Chapter 21

Competing Fundamental Values: Comparing Law's Role in American and Western-European Conflicts over Abortion

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Introduction

Legal actions have been a prominent feature of the bitterly fought struggles over abortion in the Western World. Activists regularly turned to courts and legislatures in an attempt to entrench clashing moral views about women's right to terminate pregnancies and the protection of unborn life. Among these struggles the US Supreme Court ruling in *Roe v. Wade* (1973)[1] has often been heralded as one of the greatest legal victories for reproductive choice.[2] Declaring a judicially mandated constitutional right to abortion, this ruling stands in sharp contrast to Western European laws, which maintained a normative disapproval toward the termination of pregnancies that could go unpunished under specified circumstances.[3]

Different explanations have been offered for these diverging legal developments among countries customarily clumped together for their political, economic, and socio-cultural commonalities. One explanation identified a structural difference between the two locations, arguing that the regulation of abortion in the USA has been dominated by the US Supreme Court, compared with greater opportunities for political dialogue and bargaining as part of the European legislative processes.[4] Another view attributed the divergence to differing attitudes on rights, with the American system approaching the regulation of abortion through the prism of individual rights whereas Western Europe emphasized a communitarian vision of

1 410 US 113 (1973).

2 F. Kissling and D. Shannon, 'Abortion Rights in the United States: Discourse and Dissention', in E. Lee (ed.), *Abortion Law and Politics Today* (Houndmills: Macmillan Press, 1998), 145.

3 P. Sachdev (ed.), *International Handbook on Abortion* (New York: Greenwood Press, 1988), 474.

4 M.A. Glendon, *Abortion and Divorce in Western Law* (Cambridge: Harvard University Press, 1987), 24–25.

society in reconciling competing visions on abortion.[5] Although these explanations capture important dimensions of the diverging abortion politics across the two sides of the Atlantic, they do not seem to explicate the picture to its fullness. Employing a socio-legal approach, this chapter proposes an alternative hypothesis, arguing that the legal process acted in a different *social capacity* in each of the abortion debates, thus generating diverging effects on the regulation of abortion in the USA and Western Europe.

Two principal social functions have been identified for the legal process:[6] (i) *Integrative*, classifying law as a mechanism of governance that manages conflict and facilitates social order; and (ii) *Transformative*, perceiving law to be a vehicle to express values and advance social and political change. In the American context legal actions pertaining to abortion have been primarily employed ideologically in an attempt to generate *social and cultural change*. Abortion controversies have played out as a perpetual power struggle among pro-life and pro-choice activists each attempting to legally entrench a competing worldview on abortion and foreclosing possibilities for compromise. In contrast, the legal process acted as a mechanism of *social and cultural order* in Western European debates over abortion. There, legislatures and courts framed debates beyond the clash of rights and worldviews by including additional social and public policy concerns. This process resulted in resilient legislative compromises and the gradual fading away of deeply divisive cultural debates into the background of European politics.

Drawing on these comparative findings the chapter argues that socio-cultural conflicts amplify the political nature of law. In perpetual conflicts over values, legal processes possess an irresistible appeal for social activists to entrench political and moral preferences as binding in the democratic public sphere. The American experience with abortion politics demonstrates that legal arrangements remain susceptible to shifts in political power. It further reveals that the utilization of the legal process solely in its transformative capacity may result in the negation of law's integrative function. Yet, when legal processes are utilized to institutionalize compromises as demonstrated by the Western European examples, cultural-based controversies may be pacified even as ideological worldviews remained unaffected.

The chapter proceeds in three parts: (1) A brief survey of abortion politics in the USA as evolving into a perpetual tug-of-war dynamics between competing moral views; (2) Survey of the legal developments in Britain, France, Germany,

5 D.P. Kommers, 'Abortion and the Constitution: The Cases of the United States and West Germany', in E. Manier, W. Liu and D. Solomon (eds.), *Abortion: New Directions for Policy Studies* (Notre Dame: University of Notre Dame Press, 1977); D.P. Kommers, 'Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective', *Brigham Young University Law Review* (1986), 371–409; L.H. Tribe, *Abortion: The Clash of Absolutes* (New York: Norton, 1990); D.E. McBride, *Abortion in the United States: A Reference Handbook* (Santa Barbara: ABC-Clio, 2008).

6 S. Vago, *Law and Society*, 7th edn. (Upper Saddle River: Pearson Education, Inc., 2003), 18–21.

Italy, the Netherlands and Belgium, uncovering a contrasting dynamics where the once bitterly-fought abortion controversies have been pacified; (3) Drawing on these surveys, an analysis of the diverging role of the legal process in each of these debates and the implications of this divergence for legal resolutions of socio-cultural conflicts.

Abortion Politics in the United States

State legislation prohibiting abortions in the USA began to appear in the early nineteenth century, remaining a matter for the state level until the 1970s.[7] The motivation to criminalize abortion was multifaceted and varied from state to state: (i) medical and technological advancements enabling safer abortions generated growing opposition toward their accessibility;[8] (ii) falling birthrates relative to the newer Catholic immigrants raised fears among white Protestants;[9] finally, (iii) aggressive lobbying by the medical establishment seeking to eradicate competing abortion services (midwives, apothecaries, homeopaths, etc.) proved pivotal in generating criminalization across the country.[10] By the early twentieth century abortion was generally prohibited throughout the United States in all stages of gestation with some exceptions for therapeutic (medically-authorized) abortions.

Nonetheless, as the century progressed public opinion shifted in the direction of reform. Primary triggers for liberalization included[11] (i) widespread clandestine abortions endangering women's life and health; (ii) a growing role for women in the workforce and openness toward female sexuality; and (iii) shifting attitudes within the medical profession favoring greater accessibility to abortion. By the late 1960s approximately one-third of all US states had already repealed or were in the process of reforming their legislative prohibitions on abortion. The issue reached the federal level with *Roe*'s (seven to two) holding that the concept of personal

7 B.J. George Jr., 'State Legislatures Versus the Supreme Court: Abortion Legislation into the 1990s', in J.D. Butler and D.F. Walbert (eds.), *Abortion, Medicine and the Law*, 4th edn. (New York: Facts on File, 1992).

8 J.W. Dellapenna, 'The History of Abortion: Technology, Morality, and Law', 40 *University of Pittsburgh Law Review* (1979), 406–407.

9 N.J. Davis, 'Abortion and Legal Policy', 10 *Contemporary Crises* (1986), 378.

10 J.C. Mohr, *Abortion in America: The Origins and Evolution of National Policy 1800-1900* (New York: Oxford University Press, 1978), 147.

11 McBride, *Abortion in the United States,* supra note 5 at 10–16; L.C. Hillstrom, *Defining Moments: Roe v. Wade* (Detroit: Omnigraphics, 2008); L. Greenhouse and R.B. Siegel, 'Before (and After) Roe v. Wade: New Questions about Backlash', 120 *Yale Law Journal* 8 (2011), 2028-2088; L. Greenhouse and R.B. Siegel, *Before Roe v. Wade: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling* (New York: Kaplan Pub, 2010).

liberty in the Fourteenth Amendment's Due Process Clause 'is broad enough to encompass a woman's decision whether or not to terminate her pregnancy'.[12]

The ruling has been the subject of ample scholarly criticism emphasizing the Court's intervention in a hotly debated political matter as the cause of subsequent polarization over abortion.[13] A recent study questioned this premise, tracing the escalation of the conflict to the 'entanglement of abortion with party realignment not only after the [*Roe*] decision but before it, as well.'[14] Notwithstanding these academic disagreements over the precise evolution of the abortion conflict, pro-life advocates have been engaged for decades now in a continuous legal crusade to block access to abortion against an equivalent pro-choice struggle to ensure reproductive freedom. This tug-of-war dynamics has been occurring at the federal as well as the state level and typically included the following elements:[15] (a) rigorous lobbying for legislative entrenchments of the competing moral views on abortion at all levels of government; (b) initiation of judicial proceedings and amicus curiae submissions to precipitate new deliberations on the abortion issue; (c) relentless efforts to elect, appoint or defeat political candidates and justices based on their position on abortion; (d) wide ranging public campaigns and protest at times turning violent, particularly outside abortion performing facilities.

12 *Roe v. Wade,* 410 US at, 153.

13 J.H. Ely, 'The Wages of Crying Wolf: A Comment on Roe v. Wade', 82 *Yale Law Journal* 5 (1973), 920–949; R.A. Epstein, 'Substantive Due Process by Any Other Name: The Abortion Cases', *The Supreme Court Review* (1973), 159–185; P. Freund, 'Storms over the Supreme Court', 69 *American Bar Association Journal* (1983), 1474; R.B. Ginsburg, 'Some Thoughts on Autonomy and Equality in Relations to Roe v. Wade', 63 *North Carolina Law Review* (1985), 375–386; R.B. Ginsburg, 'Speaking in a Judicial Voice', 67 *New York University Law Review* (1992), 1185–1209; Glendon, *Abortion and Divorce in Western Law,* supra note 4; C.R. Sunstein, 'Three Civil Rights Fallacies', 79 *California Law Review* (1991), 751–774; M.J. Klarman, 'Fidelity, indeterminacy, and the Problem of Constitutional Evil', 65 *Fordham Law Review* (1997), 1739–1756; J.M. Balkin (ed.), *What Roe v. Wade Should Have Said* (New York: New York University Press, 2005); G. Silverstein, *Law's Allure: How Law Shapes, Constraints, Saves and Kills Politics* (New York: Cambridge University Press, 2009).

14 Greenhouse and Siegel, 'Before (and After) Roe v. Wade: New Questions about Backlash', supra note 11 at 2086.

15 K. Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984); M. McKeegan, *Abortion Politics: Mutiny in the Ranks of the Right* (New York: Free Press, 1992); K.A. Farr, 'Shaping Policy through Litigation: Abortion Law in the United States', 39 *Crime and Delinquency* 2 (1993), 167–183; L.R. Woliver, 'Rhetoric and Symbols in American Abortion Politics', in M. Githens and D. McBride (eds.), *Abortion Politics: Public Policy in Cross-Cultural Perspective* (New York: Routledge, 1996), 5–28; K. O'Connor, *No Neutral Ground? Abortion Politics in an Age of Absolutes* (Boulder: Westview Press, 1996); M.Y. Herring, *The Pro-Life/Pro-Choice Debate* (Westport: Greenwood Press, 2003); C. Francome, *Abortion in the USA and the UK* (Aldershot: Ashgate, 2004).

Over the years pro-life activists consisting of religious and anti-abortion groups achieved several successes in limiting the effects of *Roe*. Examples at the federal level include (i) the Hyde Amendment, a rider to the Health, Education and Welfare (HEW) Appropriation Act that prohibited the use of federal funds to pay for abortions except those necessary to save the life of the pregnant woman or in cases of rape and incest;[16] and (ii) gag rules prohibiting healthcare providers and employees paid by federal funds from paying for, counseling for or even mentioning the abortion option to their patients.[17]

Furthermore, the gradual reconfiguration of the Supreme Court through appointments of conservative justices accompanied by a regular stream of pro-life amicus curiae generated certain judicial limitations on the scope of the woman's constitutional right to abortion: (a) State and federal restrictions on the funding of abortions were found constitutional.[18] (b) *Roe*'s trimester framework and the 'compelling state interest' standard has been replaced with the less stringent 'undue burden' in evaluating state restrictions on abortion procedures throughout the course of the pregnancy.[19] (c) Detailed reporting, record-keeping and other requirements on abortion procedures were upheld.[20] (d) Earlier invalidations of parental consent to a minor's abortion gradually gave way to some parental involvement.[21] (e) Counseling requirements and mandatory waiting periods that were initially held unconstitutional were replaced with meticulous consultations enabling an 'informed consent' and 24-hour-waiting periods for reflection prior

16 Pub. L. 96–123, § 109, 93 Stat. 926.

17 Ex: the 1973 Church Amendment Pub. L. No. 93–45, §401, 87 Stat. 91, 95 (1973) 42 USC § 300a-7; the 1974 Church Amendment Pub. L. No. 93–348, §214, 88 Stat. 342, 353 (1974); Coats amendment to the Public Health Service Act (1996) 42 USC § 238n; and the Federal Refusal Clause (Weldon Amendment, 2004) FY'06 Departments of Labor, Health, and Human Services, and Education Appropriations Act, Pub. L. No. 109–149 (enacted 30 December 2005); Continued in the Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110–5 (enacted 15 February 2007).

18 *Beal v. Doe,* 432 US 438 (1977); *Maher v. Roe,* 432 US 464 (1977); *Poelker v. Doe,* 432 US 519 (1977); *Williams v. Sbaraz,* 448 US 358 (1980); *Harris v. McRae,* 448 US 297 (1980); *Webster v. Reproductive Health Services,* 492 US 490 (1989); *Rust v. Sullivan* ,500 US 173 (1991).

19 *Planned Parenthood v. Casey,* 505 US 833 (1992).

20 *Planned Parenthood Association of Kansas City v. Ashcroft,* 462 US 476 (1983); *Simonopoulos v. Virginia,* 462 US 506 (1983); *Webster*, 492 US 490; *Mazurek v. Armstrong* ,520 US 968 (1997).

21 *Bellotti v. Baird* 443 US 622 (1979); *H. L. v. Matheson* 450 US 398 (1981); *Planned Parenthood Association of Kansas City v. Ashcroft*, supra note 20. *Hodgson v. Minnesota,* 497 US 417 (1990); *Ohio v. Akron Center for Reproductive Health* 497 US 502 (1990); *Casey*, supra note 19*; Lambert v. Wicklund* 520 US 292.

to performing abortions.[22] Finally, (f) the federal ban on partial birth abortion was found constitutional, narrowing the scope of an earlier ruling by the Court.[23]

Pro-life activism intended to restrict the effects of *Roe* flourished at the state level as well, although many of these actions were later repealed through judicial proceedings initiated by pro-choice activists.[24] The *Right to Know* legislation currently in force in more than twenty states, is an example of a measure that survived thus far.[25] It requires that women be informed about the abortion procedure, its medical and psychological risks, anatomical and physiological characteristics of the fetus, alternatives to abortion, financial assistance available during and after childbirth, father's responsibilities and so forth. Lastly, the pro-life camp also advanced abortion 'trigger laws,' namely conditional legislation prohibiting abortions that will immediately take effect in the event that *Roe's* rationale is overturned.[26]

The pro-choice movement consisting of women's groups, medical professionals and civil rights advocates, proved comparably energized in reaffirming the constitutional right to abortion against attacks of the pro-life camp. With a growing pro-life block in the Supreme Court, pro-choice activists sought additional statutory guarantees for the parameters laid out in *Roe* at the federal and state levels.[27] With violent harassments of abortion providers peaking in the early 1990s, pro-choice organizations lobbied successfully to secure access to abortion through buffer zones and penal measures designed to protect clinics, staff and patients.[28] Other attempts, such as the Freedom of Choice Act (FOCA), have been less successful thus far with repeated legislative introductions yet to materialize.[29] Nearly four decades since the right to abortion was judicially mandated controversies have

22 *Casey*, supra note 19.

23 *Gonzales v. Carhart* 550 US 124 (2007).

24 Francome, *Abortion in the USA and the UK*, supra note 15; P.B. Linton, *Abortion Under State Constitutions: A State-By-State Analysis* (Durham: Carolina Academic Press, 2008).

25 Ex: Florida Bill H 1205 (1997); West Virginia Senate Bill No. 170 (2002); Georgia O.C.G.A. § 31-9A-1 (2008); South Carolina: A268, R345, H3245, 118th Session (2009–2010); Minnesota H.F. No. 669 83rd Legislative Session (2003–2004); North Carolina House Bill 854 S.L. 2011–405 (=S769) 2011–2012 Session.

26 Ex: North Dakota (H.B. 1466 §1, 2007 Leg. Sess. (N.D. 2007); Louisiana (La. R.S. 40:1299.30 (2011).

27 G.A. Halva-Neubauer, 'Abortion Policy in the Post-Webster Age', 20 *The Journal of Federalism* (1990), 27–44; G.A. Halva-Neubauer, 'The States After Roe: No "Paper Tigers", in M.M. Goggin (ed.), *Understanding the New Politics of Abortion* (Newbury Park: Sage, 1993), 167–189; Linton, *Abortion Under State Constitutions*, supra note 24.

28 Ex: Freedom to Access Clinic Entrances (FACE), 1994, 18 USCA §248(a) Pub L. No. 103–259, 108 Stat. 694.

29 Versions of the bill was introduced in 1989 (H.R. 3700, 101st Cong. (17 November 1989); Sen. 1912, 17 November 1989 101st Cong.), 1991 (H.R. 25 102nd Cong. (3 January 1991) Sen. 25, 102nd Cong. (14 January 1991) 1993 (H.R. 25 103rd Congress (5 January

not subsided. In fact, the 2010 election cycle reignited abortion politics, as newly elected Tea Party representatives initiated numerous new bills across the USA, already meeting judicial injunctions instigated by the pro-choice camp.

Abortion Law in Europe

Between the late 1960s to the late 1980s conflict-ridden abortion debates have submerged the Western-European public sphere. These debates generated new regulatory regimes that institutionalized uneasy compromises over contested norms and ultimately resulted in the substantial pacification of the abortion conflicts.

High mortality caused by abortions and the births of children with disabilities steered Britain toward reforming its century-old legislation criminalizing the induction of abortion.[30] The newly enacted 1967 Abortion Act focused on regulating the medical performance of legal abortion, refraining altogether from rights discourse or the assigning of moral weight either to the women's choice or the fetus' life.[31] Allocating decision-making authority to the medical system proved a crucial determinant in calming British abortion politics. Pro-lifers found solace in the fact that a woman's decision to abort is monitored by the medical profession inherently committed to preserving life. For pro-choicers this compromise offered a viable expansion of abortion possibilities, since bestowing doctors with medical discretion has not limited access to abortion in Britain.[32] Moreover, this 'medicalized' approach made a standard gynecological service offered in public hospitals, limiting the possibility (and mobilizing potential) of protest against private abortion facilities.[33] Since the passage of the Act abortion

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1993) Sen. 25 103rd Cong. (21 January 1993)), 2007 (H.R. 1964 110th Cong. (19 April 2007) Sen. 1173 110th Cong. (19 April 2007).

30 E.M. Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart, 2001), 77; Francome, *Abortion in the USA and the UK*, supra note 15, 53; M.D. Kandiah and G. Stareck (eds.), *The Abortion Act 1967* (ICBH Witness Seminar Program, 2001, 16.

31 J. Radcliffe-Richards, *The Sceptical Feminist: A Philosophical Enquiry* (Boston: Routlege, 1982); E. Lee, 'Reinventing Abortion as a Social Problem: 'Postabortion Syndrome' in the United States and Britain', in J. Best (ed.), *How Claims Spread: Cross-National Diffusion of Social Problems* (New York: Aldine de Gruyter, 2001), 42; M. Latham, *Regulating Reproduction: A Century of Conflict in Britain and France* (New York: Manchester University Press, 2002), 89.

32 Jackson, *Regulating Reproduction: Law, Technology and Autonomy,* supra note 30 at 83; Lee, 'Reinventing Abortion as a Social Problem: 'Postabortion Syndrome', supra note 31 at 43; J. Lovenduski, 'Parliament, Pressure Groups, Networks and the Women's Movement: The Politics of Abortion Law Reform in Britain 1967–83', in J. Lovenduski and J. Outshoorn (eds.), *The New Politics of Abortion* (London: Sage Publication, 1986).

33 A. Furedi and D. Nolan, 'Fighting a Battle of Ideas – Conflict on Abortion in the UK', 24 *Planned Parenthood in Europe* 3 (1995), 7.

has remained in the margins of British politics. Private bills to amend it have been introduced over the years but were all defeated. Similarly, attempts to challenge the abortion arrangements in courts met a reluctant judiciary ever since.[34]

The French reform was set in motion around the same time as Britain, stimulated by the changing role of women, over-population growth and harmful clandestine abortions.[35] A legislative compromise construed abortion a criminal act that can be medically authorized until the tenth week of pregnancy when a woman is 'in a state of distress.' With France's highest constitutional authority, the *Conseil Constitutionnel* clearing its enactment, the compromise became France's new legal arrangement on abortion.[36] The law refrained from providing a definition to a state of 'distress,' leaving its determination in the hands of the pregnant women. Originally perceived as degrading by pro-choice activists, the state of 'distress' nevertheless made abortion a readily available procedure for French women. By the time the law, which was originally enacted on a trial basis, was brought for reevaluation the legislative compromise has already taken hold and the law was re-enacted with minor changes.[37] One such change was the inclusion of the state's duty to actively promote the principle of respect for life and implement family-oriented policies. The 'state of distress' formula proved a fitting legislative compromise for the Netherlands as well following years of political opposition and parliamentary deadlocks. A narrowest majority (76–74 in the Lower House, 38–37 in the Senate) finally managed to clear its enactment in the early 1980s. The law came into force after additional regulations were issued designed to ensure that any decision to terminate a pregnancy was carefully balancing the protection of the fetus and the rights of the mother.[38]

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34 Ex: *Paton* v. *British Pregnancy Advisory Service Trustees* [1979] QB 276; *R. (on the application of Axon) v. Secretary of State for Health and Another* [2006] E.W.H.C. 37 (Admin).

35 M. Allison, 'The Right to Choose: Abortion in France', 47 *Parliamentary Affairs* 2 (1994), 223–226.

36 74–54 DC, 15 January 1975.

37 M. A.Glendon, *Abortion and Divorce in Western Law*, supra note 4 at 15; D.M. Stetson, 'Abortion Policy Triads and Women's Rights in Russia, the United States, and France', in M. Githens and D.M. Stetson (eds.), *Abortion Politics: Public Policy in Cross-Cultural Perspective* (New York: Routledge, 1996), 109; Allison, 'The Right to Choose: Abortion in France', supra note 35 at 230; C. Gallard, 'France', in B. Rolston and A. Eggert (eds.), *Abortion in the New Europe: A Comparative Handbook* (Westport: Greenwood Press, 1994), 105.

38 J. Rademakers, 'The Netherlands', in P. Sachdev (ed.), *International Handbook on Abortion* (New York: Greenwood Press, 1988); J. Outshoorn, 'The Rules of the Game: Abortion Politics in the Netherlands', in J. Lovenduski and J. Outshoorn (eds.), *The New Politics of Abortion* (London: Sage Publication, 1986); J. Outshoorn, 'Policy-Making on Abortion: Arenas, Actors, and Arguments in the Netherlands', in D.M. Stetson (ed.), *Abortion Politics, Women's Movements and the Democratic State: A Comparative Study of State Feminism* (Oxford: Oxford University Press, 2001); E. Ketting, 'Netherlands', in

In Germany, lengthy and intense parliamentary debates during the 1970s generated the legalization of abortion in the first trimester, only to be annulled by the Federal Constitutional Court.[39] The Court constructed a constitutional hierarchy between the protection of the fetus and the personal choice of the mother, asserting that the state's duty to protect the fetus's right to life and human dignity exists even against its mother. Thus, the legal order must clearly express a condemnation to abortion that can only be justified in specified circumstances (Indications) stipulated by the Court under four classifications: medical, criminal, eugenic and social.[40] Political controversy continued as both sides of the abortion debate found this constitutionally mandated construction increasingly unsatisfactory.[41] The reunification of Germany in the early 1990s presented an opportunity for change as the *Indication* model of West Germany had to be reconciled with abortion on-demand available in East Germany. Following a protracted period of debates the unified Bundestag decriminalized (declared 'not-unlawful') first-trimester abortions for any reason subject to a counseling requirement, a three-day waiting period and a doctor's performance of the procedure.[42] Once again the Court annulled substantial parts of this unified legislation reaffirming its earlier rationale on the fundamental unlawfulness of abortion.[43] However, taking into account Germany's post-unification reality the Court amalgamated its original policy framework with

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B. Rolston and A. Eggert (eds.), *Abortion in the New Europe: A Comparative Handbook* (Westport: Greenwood Press, 1994); S.L. Henderson and A.S Jeydel, *Women and Politics in a Global World*, 2nd edn. (New York: Oxford University Press, 2010).

39 39 BverfGE 1(1975). Translated in R.E. Jonas and J.D. Gorby, 'West German Abortion Decision: A Contrast to Roe V. Wade', 9 *John Marshall Journal of Practice and Procedure* 3 (1976), 605–684.

40 D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1997), 347; M.M. Ferree, W.A. Gamson, J. Gerhards and D. Rucht (eds.), *Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States* (Cambridge: Cambridge University Press, 2002), 25–26; M.A. Case, 'Perfectionism and Fundamentalism in the Application of the German Abortion Laws', in S.H. Williams (ed.), *Constituting Equality: Gender Equality and Comparative Constitutional Law* (New York: Cambridge University Press, 2009), 95–96.

41 S. Walther, 'Thou Shalt Not (But Though Mayest): Abortion after the German Constitutional Court's 1993 Landmark Decision', 36 *German Yearbook of International Law* (1993), 386–387; G. Czarnowski, 'Abortion as a Political Conflict in the Unified Germany', 47 *Parliamentary Affairs* 2 (1994), 252–267; E. Maleck-Lewy and M.M. Ferree, 'Talking about Women and Wombs: The Discourse of Abortion and Reproductive Rights in the G.D.R. During and After the Wende', in S. Gal and G. Kligman (eds.), *Reproducing Gender: Politics, Publics and Everyday Life after Socialism* (Princeton: Princeton University Press, 2000), 94.

42 Text translated in R. Will, 'German Unification and the Reform in Abortion Law', 3 *Cardozo Women's Law Journal* (1996), 399–426, n. 86.

43 Text translated in Will, 'German Unification and the Reform in Abortion Law', 419–421; S. Michalowski and L. Woods, *German Constitutional Law: The Protection of Civil Liberties* (Aldershot: Ashgate, 1999), 145.

additional preventative measures of assistance and counseling designed to create a 'child-friendly' society and dissuade abortions. Upon the Court's specifications, the current German law includes measures providing financial and social support to pregnant women in education, housing, childcare and employment.[44]

Mirroring the German experience, in 1975 the Italian Constitutional Court declared unconstitutional the criminalization of all abortions except in strict necessity.[45] Concerned by the rise in backstreet, life-threatening abortions the Court found it unsatisfactory to give absolute priority to the fetus' constitutional right without adequate protection to the health of the woman. Speaking to a heated political atmosphere in an overwhelmingly Catholic nation the ruling contributed to the mobilization of both camps, but at the same time framed the direction of the legislative debates toward reaching an acceptable compromise over contested values.[46] A compromise between the two houses of parliament was reached in a 1978 law which kept abortion a criminal act, but established conditions – health, economic, social, or family circumstances – under which legal abortions in the first 90 days of pregnancy were permitted.[47] This enactment did not end public contestations. The heated debate culminated with the simultaneous referendum initiatives in 1981, a liberal one to expand the law and a conservative one to revoke it. Both failed the national referendum as did later judicial challenges, indicating a general consensus on the contours of abortion regulation in Italy.[48]

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44 Walther, 'Thou Shalt Not (But Though Mayest)', supra note 41, 394; Michalowski and Woods, *German Constitutional Law*, supra note 43, 146; Ferree et al., *Shaping Abortion Discourse*, supra note 40 at 42; G.L Neuman, 'Casey in the Mirror: Abortion, Abuse and the Right to Protection in the USA and Germany', 43 *American Journal of Comparative Law* (1995), 273–314; C.P. Schlegel, 'Landmark in German Abortion Law: The German 1995 Compromise Compared with English Law', 11 *International Journal of Law, Policy and Family* 1 (1997), 45–48.

45 Carmosina et al. Corte costituzionale. Sentenza no. 27 of 1975, translated in M. Cappelletti and W. Cohen, *Comparative Constitutional Law: Cases and Materials* (Indianapolis: Bobbs-Merrill, 1979).

46 Glendon, *Abortion and Divorce in Western Law*, supra note 4 at 43; M. Calloni, 'Debates and Controversies on Abortion in Italy,' in D.M. Stetson (ed.), *Abortion Politics, Women's Movements and the Democratic State: A Comparative Study of State Feminism* (Oxford: Oxford University Press, 2001), 186.

47 Law no. 194 of 1978. Gazzetta Ufficiale della Repubblica Italiana, Part I, 2 May 1978, no. 140, 3642–3646. Translated in http://www.hsph.harvard.edu/population/abortion/ITALY.abo.htm.

48 I. Figà-Talamanca, 'Italy', in P. Sachdev (ed.) *International Handbook on Abortion* (New York: Greenwood Press, 1988), 281–282; M. Nijsten, *Abortion and Constitutional Law: A Comparative European-American Study* (Florence: European University Institute, 1990), 102; J. Andall, 'Abortion, Politics and Gender in Italy', 47 *Parliamentary Affairs* 2 (1994), 245; P. Hanafin, *Conceiving Life: Reproductive Politics and the Law in Contemporary Italy* (Aldershot: Ashgate, 2007), 28–33.

The tumultuous abortion politics engulfing Western Europe between the late 1960s and the late 1980s ended with the Belgian reform in 1990. An arrest of a physician performing abortions in the early 1970s mobilized intense political controversies, generating dozens of legislative proposals and a long political stalemate over reforming the criminalization of abortion.[49] The 1990 reform closely resembled the French and Dutch compromises, decriminalizing abortion in the first trimester when the pregnancy causes a 'situation of distress or emergency' for the woman. A constitutional crisis was averted when the Catholic King who refused to then sign the law and bring it into was declared 'unable to govern' for a day to allow the law to pass.[50]

To summarize, a period of turbulent Western-European abortion politics between the late 1960s and the late 1980s concluded with the emergence of relatively cohesive national legislative compromises. To maintain a normative disapproval toward the termination of pregnancies, abortion was kept criminal yet not unlawful during the first semester when grave hardship is involved, and even in later weeks when the well-being of the woman is at stake. Moreover, as part of a vital concern for the unborn life, termination of pregnancies in these states can only take place following mandatory waiting periods and counseling processes designed to discourage abortions by emphasizing social and financial possibilities for life with a child.

A Comparative Outlook on Law's Role in Abortion Politics

Abortion politics in the United States and Western Europe seemingly conform to the 'great divide' within *Political Liberalism* over the manner in which multicultural societies ought to be organized.[51] The US Supreme Court's construction of the woman's right to choose steered abortion politics in the classical liberal direction, entrenching the discourse of fundamental rights as the principal paradigm for the American debate. Termination of pregnancies became a conflict over women's rights versus the rights of the unborn. In contrast, the European discourse emphasized communitarian dimensions, interweaving rights-based arguments with

49 R. Boland, 'Recent Developments in Abortion Law in Industrial Countries: International Review', 18 *Law, Medicine and Health Care* (1990), 404–418; V. Claeys, 'Belgium', in B. Rolston and A. Eggert (eds.), *Abortion in the New Europe: A Comparative Handbook* (Westport: Greenwood Press, 1994), 19–23; K. Celis, 'The Abortion Debates in Belgium 1974–1990', in D.M. Stetson (ed.), *Abortion Politics, Women's Movements and the Democratic State: A Comparative Study of State Feminism* (Oxford: Oxford University Press, 2001).

50 J. Outshoorn, 'The Stability of Compromise, Abortion Politics in Western Europe', in M. Githens, D.M. Stetson, D.E. McBride (eds.), *Abortion Politics: Public Policy in Cross-Cultural Perspectives* (London: Routledge, 1996), 145, 158.

51 C. Taylor, 'Cross-Purposes: The Liberal-Communitarian Debate', in N.L. Rosenblum (ed.), *Liberalism and the Moral Life* (Cambridge: Harvard University Press, 1989).

economic policies, social concerns over family welfare and political objectives for the society as a whole. Accordingly analysts not only employed this philosophical prism to explain the diverging abortion politics across the Atlantic, but also to critique the legal arrangements in each of the locations. Disapproval of the 1973 Supreme Court ruling highlighted its neglect of collective tenets.[52] In comparison, echoing the liberal-constitutional justification for the need to guarantee individual rights against majority's prejudices, European legal developments were criticized as inadequate in protecting the rights of women.[53]

Yet, the general climate of abortion conflicts following the liberalization of abortion laws has been strikingly different in the two geographical locations. Abortion debates in the USA have consistently taken a morality-based and highly public confrontational path, with the competing camps utilizing the legal process ideologically. Attempts to refashion, maneuver and circumvent legal arrangements on abortion remain active components of the American political debate since the early 1970s. Contrasting the American debate, the meeting of law and politics in Western Europe evolved as a protracted search for social accord. Prompted by varying socio-political challenges, Western European legislatures and constitutional courts negotiated over a long period of time and amid great public controversy uneasy compromises. Despite these transitional hardships, the Western European compromises have shown decades-long durability and low levels of political controversy compared to that of the USA.[54]

One can argue that the American polity has been susceptible to contentious constitutional politics more than Western Europe for two main reasons:[55] (i) By definition, the American separation-of-powers doctrine induces the potential for competing actions between the state and the federal level. Moreover, its judicialized politics epitomized by *Roe*-type rulings, reinforces the perception among political actors that courts can entrench their moral preferences when the political system will not. (ii) The American public is overall more religious than its European counterpart, making morality-based debates like abortion more contentious.

Nonetheless, the surveyed data substantially weakens these two assumptions. The premise that competing legal arenas provoke structural vulnerability toward a tug-of war dynamics is countered by the British experience, where courts have

52 G. Calabresi, *Ideals, Beliefs, Attitudes and the Law: Private Perspectives on a Public Law Problem* (Syracuse: Syracuse University Press, 1985); Glendon, *Abortion and Divorce in Western Law*, supra note 4.

53 Tribe, *Abortion: The Clash of Absolutes,* supra note 5; S. Sheldon, *Beyond Control: Medical Power and Abortion Law* (Chicago: Pluto Press, 1997); Francome, *Abortion in the USA and the UK*, supra note 15 at 51; Hanafin, *Conceiving Life*, supra note 48; J. N. Erdmann, 'Moral Authority in English and Mexican Abortion Law', in S.H. Williams (ed.), *Constituting Equality: Gender Equality and Comparative Constitutional Law* (New York: Cambridge University Press, 2009).

54 Outshoorn, 'The Stability of Compromise, Abortion Politics in Western Europe', supra note 50 at 161.

55 Francome, *Abortion in the USA and the UK*, supra note 15 at 102.

shown unwavering will to keep the 'medicalized' statutory model regardless of an institutional capability to override them. Even after Britain joined the international trend of constitutional politics by enacting the Human Rights Act 1998,[56] the court continued to reject a move in the direction rights-based jurisprudence on the issue of abortion. Contemporary observers of British politics 'note with relief that abortion in Britain generates less conflict and controversy than in the United States.'[57] Notwithstanding institutional differences between the American and the European constitutional review processes,[58] the experiences of France, Germany and Italy breed additional doubts for the inevitability a tug-of-war dynamics between the different branches of government. The involvement of the European constitutional courts in abortion controversies has proven pivotal in the emergence of long-lasting and durable compromises. In the French context the referral to the *Conseil Constitutionnel* legitimized the abortion legislative compromise. In Germany, constitutional vetoes on legislative reforms were accompanied by elaborate frameworks guiding the future legislative process. Finally, by requiring the legislature to equally balance competing rights, the Italian constitutional court effectively compelled a compromise as the ultimate legislative outcome.

Explaining the difference between present-day Western European and American abortion politics by way of secularization process appears insufficient as well. Aside from the sociological debates over Europe's processes of secularization,[59] the data suggests that secularization was one of many social developments prompting legal reforms in European states. Pressing social needs, including clandestine dangerous abortions, dwindling population, the thalidomide problem, specific historical developments such as the unification of Germany and so forth, all acted as engines of reform in the reconsideration of the criminalization of abortion. Moreover, in every example examined above reform processes met fierce anti-abortion opposition, leading to protracted debates that stretched the liberalization process over many years.

Comparing existing legal rules on either side of the Atlantic suggests a process of conversion. The 1973 judicial promulgation of a constitutional right to abortion has been gradually supplemented by legislative and judicial actions modifying the scope of this right and the ease in which abortions are obtained

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56 Incorporating the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms into English Law.

57 Erdmann, 'Moral Authority in English and Mexican Abortion Law', supra note 53 at 108; J.K. Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction* (Cambridge: Cambridge University Press, 2007), 14.

58 A. Stone Sweet, 'Why Europe Rejected American Judicial Review, and Why it May Not Matter', 101 *Michigan Law Review* (2003), 2744–2780.

59 R. Stark, 'Secularization R.I.P.', 60 *Sociology of Religion* 3 (1999), 249–273; J. Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994); G. Davie, *Religion in Modern Britain Since 1945: Believing without Belonging* (Oxford: Blackwell, 1994).

in the USA.[60] In comparison, Western European legislation, which kept a stern rhetoric of criminalization in its laws effectively made the termination of unwanted pregnancies rather accessible as well as state-funded. Yet, in line with the hypothesis on the diverging social role of law, the legal models in each of the locations differ in the length of mandatory waiting periods and consultation processes. In Western Europe, the social goal of dissuading abortions generated longer waiting periods prior to the performance of abortions compared to the USA. Moreover, the European consultation processes placed its primary emphasis on the possibilities of life with a child, whereas the American legal arrangements have customarily included elaborate requirements on informing the woman about physical and emotional risks associated with abortion and disclosing the fetus' gestational characteristics.[61]

Attention is now turned to assessing the realization of law's goal in each of the debates, namely law's actual effect on: (i) social change and (ii) its contribution to the resolution of the socio-cultural conflict. Public opinion polls in the USA on the question of abortion reveal remarkably stable views, with a minority favoring unrestricted abortions, a minority opposing abortion altogether, and the median position agreeing that abortion needs to be available 'but that women should be able to obtain the procedure *only* for good reasons.'[62] Yet, the definition of 'good reasons' is still subject to continual alterations shaped by shifts in political power.[63] Bestowing constitutional status to women's choice should have in principle transformed the extent of protection for women seeking abortion, nevertheless observers note that access to abortion in the USA remains effectively limited.[64] Thus, with the pro-choice/pro-life dichotomy becoming the dominant prism of the American conflict, broader political compromises were effectively shelved.[65] The recent stream of pro-life legislation in Republican-dominated states encountering immediate pro-choice

60 M.A. Graber, *Rethinking Abortion: Equal Choice, the Constitution and Reproductive Politics* (Princeton: Princeton University Press, 1996).

61 Glendon, *Abortion and Divorce in Western Law,* supra note 4 at 20.

62 Balkin, *What Roe v. Wade Should Have Said*, supra note 13 at 4; T.G. Jelen and C. Wilcox, 'Causes and Consequences of Public Attitudes toward Abortion: A Review and Research Agenda', 56 *Political Research Quarterly* 4 (2003), 490; McBride, *Abortion in the United States*, supra note 5 at 210–216.

63 K.L. Scheppele, 'Constitutionalizing Abortion', in M. Githens and D.M. Stetson (eds.), *Abortion Politics: Public Policy in Cross-Cultural Perspective* (New York: Routledge, 1996), 46–47.

64 Graber, *Rethinking Abortion*, supra note 60 at 215; R. Solinger, *Pregnancy and Power: A Short History of Reproductive Politics in America* (New York: New York University Press, 2005); J. Novkov, 'Law and Political Ideologies', in K.E. Whittington, R.D. Kelemen and G.A. Caldeira (eds.), *The Oxford Handbook on Law and Politics* (Oxford: Oxford University Press, 2008), 637.

65 M. Deflem, 'The Boundaries of Abortion Law: Systems Theory from Parsons to Luhmann and Habermas', 76 *Social Forces* 3 (1998), 775–818.

challenges in courts have been the latest incarnation of the perpetual battle over accessibility to abortion with mixed victories (or defeats) on either side.

In comparison, keeping abortion as a criminal act in the Western European systems should have in principle worked against the entrenchment of abortion rights. Observers even suggested that the European legal compromises of codifying pro-life rhetoric with pro-choice policy were 'empty compromises,' if not 'hypocrisy' that 'can take an unacceptably high toll on confidence in the rule of law and the integrity of the legal system as a whole'.[66] Nonetheless, the availability of abortion in Europe has proved significantly higher than in the USA. According to a recent examination 'Western Europe has had a quite stable abortion environment. In contrast to the situation in the USA, access to abortion providing facilities … is substantially easier … [and] free from the extremes of violence and controversy that have characterized abortion care in the USA.'[67]

Moreover, the frequency in which US courts and legislatures have been occupied with abortion issues has been unparalleled anywhere in Western Europe. It has been suggested that tensions within constitutional systems and backlash dynamics between courts and legislatures are not necessarily negative and may even prove as an effective political method in responding to moral controversies.[68] Yet, the 'medicalized' model of Britain, the 'distress' formula of France, the Netherlands and Belgium, and the court-prescribed compromises of Germany and Italy, all seemed to have worked substantially well not only in channeling political controversies over abortion but in depoliticizing them as well. Moreover, while the American law on abortion continues to be passionately debated in federal and state legislative sessions, judicial proceedings or in executive policies, the European legal arrangements have remained unshakable over decades.

Conclusion

Moral controversies over abortion are seemingly perpetual. The history of abortion reform in the USA and Western Europe suggests that women with unwanted pregnancies resorted to abortions regardless of the legality of the procedure or its health risks. For people who are convinced that life begins at conception, the thought of voluntarily ending prenatal life remains incomprehensible regardless of decades-long pro-choice advocacy. Hence, resolving the question of abortion on a moral basis is presumably hopeless.

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66 Tribe, *Abortion: The Clash of Absolutes*, supra note 5at 73–74; Scheppele, 'Constitutionalizing Abortion', supra note 63 at 46–47.

67 C. Joffe, 'Abortion and Medicine: A Sociopolitical History' in M. Paul, S. Lichtenberg, L. Borgatta, P.G. Stubblefield and M.D. Creinin (eds.), *Management of Unintended and Abnormal Pregnancy* (Chichester: Wiley-Blackwell, 2009), 4.

68 R. Post and R. Siegel, 'Roe Rage: Democratic Constitutionalism and Backlash', 42 *Harvard Civil Rights-Civil Liberties Law Review* (2007), 373–433.

The global trend of constitutionalism swayed scholarly deliberations toward discerning the relationship between law and social change.[69] Yet, this study highlighted the limitation of this quest in the context of abortion compared to the political potential of swinging the academic pendulum toward law's integrative social function. Morality-based socio-cultural controversies underline the political nature of the legal process.[70] Abortion politics in the USA demonstrated that moral preferences translated into law remain susceptible to shifts in the distribution of political power. However, utilizing law with the goal of generating compromises seems to offer greater promise for perpetual socio-cultural conflicts. The Western European examples demonstrated that integrative legal solutions offer more than temporary resolution to moral conflicts even if their scope of protection for the competing rights at stake (choice v. life) remains ideologically insufficient.

An argument can be made that the American legal process has been effectively functioning as a conflict-defusing mechanism, in providing orderly legal procedures to channel perpetual partisan controversies over abortion.[71] Yet, these debates also seemed to have fueled social polarization, acrimonious constitutional conflicts, a culture of evasion toward judicial edicts and periodic violent disruptions. Assessing these ongoing controversies comparatively revealed that enduring US debates over abortion rights during different trimesters, parental involvement, waiting periods, consultations, public funding and so forth, have been decades-old settled law in Western European nations. Moreover, European legal arrangements resulted in pro-choicers securing state funding for abortion procedures as pro-lifers achieved different forms of state assistance to ease motherhood.

Structural characteristics specific to Western European constitutional systems have been instrumental in realizing consensual arrangements and compromises over abortion as demonstrated by the developments in Germany, France and Italy.[72] Given the divergence in constitutional review processes in each of the

69 O. Liviatan, '*The Impact of Alternative Constitutional Regimes on Religious Freedom in Canada and England',* 32 *Boston College International and Comparative Law Review* 1 (2009), 45–82; O. Liviatan, 'Judicial Activism and Religion-Based Tensions in India and Israel', 26 *Arizona Journal of International and Comparative Law* 3 (2009), 583–621.

70 O. Liviatan, 'Faith in the Law: The Role of Legal Arrangements in Religion-Based Conflicts Involving Minorities', 34 *Boston College International and Comparative Law Review* 1 (2011), 53–89.

71 J. Ferejohn and P. Pasquino, 'Constitutional Adjudication: Lessons from Europe', 82 *Texas Law Review* (2004), 1699.

72 On these process see: A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000); A. Stone Sweet, 'The Politics of Constitutional Review in France and Europe', *International Journal of Constitutional Law* 1 (2007), 69–92; G. Nolte (ed.), *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005).

locations, constitutional transfer is often impossible and frequently undesirable.[73] Yet, the European models remain instructive in highlighting the absence of a systematic search within American legal proceedings of a *shared* approach as to what is constitutionally feasible in the context of abortion. Even as part of two-sided disputes American courts are still engaged in the creation of general rules, providing them with an opportunity to prescribe substantive guidance for a plausible compromise-building approach. This potential is all the more realizable as part of law-making in legislative chambers, as parliamentary deliberations remain the most acceptable democratic response to social conflicts.[74] Given that both the USA and Western Europe continue to experience qualified rights protection and persistent ideological disagreements over abortion, the Western European examples serve as a constant reminder that social and political peace remains the striking variant across the two sides of the Atlantic.

73 J.E Ferejohn, 'Constitutional Review in the Global Context', 6 *New York University Journal of Legislation and Public Policy* (2002), 59; Ferejohn and Pasquino, 'Constitutional Adjudication: Lessons from Europe', supra note 71.

74 J. Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).