Nummer 152 vom 14. August 1919 Seite 1383-1418.

²⁴ Ibid, 188.

²⁵ Ibid, 212.

SPD and the KPD with the political tradition of understanding population policy as a vital interest to the broader population, one consequential enough to justify state intervention. Essential to our understanding of the contention between social value and individual rights, Usborne traces the shared assumption of Wilhelmine, Weimar, and Nazi policy-makers that “politics of the body’ ranked equally with other domestic political issues, that fertility control and reproduction should be medicalized, and that in reproduction the common was more important than the individual good”, identifying a political culture of understanding abortion rights as a communal issue and reproduction as a community asset.

Paragraph 218 under the Third Reich: Pursuing Eugenic State Interests through Increased Punity and Inconsistent Application

Similarly to my discussion of abortion policy during the Weimar Era, the following section focused on NSDAP rule will bring into conversation a text with a focused lens on abortion legislation and its defining political traditions during this period. Given the extensive research and analysis of the politics of this time, I will be maintaining a narrow focus on abortion rights and how the interests of the Nazi state are reflected in the reforms made to Paragraph 218. Henry P. David, Jochen Fleischhacker, and Charlotte Hohn’s “Abortion and Eugenics in Nazi Germany” provides this specific scholarly approach, so my analysis will draw primarily from this text. The changes made to Paragraph 218 under the Nazi regime are a blatant demonstration of the state’s radical eugenic interests in their rhetorical justification, punitive nature, and inconsistent application. Despite the changes, however, the state’s contention with the issue of abortion drew from existing notions of population policy that are meant to contribute to the strength of the German Volk. Furthermore, David et. el’s argument ties cohesively with

Usborne's framing of the individual rights and social value dichotomy as she argues that "Nazi eugenic legislation with its peculiar blend of pro- and anti-natalism combined many of the features of the autocratic pre-war quantitative policy as well as of Weimar's more democratic qualitative policies"²⁶. In this way, we can understand the Nazi abortion policy as drawing from a political tradition of valuing what the regime deemed as the communal strength of the German Volk above the individual rights of women.

The Nazi objection to the liberalization of abortion rights during the Weimar Era could perhaps not be more clearly demonstrated than by Arthur Gutt, who served as the Ministerial Director for Racial Culture and Heredity in the Public Health Department and later as the Head of the Office for Population Policy and National Hygiene. In his condemnation of Weimar abortion rhetoric and reform of Paragraph 218 he asserts,

Everything was subordinated under the goal of benefiting the individual...They left it up to each woman to undertake the murder of her own child in her womb...Yet people talked and talked of public health, of the rights of women, of the emancipation of women. In reality they made the German woman a slave of her job, they took advantage of her dilemma, they drove her onto the streets, made her a "lady-friend," destroyed the German family and the sense of family²⁷.

Gutt's view and portrayal of Weimar social policy demonstrates the Nazi rejection of individual value despite that prioritization not being the driving force behind the 1926 Paragraph 218 reform. Recognizable in this argument is a clear emphasis on social value above the individual and socially conservative views of women's roles that frame reforms made to Paragraph 218. While the Weimar approach to abortion of "quality over quantity" exudes a degree of eugenic beliefs, the Nazi state carried this tradition to genocidal extremes, exemplified by the argument

²⁶ Ibid, 205.

²⁷ Joyce Mushaben, Geoffery Giles, and Sara Lennox, "Women, Men, and Unification: Gender Politics and the Abortion Struggle since 1989," in *After Unity: Reconfiguring German Identities*, ed. Konrad Hugo Jarausch (Providence, R.I.: Berghahn Books, 1997), 144.

that “abortion should be permissible only on racial grounds, such as when one partner was of ‘impure blood’”²⁸. Under the Nazi policy regime, factors such as blood status were necessary determinants for “the degree of punishment to be imposed on the physician, midwife, or any untrained person who terminated an unwanted pregnancy” and weakened the “vital energy of the people”²⁹.

This ideological basis was critical in the Nazi approach to the issue of abortion, and drove the party’s early attempts at increasing the severity of Paragraph 218. In March of 1930, Nazi members of the Reichstag tabled a bill that proposed to nationalize and racialize the legality of procurement of abortion. The language of the bill is frighteningly transparent in its anti-Semitic, racist, nationalist and eugenic goals:

Whoever undertakes to artificially block the natural fertility of the German Volk to the detriment of the German nation, or promotes such endeavors by word, publication, picture or any other means, or who by mixing with members of the Jewish blood-community or colored races contributes to the racial deterioration and decomposition of the German Volk, or threatens to contribute to such endeavors, will be punished with a penitentiary sentence for racial treason³⁰

While this attempt to extend Paragraph 218 to cover Nazi racial concerns failed, its reasoning behind abortion criminalization rooted in the eugenic notion of “racial deterioration” and nationalist sentiment is critical in our understanding of what political and social ideologies drove the later reform of the law.

The first reform made to German abortion law by the Nazi party was not directly to Paragraph 218, but was a reintroduction of Paragraphs 219 and 220 on May 26th 1933. These two Paragraphs of the Reichsgesetzblatt, the Reich’s law gazette, through which laws were made

²⁸ Henry P. David, Jochen Fleischhacker, and Charlotte Hohn, "Abortion and Eugenics in Nazi Germany," *Population and Development Review* 14, no. 1 (1988): 97, <https://doi.org/10.2307/1972501>.

²⁹ *Ibid*, 95.

³⁰ *Ibid*, 85.

public, targeted not the women attempting to procure abortions, but the doctors or unprofessional third parties who would perform the operation or assist the woman in obtaining one. Needless to say, policy such as this is incredibly dangerous to the health of those pregnant, as it removes most options in its dissuasion of medical assistance. Significantly, Paragraph 219a which “declared that anyone who, for the purpose of abortion, advertises or recommends certain articles or procedures, or exhibits them to the general public, will be punished by a fine or a prison sentence for a period not exceeding two years” was recently removed from the law on June 24th 2022. As in the Weimar Era, the decisions of the medical community were being used to determine access to abortion and were counted on to further national interests. In September 1933, the Berlin Council of Physicians revealed its involvement in the increasing inaccessibility of lifesaving abortive aid in its proclamation that the practice of abortion,

...shall be exterminated with a strong hand....The Council warns all practitioners who may seek to save their practice in abortion, by alleging that they only take cases in which abortion has already been attempted, that proceedings will be taken against every evil-doer who dares to injure our sacred healthy race³¹.

Rhetoric such as this, particularly in tandem with a punitive state, not only has the effect of making abortion nearly entirely inaccessible but also subjects women to the possibility of lethal medical emergencies left untreated as medical professionals fear retribution for aiding in any prenatal treatment that could result in the loss of a pregnancy³².

Paragraph 218 itself was not reformed by the Nazi regime until 1943, but the introduction of Paragraphs 19 and 20 and the use of the medical profession to pursue pro-natalist and eugenic practices allowed for the same abortion policy to be practiced differently. In its dissuasive nature, Paragraph 219 functioned as it would in later years, taking on some onus in mitigating the

³¹ Ibid, 90.

³² Unfortunately, this has been a common occurrence in some states in the United States since the overturning of Roe v. Wade

prevalence of abortion, allowing Paragraph 218 to remain not overly restrictive. In the case of Nazi Germany, however, the incentive for a more lenient Paragraph 218 was not the result of a liberal or progressive sentiment. Rather, placing this degree of responsibility in the hands of medical professionals rather than creating a well-defined and stricter Paragraph 218 allowed for perhaps the most notable aspect of Nazi abortion policy—its inconsistent application intended to serve the eugenic goals of the Nazi state.

As noted previously, early Nazi attempts to address abortion regulation demonstrate the degree to which they regarded the vitality of the German Volk and racial purity as the driving considerations behind reproductive policy. The liberalization of Paragraph 218 during the Weimar Era in an attempt to promote quality over quantity created space for Nazi eugenic ideology to combine anti-natalist and pro-natalist policy in service to their state goals. The criminal punishment for the procurement of an abortion by a healthy woman of “German stock” was harsher than for Jewish, non-white, physically or mentally disabled, or politically radical women. David et al. note, for example, that in 1938 “a Jewish couple was acquitted of attempting to procure an abortion on the grounds that paragraph 218 did not apply to the protection of a Jewish embryo” and that an oral history has revealed that Jewish women obtained abortions during this time³³. This application of Paragraph 218 demonstrates the intention behind the policy to benefit the state’s anti-Semitic ideology, as the procurement of abortion by a Jewish woman was not considered a threat to the vitality of the German Volk but possibly even a positive action.

Other cases, however, were certainly regarded as a negative impact as “cases brought to court for offenses against the ‘Ordinance for the Safeguarding of German National Military

³³ Ibid, 94.

Potential' skyrocketed from 1,909 in 1940 to 4,345 in 1941 and 9,108 in 1942³⁴. Not all of these cases were considered worthy of prosecution but were even supported and “to cope with racially undesirable offspring” during these years, “Reich Health Leader Leonard Conti, in a secret Decree of September 1940, granted health officers permission to perform eugenic sterilization and abortion on prostitutes, women of inferior character, and those of alien race (Bock, 1984)³⁵. This interest in protecting “racially valuable” fetuses meant that in certain cases of “mixed” parentage, despite previous orders that allowed “female Ostarbeiterinnen to have abortions on request” (Circular, 1943), required the administration of a “racial examination” that would determine “whether the future parents were racially valuable and whether the non-German parent would be suitable for German integration³⁶. Speaking to this application of both anti-natalist and pro-natalist abortion policy, David et al. cite an example of “a Polish woman whose request for abortion was denied and was ordered to carry her pregnancy to term and then to give up the baby to the Nazi welfare organization caring for ‘racially valuable’ children³⁷.”

The Nazi regime did, however, reform Paragraph 218 itself in March of 1943, subtly altering some language from the 1926 version and adding a critical new component that characterized the Nazi conception of the practice of abortion:

§ 218

(1) Eine Frau, die ihre Leibesfrucht abtötet oder die Abtötung durch einen anderen zuläßt, wird mit Gefängnis, in besonders schweren Fällen mit Zuchthaus bestraft.

(2) Der Versuch ist strafbar.

(3) [1] Wer sonst die Leibesfrucht einer Schwangeren abtötet, wird mit Zuchthaus, in minder schweren Fällen mit Gefängnis bestraft. [2] Hat der Täter dadurch die Lebenskraft des deutschen Volkes fortgesetzt beeinträchtigt, so ist auf Todesstrafe zu erkennen.

³⁴ Ibid, 96.

³⁵ Ibid.

³⁶ Ibid, 100.

³⁷ Ibid.

(4) Wer einer Schwangeren ein Mittel oder einen Gegenstand zur Abtötung der Leibesfrucht verschafft, wird mit Gefängnis, in besonders schweren Fällen mit Zuchthaus bestraft.³⁸

Within the text, the first notable change is the use of the word “Leibesfrucht” that has a closer connotation with the potential life than merely “Frucht ihres Mutterleibes”. This acknowledgement of personhood of the fetus is slight but provides justification for increasing punitive measures that align more with how a state may criminalize homicide. Furthermore, the use of the active verb “abtötet” contributes to the connotation of homicide or infanticide. The reform also reintroduced the possibility of Zuchthaus for those found guilty. The most notable extension of Paragraph 218 and its punitiveness, however, was the addition of Section 3.1, that introduced the use of the death penalty in cases that were considered a continued threat to the vitality of the German Volk. Unfortunately, capital punishment for abortion procurement was put into practice, as David et al. cite multiple cases of its application such as “a 53-year-old married housewife with a sixth-grade education and a prior record of convictions for performing abortions beginning in 1923 [who] was executed in Mannheim in 1944”³⁹. In the addition of Section 3.1 of Paragraph 218, the Nazi regime presented an undeniably clear framework for their understanding of abortion and how its regulation could be used to further the state’s eugenic interests. Holistically, the policies were a drastic and horrifying expansion of framing abortion in eugenic terms contending with matters of the collective and not the individual.

³⁸ 30. März 1943: Artt. I § 2, III der Verordnung vom 18. März 1943.

³⁹ Ibid, 98.

Section II

One Tradition, Two Systems:

GDR and FRG Abortion Policy Development from 1972 to 1976

Introduction to Abortion Policy in Divided Germany

Upon the collapse of the Third Reich and the end of World War II, Germany was divided into two states, the German Democratic Republic in the East and the Federal Republic of Germany in the West. The GDR was initially occupied by the USSR and was subsequently modeled after Soviet socialism, whereas the FRG's initial occupation by France, the United Kingdom, and the United States all but guaranteed its development of a Western style capitalist economy and democratic government. The side by side evolution of these states who share a common history but who adopted polarizing systems and ideologies provides a unique case study for historians and political scientists alike who work to understand the impact and outcomes of state building and policy development. I argue, however, that this understanding is not complete without the acknowledgment and application of political norms fostered under preceding failed governments. The GDR's and FRG's contradictory approaches to the issue of abortion under their respective ideologies and systems both contended with the same dichotomy of individual rights and social value identified during the Weimar and Nazi eras but were determined by the priorities of different systems. In the case of abortion policy development, exactly how the GDR and FRG reckoned with the political tradition of framing reproductive rights as a collective issue is critical to an understanding not only of the respective states' interests but also how they would impact later policy formation during reunification.

Both the GDR and FRG experienced major reforms to their respective abortion policies during the period between 1972 and 1976. These two approaches to abortion regulation during the 1970s intervention point and their development in their respective states—one capitalistic and democratic and the other socialist—reveal opposing balances of values, and subsequently, state interests, applied to the question of abortion and even more broadly, women’s role in society altogether. The policies themselves contribute to a broader understanding of how the states understood and manifested the role of women holistically in their distinct cultures. Creating the framework of Fristenlösung (time period solution) versus Indikationslösung (indications solution) that would eventually serve as the foundation for the Wiedervereinigung policy debate, this period specifically demonstrates the differing policy outcomes possible despite these ideologically varying states contending with a common history framing both states⁴⁰. While both consider abortion policy to be consequential in population sustainment, the GDR’s legislative rhetoric reveals, at least at its surface, a recognition of the rights of individual women, while the FRG prioritizes the “unborn life” over the personhood and personal development of the mother. The nature, intention, and application of these policies is, of course, more nuanced than the reductive assertion that the East promoted female equality and the West did not, however. Analysis of these distinct policies, rather, reveals how legislative text and legal application must be taken together to identify the ways in which they serve state interests. Holistically, both policies surrounding abortion, while taking different approaches, reflect a broader goal of bolstering their respective communities that also underlined the policies of the two previous eras

⁴⁰ “Fristenlösung” refers to an approach to abortion law that determines legality according to time or phase. For example, in the United States before *Roe v. Wade* was overturned, the decision to get an abortion within the first trimester was a constitutionally protected right. In the second and third trimesters, states had the ability to restrict access to abortion. Indikationslösung refers to an approach to abortion law that outlaws all abortion unless certain conditions are met, such as a threat to the health of the mother or inviability of the fetus.

of population policy. In this way, there is a clear continuation of the political tradition of framing abortion rights in terms of collective value established and carried out during the preceding eras. Textually, however, GDR abortion policy represents a rejection of this established policy tradition while the FRG represents an adherence to it.

Policy development and application in the GDR and FRG was also inevitably influenced by the structures of the respective systems themselves. Despite being one of the few exceptions in history of the GDR government for its lack of consensus, development of abortion policy in the East was hardly a reflection of a democratic or popular political action⁴¹. We can understand the legislation, then, more as a direct reflection of the state's interests. On the other hand, the FRG abortion policy was not only determined by electoral politics, but, notably, the influence of the court exercising of its constitutional duty of judicial review⁴². Foreshadowing the contestation between the legislative body and the Court that prolonged the abortion question during reunification, the West's experience of abortion reform from 1972 to 1976 reveals the contending values that the FRG grappled with in its abortion reform process as well as the undeniable role of the Court's in the formation and reformation of legislation. These systemic differences between the GDR and the FRG, then, critically influence how the East and West contend with their shared political traditions surrounding reproductive politics and creates a reality in which individual and collective rights are prioritized differently in application than in legislation.

Abortion Policy in the GDR: A Rejection of Political Tradition?

⁴¹ "1972: Volkskammer zum Gesetz der Schwangerschaftsunterbrechung," audio, MDR, March 9, 2012, <https://www.mdr.de/geschichte/stoebern/damals/audio197014.html>.

Transcription created with Descript

⁴² Artikel 21, Absatz 4 GG

Under the newly established GDR, the initial policy regarding abortion in East Germany was relatively restrictive in nature. East Germany faced an unparalleled population crisis resulting from the devastation of the War, including the decimation of the male population, waves of people fleeing the advance of the Red Army, punitive economic measures taken by the USSR, and migration to the West. In this environment, women became invaluable in the areas of production and reproduction. Enacted on September 27th, 1950, the “Gesetz über den Mütter- und Kinderschutz und die Rechte der Frau” or the “Law on the Protection of Mother and Children and the Rights of Women” encompassed an expansive platform of welfare and aid to mothers and families. Paragraph 11 of the legislation specifically addresses abortion, effectively restoring the ban that had been temporarily put aside during the Post-War struggles. Exceptions to the ban outlined by Paragraph 11 included “when the life or health of the expectant mother would be seriously endangered by carrying the pregnancy to its full term; or secondly when one of the parents of the children suffered from a serious hereditary illness”⁴³. For the most part, however, access to abortion was largely restricted during the first two decades of the GDR⁴⁴.

On March 9, 1972, the GDR *Volkskammer* or People’s Chamber—the legislative body of the government—passed the Law on the Termination of Pregnancy. In the early 70s, the GDR strived to adopt reproductive and family policy that would allow women’s roles in production to take precedent over simple population growth and prioritize the well-being of the new generations. In this way argues, Dr. Telman in “Abortion and Women's Legal Personhood in Germany: A Contribution to the Feminist Theory of the State”, GDR policy reflects the Weimar Era SPD policies that prioritized quality over quantity in that it represents “a position that

⁴³ Mushaben, Giles, and Lennox, "Women, Men," 146.

⁴⁴ For an in-depth discussion of abortion during the period between 1950 and 1975, see Harsch, Donna. “Society, the State, and Abortion in East Germany, 1950-1972.” *The American Historical Review* 102, no. 1 (1997): 53–84. <https://doi.org/10.2307/2171266>.

focused not on women's rights but on their social needs"⁴⁵. It seems, however, that this political tradition of elevating communal value over individual rights was not so blatant within GDR legislation. In their article "The Advance of German Unification and the Abortion Debate", Samuel Blay and Ryszard W. Piotrowicz argue that the "philosophy behind the 1972 Law was that women had equality with men, and required control over their bodies to give real effect to this right"⁴⁶. This sentiment is certainly evident in the preamble to the law, which reads:

Die Gleichberechtigung der Frau in Ausbildung und Beruf; Ehe und Familie erfordert, daß die Frau über die Schwangerschaft und deren Austragung selbst entscheiden kann. Die Verwirklichung dieses Rechts ist untrennbar mit der wachsenden Verantwortung des sozialistischen Staates und aller seiner Bürger für die ständige Verbesserung des, Gesundheitsschutzes der Frau, für die Förderung der Familie und der Liebe zum Kind verbunden.⁴⁷⁴⁸

The preamble to the Law on the Termination of Pregnancy articulates a clear commitment by the GDR to the full economic and social equality of women under the law, which the government acknowledges cannot be realized without access to reproductive choice. In doing so, it seemingly rejects the political tradition of understanding abortion rights as an issue of collective value. Scholars, however, including Donna Harsch in her article, "Society, the State, and Abortion in East Germany, 1950-1972", have questioned whether this newfound

⁴⁵ Jeremy D.A. Telman, "Abortion and Women's Legal Personhood in Germany: A Contribution to the Feminist Theory of the State", 24 N.Y.U. Rev. L. & Soc. Change 91 (1998), 124.

⁴⁶Samuel K. n. Blay and Ryszard W. Piotrowicz, "The Advance of German Unification and the Abortion Debate," *Statute Law Review* 14, no. 3 (1993): 174, <https://heinonline.org/HOL/P?h=hein.journals/statlr14&i=187>.

⁴⁷ <https://www.verfassungen.de/ddr/schwangerschaftsunterbrechung72.htm>

⁴⁸ English translation of this text taken from: Samuel K. n. Blay and Ryszard W. Piotrowicz, "The Advance of German Unification and the Abortion Debate," *Statute Law Review* 14, no. 3 (1993): 174, <https://heinonline.org/HOL/P?h=hein.journals/statlr14&i=187>.

"The equality of the woman in education and work, marriage and the family, requires that the woman be able to make decisions for herself with regard to pregnancy and its continuation. The realization of this right is inseparably bound to the increasing responsibility of the socialist State and all its citizens for the constant improvement in the protection of the woman's health, the advancement of the family and the love for children."

commitment to gender equality and individual rights was a genuine incentive for this policy⁴⁹. I argue that the change made to abortion law under the GDR in 1972 should be understood within its context of adoption by an oppressive socialist government that crafted policy in service to the collective interest of the state, even if granting an illusion of individual rights. Rhetoric surrounding the policy reveals that these reforms to abortion in the GDR ultimately were a means of strengthening the socialist system and providing the state with an opportunity to intervene in personal and familial matters to establish further control over citizen's lives. Liberalization of abortion access came not from a prioritization of individual rights, but from a desire for state interference in the lives and personal choice of its citizens. This incentive behind the new policy does not come as a surprise, as the GDR functioned as a police state that did not allow for freedoms beyond a strict understanding of socialist order; anyone who broke from the way of life deemed acceptable by the state were stripped of any personal freedoms. Within the legal text, the GDR seemed to reject the German political tradition surrounding abortion rights, but its execution was, in fact, an adherence to the idea of reproduction as a social value.

One notable aspect of the process of the 1972 policy enactment was that the vote to pass the Law on the Termination of Pregnancy was the only law in GDR history to not pass unanimously, with 14 votes against and 8 members of the Volkskammer abstaining⁵⁰. This fact highlights the degree to which, even in a state where acts of political difference are looked down on and could be dangerous to one's position, abortion access remained a contentious issue. While it is difficult to identify the exact point of dissent for those who voted against the policy, the degree of apparent liberalization of abortion law reveals that this was a dramatic shift for a population that had experienced the framing of abortion access in the Criminal Code. As Blay

⁴⁹ Donna Harsch, "Society, the State, and Abortion in East Germany, 1950-1972," *The American Historical Review* 102, no. 1 (1997)], <https://doi.org/10.2307/2171266>.

⁵⁰ "1972: Volkskammer," audio.

and Piotrowicz describe, “it is fair to say that, up to twelve weeks of pregnancy, a woman had genuine control over her pregnancy under GDR law.”⁵¹ The text of the 1972 Law on the

Termination of Pregnancy read as follows:

§ 1.

(1) Zur Bestimmung der Anzahl, des Zeitpunktes und der zeitlichen Aufeinanderfolge von Geburten wird der Frau zusätzlich zu den bestehenden Möglichkeiten der Empfängnisverhütung das Recht übertragen, über die Unterbrechung einer Schwangerschaft in eigener Verantwortung zu entscheiden.

(2) Die Schwangere ist berechtigt, die Schwangerschaft innerhalb von 12 Wochen nach deren Beginn durch einen ärztlichen Eingriff in einer geburtshilflich-gynäkologischen Einrichtung unterbrechen zu lassen.

(3) Der Arzt, der die Unterbrechung der Schwangerschaft vornimmt, ist verpflichtet, die Frau über die medizinische Bedeutung des Eingriffs aufzuklären und über die künftige Anwendung schwangerschaftsverhütender Methoden und Mittel zu beraten.

(4) Die Unterbrechung einer Schwangerschaft ist auf Ersuchen der Schwangeren und nur nach den Bestimmungen dieses Gesetzes und der zu seiner Durchführung erlassenen Rechtsvorschriften zulässig. Im übrigen gelten die §§153 bis 155 des Strafgesetzbuches vom 12. Januar 1968 (GBl. I S. 1).⁵²

This approach to determining the legality of abortion is called *Fristenlösung*, rooting its legality in a time frame of 12 weeks and granting women the freedom to decide during this period. This model is utilized in many countries and is rooted in the ideals of individual rights and freedom of choice.

Analyzing the “debate” preceding the passing of the Law on the Termination of Pregnancy uncovers a similar rhetoric among two members of the GDR government, Health Minister Professor Dr. Ludwig Mecklinger, and Member of the Committee for Health Care, Frau

⁵¹ Blay and Piotrowicz, "The Advance," 175.

⁵² "1972: Volkskammer," audio.

Hildegard Heine, who each express the importance of individual choice. However, in breaking down the language of Dr. Mecklinger and Frau Heine, I find that any value for individual rights of women is undeniably tied to and justified by the sustainment of socialist society. Dr. Mecklinger justifies granting women the freedom to decide by qualifying that they will make the right decision for the good of the state and will raise their children to be responsible citizens of the socialist state:

Die Frauen der Deutschen Demokratischen Republik werden von den ihnen übertragenen recht verantwortungsbewusst Gebrauch machen. Hunderttausende von Frauen beweisen mit ihren Männern gemeinsam dieses Verantwortungsbewusstsein gegenüber der Gesellschaft und ihrer Entwicklung. Indem sie im Interesse des persönlichen familiären Glücks und des gesellschaftlichen Erfordernisses Kindern das Leben schenken, sie mit viel Liebe und Fürsorge in das Leben hinein führen und zu zuverlässigen Charakter festen, wissenden und vorwärts strebenden Bürgern unseres sozialistischen Staates erziehen. Eine solche Einstellung zum Kind und zur Familie wird steht die große und wirksame Förderung des sozialistischen Staates erfahren⁵³.

Frau Heine takes a similar approach in her justification for Fristenlösung, arguing that women in the GDR will act responsibly to continue to build the socialist state. Specifically, she notes, “Die Frauen und Mütter haben in den zurückliegenden Jahren beim Aufbau des Sozialismus bewiesen und beweisen es jeden Tag aufs Neue, dass sie immer mehr und bewusster Verantwortung für das Ganze tragen”⁵⁴.

Furthermore, Dr. Mecklinger and Frau Heine’s speeches to the Volkskammer allude, however underhandedly, to an additional intention behind this new policy: increased state involvement in reproduction. Dr. Mecklinger emphasizes the benefit of trust in the state in his

⁵³ Ibid.

⁵⁴ Ibid.

claim that “die heute schon von vielen jungen Bürgern genutzte Ehe und sexuelle Beratungen wird immer mehr zu einer Begegnung, in der sich der Bürger vertrauensvoll in intimen Fragen seiner Ehe und ihre Gestaltung an fachkundige Berater wendet, ist sein Vertrauen mit Hilfe und Rat beantworten”⁵⁵. From this rhetoric, it is evident that the government valued the ability to give “help and advice” in personal decisions such as reproduction and saw the legalization of abortion as an avenue for that type of intervention.

Despite Dr. Telman’s assertion that “the socialist state never developed an independent ideological justification for treating women as citizens endowed with equal status” and therefore “its laws and regulations were inadequate to alter deeply ingrained social practices and assumptions regarding the gendered division of labor and the separation of spheres of influence”, the GDR *did* create a norm of access to abortion for women in the East that would undeniably influence the reunification debate⁵⁶. The political tradition of framing abortion rights as a collective issue would have to bend not only to this legal rejection of its communal premise but also with the electoral liberalization within the FRG.

Abortion Policy in the FRG: An Adherence to Political Tradition?

In the West, policy formation regarding abortion under the FRG occurred through an entirely different process and ideological framework. Similarly to the GDR legislative process in 1972, however, the attempt to reform Paragraph 218 from 1974 to 1976 fostered an unprecedented lack of consensus. Given the FRG’s more democratic system—including a bicameral legislative body and a federal judiciary—the process was arduous in its attempt to contend with contradicting partisan platforms and the Constitutional Court. The initial attempt at

⁵⁵ Ibid.

⁵⁶ Telman, “*Abortion and Women's Legal Personhood*,” 118.

reform that greatly liberalized abortion access was struck down by the Federal Constitutional Court, which has the duty, as laid out by Article 21, Paragraph 4 of the Grundgesetz, to judicial review. Condemning any language of legal abortion, the Court required that the policy of 1974 be reworked by the Bundestag, and the resulting Paragraph 218 in 1976 was significantly more restrictive of abortion access. Despite the 1974 policy demonstrating an acknowledgment of individual rights, the 1975 Federal Constitutional Court decision and clear impact on the 1976 iteration of Paragraph 218, highlight the FRG's adherence to the political tradition of framing abortion rights within the ideal of collective value. Attempting to reconcile increasingly liberal notions of reproductive rights, the abortion policy resulting from this intervention point turns to a liberalization of punitive measures without conceding the state's overarching commitment to "unborn life".

In the late 1960s and 1970s, West German politics were greatly impacted by progressive movements that challenged the previously dominant CDU/CSU. The 1972 election represented a major shift in FRG politics, as the SPD became the plurality party and re-installed Willy Brandt, who represented this new German political environment, as Chancellor⁵⁷. A key part of this progressive shift was an increasingly vocal feminist movement that, among other initiatives, called for abortion policy reform. In 1971, a group of 374 women famously claimed "Wir haben abgetrieben" on the cover of Stern magazine, challenging not only the social norm of shame surrounding abortion but also the justice system to publicly spend their resources prosecuting what many regarded as a minor crime⁵⁸. Under the socially conservative Christian Democratic Union and its Bavarian counterpart, the Christian Social Union, the FRG had reformed

⁵⁷ Wahl zum 7. Deutschen Bundestag (19. November 1972)

⁵⁸ Stefanie Grossman, "'Wir haben abgetrieben!': Als Frauen ihr Schweigen brachen" ["We've had an abortion!": When women broke their silence], NDR, last modified December 1, 2022, <https://www.ndr.de/geschichte/chronologie/Wir-haben-abgetrieben-Als-Frauen-ihr-Schweigen-brachen,abtreibung154.html>.

Paragraph 218 very minimally. In 1953, the Nazi Era addition of the possibility of the death penalty was removed from the text and in 1969, the punishment of “Gefängnis” was replaced by “Freiheitsstrafe bis zu fünf Jahren”⁵⁹. Much like previous changes, these reforms focused on the punitive measures, holding *any* abortion to be illegal. New reforms to Paragraph 218 led by the SPD/FDP coalition’s progressive approach to criminal law reform would attempt to remove *some* abortions from the category of illegal.

By striving to recognize the legality of some abortions, specifically those in the first trimester, reformists were proposing a different framework for understanding abortion access—one that acknowledged the individual rights of women over reproductive choice. The application of a Fristenlösung reform to Paragraph 218 would legalize abortions based on time or phase, rather than the Indikationslösung that requires specific conditions to be met to allow for an abortion to be decriminalized. These opposing methods of crafting abortion policy would serve as the framework for the debate within the FRG Bundestag leading up to the passing and subsequent overturning of the 1974 Paragraph 218 reform.

In their analysis of this policy formation process in “Abortion, Abstract Norms, and Social Control: The Decision of the West German Federal Constitutional Court”, Hartmut Gerstein and David Lowry outline the four bills that were initially presented to the Bundestag, all calling for not only different policies, but entirely different approaches. The first Bill, introduced by a group of CDU/CSU representatives, criminalized all abortions except for medical necessity⁶⁰. The majority of the CDU/CSU deputies supported Bill 2 that was also framed by an Indikationslösung but included “medical, eugenic, and ethical reasons” while Bill 3 added social

⁵⁹ 1. Oktober 1953: Art. 1 Nr. 1 Buchst. b, 11 Abs. 1 des Gesetzes vom 4. August 1953.

⁶⁰ Bundestag Drucksache 7-1984.

grounds to the list of acceptable conditions⁶¹. Finally, Bill 4, presenting a case for Fristenlösung and supported by the majority of the SPD, “would have sanctioned abortion on demand during the first twelve weeks of pregnancy”⁶². After multiple rounds of voting and a back and forth between the Bundestag, Bundesrat, and the Joint Arbitration Committee, Bill 4, framed by Fristenlösung, was passed.

The main body of Paragraph 218 had few substantial changes, reading as follows:

§ 218. Abbruch der Schwangerschaft

(1) Wer eine Schwangerschaft später als am dreizehnten Tage nach der Empfängnis abbricht, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.

(2) [1] Die Strafe ist Freiheitsstrafe von sechs Monaten bis zu fünf Jahren, wenn der Täter

1. gegen den Willen der Schwangeren handelt oder
2. leichtfertig die Gefahr des Todes oder einer schweren Gesundheitsschädigung der Schwangeren verursacht.

[2] Das Gericht kann Führungsaufsicht anordnen (§ 68 Abs. 1 Nr. 2).

(3) Begeht die Schwangere die Tat, so ist die Strafe Freiheitsstrafe bis zu einem Jahr oder Geldstrafe.

(4) [1] Der Versuch ist strafbar. [2] Die Frau wird nicht wegen Versuchs bestraft.⁶³

While it specified that only “a pregnancy after thirteen days” would qualify, its outlining of the illegality of abortion had little variation from earlier versions of 218. Rather, the significant weight of the liberalization fell on the addition of Paragraph 218a which applied a Fristenlösung approach by discounting abortion within the first twelve weeks of pregnancy as being punishable by Paragraph 218:

⁶¹ In this case, “eugenic” refers to instances where the child born would have serious development defect or other serious damages to health. “Ethical” refers primarily to instances of rape

⁶² Hartmut Gerstein and David Lowry, “Abortion, Abstract Norms, and Social Control: The Decision of the West German Federal Constitutional Court,” *Emory Law Journal* 25, no. 4 (1976): 856, <https://heinonline.org/HOL/P?h=hein.journals/emlj25&i=859>.

⁶³ Law of June 18, 1974, [1974] BGBl. I § 1297, commonly called the “Fifth Penal Law Reform Statute” (“Fünften Gesetzes zur Reform des Strafrechts”), 5 StrRG.

§ 218a. Strafflosigkeit des Schwangerschaftsabbruchs in den ersten zwölf Wochen

Der mit Einwilligung der Schwangeren von einem Arzt vorgenommene Schwangerschaftsabbruch ist nicht nach § 218 strafbar, wenn seit der Empfängnis nicht mehr als zwölf Wochen verstrichen sind.⁶⁴

Furthermore, the new Paragraph 218b outlined the additional indications that if met, would permit the procurement of an abortion even after the twelve week period granted by Paragraph 218a:

§ 218b. Indikation zum Schwangerschaftsabbruch nach zwölf Wochen

Der mit Einwilligung der Schwangeren von einem Arzt nach Ablauf von zwölf Wochen seit der Empfängnis vorgenommene Schwangerschaftsabbruch ist nicht nach § 218 strafbar, wenn nach den Erkenntnissen der medizinischen Wissenschaft

1. der Schwangerschaftsabbruch angezeigt ist, um von der Schwangeren eine Gefahr einer schwerwiegenden Beeinträchtigung ihres Gesundheitszustandes abzuwenden, sofern die Gefahr nicht auf eine andere für sie zumutbare Weise abgewendet werden kann, oder
2. dringende Gründe für die Annahme sprechen, daß das Kind infolge einer Erbanlage oder schädlicher Einflüsse vor der Geburt an einer nicht behebbaren Schädigung seines Gesundheitszustandes leiden würde, die so schwer wiegt, daß von der Schwangeren die Fortsetzung der Schwangerschaft nicht verlangt werden kann, und seit der Empfängnis nicht mehr als zweiundzwanzig Wochen verstrichen sind.⁶⁵

This text specifically decriminalizes abortions in situations of extreme health risks to the mother or to the child, particularly as a result of a birth defect. Taken all together, the reforms made to Paragraph 218 by the FRG Bundestag in 1974 represented a new way of regulating abortion within the German political tradition. Instead of merely liberalizing punishment, the policy recognized the right to choice, centering the individual rights of women.

⁶⁴ Ibid.

⁶⁵ Ibid.

As made evident by the vote margin of the Abortion Reform Act, with 247 votes in favor, 233 against, and 9 abstentions, there were certainly polarized views of the law⁶⁶. Perhaps not surprisingly, then, the reforms were immediately presented to the Federal Constitutional Court as potentially unconstitutional. Under the German system, the Federal Constitutional Court has the power of “abstract judicial review” which allows it to rule on the constitutionality of any law when a state government or one-third of the Bundestag petitions for it⁶⁷. This obligatory duty of the court gives it incredible power within the system. In this case, the Court almost immediately stayed the new law while it deliberated⁶⁸. In February of the following year, the Federal Constitutional Court released its decision finding the Abortion Reform Act of 1974 unconstitutional and dictated the required temporary measures until a new policy was passed:

Entscheidung des Bundesverfassungsgericht

I. § 218a des Strafgesetzbuches in der Fassung des Fünften Gesetzes zur Reform des Strafrechts (5. StrRG) vom 18. Juni 1974 (Bundesgesetzbl. 1 S. 1297) ist mit Artikel 2 Absatz 2 Satz 1 in Verbindung mit Artikel 1 Absatz 1 des Grundgesetzes insoweit unvereinbar und nichtig, als er den Schwangerschaftsabbruch auch dann von der Strafbarkeit ausnimmt, wenn keine Gründe vorliegen, die – im Sinne der Entscheidungsgründe – vor der Wertordnung des Grundgesetzes Bestand haben.

II. Bis zum Inkrafttreten einer gesetzlichen Neuregelung wird gemäß § 35 des Gesetzes über das Bundesverfassungsgericht angeordnet:

1. § 218b und § 219 des Strafgesetzbuches in der Fassung des Fünften Gesetzes zur Reform des Strafrechts (5. StrRG) vom 18. Juni 1974 (Bundesgesetzbl. 1 S. 1297) sind auch auf Schwangerschaftsabbruch in den ersten zwölf Wochen seit der Empfängnis anzuwenden.
2. Der mit Einwilligung der Schwangeren von einem Arzt innerhalb der ersten zwölf Wochen seit der Empfängnis vorgenommene Schwangerschaftsabbruch ist nicht nach § 218 des Strafgesetzbuches strafbar, wenn an der Schwangeren eine rechtswidrige Tat nach den §§ 176 bis 179 des Strafgesetzbuches vorgenommen worden ist und dringende Gründe für die Annahme sprechen, dass die Schwangerschaft auf der Tat beruht.

⁶⁶ Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. Contemp. Health L. & Pol'y 1 (1994), 4.

⁶⁷ *Ibid*, 6.

⁶⁸ *Ibid*, 7.

3. Ist der Abbruch der Schwangerschaft in den ersten zwölf Wochen seit der Empfängnis von einem Arzt mit Einwilligung der Schwangeren die auf andere ihr zumutbare Weise nicht abzuwendende Gefahr einer schwerwiegenden Notlage abzuwenden, so kann das Gericht von einer Bestrafung nach § 218 des Strafgesetzbuches absehen.⁶⁹

The FCC decision found that the legalization of abortion within in the first twelve weeks violated the constitutional guarantee of the right to life and the state's vested interest in the "inviolability of human dignity"⁷⁰. In doing so, argues Mary Ann Glendon, the court demonstrated that in "the hierarchy of constitutional values...human life is a central and supreme value of the constitutional order, to which the woman's acknowledged right to self-determination and privacy is subordinate"^{71,72}. While the Court's priority of "unborn life" over the individual

⁶⁹Judgment of February 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (First Senate) (F.R.G.).

Translation provided by: Robert E. Jonas; John D. Gorby, "West German Abortion Decision: A Contrast to *Roe v. Wade*," *John Marshall Journal of Practice and Procedure* 9, no. 3 (Spring 1976): 605-684
I. Section 218a of the Penal Code in the version of the Fifth Statute to Reform the Penal Law (5 PLRS) of June 18, 1974, (Federal Law Reporter I, p. 1297) is incompatible with Article 2, Paragraph 2, Sentence 1, in conjunction with Article 1, Paragraph 1, of the Basic Law and is null insofar as it excepts the interruption of pregnancy from criminal liability when no reasons are present which, in the sense of the reasons for this decision, have validity in the ordering of values of the Basic Law.

II. Until a new statutory regulation goes into effect the following is ordered under the authority of §35 of the Statute of the Constitutional Court:

1. §218b and §219 of the Penal Code in the version of the Fifth Statute for the Reform of the Penal Law (5 PLRS) of June 18, 1974 (Federal Law Reporter I, p. 1297) are to be applied to interruptions of pregnancy during the first twelve weeks after conception.

2. An abortion performed by a physician with the consent of the pregnant woman within the first twelve weeks after conception is not punishable under §218 of the Penal Code if an illegal act pursuant to §§176-179 of the Penal Code has been committed against the pregnant woman, and compelling reasons demand the assumption that the pregnancy is a result of the act.

3. If the interruption of the pregnancy is performed by a physician within the first twelve weeks after conception with the consent of the pregnant woman to avert from the pregnant woman danger of a serious calamity which cannot be averted in any other way which is exactable from her, the court may forgo a punishment under §218.

⁷⁰ D. Van zyl Smit, "Reconciling the Irreconcilable - Recent Developments in the German Law on Abortion," *Medical Law Review* 2, no. 3 (1994): 305,
<https://heinonline.org/HOL/P?h=hein.journals/medlr2&i=312>.

⁷¹ Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge, Mass.: Harvard University Press, 1987), 26.

⁷² It is remarkable that just two years after the *Roe v. Wade* decision in the United States, in which the Supreme Court decided that the right to abortion was constitutionally protected, primarily rooted in the right to privacy, the German FCC ruled nearly the opposite.

rights of women is evident in the statement of the decision, a deeper analysis of the FCC's reasoning in this decision highlights only further the emphasis on collective value. Notably, the reasoning asserts "bei einer Orientierung an Art. 1 Abs. 1 GG muß die Entscheidung zugunsten des Vorrangs des Lebensschutzes für die Leibesfrucht vor dem Selbstbestimmungsrecht der Schwangeren fallen"⁷³. By further claiming "dieser Vorrang gilt grundsätzlich für die gesamte Dauer der Schwangerschaft und darf auch nicht für eine bestimmte Frist in Frage gestellt werden", the court rejects any valid measure of Fristenlösung as it recognizes its duty to protect potential life at any stage⁷⁴. The decision also justifies state intervention in what would normally be considered "de[r] Bereich privater Lebensgestaltung" on the basis that "der Nasciturus ein selbständiges menschliches Wesen ist" and therefore is recognized as an individual that is protected by the Basic Law⁷⁵. Finally, the reasoning of the FCC's decision even goes as far as to warn against the liberalization of the electorate, noting, "die leidenschaftliche Diskussion der Abtreibungsproblematik mag Anlaß zu der Befürchtung geben, daß in einem Teil der Bevölkerung der Wert des ungeborenen Lebens nicht mehr voll erkannt wird"⁷⁶. In recognizing this shift in opinion, the Court calls on the legislature to form policy intended to protect unborn life that also falls within the "allgemeinen Rechtsbewußtsein" emphasizing the need to adhere to political and legal tradition⁷⁷.

The Court's decision, as revealed even further by its reasoning, is indicative of the fact that despite liberalization of the political environment that concedes to the rights of the individual, the state adheres to the political tradition of framing abortion rights as a collective

⁷³ Judgment of February 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (First Senate) (F.R.G.).

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

issue. Intervention is justified through the prioritization of the “unborn life” and in the process, the interest of the individual is subjected to the will of the state and its pursuit of its broader interests. Bonnie Hertberg captures this argument in the assertion that “the FCC's emphasis on the position of the right to life of the fetus in the objective order of values suggests that the right to fetal life is a value of the community, rather than something that belongs to the individual fetus”⁷⁸. Due to the pronounced powers of the federal judiciary as a result of constitutionally dictated abstract judicial review, the decision by the FCC would be the guiding blueprint for the eventual reform of Paragraph 218 that emerged from this era.

The second attempt at a reform to Paragraph 218 was made in 1976 and, as a result of the Court’s February 25th, 1975 decision, could not include a Fristenlösung approach. Rather, it adhered to the sentiment of the Court’s declaration of prioritizing the “unborn life” over individual choice by being framed by Indikationslösung alone. Within the main body of Paragraph 218, the phrase “später als am dreizehnten Tage nach der Empfängnis” was stricken as it would violate the Court’s assertion that the priority of the “unborn life” “darf auch nicht für eine bestimmte Frist in Frage gestellt werden”⁷⁹. Paragraph 218a, that laid out the Fristenlösung policy, was stricken also entirely. Instead, the following text was added to the end of Absatz 3:

[2] Die Schwangere ist nicht nach Satz 1 strafbar, wenn der Schwangerschaftsabbruch nach Beratung (§ 218b Abs. 1 Nr. 1, 2) von einem Arzt vorgenommen worden ist und seit der Empfängnis nicht mehr als zweiundzwanzig Wochen verstrichen sind. [3] Das Gericht kann von einer Bestrafung der Schwangeren nach Satz 1 absehen, wenn sie sich zur Zeit des Eingriffs in besonderer Bedrängnis befunden hat.

⁷⁸ Bonnie L. Hertberg, "Resolving the Abortion Debate: Compromise Legislation, an Analysis of the Abortion Policies of the United States, France and Germany." *Suffolk Transnational Law Review* 16, no. 2 (Spring 1993): 559.

⁷⁹ Judgment of February 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (First Senate) (F.R.G.).

This addition dictated that abortion in any time frame was to be considered illegal but within the first 22 weeks, under certain conditions, could go unpunished.

No longer incorporating Fristenlösung, Paragraph 218a outlined instead an explicit and more extensive set of indications that would solidify the entire policy as an Indikationslösung. The text of the reform below outlines the four designated indications that would determine the legality of an abortion, often identified as medical, eugenic, ethical, and social:

§218a. Indikation zum Schwangerschaftsabbruch.

(1) Der Abbruch der Schwangerschaft durch einen Arzt ist nicht nach § 218 strafbar, wenn

1. die Schwangere einwilligt und
2. der Abbruch der Schwangerschaft unter Berücksichtigung der gegenwärtigen und zukünftigen Lebensverhältnisse der Schwangeren nach ärztlicher Erkenntnis angezeigt ist, um eine Gefahr für das Leben oder die Gefahr einer schwerwiegenden Beeinträchtigung des körperlichen oder seelischen Gesundheitszustandes der Schwangeren abzuwenden, und die Gefahr nicht auf eine andere für sie zumutbare Weise abgewendet werden kann.

(2) Die Voraussetzungen des Absatzes 1 Nr. 2 gelten auch als erfüllt, wenn nach ärztlicher Erkenntnis

1. dringende Gründe für die Annahme sprechen, daß das Kind infolge einer Erbanlage oder schädlicher Einflüsse vor der Geburt an einer nicht behebbaren Schädigung seines Gesundheitszustandes leiden würde, die so schwer wiegt, daß von der Schwangeren die Fortsetzung der Schwangerschaft nicht verlangt werden kann,
2. an der Schwangeren eine rechtswidrige Tat nach den §§ 176 bis 179 begangen worden ist und dringende Gründe für die Annahme sprechen, daß die Schwangerschaft auf der Tat beruht, oder
3. der Abbruch der Schwangerschaft sonst angezeigt ist, um von der Schwangeren die Gefahr einer Notlage abzuwenden, die
 - a) so schwer wiegt, daß von der Schwangeren die Fortsetzung der Schwangerschaft nicht verlangt werden kann, und
 - b) nicht auf eine andere für die Schwangere zumutbare Weise abgewendet werden kann.

(3) In den Fällen des Absatzes 2 Nr. 1 dürfen seit der Empfängnis nicht mehr als zweiundzwanzig Wochen, in den Fällen des Absatzes 2 Nr. 2 und 3 nicht mehr als zwölf Wochen verstrichen sein.⁸⁰

⁸⁰ 18. Juni 1976/21. Juni 1976: Artt. 1 Nr. 4, 6 des Gesetzes vom 18. Mai 1976.

Dr. Telman summarizes the application of the four recognized indications as “the medical indication (if the mother's life or health were endangered), the criminological indication (if the pregnancy resulted from a criminal act such as rape or incest), the embryological indication (if the fetus suffered from some severe developmental defects), and the social indication (if, due to the woman's economic or psychological conditions, it would be "unreasonable" to ask her to complete the pregnancy)⁸¹. The social indication in particular, provides a clear path to a degree of leniency in the law despite the adherence to framing any abortion as illegal. In this way, the new abortion policy does seem to find ways to appeal to a liberalizing ideal of abortion access while technically remaining steadfast in its constitutional commitments.

Finally, the new Paragraph 218b outlined the medical counseling necessary in order for an abortion to go unpunished under the new addition to Absatz 3:

Abbruch der Schwangerschaft ohne Beratung der Schwangeren

(1) Wer eine Schwangerschaft abbricht, ohne daß die Schwangere

1. sich mindestens drei Tage vor dem Eingriff wegen der Frage des Abbruchs ihrer Schwangerschaft an einen Berater gewandt hat und dort über die zur Verfügung stehenden öffentlichen und privaten Hilfen für Schwangere, Mütter und Kinder beraten worden ist, insbesondere über solche Hilfen, die die Fortsetzung der Schwangerschaft und die Lage von Mutter und Kind erleichtern, und
2. von einem Arzt über die ärztlich bedeutsamen Gesichtspunkte beraten worden ist...⁸²

It is important to note that the medical consultation required was obligated to inform women of the resources available to them, both medically with regard to the abortion and socially with regard to state support that may influence patients to not get an abortion. However, we must keep in mind that despite the fact that women would make a choice after medical counseling whether

⁸¹ Telman, “*Abortion and Women's Legal Personhood*,” 136.

⁸² 18. Juni 1976/21. Juni 1976: Artt. 1 Nr. 4, 6 des Gesetzes vom 18. Mai 1976.

to proceed with the abortion or not, Paragraph 218 still dictates that the act is illegal despite fulfilling the necessary requirements to be not punishable.

The process to reform Paragraph 218 in the FRG was far from the simple vote taken in the GDR Volkskammer, but was instead contending with polarized platforms between parties and a federal judiciary with the enumerated power to rule on the constitutionality of laws passed by the Bundestag. This contentious environment, however, allowed for the debate between varying approaches to abortion policy to play out within the political system. As a result of this public contention with opposing values, the state's interests behind the development of reproductive policy are front and center in our understanding of the intention of the policy. By overturning the Bundestag's initial attempt at adopting a policy driven by Fristenlösung on the basis of prioritizing unborn life over individual rights, the FCC adhered to the political tradition of regarding reproductive policy as a matter of collective value and set the stage for an inevitable clash with an increasing liberal electorate. The 1976 iteration of Paragraph 218, however, would face a much larger challenge come Reunification as the political tradition within the West German constitution would contend with an East German culture that regarded abortion access as a right of the individual.

Section III

One Tradition, Two Systems = One Policy?:

The Development of a Unified Abortion Policy from 1990-1995

Introduction to Reunification

The Reunification of Germany was not a compromise between the East and the West. Rather, the former GDR was, in large part, simply swallowed into the systems, culture, and laws

of the FRG. Given the incredibly contradictory economic, social, and political natures of the two states, it is hard to imagine how the process of merging East and West Germany went as smoothly as it did. This is not to say that the process was easy, however, and the Unity Treaty was an impressive piece of political work that grappled with complex systemic integration. One of the major differences that the Treaty was obligated to reconcile was the contrast between East and West gender culture that had been fostered by the policies of the respective governments. While “West German women generally faced the choice between having children and having a career”, explains Dr. Telman, GDR extensive state support systems enabled women in the East to develop professional careers while also raising children⁸³. Often referred to as the Double Burden, this lived reality for women in the GDR was not necessarily an example of gender equality, but the socialist system did, nonetheless, instill an expectation of the freedom for women to develop as individuals, specifically in regards to reproductive rights. Reunification, then, had to grapple with the reality that “West Germany's definition of women's primary social roles and identities clashe[d] with the ones East German women ha[d] internalized”⁸⁴.

Nowhere was this struggle more evident than in the attempts to compromise on an abortion law that could hold to Western legal tradition, but also not strip rights away from East German women. The East German representatives held firm in refusing to merely adopt the West German Indikations approach, viewing it as “a radical threat to individual autonomy” that had been enjoyed—at least regarding abortion rights—by women under the GDR⁸⁵. As a result of the two states’ entirely different approaches to abortion legislation making it too large of an issue to tackle in the environment of Reunification, the creation of an all-Germany abortion policy was

⁸³ Telman, “*Abortion and Women's Legal Personhood*, 140.

⁸⁴ Ingrid Sandole-Staroste, *Women in Transition: Between Socialism and Capitalism* (Westport, Conn.: Praeger, 2002), 8.

⁸⁵ Telman, “*Abortion and Women's Legal Personhood*, 139.

pushed down the road to be dealt with at a later date. Article 31 of the Unity Treaty presented this decision to address abortion rights separate from the official unification process, declaring that the all-German legislature would pass an abortion policy by December 31st, 1992 “that would ensure better protection of unborn life and provide a better solution in conformity with the Constitution for conflict situations faced by pregnant women – notably through legally guaranteed entitlements for women, first and foremost through advice and public support”⁸⁶. The language of Article 31 foreshadows the subversion of East German abortion rights to the legal tradition of placing priorities on the protection of unborn life in the West. It further indicates that abortion policy will be rooted in an effort to dissuade both abortion itself and the need for abortion through social support.

Compromise?: The Creation of Contemporary Paragraph 218

In the months leading up to the deadline established by Article 31, the Bundestag was presented with a wide array of bills intended to address the abortion issue, ranging from an even stricter Indikations model than the one active in the West to one entirely based in Fristenlösung⁸⁷. The law passed by the Bundestag on July 27th 1992, “Gesetz zum Schutz des vorgeburtlichen/werdenden Lebens, zur Förderung einer kinderfreundlicheren Gesellschaft, für Hilfen im Schwangerschaftskonflikt und zur Regelung des Schwangerschaftsabbruchs” or the Law on Assistance to Pregnant Women and Families encompassed a swath of legislation that would increase social support for mothers and families, intending to lessen the necessity of abortion⁸⁸. The title alone alludes to the broader goals of the policy as it speaks to a holistic

⁸⁶ Translation from Gert-Joachim Glaessner, *The Unification Process in Germany: From Dictatorship to Democracy* (New York: St. Martin's Press, 1992), 222.

⁸⁷ Susanne Walther, "Thou Shalt Not (but Thou Mayest): Abortion after the German Constitutional Court's 1993 Landmark Decision," *German Yearbook of International Law* 36 (1993): 388.

⁸⁸ Schwangeren- und Familienhilfegesetz, 7 July 1992, BGBl. I, 1992, 1398.

strategy aimed at reducing abortion rates. Article 13 “Änderung des Strafgesetzbuches” presented a new, compromised abortion policy for united Germany within Paragraphs 218 and 219. Represented by the slogan “Hilfe statt Strafe” or “support instead of punishment”, the policy in the Act attempted to combine the Indikations and Fristenlösungen while protecting the unborn life through the implementation of a counseling requirement⁸⁹.

The policy’s focus on reforms such as exceptions and requirements meant that the major policy changes did not affect the text of the main body of Paragraph 218. This base language of illegality remained largely the same in this reform, apart from the addition of the following sentence to the first section: “Handlungen, deren Wirkung vor Abschluß der Einnistung des befruchteten Eies in der Gebärmutter eintritt, gelten nicht als Schwangerschaftsabbruch im Sinne dieses Gesetzes”⁹⁰. Adding this note recognizes that the use of contraceptives and emergency contraceptives would not qualify as abortion. Instead, the weight of the reforms fell primarily on Paragraph 218a, which would now read,

§218a. Strafflosigkeit des Schwangerschaftsabbruchs

(1) Der Schwangerschaftsabbruch ist nicht rechtswidrig, wenn

1. die Schwangere den Schwangerschaftsabbruch verlangt und dem Arzt durch eine Bescheinigung nach §219 Abs. 3 Satz 2 nachgewiesen hat, daß sie sich mindestens drei Tage vor dem Eingriff hat beraten lassen
2. der Schwangerschaftsabbruch von einem Arzt vorgenommen wird und
3. seit der Empfängnis nicht mehr als zwölf Wochen vergangen sind.

(2) Der mit Einwilligung der Schwangeren von einem Arzt vorgenommene Schwangerschaftsabbruch ist nicht rechtswidrig, wenn nach ärztlicher Erkenntnis der Abbruch notwendig ist, um eine Gefahr einer schwerwiegenden Beeinträchtigung ihres körperlichen oder seelischen Gesundheitszustandes abzuwenden, sofern diese Gefahr nicht auf andere für sie zumutbare Weise abgewendet werden kann.

⁸⁹ Telman, “*Abortion and Women's Legal Personhood*,” 140.

⁹⁰ Schwangeren- und Familienhilfegesetz, 7 July 1992, BGBl. I, 1992, 1398.

(3) Die Voraussetzungen des Absatzes 2 gelten auch als erfüllt, wenn nach ärztlicher Erkenntnis dringende Gründe für die Annahme sprechen, daß das Kind infolge einer Erbanlage oder schädlicher Einflüsse vor der Geburt an einer nicht behebbaren Schädigung seines Gesundheitszustandes leiden würde, die so schwer wiegt, daß von der Schwangeren die Fortsetzung der Schwangerschaft nicht verlangt werden kann. Dies gilt nur, wenn die Schwangere dem Arzt durch eine Bescheinigung nach 219 Abs. 3 Satz 2 nachgewiesen hat, daß sie sich mindestens drei Tage vor dem Eingriff hat beraten lassen und wenn seit der Empfängnis nicht mehr als zweiundzwanzig Wochen verstrichen sind.

(4) Die Schwangere ist nicht nach §218 strafbar, wenn der Schwangerschaftsabbruch nach Beratung (219) von einem Arzt vorgenommen worden ist und seit der Empfängnis nicht mehr als zweiundzwanzig Wochen verstrichen sind. Das Gericht kann von Strafe nach 218 absehen, wenn die Schwangere sich zur Zeit des Eingriffs in besonderer Bedrängnis befunden hat.⁹¹

Within Paragraph 218a, the reform attempts to balance the individual rights of women and the state's interest in protecting unborn life by adopting Induktions and Fristen measures as well as requiring the counseling laid out in Paragraph 219. Importantly, the text notes that under these conditions, an act of abortion would be considered “nicht rechtswidrig” or “not illegal”.

Essential to this assessment of an abortion being “nicht rechtswidrig” is the counseling required of women at least three days before receiving abortive care that is “intended to make the pregnant woman aware of all of her options, including contraceptive methods, sex education, family planning, and abortion methods”⁹². Under the 1992 Act, Paragraph 219 read:

§219. Beratung der Schwangeren in einer Not- und Konfliktlage

(1) Die Beratung dient dem Lebensschutz durch Rat und Hilfe für die Schwangere unter Anerkennung des hohen Wertes des vorgeburtlichen Lebens und der Eigenverantwortung der Frau. Die Beratung soll dazu beitragen, die im Zusammenhang mit der Schwangerschaft bestehende Not- und Konfliktlage zu bewältigen. Sie soll die Schwangere in die Lage versetzen, eine

⁹¹ Ibid.

⁹² Telman, “*Abortion and Women's Legal Personhood*,” 141.

verantwortungsbewußte eigene Gewissensentscheidung zu treffen. Aufgabe der Beratung ist die umfassende medizinische, soziale und juristische Information der Schwangeren. Die Beratung umfaßt die Darlegung der Rechtsansprüche von Mutter und Kind und der möglichen praktischen Hilfen, insbesondere solcher, die die Fortsetzung der Schwangerschaft und die Lage auch zur Vermeidung künftiger ungewollter Schwangerschaften bei.

- (2) Die Beratung hat durch eine auf Grund Gesetzes anerkannte Beratungsstelle zu erfolgen. Der Arzt, der den Schwangerschaftsabbruch vornimmt, ist als Berater ausgeschlossen⁹³.

Of particular importance within this text is the policy's recognition of the validity and significance of a woman's individual choice on the matter. Through advice and aid, the counseling aims to be primarily informational to enable the woman to make her own "responsible" decision. When taken together with the hybrid model of Paragraph 218a, Paragraph 219 creates an abortion policy that Kommers describes as "a counseling model which incorporated pro-life inducements, but left the ultimate choice to the woman"⁹⁴.

Analyzing the legislative process behind the adoption of this policy, D. Van Zyl Smit notes that its supporters "were confident that by making conditions in society more favourable for the raising of children and by placing a duty on the pregnant woman contemplating an abortion to submit to counselling, the state was meeting its obligation to protect unborn life" that the FCC found in its 1975 decision⁹⁵. However, the law was immediately challenged by members of the CDU/CSU and was placed under the judicial review process by the Federal Constitutional Court. On May 28th, 1993, the FCC released its decision on the Law on Assistance to Pregnant Women and Families and found it to be unconstitutional. In particular, the Court found both Paragraph 218a and 219 to be invalid:

⁹³ Absatz 3 was not included here for the sake of space

⁹⁴ Kommers, "The Constitutional Law of Abortion", 14.

⁹⁵ Smit, "Reconciling the Irreconcilable," 310.

1. § 218a, Section 1 of the Penal Code in the version of the Act to Protect Unborn/Gestating Life, Promote a Society More Hospitable Toward Children, Provide Assistance in Pregnancy Conflicts, and Regulate Pregnancy Terminations (Pregnancy and Family Assistance Act) of July 27, 1992 (Federal Law Gazette I, p. 1398) contravenes Article 1, Paragraph 1 in conjunction with Article 2, Paragraph 2, Sentence 1 of the Basic Law inasmuch as the provision declares a pregnancy termination under the preconditions set forth in the aforementioned statute to be not illegal and, in No. 1, refers to counseling which, in turn, fails to satisfy the constitutional requirements pursuant to Article 1, Paragraph 1 in conjunction with Article 2, Paragraph 2, Sentence 1 of the Basic Law.

The entire provision is invalid.

2. § 219 of the Penal Code in the version of the aforementioned Act contravenes Article 1, Paragraph 1 in conjunction with Article 2, Paragraph 2, Sentence 1 of the Basic Law and is invalid⁹⁶.

In this decision, the FCC reaffirmed the decision made by the 1972 court in finding that the new abortion policy was insufficient in its commitment to the protection of the unborn life, arguing that “termination must be viewed as fundamentally wrong for the entire duration of the pregnancy and thus prohibited by law”⁹⁷. Adopting the line of reasoning from its predecessor, the FCC invalidated the legality of abortion law that would give women the freedom of choice at any stage of pregnancy. In particular, the Court took issue with the language of “nicht rechtswidrig” used by the new Paragraphs and argued that “protection [of unborn life] is only possible if the legislature fundamentally forbids the mother to terminate her pregnancy and thus imposes upon her the fundamental legal obligation to carry the child to term”⁹⁸. Similarly to the language of the 1972 decision, the 1992 text also notes the public’s liberalization and argues that “the state's mandate to protect human life requires it to preserve and to revive the public's general awareness of the unborn's right to protection”⁹⁹. This conviction reveals the degree to

⁹⁶ BVerfG, Order of the Second Senate of 28 May 1993 - 2 BvF 2/90 -, paras. 1-434, http://www.bverfg.de/e/fs19930528_2bvf000290en.html

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

which the interests of the state could, and apparently *should*, be made to overshadow the beliefs of the body politic for the sake of adhering to political and legal tradition.

The FCC decision, however, did not just rule the new abortion policy to be unconstitutional, but stretched the limits of judicial activism by drafting policies requirements that would pass the Court's test of protecting unborn life. In its ruling, the Court conceded to the liberalization of abortion regulation through the use of both Indikations and Fristenlösungen but conditioned this approach with the requirement of an actively pro-life counseling method that would do more to protect "unborn life" than the medically focused counseling outlined by the 1992 law. The decision specifically notes that "the Basic Law does not fundamentally prohibit the legislature from shifting to a concept for protecting unborn human life which, in the early phase of pregnancy, emphasizes counseling the pregnant woman to convince her to carry the child to term" while dispensing "with the threat of criminal punishment based on indications and the ascertainment of grounds supporting the indications by third parties"¹⁰⁰.

By making concessions to Indikations and Fristenlösungen while maintaining illegality, the FCC shifted the heavy onus of dissuasion that it deemed necessary to the constitutional duty of the state to protect "unborn life" onto counseling. Given, then, the significance of the counseling, the Court necessitated the nature of this intervention, noting that it "serves to protect unborn life". Furthermore, the Court dictated that "it has to be guided by the effort to encourage the woman to continue the pregnancy [to] help her make a responsible and conscientious decision"¹⁰¹. In his commentary on this aspect of the decision, Dr. Telman notes that "the Court promotes the stereotype of the dependent woman who, unable to make her own moral decision, must undergo counseling provided by the state"¹⁰². Finally, through the counseling "the woman

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Telman, "*Abortion and Women's Legal Personhood*, 146.

must be aware of the fact that, in every stage of pregnancy, the unborn has an independent right to life even vis-à-vis her”, once again solidifying that the adherence state’s ideals—the right to life though not pertaining to any specific individual—overrides an individual’s right to dictate their own life. In its unprecedented activist approach to the overruling of the 1992 Law on Assistance to Pregnant Women and Families, the FCC laid the groundwork for the policy that would eventually be adopted by the newly unified Germany.

Given that by 1993 abortion was, however divisive an issue, a largely protected right in Western countries, the FCC decision dictating that abortion must remain illegal was regarded by many as a suppression of rights, specifically those of East German women. Legal scholars discussing German abortion law that I have referenced throughout this paper have addressed the gravity of the ruling that can aid our grasp on the decision, particularly as they have taken strong stances. Blay and Piotrowicz assert that because “the Court has been politically inept even if it has acted in good faith...the worst fears of East Germans have been realized”¹⁰³. Citing the nuanced political work undertaken in the 1992 attempt at reform, Smit claims that “German society is the poorer for the fact that its highest court, in spite of almost ten months of deliberation, could not match the compassion and spirit of compromise of its legislators”¹⁰⁴. Finally, Joyce Mushaben, Geoffery Giles, and Sara Lennox conclude “Women, Men, and Unification: Gender Politics and the Abortion Struggle since 1989” with a particularly strong note on the ruling: “At best, a woman is viewed as a guardian or custodian of 'life'; as expressly decreed by the High Court, her needs are secondary to those of the 'life' she bears for the duration of the pregnancy. At worst, women are represented as potentially hostile not just to their own fetuses but to all other forms of life”¹⁰⁵. Taken together, these assessments of the 1993

¹⁰³ Blay and Piotrowicz, "The Advance," 185.

¹⁰⁴ Smit, "Reconciling the Irreconcilable," 320.

¹⁰⁵ Mushaben, Giles, and Lennox, "Women, Men," 152.

FCC ruling highlight the degree to which the Court's adherence to the political tradition of framing abortion as a collective issue clashed with the lived experience of East German women and the liberalization of views on abortion.

When the unified Bundestag at last passed an abortion policy on July 8th 1995, it was in many ways simply a codification of the 1993 FCC decision. Given that abortion would remain illegal, Paragraph 218 itself was once again left alone. Instead, Paragraph 218a's language "Der Schwangerschaftsabbruch ist nicht rechtswidrig, wenn" was replaced with "Der Tatbestand des § 218 ist nicht verwirklicht, wenn" which would keep abortion illegal but disqualify from punishment those that fell within in the combined Indikations and Fristenlösungen. Importantly, this signified that abortion was, despite being "illegal", still an option for women in the first twelve weeks of pregnancy and a (mostly) individual decision. The critical change made to the 1992 policy was the adoption of the court dictated counseling that would be outlined in Paragraph 219:

§ 219. Beratung der Schwangeren in einer Not- und Konfliktlage.

(1)

1. Die Beratung dient dem Schutz des ungeborenen Lebens.
2. Sie hat sich von dem Bemühen leiten zu lassen, die Frau zur Fortsetzung der Schwangerschaft zu ermutigen und ihre Perspektiven für ein Leben mit dem Kind zu eröffnen; sie soll ihr helfen, eine verantwortliche und gewissenhafte Entscheidung zu treffen.
3. Dabei muß der Frau bewußt sein, daß das Ungeborene in jedem Stadium der Schwangerschaft auch ihr gegenüber ein eigenes Recht auf Leben hat und daß deshalb nach der Rechtsordnung ein Schwangerschaftsabbruch nur in Ausnahmesituationen in Betracht kommen kann, wenn der Frau durch das Austragen des Kindes eine Belastung erwächst, die so schwer und außergewöhnlich ist, daß sie die zumutbare Obergrenze übersteigt.
4. Die Beratung soll durch Rat und Hilfe dazu beitragen, die in Zusammenhang mit der Schwangerschaft bestehende Konfliktlage zu bewältigen und einer Notlage abzuwehren.
5. Das Nähere regelt das Schwangerschaftskonfliktgesetz.

(2)

1. Die Beratung hat nach dem Schwangerschaftskonfliktgesetz durch eine anerkannte Schwangerschaftskonfliktberatungsstelle zu erfolgen.
2. Die Beratungsstelle hat der Schwangeren nach Abschluß der Beratung hierüber eine mit dem Datum des letzten Beratungsgesprächs und dem Namen der Schwangeren versehene Bescheinigung nach Maßgabe des Schwangerschaftskonfliktgesetzes auszustellen.
3. Der Arzt, der den Abbruch der Schwangerschaft vornimmt, ist als Berater ausgeschlossen¹⁰⁶.

As specified by the Court, the ultimate goal of this counseling is to protect unborn life by encouraging the woman to continue with the pregnancy and reminding her of the “unborn child’s” right to life. Dr. Telman argues that this obligatory counseling, as structured by the Court “undercuts any real acknowledgment of self-determination”¹⁰⁷. While the language of Paragraph 219 certainly attempts to dissuade the procurement of abortion, it still leaves the option to decide to get an abortion possible, even if illegal. The new Paragraphs came into effect on January 1st 1996 and abortion policy in Germany has remained largely the same since.

Ultimately, the process of developing an all-German abortion policy in the early 1990s mirrored in many ways the structure of the FRG’s process from 1974 to 1976. An attempt to liberalize policy that recognized the rights of the individual was struck down by the FCC which framed the issue within a broad collective value by prioritizing the protection of “unborn life” and a more restrictive policy was adopted that maintained the criminalization of abortion. As Dr. Telman argues, however, “the Court has engaged in extraordinary feats of judicial activism in an attempt to find alternatives to criminal punishment that will still provide adequate protections of the fetus’s right to life” as it contends with a population and international standard more insistent on access to abortion rights¹⁰⁸. In this way, the modern German abortion policy textually adheres

¹⁰⁶ 1. Oktober 1995: Artt. 8 Nr. 3, 11 S. 2 des Gesetzes vom 21. August 1995.

¹⁰⁷ Telman, “*Abortion and Women’s Legal Personhood*,” 146.

¹⁰⁸ *Ibid*, 144.

to the political tradition of framing abortion as a collective issue, despite jumping through hoops to allow for individual rights.

Conclusion

On June 24th, 2022, the same day that *Roe v. Wade* was overturned in the United States, Germany amended its abortion law. Unlike in the US, however, German law was further liberalized. The measure taken was to strike down Paragraph 219a, a policy first implemented under the Nazi regime that forbade doctors from advertising abortion services. It was the first major change made to the abortion Paragraphs since the eventual outcome of Reunification implemented in 1995. Effectively, abortion was and still is “illegal” in Germany as the policy has been entirely crafted around the constitutional conviction of the protection of “unborn life”. Despite this legal concession of individual reproductive rights, what is regarded by many as simply health care, to broad state ideals, abortion is more accessible to Germans than to many Americans. The political tradition of regarding abortion rights as a collective value prevailed through countless reforms and yet, practically, the right to abortion is secure in Germany. By conducting this analysis of policy development, this outcome begins to make sense. At each intervention point, the language of the law itself seemed to be nearly as important as the outcome. Even in its rejection of political traditions, the GDR adhered to a set of broader ideological standards that framed its policy. We might discern from this, then, a political tradition not necessarily only of collective value over individual rights but rather placing value in a broader set of ideals that is larger than the individual and its will.

CISLA Addendum

Preface

In the following pages, I will be explaining and exploring for myself the experiences, classes, and thought processes that have shaped not just my time at Conn but my understanding of the world and my place in it. I will preface that these thoughts are not, and never will be, entirely complete as everyday I can feel myself thinking about them differently, developing new ideas, and being molded by the events and people around me. That being said, however, the development of these ideas, shaped by both my experiences during my time at Conn and outside of Conn, have come to be deeply intertwined with my SIP interests and now topic. I feel incredibly grateful to have an opportunity that is rare to Conn and specifically CISLA: to explore without restriction my deep and often very personal interests in an interdisciplinary way (in both an academic and life sense) and apply these (sometimes not fully developed) explorations to meaningful and consequential topics of study.

Introduction

One of the earliest and arguably most important things one learns as a history major is that a critical form of power is control over a narrative. Those who write a history of a people, of a nation, or of an individual hold the power to dictate that person or that group's identity. An equally critical lesson is that history is subjective. Representations are affected and even dictated by the interpretations rooted in inevitable individual perception throughout the process of creating a narrative. In combining these two essential realizations about history, we come to understand how critical our perceptions and lenses are because they not only form the way that we understand the world and our place in it, but they have the power to dictate the identities of others.

Perceptions of Identity: Personal Reflections

In my preparation to write this paper, I have spent a good deal of time thinking back to where my mind was my sophomore year when beginning my CISLA experience in IS 201. Broadly, I wanted to try to unpack how the way that I viewed the world had changed. Instead, however, in a self-centered manner not atypical of a college student, I found myself thinking about how the way I viewed *myself* had changed. In particular, I remember this time as one in which I was constantly thinking about and questioning my gender identity. For a paper in IS 201, I had the chance to explore my relationship with my gender identity. One of the things I reflected on was how impactful being a woman or being perceived as a woman was on my life. I felt and still feel very strongly that it is a part of my identity regardless if I feel “female” because of the shared experiences I have with women. When I reflect back on that now, I think about what creates these shared experiences that ties me to womanhood, regardless of my own feelings on gender. It's not that we're all the same. It's not that we all express our womanhood the same. It's not that we all think the same. It's that, whether we like it or not, society has a prescribed role for who we are based on that identity. This idea of who we are “meant” to be and the roles we are meant to play in society dictates how we are treated. Whether it's on an individual basis in the everyday interactions we have or on a much wider scale regarding laws or governmental policy.

There have been a few moments in recent years when I have had to take a step back and think, “oh my God, is that really how society views me?” The night that Donald Trump was elected was one of those moments. It was right after the Access Hollywood tape had come out, and I could not fathom that half of our country could vote for a man who spoke so vilely about women. I remember having a near crisis of identity trying to reconcile the fact that I felt that being a woman was so strongly part of my identity and yet, I now had no idea what that identity

actually meant if that kind of rhetoric and those actions were being condoned. I thought I knew what that identity represented but all of a sudden, I felt that I had been wrong about what it represented to others. The tape revealed how he perceived and valued women, and yet he was still considered worthy of being elected to one of the most powerful positions in the world. 16-year-old me could not stop thinking of the fact that if I were to meet the President of the United States, the man who is supposed to represent the values of our American society, that I would be first and foremost viewed as a sexual object. That realization made me sick to my stomach. I wish I could say that it didn't affect the way that I thought about myself. I wish I could say that it didn't change the value I placed in that identity. Or that it didn't undermine my confidence. But it inevitably did. Unfortunately, it also had the added effect of making me incredibly aware of how society perceives me. I had thought of previous experiences with sexual harassment as one-offs (after all, I was only 16). After this moment, however, my understanding of these experiences changed, and I became incredibly aware of the perceptions that we rooted in and the message they sent.

I am sure that this is not just the second time that I experienced this feeling, but another time that I felt that need to take that step back was from this past summer. As we all know, Roe v Wade was overturned. I feel incredibly fortunate to be from a state like New Jersey, where my rights to contraception and abortion are protected. However, that moment, as I'm sure it was for millions of women around the country and the world, was a blow to the reality that I thought I lived in. Similarly to the moment when Donald Trump was elected, I felt the need to step back and ask myself what this told me about my worth to the United States and society at large. And just like that previous time, it felt like a crisis of identity, during which a constant stream of questions about my identity and value bombarded my thoughts. If my right to bodily autonomy is

no longer recognized as constitutionally protected, what am I to this country? Is the fact that I have the ability to reproduce more valuable to society than the contributions I may offer if I am entitled to choosing my own path? Or than simply just who I am? Do I need to justify that right with the fact that I will contribute something? Are someone else's religious beliefs projected onto others worth more than my life? I was in Germany at the time Roe v Wade was overturned, and there was one other American that I had met during my time in Dresden. I sought her out after the news was announced, and all I could do was look at her and cry. It felt like I knew her so well in having this shared outside perception of who we are and what we are worth to our country.

Regardless of how I think of myself and who I am, unfortunately, I don't believe that I will ever really be able to escape these limitations that society inherently places on me. Each individual experiences this in some degree or another, and often with many different aspects of their identity. It's inevitable and part of the human experience. What becomes more important, then, is the recognition of how our perceptions can affect and even dictate the identities of others and in doing so, however much, strip them of a degree of agency. In this way, we hold power over others merely through perceiving them.

Perceptions of Identity: Implications on Law and Policy

Much like my personal reflections, the common theme that I have taken from my academic experience has been outward perceptions of identity. When I reflect on the classes that I've taken at Conn, I find that the trend that I keep coming back to, the concept that my brain can't seem to let go of, is this idea of policy as reflective of how the state understands an individual or an identity. It is something that I have found in a number of classes including Constitutional Law, Courts and the Law, Nationalism and Ethnic Conflict in Europe, Segregation in America, American Political Development, Natives and Newcomers, and many others, even if

in a less direct way. In many cases, the identifiable outcome of this perception is the stripping away of rights based on the value, or lack thereof, a state places in an individual. During this past semester in particular, I have had the opportunity to dive deeply into this idea in a diverse set of contexts. My coursework and papers throughout the semester have given me the opportunity to explore this question through the lenses of issues that I would not have explored on my own. In the process, I have developed different ways of approaching and understanding the idea of policy informed by perceptions of identity.

In *Islam in Asia*, the underlying theme of our readings, discussions, and papers was how representations of Islam and Muslim populations reflect the values of those constructing the representations, whether it is the group itself or those on the outside. I chose to focus my final project and presentation on the Rohingya population because the Myanmar state has attempted (and in many ways succeeded) to strip the group of their identity by controlling their narrative. This denying of the Rohingya existence altogether has served as the foundation for oppressive policy in Myanmar since 1982 at which time the Muslim ethnic minority was made stateless. Not surprisingly, the oppression of rights due to state perceptions of an individual was also the underlying theme of *Race and the Criminal Justice System* for me. I have concluded in much of my work for the class that the essence of the construction and execution of the American carceral state is that it frames the individual holistically, crafting an identity of “criminal” that justifies the punitive and perpetual nature of incarceration. By privatizing failure, the state not only masks its own deficiencies created by the adoption of neoliberal social and economic policy, but creates a vicious cycle of poverty and incarceration rooted in conceptions of individual onus that targets those most vulnerable to the whims of the free market. Furthermore, the policy reforms that lead to this reality are largely driven by moral panics, as our judicial systems in the United States are

constructed to allow for the influence of electoral politics. In this way, not only can we understand the state as dictating policy that suppresses the rights of individuals rooted in identity, but that these identity formations are largely driven by the perceptions of the public.

Despite the fact that I already knew that I would be exploring conceptions of gender in the DDR in my SIP, the work that I have done in these classes has helped me develop a more tangible framework through which to analyze these conceptions. After two years of many changes and long periods of uncertainty, I have settled on exploring how the German state understands women and how abortion rights policy is reflective of that understanding. We've seen a fascinating and sometimes horrible history in which German policy regarding abortion revolves around the values that state is promoting at that given time. Especially given that Germany has experienced so many governments and even forms of governance over the last 104 years, those policies have looked really different. If we look at policy during Nazi Germany, abortion was illegal for those whom the Reich deemed ethnic German woman or even those who could be "germanized" while it was not only legal but encouraged and sometimes forced (as well as sterilization) on those who the German Nazi government deemed unworthy of reproduction. It's a terrifying concept to frame the right to abortion in the idea of eugenics. That in this case, state policy sends the message that "you have the right to abortion because we do not want you to reproduce because you are inherently less than". The Nazi state's understanding and devaluing of an identity in this case granted rights, or what we would now see as rights. This example highlights, in particular, that rights are often dictated by the values and goals of the state.

Interestingly enough, that same day that Roe v Wade was overturned, just hours beforehand, Germany also overturned a law regarding abortion. In this case, however, Germany

was eradicating a section of criminal code originating from the Nazi-era that allowed for the punishment of doctors who publicly share information on abortion or “advertise” how to obtain one. So in one day, while the United States was restricting abortion rights, Germany was making them more accessible. Being in Germany at the time, my thoughts about society’s perception of me that erupted from the Roe decision were interrupted by the different message I had received, not from my own country but from the one that I was currently in. The contradiction of the two felt impossible to process at the time.

However, during this fall semester, I have had a number of opportunities to reflect on this moment. In particular, during one conversation with Professor Forster, he asked whether I felt, in that moment, that Germany was making progress and the United States was backsliding. While I would have assumed that this was my initial feeling, it did not seem to map on to how my brain had juxtaposed these contradictory actions. Instead, it felt as though Germany was operating on a (at least somewhat) linear conception of progress and policy while the United States was operating in an entirely different framework, one in which policy can jump from one linear perception of progress to another entirely different line. In this way, it felt like in the United States, one perception of women’s role in society won out over another. Trying to account for not only these different changes but different approaches to changes, I left that conversation reflecting on how different electoral structures may alter policy development. In the German parliamentary system in which the governing force is composed of a coalition that is forced to compromise, it would make sense that policy is slow and incremental. Always trying to understand things visually, my brain pictures the German system of governance as a tug of war. In contrast, the US electoral system is not only fraught with partisan polarization but this characteristic is highly influential on policy as we operate on a majoritarian basis. I visualize this

policy struggle as a pendulum. The reflection of perceptions of identity, therefore, manifests itself differently in these two environments: as a compromise (not without struggle) and as a win-lose dichotomy that fosters reactionary policy.

With this framework that I derived from the comparative analysis of Germany and the United States, inspired by my being in Germany when Roe v Wade was overturned, I have begun reflecting on how the different political systems of East Germany and West Germany developed policy. In particular, I am considering how the systems allow for policies to be reflective of certain perceptions of identities vs others. Furthermore, with entirely different policies regarding abortion going into Wiedervereinigung (legal and accessible in the East and less so in the West), how did these policies combine, accounting for (or not) the different perceptions of identity from each side. These are the questions I hope to explore in my SIP research and writing.

Conclusion

Through my exploration of my own very personal reflections on perceptions of identities, including my own, my understanding of the power of perception over narrative and the power of narrative over identity, and the exploration of this power in dictating policy, I feel that my SIP is very much my own. I feel fortunate not just to be able to dive deeply into my interests but also dive into how my identity informs my interests. Finally, I feel fortunate to be able to say that my research is a combination of all of my majors and coursework, CISLA, my identity, and my personal convictions.

Bibliography

- Blay, Samuel K. n., and Ryszard W. Piotrowicz. "The Advance of German Unification and the Abortion Debate." *Statute Law Review* 14, no. 3 (1993): 171-85.
<https://heinonline.org/HOL/P?h=hein.journals/statlr14&i=187>.
- Böhm, Tatjana, and Diane Forman Kent. "The Abortion Question: A New Solution in Unified Germany?" *German Politics and Society*, no. 24/25 (1991): 135-41.
<http://www.jstor.org/stable/23734948>.
- Crabbs, Karen Y. (1991) "The German Abortion Debate: Stumbling Block to Unity," *Florida Journal of International Law*: Vol. 6: Iss. 2, Article 2.
- David, Henry P., Jochen Fleischhacker, and Charlotte Hohn. "Abortion and Eugenics in Nazi Germany." *Population and Development Review* 14, no. 1 (1988): 81-112.
<https://doi.org/10.2307/1972501>.
- Eser, A., & Koch, H.-G. (1992). *Schwangerschaftsabbruch: auf dem Weg zu einer Neuregelung: Gesammelte Studien und Vorschläge*. Baden-Baden: Nomos.
- Eser, Albin. "Reform of German Abortion Law: First Experiences Comment." *American Journal of Comparative Law* 34, no. 2 (1986): 369-83.
<https://heinonline.org/HOL/P?h=hein.journals/amcomp34&i=381>.
- Frink, Helen H. *Women after Communism: The East German Experience*. Lanham, Md: University Press of America, 2001.
- Gerstein, Hartmut, and David Lowry. "Abortion, Abstract Norms, and Social Control: The Decision of the West German Federal Constitutional Court." *Emory Law Journal* 25, no. 4 (1976): 849-78. <https://heinonline.org/HOL/P?h=hein.journals/emlj25&i=859>.
- . "Abortion, Abstract Norms, and Social Control: The Decision of the West German Federal Constitutional Court." *Emory Law Journal* 25, no. 4 (1976): 849-78.
<https://heinonline.org/HOL/P?h=hein.journals/emlj25&i=859>.
- Glaessner, Gert-Joachim. *The Unification Process in Germany: From Dictatorship to Democracy*. New York: St. Martin's Press, 1992.
 Outlines, with documents and speeches, efforts to combine East and West. Provides english legal text for treaties and articles of reunification.
- Glendon, Mary Ann. *Abortion and Divorce in Western Law*. Cambridge, Mass.: Harvard University Press, 1987.
- Gray, Richard T., and Sabine Wilke, eds. *German Unification and Its Discontents: Documents from the Peaceful Revolution*. Seattle: University of Washington Press, 1996.

- Grossman, Stefanie. "Wir haben abgetrieben!": Als Frauen ihr Schweigen brachen" ["We've had an abortion!": When women broke their silence]. NDR. Last modified December 1, 2022. <https://www.ndr.de/geschichte/chronologie/Wir-haben-abgetrieben-Als-Frauen-ihr-Schweigen-brachen,abtreibung154.html>.
- Harsch, Donna. *The Revenge of the Domestic: Women, the Family, and Communism in the German Democratic Republic*. Princeton, N.J.: Princeton University Press, 2008.
- . "Society, the State, and Abortion in East Germany, 1950-1972." *The American Historical Review* 102, no. 1 (1997): 53-84. <https://doi.org/10.2307/2171266>.
- Hertberg, Bonnie L. "Resolving the Abortion Debate: Compromise Legislation, an Analysis of the Abortion Policies of the United States, France and Germany." *Suffolk Transnational Law Review* 16, no. 2 (Spring 1993): 513-570
- Jarausch, Konrad Hugo, ed. *After Unity: Reconfiguring German Identities*. Providence, R.I.: Berghahn Books, 1997.
- Jarausch, Konrad Hugo, and Volker Gransow, eds. *Uniting Germany: Documents and Debates, 1944-1993*. Providence: Berghahn Books, 1997.
- Jonas, Robert E., and John D. Gorby. "West German Abortion Decision: A Contrast to Roe V. Wade West German Abortion Decision: A Contrast to Roe V. Wade." *John Marshall Journal of Practice and Procedure* 9, no. 3 (1975-1976): 605-84. <https://heinonline.org/HOL/P?h=hein.journals/jmlr9&i=615>.
- Kommers, Donald P. "The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?." 10 *J. Contemp. Health L. & Pol'y* 1 (1994).
- Krautgartner, Lisa. "Die Entwicklung Der Regelung Des Schwangerschaftsabbruchs Im Zuge Der Deutschen." JOHANNES KEPLER UNIVERSITÄT LINZ, 2018. <https://epub.jku.at/obvulihs/download/pdf/3362770?originalFilename=true>.
- Mattern, Michael G. "German Abortion Law: The Unwanted Child of Reunification Notes and Comments." *Loyola of Los Angeles International and Comparative Law Journal* 13, no. 3 (1990-1991): 643-94. <https://heinonline.org/HOL/P?h=hein.journals/loyint13&i=653>.
- Mushaben, Joyce, Geoffery Giles, and Sara Lennox. "Women, Men, and Unification: Gender Politics and the Abortion Struggle since 1989." In *After Unity: Reconfiguring German Identities*, edited by Konrad Hugo Jarausch, 137-72. Providence, R.I.: Berghahn Books, 1997.
- Mushaben, Joyce Marie. "Concession or Compromise? The Politics of Abortion in United Germany." *German Politics* 6, no. 3 (December 1997): 70-88. <https://doi.org/10.1080/09644009708404489>.

"1972: Volkskammer zum Gesetz der Schwangerschaftsunterbrechung." Audio. MDR. March 9, 2012. <https://www.mdr.de/geschichte/stoebern/damals/audio197014.html>.

Sandole-Staroste, Ingrid. *Women in Transition: Between Socialism and Capitalism*. Westport, Conn.: Praeger, 2002.

Smit, D. Van zyl. "Reconciling the Irreconcilable - Recent Developments in the German Law on Abortion." *Medical Law Review* 2, no. 3 (1994): 302-20.
<https://heinonline.org/HOL/P?h=hein.journals/medlr2&i=312>.

Telman, Jeremy D.A. *Abortion and Women's Legal Personhood in Germany: A Contribution to the Feminist Theory of the State*, 24 N.Y.U. Rev. L. & Soc. Change 91 (1998).

Usborne, Cornelia. *The Politics of the Body in Weimar Germany: Women's Reproductive Rights and Duties*. Ann Arbor: Univ. of Michigan Press, 1995.

Von Behren, Dirk. "Kurze Geschichte des Paragraphen 218 Strafgesetzbuch." Bundeszentrale für politische Bildung. Last modified October 5, 2019.
<https://www.bpb.de/shop/zeitschriften/apuz/290795/kurze-geschichte-des-paragraphen-218-straftgesetzbuch/>.

Walther, Susanne. "Thou Shalt Not (but Thou Mayest): Abortion after the German Constitutional Court's 1993 Landmark Decision," *German Yearbook of International Law* 36 (1993): 385-404

Wuerth, Andrea Christine. "Nation, state, and the politics of women's rights: Abortion law reform in post-Wall Germany, 1989-1993." PhD diss., Johns Hopkins University, 1995.
<https://www.proquest.com/openview/f0b0c0b60d7523cc4198362c46f78c9c/1?pq-origsite=gscholar&cbl=18750&diss=y>.

Laws and Court Rulings Cited

1. Oktober 1953: Art. 1 Nr. 1 Buchst. b, 11 Abs. 1 des Gesetzes vom 4. August 1953.

1. Oktober 1995: Artt. 8 Nr. 3, 11 S. 2 des Gesetzes vom 21. August 1995.

18. Juni 1976/21. Juni 1976: Artt. 1 Nr. 4, 6 des Gesetzes vom 18. Mai 1976.

8. Juni 1926: Gesetz vom 18. Mai 1926, Art. 71 der Verfassung des Deutschen Reichs vom 11. August 1919, Reichsgesetzblatt 1919 Nummer 152 vom 14. August 1919 Seite 1383-1418.

30. März 1943: Artt. I § 2, III der Verordnung vom 18. März 1943.

Artikel 21, Absatz 4 GG

Bundestag Drucksache 7-1984.

BVerfG, Order of the Second Senate of 28 May 1993 - 2 BvF 2/90 -, paras. 1-434,
http://www.bverfg.de/e/fs19930528_2bvf000290en.html

Januar 1872: Gesetz vom 15. Mai 1871.

Judgment of February 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (First Senate) (F.R.G.).

Law of June 18, 1974, [1974] BGBl. I § 1297, commonly called the "Fifth Penal Law Reform Statute" ("Fünftes Gesetz zur Reform des Strafrechts"), 5 StrRG.

Schwangeren- und Familienhilfegesetz, 7 July 1992, BGBl. I, 1992, 1398.