

## Dignity and the Duty to Protect Unborn Life

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THIS CHAPTER ANALYSES COMPETING claims on dignity in constitutional judgements about abortion that impose on government a constitutional duty to protect unborn life, with attention to the ways courts reconcile commitments to dignity as liberty, dignity as equality, and dignity as life. By appeals to dignity as liberty, I mean appeals to dignity that invoke values of autonomy and free development of personality; by appeals to dignity as equality, I mean appeals to dignity that invoke concerns about standing, status, and respect. By appeals to dignity as life, I refer to claims on dignity associated with the regulation of birth, sex, or death that protect or symbolically express the value of human life itself.

The chapter first considers rival claims on dignity in political debates that led to the constitutionalization of abortion in the 1970s. Against this backdrop, it examines two influential German judgements that interpret constitutional protection for dignity as requiring protection for unborn life. The two judgements, rendered over a twenty-year period, reflect an evolving view of how the state may express respect for human life—a judgement tied to evolving understandings about the respect owed women in making decisions concerning motherhood. Brief consideration of other duty-to-protect-life jurisdictions suggest great variation in the ways that legal systems coordinate respect for different kinds of human dignity implicated by the regulation of abortion.

In 1975, West Germany's Federal Constitutional Court interpreted the guarantee of dignity in the nation's Basic Law to impose a duty to protect unborn life, and struck down a statute that had balanced respect for women's autonomy and respect for life by allowing abortion after dissuasive counselling in the first twelve weeks of pregnancy.<sup>2</sup> Two decades later, after the reunifica-

<sup>1</sup> This chapter draws on Reva Siegel, 'Constitutionalization of abortion', in Michel Rosenfeld and András Sajó, *Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012), 1057.

<sup>2</sup> 39 BVerfGE 1 (1975) (*Abortion I*), translated in John D. Gorby and Robert E. Jonas, 'West German abortion decision: a contrast to *Roe v Wade*', *John Marshall Journal of Practice & Procedure* 9 (1976), 605.

tion of Germany, the Federal Constitutional Court revisited its judgement, and allowed government to discharge the duty to protect life through a regime of counselling rather than the threat of criminal punishment.<sup>3</sup> The court allowed the substitution on the grounds that counselling might be more effective in protecting life, but the court's reasoning revealed that conceptions of dignity as liberty also played a role in the judgement. While in its first decision the Federal Constitutional Court reasoned that dignity as life trumps dignity as liberty/equality, in the second, the court began to acknowledge and accommodate different forms of dignity.

Liberalization of the German framework is often explained as a compromise associated with reunification. But the court's reasoning also reflects a changing view of women. Practical judgements about the appropriate way for government to discharge its duty to protect life *in utero* presuppose some view of women. For this reason, in judicial decisions, judgements about dignity as liberty are often nested inside judgements about dignity as life. To see this dynamic at work, I compare discussion of dignity in the first and second German judgement, and close by considering protection for dignity as liberty and dignity as equality in the case law of other jurisdictions that impose a constitutional duty to protect life on government regulation of abortion.

The complex role of dignity in the German abortion cases and in other duty-to-protect-life jurisdictions suggests that, over time, both the right-to-life movement and the women's movement have shaped the evolution of dignity in constitutional case law. Changing conceptions of women as deliberative agents seem to play a role in the abortion case law, even in jurisdictions that constitutionalize a duty to protect unborn life. Attention to the ways law coordinates competing claims on dignity in the abortion cases offers a fascinating window on the roles dignity can play in mediating conflict within a constitutional community.

### Appeals to dignity in debates leading to constitutionalization of abortion

In the 1960s, public health arguments for liberalizing access to abortion began to spread in Western Europe and North America. Critics argued that poor women unequally suffered the health harms of criminalization, and doctors sought freedom to practice in circumstances in which the criminal law was

<sup>3</sup> 88 BVerfGE 203 (1993) (*Abortion II*), translation available at <[http://www.bverfg.de/entscheidungen/fs19930528\\_2bvff000290en.html](http://www.bverfg.de/entscheidungen/fs19930528_2bvff000290en.html)> (official court translation).

erratically enforced.<sup>4</sup> By the end of the decade, however, a newly mobilizing women's movement had joined public health advocates in challenging the criminalization of abortion. No longer were reformers satisfied with liberalizing indications for abortion (exceptions to criminal bans on abortion, typically determined in the individual case by permission of a committee of doctors). They now sought repeal of indications legislation, and, at the very least, enactment of periodic legislation that would give to women capacity to decide whether to carry a pregnancy to term during the early months of pregnancy—legislation sometimes termed 'on demand', because it shifted control of the decision whether to carry a pregnancy to term to the pregnant woman who was no longer obliged to plead her case to a committee of doctors.<sup>5</sup>

Feminists challenged the criminalization of abortion on new grounds, arguing that laws criminalizing abortion violated women's dignity. The claim was both practical and symbolic. Under prevailing social arrangements, they argued, laws criminalizing abortion took from women decisions about their health, sexual relations, family needs, economic independence, and political participation. Laws criminalizing abortion thus reflected and perpetuated status-based controls over women's lives. These associations, once identified, escalated the practical and symbolic stakes of the abortion debate and transformed it into a site of struggle over women's citizenship.<sup>6</sup> In 1969, Betty Friedan, president of the newly formed National Organization of Women, mobilized these arguments in a call for the repeal of laws criminalizing abortion, in the process fatefully reframing American policy debate over abortion

<sup>4</sup> See Dagmar Herzog, *Sexuality in Europe: A Twentieth-Century History* (Cambridge, Cambridge University Press, 2011) 156–60; Linda Greenhouse and Reva B. Siegel, 'Before (and after) *Roe v Wade*: New questions About backlash', *Yale Law Journal* 120 (2011), 2028, 2036–46. See generally Christopher Tietze, 'Abortion in Europe', *American Journal of Public Health* 57 (1967), 1923.

<sup>5</sup> In this era, many feminists challenged the use of criminal law to regulate women's abortion decisions, and sought to minimize the involvement of the medical profession as well. It is impossible to identify one position spanning movements and borders. But there was shared hostility to the use of criminal law and to doctors' committees to restrict access to abortion in early pregnancy.

<sup>6</sup> See, for example, Herzog, *Sexuality in Europe*, 156–60; Machteld Nijsten, *Abortion and Constitutional Law: A Comparative European-American Study* (Florence, European University Institute, 1990) 30–1; Reva B. Siegel, 'The constitutionalization of abortion', in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press 2012) 1057, 1060–4; Reva B. Siegel, 'Roe's roots: The women's rights claims that engendered *Roe*', *Boston University Law Review* 90 (2010), 1875, 1879–86, 1900–7; Greenhouse and Siegel, 'Before (and after) *Roe v Wade*', 3029–46. See also, Myra Marx Ferree, William Anthony Gamson, Jürgen Gerhards, and Dieter Rucht, *Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States* (Cambridge, Cambridge University Press, 2002), 131–53; Dorothy McBride Stetson (ed.), *Abortion Politics, Women's Movements, and the Democratic State: A Comparative Study of State Feminism* (Oxford, Oxford University Press, 2003).

reform.<sup>7</sup> Friedan insisted: '[T]here is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand the control over our own bodies, over our own reproductive process ... The real sexual revolution is the emergence of women from passivity, from *thing-ness*, to full self-determination, to full dignity ...'<sup>8</sup>

This feminist claim to dignity in making decisions about bearing children would be publicized through speak-outs and through civil disobedience. In France, 343 women declared that they had had abortions in a manifesto published in *Le Nouvel Observateur* in April 1971.<sup>9</sup> Two months after publication of the French manifesto, Aktion 218, a women's organization in West Germany named for the code provision criminalizing abortion, published in *Der Stern* the names of 374 women who had had abortions. They denounced the law criminalizing abortion because it 'branded them as criminals', and in their manifesto declared: 'I am opposed to Paragraph 218 and for desired children.'<sup>10</sup> In other nations, similar speak-outs followed.

Opponents of abortion reform appealed to dignity as well. In appealing to human dignity, opponents were not seeking abortion laws that would express respect for women's decisional authority but instead sought abortion laws that would express respect for the value of life itself. In 1970, the Central Committee of German Catholics, an association of Catholic laypersons, argued that decriminalizing abortion would violate West German constitutional guarantees of dignity: 'If becoming life is not protected, including with the means of the criminal law, unconditional fundamental principles of a society founded on human dignity are not assured for long.'<sup>11</sup>

During the 1970s, these national and transnational debates led to the enactment of legislation in a number of countries that liberalized access to abor-

<sup>7</sup> Betty Friedan, President, National Organization for Women, Address at the First National Conference on Abortion Laws: 'Abortion: a woman's civil right' (February 1969), reprinted in Linda Greenhouse and Reva B. Siegel (eds), *Before Roe v Wade: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling* (Kaplan Publishing, 2010), 38.

<sup>8</sup> Greenhouse and Siegel, *Before Roe v Wade*, 39–40.

<sup>9</sup> 'La liste des 343 françaises qui ont le courage de signer le manifeste 'je me suis fait avorter'' [The list of 343 French women who have the courage to sign the manifesto 'I have had an abortion'], *Le Nouvel Observateur* (5 April 1971), 5 (author's translation).

<sup>10</sup> Wir haben abgetrieben! [We Aborted] *Stern* (Hamburg) (6 June 1971), 16 (author's translation). See also Alice Schwarzer (ed.), *Frauen gegen den §218. 18 Protokolle, aufgezeichnet von Alice Schwarzer* [Women Against §218: Eighteen Interviews, Recorded by Alice Schwarzer] (1971), 146 (author's translation).

<sup>11</sup> Manfred Spieker, *Kirche und Abtreibung in Deutschland: Ursachen und Verlauf eines Konflikts* (2nd edn, 2008), 22–3 (author's translation).

tion. Those frustrated in politics increasingly brought their claims to court, leading to the first constitutional judgments on abortion.<sup>12</sup>

### Claims on dignity in the German abortion decisions

Beginning with the West German judgement in 1975, and accelerating over time, claims on dignity played an increasingly important role in the constitutional law of abortion. The West German judgement famously interpreted constitutional protection for human dignity to require protection for unborn life. Less appreciated is the way in which the court's judgement *also* reflected an engagement with the dignity claims of the West German women's movement.

In what follows, I consider how dignity figured in two German abortion judgements set almost twenty years apart. The first German judgement, from 1975, appealed to dignity as respect for life to strike down periodic legislation adopted in response to the Aktion 218 campaign. In 1993, after reunification, the Federal Constitutional Court qualified its judgement in ways that acknowledged competing claims on dignity.

In 1975, the Federal Constitutional Court held that West Germany's 1974 law, which decriminalized abortion during the first twelve weeks of pregnancy for women who received abortion-dissuasive counselling, violated the Basic Law.<sup>13</sup> The court reasoned that the duty of the state to protect unborn life was derived from the Basic Law's protection for life and for dignity: 'Where human life exists, human dignity is present to it; it is not decisive that the bearer of this dignity himself be conscious of it and know personally how to preserve it.'<sup>14</sup> Without deciding whether the unborn held a right to life, the court concluded that there was an objective dimension to the right to life that government was obliged to respect by law.<sup>15</sup>

<sup>12</sup> In the early 1970s, the US Supreme Court and four courts in Western Europe issued judgements on the constitutionality of the legal regulation of abortion. Nijsten, *Abortion and Constitutional Law*, 231–6.

<sup>13</sup> BVerfGE 1 (1975) (*Abortion I*), 605.

<sup>14</sup> BVerfGE 1 (1975) (*Abortion I*), 641 (citing Articles 2(2)(1) and 1(1)(2)).

<sup>15</sup> See BVerfGE 1 (1975) (*Abortion I*), 641–2. 'The question ... whether the one about to be born himself is the bearer of the fundamental right, or on account of a lesser capacity to possess legal and fundamental rights, is 'only' protected in his right to life by the objective norms of the constitution need not be decided here ... the fundamental legal norms contain not only subjective rights of defense of the individual against the state but embody, at the same time, an objective ordering of values, which is valid as a constitutionally fundamental decision for all areas of law and which provides direction and impetus for legislation, administration and judicial opinions.'

The court famously justified its decision to strike down the 1974 statute liberalizing access to abortion by invoking the Holocaust.<sup>16</sup> Less well known is the court's engagement with feminist claims; the 1975 decision expressly repudiated feminist dignity claims. The Federal Constitutional Court warned the legislature not to 'acquiesce' in popular beliefs about abortion that might have developed in response to 'passionate discussion of the abortion problematic'.<sup>17</sup>

The court expressly rejected the parliament's efforts to devise a framework that respected the dignity of both women and the unborn. It rejected the view of legislators who sought to identify a period during pregnancy to respect 'the right to self-determination of the woman which flows from human dignity vis-à-vis all others, including the child's right to life', on the grounds that it was 'not reconcilable with the value ordering of the Basic Law'.<sup>18</sup> Given the overriding importance of the dignity of human life, the court concluded, 'the legal order may not make the woman's right to self-determination the sole guideline of its rulemaking. The state must proceed, as a matter of principle, from a duty to carry the pregnancy to term.'<sup>19</sup>

The Federal Constitutional Court not only rejected the parliament's efforts to coordinate dignity concerns of women and the unborn; the opinion went further, and denied that pregnant women had claims of deliberative autonomy concerning motherhood. The court recognized a constitutional duty to protect life that required government to 'proceed ... from a duty to carry the pregnancy to term', that is, to enforce women's duty to mother.

The court derived these duties from nature, reasoning that the duty to protect life was 'entrusted by nature in the first place to the protection of the mother. To reawaken and, if required to strengthen the maternal duty to protect, where it is lost, should be the principal goal of the endeavours of the state by the protection of life.' The duty to protect life obliged government to 'strengthen the readiness of the expectant mother to accept the pregnancy as her own responsibility'.<sup>20</sup> On this view, women naturally choose to protect unborn life; where nature falters, law must enforce choices women ought naturally to make.

<sup>16</sup> BVerfGE 1 (1975) (*Abortion I*), 662. The majority's reasoning was disputed by dissenting justices, who pointed out that National Socialists had criminalized abortion. BVerfGE 1 (1975) (*Abortion I*), 669–70.

<sup>17</sup> BVerfGE 1 (1975) (*Abortion I*), 661–2.

<sup>18</sup> BVerfGE 1 (1975) (*Abortion I*), 643 (citing German Federal Parliament, Seventh Election Period, 96th Sess., Stenographic Reports, 6492).

<sup>19</sup> BVerfGE 1 (1975) (*Abortion I*), 644.

<sup>20</sup> BVerfGE 1 (1975) (*Abortion I*), 644.

Yet, even as the court required government to enforce women's maternal duties, the court limited the kind of sacrifices government could exact from women, again appealing to judgements about what is normal for women. The court distinguished between the 'normal' burdens of motherhood, which government can exact by law, and extraordinary burdens of motherhood, such as those posing a threat to a woman's life or health, which the court ruled were non-exactable by law.<sup>21</sup>

The passages of the opinion explaining when and why the duty to protect life should be exacted by law turn on judgements about women's dignity, identifying circumstances in which government must respect women's bodily integrity and deliberative autonomy, circumstances when government may do so, and circumstances when government must not do so. The court explained that when a pregnant woman faced difficulties other than the 'normal' burdens of motherhood, her 'decision for an interruption of pregnancy can attain the rank of a decision of conscience worthy of consideration', and in these circumstances it would be inappropriate to use criminal law or 'external compulsion where respect for the sphere of personality of the human being demands fuller inner freedom of decision'.<sup>22</sup> By contrast, women who 'decline pregnancy because they are not willing to take on the renunciation and the natural motherly duties bound up with it' may decide 'upon an interruption of pregnancy without having a reason which is worthy of esteem within the value order of the constitution'.<sup>23</sup> The court recognized a woman's concern about continuing a pregnancy that posed a threat to her life or grave risk to her health as worthy of respect, hence warranting an exemption from legal compulsion. The court permitted the legislature to allow exceptions on several indications where pregnancy would pose similarly onerous burdens for women.<sup>24</sup> But even in these cases where law was to respect women's deliberative judgement, the state was nonetheless to provide dissuasive counseling to guide its exercise 'with the goal of reminding pregnant women of the fundamental duty to respect the right to life of the unborn, to encourage her to continue the pregnancy ...'.<sup>25</sup>

In the 1990s, the Federal Constitutional Court would reaffirm this understanding, but in a framework that indirectly afforded far greater recognition to women's autonomy in making decisions about motherhood. The reunification

<sup>21</sup> BVerfGE 1 (1975) (*Abortion I*), 647.

<sup>22</sup> BVerfGE 1 (1975) (*Abortion I*), 647.

<sup>23</sup> BVerfGE 1 (1975) (*Abortion I*), 653.

<sup>24</sup> BVerfGE 1 (1975) (*Abortion I*), 624, 647–8. The court gave the legislature discretion whether to allow abortion on eugenic, rape, and social emergency indications.

<sup>25</sup> BVerfGE 1 (1975) (*Abortion I*), 649.

of Germany required reconciling the law of East Germany, which allowed women to make their own decisions about abortion in early pregnancy, with the law of West Germany, which did not.<sup>26</sup> Germany enacted compromise legislation that allowed women to make their own decisions about abortion in the first twelve weeks of pregnancy after participating in a counselling process designed to persuade women to carry the pregnancy to term—a form of regulation presented as more effective in deterring abortion than a criminal ban and respecting both ‘the high value of unborn life and the self-determination of the woman’.<sup>27</sup> The Federal Constitutional Court struck down the legislation, but shifted ground as it did so.

The court again rejected legislation on the periodic model, reasoning that ‘a woman’s human dignity and her ability to make responsible decisions herself’ was not enough to justify limiting protection for unborn life, even during the early months of pregnancy.<sup>28</sup> The court invoked the harm principle, (‘[l]egal protection presupposes that the law lays down conditions governing to what extent and how far one person can interfere with another and does not leave it to the will of one of the parties concerned’)<sup>29</sup>, and reasoned from women’s natural duties in determining the principle’s application, (‘[a]lthough [a woman’s constitutional rights] must accordingly be protected, they do not extend so far as to allow the constitutional duty to carry the child to term to be suspended even for a limited time’).<sup>30</sup> In striking down the statute, the court emphasized that the legislature was obliged to clearly communicate the scope of the duty to protect by demarcating in law the obligations exactable of the pregnant woman herself, and also of others in a position to support her in carrying the pregnancy to term.<sup>31</sup> Preserving the law criminalizing abortion was an effective way to do this.

But, the court emphasized, the legislature was not obliged to protect unborn life through the threat of criminal punishment itself. The legislature might find that the threat of criminal punishment did not in fact deter abortion but merely drove the practice underground. With this understanding, the legislature could arrange a system of counselling to persuade pregnant women to carry to term, and so long as the counselling was effective to that end, the

<sup>26</sup> See Peter H. Merkl, *German Unification in the European Context* (University Park, PA, Penn State University Press, 1993), 176–80.

<sup>27</sup> 88 BVerfGE 203 (1993) (*Abortion II*), 37.

<sup>28</sup> BVerfGE 1 (1975) (*Abortion I*), 156.

<sup>29</sup> BVerfGE 1 (1975) (*Abortion I*), 156.

<sup>30</sup> BVerfGE 1 (1975) (*Abortion I*), 157; see also 644, 647, and 653. The court discusses ‘the constitutional duty to carry the child to term’ as enforcing the natural role and responsibilities of women.

<sup>31</sup> BVerfGE 1 (1975) (*Abortion I*), 173–4; see also 170–2.

legislature could even dispense with the threat of criminal punishment 'in view of the openness necessary for counselling to be effective'.<sup>32</sup>

The court presented this judgement as a practical judgement, but explained it in ways that reflected and expressed an evolving view of women. The court reasoned that the legislature might base its judgement about enforcing the duty to protect on the view that the state's efforts to protect unborn life were more likely to succeed if it sought to work with the mother and to secure her support.<sup>33</sup> The court presented this new account of the state's duty of protection as in 'conformity with the respect owed to a woman and future mother',<sup>34</sup> observing that the counselling concept endeavours to exact what the pregnant woman owes 'without degrading her to a mere object of protection', and 'respects her as an autonomous person by trying to win her over as an ally in the protection of the unborn'.<sup>35</sup>

While the court required adherence to its 1975 judgement, the court's willingness to accept the substitution of counselling for threat of criminal prosecution reflected a changing view of the citizen that abortion regulation addresses. In this emergent view, women citizens are persons who exercise autonomy even in the ways they inhabit family roles; that exercise of autonomy is sufficiently worthy of respect that women would be degraded if abortion law were to treat them as a mere object or instrument for bearing children. For practical and even demonstrative reasons, government might discharge its duty to protect life through deliberative rather than coercive interactions with women.

A dissenting opinion underscored this point:

[T]he counselling regulation is not a frustrated escape from the frustrating failure of the indication solution. The new regulation is much more the result of an altered understanding of the personality and dignity of the woman. The judgement's finding that a woman is capable of a responsible choice regarding the continuation or interruption of her pregnancy must, however, have consequences for the interpretation of the constitution. In our opinion, it forces us to solve the collision between the human dignity of the unborn on the one hand, and the dignity of the pregnant woman on the other, by achieving a balance between the two. This did not occur in th

In the wake of the 1993 decision, abortion in Germany remains criminally prohibited except under restricted indications, but a woman who completes

<sup>32</sup> BVerfGE 1 (1975) (*Abortion I*), 178.

<sup>33</sup> BVerfGE 1 (1975) (*Abortion I*), 183.

<sup>34</sup> BVerfGE 1 (1975) (*Abortion I*), 185.

<sup>35</sup> BVerfGE 1 (1975) (*Abortion I*), 214.

counselling can receive a certificate granting her immunity from prosecution for an abortion during the first twelve weeks of pregnancy.<sup>36</sup>

### Respect for women's dignity in jurisdictions enforcing a duty to protect life

Around the world, there are now many jurisdictions that have followed Germany in imposing on government regulation of abortion a constitutional duty to protect life. In duty-to-protect jurisdictions, courts employ a variety of approaches for coordinating constitutional protections for dignity as life and dignity as liberty. A look at several cases in duty-to-protect jurisdictions shows how practical judgements about the state's obligations to protect unborn life are entangled with questions about the state's obligations to respect women's decisions concerning motherhood.

Some constitutional orders enforce the duty to protect unborn life even more strenuously than the 1975 West German decision. In the Republic of Ireland, the constitution was amended in 1983 to provide: 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.'<sup>37</sup> This framework for vindicating the rights of the unborn imposes on women a duty to carry pregnancy to term exactable by law under a far greater range of circumstances than does the first German abortion decision. The first German abortion decision reasoned that when a pregnant woman faces difficulties exceeding the 'normal' burdens of motherhood, her 'decision for an interruption of pregnancy can attain the rank of a decision of conscience worthy of consideration', and in these circumstances it would be inappropriate to use criminal law or 'external compulsion where respect for the sphere of personality of the human being demands fuller inner freedom of decision'.<sup>38</sup> Irish constitutional law does not seem to recognize pregnant women as having dignity as liberty in decisions respecting motherhood. When an adolescent who was pregnant by rape was enjoined from travelling abroad for an abortion, the Irish Supreme Court overturned the

<sup>36</sup> See Strafgesetzbuch [StGB] [German Penal Code] para. 218a; available in English at <[http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#StGB\\_000P218](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGB_000P218)>.

<sup>37</sup> Republic of Ireland, Eighth Amendment of the Constitution Act, 1983, 1983 Acts of the Oireachtas, 7 October 1983 (amending Irish Constitution, Article 40.3.3). Adopted in response to developments in Ireland, Europe, and the USA, the amendment was intended to clarify that the Irish constitution recognized a 'personal' right to life of the unborn, and not only the objective value of life.

<sup>38</sup> 39 BVerfGE 1 (1975) (*Abortion I*), 647–8.

injunction, but without recognizing the young woman as having right to resist bearing the child of her rapist; instead, the court released the young woman from the obligation to bear the child on the ground that the young woman's risk of suicide satisfied the standard of a 'real and substantial risk' to the pregnant woman's life.<sup>39</sup>

Ireland's approach is not shared in all duty-to-protect-unborn-life jurisdictions. In the wake of the first German decision, the Spanish Constitutional Court held that the government could include a rape indication in abortion legislation consistent with its duty to protect life. The Spanish court emphasized that in the case of rape 'gestation was caused by an act ... harming to a maximum degree [a woman's] personal dignity and the free development of her personality', emphasizing that 'the woman's dignity requires that she cannot be considered as a mere instrument'.<sup>40</sup> Even so, following the first German decision, the Spanish court reasoned that Spain was permitted, not required, to include the rape indication in its abortion legislation.

The Colombian Constitutional Court has also interpreted its constitution to require government to protect unborn life, yet reasoned about government's obligation to vindicate this duty quite differently. The Colombian court held that a statute banning abortion was constitutionally *required* to contain exceptions for several indications.<sup>41</sup> Failure to allow for abortion in cases of rape, the court explained, would be in 'complete disregard for human dignity and the right to the free development of the pregnant woman whose pregnancy is not the result of a free and conscious decision, but the result of arbitrary, criminal acts against her in violation of her autonomy'.<sup>42</sup> The court emphasized that '[a] woman's right to dignity prohibits her treatment as a mere instrument

<sup>39</sup> *Attorney General v X and others*, 1992, 1 IR 1, para [44]. In response to *X* and to the ruling of the ECHR in Case 14234/88, *Open Door and Dublin Well Woman v Ireland* [1992] ECHR 68, Ireland has amended its constitution to allow women to obtain information about and travel to abortion providers abroad—the statutory implementation of which the Irish Supreme Court upheld as constitutional so long as the information provided neither 'advocates' nor 'promotes' abortion. Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995, In Re [1995] IESC 9; [1995] 1 IR 1 (12 May 1995).

<sup>40</sup> Tribunal Constitucional, STC 53/1985, Pt 11(b), 11 April 1985, 1985-49 *Boletín de Jurisprudencia Constitucional* 515 (Spain), available at <[http://www.boe.es/aeboe/consultas/bases\\_datos/doc.php?coleccion=tc&id=SENTENCIA-1985-0053](http://www.boe.es/aeboe/consultas/bases_datos/doc.php?coleccion=tc&id=SENTENCIA-1985-0053)>. Official court translation available at <<http://www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC531985en.aspx>>.

<sup>41</sup> Corte Constitucional (Constitutional Court), 10 May 2006, Sentencia C-355/2006, 25, Gaceta de la Corte Constitucional (Colombia) (partial translation is available in *Women's Link Worldwide*, C-355/2006: *Excerpts of the Constitutional Court's Ruling that Liberalized Abortion in Colombia* (2007)).

<sup>42</sup> Corte Constitucional, 10 May 2006, 51.

for reproduction, and her consent is therefore essential to the fundamental, life-changing decision to give birth to another person'.<sup>43</sup>

A recent decision of the Argentinian Supreme Court is to similar effect. Invoking women's dignity, the court required the government to take positive measures to implement a rape indication in order to ensure that women who were raped could abort the resultant pregnancy if they so chose.<sup>44</sup>

An evolving understanding of women's dignity is reflected within the duty to protect, not only in judgements concerning the indications that are constitutionally permitted or required in abortion bans but also in judgements concerning the constitutionality of abortion-dissuasive counselling legislation, which, following Germany, a number of European countries have adopted.<sup>45</sup>

In Portugal, legislation that allows abortion during the first ten weeks of pregnancy after a waiting period and counselling 'aimed at providing the pregnant woman access to all relevant information necessary to make a free, genuine, and responsible decision' was recently upheld by the Portuguese Constitutional Court as an effective means of protecting life.<sup>46</sup> The counselling regime the court upheld was not expressly dissuasive.<sup>47</sup> The decision em-

<sup>43</sup> Corte Constitucional, 10 May 2006, 53.

<sup>44</sup> Corte Suprema de Justicia de la Nación [CSJN] [Supreme Court of Justice of the Nation], 13/3/2010, 'F, A. L. s/ Medida Autosatisfactiva', Expediente Letra 'F', N 259, Libro XLVI (13 March 2012) (Argentina).

<sup>45</sup> A recent Spanish statute provides women access on the periodic model: the ability to decide during the first fourteen weeks of pregnancy (twenty-two weeks for health reasons) subject to a mandatory three-day period for reflection. Invoking 'dignity and the free development of personality', the preamble declares that 'women can make the initial decision about ... pregnancy and that the decision, conscious and responsible, will be respected'; at the same time, the preamble reasons, in the tradition of German law, that '[e]xperience has shown that protecting prenatal life is more effective through active policies to support pregnant women and maternity. Thus, protection of the legal right at the very beginning of pregnancy is articulated through the will of the woman, and not against it.' See Ley Orgánica 2/2010, de 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del embarazo, available at <[http://www.boe.es/boe/consultas/bases\\_datos/doc.php?id=BOE-A-2010-3514](http://www.boe.es/boe/consultas/bases_datos/doc.php?id=BOE-A-2010-3514)>. See generally Albin Eser and Hans-Georg Koch, *Abortion and the Law: From International Comparison to Legal Policy* (The Hague, T.M.C. Asser Press, 2005) 285–91.

<sup>46</sup> Tribunal Constitucional, Acórdão no 75/2010, Processos nos 733/07 and 1186/07, 26 March 2010, Diário da República vol. 60, at 15566 (Portugal), available at <<http://w3.tribunalconstitucional.pt/acordaos/acordaos10/1-100/7510.htm>> (author's translation). See also at 11.4.15.

<sup>47</sup> The court observed that the legislation directed that the pregnant woman would receive information concerning government assistance should she carry the pregnancy to term, and stated at 11.4.15 that: 'the body of information to be provided to the pregnant woman in a mandatory counselling process ... has the objective effect of promoting in her the consciousness of the value of the life that she carries in her (or, at least, it will clearly be perceived by her as an attempt to do so) ... The fact that the counselling process is not, expressly and ostensibly, orientational does not impose, *ipso facto*, its qualification as merely informative and deprived of any intention to favour a decision to carry on with the pregnancy.'

ployed the reasoning of the 1993 German decision to dispense with the need for expressly dissuasive counselling of the kind mandated by the 1993 German decision, and invoked women's dignity as it did so:

By abstaining, even at a communicational level, from any indication that might be felt by the woman as an external judgement imposing a particular decision, the legislator acted in line with the underlying reasoning supporting the decision not to punish abortion.

This is based on the belief that only the free adhesion of the woman to carry on with the pregnancy guarantees, at this stage, the protection of the unborn life.

It is objectively founded for a legislator that has decided, also for reasons of efficiency, to trust in the sense of responsibility of the pregnant woman by calling her to cooperate in the duty of protection that belongs to the state, not to create a context of decision that may run counter to that purpose.

The trust in the sense of responsibility of the woman and in her predisposition to be open to the reasons contrary to abortion would not be compatible with a tutelage and paternalistic approach. The protection of the woman's dignity is also affirmed by the way in which the counselling process imposed on her takes place.<sup>48</sup>

Portugal's abortion statute and the constitutional decision upholding it reflect an understanding of women's dignity that has evolved beyond the second German judgement. In Portugal, life-protective abortion counselling of pregnant women presupposes a particular view of women as decision-makers and ethical agents. On the court's account, counselling does not condescend to women or treat them paternalistically. In this constitutional order, government addresses women making decisions about motherhood as equal and self-governing citizens. As the court explains the counselling required by Portugal's abortion law, the counselling relationship simultaneously vindicates dignity as life, dignity as liberty, and dignity as equality. But the constitutional framework in Portugal yet remains at some distance from the women's dignity-periodic access cases of jurisdictions such as the USA and South Africa.<sup>49</sup> The Portuguese court ruled that a result-open counselling framework in the early period of pregnancy is constitutionally *permitted*, not required, as it would be in a traditional woman's rights framework.

<sup>48</sup> See Tribunal Constitucional, 11.4.16.

<sup>49</sup> See *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992); *Christian Lawyers Association v Minister of Health*, 2004, 4 All SA 31(T).

## Conclusion

In explaining what government must or may do to meet its constitutional duty to protect life *in utero*, courts have imposed different kinds of affirmative obligations on government,<sup>50</sup> and, in particular, on women. Judicial accounts of how government must respect the dignity of life *in utero* entail nested judgements about how government may, or must, respect the dignity of women.<sup>51</sup>

In jurisdictions that follow Germany in imposing on governmental regulation of abortion a constitutional duty to protect life, there appears to be growing recognition that respecting dignity as life entails judgements about dignity as liberty and dignity as equality. It is not simply that pregnant women have lives to be protected too. It is that pregnant women understand themselves in relation to others in the community and so experience and respond to law in different ways than do the unborn. This understanding may have taken root in instrumental reason, as a set of judgements about the most efficient way to manage women who are pregnant, but over time instrumental judgements have engendered expressive judgements about the forms of respect owed women who are pregnant.

In the 1970s, some judges and advocates may have imagined the abortion conflict as a zero-sum game, in which courts enforcing the constitution would declare a winner. This understanding of constitutional law waned as conflict intensified and crossed borders. Over time, courts have approached the interpretation of constitutions with the aspiration to channel rather than settle conflict. In this process, some judges have begun to coordinate constitutional values, looking for forms of regulation that might be understood as manifesting respect for different claimants and for different conceptions of human

<sup>50</sup> The German court is clear that the duty to protect life imposes obligations on government as well as women. See BVerfGE 1 (1975) (*Abortion I*), 173–4; also 170–2. But there are limits to the obligations courts impose on government. The Irish court has distinguished between the affirmative obligations the right to life imposes on women and on government. See *Baby O & Another v Minister for Justice, Equality and Law Reform & Others*, 2002, IR 169 (unreported Supreme Court decision) (upholding Ireland's deportation of a pregnant Nigerian woman and finding 'the standard of ante or postnatal care available ... in Nigeria ... entirely irrelevant to the legality of her deportation').

<sup>51</sup> See, for example, Reva B. Siegel, 'Dignity and the politics of protection: Abortion restrictions under *Casey/Carhart*', *Yale Law Journal* 117 (2008), 1694, 1762 (observing that the United States Constitution imposes limits on the ways government may regulate abortion to protect unborn life; '*Casey*'s undue burden framework insists that the state can express respect for the dignity of life only if it does so in ways that respect the dignity of women').

dignity. American law has evolved in the process,<sup>52</sup> as has law in Europe.<sup>53</sup> Those approaching constitutional law from this perspective do not imagine constitutional law on the behavioural model, as the kind of instrument that can impose outcomes, but instead on the hermeneutic model, as the kind of instrument that can engender values. Purposive constitutional interpretation of this type seeks not only to shape norms of social life but also to mediate conflict, and even to cultivate community, among agonists.

Consider again the recent history of dignity and the duty to protect life. Few judges have conferred on life *in utero* the rights of born persons—perhaps because of the entailments for women, perhaps because of the entailments for government, perhaps because of the entailments for politics.<sup>54</sup> More common is the declaration that respect for the dignity of life is an objective value that government is bound to respect.<sup>55</sup> Understood in this way, as a question concerning the values expressed and vindicated through law, respect for dignity as life, dignity as liberty, and dignity as equality do not stand in zero-sum conflict. As courts in a number of ‘life-respecting’ jurisdictions have concluded, laws manifesting respect for the dignity of life need not instrumentalize women. As a practical matter, laws manifesting respect for the dignity of life can address women as deliberative agents. As a demonstrative matter, laws manifesting respect for the dignity of life might address women as the kind of deliberative agents who are capable of respecting the dignity of life. In some jurisdictions, the law must do so.

<sup>52</sup> Siegel, ‘Dignity and the politics of protection’, 1749–53 (tracing the incorporation of dignity values into the American constitutional framework, and analysing standards authorizing dissuasive counselling and other life-respecting restrictions on abortion under *Casey/Carhart*).

<sup>53</sup> See *A, B and C v Ireland* (25579/05) Eur. Ct. H.R. (2010), [235] (finding ‘that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law’, that at least thirty states in Europe allow ‘abortion on request’, that forty states allow abortion on ‘health and well-being grounds’, that only three states have more restrictive access to abortion services than Ireland); Siegel, ‘*Roe*’s Roots, 1077: ‘The emergence in the last two decades of fetal-protective justifications for providing women control over decisions concerning abortion is especially striking in light of the concurrent spread of woman-protective justifications for denying women access to abortion (e.g., banning or restricting abortion for the asserted purpose of protecting women from harm or coercion).’

<sup>54</sup> As previously noted, the German court is clear that the duty to protect life imposes obligations on government as well as women. See BVerfGE 1 (1975) (*Abortion I*), 173–4; also 170–2.

<sup>55</sup> See, for example, BVerfGE 1 (1975) (*Abortion I*), 641–2..

