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Comparative Pragmatism

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INTRODUCTION

In 1987, Mary Ann Glendon framed Western European and North American abortion laws as a choice between the approach of the United States, symbolizing the protection of women's constitutional rights, and the approach of Germany, symbolizing the protection of fetal constitutional rights.[1] For twenty-five years, this dichotomy has remained a principal comparison in national court decisions from a group of diverse countries and in the curricula of U.S. law schools.[2] Although several commentators have previously suggested

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1. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 22–25, 33–38 (1987).

2. *See infra* Part II. The leading comparative constitutional law casebook, for example, begins with abortion in the first chapter to provide an illustration of constitutional comparativism. VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1–140 (2d ed. 2006). The casebook excerpts the U.S. and German cases described in Part I, as well as the Canadian case, *R. v. Morgentaler*, [1988] S.C.R. 30 (Can.). JACKSON & TUSHNET, *supra*. The casebook contrasts Mary Ann Glendon's view that U.S. law, like its Western European counterparts, should accord greater respect to life with Lawrence Tribe's argument that the U.S. attachment to individual rights and court-enforced norms makes a European model untenable. *Id.* at 137–39; *see also* D. MARIANNE BLAIR & MERLE H. WEINER, FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN

that the United States and Germany now share more commonalities than differences,[3] this Article challenges the conventional wisdom by suggesting that the United States and Germany have moved in the opposite direction on a spectrum of available abortion services. In the United States, the constitutional right to an abortion is unrealizable for many women due to restrictive state and federal laws and the absence of providers in many areas.[4] In Germany, by contrast, despite the country's formal recognition of fetal rights, early abortion is widely available and often funded by the government.[5] In short, the dichotomy Professor Glendon described in 1987 may be unrecognizable today.

Yet the comparison between Germany and the United States persists. Over the last decade, major court decisions in countries such as Colombia, South Africa, Portugal, and Mexico have referred to the sweeping, global influence of *Roe v. Wade*.[6] At the same time, these courts cite a case decided in 1975 by the Federal Constitutional Court

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COMPARATIVE AND INTERNATIONAL FAMILY LAW 1082–88 (2003) (juxtaposing U.S. and German case law in explaining the comparative judicial approach to abortion).

3. Scholars cited by Jackson and Tushnet argue that U.S. and German abortion case law share a middle ground that Professors Tribe and Glendon do not sufficiently acknowledge. *See* JACKSON & TUSHNET, *supra* note 2, at 139 (citing Udo Werner, *The Convergence of Abortion Regulation in Germany and the United States: A Critique of Glendon's Rights Talk Thesis*, 18 LOY. L.A. INT'L & COMP. L.J. 571, 601 (1996), for Werner's argument that "a demand for abortion services existed in German society despite the pronouncements of the Constitutional Court[, which] proved to be relatively independent from the legal prohibition of abortion"); *see also* Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 1045 ("In assessing modern abortion law in [the United States and Germany], what seems most remarkable is the growing convergence of the two laws . . . ."); Gerald L. Neuman, Casey *in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273, 273 (1995) ("In practical terms, the situation in Germany now resembles the post-*Casey* situation in Pennsylvania."); John A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics*, 43 COLUM. J. TRANSNAT'L L. 189, 200 (2004) (arguing that lawyers in the United States will recognize that, in regards to abortion, "the balance struck in Germany was similar in many respects to that drawn in the United States").

4. *See infra* Part III.A.

5. *See infra* Part III.B.

6. 410 U.S. 113 (1973); *see infra* Part II.

of Germany ("FCC")[7] to acknowledge that some countries protect "unborn life" under their constitutions.[8] With less frequency and for similar purposes, contemporary courts also cite to *Planned Parenthood of Southeastern Pennsylvania v. Casey*[9] and to a 1993 decision of the post-unification FCC.[10] Although national courts mention cases of other countries, they consistently focus on the comparison between U.S. and German law as evidence of an emerging consensus on the need for legal abortion, at least on limited grounds.[11]

For example, in 2006, the Constitutional Court of Colombia used a legal comparison between U.S. and German law when it struck down the country's criminal ban on abortion and permitted abortion in cases of risk to maternal life or health, a criminal act against the woman, unwanted artificial reproductive technology, or serious malformation of the fetus.[12] The Constitutional Court cited the *Roe* tri-

7. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, *translated in* Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to* Roe v. Wade, *Translation of the German Federal Constitutional Court Decision*, 9 J. MARSHALL J. PRAC. & PROC. 605, 605–84 (1976).

8. *See infra* Part II.

9. 505 U.S. 833 (1992).

10. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203 (translation provided by author).

11. *See infra* Part II. I have chosen decisions of national courts from the last ten years that are commonly cited when recent, comparative abortion jurisprudence is discussed. *See, e.g.*, Martha Davis, *Abortion Access in the Global Marketplace*, 88 N.C. L. REV. 1657, 1678–80 (2010) (discussing decisions from Mexico and Colombia). I also chose the examples presented in this Article based on the length and detail of the comparative analysis in each case.

For a comprehensive, but somewhat dated review of national abortion laws, see Reed Boland & Laura Katzive, *Developments in Laws on Induced Abortion: 1998–2007*, 34 INT'L FAM. PLAN. PERSP. 110 (2008) (discussing the state of abortion laws in 196 countries). For revisions to national abortion laws updated on a consistent basis, see GUTTMACHER INST., INT'L DATA CENTER, http://www.guttmacher.org/idc/countrysummary.jsp (last visited Oct. 30, 2012). Cases decided at the international or regional level are interesting but not relevant to the national decisions that are the focus of this article.

12. Corte Constitucional [C.C.] [Constitutional Court], Sala Plena mayo 10, 2006, Sentencia C-355/2006 (p. 356–65) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2006/C-355-06.htm, *excerpts translated in* WOMEN'S LINK WORLDWIDE, C-355/2006: EXCERPTS OF THE CONSTITUTIONAL COURT'S RULING THAT LIBERALIZED

mester framework as an example of how to balance the rights of pregnant women against those of fetuses in the second and third trimesters. By contrast, the court described the 1975 German decision as supporting the countervailing protection for "unborn life." The limited common ground that U.S. and German case law share, the court reasoned, demonstrates a consensus on the basic rights of women and potential life.[13]

Courts contemplating deeper reform also refer to U.S. and German jurisprudence. In 2004, the Supreme Court of Appeal of South Africa upheld provisions of a post-apartheid law, the Choice on Termination of Pregnancy Act of 1996, which grants women of any age access to abortion on any ground during the first twelve weeks of pregnancy.[14] Similar to the Colombian court, the South African court quoted from *Roe* in support of women's rights to autonomy and equality in deciding whether to terminate a pregnancy. The court described the German cases as exceptions to an international consensus that fetuses do not enjoy constitutional rights to life.[15]

In examining the comparative approach of these and other decisions, it becomes clear that the U.S. and German cases take on meanings that were likely not intended by the courts that issued the original decisions.[16] Most notably, these contemporary decisions misconstrue or misinterpret U.S. and German abortion law.[17] The South African Supreme Court of Appeal, for example, cited *Casey* as supportive of minors' independent access to abortion, despite the fact

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ABORTION IN COLOMBIA (2007) [hereinafter C-355/2006 EXCERPTS], *available at* http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006
.pdf.

13. *See infra* Part II.A.

14. *Christian Lawyers' Ass'n v. Nat'l Minister of Health* 2004 (4) All SA 31 (SCA) at 33, 35–36, 47–48 (S. Afr.); *see also Christian Lawyers Ass'n v. Minister of Health* 1998 (4) SA 1113 (T) at 1117–18 (S. Afr.) (upholding the constitutionality of the 1996 law in a challenge based on a right to life from conception).

15. *See infra* Part II.B.

16. *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1273 (1999) ("A nation that did not have the experience of having to live with the knowledge that its people put Hitler in place might not be in a position to learn much from the German abortion decisions."); *see also* Karen Knop, *State Law Without Its State*, *in* LAW WITHOUT NATIONS 66, 67–68 (Austin Sarat et al. eds., 2011) (noting how other nations have "disembedded" the original meaning of a famous case decided by U.S. Supreme Court, *Lochner v. New York*, 198 U.S. 45 (1905)).

17. *See infra* Parts II–III.

that the *Casey* Court upheld a Pennsylvania law requiring a minor to obtain parental consent before an abortion.[18]

The reason national courts cite U.S. and German cases is to justify their decisions in light of national politics and to legitimize their opinions in a national context.[19] As part of this justification and legitimation, courts draw on comparative law to join an international conversation about how modern countries balance competing rights.[20] For example, language from an opinion recently decided by the Constitutional Court of Portugal reveals that court's concern with popular, national attitudes opposed to abortion.[21] Thus, in its opinion, the court upheld legislation that marked a major change in the country's abortion law, but framed the legislation as responsive, in part, to the same concerns that were before the FCC in 1993.[22]

Contributing to a rich literature on comparative constitutionalism and globalization,[23] this Article explores how and why courts and

18. *See infra* Parts I.A, II.B.

19. *See infra* Part II. This Article does not consider the oft-debated question of whether national courts should borrow from the decisions of foreign judicial bodies, or how much weight courts should give to foreign experience. For an analysis of those issues in the context of U.S. and German abortion law, see Myra Marx Ferree & William A. Gamson, *The Gendering of Governance and the Governance of Gender: Abortion Politics in Germany and the USA*, *in* RECOGNITION STRUGGLES AND SOCIAL MOVEMENTS: CONTESTED IDENTITIES, AGENCY AND POWER 35, 39 (Barbara Hobson ed., 2003) (examining U.S. abortion law in light of German abortion law and noting the implications for the development of U.S. law); Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y 1, 2 (1994) (questioning how societies with similar constitutional values have reached "radically different constitutional positions"); Neuman, *supra* note 3 at 289, 293–300, 314 (examining "[t]he German [l]aw in an American [l]ight" and focusing on the comparative roles of "positive rights and state duties" and courts and legislatures of the United States and Germany).

20. Reva Siegel recently noted the way in which modern constitutional frameworks for abortion draw from U.S. and German approaches to balance the rights of women and fetuses. Reva B. Siegel, *The Constitutionalization of Abortion*, *in* OXFORD HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW 1057, 1057–58 (Michael Rosenfeld & András Sajo eds., 2012) [hereinafter Siegel, *Constitutionalization of Abortion*].

21. T.C., Acórdão No. 75/2010, Relator: Joaquim de Sousa Ribeiro, 23.02.2010, 60, DIÁRIO DA REPÚBLICA, 2.ª SÉRIE [D.R.], 26.03.2010, 15566, 15582–83 (Por.) (translation provided by Marcelina Alvrim and on file with author).

22. *See infra* Part II.C.

23. *See, e.g.*, Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 19–21 (David

lawyers rely on a particular formulation of comparative law as evidence of modern and universal trends in abortion law reform. It also assesses the consequences of this comparative methodology. Legislative acts or judicial decisions that appear to add to or expand legal grounds for abortion may not necessarily correspond with better or more extensive health care services; Germany and the United States are good examples.[24] State laws in the United States ban certain procedures, mandate special standards for licensing and facilities, require counseling and waiting periods, and limit funding for abortion services in public programs (and, more recently, in private insurance plans).[25] The legal and liability pressures on health care providers, the rising costs of services, and social stigma limit the availability of abortion services for many U.S. women.[26]

German women, by contrast, can terminate pregnancies after submitting to counseling, the requirements of which vary in tone and by region.[27] Although the 1993 FCC decision reiterated that abortion is an unlawful act, proof of counseling before the twelfth week of pregnancy suspends criminal punishment.[28] Women know which counseling centers to contact depending on their need for minimal, though legally compliant, counseling.[29] In addition, state welfare funds cover almost all of the country's abortions.[30] Present applica-

M. Trubek & Alvaro Santos eds., 2006) (analyzing three time periods when "legal institutional and conceptual change" developed alongside global economic change); Heinz Klug, *Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism,"* 2000 WIS. L. REV. 597, 597–99 (evaluating the place of the U.S. Constitution in the constitutional development of other countries); Sally Engle Merry, *New Legal Realism and the Ethnography of Transnational Law*, 31 LAW & SOC. INQUIRY 975, 975–77 (2006) (examining "new legal realism" through the lens "of the use of human rights in the international movement against violence against women").

24. *See infra* Part III.

25. *See infra* Part III.A; *see also* Emily Bazelon, *The Reincarnation of Pro-Life*, N.Y. TIMES MAG., May 27, 2011, at MM13, *available at* http://www.nytimes.com/2011/05/29/magazine/the-reincarnation-of-pro-life.html (describing the types and prevalence of anti-abortion legislation).

26. *See infra* Part III.A.

27. *See infra* Part III.B.

28. *See infra* notes 93–94 and accompanying text.

29. *See infra* notes 269–276 and accompanying text.

30. *See infra* notes 277–285 and accompanying text.

tion of the law has led some to argue that Germany, in effect, permits abortion for any reason.[31]

Briefs penned by women's rights advocates and cited by national courts illustrate how comparative examples provide support for the dominant rights-based approach to abortion.[32] These briefs, and the court decisions that borrow from them, transplant examples from Western Europe and North America for the sake of modernity and progress. This comparative method may perpetuate what Karen Knop has described as a "soft form[] of imperialism."[33] Activists' and courts' focus on rights to legal decisionmaking, however, reifies a formalist understanding of comparative constitutional law that makes it difficult to see the consequences and practices, both before and after law reform. In the context of abortion, the prevailing comparative methodology provides little opportunity for courts, advocates, and scholars to compare how states tolerate both formal and informal practices.[34]

A different approach, which might be loosely labeled as "comparative pragmatism,"[35] also has important implications for women's

31. *See infra* Part III.B; *see also* Elizabeth Crighton & Martina Ebert, *RU 486 and Abortion Practices in Europe: From Legalization to Access*, 24 WOMEN & POL. 13, 25–26 (2001) (evaluating the current state of abortion law in Germany and concluding "that the current law takes an ambivalent position on abortion").

32. *See infra* Part IV.A.

33. Knop, *supra* note 16, at 76.

34. *See infra* Part IV.B. In this vein, Annelise Riles issued a challenge for comparative theory generally: "Rather than attempting to relate global and local spheres of legality, to somehow tie them up in one grand comparative scheme, we might take on the somewhat less grandiose task of describing and understanding actual artifacts of transnational legality . . . ." Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 277 (1999).

35. Although I use the word "pragmatism" in a conversational sense, theories of legal pragmatism have attracted varied scholarly attention. For contemporary examples in American legal theory, see Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2071–72 (1996) (describing legal pragmatists as "embracing a wide variety of ideologies from neotraditionalism to feminism to critical race theory" who reject formalism and "attempts to ground legal doctrine in terms of one overarching social policy or 'grand theory'"); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332 (1988) (describing legal pragmatism as "solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy"); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 173–81 (2004) (describing "[t]he basic background

rights advocates based in the global North, in particular in the United States. A comparative analysis that focuses less on constitutional case law and more on public health concerns can challenge the pervasive and encompassing focus on the recognition of formal rights.[36] In countries like Colombia and South Africa, for example, reform strategies might contemplate the availability of health care resources, the relative power of the state to enforce abortion laws, and the existence of informal networks for obtaining abortion services. This restyled comparative inquiry might elicit solutions that fit with diverse community needs, deter counter-movements against liberalization, and encourage flexible strategies that align with the relative power of the state at issue. This type of comparative pragmatism would also contradict the prevalent misconception—particularly abroad—that *Roe* currently provides U.S. women with abortion on demand.

This Article has four parts. Part I will summarize the cases in the United States and Germany that are the frequent sources of comparison. Part II will describe patterns in the legal reasoning of recent decisions from Colombia, South Africa, Portugal, and Mexico.[37] Although these decisions come from different courts in different countries, they all rely on a similar comparative myth: the United States and Germany are ends on a spectrum and share certain overlapping concerns for women's rights and fetal rights. Part III will explain why the comparators—the United States and Germany—are misunderstood proxies for permissive or restrictive legal regimes, respectively. In particular, this Part will show how abortion services are restricted in the United States and relatively accessible in Germany. Finally, Part IV will consider what courts and advocates may miss because of their focus on expanding the legal grounds for abortion.

I. THE COMPARATORS: THE UNITED STATES AND GERMANY

Before discussing a set of high-profile foreign cases decided in the last ten years, a brief description of the law from which the comparisons are drawn is helpful. This Part introduces relevant U.S. and German case law.

premises of Legal Pragmatism [as] Citizen Perspective, Associative Democracy, and the Priority of Solutions").

36. *See infra* Part IV.B.

37. Part II will also briefly discuss cases decided by courts in Spain and Nepal.

A. The United States: Roe *and* Casey

Abortion law and practice in the United States has been in a state of change since 1973 when the Supreme Court of the United States decided *Roe v. Wade*. This Section could not possibly cover the extent to which abortion law and practice has evolved, or the voluminous writing on the subject.[38] As will be discussed in more detail in Part III, state legislatures and the federal government have passed a variety of laws that shape abortion provision and access. This Section does, however, provide a brief summary of the relevant portions of the constitutional cases often cited by foreign courts: *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

In *Roe*, the Supreme Court held that criminal laws banning abortion were an infringement of a constitutional right to privacy.[39] According to the Court, women, in consultation with their physicians, could elect to have an abortion for any reason during the first trimester.[40] In the second trimester, a state could "regulate the abortion procedure in ways that are reasonably related to maternal health."[41] In the last trimester, a state, "in promoting its interest in the potentiality of human life [could], if it cho[se], regulate, and even proscribe,

38. *See generally* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 3, 9–10 (1984) (discussing how individuals form their opinions about abortion and analyzing how those opinions have contributed to "the reemergence of abortion as a political and moral issue"); THE REPRODUCTIVE RIGHTS READER: LAW, MEDICINE, AND THE CONSTRUCTION OF MOTHERHOOD 11–14 (Nancy Ehrenreich ed., 2008) (collecting essays as an introduction to various issues of reproductive justice); LAWRENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES 3 (1992) (discussing abortion as a "clash" between life and liberty); WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005) (discussing abortion jurisprudence through a collection of hypothetical rewrites of *Roe v. Wade*).

39. 410 U.S. 113, 153, 164–66 (1973).

40. *Id.* at 164 ("For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."). More than ten years before *Roe*, the American Law Institute called for the legalization of abortion on the grounds of danger to mental or physical health, rape, and grave fetal anomaly, as determined by a physician. Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2037 (2011).

41. *Roe*, 410 U.S. at 164.

abortion except where it [was] necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[42]

Immediately following *Roe*, legislation and litigation tested the trimester framework. The Supreme Court upheld several federal and state restrictions on abortion[43] but also struck down state laws that limited access to abortions.[44] For example, the Supreme Court held unconstitutional informed consent requirements that attempted to dissuade women from obtaining abortions.[45]

In 1992, a plurality of the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* preserved constitutional protection for abortion, but rejected *Roe*'s trimester framework and gave states much more discretion to restrict access to abortion and to extend

42. *Id.* at 164–65.

43. *See generally* Nancy Ford, *The Evolution of a Constitutional Right to an Abortion: Fashioned in the 1970s and Secured in the 1980s*, 4 J. LEGAL MED. 271 (1983) (tracing the evolution of U.S. abortion law in the 1970s and early 1980s); *see also* Rust v. Sullivan, 500 U.S. 173, 192–99 (1991) (upholding against a First Amendment challenge the federal government's refusal to allow family planning funds to be used for counseling and other speech related to abortion); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 506 (1990) (upholding "an Ohio statute that, with certain exceptions, prohibit[ed] any person from performing an abortion on an unmarried, unemancipated, minor woman absent notice to one of the woman's parents or a court order of approval"); Hodgson v. Minnesota, 497 U.S. 417, 497 (1990) (upholding a two-parent notice requirement in a Minnesota statute that included an alternative judicial bypass procedure); Webster v. Reprod. Health Servs., 492 U.S. 490, 504–09, 516–17 (1989) (upholding a Missouri statute that contained a preamble defining life at conception, required physicians to ascertain point of viability, and barred abortion in state facilities or performed by state employees); Harris v. McRae, 448 U.S. 297, 301, 326 (1980) (upholding the Hyde Amendment, which prohibits the federal government from funding "certain medically necessary abortion"); Maher v. Roe, 432 U.S. 464, 473–74, 480 (1977) (upholding a Connecticut regulation providing state Medicaid benefits for childbirth but not for nontherapeutic abortions).

44. *See* Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 759–69 (1986) (striking down requirements for informed consent, record-keeping, and techniques designed to protect post-viability fetuses), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881–82 (1992); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 437–39, 448–49 (1983) (striking down a state hospitalization requirement for second trimester abortions and informed consent measures intended to dissuade women from abortion), *overruled by Casey*, 505 U.S. at 881–82; Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67–75 (1976) (striking down spousal and parental consent requirements).

45. *Thornburgh*, 476 U.S. at 764; *City of Akron*, 462 U.S. at 448–49.

protections for fetal life.[46] In addition, Justices O'Connor, Kennedy, and Souter determined that states could restrict abortion so long as the states did not create an "undue burden" on women's choice to have an abortion.[47] The Justices described an undue burden as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[48] A majority of the Court, however, held that the state has an interest in protecting women's health and in respecting fetal life throughout a woman's pregnancy.[49] The plurality noted that after viability, the state could proscribe abortion except when pregnancy threatened "the life or health of the mother."[50] Based on this analysis, the plurality upheld Pennsylvania's requirements for parental consent for a minor's abortion,[51] record keeping and reporting to the state,[52] informed consent,[53] and a twenty-four-hour waiting period.[54] The only provision of the Pennsylvania law that the plurality struck down as imposing an undue burden on the right to pre-viability abortion was a spousal notice requirement.[55]

Casey's undue burden test has justified laws that make abortion logistically and financially more difficult for many U.S. women to obtain.[56] For example *Casey* has justified state laws that restrict provider practices and impose counseling or other requirements on patients that are unique to abortion.[57] Some scholars question whether *Casey*'s

46. *Casey*, 505 U.S. at 844–46, 872–76. Justice O'Connor wrote the plurality opinion, in which Justice Kennedy and Justice Souter joined. *Id.* at 843.

47. *Id.* at 874.

48. *Id.* at 877.

49. *Id.* at 846.

50. *Id.* at 879 (citing Roe v. Wade, 410 U.S. 113, 164–165 (1973)).

51. *Id.* at 899.

52. *Id.* at 900–01.

53. *Id.* at 883. Interestingly, this provision provided women with information that might lead "the woman to choose childbirth over abortion." *Id.*

54. *Id.* at 886–87.

55. *Id.* at 898. *But see* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under* Casey/Carhart, 117 YALE L.J. 1694, 1735–36, 1773–80 (2008) (noting the shifting rhetoric in *Casey* to women's dignity, liberty, autonomy, and equality).

56. *See infra* Part III.A.

57. *See* Scott Woodcock, *Abortion Counseling and the Informed Consent Dilemma*, 25 BIOETHICS 495, 496–98 (2011) (distinguishing informed consent standards for abortion versus for other medical procedures).

undue burden test has any teeth at all, or whether it is merely a "reasonableness" standard that poses few obstacles to state regulation.[58]

Although not cited by the foreign court decisions described in this Article, the Supreme Court's latest word on abortion in *Gonzales v. Carhart*[59] provides a snapshot of how the jurisprudence of the Supreme Court has evolved.[60] In *Carhart*, the Court upheld a federal law that barred physicians from using an abortion method clinically described as intact dilation and evacuation ("intact D&E"), but referred to as partial-birth abortion by abortion opponents.[61] Applying *Casey*'s undue burden standard, the Court held that the federal law did not have to include an exception for women's health.[62] In reaching this holding, the Court suggested that the law protected not only fetal life, but also the integrity of the medical profession,[63] and expressed concern for the emotional health of women who may suffer from regret once they learned what the intact D&E procedure entailed.[64] While the trajectory of abortion law in the United States is not uniform, a case like *Carhart* illustrates the Court's willingness to permit restrictions on abortion.[65]

58. *See, e.g.*, David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 538–39 (2000) (noting that the "undue burden" test is extremely deferential because it "turn[s] more frankly on the Court's assessment of . . . 'reasonableness'").

59. 550 U.S. 124 (2007).

60. For other examples of post-*Casey* case law, see Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 328–32 (2006) (explaining that, if possible, lower courts should sever from a statute any potentially unconstitutional provision regulating minors' access to abortion in medical emergencies); Mazurek v. Armstrong, 520 U.S. 968, 974 (1997) (per curiam) (acknowledging that "performance of abortions may be restricted to physicians"); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 266–68 (1993) (holding that a federal law prohibiting private conspiracies to deprive people of civil rights does not apply to conspiracies to close abortion clinics).

61. *Carhart*, 550 U.S. at 136–37, 168.

62. *Id.* at 156–67. In brief, the Court stated that other safe procedures were available to women who might otherwise have intact D&Es and that whether the procedure was necessary to protect women's health was contested by the medical profession. *Id.* at 158, 162–65. The Court also dismissed claims that the federal law was vague or overbroad. *Id.* at 148–50.

63. *Id.* at 160.

64. *Id.* at 159–60.

65. *See* Sonia M. Suter, *The "Repugnance" Lens of* Gonzales v. Carhart *and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1519 (2008) (arguing that *Carhart* "broaden[ed] the range of state interests that can

B. Germany: The 1975 and 1993 FCC Decisions

In 1975, the FCC handed down a decision that reflected a different approach than the one expressed by the U.S. Supreme Court in *Roe v. Wade*.[66] The FCC was well aware of abortion politics and jurisprudence in the United States.[67] And, in a sense, the FCC's rejection of *Roe* captures the contrasting nature of U.S. and German case law.[68] The court acknowledged that the laws of "other democratic countries of the Western World . . . have been 'liberalized' or 'modernized,'" but differentiated West German legal standards and history.[69] In particular, the court held that the rights to life and dignity that buttress Germany's Basic Law were informed by the gross abuses of the totalitarian National Socialist Party, "a political regime to which the individual life meant little."[70]

In its 1975 decision, the FCC struck down amendments to the German Penal Code that permitted abortion until the twelfth week of pregnancy after pro-childbirth counseling and after twelve weeks in cases of medical necessity or serious fetal anomaly.[71] The court held

justify limiting reproductive decisions"). For a study of post-*Casey* decisions from various federal courts, see Linda J. Wharton, Sue Frietsche, & Kathryn Kolbert, *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 353–85 (2006).

66. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, *translated in* Jonas & Gorby, *supra* note 7, at 605–84. I refer to this case as "the 1975 FCC decision."

67. *See id.* at 667 (von Brünneck, J., dissenting) (observing that "the Supreme Court of the United States has even regarded punishment for the interruption of pregnancy [in the first trimester] as a violation of fundamental rights"); Kommers, *supra* note 19, at 9 (contending that the German court's "pronouncement diverged radically from the U.S. Supreme Court's refusal in *Roe v. Wade* to say when life begins").

68. *See* Mary Anne Case, *Perfectionism and Fundamentalism in the Application of German Abortion Laws*, *in* CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 95 (Susan H. Williams ed., 2009) (noting that U.S. and German abortion law have been treated as mirror images of each other).

69. 39 BVERFGE 1 (57), Jonas & Gorby, *supra* note 7, at 661–62.

70. Jonas & Gorby, *supra* note 7, at 637–38.

71. Jonas & Gorby, *supra* note 7, at 609–13. Under the 1974 amendments to the penal code, the required counseling was designed to inform women of "the public and private assistance available for the pregnant women, mothers and children" and to "facilitate[] the continuation of the pregnancy." *Id.* at 612. The West German Parliament (the Bundestag) amended the penal code by a narrow margin. MYRA MARX FERREE ET AL., SHAPING

that Articles 1 and 2 of the Basic Law[72] protect the inviolability of human dignity and the right to life and impose positive duties on the state to protect the "unborn life" or "developing life."[73] In considering the rights of women and of "developing life," the court stated, "precedence must be given to the protection of the life of the child about to be born."[74] But the FCC held that abortion was not punishable in exceptional circumstances, such as in instances of an expecta-

ABORTION DISCOURSE: DEMOCRACY AND THE PUBLIC SPHERE IN GERMANY AND THE UNITED STATES 34 (2002). Abortions for medical reasons (threat to a woman's life or serious impairment of the woman's health) could be performed any time during the pregnancy. Jonas & Gorby, *supra* note 7, at 610. Abortion for reason of fetal anomaly could be performed up to twenty-two weeks. *Id.* at 611. In June 1974, the FCC issued an order suspending enforcement of the law, "although the interruption of pregnancy which [was] indicated medically, eugenically or ethically within the first twelve weeks after conception . . . remain[ed] free of punishment," until it handed down its decision. 39 BVERFGE 1 (8), Jonas & Gorby, *supra* note 7, at 622; *see also* FERREE ET AL., *supra*, at 33–34 (discussing the political process surrounding abortion legislation in Germany). Interestingly, the 1974 legislation struck down by the FCC looks somewhat like the counseling provisions that the court mandated two decades later. *See infra* notes 90–101 and accompanying text.

72. Article 1 provides:

> (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I at 1, *translated in* BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY 15 (Christian Tomuschat & Donald P. Currie trans., Deutscher Bundestag, 2010).

Article 2 provides:

> (1) Every person shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Id.

73. Jonas & Gorby, *supra* note 7, at 624.

74. 39 BVERFGE 1 (39), Jonas & Gorby, *supra* note 7, at 628, 643. The court also noted that the penal code was not the only source of protection for unborn life, and that it was "the task of the state to employ, in the first instance, social, political, and welfare means for securing developing life." Jonas & Gorby, *supra* note 7, at 644.

tion of a severe birth defect, a threat to the pregnant women's life or health, a criminal act of rape or incest, or a "general situation of need."[75] The FCC defined this last ground, also called the "social indication," as "conflicts of such difficulty that, beyond a definite measure, a sacrifice by the pregnant woman in favor of the unborn life cannot be compelled."[76] The following year, in 1976, the West German Parliament codified as grounds for legal abortion the reasons of maternal health and life, fetal malformation, rape or incest, and general situation of need.[77]

Almost all West German women seeking abortion after the 1975 decision relied on the social indication exception.[78] In other words,

75. 39 BVERFGE 1 (43–44), Jonas & Gorby, *supra* note 7, at 648; *see also* Neuman, *supra* note 3, at 275 (writing that the FCC approved an exception from the general prohibition on abortion "for a 'general situation of need . . . when continuation of the pregnancy would impose extreme hardship on the woman").

76. 39 BVERFGE 1 (44–45); Jonas & Gorby, *supra* note 66, at 648.

77. Fünftzehnten Strafrechtsänderungsgestzes [Fifteenth Penal Law Amendment Act], May 18, 1976, BGBl. I at 1213 [hereinafter 1976 Act] (translation provided by author). Under the 1976 Act, grounds for legal termination were: (1) "to avert a danger to [the] life [of the pregnant woman] or the danger of a serious prejudice to her physical or mental health, provided that the danger cannot be averted in any other way which she can reasonably be expected to bear"; (2) if, "as a result of a genetic trait or harmful influence prior to birth, the child would suffer from an incurable injury to its health which is so serious that the pregnant woman cannot be required to continue the pregnancy"; (3) if the pregnant woman was the victim of rape or incest; or (4) "to avert the threat of a distress which (a) is so serious that the pregnant woman cannot be required to continue her pregnancy, and (b) cannot be averted in another way she can reasonably be expected to bear." Bruggemann v. Germany, No. 6959/75, 3 Eur. H.R. Rep. 244 (1981) (quoting the 1976 Act, BGBl. I at 1213, art. 218(a), *available at* http://www.strasbourgconsortium.org /document.php?DocumentID=2033. For the ground of fetal anomaly, abortion was permissible before twenty-two weeks. For grounds of criminal act and general situation of need, abortion was permissible before twelve weeks. *Id.*

78. *See* FERREE ET AL., *supra* note 71, at 37 ("Under the 1976 law, more than 80% of legal abortions were carried out under the social need exception to the prohibition."); Udo Werner, *The Convergence of Abortion Regulation in Germany and the United States: A Critique of Glendon's Rights Talk Thesis*, 18 LOY. L.A. INT'L & COMP. L.J. 571, 594–95 (1996) ("West German abortion practice was characterized by an extensive utilization of the 'social indication' justification and abortion tourism."); *see also* Neuman, *supra* note 3, at 276 ("[I]mplementation [of legislation after 1975] varied regionally in West Germany in accordance with political and religious differences, leading women to travel within Germany, as well as to the Netherlands, for abortions."). This is not to discount the prosecutions of

the 1975 decision did not translate into an insurmountable obstacle to abortion access.[79] Over eighty percent of women seeking an abortion qualified on the ground of "general situation of need," and in practice "almost every pregnant woman [in West Germany] could obtain an indication [of general situation of need] if she did so with determination."[80] Stated differently, a high number of legal terminations characterized the practice of abortion in West Germany after the mid-1970s.[81]

In East Germany, women could obtain abortion on request during the first trimester.[82] One of the most controversial tasks of the post-unification German Bundestag ("Parliament") was to harmonize the abortion laws of West and East Germany.[83] In 1992, Parliament amended the penal code and decriminalized abortion until the twelfth week of gestation if accompanied with non-directive, non-persuasive, counseling, and a three-day waiting period.[84] The purpose

women under the 1976 Act. Although prosecutions had already fallen dramatically by 1969, estimates from the years after the 1976 Act and before the new legislation in 1994 suggest that there were around 170 prosecutions for illegal abortions a year. FERREE ET AL., *supra* note 71, at 28, 37. Moreover, some women who traveled to the Netherlands to obtain abortions were stopped at the German-Dutch border and forced to have gynecological exams. *Id.* at 38.

79. *See* Werner, *supra* note 78, at 600 (documenting the rise in abortions in Germany in the years following the 1975 FCC decision).

80. Ferree & Gamson, *supra* note 19, at 41 (reporting that "approximately 90 percent of all legal abortions were done [under social necessity]"); Neuman, *supra* note 3, at 276; *see also supra* note 78 and accompanying text.

81. FERREE ET AL., *supra* note 71, at 38 (estimating that two-thirds of all abortions were illegal under the 1976 Act, based on the disparity between the number of claims for abortion procedures submitted to insurance companies and the official "number of legally registered abortions").

82. *See id.* at 33 (writing that in 1972 the East German legislature legalized abortion during the first trimester and that "[a]bortion was . . . available at no cost").

83. *Id.* at 40–43.

84. Gesetz zum Schutz des vorgeburtlichen/werdenden Lebens, zur Föderung einer kinderfreundlicheren Gesellscharft, für Hilfen im Schwangerschaftskonflict un zur Regelung des Schwangershcaftsabbruchs [Schwangeren- und Familienhilfegesetz] [Pregnancy and Family Assistance Act], July 27, 1992, BGBl. I at 1398, § 218a, *excerpts translated in* World Health Organization, *Human Reproduction and Population Policies*, 43 INT'L DIG. HEALTH LEGIS. 737, 740–45 (1992) [hereinafter 43 INT'L DIG. HEALTH LEGIS.]. The legislation, discussed further in Part III.B, set out regulations for a new counseling regime and replaced §§ 218–219d of the German Penal Code. The legislation was accompanied by

of the counseling was to "place the pregnant woman in a position to make her own responsible decision in accordance with her conscience," as well as to "protect life by means of advice and help."[85] The post-unification Parliament intended this legislation to "solve[] the problem [of] using the 'backdoor' [of general need] provided in the 1975 ruling."[86] In addition, the 1992 legislation permitted legal abortion "to prevent a threat to the life of the pregnant woman or a threat of serious injury to her physical or mental health," and for reasons of severe fetal anomaly before the twenty-second week of pregnancy.[87] Finally, the 1992 legislation suspended punishment for abortions before twenty-two weeks of pregnancy if the woman was "in a state of particular distress."[88]

In a 1993 decision, the FCC reinforced the constitutional protection of fetal life and the conditional nature of women's rights to end a pregnancy under Articles 1 and 2 of the Basic Law.[89] Weighing the constitutional protections of "unborn life" against the competing rights of pregnant women, the court struck down the legislative provisions decriminalizing early abortion and providing for non-directive counseling.[90] The FCC repeated its holding that the state had a positive duty to protect fetal life, but it also held that the state could not

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statutory revisions to the health insurance code (permitting coverage for abortions with counseling). Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203 (214–18) (Ger.) (translation provided by author).

85. Pregnancy and Family Assistance Act, BGBl. I at 1403, § 219(1), 43 INT'L DIG. HEALTH LEGIS., *supra* note 84, at 744.

86. Werner, *supra* note 78, at 595 ("The [FCC] solved the problem [of reconciling the legal standpoint with the social reality] by using the 'backdoor' provided in the 1975 ruling on abortion."); *see also* Kommers, *supra* note 19, at 12–14 (noting that the German Parliament drafted the law with the 1975 decision in mind).

87. Terminations for reason of fetal anomaly had to be coupled with counseling and a three-day waiting period. Pregnancy and Family Assistance Act, BGBl. I, at 1402, § 218a(2)–(3), 43 INT'L DIG. HEALTH LEGIS., *supra* note 84, at 743.

88. *Id.* § 218a(4), 43 INT'L DIG. HEALTH LEGIS., *supra* note 84, at 743.

89. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203 (208–09) (translation provided by author). I refer to this as "the 1993 FCC decision."

90. *Id.* at 238–43. Interestingly, the 1993 FCC decision mentions the United States once, arguing that the lack of criminal prohibition in the United States provides no legal method of curbing practices like sex selection. *Id.* at 239.

place unreasonable demands on pregnant women.[91] Thus, the court determined that the law must allow legal abortion for reason of serious danger to or impairment of the life or health of the pregnant woman, criminal acts like rape or incest, and if grave birth defects were expected.[92] In the place of the social indication or general situation of need, the FCC held that "unevaluated" abortion, or abortion performed after dissuasive or pro-childbirth counseling, would remain unlawful, but would not be prosecuted or punished.[93]

Thus, the FCC conceived of counseling, administered by state-regulated centers, as the vehicle for women to avoid state prosecution for abortions without physician approval.[94] The FCC held that state-licensed counseling centers must provide counseling that encourages women to carry the pregnancy to term and deters women from choosing abortion.[95] The court cautioned that professionals who deliver counseling should help rather than judge women, and that counseling should not be manipulative or seek to indoctrinate women with a particular worldview.[96] Thus, the court noted that counseling could

91. *Id.* at 234 (noting, in reliance on the 1975 FCC decision, that abortions to save the life of a pregnant woman, to protect a pregnant woman's health, to prevent grave fetal anomaly, and in cases of a criminal act against a woman continue to present extreme situations in which women's rights outweigh fetal rights under the Basic Law).

92. *Id.* at 256. Revisions to the penal code indirectly incorporated a eugenic indication by permitting abortion "to avert a danger to life or the danger of a grave impairment of the physical or emotional state of health of the pregnant woman." Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, BGBl. I, § 218a(2) (Ger.), *translated in* STEPHEN THAMAN, THE AMERICAN SERIES OF FOREIGN PENAL CODES: THE GERMAN PENAL CODE AS AMENDED AS OF DECEMBER 19, 2001, at 131 (2002).

93. 88 BVERFGE 203 (210–11, 270–73) (determining that terminations for social need or material hardship would not be punishable, but also that such terminations could not be exempt from the penal code).

94. *Id.* at 267–68. The FCC reasoned that criminal law was a relatively ineffective tool for reducing the number of abortions, but that counseling could deter abortion. *Id.* at 265–67.

95. *Id.* at 270–72, 283–84 ("[Counseling] should help [a woman] make a responsible and conscientious decision. In the process, the woman 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, and thus, according to the legal system, pregnancy termination can only be considered in exceptional situations where bearing the child to term would place the woman under a burden which . . . is so severe and exceptional that it exceeds the limits of exactable sacrifice." (translation provided by author)).

96. *Id.* at 283.

be "open-ended but not open goal."[97] As described by the FCC, "[c]ounseling serves to protect unborn life [and] has to be guided by the effort to encourage the woman to continue the pregnancy and open up perspectives to her for a life with the child."[98] Moreover, the FCC held that the national health insurance scheme would not pay for terminations with counseling.[99] In cases of economic hardship, however, the court indicated social assistance benefits may cover termination costs.[100]

The revised Pregnancy and Family Assistance Act of 1995 describes the requirements of counseling, which include providing information on contraceptive methods, family benefits, support for pregnant women, and risks of abortion.[101] The Act directs counselors to ask women their reasons for seeking an abortion and to protect women's anonymity. It obliges the state to certify counselors and to make counseling available broadly, and it requires a three-day waiting period between counseling and abortion services.[102]

As will be explained in the next Part, the U.S. Supreme Court decisions in *Roe* and *Casey*, and the 1975 and 1993 FCC decisions have had enormous influence on the constitutional decisions of a diverse group of national courts. These national court decisions do not, however, engage with the implications and evolution of abortion jurisprudence in the United States or Germany. Indeed, these opinions at times misinterpret U.S. and German law. Yet national courts cite comparative examples from the United States and Germany to justify their positions with respect to abortion and to communicate how

97. *See* FERREE ET AL., *supra* note 71, at 42 (describing the "goal-oriented" mandate that counseling protect life, but remain "'outcome-open' in style," as the "most ambiguous part" of the court's decision).

98. 88 BVERFGE 203 (210) (translation provided by author).

99. *Id.* at 312–19.

100. *Id.* at 241.

101. Schwangeren- und Familienhilfeänderungsgesetz [SFHÄndG] [Assistance to Pregnant Women and Families Amendment Law], Aug. 21, 1995, BGBl. I at 1050, § 219 (Ger.), *excerpts translated in* World Health Organization, *Human Reproduction and Population Policies*, 47 INT'L DIG. HEALTH LEGIS. 34, 34–35 (1996) [hereinafter 47 INT'L DIG. HEALTH LEGIS.].

102. *See id.* § 219(2), 47 INT'L DIG. HEALTH LEGIS., *supra* note 101, at 35 (discussing certification of counselors); *see also* Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, BGBl. I, § 218a(1)1 (Ger.), THAMAN, *supra* note 92, at 131, 133 (2002) (discussing the three-day waiting period and the current certification provision).

their countries fit with or resist what the courts describe as an emerging, global acceptance of reproductive rights.

II. COMPARATIVE LAW IN CONTEMPORARY ABORTION DECISIONS

This Part reviews decisions in which courts exercise their power to broaden the grounds for abortion or courts uphold legislative acts that decriminalize early abortion for any reason. Each court's attempt to balance competing rights reveals a particular aspect of comparative abortion law at work: setting out a middle ground,[103] identifying with approaches at the ends of the spectrum from criminalization to liberalization,[104] and repackaging old comparisons in new cases.[105] Despite the differences in countries and cases, each court applies a similar, formalist-comparative reasoning that depends little on the specific social, political, and economic characteristics of the comparators of the United States and Germany.

This Part does not present the finer details of comparative constitutional analysis, which is the project of varied and important scholarship. Rather, it provides only the background information necessary to understand the context in which courts cite comparative law. The goal of this Part is to reveal the patterns in court decisions,[106] not to wrestle with variations in legislative language, judicial review powers, or courts' methods of constitutional and statutory interpretation. Indeed, the fact that these countries' governments and legal systems vary widely makes the consistency of the courts' comparative examples, even in dicta, all the more striking.

A. Identifying Common Ground: Colombia

A 2006 decision of the Constitutional Court of Colombia cited comparative abortion law in an opinion that overturned the country's

103. *See infra* Part II.A.

104. *See infra* Part II.B–C.

105. *See infra* Part D.

106. Of course, some courts have declined to cite comparative law in ruling on modern abortion laws. *See, e.g.*, Ústavný súd Slovenskej republiky 04.12.2007 [Constitutional Court], č.1-PL.US 12/01 (Slovk.), *translated in* CONSTITUTIONAL COURT OF THE SLOVAK REPUBLIC, FINDINGS AND RULINGS 2007: ON ABORTION, http://portal.concourt.sk/Zbierka/2007a/1_07a.pdf. (upholding legislation allowing abortion on request during the first twelve weeks of pregnancy).

criminal ban on abortion.[107] The decision provides a description of what the court sees as a global consensus on minimum grounds for abortion, and distinguishes the outliers of Germany (criminalization) and the United States (abortion by request).[108] In balancing the rights of women and potential life, the decision casts Colombian law as the middle ground between the U.S. and German approaches.

The Constitutional Court struck down the criminal ban on abortion and legalized terminations in three instances: (1) when continuation of the pregnancy would put the woman's mental or physical health or life at risk; (2) when serious malformations of the fetus would make it non-viable outside of the uterus; and (3) when pregnancy is the result of rape, incest, unwanted artificial insemination, or unwanted implantation of a fertilized ovum.[109] The court's decision relied heavily on comparative and international human rights law.[110] The court held that the Constitution of Colombia required it to balance the competing interests of women and "unborn life" in accordance with the principle of proportionality.[111] Rights subject to balancing are defined in part by a "constitutional bundle," which includes

107. Corte Constitucional [C.C.] [Constitutional Court], Sala Plena mayo 10, 2006, Sentencia C-355/2006 (pp. 299–300) (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/2006/c-355-06.htm, *excerpts translated in* C-355/2006 EXCERPTS, *supra* note 12, at 6.

108. *Id.* at 276–82, C-355/2006 EXCERPTS, *supra* note 12, at 48.

109. *Id.* at 293, C-355/2006 EXCERPTS, *supra* note 12, at 61. In three earlier cases (decided in 1994, 1997, and 2000), the court upheld the criminal ban on abortion but expanded the ability of courts to decline to punish women whose abortions had been motivated by rape or other extreme circumstances. *See* CTR. FOR REPROD. RIGHTS & UNIVERSIDAD DE LOS ANDES SCHOOL OF LAW, BODIES ON TRIAL: REPRODUCTIVE RIGHTS IN LATIN AMERICAN COURTS 67–68 & nn.256–58 (2003), *available at* http://reproductiverights.org/en/document/bodies-on-trial-reproductive-rights-in-latin-american-courts (summarizing litigation preceding C.C., Sentencia C-355/2006).

110. C.C., Sentencia C-355/2006 (pp. 235–49, 276–80), C-355/2006 EXCERPTS, *supra* note 12, at 23–32, 48; *see id.* (p. 218), C-355/2006 EXCERPTS, *supra* note 12, at 14–15 (noting plaintiffs' reliance on the Constitution of Colombia, specifically, articles 1 (dignity), 11 (life), 12 (bodily integrity), 13 (equality and liberty), 42 (deciding number of children), and 49 (health)).

111. *Id.* at 271–75, C-355/2006 EXCERPTS, *supra* note 12, at 46–48; Verónica Undurraga & Rebecca J. Cook, *Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006*, *in* CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 215, 219–20 (Susan H. Williams ed., 2009).

Colombia's obligations under its own constitution and international human rights treaties.[112]

Rejecting the argument that international human rights law supports a right to life at conception, the Constitutional Court stated that "women's sexual and reproductive rights have finally been recognized as human rights, and as such, they have become part of constitutional rights, which are the fundamental basis of all democratic states."[113] These rights recognize and promote "gender equality in particular, and the emancipation of women and girls [as] essential to society."[114] The court explained that denying women access to abortion on the grounds of threat to life or physical or mental health, fetal malformation, and rape, incest, or unwanted artificial reproductive technology impairs a woman's dignity by making the woman "a mere receptacle for the fetus."[115]

The Colombian Constitutional Court also noted that international human rights law does not explicitly prohibit states from criminalizing abortion.[116] The court acknowledged that the treatment of abortion in Latin and Central America was mixed. Countries including Argentina, Bolivia, and Cuba allow abortion only if there is a threat to the woman's life or health or in the case of rape.[117] Moreo-

112. C.C., Sentencia C-355/2006 (pp. 235–41, 269–71), C-355/2006 EXCERPTS, *supra* note 12, at 23–25, 44–46; *see* Undurraga & Cook, *supra* note 111, at 226 (describing the Constitutional Court's adoption of a "constitutional bundle," which is "the expansion of the idea of the constitution from a formal constitutional text to an idea of a constitutional fabric by a weaving of different sources"); *see also* C.C., Sentencia C-355/2006 (p. 218), C-355/2006 EXCERPTS, *supra* note 12, at 15 (citing article 93 of the Colombian Constitution, which outlines Colombia's "obligations under international human rights law"); Martha I. Morgan, *Emancipatory Equality: Gender Jurisprudence Under the Colombian Constitution*, *in* THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 75, 77–80 (Beverly Baines & Ruth Rubio-Marin eds., 2005) (explaining the influence of international law on Colombian constitutional law).

113. C.C., Sentencia C-355/2006 (pp. 238, 241, 248), C-355/2006 EXCERPTS, *supra* note 12, at 24, 31.

114. *Id.* at. 249, C-355/2006 EXCERPTS, *supra* note 12, at 32.

115. *Id.* at 284–85, C-355/2006 EXCERPTS, *supra* note 12, at 50; *see* Undurraga & Cook, *supra* note 107, at 239 (noting that the Constitutional Court determined that "[a] total ban on abortion . . . reduces a woman to be a mere receptacle of developing life").

116. C.C., Sentencia C-355/2006 (p. 249), C-355/2006 EXCERPTS, *supra* note 12, at 32.

117. *Id.* at 276–77 & nn.108–11 (citing the relevant provisions of the penal codes of Argentina, Bolivia, and Cuba).

ver, several countries, such as Chile, Costa Rica, Ecuador, El Salvador, Guatemala, and Honduras, prohibit abortion in all circumstances.[118]

The court, however, did not attempt to justify its approach in light of the regional laws that prohibit or substantially restrict abortion. Rather, the decision identified with cases from comparators outside the region and highlighted how North American and Western European examples provide evidence of a convergence toward limited rights to abortion.[119] The court explained that, like the constitutions of Western legal regimes, the Colombian Constitution required it to weigh the rights of the fetus against those of the pregnant woman.[120] Next, the court noted, "[Western judges] have shared common ground in affirming that a total prohibition on abortion is unconstitutional because under certain circumstances it imposes an intolerable burden on the pregnant woman which infringes upon her constitutional rights."[121] For "purely illustrative" reasons, the majority decision relied on cases decided in the United States and Germany, and, to a lesser extent, an opinion issued by the Spanish Constitutional Court in 1985,[122] to illustrate this balancing task.[123] Finding a middle ground between the two approaches of the United States and Germany, the Constitutional Court of Colombia held that even persuasive state interests in life must give way if continued pregnancy results in an extraordinary burden on the woman.[124]

In reflecting on U.S. abortion reform, the court cited *Roe*—the "most famous case addressed by the U.S. Supreme Court on the matter."[125] The Constitutional Court specifically described *Roe*'s trimester

118. *Id.* at. 277.

119. *Id.* at 277–82, C-355/2006 EXCERPTS, *supra* note 12, at 48.

120. *Id.* at. 276, 283–85, C-355/2006 EXCERPTS, *supra* note 12, at 48–50. However, the court qualified its remarks by stating it did not "pretend[] to make a description of the foreign legislation nor of the jurisprudence of other countries." *Id.* at 276 (translation provided by author).

121. *Id.* at 282, C-355/2006 EXCERPTS, *supra* note 12, at 48.

122. *See* Richard Stith, *New Constitutional and Penal Theory in Spanish Abortion Law*, 35 AM. J. COMP. L. 513, 513–14, 517–18 (1987) (summarizing a holding from a case decided by the Constitutional Court of Spain, T.C., Apr. 11, 1985 (B.J.C., No. 1985-49, p. 515)). The 1975 FCC decision from Germany also influenced the approach to fetal life taken in the 1985 Spanish decision. *Id.* at 513–14 & n.6.

123. C.C., Sentencia C-355/2006, (pp. 277–81), C-355/2006 EXCERPTS, *supra* note 12, at 48.

124. *Id.* at 281–82, C-355/2006 EXCERPTS, *supra* note 12, at 48.

125. *Id.* at 278 (translation provided by author).

framework as balancing the privacy rights of women against the state's interest in protecting "unborn life."[126] The court observed the U.S. Supreme Court's holding from *Roe* that as pregnancy progresses, the state's interest in "unborn life" becomes stronger, permitting limitations on the right to abortion, except in instances where a woman's life or health is at risk.[127] Although noting that *Roe* was "not the only time in which [the U.S. Supreme Court] talked about abortion,"[128] the Colombian Constitutional Court did not mention that *Roe*'s trimester framework had been repealed and replaced with the undue burden standard in *Casey*.[129] Indeed, *Casey* fundamentally changed how U.S. courts balance women's rights and state interests in fetal life.[130]

In addition, the Constitutional Court acknowledged that fetal life had independent value and cited the 1975 FCC decision as an example of the application of constitutional rights to life and dignity to "unborn life."[131] The court emphasized, however, that the FCC did not require women to bring a pregnancy to term in instances of an "extraordinary and oppressive burden," a fetal anomaly, a criminal act, or a risk to life or health.[132]

The court also briefly discussed the 1993 FCC decision.[133] Although the Colombian court did not describe the holding of the German case,[134] it cited the 1993 FCC decision as proof that German law recognized the "unenforceability of a duty to carry a pregnancy to term."[135] Like *Casey,* the 1993 FCC decision reconfigured the practice of abortion. Rather than focusing on the situations in which continued pregnancy would be intolerable for women, the FCC suspended criminal punishment for terminations preceded by counseling in or-

126. *Id.* at 278–79.

127. *Id.*

128. *Id.* at 278 (translation provided by author).

129. *See supra* notes 46–55 and accompanying text.

130. *See supra* notes 56–58 and accompanying text.

131. C.C., Sentencia C-355/2006, (p. 279) (citing 39 BVERFGE I (Ger.)).

132. *Id.* at 279 (translation provided by author).

133. *Id.* at 280, C-355/2006 EXCERPTS, *supra* note 12, at 48. The Colombian Constitutional Court incorrectly listed the year of the 1993 FCC decision as 1985. *Id.*

134. *Id.* The Constitutional Court did note, however, that the law at issue in the FCC case permitted women to elect abortion during the first twelve weeks of pregnancy contingent on mandatory counseling. *Id.* at 279.

135. *Id.* at 280 (translation provided by author).

der to accommodate broader access to abortion services.[136] And, interestingly, the Colombian court's description ignores one point that was fundamental to the FCC's reasoning: Abortion absent risk to the woman's life or health, criminal act, or fetal anomaly, remained an unlawful act.[137]

The Colombian Constitutional Court's description of U.S. and German law speaks to a middle ground of permitting abortion on limited grounds. According to the court, the United States and Germany both balanced women's rights and fetal rights, but with different outcomes. The United States protected women's privacy and autonomy at the expense of fetal recognition, though not without limits. Germany protected fetal life at the expense of women's autonomy, though not in all circumstances.[138] It is notable that the court framed the grounds of life, rape, health, fetal abnormality as a compromise between these two approaches, even though the present Colombian abortion law is much more restrictive than current German abortion law. The court recognized neither a right for women to abortion nor a right to life for the unborn, although it did recognize that the fetus is entitled to some constitutional protection.[139]

Not only does the Colombian Constitutional Court's description oversimplify the respective positions of each comparator,[140] it also collapses U.S. and German law into their 1970s iterations. Countries claiming a global consensus on modern abortion law inevitably rely on dated conceptions of American and German rights reform.[141]

B. Identifying with the United States: South Africa

Contemporaneously with the Colombian decision, a court on the other side of the world applied similar examples from foreign courts for a different purpose. In upholding a law that permits abortion for any reason early in pregnancy, but then imposes restrictions on women's decisions as pregnancy progresses, the South African court en-

136. *See supra* notes 93–99 and accompanying text.

137. *See supra* note 93 and accompanying text.

138. C.C., Sentencia C-355/2006, (pp. 277–82).

139. *Id.* at 283, C-355/2006 EXCERPTS, *supra* note 12, at 48.

140. *See* Vicki C. Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 PENN. ST. INT'L L. REV. 319, 323–24 (2010) (noting "the complexity of historical context and the interdependence of constitutional provisions" as a "challenge[s] that appl[ies] to any kind of comparative legal study").

141. *See infra* Parts II.B–D, III.

gaged comparative law to analogize its position to that of the U.S. Supreme Court.[142] The Supreme Court of Appeal rooted its opinion in women's rights that were embraced by *Roe* and rejected by the German decisions.[143]

Concurrent with the transition from apartheid to democracy, South Africa's abortion law changed radically with the passage of the Choice on Termination of Pregnancy Act ("CTOPA").[144] The CTOPA provides government-funded abortion services for all women for any reason through the twelfth week of gestation.[145] From the thirteenth week, up to and including the twentieth week of gestation, the CTOPA conditions abortion on a medical practitioner's determination that: there is "a risk of injury to the woman's physical or mental health;" there is a risk of severe fetal abnormality; "the pregnancy resulted from rape or incest;" or "the continued pregnancy would significantly affect the social and economic circumstances of the woman."[146] After twenty weeks of gestation, and with the opinions of two medical practitioners, abortion is permissible if continued pregnancy "(i) would endanger the woman's life; (ii) would result in a severe malformation of the fetus; or (iii) would pose a risk of injury to the fetus."[147] *Roe v. Wade* inspired the CTOPA's trimester approach.[148] Drafters of the CTOPA believed a trimester approach would "ground

142. *Christian Lawyers' Ass'n v. Nat'l Minister of Health* 2004 (4) All SA 31(SCA) at 35–36, 42–45 (S. Afr.).

143. *Id.* at 46–47.

144. Choice on Termination of Pregnancy Act 92 of 1996 pmbl. (S. Afr.) ("This Act therefore repeals the restrictive and inaccessible provisions of the Abortion and Sterilization Act, 1975."). Before passage of the CTOPA, the Abortion and Sterilization Act 2 of 1975 governed abortion in South Africa. That Act permitted abortion only when there was a serious threat to a woman's physical or mental health, risk of serious disability of the fetus, or a pregnancy resulting from rape or incest, and only upon the approval of two medical practitioners, excluding the practitioner who will perform the abortion. Abortion and Sterilization Act 2 of 1975 §§ 2–3 (S. Afr.).

145. Choice on Termination of Pregnancy Act 92 of 1996 pmbl., § 2 ("[r]ecognising that the State has the responsibility to provide reproductive health to all"), *amended by* Choice on Termination of Pregnancy Amendment Act 1 of 2008 pmbl.

146. Choice on Termination of Pregnancy Act 92 of 1996 § 2(1)(b).

147. *Id.* § 2(1)(c) (stating that the two medical opinions could come from a medical practitioner and a registered midwife).

148. Julia L. Ernst et al., *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 761 (2004).

[the law] 'in the right to freedom, dignity and autonomy of the woman,'"[149] while also respecting the "'changing moral attitudes of women towards developing fetal life.'"[150]

In 2004, the Christian Lawyers Association, a South African nonprofit organization, challenged minors' access to abortion without parental consent under the CTOPA.[151] In rejecting the challenge, the Supreme Court of Appeal quoted at length from *Roe* and described *Casey* as "affirm[ing] the essential findings of *Roe* including the principle that women have a constitutional right to determine the fate of their own pregnancy."[152] The court concluded, "[t]he same considerations as applied in the [United States] would compel one to conclude that our Constitution protects a woman's right to choose."[153]

Ultimately, the court did not apply those "same considerations" because the Constitution of the Republic of South Africa provides explicit protection for the right "to make decisions concerning reproduction"[154] and the right to "have access to . . . health care services, including reproductive health care."[155] A woman's right to determine her fate, however, was not a sufficient reason to strike down requirements for parental involvement in the United States. The Supreme Court of Appeal's decision did not mention that *Casey* upheld Penn-

149. Rachel Rebouché, *The Limits of Reproductive Rights in Improving Women's Health*, 63 ALA. L. REV. 1, 16 (2011) [hereinafter Rebouché, *Reproductive Rights*] (quoting a South African activist *in* CTR. FOR REPROD. RTS., THIRTY FACES OF *ROE*: INTERNATIONAL VOICES (2006)).

150. *Id.* (quoting UN INT'L RES. AND TRAINING INST. FOR THE ADVANCEMENT OF WOMEN, ENGENDERING THE POLITICAL AGENDA: THE ROLE OF THE STATE, WOMEN'S ORGANIZATIONS, AND THE INTERNATIONAL COMMUNITY 204 (Tatjana Sikoska et al. eds., 2000)).

151. *Christian Lawyers' Ass'n v. Nat'l Minister of Health* 2004 (4) All SA 31 (SCA) at 40–42 (S. Afr.).

152. *Id.* at 42–45.

153. *Id.* at 45. The Constitution of the Republic of South Africa compels domestic courts to "consider international law," and states that the courts "may consider foreign law." S. AFR. CONST., 1996 § 39(1)(b)–(c), *available at* http://www.info.gov.za/documents/constitution/1996/index.htm.

154. S. AFR. CONST., 1996 § 12(2)(a); *Christian Lawyers'* 2004 (4) All SA at 45.

155. S. AFR. CONST., 1996 § 27(1)(a); *Christian Lawyers'* 2004 (4) All SA at 45.

sylvania's parental consent law, which required parental permission before a minor's abortion.[156]

The South African court described German case law as an exception to an international consensus that a fetus does not enjoy constitutional rights to life at the expense of a woman's rights to terminate her pregnancy.[157] The court acknowledged that the state has an interest in protecting fetal life, but noted that any regulation of abortion could not deny women their constitutionally protected right to choose to have an abortion.[158] In making this argument, the Supreme Court of Appeal framed Germany as an exception to approaches in England, the United States, and Canada.[159]

Describing the German cases as "alternative perspective[s]," the Supreme Court of Appeal noted that "[t]he German Constitutional Court has held that the right to life extends to the protection of pre-natal life[, but] also recognised a countervailing constitutional right which protects the woman's personal autonomy."[160] The court stated:

156. *See Christian Lawyers'* 2004 (4) All SA at 44–45 (discussing the U.S. Supreme Court's decision in *Casey*, but omitting any discussion of the parental consent provision); *see also supra* text accompanying notes 47–48, 51.

157. *Christian Lawyers'* 2004 (4) All SA at 46.

158. *See id.* at 46–47 ("The state has a legitimate role, in the protection of pre-natal life as an important value in our society, to regulate and limit the woman's right to choose in that regard[, but] the regulation thereof by the State may not amount to the denial of that right."). In a previous case, also brought by the Christian Lawyers' Association, the High Court of the Transvaal Provincial Division dismissed a challenge to the CTOPA based on the right to life for the fetus. The court quoted from *Roe* in support of the "generally accepted" principle among other countries that a fetus does not have a right to life because granting such a right would infringe on women's rights to equality and security of person. *Christian Lawyers' Ass'n v. Minister of Health* 1998 (4) SA 1113 (T) at 1124 (S. Afr.); *see* Klug, *supra* note 23, at 612 (observing that the Christian Lawyers' challenge in the 1998 case "was dismissed on the grounds that the fetus is not a bearer of rights under the South African Constitution").

159. *Christian Lawyers'* 2004 (4) All SA at 42–47; *see also Christian Lawyers* 1998 (4) SA at 1125 ("The exception to this line of authority in England, the United States of America, Canada and the European Court of Human Rights, is Germany."). In the 1998 decision, the High Court of the Transvaal Provincial Division, quoting U.S. law professor Gerald Neuman, opined that the 1975 FCC decision from Germany was a "'reaction against the contempt for individual life displayed in the Nazi period as well as the Catholic natural law that provided one strand of the rights orientation in the 1949 Constitution.'" *Christian Lawyers* 1998 (4) SA at 1125–26 (quoting Neuman, *supra* note 3, at 289–90).

160. *Christian Lawyers'* 2004 (4) All SA at 46.

> The jurisprudence of the German Constitutional Court accordingly lends support to an alternative perspective that the right to freedom and security of the person affords constitutional protection to a woman's right to determine the fate of her own pregnancy, albeit subject to limitation to protect the life of the foetus.[161]

The court did not specify whether it was referring to the 1975 or the 1993 FCC decision, or both.[162] Rather, it treated the decisions as the same by suggesting that both cases protected fetal life subject to balancing women's rights.[163]

In short, the South African court's use of comparative law placed the CTOPA at the forefront of liberalization, having recognized abortion on request.[164] The Supreme Court of Appeal positioned South Africa as a state in which constitutionalized women's rights take precedence.[165] However, the court ignored key aspects of U.S. law, particularly the Supreme Court's decision in *Casey*, which cut back on women's rights to abortion by upholding consent laws and abandoning the *Roe* trimester framework. In addition, the South African court did not acknowledge how the 1993 FCC decision revised the rights-balancing approach of the 1975 FCC decision by suspending prosecution for abortion that is accompanied by counseling.[166]

C. Identifying with Germany: Portugal

Contrast the approach of South Africa, which identifies with a dated conception of U.S. constitutional law, with that of Portugal. In

161. *Id.* The court further cited *Bruggemann v. Germany*, a 1977 decision from the European Commission of Human Rights, for the proposition that "although the woman has a right of self-determination, it [is] permissible for the State to regulate abortion because the right to privacy 'cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother'." *Id.* (quoting Bruggemann v. Germany, No. 6959/75, 3 Eur. H.R. Rep. 244, 253, *available at* http://www.strasbourgconsortium.org/document.php?DocumentID=2033).

162. *Id.* (discussing "[t]he jurisprudence of the German Constitutional Court," but making no distinction between the 1975 and 1993 FCC decisions).

163. *Id.*

164. *Id.* at 35, 49.

165. *Id.* at 48 ("Our Constitution protects the right of a woman to determine the fate of her own pregnancy. It follows that the State may not unduly interfere with a woman's right to choose whether or not to undergo an abortion.").

166. *See supra* notes 93–94 and accompanying text.

a 2010 decision,[167] the Constitutional Court of Portugal upheld a law permitting early abortion for any reason when coupled with counseling.[168] Although the court referred to women's rights in its holding,[169] it also aligned with the German FCC, and against the U.S. Supreme Court, in ways that might cater to the attitudes of the Portuguese population.[170]

In 2007, the Assembly of the Republic of Portugal passed legislation ("the 2007 Act") that amended the Portuguese Penal Code to permit abortion until the tenth week of pregnancy ("and, when due to the fetus' medical condition, up to 24 weeks").[171] Before the 2007 Act, the law restricted abortion during the first twelve weeks of pregnancy to instances where there was risk to the woman's life, physical, or mental health, or when the pregnancy resulted from a rape. From twelve to sixteen weeks, abortion was permitted in cases of "serious disease or defect" of the fetus.[172]

The 2007 Act required counseling and a three-day waiting period, and set out the provisions for counseling in some detail.[173] For example, non-directive counseling was required to help women make

167. T.C., Acórdão No. 75/2010, Relator: Joaquim de Sousa Ribeiro, 23.02.2010, 60, DIÁRIO DA REPÚBLICA 2.ª SÉRIE [D.R.], 26.03.2010, 115566 (Port.) (translation provided by Marcelina Alvrim and on file with author).

168. *Id.* at 15591.

169. *Id.* at 15582 (holding that by continuing pregnancy, a woman is responsible for "permanent duties of support and care for another person, which is a burden over her existential sphere").

170. *Id.* at 15578, 15581–84.

171. Lei No. 16/2007, de 10 de Abril de 2007, DIÁRIO DA REPÚBLICA, 1.ª SÉRIE [D.R.], 75: 2417 de 17.04.2007 (Port.) (translation provided by Marcelina Alvrim and on file with author); Debora Diniz, *Constitutional Court of Portugal Upholds the Abortion Law (Lei n. 16/2007)—Acórdão 75/2010*, Reprod. and Sexual Health Law Listserve 1 (Oct. 20, 2010), http://www.law.utoronto.ca/documents/reprohealth/LS056_Portugal_abortion_law.pdf. The 2007 Act followed a national referendum that did not receive the necessary participation of 50% of the voting population: "54.43% of the voters were absent," 59.25% voted for abortion law reform, and 40.75% voted against law reform. *Id.* A similar referendum failed to pass in 1998. *See id.* ("In 1998, the Supreme Court [of Portugal] supported the constitutionality of a national referendum on the proposed reform . . . , in which 68.1% of the voters were absent. 50.9% said no to the law reform and 49.1% said yes to the law reform.").

172. *See* Glendon, *supra* note 1, at 149 (citing "Portuguese Law No. 6184 of 11 May 1984 [as] translated in 35 *I.D.H.L.* 768 (1984)").

173. Lei No. 16/2007, D.R., 75: 2417 (Port.).

a "free decision, [that is] conscious and responsible."[174] The counseling sessions had to include information about the possible health risks of abortion, state support available to women who continue their pregnancies, and psychological and social assistance available to women during the waiting period.[175] The 2007 Act also provided that medical practitioners could refuse to participate in abortion procedures, but that an objecting practitioner could not be involved in the counseling session.[176]

In 2010, thirty-three politicians and representatives of the Madeira Archipelago, an autonomous region of Portugal, challenged the constitutionality of the 2007 Act.[177] The petitioners argued that because Article 24 of the Portuguese Constitution provides that "[h]uman life shall be inviolable," any counseling offered to pregnant women must try to deter them from abortion.[178] To this end, the petitioners argued that: non-directive counseling failed to meet the state's duty to protect potential life or ensure women's informed consent; a three-day reflection period was too short to dissuade women from abortion; and prohibiting abortion objectors from offering counseling was discrimination.[179]

174. *Id.* Shortly after the 2007 Act was passed, the President's office asked for additional "safeguards," including counseling about adoption options and the health consequences of abortion, as well as recommending that the father be allowed to attend counseling sessions. *Portugal Ratifies Law Allowing Abortions*, GUARDIAN (Apr. 10, 2007, 9:31 AM), http://www.guardian.co.uk/world/2007/apr/10/1.

175. Lei No. 16/2007, D.R., 75: 2417 (Port.). The 2007 Act did not require third-party consent or notice for women over the age of 16. *Id.* In addition, women who sought abortions were entitled to confidentiality. *Id.*

176. *Id.* at 2418.

177. Diniz, *supra* note 171, at 1.

178. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION] art. 24(1) [hereinafter Portuguese Constitution], *translated in* CONSTITUTION OF THE PORTUGUESE REPUBLIC: SEVENTH REVISION [2005], http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf; T.C., Acórdão No. 75/2010, Relator: Joaquim de Sousa Ribeiro, 23.02.2010, 60, DIÁRIO DA REPÚBLICA, 2.ª SÉRIE [D.R.], 26.03.2010, 15566, 15570–71 (translation provided by Marcelina Alvrim and on file with author).

179. T.C., Acórdão No. 75/2010, 60, D.R., 15575 (Port.); Diniz, *supra* note 171, at 1–2. The petitioners also argued that the exclusion of a father's consent to an abortion offended "the right to found a family and to marry on terms of full equality" for men under the Portuguese Constitution. PORTUGUESE CONSTITUTION art. 36(1), CONSTITUTION OF THE PORTUGUESE REPUBLIC: SEVENTH REVISION [2005], *supra* note 178; T.C., Acórdão No. 75/2010, 60, D.R., 15575.

The Constitutional Court of Portugal dismissed all of the petitioners' claims.[180] As for the waiting period, the court held that:

> (1) [three days] is only a minimum period of time; (2) there is a limit of ten weeks to performance the abortion, so any extension of this period might have consequences for women's rights; (3) there is no evidence that lengthening this period of time would cause the woman to decide differently.[181]

The court also stated that "a health care meeting between the woman and the provider [is] not a moral arena to debate different perspectives about abortion," concluding that neutral counseling and exclusion of the refusing practitioner were constitutional.[182]

Responding to the crux of petitioners' claims, the Court held that counseling need not be dissuasive. To that end, the court cited U.S. and German jurisprudence and briefly described the counseling requirements of several other countries.[183] The court noted that the dominant global model was liberalization, but that there were different approaches to punishing or restricting women's abortion decisions and different means by which to provide counseling options.[184] The court was quick to contrast Portugal's law with what it perceived to be the U.S. standard, in which women may make "spontaneous decisions."[185] The court reasoned that U.S. women make their abortion decisions alone, while Portuguese women have the support of the state in considering whether to choose abortion or childbirth.[186]

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180. T.C., Acórdão No. 75/2010, 60, D.R., 15596 (Port.). Much of the decision is devoted to why regions in Portugal could not opt out of implementing the 2007 Act. *Id.* at 15592–96.

181. Diniz, *supra* note 171, at 2.

182. *Id.*

183. T.C., Acórdão No. 75/2010, 60, D.R., 15582–84 (Port.). The Portuguese Constitution provides that "[t]he rules and principles of general or common international law shall form an integral part of Portuguese law." PORTUGUESE CONSTITUTION art. 8, CONSTITUTION OF THE PORTUGUESE REPUBLIC: SEVENTH REVISION [2005], *supra* note 178.

184. T.C., Acórdão No. 75/2010, 60, D.R., 15582–83 (Port.).

185. *Id.* at 15578. As the next Part considers, numerous U.S. laws condition abortion on counseling and waiting periods. *See infra* Part III.A.

186. T.C., Acórdão No. 75/2010, 60, D.R., 15580 (Port.). The court also cited a dissenting opinion from the 1993 FCC decision to support an argument in favor of affording discretion to the legislature to protect fetal life as pregnancy develops. *Id.* 15579, 15581–82. This rejection of the U.S. approach built on the Constitutional Court's reasoning in

The Constitutional Court described U.S. abortion law as the height of liberalization, in which abortion is an entirely private decision, made at any time.[187] But post-*Roe* legislative developments in the United States, especially in the area of informed consent, suggest that this is a questionable assumption. Rather than being alone in their decisions, U.S. women encounter a dense network of laws that make an abortion anything but "spontaneous."[188]

After distancing Portugal's law from that of the United States, the Constitutional Court cited the 1993 FCC decision as an example of a counseling regime that relied on preventive, rather than punitive, measures and social services to deter abortion.[189] The court reasoned that the counseling requirements in Portugal—informing women of risks, obtaining written consent, and providing information on contraception and support services—accomplished the goals set out by the 1993 FCC decision but without the explicit acknowledgement of a constitutional right to life for a fetus.[190] The court framed Germany's case law as, on the one hand, an outlier in comparison to that of its European neighbors, but, on the other, not so different in its use of measures to promote childbirth and dissuade women from abortion.[191] Even though the Constitutional Court of Portugal noted that German counseling promotes life, it made the case that Portugal's non-directive counseling was implicitly dissuasive.[192] The court concluded that the legislature could pursue the counseling regime it believed most likely to change women's minds, which translated into state support for pregnancy and childbirth.[193]

In a sense, the Portuguese legislation, with its non-directive counseling and emphasis on state services, looks like the German legislation that the FCC struck down in 1993 on the grounds that the legislation failed to comply with the Basic Law's protection of unborn life.

two previous cases in which the court upheld the constitutionality of national referendums on abortion. T.C., Acórdão No. 617/2006, Relator: Maria Fernanda Palma, 15.11.2006, 223, DIÁRIO DA REPÚBLICA, 1.ª SÉRIE [D.R.], 20.11.2006, 7970-(2), 7970-(13) to-(14) (Port.); T.C., Acórdão No. 288/98, Relator: Luís Nunes de Almeida Brito, 17.04.1998, 91, DIÁRIO DA REPÚBLICA, 1.ª SÉRIE [D.R.], 18.04.1998, 1714-(2), 1714-(23) (Port.).

187. T.C., Acórdão No. 75/2010, 60, D.R., 15578, 15580 (Port.).

188. *See infra* Part III.A.

189. T.C., Acórdão No. 75/2010, 60, D.R., 15581–83 (Port.).

190. *Id.* at 15583–84.

191. *Id.* at 15581–85.

192. *Id.* at 15584.

193. *Id.*

Although the 1993 FCC decision granted the legislature discretion to use means other than criminalization to deter abortion, such as counseling, it did not recognize a pregnant woman's right to abortion. Rather, the FCC stated that legislation must convey the message that abortion is always a moral wrong.[194] In upholding the non-directive counseling system, the Constitutional Court of Portugal minimized this central premise of the 1993 FCC decision. The court invoked German law to distinguish Portugal from countries with "abortion on demand," even though Portugal's legislation allowed women to obtain abortions for any reason and with non-directive counseling.[195]

In dissent, Justice Maria Lucia Amaral contested the majority's decision to distance itself from the U.S. Supreme Court and to associate with Germany's counseling requirements. Similar to the majority opinion, Justice Amaral's dissent asserted that U.S. law conditioned the availability of abortion only on a pregnant woman's will to seek one.[196] She argued that in upholding abortion on request until the tenth week, the majority issued a judgment that looked like *Roe*.[197] In her view, the majority chose between extremes: a state duty to protect "unborn life" and the rejection of that duty, which she argued was signified by *Roe*.[198] Justice Amaral's contention was not that the majority's recitation of comparative law was inaccurate. Rather, Justice Amaral argued that the majority contorted national Portuguese values in the service of a borrowed, foreign approach.[199]

D. Repackaged Comparisons: Mexico City

What the Colombian, South African, and Portuguese decisions reveal is that courts conceive of the options for abortion law reform in longstanding and limited ways, as choices between liberal and criminal regimes, represented by the United States and Germany, respectively, or as staking out a middle ground that balances women's rights

194. *See supra* notes 92–98. In the 1993 FCC decision, the court suggested that this could be done through strictly regulated, mandatory, dissuasive counseling as well as through the limitation of public funds to only those abortions considered legal (that is, backed by a tolerated exception) or for poor women. *See supra* notes 92–101 and accompanying text.

195. T.C., Acórdão No. 75/2010, 60, D.R., 15582–83 (Port.).

196. *Id.* at 15601 (Amaral, J. dissenting).

197. *Id.* at 15600–01.

198. *Id.* at 15601.

199. *Id.* at 15600–01.

and fetal rights. It bears repeating that the mainstays of comparison, *Roe* and the 1975 FCC decision, are almost forty years old.[200] Yet, similar to the decisions already discussed, a 2007 decision from the Supreme Court of Mexico upholding Mexico City's decriminalization of early abortion[201] collapses the trajectory of abortion law in the United States and Germany from the 1970s to the 1990s. Introducing a new theme, the Mexican decision also repackages contemporary examples from Colombia and South Africa as expressing meanings similar to those of the traditional comparators.[202]

In 2007, the Legislative Assembly of Mexico City redefined the crime of abortion as the interruption of pregnancy after the twelfth week of gestation and established that, prior to that point, termination of a pregnancy for any reason was a free health service available in public hospitals, regardless of the patient's financial need.[203] Un-

200. Roe v. Wade, 410 U.S. 113 (1973); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, *translated in* Jonas & Gorby, *supra* note 7, at 605–84.

201. Acción De Inconstitucionalidad, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Agosto de 2008, 146/2007, Página 176, 205–06 (Mex.), *available at* http://www.equidad.scjn.gob.mx/IMG/pdf/ENGROSECOSSxcdO-146-07.pdf (translation provided by Marcelina Alvrim and on file with author).

202. *Id.* Página 790–91. There is a rich literature discussing how comparative constitutional law travels or migrates. *See, e.g.*, Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006) (noting that the migration metaphor as applied to comparative constitutional law "grants equal prominence to the fact of movement of constitutional ideas across legal orders, as well as to the actual ideas which are migrating"); VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 42 (2010) ("Convergence, though, may also be a normative interpretive posture, working to conform national constitutional interpretation to international law or transnational legal consensus."). For a summary of this literature, see Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations*, *in* OXFORD HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW 1304 (Michel Rosenfeld & András Sajo eds., 2012) (observing that "instances of constitutional borrowing are now everywhere [with c]ourts around the world . . . often consult[ing] the work of their foreign peers in interpreting similarly worded constitutional provisions").

203. Public Administration of Mexico City, *Mayor's Office Decrees the Reform of the Mexico City Penal Code and Additions to the Mexico City Health Law*, 70 OFFICIAL MEXICO CITY GAZETTE, Penal Code art. 144, Health Code art. 16, § 6, (26 April 2007) [hereinafter *Mayor's Office Decrees*], *available at* http://www.gire.org.mx/publica2/MexicoCityLaw_

der the 2007 reforms, health professionals are required to give women timely and truthful information about abortion alternatives and possible side effects of abortion, distribute free contraception, and offer counseling after the procedure.[204]

The Supreme Court of Mexico upheld the Mexico City law against a challenge to its constitutionality.[205] The court held that the Constitution of Mexico did not recognize a right to life, but did protect women's rights.[206] A concurring opinion cited *Roe v. Wade* as an example of an approach that values women's rights to privacy and autonomy.[207] In *Roe*, the U.S. Supreme Court concluded that the state could intervene early in pregnancy and that any regulation postviability must preserve women's health, but could also serve to protect fetal life.[208] According to the majority of the Supreme Court of Mexico, *Roe*, as reaffirmed by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, is the backbone of this understanding with its emphasis on viability.[209] Like the decisions previously described in this Part, the Mexican court's decision minimized the differences between the trimester test announced in *Roe* and the undue burden standard announced in *Casey*.[210]

English.pdf. Abortion for any reason after the twelfth week remains a punishable offense. *Id.*; Penal Code art. 145. Also, the Health Code states that the procedure must be performed within five days of the woman's request. Luisa Conesa Labastida, *Making the Best of It: A Conceptual Reconstruction of Abortion Jurisprudence in the United States and Mexico*, 2 MEX. L. REV. 31, 59 (2010); *see* Alejandro Madrazo & Estefanía Vela, *The Mexican Supreme Court's (Sexual) Revolution?*, 89 TEX. L. REV. 1863, 1874–75 (2011) (describing the 2007 reforms to Mexico City's criminal code and health law).

204. *Mayor's Office Decrees*, *supra* note 203, Health Code art. 16, § 8; Labastida, *supra* note 203, at 59.

205. SCJN, Agosto de 2008, 146/2007, Página 205–06.

206. *Id.* at 174–75. In considering Mexico's obligations under international law, the court noted that there was no international convention to which Mexico was a party that established when life begins. *Id.* at 173–74; Labastida, *supra* note 203, at 61.

207. SCJN, Agosto de 2008, 146/2007, Página 246 & n.121 (Mex.) (Pimentel, J., concurring) (citing Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965)).

208. *See supra* notes 39–42 and accompanying text.

209. SCJN, Agosto de 2008, 146/2007, Página 790 (Mex.) (majority opinion).

210. *Id.* In her dissent in *Gonzales v. Carhart*, Justice Ginsburg criticized the majority's decision to uphold the ban on a procedure that was sometimes performed before viability. 550 U.S. 124, 170–71 (2007) (Ginsburg, J., dissenting); *see also supra* Part I.A.

The Supreme Court of Mexico referred to German case law for the opposite argument. The court stated that the FCC protected the "life of the unborn as an independent legal interest, establishing as a duty of the woman to take the pregnancy to term until the moment of labor and a governmental obligation to implement the legal mechanisms for the protection of the life of the fetus."[211] In short, under the Supreme Court's view of German law, the interests of potential life outweighed women's rights in the absence of undue hardship for women.[212] However, the court did not make clear to which of the two FCC decisions it was referring. Indeed, much as it did with *Roe* and *Casey*, the court treated both the 1975 and 1993 FCC decisions as interchangeable.[213]

In addition to U.S. and German law, the court cited the Colombian and South African cases discussed above to make points for which U.S. and German cases are typically used.[214] Three dissenting justices, quoting a Constitutional Court case from Colombia, argued that Colombian law aligned with German jurisprudence, "'to establish, in defense of the life that begins with conception, an effective legal protection system, including necessarily adoption of criminal laws.'"[215] Interestingly, the Colombian court did not only align its approach with the 1975 FCC decision; that court also drew from the approach of the U.S. Supreme Court in *Roe*.[216]

In comparison, the majority of the Supreme Court of Mexico noted that South Africa protected a woman's right to abortion at any age and refused to grant rights to potential life before birth.[217] The

211. SCJN, Agosto de 2008, 146/2007, Página 739 (Mex.).

212. *Id.* at 791–92.

213. The court only incidentally mentioned grounds of undue hardship for medical reasons and did not mention the earlier category of "social need." *Id.*

214. *Id.* at 791. The court also briefly cited abortion cases from Canada, *R. v. Morgentaler*, [1988] S.C.R. 30, and Spain, T.C., Apr. 11, 1985 (B.J.C. No. 1985–49, p. 515), and referred to the abortion laws of Italy and France as well. SCJN, Agosto de 2008, 146/2007, Página 738–39, 791, 795–96; *see also supra* notes 2, 122 and accompanying text.

215. SCJN, Agosto de 2008, 146/2007, Página 525–28 (Mex.) (Anguiano, J., dissenting) (quoting Corte Constitucional [C.C.] [Constitutional Court], Sala Plena marzo 17, 1994, Sentencia C-133/1994 (Colom.)).

216. *See supra* Part II.A.

217. SCJN, Agosto de 2008, 146/2007, Página 791–93 (Mex.) (majority opinion). The opinion also noted a handful of countries, Colombia included, that would not, as a legal matter, determine the complex, controversial question of when human life begins—an inquiry better suited to medicine or philosophy. *Id.* at 789–92.

Mexican court is not alone in invoking the South African decision as a point of comparison. In 2009, the Supreme Court of Nepal cited the South African case, alongside *Roe*, for the argument that a fetus cannot be recognized as a person.[218] The Supreme Court of Nepal's decision cited extensively to international and comparative law, using reproductive rights interchangeably with the meanings associated with U.S. and South African case law.[219]

The Mexican and Nepalese decisions draw on a broader range of examples, but they return to the same principle comparators, with U.S. and German examples ultimately defining the scope of reform opportunities. In general, the decisions discussed in this Part employ a comparative method that places country experiences, as embodied in judicial opinions and statutes, along a spectrum of legality. At one end is abortion as a criminal act that protects fetal life (responsive to local or national concerns),[220] and at the other is abortion as a noncriminal act that protects women's rights (responsive to global and progressive concerns).[221] Although the United States and Germany

218. *See* Lakshmi Dhikta v. Nepal, (2009) WO-0757, 2067, *excerpts translated at* LAKSHMI DHIKTA CASE SUMMARY AND TRANSLATED EXCERPTS 2, http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Lakshmi%20Dhikta%20-%20English%20translation.pdf (last visited Sept. 8, 2012) (citing *Roe* for the proposition that the U.S. Supreme Court did not recognize the fetus as a human life and citing South African jurisprudence and a 1974 decision by the Supreme Court of Austria for the argument that a fetus cannot be recognized as a person); *see also* CTR. FOR REPROD. RIGHTS: FORUM FOR WOMEN, LAW, AND DEV., LAKSHMI DHIKTA V. NEPAL 2, *available at* http://www.asap-asia.org/LD_FS_4.11.pdf (summarizing the *Dhikta* case).

219. LAKSHMI DHIKTA CASE SUMMARY AND TRANSLATED EXCERPTS, *supra* note 218, at 2, 5, 8; LAKSHMI DHIKTA V. NEPAL, *supra* note 218, at 2.

220. *See supra* Part II.C.

221. *See supra* Part II.B. Similarly, Werner and Kommers argue that U.S. law resonates with commitments to women's rights (sometimes at the expense of other state interests) and the German approach with communitarian values that curtail women's rights (but recognize limited individual rights). *See* Kommers, *supra* note 19, at 28 ("In Germany, the main contestants did not question the state's duty to protect the life of the fetus at all stages of pregnancy. On this question, the most non-religious Social Democrat could agree with the most religious Christian Democrat."); s*ee also* Werner, *supra* note 78, at 599–601 (comparing U.S. and German abortion jurisprudence and noting that "in the United States, the woman has the privilege to be free from undue burdens by the state in her right to decide about abortion[, but] in Germany, because the core of the German concept of prevention by counseling is to make the woman an ally in protecting the unborn life, it emphasizes an informed but unhindered decision").

treat the legality of abortion differently, under this dominant comparative framework, they overlap in recognizing basic grounds for legal abortion. As Part IV suggests, this mirrors what scholars and advocates argue is the consensus for legal abortion as a subject of international human rights law.

Part III argues that the ends of this spectrum (the respective approaches of the United States and Germany) present a more complicated story than national courts acknowledge. The realities of abortion provision in the United States and Germany show that reducing countries to their landmark court decisions may not support these national courts' ultimate purpose of citing comparative law—that countries with strong rights to abortion provide extensive legal abortion services.

III. THE INVERTED AVAILABILITY OF SERVICES

National courts' comparative method ignores the current state of U.S. and German law. In particular, despite the rhetoric of *Roe* and, to a lesser extent, *Casey*, U.S. law imposes substantial legal barriers on women seeking abortions.[222] German law, by contrast, makes it possible for women to navigate legal restrictions with relative ease.[223] For example, in the United States, abortion is not readily available for many women without financial means, whereas Germany heavily subsidizes abortion services. This Part compares the availability of abortion in the United States with the availability in Germany. It demonstrates that legal restrictions and financial limitations call into question the persistent borrowing from U.S. and German jurisprudence, and displace the assumptions underpinning the dominant comparative method, which relies upon the binary choices between U.S. liberalization and German criminalization.

A. Abortion Availability in the United States

The national court decisions discussed in Part II largely ignore post-*Roe* developments when they describe an emerging, global consensus on abortion. Perhaps this is unsurprising, given that courts invoke *Roe* to illustrate a women's-rights approach to abortion.[224] But

222. *See infra* Part III.A.

223. *See infra* Part III.B.

224. *See, e.g.*, *Christian Lawyers' Ass'n v. Nat'l Minister of Health* 2004 (4) All SA 31 (SCA) at 44 (S. Afr.) (noting that in *Casey*, "the [U.S.] Supreme Court again affirmed the essen-

perpetuating this image of the United States may distort the significance of more recent laws (or the cases upholding them) that explicitly seek to protect fetal rights. This Section shows that the right to abortion is difficult to realize for many U.S. women, challenging the invocation of *Roe* as the hallmark of a liberal regime protective of women's rights.

State laws in the United States regulating abortion take a variety of forms, including requirements and regulations for special licenses, admitting privileges at hospitals, ethics training, clinic or facility space and design, ambulatory surgical centers, and detailed record-keeping.[225] All of these restrictions apply throughout pregnancy.[226] Almost ninety percent of American women who seek an abortion do so in the first trimester of pregnancy, and many women who end pregnancies in the second or third trimesters do so because of fetal anomaly, a legal ground for abortion in Germany.[227] So, although

tial findings of *Roe* including the principle that women have a constitutional right to determine the fate of their own pregnancy").

225. For example, "[forty-six states] require hospitals, facilities, and physicians providing abortions to submit regular and confidential reports to the state" and fourteen states further require certification that "mandates for abortion counseling and parental involvement were satisfied." GUTTMACHER INST., STATE POLICIES IN BRIEF: ABORTION REPORTING REQUIREMENTS 1 (Sept. 1, 2012), *available at* http://www.guttmacher.org/pubs/spib_ARR.pdf. In April 2011, the Kansas State Legislature passed an act that "created a new licensing category for abortion providers." Kate Sheppard, *Abortion Foes' Latest Backdoor Ban*, MOTHER JONES (June 27, 2011, 6:00 AM), http://motherjones.com/politics/2011/06/abortion-foes-latest-backdoor-ban.

Regulations issued pursuant to the act require expanded waiting room and janitorial supply spaces. *Id.* Further, doctors must now have admitting privileges "to directly admit patients[] at a hospital within 30 miles of the clinic." *Id.* Similar laws have been passed in Virginia and Utah. *Id.*

226. *Cf.* STATE POLICIES IN BRIEF: ABORTION REPORTING REQUIREMENTS, *supra* note 225, at 1 (noting that "most state vital statistics agencies have adopted" an abortion reporting form that requires, among other disclosures, "gestational age").

227. Only twelve percent of abortions are performed in the second trimester, but "women seeking second trimester abortions are medically 'a very important group, including virtually all patients who have antenatal diagnosis of congenital anomalies.'" Maya Manian, *The Irrational Woman: Informed Consent & Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 228 (2009). Only 1.5% of women have abortions in the third trimester. GUTTMACHER INST., FACTS ON INDUCED ABORTION IN THE UNITED STATES 2 (Aug. 2011), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.pdf; *see also supra* Part I.B.; *infra* Part III.B.

abortion with counseling is not available in Germany after the twelfth week of pregnancy, because Germany allows legal terminations for reason of fetal abnormality, most American women who seek second-trimester abortions could also do so in Germany.

After viability, forty-one states strictly limit or ban women's access to abortion.[228] The most recent restrictions on the availability of services are new state laws that prohibit providers from performing abortions after twenty weeks of gestation, which is, in most cases, before viability.[229] These laws appear to contradict *Casey*, in which the plurality determined that states could not ban abortion before viability (about twenty-three to twenty-four weeks of pregnancy).[230] As of June 2011, six states had passed legislation banning abortion after twenty weeks unless the pregnant woman's life is in danger or there is serious risk to physical health.[231] The purpose of the bans is to protect fetal health, not women's health.[232] The premise of these laws is the contested belief that fetuses can feel pain after twenty weeks.[233]

228. GUTTMACHER INST., STATE POLICIES IN BRIEF: STATE POLICIES ON LATER ABORTIONS 1 (Sept. 1, 2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf. Twenty-one of the forty-one states prohibit abortions after viability, five states ban abortion in the third trimester, and fifteen states do so "after a certain number of weeks, generally 24." *Id.*

229. *See infra* note 231 and accompanying text. As Justice Ginsburg noted in dissent in *Gonzales v. Carhart*, the Supreme Court's decision to uphold the federal "partial birth abortion" ban, "blurs the line, firmly drawn in *Casey*, between previability and postviability abortions." 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting).

230. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."); *see also* Roe v. Wade, 410 U.S. 113, 160 (1973) ("Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.").

231. Erik Eckholm, *Several States Forbid Abortion After 20 Weeks*, N.Y. TIMES, June 26, 2011, at A10 (listing Alabama, Idaho, Indiana, Kansas, Nebraska, and Oklahoma). As of September 2012, Louisiana and North Carolina had also banned abortion after twenty weeks. STATE POLICIES IN BRIEF: STATE POLICIES ON LATER ABORTIONS, *supra* note 228, at 2. The exception to the Nebraska prohibition is "a condition which . . . so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function." Legis. B. 1103, 101st Leg. 2d Sess. § 2(4) (Neb. 2010).

232. *See* Eckholm, *supra* note 231 ("The purpose of this type of bill [banning abortion after the twentieth week] is to focus on the humanity of the unborn child . . . ."); *see also* Hearing on Legis. B. 847, Legis. B. 1043, Legis. B. 1089, and Legis. B. 1103 Before the Ju-

In addition, several types of laws fall into what can loosely be labeled as informed-consent provisions. Unlike with most medical procedures,[234] the majority of states require abortion patients to observe waiting periods[235] and require providers to deliver scripted counseling and information.[236] Mandatory counseling may include information about abortion procedures generally or may require specific elaboration of the procedure and its risks.[237] It is common for states to require abortion providers to dispense information about possible physical or psychological consequences of abortion and about the age or development of the fetus.[238] Several states, however, mandate that

diciary Comm., 101st Leg., 2d Sess. 51 (Neb. 2010) (statement of Senator Brenda Council, Member, Judiciary Comm.) (noting that Legis. B. 1103 places the health of the fetus above that of the mother when the mother's mental condition could lead to death or physical harm).

233. *See, e.g.*, Neb. Legis. B. 1103, § 3 (finding "substantial evidence that an unborn child" can feel pain after twenty weeks). *But see* I. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution*, 39 J.L. MED. & ETHICS 235, 238–39 (2011) (refuting the Nebraska legislature's finding that fetuses can "experience" pain at twenty weeks).

234. *See* Scott Woodcock, *Abortion Counseling and the Informed Consent Dilemma*, 25 BIOETHICS 495, 498, 500 (2011) (noting the divergence between informed consent for abortion and for other medical procedures, particularly regarding the "emotional harm" that can result from the "key move in the anti-abortionist argument to offer women any and all information related to abortion").

235. Twenty-six states require a waiting period between counseling and the abortion procedure. GUTTMACHER INST., STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION 1 (Sept. 1, 2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf. Most waiting periods are twenty-four hours, but some states either impose longer time periods or require in-person counseling, necessitating two trips to the provider. *Id.* South Dakota is the outlier, recently having imposed a seventy-two hour waiting period that is now the subject of litigation. *Id.* at 2; *see* H.B. 1217, 2011 Legis. Assemb. 86th Sess., § 3 (S.D. 2011) (imposing seventy-two hour waiting period); Planned Parenthood Minn., N.D., S.D. v. Daugaard, 799 F. Supp. 2d 1048, 1077 (D.S.D. 2011) (granting a preliminary injunction preventing enforcement of the seventy-two hour waiting period).

236. Thirty-five states require counseling before an abortion. STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION, *supra* note 235, at 1.

237. *Id.* at 2–3.

238. *Id.* at 1 (noting that thirty-three states require provision of information about gestational age, while twenty-five states require information about fetal development). *But see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) (noting that informed

women receive counseling information that details only the possible negative risks[239] such as infertility,[240] and psychological problems like depression, anxiety, eating disorders, and suicidal tendencies.[241] A handful of laws inaccurately link abortion to the occurrence of breast cancer or include information about the potential occurrence of fetal pain.[242] Many states have also recently adopted controversial ultrasound requirements.[243] Of particular interest are laws in Louisiana, North Carolina, Oklahoma, and Texas that require physicians to display sonogram images even if patients have requested not to view the images.[244] The Texas statute, for example, requires physicians to display and describe sonogram images to women, as well as play the sound of the fetal heartbeat.[245]

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consent statutes that require providing information about the procedure, risks of abortion and childbirth, and "probable gestational age" of the unborn child are constitutional).

239. STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION, *supra* note 235, at 1–3.

240. *See, e.g.*, WIS. STAT. ANN. § 253.10(3)(c)(1)(f) (West 2010) (requiring that the physician who performs the abortion inform the women about the risk of infertility).

241. *See, e.g.*, W. VA. DEP'T OF HEALTH & HUM. RESOURCES, INFORMATION ON FETAL DEVELOPMENT, ABORTION & ADOPTION 15 (2003), *available at* http://www.wvdhhr.org/wrtk/wrtkbooklet.pdf (listing "possible detrimental psychological effects of abortion," which include depression, fear, anxiety, suicidal thoughts, and eating disorders).

242. STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS, *supra* note 235, at 1 (reporting that eleven state laws "include information on the ability of a fetus to feel pain," and five states include inaccurate information on breast cancer).

243. GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND 1 (Sept. 1, 2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf.

244. LA. REV. STAT. ANN. § 1299.35.2 (West 2011); N.C. GEN. STAT. ANN. § 90-21-8(1)(e) (West 2011); OKLA. STAT. ANN. tit. 63, § 1-738.3d(B) (West 2004 & Supp. 2012); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West 2010 & Supp. 2012). The North Carolina and Oklahoma laws are "temporarily unenforceable pending a court decision." STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND, *supra* note 243, at 2.

245. TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4)(B)–(D). In August 2011, a federal district court granted a preliminary injunction, ruling that the law offended physicians' First Amendment rights. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 975 (W.D. Tex. 2011), *vacated in part*, 667 F.3d 570, 584 (5th Cir. 2012). In January 2012, the U.S. Court of Appeals for the Fifth Circuit lifted the injunction, holding that the district court erred in ruling that the physician-plaintiffs were likely to succeed on their challenge to the law's constitutionality. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 584 (5th Cir. 2012).

And there are other varieties of abortion restrictions across the United States that this Section does not describe. For example, federal law and the laws of forty-six states permit individual health care providers and institutions to refuse to participate in an abortion procedure through "conscience clauses."[246] Thirty-seven states require parental notice or consent before a minor's abortion.[247]

Perhaps the most salient abortion restrictions relate to funding, which significantly limit the availability of abortion in the United States as compared to Germany. Each year a rider to the congressional health appropriations bill (known as the "Hyde Amendment") prohibits federal money from funding abortions for low-income women, except when the woman's life is at stake or when pregnancy is the result of rape or incest.[248] Although some states allow Medicaid funding for abortion, most states either follow the approach of the Hyde Amendment or ban state funding for any abortion services or referrals.[249] In addition, the Patient Protection and Affordable Care Act ("PPACA") of 2010 excludes abortion as an essential benefit in the minimum set of services that new state exchange plans will cover.[250] This means that private insurance plans that elect to participate

246. While "[forty-four] states allow health care institutions to refuse to provide abortion services[, thirteen states] limit the exemption to private health care institutions and [one] state allows only religious health care entities to refuse." GUTTMACHER INST., STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES 2 (Sept. 1, 2012), *available at* http://www.guttmacher.org/pubs/spib_RPHS.pdf. The first federal conscience clause law, the "Church Amendment," was enacted in 1973. Health Programs Extension Act of 1973, Pub. L. No. 93–45, 87 Stat. 95 (codified at 42 U.S.C. § 300a-7(b) (2006)).

247. *See* Rachel Rebouché, *Parental Involvement Laws and New Governance*, 34 HARV. J.L. & GENDER 175, 179–88 (2011) (summarizing types of parental consent and notice laws).

248. *See* NAT'L ABORTION FED'N, PUBLIC FUNDING FOR ABORTION: MEDICAID AND THE HYDE AMENDMENT 1 (2006), *available at* http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/public_funding.pdf (noting that, in 1979, Congress removed the physical health exception, and, in 1981, the rape and incest exceptions, which were reintroduced in 1993).

249. NAT'L NETWORK OF ABORTION FUNDS, ABORTION FUNDING: A MATTER OF JUSTICE 4–5 (2005), *available at* http://www.fundabortionnow.org/sites/default/files/national_network_of_abortion_funds_-_abortion_funding_a_matter_of_justice.pdf (noting that in 2005, thirty-three states and the District of Columbia did not permit state Medicaid or other funds to cover low-income women's abortion services, except in cases of rape).

250. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111–148, § 1303(a)(1)(A)(i), 124 Stat. 119, 168 (2010) (codified in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

in state exchanges and to offer abortion coverage must comply with segregation rules to ensure that no federal money subsidizes abortion care.[251] Since the passage of the PPACA, fifteen states have passed laws banning abortion coverage outright or prohibiting insurance companies that participate in state exchanges from offering any coverage for abortion services; another fifteen states have proposed similar laws.[252] The combination of new administrative and financial disincentives for insurance companies to offer coverage[253] and the PPACA's potential expansion of Medicaid eligibility with Hyde Amendment restrictions will further entrench the status quo of women paying out of pocket for abortion services.[254]

Finally, it is worth noting that, as a general matter, availability of abortion depends on the region in which a woman resides or her ability to travel to states with less restrictive laws. Outside of the Northeast, the number of abortions performed in the Midwest, South, and West decreased by roughly ten percent from 2000 to 2005.[255] A large

251. *Cf. id.* § 1303(a)(1)(B)(i), 124 Stat. at 169 ("The services described in this clause are abortions for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is not permitted . . . .").

252. Karmah Elmusa, *Map of the Day: States Banning Abortion Coverage*, MOTHER JONES (June 29, 2011, 5:57 PM), http://motherjones.com/mojo/2011/06/map-state-abortion-coverage-ban. The U.S. House of Representatives passed the No Taxpayer Funding for Abortion Act of 2011, which was not voted on in the Senate. H.R. 3, 112th Cong. (2011). The bill prevents employers from taking a tax deduction for insurance plans that include abortion coverage and prevents individuals from paying for plans that cover abortion with pretax dollars or flexible health spending accounts and from claiming a medical care deduction from federal taxes. *Id.* §§ 201, 202, 204. The Protect Life Act of 2011, which also passed in the House, amends the PPACA to prohibit health plans receiving federal funds to cover abortion. H.R. 358, 112th Cong., § 2(c) (2011).

253. *See* Susan A. Cohen, *Insurance Coverage of Abortion: The Battle to Date and the Battle to Come*, GUTTMACHER POL'Y REV., Fall 2010, at 4, *available at* http://www.guttmacher.org/pubs/gpr/13/4/gpr130402.pdf (discussing the new administrative burden on insurers that will provide abortion coverage).

254. The average cost of a first-trimester termination is approximately $468, increasing to over $1,000 as pregnancy progresses. ABORTION FUNDING: A MATTER OF JUSTICE, *supra* note 249, at 6.

255. Rachel Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSPS. SEXUAL & REPROD. HEALTH 6, 10 (2008) (reporting that the number of abortions decreased by 3% in the Northeast, 12% in the Midwest, 9% in the South, and 12% in the West). Since 1980, there has been steady decline in abortion rates. *Id.* at 9. From

number of counties in the United States have no abortion provider: in 2008, 87% of U.S. counties had no abortion provider and 97% of all non-metropolitan counties lacked abortion providers.[256] Generally, between the years 1982 and 2000, the number of abortion providers in the United States declined from approximately 2,900 to 1,800.[257] Many obstetricians who are willing to provide abortion services cannot do so because of the costs of complying with state regulations, the lack of training opportunities in residencies, and fears of personal security.[258]

These restrictions on abortion availability in the United States paint a different picture than the national court decisions described in Part II. Judges need not be historians or sociologists who have detailed understandings of how foreign laws work in practice, although many restrictions are well documented in mainstream media,[259] and the U.S. Supreme Court has decided several cases upholding some of these restrictions.[260] But regardless of what courts should or can know about developments in foreign law, the gap between the decisions discussed in Part II and the facts on the ground is wide. Courts repeatedly position the United States as the world's liberal abortion regime, which is in direct contradiction to the well-documented realities of abortion law and access in the country.[261]

1990 to 2005, the abortion rate dropped 25%. Nancy Gibbs, *Why Have Abortion Rates Fallen?*, TIME, Jan. 21, 2008, *available at* http://www.time.com/time/nation/article/0,8599,1705604,00.html. "Each year, about two percent of women aged 15–44 have an abortion." FACTS ON INDUCED ABORTION IN THE UNITED STATES, *supra* note 227, at 1.

256. Rachel Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services in the United States, 2008*, 43 PERSPS. SEXUAL & REPROD. HEALTH 41, 46 (2011).

257. Jones et al., *supra* note 255, at 6. The number of abortion providers appears to have remained the same from 2005 to 2008. Jones & Kooistra, *supra* note 256, at 46.

258. LORI FREEDMAN, WILLING AND UNABLE: DOCTORS' CONSTRAINTS IN ABORTION CARE 3–4 (2010).

259. *See, e.g.*, Bazelon, *supra* note 25 (documenting abortion restrictions for the New York Times); Eckholm, *supra* note 231 (same).

260. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 132, 168 (2007) (upholding federal ban on "partial birth" abortion); *see also supra* note 60.

261. *See* Daniel Grossman et al., *Self-Induction of Abortion Among Women in the United States*, 18 REPROD. HEALTH MATTERS 136, 136–37, 140–42 (2010) (summarizing the barriers to abortion in the United States, which may lead some women to self-induce abortion).

B. Access to Abortion in Germany

National courts likewise tell a partial story when their opinions suggest that the German experience is the antithesis of a liberal or modern abortion law. The 1993 FCC decision and resulting legislative changes in 1995 have not created significant barriers to abortion services. In fact, in Germany, the provision of abortion has "prove[d] to be relatively independent from the legal prohibition of abortion."[262] In a study of German abortion law, Mary Anne Case noted that the FCC's continued constitutional protection of fetal life and refusal to declare unevaluated abortion, or abortion performed after counseling, a legal act did not result in an anti-abortion regime, but instead resulted in "a compromise many of the leading participants . . . found attractive enough to be worth trying to preserve."[263] A woman in Germany can make the decision to terminate her pregnancy during the first twelve weeks so long as she participates in a state-regulated counseling process, which, with the exception of the length of the waiting period, can be less onerous than the processes in many U.S. states.[264]

The suspension of legal prosecution for unevaluated pregnancies and the application of the revised Pregnancy and Family Assistance Act of 1995 have led commentators to argue that Germany, in effect, permits abortion by request.[265] Almost 97% of abortions occur after

262. Werner, *supra* note 78, at 601; *see also* Kommers, *supra* note 19, at 19 ("By 1990, public opinion polls were showing that large numbers of West Germans would ease restrictions on abortion in early pregnancy."). Following a global trend, in 1994, the Basic Law was amended to include more explicit protections for women's rights. David Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 825 (2012). This change led to an "abrupt decline" in constitutional similarity between the United States and Germany. *Id.*

263. Case, *supra* note 68, at 98–99.

264. *See* Christian Fiala, *Abortion in Europe: Are the Laws and Practices Patient Centred?*, ENTRE NOUS: THE EUR. MAG. SEXUAL & REPROD. HEALTH, 2005, at 23, 24, tbl.1 (2005), *available at* http://www.euro.who.int/__data/assets/pdf_file/0004/69763/en59.pdf (describing Germany's counseling requirements); STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION, *supra* note 235 (describing the increasingly onerous counseling requirements in the United States). *But see* Fiala, *supra*, at 24, tbl.1 (stating that the obligatory waiting period in Germany is "[t]hree full days").

265. Crighton & Ebert, *supra* note 31, at 24. Women receive a certificate that proves the completion of counseling and that grants them immunity from prosecution.

counseling, rather than on the legal grounds of life, health, criminal act, or fetal anomaly.[266] According to the organization Pro Familia, which provides counseling in Germany through a network of centers, common reasons patients give for wanting an abortion include the inability to financially support a child, the desire to finish education, and the need to seek employment.[267] A Pro Familia physician explained his perception of the counseling requirements:

> The purpose of counseling is to help someone make their own decision, not to impose anything. In 80 percent of the cases, the women have already decided to abort before they come here. In those cases, we do not try to change their decision. The other 20 percent are [g]enuinely unsure of what they want, and we can help those make a decision. More and more, we've noticed their partners accompanying them. But we make sure the decision is always finally the woman's.[268]

In a report issued by the European Women's Health Network, Pro Familia stated its position as letting women decide whether to continue pregnancies on their own, "as a consequence of the human right to family planning."[269] For women who are undecided, Pro Familia's position is that the advice offered must "consider different world-views[,] . . . a secular concept of human being, [and women's] individuality, equality of rights and chances, autonomy and tolerance."[270] Pro Familia explained that its counseling complied with German law because the counseling was consistent with "science and

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STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BGBl. I, §§ 218a(1), 219(2) (Ger.), *translated in* THAMAN, *supra* note 92, at 131, 133.

266. *See* GESUNDHEITSBERICHTERSTATTUNG DES BUNDES, DATA SOURCES OF THE FEDERAL STATISTICAL OFFICE: STATISTICS ON TERMINATIONS OF PREGNANCY, http://www.gbe-bund.de/gbe10/hrecherche.prc_herkunft_rech?tk=51310&tk2=51311&p_fid=424&p_uid=gast&p_aid=1619436&p_sprache=E&cnt_ut=1&ut=51311 (last visited Nov. 9, 2012) (reporting that 105,357 of 108,867 abortions performed in Germany in 2011 were by reason of the counseling rule).

267. *Why Are There More Abortions in Berlin?*, EXBERLINER MAG. (June 5, 2008, 7:21 AM), http://www.thelocal.de/lifestyle/20080605-12291.html.

268. *Id.*

269. VERA LASCH ET AL., EUROPEAN WOMEN'S HEALTH NETWORK, STATE OF AFFAIRS, CONCEPTS, APPROACHES, ORGANIZATIONS IN THE HEALTH MOVEMENT, COUNTRY REPORT: GERMANY 123 (2000).

270. *Id.*

the respect for the final decision and responsibility of the woman."[271] Rather than sounding in tones of fetal life and protection of the unborn, this language hewed more closely to the women's rights rhetoric associated with the international human rights movement.[272]

In Germany, a variety of groups with varying ideologies may apply for counseling licenses.[273] Even the non-profit counseling organizations aligned with the Catholic Church do not perceive their role as obstructing women's decisions but as "supportive" of women.[274] While state mandated counseling would appear to contradict women's rights to autonomy,[275] the German regime has provided a compromise that meets abortion supporters' goal of permitting access to services, as well as abortion opponents' goal of a system committed to reducing the number of abortions.[276]

In terms of funding abortion services, the national health insurance scheme in Germany "typically covers abortion procedures if a

271. *Id.* at 124; *see also id.* at 129 ("The local, provincial and district associations are organized as member-associations and responsible for more than 160 advice service institutions," and Pro Familia "is mainly financed by public funds, that means municipal, provincial and national funds").

272. *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], Sala Plena mayo 10, 2006, Sentencia C-355/2006 (p. 241-49) (Colom.), C-355/2006 EXCERPTS, *supra* note 12, at 25–32.

273. *See* Lee Ann Banaszak, *The Women's Movement Policy Successes and the Constraints of State Reconfiguration: Abortion and Equal Pay in Differing Eras*, *in* WOMEN'S MOVEMENTS FACING THE RECONFIGURED STATE 141, 152 (Lee Ann Banaszak et al. eds., 2003) (noting that the German counseling requirement "allows groups like Pro Familia to have a very different emphasis than Donum Vitae, the Catholic organization involved in abortion counseling").

274. *See* Case, *supra* note 68, at 106 (describing the approach of Donum Vitae, a Catholic-aligned counseling center, "that is at its root not finger-wagging, but supportive, whose aim is, as the [FCC] required, to 'show [the pregnant woman] opportunities for a life with the child,' not to threaten her with regret or cancer") (alteration in original). Professor Case also notes the lengthy debate between Catholic counseling centers and the Vatican, culminating in the Vatican's "unambiguous and insistent directives" that no church entity provide counseling. *Id.* at 105. As a result, Catholic lay groups, such as Donum Vitae, now provide counseling. *Id.*

275. *See* Nanette Funk, *Abortion Counselling and the 1995 German Abortion Law*, 12 CONN. J. INT'L L. 33, 60 (1996) (arguing that counseling restricts a woman's freedom).

276. Case, *supra* note 68, at 99, 100.

medical or criminal indication is present."[277] Unevaluated abortions, or those performed after counseling, are not funded as part of the national insurance scheme.[278] As Gerald Neuman noted, whether government money should support abortion services for unevaluated abortions is a controversial issue,[279] and "[t]he disallowance of payment for abortions founded on the 'general situation of need' was the price for permitting women to evaluate their own need."[280] Recall, however, that the 1993 FCC decision permits state welfare programs to cover the costs of abortions for those women with financial need.[281] Most regional legislatures have interpreted "need" very generously, so that in some areas the state pays for almost every abortion.[282] Professor Case noted that "the percentage of state-financed abortions varies by region, from approximately 65% in conservative Catholic Bavaria to approximately 95% in Nordrhein-Westfalen."[283] In contrast, almost 60% percent of U.S. women pay out of pocket for their abortion procedures.[284] Only 13% of women receiving abortions in the United States rely on state funding, which is almost the flip of the approximately 16% percent of German women who pay out of pocket.[285] Thus, as Professor Case summarized, in the United States, abortion is

277. SUSANNE DIEPER, AM. INST. CONTEMP. GERM. STUD., JOHNS HOPKINS UNIV., THE LEGAL FRAMEWORK OF ABORTIONS IN GERMANY 2 (2012), *available at* http://www.aicgs.org/issue/the-legal-framework-of-abortions-in-germany/.

278. *Cf. id.* ("In most other cases, e.g., those performed according to paragraph 218a and considered unlawful, the woman has to cover the medical costs herself.").

279. Neuman, *supra* note 3, at 286.

280. *Id.* at 290.

281. Kommers, *supra* note 19, at 23.

282. Case, *supra* note 68, at 103. Professor Case notes that only the woman's income, not her household's income, is used to establish need. *Id.*

283. *Id.* at 101 n.21.

284. RACHEL K. JONES ET AL., GUTTMACHER INST., CHARACTERISTICS OF U.S. ABORTION PATIENTS, 2008, at 1 (May 2010), *available at* http://www.guttmacher.org/pubs/US-Abortion-Patients.pdf.

285. ADAM SONFIELD ET AL., GUTTMACHER INST., PUBLIC FUNDING FOR FAMILY PLANNING, STERILIZATION AND ABORTION SERVICES, FY 1980–2006: OCCASIONAL REPORT NO. 38, at 6, tbl.A (2008), *available at* http://www.guttmacher.org/pubs/2008/01/28/or38.pdf; Elke Thoss & Joachim von Baross, *Mifegyne in Germany: Were All the Efforts in Vain?*, 28 CHOICES 26, 28 (2000).

"famously protected, but unsubsidized," but in Germany it is "at once condemned and subsidized."[286]

For a country like Germany where the illegality of abortion is a consistent point of comparative emphasis, abortion is a "relatively simple" process.[287] In 2010, there was an average of nearly 161 terminations for every 1,000 live births, a statistic that has declined by approximately 2 to 3% each year over the last five years.[288] German abortion rates are the same as or higher than the rates in most of the neighboring countries, including Belgium, Switzerland, and the Netherlands, which have less restrictive abortion laws.[289] Although the United States has a higher per capita rate of abortion than Germany does,[290] studies suggest that the rates of abortion in Germany and the rest of Western Europe are generally lower than that in the United States because of widespread contraceptive use.[291]

286. Case, *supra* note 68, at 100.

287. FERREE ET AL., *supra* note 71, at 3.

288. DESTATIS STATISTISCHES BUNDESAMT, ABORTIONS: ABORTIONS BY PLACE OF RESIDENCE OF THE WOMEN AND QUOTA EVERY 1,000 BIRTHS, https://www.destatis.de/EN/FactsFigures/SocietyState/Health/Abortions/Tables/StateOfResidence.html (last visited Sept. 8, 2012). A newspaper cited the national abortion rate at 15%. *Why Are There More Abortions in Berlin?*, *supra* note 267.

289. Wm. Robert Johnston, *Percentage of Pregnancies Aborted by Country* http://www.johnstonsarchive.net/policy/abortion/wrjp334pd.html (last updated Mar. 12, 2012). In the Netherlands, women may seek an abortion for any reason before viability after a five-day waiting period. UNITED NATIONS POPULATION DIV., DEP'T OF ECON. & SOC. AFF., ABORTION POLICIES: A GLOBAL REVIEW 159–60 (2002), *available at* http://www.un.org/esa/population/publications/abortion/profiles.htm. In Belgium, women may seek an abortion for any reason before twelve weeks if they receive counseling six days in advance. *Id.* at 54–55. In Switzerland, women may seek an abortion to avoid "danger to [their] li[ves] or serious danger of severe and lasting injury to [their] health." *Id.* at 116–17. The law does not set a time limit or require counseling. *Id.*

290. UNdata, the online compilation of United Nations's statistics, reports that the United States' rate for abortion is approximately twice that of Germany, as well as those of Germany's neighbors, Belgium, the Netherlands, and Switzerland. *See* UNDATA, ABORTION RATE, http://data.un.org/Data.aspx?d=GenderStat&f=inID%3A12#f_1 (last visited Sept. 8, 2012) (reporting data from 2003 for the United States and Belgium and data from 2004 for Germany, Switzerland, and the Netherlands).

291. *See* Susan A. Cohen, *New Data on Abortion Incidence, Safety Illuminate Key Aspects of Worldwide Abortion Debate*, GUTTMACHER POL'Y REV., Fall 2007, at 2, *available at* http://www.guttmacher.org/pubs/gpr/10/4/gpr100402.html (summarizing findings from a study conducted by the Guttmacher Institute and the World Health Organization).

This is not to minimize the complexity of German abortion politics or to suggest that abortion has not been a contentious issue,[292] although the public discourse and debate are nothing like they are in the United States.[293] As in the United States, different regions of Germany have reacted differently to abortion.[294] The highest abortion rates are in the cities of Hamburg, Bremen, and Berlin.[295] In Berlin in 2006, one in four pregnancies ended in abortion.[296] But some regions of the country are notoriously unfriendly to abortion. States like Bavaria, for example, restrict the provision of abortion by limiting physicians' income from termination services.[297]

292. One contemporary debate, which resulted in revisions to the Pregnancy and Family Assistance Act, has been the lack of mandated counseling for women seeking abortion because of fetal anomaly, a "medically necessary" ground for legal abortion. *See* Daniela Reitz & Gerd Richter, *Current Changes in German Abortion Law*, 19 CAMBRIDGE Q. HEALTHCARE ETHICS 334, 334–35 (2010) (describing the debate).

293. *See* Ferree & Gamson, *supra* note 19, at 42 (contrasting the U.S. and German debates between abortion supporters and opponents); *see also* Crighton & Ebert, *supra* note 31, at 15–17 (noting that the Pregnancy and Family Assistance Act of 1992 was a compromise between progressive and conservative forces in Germany and that the 1995 revisions took "an ambivalent position on abortion").

294. *See, e.g.*, DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 347–48 (2d ed. 1997) (noting that in West Germany, abortion was generally a criminal offense whereas East Germany permitted abortion on demand).

295. ABORTIONS: ABORTIONS BY PLACE OF RESIDENCE OF THE WOMEN AND QUOTA EVERY 1,000 BIRTHS, *supra* note 288. Abortion rates in the former East German states are generally higher than those in the former West German states: rates range from 167 abortions for every 1,000 births in Saxony to over 230 for every 1,000 in Saxony-Anhalt. *Id.* In the former West Germany, rates range almost 111 abortions per 1,000 births in Bavaria to 167 in Hessen. *Id.*

296. *Why Are There More Abortions in Berlin?*, *supra* note 267. Ease of access to required counseling may play a role because, unlike non-urban areas, Berlin has twenty-five counseling institutions and about 190 physicians licensed to counsel women. *Id.*

297. *See* Funk, *supra* note 275, at 55 (discussing a regional law requiring women to give reasons for abortion and reimbursing insurance costs of abortion only for needy women). Indeed, Bavaria was a petitioner to the FCC in the 1993 FCC decision, arguing that coverage of unevaluated abortions under the national health insurance scheme violated the Basic Law. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203 (232, 237) (Ger.) (translation provided by author). Bavaria also tried to restrict outpatient abortion

German abortion law is not simple, but, contrary to how it is characterized by the national court decisions discussed in Part II, it is not simply a reflection of an anti-abortion agenda.[298] Yet the use of comparative law by foreign courts embraces an American-German duality and oversimplifies the practice of abortion in each country. The next Part explains the roots of the dominant model of comparative law and why it is difficult, though not impossible, to envision a differently-styled comparative method.

IV. ENTRENCHED COMPARISONS: MODERNITY AND INFORMALITY

Courts and advocates are blind—perhaps willfully blind in some cases—to the distance between the constitutional symbols they evoke and the worlds those symbols represent. As argued in Part II, this gap is problematic at one level because it leads to specious judicial reasoning in particular cases. This gap, however, is also problematic for broader reasons. When courts cite foreign law, they often refer to a principle or abstraction of law removed from its original context,[299] for varying goals and motives.[300] In the context of contemporary abortion decisions, when courts refer to the United States or to Germany, they situate their judgments among those of modern nations that have liberal or restrictive abortion laws.[301] Courts' use of comparative law arguably has more to do with political choices courts make to jus-

services and to permit searches of physicians' offices for evidence of illegal abortion procedures. FERREE ET AL., *supra* note 71, at 43. The FCC struck down these provisions. *Id.*

298. *See* FERREE ET AL., *supra* note 71, at 43 (mapping the changing public discourse of abortion in Germany).

299. *See* Knop, *supra* note 16, at 67–68 (describing how "state law can become disembedded from its state"). There is a rich literature on how and why these conversations happen between courts of different countries. *See generally* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999); David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523 (2011); Anne Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Anne Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005).

300. *See, e.g.*, Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 461–62 (2010) (citing transplantation and displacement as goals).

301. *See supra* Part II.

tify their decisions than with fidelity to foreign law.[302] As Part II discussed, the United States and Germany serve as proxies for women's rights or fetal rights, respectively, giving courts a language to situate their opinions in national priorities and politics.

This Part explores why the comparative method on which courts and advocates rely has such broad political appeal and why this method travels. It begins by demonstrating that courts draw heavily from the comparative analysis of advocates' amicus briefs in ways that perpetuate and strengthen the current rights-based approach.[303] In particular, the animating and familiar themes for court opinions and advocates' briefs are modernity and universality, which translate into rereform strategies that inevitably omit important considerations, like the delivery of abortion services. It concludes with tentative reflections on what a move away from the formalism of the current method may look like.[304]

A. The Source of Current Comparisons

The court decisions discussed in this Article are deeply embedded in a larger conversation about the convergence of global constitutionalism and human rights norms.[305] Courts specifically refer to other countries' experiences as evidence of this convergence. For example, in elaborating on the meaning of liberty, the Constitutional Court of Colombia restated the Colombian Attorney General's argument that "[t]he power to choose different life choices defines man in the modern world, as the founders of modern theory consider this authority as inherent to the human condition."[306] Likewise, the Supreme Court of Appeal of South Africa quoted at length from the work of American political theorist Ronald Dworkin who argued that the principles of liberty and privacy indicative of "western political

302. *See supra* Part II.

303. *See infra* Part IV.A.

304. *See infra* Part IV.B.

305. *See, e.g.*, Sujit Choudhry, *After the Rights Revolution: Bills of Rights in the Postconflict State*, 6 ANN. REV. L. & SOC. SCI. 301, 303 (2010) (noting the preoccupation of comparative constitutional law with "The Rights Revolution").

306. Corte Constitucional [C.C.] [Constitutional Court], Sala Plena mayo 10, 2006, Sentencia C-355/2006, (p. 172–73) (Colom.) (translation provided by author).

culture" include women's rights to autonomy and support rights to abortion.[307]

However, the examples that national courts cite come from a narrow band of experience: the constitutionalism of rights found in the United States and Germany.[308] Courts in Colombia and South Africa, for example, speak to global trends when their countries are outliers in their own regions. As the Colombian Constitutional Court noted, countries that heavily restrict abortion or ban all abortion surround Colombia.[309] In addition, South Africa has the most liberal abortion law on the African continent.[310] And, interestingly, South Africa adopted a constitution that both reflects human rights and protects customary practices.[311] Yet the Supreme Court of Appeal chose to cite Dworkin, writing about "western political culture,"[312] rather than customary practices that historically permitted abortion.[313] The exclusion of non-Western sources of comparison led many to question whether the consensus-driven agenda of comparative citation is a practice defined by and supportive of only Western, and primarily U.S., interests.[314]

307. *See Christian Lawyers' Ass'n v. Nat'l Minister of Health* 2004 (4) All SA 31 (SCA) at 43–44 (quoting RONALD DWORKIN, LIFE'S DOMINION 103–04, 106–07 (1994)) (describing Dworkin's conclusions that the U.S. Constitution protects "personal privacy" as well as "the woman's freedom to determine the fate of her own pregnancy").

308. *See infra* Part II.

309. *See infra* notes 117–118 and accompanying text.

310. *See* Charles Ngwena, *An Appraisal of Abortion Laws in Southern Africa from a Reproductive Health Rights Perspective*, 32 J. LAW, MED. & ETHICS 708, 709, 711 (2004) (noting that most African countries permit abortion only to protect the physical health or life of the mother).

311. *See* T.W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA 42–43 (2004) (discussing when courts are "constitutionally obliged to apply customary law"); Tracy E. Higgins et al., *Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism*, 30 FORDHAM INT'L L.J. 1653, 1654 (2007) (describing how the South African Constitution protects "rights to culture and religious freedom").

312. *See supra* note 307 and accompanying text.

313. *See* Ngwena, *supra* note 310, at 711 ("A common feature of early colonial abortion law was the criminalization of abortion save where abortion was necessary to save the life of the mother.").

314. *See e.g.*, Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 522 (2000) (describing scholarship that maps how comparative and international law often serves legal and market interests of the United States, although it claims no political agenda).

National courts appear to respond by framing comparative citation, though narrowly drawn, as exemplary of claims of universal rights.[315] Thus, instead of engaging questions of culture or context, the court decisions described here anchor abortion reform in human rights principles that, according to description and design, are universally applicable.[316] For example, the Supreme Court of Mexico, in beginning its judgment upholding limited abortion on request, stated:

> Abortion has to do with human rights, the notion corresponds to the assertion of the dignity of the person. Contemporary society recognizes that all human beings have rights that must be respected and guaranteed by the State, characteristics, which are inherent to the human person, inalienable, universal, integral and progressive.[317]

The Constitutional Court of Portugal similarly justified its liberalized abortion law, a model "widely prevalent" in Europe,[318] as compliant with human rights standards.[319] Supporting this view, a circular issued by Portugal's Ministry of Health stated, "the government's recent decriminalization of abortion represents a move toward joining the most modern, developed and open European societies."[320] Like-

315. *See* ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 21–28 (1990) (arguing that the appeal of modern international law is its ability to transform local ideals into principles that are globally applicable).

316. *See, e.g.*, Reva Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage*, 10 INT'L J. CONST. L. 1, 20–22 (2012) (discussing human rights as the foundation for both the U.S. and German approaches to abortion).

317. Acción De Inconstitucionalidad, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Agosto de 2008, 146/2007, Página 72 (Mex.), *available at* http://www.equidad.scjn.gob.mx/IMG/pdf/ENGROSECOSSxcdO-146-07.pdf (translation provided by Marcelina Alvrim and on file with the author).

318. T.C., Acórdão No. 733/07, Relator: Joaquim de Sousa Ribeiro, 23.02.2010, 60, DIÁRIO DA REPÚBLICA, 2.ª SÉRIE [D.R.], 26.03.2010, 15566, 15582–83 (Port.) (translation provided by Marcelina Alvrim and on file with author). The majority opinion lists fourteen European countries that permit abortion for any reason within varying time limits and notes which of those countries require counseling. *Id.* at 15582–83 (listing the United Kingdom, Belgium, Switzerland, Bosnia/Herzegovina, Macedonia, Turkey, Estonia, Netherlands, Romania, Sweden, Greece, Denmark, France, and Austria).

319. *Id.* at 15582–84 (calling this the "model of time").

320. DIRECÇÃO-GERAL DA SAÚDE, CIRCULAR NORMATIVA NO. 11/SR: ORGANIZAÇÃO DOS SERVIÇOS PARA IMPLEMENTAÇÃO DE LEI 16/2007 DE 17 DE ABRIL (translation provided by Marcelina Alvrim and on file with author).

wise, the Constitutional Court of Colombia justified its decision by writing:

> Various international treaties form the basis for the recognition and protection of women's reproductive rights, which derive from the protection of other fundamental rights such as the right to life, health, equality, the right to be free from discrimination, the right to liberty, bodily integrity and the right to be free from violence.[321]

Although specific international standards cited by national courts range from non-binding declarations to treaties, the purpose of referring to international human rights is to show agreement among countries around limited abortion reform.[322] This role for comparative law as instrumental in the broader diffusion of rights is of course not unique to movements for reproductive rights.[323]

Claiming consensus on abortion rights is contested: Global trends may point in the direction of decriminalization, but arguably no single legislative or judicial formulation dominates law reform.[324]

321. Corte Constitucional [C.C.] [Constitutional Court], Sala Plena mayo 10, 2006, Sentencia C-355/2006, (p. 245) (Colom.), C-355/2006 EXCERPTS, *supra* note 12, at 27.

322. *See* Christina Zampas & Jamie Gher, *Abortion as a Human Right: International and Regional Approaches*, 8 HUM. RTS. L. REV. 249, 255 (2008) (explaining that protection of abortion rights under international human rights law "hinges on whether a woman's life or health is at risk, the pregnancy resulted from rape or incest or there is risk of foetal impairment"); *see also* Rebecca Cook & Bernard Dickens, *Human Rights Dynamics of Abortion Law Reform,* 25 HUM. RTS. Q. 1, 2 (2003) (arguing that "[m]odern momentum for liberalization comes from international adoption of the concept of reproductive health"); Rosalind Dixon & Martha Nussbaum, *Abortion, Dignity and a Capabilities Approach*, *in* FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 64, 66 (Beverley Baines et al. eds., 2012) (noting that "[t]here have also been numerous attempts, both judicial and scholarly, to connect th[e theoretical] idea of dignity [developed in the Western tradition] to the specific abortion context").

323. Duncan Kennedy, for example, has described the contemporary diffusion of law as that which is distinctly marked by the balancing of rights and a neo-formalism as to what universally applicable rights can accomplish. Kennedy, *supra* note 23, at 65.

324. *See* Rosalind Dixon & Eric A. Posner, *The Limits of Constitutional Convergence*, 11 CHI. J. INT'L L. 399, 405–06 (2011) (arguing that there is a "quite clear trend toward liberalization in recent years," but not "clear convergence toward a single global position"). *But see* RITA JOSEPH, HUMAN RIGHTS AND THE UNBORN CHILD xviii (2009) (arguing that the right to life for the unborn has more support in international human rights law than the right to abortion); Richard G. Wilkins & Jacob Reynolds, *International Law and the Right to Life*, 4 AVE MARIA L. REV. 123, 125 (2006) (arguing that modern advocacy for the right to

The extent to which courts characterize abortion as a woman's right, however, marks the influence of a global movement for reproductive health and rights. It has been a central goal of women's rights movements to build consensus for expanded abortion rights globally. And to that end, over the last several decades, international and national women's rights organizations have made significant gains in marrying human rights and women's reproductive health.[325] Reva Siegel recently mapped how feminists successfully challenged criminal abortion laws in the 1960s and 1970s by arguing in favor of women's rights to control their reproductive lives and against state imposition of traditional sexual mores.[326] United States and German abortion jurisprudence reflects that activism, responding to and incorporating feminist claims from the 1970s through the 1990s.[327]

Since the 1990s, women's rights groups have won notable legal battles.[328] Indeed, reproductive rights advocates have supported the use of comparative and international law by submitting amicus briefs to the courts in the decisions discussed above.[329] In the cases described in Part II, courts lifted comparative examples directly from the advocates' writings. The extent to which courts rely on advocates' arguments, which are similarly rooted in modernity and universality,

abortion supplants the history of human rights documents and ignores national laws that protect unborn life).

325. *See, e.g.*, CTR. FOR REPROD. RIGHTS, ABORTION WORLDWIDE: TWELVE YEARS OF REFORM 1 (2007) (noting that international principles "reflect a global trend toward abortion law liberalization—a trend that first gained momentum in the late 1960s and continues to this day"); Laura Reichenbach, *The Global Reproductive Health and Rights Agenda: Opportunities and Challenges for the Future*, *in* REPRODUCTIVE HEALTH AND HUMAN RIGHTS: THE WAY FORWARD 26 (Laura Reichenbach & Mindy Jane Roseman eds., 2009) (noting the transition in law's focus from population and development to women's empowerment and citing the International Conference on Population and Development).

326. Siegel, *Constitutionalization of Abortion*, *supra* note 20, at 1060–64. Feminist intervention in transnational debates is longstanding. *See* Vicki C. Jackson, *Gender and Transnational Discourse*, 14 YALE J.L. & FEMINISM 377, 378 (2002) (noting that feminists have always "use[d] law at the local, national, and international levels").

327. Siegel, *Constitutionalization of Abortion*, *supra* note 20, at 1066–71 (arguing that, from *Roe* to *Casey*, the U.S. Supreme Court shifted its focus from physician decisionmaking to women's autonomy, and that likewise, from the 1975 FCC decision to the 1993 FCC decision, the FCC shifted from rhetoric on mothers' duties to produce life to a counseling system that afforded women more discretion).

328. *See supra* Part II.

329. *See infra* notes 332–355 and accompanying text.

speaks to the power of reproductive rights rhetoric[330] and its ability to travel.[331]

For example, the use of foreign case law by the Constitutional Court of Colombia tracked the arguments made in an amicus brief that was written by a coalition of local and international women's rights groups.[332] In citing the 1975 FCC decision, the brief argued that even countries with restrictive laws, like Germany, recognize key human rights points.[333] Mirroring the court's opinion, the same brief described the U.S. approach to balancing women's rights and state interests in potential life by citing *Roe*.[334] In addition, these advocates urged the Constitutional Court to recognize the convergence around abortion liberalization across the world, although their examples came almost exclusively from the global North.[335] The brief argued:

> Despite their differences, however, all [European and North American courts] permit abortion in at least three specific situations: (1) where pregnancy poses a threat to the life or health of the pregnant woman; (2) where the fetus suffers from physical and/or serious mental defects; and (3) where the pregnancy resulted from rape. Failing to recognize these three exceptions falls below the minimum standards

330. *See* JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 20–22 (2006) (describing the governance power of feminism, which at the international level, can be seen "running things" through "'nongovernmental organizations' that strategize hard—sometimes successfully—to become indispensable when major new fluidities in formal power emerge").

331. Cook & Dickens, *supra* note 322, at 3–5.

332. Intervención de Terceros, preparada por el Centro de Derechos Reproductivos et al., Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/2006 (Colom.) (translation provided by Marcelina Alvrim and on file with author).

333. *Id.* at 6. The brief, for example, focused on the 1993 FCC decision's balancing of the fetus's interests with the burden that pregnancy would impose upon women. *Id.* at 7.

334. *Id.* at 13–14. Unlike the majority opinion, however, which ignored *Casey*, the brief cited *Casey* to argue that the balancing test of *Roe*, balancing women's right to privacy with the state interest in protecting the fetus, remained the dominant approach of the U.S. Supreme Court. *Id.* at 14–15. The brief also noted that in *Casey*, the Supreme Court replaced the trimester framework established by *Roe* with an "undue burden" test until viability, arguing that in regulating post-viability abortions states may weigh women's liberty interests against those of a post-viability fetus. *Id.*

335. *Id.* at 3–4 (citing only two countries outside of North America and Western Europe: Australia and Guyana).

> that have been widely accepted as necessary to protect a woman's fundamental rights to life, health and dignity.[336]

Adopting these arguments in its opinion, the Constitutional Court described the authors of the brief as "international authorities" that monitor and hold governments accountable.[337]

Similarly, in the South African litigation, a brief filed on behalf of the Reproductive Rights Alliance, which was composed of international and national advocates leading the campaign for the CTOPA, outlined the comparative arguments that surfaced in the Supreme Court of Appeal's opinion.[338] The brief referred to "three basic human rights norms that protect reproductive rights: freedom, human dignity and equality,"[339] and then proceeded to rely on U.S. law and legal literature.[340] For example, the brief cited a law review article by Professor Cass Sunstein to argue that judges, in deference to the legislature, should review equality rights guaranteed in legislation like the CTOPA on the basis of rationality.[341] Interestingly, South African courts have never employed the tiered scrutiny of equality rights that would have made Professor Sunstein's argument relevant.[342]

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336. *Id.* at 3.

337. Corte Constitucional [C.C.] [Constitutional Court], Sala Plena mayo 10, 2006, Sentencia C-355/2006 (p. 176–86) (Colom.) (translation provided by Marcelina Alvrim and on file with author).

338. Heads of Argument on Behalf of the Reproductive Rights Alliance, at 28–34 [hereinafter Brief for Reproductive Rights Alliance], *Christian Lawyers' Ass'n v. Minister of Health* 2004 (4) All SA 31 (SCA) at 42–47 (No. 7728/2001) (brief on file with author).

339. *Id.* at 28.

340. *Id.* at 15–19, 30–32.

341. *Id.* at 13–14. The brief states that "the provisions of the CTOPA manifestly meet the requirements of rationality" because, according to Professor Sunstein, rational basis review is an "extremely deferential means-ends scrutiny." *Id.* However, the Sunstein article, written in 1984, addressed the development of U.S. constitutional law generally. One might also notice that Sunstein, in the article cited in the brief, was not making a case for rational basis review in the ways the brief implies. *See* Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1696–97, 1700 (1984) (arguing that a deferential form of scrutiny, "accounts for much of modern constitutional doctrine," and that "rationality review—reflects a strong presumption that a public value is at work").

342. The Colombian Constitutional Court also referenced the work of Professor Sunstein. After citing the holding of *Roe*, the court cited from a chapter titled *Pornography, Abortion, Surrogacy* in Sunstein's book, THE PARTIAL CONSTITUTION (1993). C.C., Sentencia C-355/2006 (p. 278 n.113).

In arguing that the South African Constitution protects a right to an abortion,[343] the Reproductive Rights Alliance brief (like the decision of the Supreme Court of Appeal) quoted from Ronald Dworkin's book, *Life's Dominion*, in support of termination of pregnancy rights grounded in procreative autonomy.[344] The brief excerpted Dworkin's argument, ultimately quoted by the court, that autonomy understood as a dignitarian right is important "not only in the structure of the U.S. Constitution but in western political culture more generally."[345]

But recall that the South African litigation dealt with the question of minors' abortions without parental approval.[346] The brief, as well as the Supreme Court of Appeal's opinion, considered select U.S. cases as support for the unconstitutionality of parental consent laws.[347] For example, as evidence that parental involvement laws are "contrary to comparative case law," the brief quoted from cases interpreting parental involvement laws in California and Florida.[348] The brief, however, ignored *Casey*'s approval of a parental consent law and the many states, including Florida and previously California, that enacted consent or notice statutes.[349] Advocates are, of course, entitled to make

343. *Cf.* Rebouché, *Reproductive Rights*, *supra* note 149, at 18 (noting that drafters of the South African Constitution appeared hesitant to create an explicit right to an abortion and, instead, left the articulation of specific abortion rights to legislation).

344. *Compare* Brief for Reproductive Rights Alliance, *supra* note 338, at 15–18, *with Christian Lawyers' Ass'n v. Nat'l Minister of Health* 2004 (4) All SA 31 (SCA) at 43–44.

345. Brief for Reproductive Rights Alliance, *supra* note 338, at 17.

346. *See supra* Part II.B.

347. *Christian Lawyers'* 2004 (4) All SA at 44–45 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) and Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986)); Brief for Reproductive Rights Alliance, *supra* note 338, at 21, 30–33 (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976), for the proposition that requiring spousal consent for a woman's abortion decision is an unconstitutional burden on women's rights).

348. Brief for Reproductive Rights Alliance, *supra* note 338, at 30–33 (citing Am. Academy of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997); *In re* T.W., 551 So. 2d 1186 (Fla. 1989)).

349. In 2012, "[thirty-seven] states require some type of parental involvement in a minor's decision to have an abortion," whether through consent, notification, or both. GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS 1–2 (Oct. 1, 2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf. California's parental involvement law is permanently enjoined and not in effect. *Id.* at 2. Interestingly, the Florida and California cases cited in the brief did not end the controversy of minors' abortion in either state. Florida amended its state constitution to permit a new

the strongest arguments they believe support their cause. However, the Reproductive Rights Alliance brief, like the Supreme Court of Appeal's opinion, had to read out significant aspects of U.S. law and practice to express support for women's rights associated with *Roe*.

Advocates' briefs reveal how rights-based strategies travel in relatively consistent and decontextualized ways. Women are either rights bearers (in regimes with new, permissive laws) or victims (in regimes with criminal sanctions).[350] Advocates have also argued that criminal abortion laws target women and impose violence on them—a type of victimization that is shared universally by women in restrictive legal systems.[351] Thus, feminist engagement in litigation not only focuses

parental involvement law after the Florida Supreme Court struck down a previous law. *See* N. Fla. Women's Health & Counseling Servs. v. Florida, 866 So. 2d 612, 615 (Fla. 2003) (striking down Florida's 1999 parental notice statute in June 2003). The state constitutional amendment, section 22, requires parental notice before abortion. FLA. STAT. § 390.01114 (West 2007) (effective 2006). In California, a state ballot proposition on parental notice narrowly failed to pass in 2005, 2006, and 2008. PROPOSITION 4: WAITING PERIOD AND PARENTAL NOTIFICATION BEFORE TERMINATION OF MINOR'S PREGNANCY, STATE OF CALIFORNIA, http://www.smartvoter.org/2008/11/04/ca/state/prop/4/ (last visited Oct. 15, 2012); SPECIAL STATEWIDE ELECTION, NOVEMBER 8, 2005: STATE BALLOT MEASURES, http://vote2005.sos.ca.gov/Returns/prop/00.htm (last visited Oct. 15, 2012); VOTE SUMMARIES: OFFICIAL DECLARATION OF THE RESULTS OF THE GENERAL ELECTION HELD ON TUESDAY, NOVEMBER 7, 2006, THROUGHOUT THE STATE OF CALIFORNIA ON STATEWIDE BALLOT MEASURES SUBMITTED TO A VOTE OF ELECTORS, http://www.sos.ca.gov/elections/sov/2006_general/sum_amended.pdf (last visited Oct. 15, 2012). As of October 2012, California's parental involvement law was permanently enjoined and not in effect. STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS, *supra*, at 2.

350. *See supra* notes 332–345 and accompanying text.

351. Maternal mortality and morbidity rates are often cited in this regard. *See* Lance Gable, *Reproductive Health as a Human Right*, 60 CASE W. RES. L. REV. 957, 965–66 (2010) (describing the number of illegal abortions estimated globally as abortions that are unsafe). Public health literature (and some legal literature) exhibits an increasing discontent with the assumption that all illegal abortion is unsafe abortion. *See* Joanna N. Erdman, *Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach*, 34 HARV. J.L. & GENDER 413, 413–14 (2011) (discussing the unworkable distinction between safe and unsafe abortions); *see also* Anne Orford, *Feminism, Imperialism, and the Mission of International Law*, 71 NORDIC J. INT'L L. 275, 277–78 (2002) (describing feminist intervention in international law generally as a strategy concerned with universalized harm to women).

on winning rights for women, but also on protecting women from harm.

In this way, the briefs of women's rights groups (and the national court opinions that cite to them) link rights to abortion with the avoidance of injury caused by illegal abortion. For example, in the debate leading up to the Supreme Court of Mexico's 2007 decision, a large and diverse number of groups took action in support of the Mexico City law.[352] The Assembly of the Federal District of Mexico City stated that its motivation in revising the city's penal and health codes was to deter illegal or unsafe abortions.[353] Amicus briefs from national and international organizations continued the work of the public campaign before the Supreme Court.[354] An amicus brief submitted by the U.S. non-profit organization, the National Abortion Fund, concluded "[a]s the experience in many other countries has shown, decriminalization of abortion will reduce mortality and morbidity among women seeking abortions and thereby improve public health."[355]

Similarly, in Portugal, the Constitutional Court's decision reflects women's rights advocates' insistence that if the law did not allow abortions in limited circumstances, women would inevitably seek danger-

352. Mexican civil society organizations sponsored a discussion seminar entitled "Abortion, an Open Debate," which featured "academics, researchers in the fields of medicine, law, philosophy, and biology, members of the civil society, [government] officials, and members of political parties." NORMA UBALDI GARCETE, CONSTITUTIONALITY OF THE ABORTION LAW IN MEXICO CITY 27 (2010).

353. Madrazo & Vela, *supra* note 203, at 1874–75.

354. *See* Written Comments by the Int'l Reprod. & Sexual Health Law Programme, Faculty of Law, Univ. of Toronto at 3 [hereinafter Brief for Int'l Reprod. & Sexual Health Law Programme], Acción De Inconstitucionalidad, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Agosto de 2008, 146/2007, *available at* http://www.law.utoronto.ca/documents/reprohealth/BriefMexicoEnglish.pdf (arguing that removing punitive provisions would be in accordance with the Convention on the Elimination of All Forms of Discrimination against Women and the Beijing Declaration and Platform for Action); *see also* Written Comments by Nat'l Abortion Fed. at 7 [hereinafter Brief for Nat'l Abortion Fed.], Acción De Inconstitucionalidad, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Agosto de 2008, 146/2007, *available at* http://www.prochoice.org/pubs_research/publications/downloads/international/NAF_amicus_mx_en.pdf (concluding that "[t]he reforms of the [Mexican] Decree are important measures to improve women's access to sexual and reproductive health care services").

355. Brief for Nat'l Abortion Fed., *supra* note 354, at 2–5, 7.

ous, illegal terminations.[356] The court wrote of "the empirical reality of social life" and "incontrovertible data gathered from past experience" that the public, as well as state officials, did not want to prosecute women for early abortions.[357] Crucial to the court's acceptance of these arguments were the reproductive rights groups that intervened early in debates about abortion[358] and argued that Portugal's restrictive abortion law put women's lives at risk.[359] The majority of the court reasoned that national values resistant to abortion generally must give way to concerns for women's health.[360]

The fixed nature of these strategies and narratives means that the recurrent actors in litigation rarely step outside their roles to see something other than powerful states enforcing or not enforcing

356. *See* T.C., Acórdão No. 733/07, Relator: Joaquim de Sousa Ribeiro, 23.02.2010, 60, DIÁRIO DA REPÚBLICA, 2.ª SÉRIE [D.R.], 26.03.2010, 15566, 15581–82 (Port.) (translation provided by Marcelina Alvrim and on file with author).

357. *Id.* at 15581. Moreover, the court held that policing women's procreative choices has been historically difficult for the state to do well. *Id.*

358. Women's rights groups, like the Association for Family Planning, pointed to the thousands of women who required hospital treatment because of unsafe abortions as examples of the effects of the criminal law. APF (ASS'N PARA O PLANEAMENTO DA FAMÍLIA), DISCUSSÕES PÚBLICAS E POSIÇÕES DA APF, http://www.apf.pt/apf.php?area=300&mid=003&sid=001 (last visited Sept. 2, 2012) (listing documents of the organization prepared for the campaign to decriminalize abortion); MPE MÉDICOS PELA ESCOLHA, QUEM SOMOS, http://www.medicos pelaescolha.pt/acerca/quem-somos/ (last visited Oct. 15, 2012) (translation provided by Marcelina Alvrim and on file with author). In 1984 and 1985, two decisions of the Supreme Court of Portugal authorized abortion for medical and humanitarian reasons (to save the woman's life, and in instances of fetal abnormalities and rape). *See* Diniz, *supra* note 171, at 1 (discussing the 1984 and 1985 cases). For a general discussion of the influence of Catholicism on the abortion debate in Portugal during this period, see Paul Manual & Maurya Tollefsen, *Roman Catholicism, Secularization and the Recovery of Traditional Communal Values: The 1998 and 2007 Referenda on Abortion in Portugal*, 13 S. EUR. SOC. & POL. 117, 117–127 (2008).

359. *See* Diana Curado, *Portugal, 3 Years of Legal, Safe and Free Abortion*, IWL-FI (Dec. 13, 2010), http://www.litci.org/en/index.php?option=com_content&view=article&id=1748 (describing the "pro-choice" movement that "campaigned on the streets and on television").

360. T.C., Acórdão No. 733/07, 60, D.R., 15582 (Port.). *But see* Janine P. Holc, *The Purest Democrat: Fetal Citizenship and Subjectivity in the Construction of Democracy in Poland*, 29 SIGNS 755, 756–58 (2004) (demonstrating that anti-choice advocates solidify and support nationalist identities by resisting abortion reform).

rights.[361] Totalizing harm, like human rights, can sideline women's practical engagement with abortion services, legal or illegal. The next Section suggests that the focus on the comparative constitutional law of the global North translates to the specific marginalization of extra-legal or informal conduct.

B. Pragmatic Comparisons

The dominant approach to comparative law in abortion cases may help legitimize the political choices of courts, but does so in formalist terms[362] that funnel law reform into predetermined molds for legal grounds or legal permission.[363] Consider a map of the world's abortion laws, published by the Center for Reproductive Rights.[364] Countries are shaded a different color depending on whether the country prohibits abortion altogether or permits abortion only to save the woman's life, permits abortion to preserve physical health, permits abortion to preserve mental health, permits abortion on socioeconomic grounds, or permits abortion without restriction as to rea-

361. *See* HALLEY, *supra* note 330, at 33 (describing a "textbook case of bad faith" when feminists will not see other forms of power or justice projects); Peer Zumbansen, *Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order*, 1 GLOBAL CONSTITUTIONALISM 16, 26 (2012) (speaking of comparative constitutional law that is wedded to rights and to state enforcement as "only seeing what we set out to see").

362. The critique of comparativism as being overly formalist is longstanding. Comparative inquiries of the late 1800s and early 1900s were "dubious and non-scientific typologies of the world's legal systems based on a crude evolutionary model of social and legal development." Riles, *supra* note 34, at 228. Fernanda Nicola details two camps within modern comparative law: one committed to harmonizing laws (using law to accomplish a social purpose) and one accepting and approving of divergence (mapping the divergent meanings and purposes of law). Fernanda Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777, 785 (2010).

363. In this vein, it is interesting to consider how, in the United States, grounds for abortion were originally tailored to serve specific health purposes. For example, grounds to preserve life and health were at one time responsive to the realities of pregnancy and childbirth: "At the time [criminal abortion laws] were adopted, there were in fact many indications for life-saving abortions . . . . By the 1960s, however, advances in medicine meant that it was only a rare case where a pregnant women's life could be said to be at stake." GLENDON, *supra* note 1, at 11–12.

364. CTR. FOR REPROD. RIGHTS, THE WORLD'S ABORTION LAWS 2007, *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Abortion%20Map_FA.pdf.

son.[365] The picture is striking: the northern half of the world is mostly green, connoting abortion on request, whereas the southern half of the map is in shades of red, connoting abortion only to save the woman's life or to protect physical health.[366] Because of its format and function, however, the map cannot (and is not intended to) represent the nuances of how law is implemented, interpreted, or ignored. Fernanda Nicola has described this type of comparative methodology as "comparison by columns," or "comparing the language of legal norms understood as positive law in specific legal regimes."[367]

Yet comparative inquiry could be a platform to consider how law intersects with the local practices and attitudes.[368] Studies in Colombia, for example, demonstrate that self-induced abortion via over-the-counter drugs persists even for women who could have obtained legal abortions.[369] The same can be said of South Africa, where the number of abortions performed outside the parameters of the CTOPA remains high, despite legal permission for abortion on request until the twelfth week of pregnancy.[370] Women in Mexico City continue to seek private, and thus unsubsidized, abortion services because they expect confidentiality, better quality health care, and the absence of bureaucratic hurdles or health care professionals with conscientious objections.[371]

365. *Id.*

366. *Id.*

367. Nicola, *supra* note 362, at 785.

368. *See, e.g.*, Aníbal Faúndes & Ellen Hardy, *Illegal Abortion: Consequences for Women's Health and the Health Care System*, 58 INT'L J. GYNECOLOGY & OBSTETRICS 77, 79–80 (1997) (providing examples of countries, like India, where abortion is legal for any reason yet high rates of abortions performed outside legal parameters persist, and countries where laws are restrictive yet women access illegal services frequently, like Romania, Mozambique, Chile, Brazil, and Bangladesh).

369. Eduardo Amado et al., *Obstacles and Challenges Following the Partial Decriminalization of Abortion in Colombia*, 18 REPROD. HEALTH MATTERS 118, 118–21 (2010); *see also* Jennifer Lee & Cara Buckley, *For Privacy's Sake, Taking Risks to End Pregnancy*, N.Y. TIMES, Jan. 5, 2009, at A15 (revealing that in Latina immigrant enclaves in Upper Manhattan misoprostol is "frequently employed").

370. Banwari Meel & Ram P. Kaswa, *The Impact on the Choice on Termination of Pregnancy Act of 1996*, 36 AFR. J. PRIMARY HEALTH CARE & FAM. MED. 1, 1 (2009).

371. Raffaela Schiavon et al., *Characteristics of Private Abortion Services in Mexico City After Legalization*, 18 REPROD. HEALTH MATTERS 127, 128 (2010); *see also* Daniel Grossman et al., *Self Induction of Abortion Among Women in the United States*, 18 REPROD. HEALTH MATTERS 136, 140–42 (2010) (noting that in the United States, women self-induce because of cost

This evidence, largely drawn from public health literature, suggests that not only do extralegal methods persist after law reform, but also that new legislation or court decisions may result in bureaucracy, backlash, and stress on state resources. This insight has three important consequences for women's health. First, reform concentrated on legal grounds might inadvertently shut down avenues currently open to women or construct new obstacles to service delivery. Cyra Choudhury, for example, argues that new bureaucratic and potentially cumbersome processes can deter women from seeking legal terminations.[372] Indeed, one recent study revealed that of forty-six Colombian women, thirty-six had requests for legal terminations denied after a "protracted bureaucratic process, requiring several medical or legal referrals."[373]

Second, creating state-defined (as well as state-implemented and enforced) grounds for abortion means that health care professionals will interpret and apply new terms and definitions with the attendant fears of mistake and liability. Some physicians may resist performing now-legal abortions without court or official authorization, possibly causing considerable delay and confusion.[374] Although some health care professionals will always refuse to provide terminations for religious or moral reasons,[375] state reforms may influence previously complicit, indifferent, or somewhat supportive physicians to oppose abortion.[376] This raises the complicated question of backlash, and whether law reform, particularly reform implemented through judi-

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and logistical complications of clinical care, that women learn of these methods through friends and family, and that women with basic information about administration of the drug are more likely to complete abortions without clinical assistance).

372. Cyra Akila Choudhury, *Exporting Subjects: Globalizing Family Law Progress Through International Human Rights*, 32 MICH. J. INT'L L. 259, 284, 285 n.114, 288 (2011); *see also* Sharad D. Iyengar, *Introducing Medical Abortion Within the Primary Health System: Comparison with Other Interventions and Commodities*, 13 REPROD. HEALTH MATTERS 13, 13 (2005) (discussing "rigid regulatory systems" as "safeguarding an alien standard of quality that has not been adapted to local conditions").

373. Amado et al., *supra* note 369, at 120.

374. *Id.* at 119–20.

375. *Id.* at 123.

376. For example, in Colombia, women knew where to obtain abortions before decriminalization of the procedure, and their choices were "tolerated" by society. *Id.* at 119. After the Supreme Court's ruling, "in practice the right of Colombian women to access a legal abortion is not yet always recognised by those responsible for providing abortion ser-services." *Id.*

cial decisions, politicizes issues in ways that impede reformists' goals.[377]

Without taking a position on the questions of whether and how backlash occurs, it is worth noting that, in the countries that have been the focus of this Article, anti-abortion advocates impeded change after the initial liberalization of abortion. For example, since the Supreme Court of Mexico's decision in 2007, fifteen district assemblies across the country have banned all abortions by enacting laws recognizing that human life begins from the moment of conception.[378] Where abortion was once an ignored crime, it now appears that hospital staff are taking an active role in reporting patients who appear to have self-induced abortion, and law enforcement appears to have a newfound interest in prosecuting those women.[379]

Finally, because the dominant, rights-oriented approach is a model dependent on state implementation, the answer to implementation problems will be more law. Following the Colombian, South African, and Mexican cases, lawyers returned to court to ask for government-issued guidelines on the delivery of services and the legal duties of health professionals and state officials.[380] In Colombia, advocates sued to force the government to provide state funding for low-income women seeking abortion care and to clarify when physicians may refuse to perform a legal abortion.[381] In response, the Colombian Ministry of Social Protection issued guidelines that attempt to explain the definitions of and limitations on refusal rights for providers, to provide instructions for what constitutes "good medical attention," and to clarify the requirements that basic insurance plans include

377. *See, e.g.*, Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251, 251–52 (2009) (discussing generally the challenges of social reform litigation and the experiences of Ruth Bader Ginsburg and Thurgood Marshall); *cf.* Greenhouse & Siegel, *supra* note 40, at 2031 (tracing the roots of abortion opposition in the United States in ways that do not support a backlash thesis).

378. *See* Mary Cuddehe, *Mexico's Anti-Abortion Backlash*, NATION, Jan. 23, 2012, *available at* http://www.thenation.com/article/165436/mexicos-anti-abortion-backlash (noting that, as of 2010, seventeen Mexican states, which is more than half the country, have fetal rights amendments).

379. *Id.*

380. *See, e.g.*, Davis, *supra* note 11, at 1678–81 (discussing the Mexican and Colombian litigation that sought legal guidance from state institutions). It is too early to tell what, if any, subsequent litigation will follow the 2010 cases from Portugal and Spain.

381. *Id.* at 1679–80.

abortions coverage.[382] Abortion advocates, however, lament the vagueness and lack of enforcement of those guidelines.[383] Likewise, in South Africa, Parliament amended the CTOPA to allow registered midwives to perform early-term abortions and to decentralize how clinics become approved facilities.[384] But the scarcity of resources, including a shortage of providers and facilities, persists after the legislative amendment,[385] and legal abortion continues to be elusive throughout most of the country.[386]

For those who write briefs that serve as vehicles for comparative law, a pragmatic basis for comparison might be how the states intervene in, interact with, or tolerate informal avenues for reproductive health care might suggest a strong state role in serving as the primary conduit of services and information. In these instances, health care professionals and women might feel comfortable with the state as the mediator of services, as may be the case in Germany.[387]

There are other contexts, however, in which the pursuit of expanded grounds for abortion is a project suited to the traditional comparators. For example, reasons such as mental health or socioeconomic distress can be legal exceptions to criminal laws that permit many women to seek abortions for diverse reasons.[388] And these

382. Amado, *supra* note 369, at 123–24 (discussing three guidelines instituted by the Ministry of Social Protection in Columbia: Decree 4444/2006, defining how and when abortions services should be provided; Resolution 4905, providing guidelines for ensuring good medical attention for woman requesting a legal termination; and Agreement 350/2006, stating that abortion should be provided for in basic health care plans).

383. Mónica Roa, *Ensuring Reproductive Rights in Colombia: From Constitutional Court Success to Reality*, ISIS INT'L (Sept. 3, 2008, 8:02 PM), http://www.isiswomen.org/index.php?option=com_content&task=view&id=1103&Itemid=200 (describing the challenges of physician refusals to provide services and the scarcity of funding for services from the point of view of the lead lawyer in the 2006 litigation).

384. *See supra* note 147 and accompanying text.

385. *See, e.g.*, Diane Cooper et al., *Ten Years of Democracy in South Africa: Documenting Transformation in Reproductive Health Policy and Status*, 12 REPROD. HEALTH MATTERS 70, 71 (2004) (discussing the availability of reproductive services in South Africa).

386. For a summary of South African implementation problems, see Rebouché, *Reproductive Rights*, *supra* note 149, at 14–25.

387. *See* Ferree & Gamson, *supra* note 19, at 60–61 (noting that the German state's role in abortion is publicly promoted as "moral" and "helpful" rather than punitive).

388. This example draws from the Spanish experience, in which, before new legislation passed in 2010, over 100,000 women regularly received abortions on the ground of "mental distress." *Spain OKs New Abortion Law, Angers Church*, MSNBC (Feb. 24, 2010, 2:59 PM),

grounds can fold into informal practices that straddle legality and illegality.[389]

Where state power is diffuse and state resources are limited, the capacity and limitations of informal regimes might convey interesting information about women's reproductive health needs.[390] In countries like South Africa and Colombia, a well-known informal sector for abortion provision could inform statutory or regulatory revision and support interventions that tap into existing channels to services.[391] But this requires a more pragmatic comparative method, one that analyzes how law reform should intersect with the availability of abortion services. Close engagement with existing practices and attitudes—considerations that are arguably absent from current litigation strategies—can help elucidate present alternative opportunities and costs.[392]

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http://www.msnbc.msn.com/id/35565952/ns/world_news-europe/t/spain-oks-new-abortion-law-angers-church/. The "mental distress" ground had been interpreted to include socio-economic distress. *See* Reed Boland, *Selected Legal Developments in Reproductive Health*, 24 FAM. PLAN. PERSP. 178, 179–80 (1991) (noting a case of "physical and mental distress" when a Spanish woman could not support another child). In 2010, however, the Spanish Parliament legalized abortion on any ground until the twelfth week of pregnancy. The Constitutional Court of Spain dismissed an early constitutional challenge to the law's enforceability, declining to decide the issue of constitutionality before it came into force. S.T.C., July 14, 2010 (B.O.E., No. 90/2010, p. 118, 122). Exhibiting a pattern described above, however, the dissenting opinion contrasted the majority's position with the German Constitutional Court's 1975 decision, arguing that a fetus's right to life should trump a woman's right to abortion. *Id.* at 126 (Delgado Barrio, J., dissenting).

389. For example, in "menstrual regulation," a health professional administers the drug combination that results in a medical abortion if no more than eight weeks have passed since a patient's last menstrual cycle. Because the patient never takes a pregnancy test, however, the procedure is not considered a termination. Choudhury, *supra* note 372, at 294 (explaining the practice of menstrual regulation in Bangladesh).

390. *See* Iyengar, *supra* note 372, at 14 ("[W]here the enforcement of laws and regulations is weak, as in the rural interiors and urban slums, a primary health underworld thrives on the need for essential services for the poor.").

391. Public health scholars have called for demedicalization of primary health care services: introducing self-medication, removing facility requirements, and expanding the categories of persons that can administer health services. *Id.* at 15.

392. *See* Jeremy Elkins, *Beyond "Beyond the State": Rethinking Law and Globalization*, *in* LAW WITHOUT NATIONS 22, 37–39 (Austin Sarat et al. eds., 2011) (couching a normative theory of cognition in a legal realist heritage); *see also* Libby Adler, *Gay Rights and Gay Lefts*, HARV. C.R.-C.L. L. REV. COLLOQUIUM (Sept. 2, 2011), http://harvardcrcl.org/wp-content/uploads/2011/02/Libby_Adler_Gay_Rights_And_Lefts.pdf (modeling risks-

V. CONCLUSION

A new source of comparison is needed to capture pragmatic influences that account for the state's ability to implement formal rights.[393] Some reform strategies will be better suited to the traditional, rights-based model, but others will not. By focusing on state capacity to implement laws and perhaps suggesting that informal mechanisms might better suit some contexts, the power imbalances between political economies becomes a focus of comparison, rather than treating all law reform as if it has a North American or Western European trajectory.

benefits analyses for social justice and rights reform projects); HALLEY, *supra* note 330, at 304 (modeling a process of assessing the costs and benefits of her proposal to "take a break from feminism").

393. I elaborate on an alternative comparative methodology in greater detail in a chapter, *Functionalist Approaches to Comparative Abortion Law,* in the forthcoming book, SHIFTING PARADIGMS IN ABORTION LAW, edited by Rebecca Cook, Bernard Dickens, and Joanna Erdman.