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At the End of Life: Conceptualizing Human Dignity and Assisted Suicide Debates in Contemporary Germany

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AT THE END OF LIFE: CONCEPTUALIZING HUMAN DIGNITY AND ASSISTED SUICIDE DEBATES IN CONTEMPORARY GERMANY

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Dedication

To Dr. David McMillen (1941-2022), Dixie McMillen (1947-2022), Claude Bedwell (1939-2021), Dorothy Bedwell (1939-2022), and Judy Green (1946-2023), or as I knew them, Papa D, Mama D, Grandpa Claude, Grandma Dottie, and Meemaw.

And to Dr. Edith McMillen, also known as Nana, for her strength of spirit and constant encouragement and support.

Abstract

As medicine improves and breakthroughs on cures for illnesses formerly thought deadly continue to develop, the global population continues to age. This has introduced new concerns about aging and end-of-life health care. One proposed end-of-life healthcare solution is assisted suicide, although the practice is not without its controversies. The case of assisted suicide in Germany is of particular interest for a variety of reasons, and the practice has not had an easy path there. A series of debates in 2015 led to the practice being banned, but that ban was overturned in 2020 by Germany's Constitutional Court. While assisted suicide is a bioethical issue, in Germany the debates that led to the 2015 ban centered around the constitutionality of the practice, with a special focus on the Basic Law's principles of human dignity and the right to personality. As the Basic Law was ratified in 1949, directly following the Nazi period, these principles are a reflection of an attempt to prioritize human dignity following a period of human rights violations. The Constitutional Court's decision to overturn the ban in 2020 heavily rested upon human dignity as well. In this work, I use minutes of 2015 Bundestag debates, Constitutional Court headnotes, and scholarly literature surrounding constitutionalism under the Basic Law to examine the intersection of assisted suicide with human dignity and the Basic Law. This work also serves as one of the first comprehensive analyses of the debates and the court's decision, due to the relative recentness of the decision and the debates stalling throughout the pandemic. I posit that the assisted suicide debates in Germany demonstrate a transformation of interpretations of the Basic Law by the Constitutional Court as it relates to human dignity.

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Introduction: Defining Assisted Suicide in Germany

When debating assisted suicide, people often assume that the "why" of the issue is implicit. We should care about the outcome of these debates because they involve the end of life, and that is an intense moral quandary, especially as life expectancies continue to rise. While there are many intriguing aspects of the debate, this thesis examines a specific question pertaining to the intersection of the law with morality and personal ethical convictions. Those with the power to make laws institutionalize certain ethical values, via either allowing assisted suicide, restricting it, or banning it. The issue of assisted suicide also brings up the question of how deeply the state should be involved in regulating matters such as assisted suicide, which is a deeply personal decision that involves personal ethical convictions that may not be congruent with those of the ones in power. For these reasons, assisted suicide must be studied in context, as the manner in which it operates is embedded in the cultural understanding of the specific legal framework in which debates are happening.

Assisted suicide is controversial around the globe and has been for decades. In the United States, the practice (with the specific assistance of a physician) is legal in ten states (California, Colorado, Hawaii, Montana, Maine, New Jersey, New Mexico, Oregon, Vermont, and Washington) and one jurisdiction (the District of Columbia). The practice is also legal in Switzerland, the Netherlands, Belgium, Luxembourg, Colombia, Canada, Austria, New Zealand, Spain, and, most recently, Australia. For this work, I will be focusing specifically on assisted suicide as it functions in Germany. In the German context, while the Bundestag and Bundesrat have lawmaking power, those laws can be overturned as unconstitutional by the *Bundesfassungsgericht*, or Federal Constitutional Court. The Constitutional Court is the highest legal entity in the country and via its interpretation of the Basic Law upholds human dignity as

the highest legal value, centering many of its decisions around this concept. I began this work with a specific interest in the legacy of the Nazi euthanasia program might be causing some Germans to have hesitations about the practice of assisted suicide. While this was not a fruitless search for information, what I found was that the relationship between Nazisim and assisted suicide was not outright stated; however, a relationship does exist, as Germany's assisted suicide debates have centered around the Basic Law, especially as it pertains to the concept of human dignity, and the emphasis on human dignity in the Basic Law is a direct response to the legacy of the horrors of National Socialism. I then attempted to analyze the issue from a purely bioethical angle. Ultimately, however, the issue of assisted suicide in Germany pertains largely to the constitution, especially to clauses associated with human dignity, the right to personality, and autonomy. While these are issues that are also related to bioethics, throughout the debates these bioethical concepts were related to what is and is not legal underneath the Basic Law's framework.

This thesis explores the assisted suicide debates in Germany's Bundestag as they relate to constitutionalim, specifically to the Basic Law's provisions of human dignity and the right to personality, and how these debates have impacted modern interpretations of these provisions. To conduct this analysis, I use primary literature of several types, such as those on the processes that led to the generation of the Basic Law, Bundestag minutes, and Constitutional Court headnotes. I also use secondary literature, such as sources analyzing the right to human dignity and the right to personality, along with analyses of the decision of the Constitutional Court in 2020. All of these sources are used in tandem to show the importance of the court's decision and the manner in which the assisted suicide debates have shaped German politics in a new manner. In researching and writing this work, I answer the following question: how did the assisted suicide

debates in Germany, the ban of the practice, and the subsequent overturn of that ban impact interpretations of human dignity, the highest value in the modern German legal system? I find that the case of assisted suicide in Germany demonstrates the ways in which the German legal system has evolved over time and how the Constitutional Court's interpretations of the right to human dignity also show an evolution as the country transitions into the twenty-first century; assisted suicide has typically been conflated with euthanasia and interpretations of human dignity by the Constitutional Court have centered around the right-to-live, marking the decisions made by the court in 2020 as a departure from what has been conceived as the norm.

What is Assisted Suicide?

Assisted suicide is not always simply defined and the definition of the practice is often under dispute. Many medical associations and journals have definitions of the practice but these definitions can often be accompanied by the bias of the organization. For that reason, I am using the *Merriam-Webster Dictionary* definition of assisted suicide: "suicide committed by someone with assistance from another person." As the dictionary notes, assisted suicide is often conflated with physician-assisted suicide (especially in the United States). However, in the German context, the debates speak about assisted suicide led by both physicians and euthanasia organizations and assisted suicide is the more commonly used term. The terms used most commonly in the debates in German are *Sterbhilfe* or *Suizidhilfe*, which directly translate to "help for death" and "help for suicide." The most prominent German dictionary, *Digitales Wörterbuch der deutschen Sprache,* does not offer a definition for *Suizidhilfe* but defines *Sterbhilfe* as either *Euthanasie* (euthanasia) or *Sterbegeld* (death benefit). When discussing assisted suicide, it is also beneficial to devote some time to suicide itself. Merriam-Webster

defines suicide as “the act or an instance of taking one's own life voluntarily and intentionally.” While the term suicide is visceral and debates around assisted suicide often focus more on suicide prevention than healthcare issues (causing debates around assisted suicide to be obscured), there is, as far I as I see, no better term for the practice of assisted suicide, as someone is taking their own life voluntarily and intentionally, although instead of locating the means themselves, they are provided via a prescription. Of course, one cannot ignore suicide prevention, and the importance of preventing suicide is one of the driving forces behind the contentious nature of the assisted suicide debates in both Germany and other locales around the world.

Euthanasia is a term often used in tandem with assisted suicide. Euthanasia differs from assisted suicide in that someone other than the person ending their life administers the lethal drug or other life-ending method to the person dying, whereas in the context of assisted suicide, the person dying administers the life-ending method themselves after it was provided by another source. Notably, euthanasia has been prohibited by the German criminal code,[1] while assisted suicide is not (and was not until the conclusion of the 2015 debates). Another term often mentioned in conjunction with assisted suicide is passive euthanasia. Passive euthanasia differs from assisted suicide in that it does not involve the administration of any lethal drugs but instead treatments that ease pain but may lead to a more expedited end of life for the patient.[2] Palliative care in general plays a large role in the debates; the 2015 assisted suicide legislation debates included the passing of a law strengthening palliative care in Germany and many opponents of

[1] The code was originally written in 1871 and has experienced modifications over the century and a half since then. There were notably large revisions following the Nazi period, including the prohibition of euthanasia.
[2] i.e. the administration of more morphine to ease pain, which will end the patient’s life faster than if morphine were not administered.

the practice cite palliative care as a viable alternative in situations where one may seek assisted suicide.

The practice has not had an easy path in Germany. There is often an assumption that assisted suicide is illegal, as euthanasia is prohibited and the two pratices are often conflated with each other; until 2015, however, it was de facto legal. A series of debates around legislation introduced by various cross-party groups in the Bundestag (some for regulating the practice and others for the outright ban) led to the codification of § 217 of the criminal code in December of that year. The law was met by almost immediate challenges; a stay was filed before it was even officially a part of criminal law. In 2019, the Constitutional Court of Germany began hearing arguments related to the case, and on February 26, 2020, that body released a decision overturning the ban. Since then, new legislation and debates have emerged, and while for the time being assisted suicide is fully legal, there are sure to be new challenges in the coming years.

Essential to understanding the manner in which the assisted suicide debates have functioned in the German context is understanding the nature of Germany's political system, which shares some similarities with the political system of the United States but is in other ways vastly different. The Bundestag is the federal parliament of Germany.[3] Representatives are elected to the Bundestag every four years via a mixed-member proportional representation system; essentially, the proportion of seats in the Bundestag that a given party has is the same as the proportion of votes they won in the election. As a result of this system, there is not a majority party in the Bundestag and after an election a governing coalition is formed. The chancellor is then typically the leader of the party in the coalition with the highest percentage of the vote. While the Bundestag is a key governing body (and the debates around assisted suicide in

[3] Germany has sixteen federal states, three of which (Berlin, Hamburg, Bremen) are city-states. The states, or *Länder* in German, are represented in the Bundesrat. The Bundesrat is comprised of delegations from each state based on the voting in that state.

Germany occurred in that body), another essential body is the *Bundesverfassungsgericht*, or the Federal Constitutional Court. The Constitutional Court's main duty is judicial review; they have the power to overturn any piece of legislation that they deem to be unconstitutional. In the case of assisted suicide, the Constitutional Court played a key role in that the court was the body that overturned the Bundestag-ratified ban on assisted suicide. This action demonstrated the power of the Constitutional Court and Germany's system of checks and balances; despite being passed by the Bundestag, a body representing the people, the ban on assisted suicide was overturned by the Court for its unconstitutionality, proving that the Basic Law and its tenets are held above all else.

Assisted Suicide in Other Countries

Germany came to legalization in its own unique way, as have all other nations who have legalized assisted suicide. Nonetheless, there are a few patterns. In the United States alone, each state has used a different method. In California, Hawaii, Maine, New Jersey, New Mexico, and Vermont, a law was passed by the legislature. In Colorado, constituents voted on a proposition, and in Oregon, a similar process occurred via a referendum. In Montana, the practice was legalized via a decision in the Montana Supreme Court. Washington, D.C. had a bit of a different process because it is not a state; a bill was passed by city council and approved by the mayor.

Other non-European countries where the practice is legal include Colombia, Canada, New Zealand, and Australia. Colombia decriminalized assisted suicide via a decision by their Constitutional Court. In Canada, a variety of laws were passed by their parliament to eventually make up the Medical Assistance in Dying, or MAiD, program. Australia passed it via a legislative measure, and New Zealand legalized it via a national referendum. In the German assisted suicide debates, other European countries that either have or have not approved the

practice are often cited as examples of either positive or negative legislation, depending on the side of the debate. The European countries where assisted suicide is legal include Switzerland, the Netherlands, Belgium, Luxembourg, Austria, and Spain. In Switzerland, assisted suicide is technically de facto legal; there is an Swiss law banning active euthanasia but it does not explicitly ban assisted suicide and despite legal challenges, the legality remains. In the Netherlands, a law was passed by the legislature. In Belgium, it was also passed by the legislature, but Belgium is in an interesting case in that the country allows assisted suicide for mental illnesses (as opposed to just physical illnesses, like the other places in which the practice legal) and, in 2014, the practice was legalized for children who would like to pursue it (parents must agree with the treatment). Belgium has the world's least restrictive laws regulating assisted suicide but has, as a result, opened itself up to controversy. In Luxembourg, the legislature was also the method of legalizing assisted suicide, as in Austria, and a similar process occurred in Spain. Germany is a bit interesting in both the global and regional context, following the trajectory of the U.S. state of Montana and the country of Colombia with assisted suicide being legalized via a decision by the Constitutional Court.

The Ministers of Health During the Assisted Suicide Debates: Hermann Gröhe, Jens Spahn, and Karl Lauterbach

This thesis covers three sessions of the Bundestag and, as a result, three Federal Ministers of Health. The Ministers of Health are significant not only because they serve as the head of the Ministry of Health, a high-ranking position in the German government, but also because they represent the interests of the people. Of course, as each Minister of Health is a different person and they can come from different parties, they represent a particular set of interests of a

particular set of people. They also, as the official highest spokesperson of the Ministry of Health, have the ability to alter public opinion or sway healthcare-related debates in certain directions. The first is Hermann Gröhe, who was the Minister of Health in 2015 when the ban on assisted suicide was passed–he, in fact, was one of the key drafters of that bill. Prior to serving as Minister of Health, he had no previous healthcare experience, although he had been known to work on issues involving humanitarian aid and global human rights issues. Following the overturning of the ban on assisted suicide in 2020, Gröhe drafted another bill for heavy restrictions on the practice and has advocated for that bill on the Bundestag floor. Following Gröhe, Jens Spahn, also of the CDU, was the last Minister of Health under Angela Merkel. Spahn also had no previous medical training; Prior to his term as Minister of Health, he primarily worked in tax law and banking. The ban on assisted suicide was repealed during Spahn's term and he was then tasked by the Constitutional Court with drafting new legislation regarding assisted suicide. However, he avoided the duty, stating on the Bundestag floor that he did not draft legislation because he is opposed to the practice.

The current Minister of Health under Olaf Scholz is Dr. Karl Lauterbach of the SPD. Unlike his two predecessors, Lauterbach is actually a medical professional, and he previously served as the "shadow" Minister of Health in the cabinet of Peer Steinbrück as part of his campaign for chancellor in 2012 and 2013. Prior to becoming Minister of Health, Lauterbach was well-known in Germany for his messaging throughout the start of the covid-19 pandemic. Lauterbach has been a prominent figure in the assisted suicide debates; he was a key drafter and speaker for a law regulating the practice as opposed to banning it in 2015, introduced the first new legislation on the issue after Spahn failed to in April 2021, and introduced a new bill officially supported by the Federal Ministry of Health itself in June 2022. While the Minister of

Health is not the end-all be-all of healthcare decisions in Germany, they do stand as the most prominent face of official medical policy in Germany, and their stance can have a profound impact on both public and legislative opinion. The fact that Gröhe and Spahn oppose the practice, while Lauterbach supports it, is certainly not something to be ignored.

Methodology

For this work, I will be using historiographical textual analysis with different primary texts and secondary source texts for each chapter. This work is historical in nature in that it covers an issue that has roots in the 1948 and 1949 ratification of the Basic Law and the establishment of West Germany sovereignty and the main issue at hand's key moments occurred in 2015 and 2020. However, this work also has a foot in the future in that the assisted suicide debates are ongoing and that more revelations may emerge in the coming years. It is worth noting that many of the sources used for this work are in German but have been quoted here in English for accessibility purposes.

The first chapter, titled "Human Dignity in German Law after National Socialism" primarily discusses why the decision to overturn the ban on assisted suicide in 2020 is notable for the court's interpretations of human dignity and the Basic Law's evolution over time. I briefly describe human dignity under the National Socialist regime and the process that led to the ratification of Germany's Basic Law in 1949 before diving into constitutionalism and jurisprudence in the German context, with a specific focus on interpretations of human dignity and the right to personality (often linked with autonomy) in the German constitution. Sources for this chapter include primary documents from the discussions leading up to 1949, the Basic Law itself, and scholarly analysis of the Basic Law, especially as it pertains to human dignity.

The second chapter, titled “Reframing Human Dignity: Bundestag Debates on Assisted Suicide, 2014-2015,” covers the debates that led to the codification of the section of the criminal code banning assisted suicide. There is a specific focus on themes that emerged throughout the rounds of debate, the voting record for and against the bill, and the manner in which drafters and speakers of laws for and against assisted suicide invoked the Basic Law’s provisions of human dignity and the right to personality. Sources for this chapter include the draft laws and minutes of the 2015 Bundestag debates in which these drafts were discussed.

The third chapter, titled “Re-Legalizing Assisted Suicide: The February 2020 Repeal of Criminal Code Section 217,” covers the Constitutional Court repeal of the ban on assisted suicide, with a specific focus on the manner in which the court discussed human dignity and the right to personality, along with reactions to and interpretations of the decision. A special focus is placed on what makes this decision revolutionary in nature and how it reoriented the court’s positionality on issues involving the right to life. Sources for this chapter include the press releases and headnotes from the Constitutional Court’s decisions, along with both popular and scholarly interpretations and reactions to the decision. Finally, I conclude this work by offering a brief timeline, via Bundestag documents, of the debates since 2022 and what I perceive the future of the debates and the interpretation of human dignity to be in the German context as it pertains to assisted suicide.

Chapter One: Human Dignity in German Law after National Socialism

Human dignity is considered to be the highest value established in the German Basic Law, and thus serves as an underpinning for all lawmaking and legal decisions, especially concerning the constitutionality of a law. The first article of Germany's Basic Law reads as follows:

> (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.[4]

This interpretation of human dignity emerged as a result of National Socialism and is an enduring legacy of the period immediately following the end of World War II; following the Third Reich's reign of terror and the practical dissolution of human rights under the regime, those tasked with obtaining new sovereignty for Germany sought to create a firm foundation of human dignity as a diametric opposite to the Nazi period. This chapter covers the development of Germany's Basic Law and its constitutional court with a special focus on constitutional interpretations of human dignity and the right to personality from 1949 to the modern period. Sources include the Basic Law itself, primary documents from the 1948-1949 period in which the Basic Law was written and through which Germany eventually received its sovereignty, and analyses of the Basic Law and Constitutional Court decisions over time. The Basic Law has become inextricably intertwined with German Law to the point where, upon reunification in 1990, East Germany adopted the West German constitution instead of a new one being written for a unified Germany. However, the constitution and its interpretation have evolved over time, especially as it relates to human dignity. Human dignity and assisted suicide are linked via views

[4] Federal Ministry of Justice, "Basic Law for the Federal Republic of Germany (Official English Translation)," Federal Office of Justice, last amended June 28, 2022, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

on the end-of-life process; some believe that it grants *more* dignity to allow someone to end their life when they themselves see fit, whereas others have the viewpoint that allowing someone to end their life takes away their dignity. There are concerns about individuals being pressured into assisted suicide and fears that legalization will make it seem "state sponsored." Traditionally interpretations of human dignity by the Constitutional Court have been coupled with the right to life (especially in the case of Germany's ban on abortion); the decision to repeal a ban on assisted suicide based on human dignity by that body marks a change in decision-making and marked evolution of the Basic Law in the twenty-first century.

The Nazi Euthanasia Program, Human Rights Violations in the National Socialist Period, and the Development of the Basic Law

The Nazi period is often associated with rampant human rights violations, especially in terms of involuntary euthanasias and mass genocide. Karl Binding and Alfred Hoche's booklet entitled *Die Freigabe der Vernichtung lebensunwerten Lebens* (*Permission to Annihilate: Life Unworthy of Life*), published in 1920, was a major eugenic publication in Germany. This booklet caused a major paradigm shift in terms of care for the disabled. Some theologians at the time considered it "reasonable" to end the lives of the severely disabled in order to "decrease suffering." Others seemed to almost agree with Binding and Hoche's statements about the disabled being "barely human" or "horrors." Only those who were "acceptably" disabled and could still work were considered worthy of life.

Following a propaganda campaign espousing why individuals with disabilities were negative assets to the Third Reich, the killings began. While the T4 program did not last very long in an official context, killings continued: protests in 1941 about the killing of disabled

children led to the official discontinuation of the program, but Nazi physicians were instead given a blank check to determine the outcome of patients' cases, leading to thousands more deaths. This included the construction of sham registry offices to issue death certificates with untrue causes of death, and the euthanasia program as it related to those with disabilities was put under strict secrecy by the Nazi regime. Healthcare workers were at the forefront of the Nazi euthanasia movement; in fact, euthanasia via the actions of physicians under the Third Reich's rule was carefully orchestrated, as prior to the Second World War, many doctors were Jewish:

> At the beginning of Hitler's dictatorship, almost half of pediatricians in Germany were Jewish. Gradual persecution and professional exclusion led to many emigrating or eventually being killed themselves in the holocaust, leaving a large professional vacuum to be filled by physicians of Nazi persuasion. Indeed, nearly half of practicing doctors in Nazi Germany were members of the Nazi Party.

And while there were some laws and regulations in place for Nazi doctors, they were applied very broadly and doctors in the period were encouraged to skirt the law. Many of these doctors were tried after the end of the war as part of the Nuremberg trials; sixteen of them were found guilty, and seven were sentenced to death.[5] These trials were part of a large effort to grant restitution for the mistreatment of people and violations of human dignity, but there were other restitution efforts at work–in many ways, the creation of the Basic Law itself served as an attempt at righting the wrongs wrought by the Nazis.

Following the actions of the Nazis before and during World War II, there was some hesitation about how to achieve German sovereignty once more. Germany was occupied in 1945 by the then-Soviet Union, France, Great Britain, and the United States. Deliberations began in February 1948 about how best to allow Germany to have its own government. Initially, there were hopes of a unified Germany at the outset, but as tensions increased between the Soviet

[5] Online Exhibits, "The Doctors Trial: The Medical Case of the Subsequent Nuremberg Proceedings," *United States Holocaust Memorial Museum.*

Union and the western Allies, including the blockade of Berlin in June 1948, it was eventually decided that there would be two separate Germanys. On July 1, 1948, the process of establishing the Basic Law began. The western Allies issued a collection of documents known as the "London Documents." The first of these provided instructions for the creation of a constituent assembly. This assembly was tasked with the creation of a democratic constitution that would "protect the rights of the participating states, provide adequate authority, and contain guarantees of individual rights and freedoms."[6] If the submitted constitution that was drafted by the assembly was found acceptable by the occupying powers, they would permit a vote on it, which would have to be approved by two-thirds of the German states.

The process had its bumps, but overall it took less than a year for the constitution of the newly-minted Federal Republic of Germany to be written and approved. The German Democratic Republic was established five months later on October 7, 1949. The West German parliamentary council had ultimately decided to refer to the new constitution for the Federal Republic as the *Grundgesetz,* or Basic Law, with hopes that unification would come soon and they would draft a new constitution upon rejoining with East Germany. However, it would take roughly forty years for reunification to occur, in which time the Basic Law became entrenched in the German consciousness–"many of the (Constitutional) Court's tools of transformative law had already become so entrenched in its jurisprudence and constitutional doctrine that abandoning them was no longer feasible"[7]–and ultimately all of Germany adopted the Basic Law. The Basic Law was, and still is, a notable document because of its sharp turn from National Socialist ideals. While the sociopolitical landscape in the Nazi period had been overrun with human rights

[6] "Authorization for Convocation of a Constituent Assembly in the Trizone, the 'London Documents,' July 1, 1948," German History in Documents and Images, Volume 8. Occupation and the Emergence of Two States, 1945-1961, German Historical Institute.
[7] Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford: Oxford University Press, 2015), 65.

violations and a complete removal of autonomy for many groups, the new Basic Law emphasized human dignity as its key tenant–a direct response to the horrors of the Third Reich.

Constitutionalism can have many different meanings depending on context. For this work, I take a definition from Donald P. Kommers' "German Constitutionalism: A Prolegomenon": "As used here the term shall be limited to the principles and ideas flowing from the written constitution as interpreted by Germany's highest court of constitutional review."[8] In the nearly eighty years since the Basic Law's establishment, the German legal system has shaped itself around the tenets of the constitution. All laws must abide by the Basic Law, and as mentioned in the introduction to this work, Germany has a "supreme court" in the *Bundesverfassungsgericht*, or Federal Constitutional Court. This body not only takes cases regarding challenges to laws that possess a constitutional basis, but it also reviews amendments to the constitution to ensure that they do not violate any of its tenets, especially the eternity clauses.

Constitutionalism in Germany also developed in an interesting manner owing to a key difference between the establishment of the Weimar Republic and the Federal Republic. The Weimar Republic did not receive meaningful support from the international community following World War I, and in many ways, that impacted how the republic began to collapse; they had no aid in attempting to hold the new democratic system up, and were plagued with reparations, inflation, hunger, unemployment, and more. The situation after World War II's conclusion was different in that Germany was occupied by the Allied Powers and for four years existed in an amorphous state. While that certainly aided in the success of the Federal Republic, it also created circumstances where the German system was heavily influenced by Western ideals of democracy and the way that democracy should be monitored; in many ways, a unique form of

[8] Donald P. Kommers, "German Constitutionalism: A Prolegomenon," *Emory Law Journal* 40 (1991): 837.

jurisprudence in Germany had to be fought for. Following the Constitutional Court's first decision in 1951, analyst Arthur T. von Mehren wrote,

> The establishment of the Constitutional Court thus marks the completion of one constitutional evolution, and its first decision the beginning of another-for the future of judicial review in Germany will depend, in a large measure, upon the skill and insight with which the Constitutional Court discharges its task.[9]

Human Dignity in the Basic Law

Many of the Constitutional Court's decisions since the first one in 1951 have related to the issue of human dignity. In the German context, human dignity is considered to be inviolable and is often held above every other fundamental right. As the fundamental rights outlined in the first twenty articles of the Basic Law have shaped the entire German legal system, one could reasonably conclude that the concept of human dignity has served as a primary shaper of the system since 1949. Human dignity is also a tenant of the Basic Law that clearly emerged from what Kommers calls a "Hitlerarean tragedy"–Kommers himself wrote, "After the total neglect of human rights during the rule of the National Socialist Party in Germany, the protection of fundamental rights became a primary concern for the authors of the Basic Law."[10] This issue is also described in Christoph Enders' "Social and Economic Rights in the German Basic Law? An Analysis with Respect to Jurisprudence of the Federal Constitutional Court," where it is described as a "twofold challenge,"[11] where the newly-established Federal Republic had to balance taking a stand against the history of National Socialism while also being the losers in a global conflict that in large part had been generated, or, at the very least, exacerbated by that ideology. Human rights were of beyond paramount importance due to the Nazi legacy, and a

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[9] Arthur T. von Mehren, "Constitutionalism in Germany: The First Decision of the New Constitutional Court," *The American Journal of Comparative Law* 1, no. 1/2 (Winter-Spring 1952): 70.
[10] Donald P. Kommers, "German Constitutionalism: A Prolegomenon," *Emory Law Journal* 40 (1991): 852.
[11] Christoph Enders, "Social and Economic Rights in the German Basic Law? An Analysis with Respect to Jurisprudence of the Federal Constitutional Court," *Constitutional Review* 6, no. 2 (December 2020): 191.

point was made, as mentioned previously in this chapter, to emphasize their importance as a way of distancing modern Germany from the Nazi period.

Many sources cite human dignity as being the foundation of all legal decisions in Germany, "crowning" the veritable gauntlet of fundamental rights offered in Articles 1 through 20. When making legal decisions, courts have an obligation to ensure that human dignity is not being violated, and it is one of the key elements found in most (if not all) Constitutional Court decisions. This is by design; the Basic Law itself stipulates that government bodies in Germany must uphold human dignity, along with all other fundamental rights– "It is stated in the first article of the Basic Law, that the following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law…all public officials and institutions have to respect and secure human rights."[12] The Parliamentary Council, when drafting the Basic Law, also established the body that would ensure that the fundamental rights were not being violated, the one and only Constitutional Court. Kommers writes that this creates an environment where "law therefore serves as a guide to freedom and right living."[13]

Interestingly, much of the literature on German constitutionalism mentions a connection between human dignity and the right to life in the Constitutional Court's decision making process. This tie is, for the most part, based on the Court's decisions regarding abortion.[14] However, the aforementioned literature[15] was also written prior to the Court's decision in 2020 to repeal § 217. Based on previous Court decisions regarding ending life that was still in the gestational period, one might surmise that the Constitutional Court would allow a ban on assisted suicide, but instead in their 2020 decision the Court prohibited a complete ban on the practice.

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[12] Julia Limbauch, "How a constitution can safeguard democracy: The German Experience," Center for Comparative and Public Law, the University of Hong Kong, 2018, 1.
[13] Donald P. Kommers, "German Constitutionalism: A Prolegomenon," *Emory Law Journal* 40 (1991): 850.
[14] Abortion is illegal in Germany, although there are some exceptions within the first twelve weeks of pregnancy.
[15] Such as Michaela Hailbronner's *Traditions and Transformations: The Rise of German Constitutionalism* and Donald P. Kommers' *The constitutional jurisprudence of the Federal Republic of Germany*.

The case of assisted suicide in Germany is interesting for many reasons that have been previously outlined, but perhaps one of the most compelling of these is the manner in which this case shows changes in the German legal system. The system has evolved since its modern conception in 1949, and the disentanglement, in some small way, of human dignity and the right to life in the Constitutional Court's decision-making process shows that it will continue to evolve.

While human dignity is held above all other values when considering legal issues in the German constitution, it is also linked to the right to personality, which tends to translate into the right to self-determination and autonomy in the German context; "The Constitutional Court rarely speaks of the right to personality without referring to human dignity."[16] The issues of the right to personality and human dignity would heavily influence not only the 2015 Bundestag debates leading up to the codification of § 217 but also the Constitutional Court's decision to repeal § 217 in 2020. Something that separates human dignity and the right to personality in the Court's decisions is the inviolable nature of human dignity as compared to the restrictive clauses that restrain the right to personality–"the personality right secured by Article 2 may be restrained in the interest of the rights of others, the moral code, or the constitutional order."[17] For example, the right to personality can be restrained if it violates another right, such as human dignity ("No infringement of dignity is justifiable. If a conflict between dignity and other human rights arises, dignity always trumps"[18]). The right to personality is also harder to enforce owing to the fact that it cannot compel someone to do something; there is not an affirmative obligation for anyone to have to do something, but rather it can prevent the state from intruding on a fundamental liberty.

[16] Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany, second edition* (Durham: Duke University Press, 1997), 313.
[17] Kommers, *Constitutional Jurisprudence,* 314.
[18] Dieter Grimm, Mattias Wendel, and Tobias Reinbacher, "European Constitutionalism and the German Basic Law," in *National Constitutions in European and Global Governance: Democracy, Rights, and the Rule of Law,* ed. by Anneli Albi and Samo Bardutzky (The Hague: T.M.C. Asser Press, 2019), 432.

This facet of the right to personality was heavily discussed in the 2015 debates and the 2020 decision. However, one cannot truly say if something violates the Basic Law until the Constitutional Court has offered up its official decision. What this means is that, in the 2015 debates (which will be discussed in detail in the next chapter), each side was attempting to demonstrate how their proposal best reinforced the rights enshrined in the Basic Law and how the other side was undermining those rights. The side that would ultimately prevail (the side banning assisted suicide) would, however, have holes punched in its argument by the Constitutional Court itself, via their interpretation of human dignity and the right to personality being reinforced and supported by permitting the practice of assisted suicide.

Chapter Two: Reframing Human Dignity: Bundestag Debates on Assisted Suicide, 2014-2015

The assisted suicide debates in Germany revealed the ways in which human dignity both is and can be conceptualized in modern-day Germany. Throughout the debates, both lawmakers for and against the practice used the concept of human dignity in their arguments, framing the principle to their advantage. While the side against the practice posited that it would violate human dignity to give someone potentially easier access to the tools needed to end their own life, the side for the practice argued that it would support human dignity to allow someone to end their life in the way that they chose. The purpose of this chapter is to explore these debates that eventually led to the ban on assisted suicide in December 2015 via the codification of Section 217. Sources include the four draft bills (two to ban assisted suicide and two to regulate the practice) and the Bundestag minutes of the debates. Emphasis is placed on the major themes that emerged in the debate and the ways in which both sides of the debate operate as mirrors to each other. There are also discussions of the focus on palliative care in the debates and the ways in which the term "suicide" may obscure the finer points of the debates.

Origins of the Assisted Suicide Debates

CDU member and Senator for Justice of Hamburg Roger Kusch was known for being an inflammatory political figure, and in some ways it came as no surprise when, in 2007, he debuted his own "suicide machine." As a proponent of assisted suicide, he had developed the machine claimed that it would allow those wishing to end their life painlessly and with great ease in a period of only three to four minutes. However, it was definitely a shock to Germany's sociopolitical ecosystem when he announced that he had assisted a seventy-nine year old woman

in her own suicide. He had not used his machine, but he had provided the elderly woman with lethal drugs. He knew that his actions could be called into legal question, so he had filmed five hours worth of footage, including her death, that showed that she had taken the drugs alone and of her own free will. These actions, and the fact that Kusch was so eager to celebrate the woman's death, saying in an interview, "My offer, since last Saturday, is to allow people to die in their own beds. That is the wish of most people, and now it is possible in Germany,"[19] stirred up a debate over assisted suicide, end-of-life healthcare, and the treatment of Germany's rapidly aging population that had laid dormant for a period as Germany dealt with reunification and the challenges that came with the subsequent turn of the century. While what Kusch did was technically not illegal, it caused anxiety among lawmakers and the public alike because of its relation to euthanasia. Assisted suicide existed (and still exists) in a legal gray area; as mentioned above, Kusch was aware of this area, and acted accordingly.

In November of 2014 this stirring finally led to action, and various factions of the Bundestag met to discuss what, exactly, to do about the issue of assisted suicide. The general consensus was that it ought to be regulated, but there was some disagreement on the specifics, and it was determined that groups composed of members of various factions would collaborate on bills to be presented at a later date. In July of 2015, those bills were finally presented and debated upon. Four bills were presented to the Bundestag; two of the bills advocated for the banning of the practice, whereas the other two sought to regulate the practice. By December of that same year, one of the bills had won out and a new section had been added to Germany's criminal code that banned assisted suicide, although it did not come without questions or challenges. In many ways, Germany had taken a sharp turn away from many of its European

[19] Mark Landler, "Assisted Suicide of Healthly 79-Year-Old Renews German Debate on Right to Die," *The New York Times,* July 3, 2008.

neighbors with much more relaxed laws surrounding the practice, such as Denmark, Sweden, Switzerland, and the Netherlands, although these very countries were used as examples by the drafters of the new law as to why Germany desperately needed a ban.

How does the Bundestag Function?

As outlined in the introduction to this work, the Bundestag is the federally representative body, or parliament, of Germany. Members are elected via a proportional system and then a governing coalition is formed, as no party can win a majority. The main political parties in Germany are Alternativ für Deutschland (AfD, far right), Christlich Demokratische Union Deutschlands (CDU, center right), Freie Demokratische Partei (FDP, center right), Die Grünen (the Greens, center left), Sozialdemokratische Partei Deutschlands (SPD, center left), and Die Linke (the Left, far left). While there is technically a right-to-left political spectrum in Germany, the four center parties (CDU, FDP, the Greens, and the SPD) tend to have reasonably similar viewpoints, in part because they tend to work together in coalition. Additionally, as a result of coalitions, many issues do not develop precisely along party lines. However, there are some cases in which issues can be somewhat delineated around general ideological lines that correspond to party platforms, one being assisted suicide. While there are some exceptions, for the most part members of right-of-center and right-wing parties are against the practice, while most members of more left-leaning parties are for the practice.

During the assisted suicide debates in 2015, the chancellor was Angela Merkel, with the governing coalition made up of the CDU and the SPD. This chancellor and coalition endured through the next session of the Bundestag. As of the writing of this work, the current Bundestag was elected in October of 2021, with the coalition being finalized in December 2021. The

chancellor is Olaf Scholz of the SPD; his election marked the first time in sixteen years that the chancellor was not Angela Merkel of the CDU. The current governing coalition is made up of the SPD, the Greens, and the FDP. It is worth mentioning that while the opposition parties in each Bundestag (meaning those parties not in the governing coalition) are technically on the same "side," they did not choose to be, and unlike the governing coalition, their viewpoints tend to be farther apart and they do not necessarily always work together on issues; this will become evident in the analysis of the debates in this work.

Proposal by Brand and Others: Draft law on the criminal liability of the businesslike promotion of suicide

The first of the two proposals that aimed to ban assisted suicide was interesting for several reasons, one of them being that the drafters would ardently defend themselves in debates, claiming that they never intended to ban the practice wholesale. This bill was also the one that was passed in November 2015 and led to the codification of § 217. The drafters note that they are not criminalizing what one typically thinks of when considering suicide, but that, "A correction is necessary where businesslike offers make assisted suicide appear as a normal treatment option."[20] They posit that those who are elderly and/or sick can be pressured into assisted suicide when the practice is allowed, and that allowing the practice also leads to "normalization" or "habituation" of assisted suicide. They also emphasize, at the beginning of the proposal, that they do not wish to ban assisted suicide in every situation, as "A complete ban on assisted suicide, as is the case in individual other European states, is not wanted politically and…can hardly be reconciled with the fundamental political decisions of the Basic Law."[21]

[20] Michael Brand, Kerstin Griese, Kathrin Vogler, et al., "Entwurf eines Gesetzes zur Strafbarkeit der geschäftsmäßigen Förderung der Selbsttötung," Deutscher Bundestag Drucksache 18/5373, July 1, 2015, 2.
[21] Brand, et al., "Entwurf eines Gesetzes zur Strafbarkeit der geschäftsmäßigen Förderung der Selbsttötung," 3.

Next come the words that actually led to penal code 217:

> The draft proposes the creation of a new criminal offense in the penal code, § 217 StGB-E, which in paragraph 1 criminalizes the commercial promotion of suicide. According to paragraph 2, relatives or other persons close to the suicidal person who merely identify as not participating in the act are to be exempted from the criminal sanctions.[22]

In proposing section 217, they reference a 2012 proposal (that did not pass the Bundestag) that banned assisted suicide in any and all cases, using the comparison to say that this bill is more lenient and therefore should be more acceptable.

In the justification for this bill, autonomy is used as a reason for people *not* to end their life. The authors fear people being pressured into assisted suicide, and note that the elderly and sick are most vulnerable to the "concern that they are a burden to their own relatives"[23] and "Especially in older people, depressive illnesses are often not recognized or not recognized correctly and accordingly not or only insufficiently treated."[24] There seems to be a great concern among the drafters that rather than genuinely desiring to end their life via assisted suicide due to a terminal diagnosis, those who will be influenced into the practice are experiencing an untreated mental illness and/or general loneliness. They also repeatedly cite a release from the German Ethics Council recommending "statuatory strengthening of suicide prevention."[25]

Something that I found especially compelling about this proposal was this particular set of lines:

> A broad social debate about dying and death in society is also required. Everyone and each individual and society as a whole should take the opportunity to express themselves openly and early on to deal with dying and death as fearlessly as possible.[26]

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[22] Ibid., 3.
[23] Ibid., 8.
[24] Ibid., 8.
[25] Ibid., 8.
[26] Ibid., 8.

What is especially curious about these words is that, once again, those in favor of banning assisted suicide have flipped proponents of the practices' sentiments for their own purposes. Many who support the practice say that it should be legal and regulated because it is part of a larger conversation about what to do at the end of life, when an illness can no longer be cured, and this logic was, in fact, one of the major causes of this topic being selected for this project. The writers go on to describe how other methods of end-of-life care, such as palliative care and hospice, should be emphasized over assisted suicide, and,

> The possibilities of a power of attorney or a living will must also be better and more comprehensive to be informed. These aids and instruments to strengthen autonomy even at the end of life can help to increase security and strengthen one's own decision as to whether and which medical procedures are desired or should be avoided.[27]

It is worth mentioning here that they explicitly approve of passive euthanasia, which falls under palliative care's umbrella. Once again, a different version of autonomy takes center stage and serves as a backdrop for their justifications, and the fear of these authors is that people are too easily influenced, especially when in a vulnerable state, to truly make autonomous decisions about end of life. They even fear that evaluation by a physician on whether someone is fit for assisted suicide may not be adequate, as physicians can be biased or may make incorrect judgements. They believe that a law must be put in place to prevent the practice because,

> It cannot be trusted that the general police and regulatory law, the narcotics law, or medical professional law offer a sufficiently secure legal framework to deal with professional suicide promotion. A criminal prohibition norm can be much more precise in this respect to determine the content and limits of what is prohibited.[28]

Throughout this work, I will be referring to this proposal as "Gröhe's bill" or "Gröhe's proposal." While the head writer is Michael Brand, Gröhe was the federal minister of health during the 2015 debates, and he was one of the drafters of this proposal. As one of the other bills

[27] Ibid., 9.
[28] Ibid., 14.

was drafted in part by now-minister of health Karl Lauterbach, and there was another minister of health between the 2015 debates and the 2022 debates, I find it useful in this context to characterize the bills that included those in these positions by their involvement.

Proposal by Sensburg and Others: Draft law on criminal liability for participation in suicide

Of the two bills presented to the Bundestag that advocated for banning assisted suicide, the stricter of the two was head-drafted by Patrick Sensburg of the CDU. Entitled "Draft law on criminal liability for participation in suicide," at first glance it looked similar in nature to the other law proposing the banning of the practice. However, its language advocated for something more than a ban on assisted suicide: Sensburg and the other drafters opposed suicide completely. The text of their proposed addition to the criminal code read:

> § 217: Participation in suicide. (1) Anyone who instigates another to kill himself or assists him in doing so will be punished with imprisonment of up to five years. (2) The attempt is punishable.[29]

With this language, not only would the person assisting in suicide be punishable; the person attempting suicide with assistance would also face criminal liability.

Throughout the draft, there are a few reasons given for the strength and intensity of the proposal. The drafters fear that suicide "encourages imitation,"[30] suicide causes immense guilt among those who have a relationship with the deceased, and "suicide is not the normal end of life."[31] In terms of the question of self-determination and autonomy, the drafters argue that these two principles are moot points; death leads to the end of autonomy, they write, meaning that autonomy doesn't need to be considered when critiquing their bill.

[29] Patrick Sensburg, Thomas Dörflinger, Peter Beyer, et al., "Entwurf eines Gesetzes über die Strafbarkeit der Teilnahme an der Selbsttötung," Deutscher Bundestag Drucksache 18/5376, June 30, 2015, 5.
[30] Sensburg, et al., "Entwurf eines Gesetzes über die Strafbarkeit der Teilnahme an der Selbsttötung," 7.
[31] Ibid., 7.

When considering the medical uses of assisted suicide, the drafters argue that not even doctors should be allowed to carry out assisted suicide (although passive euthanasia will still be permitted under their proposal), for two primary reasons. First of all, they posit that physicians will face an undue emotional and psychological burden if they have to decide whether or not to provide a patient with lethal drugs. Secondly, they believe that doctors will no longer be fulfilling their duties as a physician if they actively aid a patient in dying:

> During the license to practice medicine, the doctor takes the Geneva doctor's pledge. Here it says, among other things: 'My patient's health should be the top priority in my actions.' Should a doctor carry out assisted suicide, the health of his patient is no longer the top priority of his actions.[32]

This bill demonstrates a key issue that I find within the debate and briefly mentioned in the introduction to this work is the use of the term "suicide." This bill lacks significant substance, as it focuses on what leads someone to taking their own life and the ramifications of that. This bill possesses less similarities to the other draft law banning assisted suicide than it does upon first glance, but both bills are comparable in that they permit the continued use of passive euthanasia. Interestingly, this proposal explicitly bans even doctors from the practice, while the previous bill uses the term "businesslike," which the authors would claim did not prohibit doctors from participating in assisted suicide but in practice would. The term "businesslike" extends from concern about euthanasia organizations (which are non-medical entities seeking to assist in suicide) and repeated use of the practice (which is typically a part of the definition of "businesslike" in the debates).

Proposal by Künast and Others: Draft law on the impunity of assisted suicide

[32] Ibid., 9.

Of the two proposed bills regulating assisted suicide, one was once again looser than the other; the first and more lenient of these was headed by Renate Künast of the Greens. Here we see another proposal that is far more complex than it initially appears. The drafters write that,

> The purpose of this law is 1. to determine the conditions for assisted suicide, 2. to clear up the legal uncertainties for individuals and organizations providing, 3. to make it clear for physicians that they may provide assisted suicide, and 4. to establish rules for organizations whose purpose is to provide assisted suicide.[33]

The established rules are fairly comprehensive, albeit similar to other proposals attempting to regulate the practice. Those seeking assisted suicide must receive counseling from a doctor regarding their interest in the practice and other options, such as hospice and palliative care, and then fourteen days must elapse before the patient is provided with the prescription for lethal drugs. The drafters acknowledge that pre-existing bans on the sale of lethal narcotics may cause some issues, but that that is out of the purview of their proposal; it "represents a challenge for the legislator."[34]

The drafters emphasize that their proposal only allows doctors to carry out assisted suicide; those who are not medical professionals, even those who are members of euthanasia organizations/businesses are legally obligated under this proposal to refer those who ask them about the practice to a doctor. Doctors are not, however, under any obligation to perform assisted suicide; they have the option to, but if they are not comfortable prescribing lethal drugs to a patient, they are allowed to refuse the request and refer the patient elsewhere.

A point this draft makes several times is that the drafters believe it is not in conflict with any pre-existing laws surrounding suicide. Suicide itself is not punishable by law in Germany and has not been for the entirety of Germany's history. They also cite EU law:

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[33] Renate Künast, Petra Sitte, Kai Gehring, "Entwurf eines Gesetzes über die Straffreiheit der Hilfe zur Selbsttötung," Deutscher Bundestag Drucksache 18/5375, June 30, 2015, 3.
[34] Künast, et al., "Entwurf eines Gesetzes über die Straffreiheit der Hilfe zur Selbsttötung," 1-2.

> The European Court of Human Rights has ruled from Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the right to respect for private life, that a human is entitled to decide when and in what form his life should end, provided that this person is able to make a free decision about it.[35]

This bill is perhaps the most liberal of all the proposals. The drafters emphasize self-determination, dignity, and personal well-being as the protected goods underneath their law. They also advocate for "compassionate mercy"[36] and write that "Criminal law is not the place to make your own worldview or religion the yardstick for others. The individual is sovereign of his own life."[37] What is especially interesting about this statement is that some speakers in the debate for other bills explicitly stated that they were being guided by the principles of their personal religion to draft and support legislation that would prohibit or limit the rights of others; the secular nature of the German state came up repeatedly throughout the debates.

Proposal by Hintze and Others: Draft of a law to regulate the medically supervised termination of life

The proposal for the final bill of those brought to the floor in July 2015 begins off with a definitive declaration of what the drafters see as a key problem: "Medical advances have made it possible to extend human life and led to an improvement in the quality of life. At the same time, the medically-enabled life extension creates new challenges in terms of disease-related ailment in the dying phase."[38] The drafters posit that palliative care will never be enough to address the most desperate of situations. This bill also mentions that Germany is in the midst of an ongoing demographic crisis, as the country has a rapidly aging population. This bill also references the Basic Law, which, to go back to my point about autonomy earlier, includes self-determination of

[35] Ibid., 9.
[36] Ibid., 7.
[37] Ibid., 7.
[38] Peter Hintze, Carola Reimann, Karl Lauterbach, et al., "Entwurf eines Gesetzes zur Regelung der ärztlich begleiteten Lebensbeendigung (Suizidhilfegesetz)," Deutscher Bundestag Drucksache 18/5274, June 30, 2015, 1.

life, but this principle is used in different ways by both sides of this debate–"Within the scope of application of the Basic Law, every person enjoys powers of action basically a comprehensive freedom of disposition with regard to one's own life. In particular, suicide and, as a result, assisted suicide are allowed under the provisions of the Criminal Code."[39]

However, the usage of the Basic Law goes in a completely different direction after that. The drafters reference pluralism, a system where multiple principles exist, as a reason that assisted suicide should be not banned but regulated, as, "It is the responsibility of the state of the ideologically neutral Basic Law, in the event of a legal regulation of medically assisted suicide, to provide sufficient space for individual conscience and to let decisions be guided by individual religious convictions."[40] They posit that, in order for physicians to actually be able to help patients in these situations, so that patients can utilize self-determination, they should have a clear set of legal guidelines regulating the practice. They also reference that if patients can create documents such as living wills and advanced healthcare directives, they ought to be able to make decisions related to assisted suicide.

In many ways, this proposal functions as a mirror to Gröhe's, *Draft law on the criminal liability of the businesslike promotion of suicide*. The drafters emphasize, like the drafters of his bill, that the practice should only be allowed in certain, well-defined circumstances:

> The principle of impunity notwithstanding, assisted suicide should only be a medical suicide assistance allowed by law and therefore protected from possible professional sanctions. If the patient is of legal age and able to consent, the medical assistance provision is voluntary, given that comprehensive counseling of the patient has taken place and the presence of an incurable, irreversibly fatal illness has been confirmed by another doctor.[41]

[39] Hintze, et al., "Entwurf eines Gesetzes zur Regelung der ärztlich begleiteten Lebensbeendigung (Suizidhilfegesetz)," 2.
[40] Ibid., 3.
[41] Ibid., 4.

The two proposals utilize the same principles, and in some ways, have similar end goals. Gröhe's proposal seeks to limit the practice by banning it and introducing exceptions, while this proposal seeks to regulate the practice instead of creating extra hoops to jump through to utilize it. In many ways, this is useful when trying to analyze the debate that the two sides have more in common than they believe they do.

Much like Gröhe's bill, for the rest of this work I will be referring to this proposal as "Lauterbach's law" or "Lauterbach's bill." As with Gröhe's bill, I find it useful to be able to follow the debate via its major players. Lauterbach's role in the debates around assisted suicide is perhaps even more pronounced than Gröhe's; in addition to serving as a drafter of a bill in the 2015 debates, when the debates resumed following the repeal of § 217, he drafted a bill that was debated in the Bundestag in April 2021. He has served as Germany's Federal Minister of Health since December 2021 and in that position drafted yet another piece of legislation regarding assisted suicide in June 2022.

July 2015 Debates: Four Bills, Two Possible Outcomes

On July 2, 2015, the four bills outlined here were debated on the Bundestag floor. Within the debate, various themes emerged. These included the importance of strengthening palliative care and increasing access to hospice services, the fact that assisted suicide is a topic that affects everyone, death being a taboo subject in society, the hope for clarity around the issue following the debates, fear of "euthanasia tourism" (Germans going to other countries to access assisted suicide), the Bundestag as the advocate of the citizens of Germany, and that end-of-life experiences are not generalizeable. Something that all sides agreed upon as well and expressed

was that, no matter the outcome of the debate and any subsequent discussions, there would be profound changes in society.

At the core of this debate is autonomy as put forth in the Basic Law. Much like in the draft laws themselves, the right to personality and self-determination present in the German constitution reverberates throughout the arguments on both sides of the debate. Those in favor of bans fear that pressure on the sick and elderly to use assisted suicide will reduce their ability to self-determine, while those opposed to bans and in favor of allowing the practice believed that banning assisted suicide would reduce the ability to self-determine. As mentioned previously, these two arguments were functionally flip sides of the same coin. The biggest conflict came over the same question: how do we as a society best help the sick, and how do we best serve the need for self-determination and death with dignity?

Something that emerged in the debate that was not a theme of the discussion, per se, but instead simply something interesting to note was the repeated use of a series of metaphors throughout the debates. In this debate, it was the "door" metaphor. Michael Brand first used it, saying that the door to the regular use of assisted suicide shouldn't be opened, when defending Gröhe's bill, and it escalated from there. The terminology was eventually used to defend Gröhe's, Künast's, and Sensburg's proposals. This is a series of actions that would repeat in later debates, most notably with the debaters as a whole seizing on metaphors of "dams" and "swords." This debate was, for the most part, civil. There were a few interruptions that were referenced by other speakers, but the focus of the debate remained on the bills themselves. This was a trend that would not necessarily continue through the rest of the debates around assisted suicide. As previously mentioned, this is a deeply personal issue, and tensions flared as voting

got closer in November 2015, but in July 2015, the opposing sides were not yet at each other's throats (to use another metaphor).

Proposal by Brand and Others: Draft law on the criminal liability of the businesslike promotion of suicide ("Gröhe's law")

For the speakers defending Gröhe's law, one theme emerged that was not mentioned by any other groups: religion, or, to be more specific, Christianity. Perhaps this should not come as a surprise, as Brand, the head drafter, and Gröhe, the then-Minister of Health, came from the CDU, but the bill had many other speakers. In fact, one of the speakers who explicitly mentioned religion ("I think that life comes from God and man does not have the right to end it himself."),[42] Kathrin Vogler, came from the Left. Claudia Lücking-Michel of the CDU cited that allowing assisted suicide goes against the Christian image of man."[43] This sentiment towards Christian belief as a reason for opposition to assisted suicide links to the emphasis by speakers for this bill on a "natural" death. As Johannes Singhammer of the CDU said in his speech, "As a Christian I say for myself personally: I pray for a natural final end."[44]

In that vein, speakers for this bill placed a heavy emphasis on the importance of increasing access to palliative care, theorizing that, as there are treatments that can bring comfort at the end of life, access to assisted suicide is not really a necessity; "We know about the great possibilities of modern palliative medicine, and we know about the beneficial effects of the hospice movement."[45] Kerstin Griese, the second author of the bill after Michael Brand, cited in her speech that the drafters had consulted with the German Palliative Foundation, the German Hospice and Palliative Association, the German Foundation for Patient Protection, and "many people" that were hospice patients or palliative care patients. For the supporters of Gröhe's bill,

[42] Deutscher Bundestag, "Stenografischer Bericht 115. Sitzung," Plenarprotokoll 18/115, July 2, 2015, 11044.
[43] Deutscher Bundestag, "Stenografischer Bericht 115. Sitzung," 11061.
[44] Ibid., 11056.
[45] Ibid., 11038.

end of life supports like palliative care and hospice are essential to protect patients who may be in desperate situations.

In fact, supporters of Gröhe's bill characterize the desire to end one's life to be momentary, a feeling that someone only has when they feel overwhelmed. Harald Terpe of the Greens referred to suicidal ideation in his speech as an "existential crisis."[46] As a result, many of the speakers expressed fear that patients, especially elderly patients, could be pressured into assisted suicide in a moment of desperation, or when they perceived that they were a burden to others. They had concerns that allowing assisted suicide would lead to a normalization of the practice or more people utilizing it during moments of desperation. Their overall argument was that doctors were supposed to give their patients hope, not take it away, and allowing assisted suicide would remove that hope when a patient was in a desperate situation.

Something else worthy of note is that this is the only bill of the debate in which a speaker brought up Germany's past and the Nazi euthanasia program. I began this project with the belief that the Nazi euthanasia program would be a major influencing factor on positionality for or against assisted suicide, but this is the one and only time in my research that I located an explicit mention of the Third Reich–and even this mention is not very explicit. In her speech defending Gröhe's bill, Ulla Schmidt of the SPD said, "We in Germany can use this discussion to keep an eye on our past. Once there was organized collective euthanasia decreed by the state. We, as opposed to that, are talking about autonomy."[47] Those supporting Gröhe's bill put a heavy emphasis on autonomy throughout the 2015 debates, and this instance was no exception. In a way, Schmidt was comparing the Nazi euthanasia program to allowing assisted suicide in the modern context. Whether or not this is a valid comparison is a key question; once again, the

[46] Ibid., 11048.
[47] Ibid., 11057.

issue of false comparison emerges. While both the euthanasia program and assisted suicide involve the end of life, the euthanasia program involved the end of life against someone's will, whereas all proposals allowing assisted suicide included stipulations about required counseling and waiting periods before receiving the drugs. And then, even when one receives lethal narcotics, they're under no obligation to take them.

Proposal by Sensburg and Others: Draft law on criminal liability for participation in suicide

As with the bill itself, Sensburg's supporters took a bit of a different, and less equivocal, timbre than those speaking on behalf of Gröhe's bill. They shared in the themes that all of the bills shared, but otherwise, they spoke in broad strokes, with their most specific focus on, as in their bill, the use of the word "suicide." To begin their broad strokes, Patrick Sensburg himself stated that there are "many other European countries"[48] with similar regulations to what his group proposes; he specifically mentions Austria, Italy, Finland, Spain, Poland, and England. Focusing in on Germany itself, Sensburg cited a statistic (the validity of which could not be confirmed) that 93% of Germans already thought that assisted suicide was prohibited.[49] In Sensburg's world, his proposal just followed what he perceived as the norm.

He also felt, as he mentioned in the draft bill, that there was already a solution to the problem assisted suicide was solving: palliative care. During his speech, he said, "We know that strengthening palliative care is the correct approach."[50] This was a sentiment that was repeated by other speakers for the bill. Hubert Hüppe of the CDU expressed fear of "killing as therapy"[51] and doctors deciding who was and wasn't worth living.[52]

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[48] Ibid., 11043.
[49] Ibid., 11043.
[50] Ibid., 11043.
[51] Ibid., 11050.
[52] Hüppe also got interrupted several times during his speech and argued with those interjecting, leading the next speaker, Michael Freiser from the CDU in support of Gröhe's bill, to ask everyone to be respectful of each other.

Something that was mentioned in the draft law and then expressed again in the debates was the idea that life was the prerequisite for all goods. Thomas Dörflinger, of the CDU, stated this quite succinctly in his speech: "For me, life is the highest good that the constitution has to protect, because it is the prerequisite for all other goods to develop."[53] His further arguments were similar to that in the bill and could best be summed up, rather crudely, as that one can't have self-determination if they're dead, and allowing someone to kill themselves takes away their ability to self-determine. This logic does come with a few holes in it, in that the decision to pursue assisted suicide occurs before death, when one is still alive to, in the Sensburg universe, have the ability to self-determine, meaning that it does not violate the need to be alive before having any other goods.

There was an emphasis on the connotations of the word "suicide" in the speeches given by those supporting Sensburg's bill. While palliative care was mentioned, there was a minimal focus on the medical ramifications of assisted suicide. Rather, Sensburg focused on suicide prevention and the belief that it was more humanitarian to convince someone to live rather than take their life, Hüppe stated that, "Suicide is not an act of charity,"[54] and Dörflinger asked the other members of the Bundestag how they would feel if a loved one ended their life (a reflection of the issue of guilt mentioned in their draft) and expressed a belief that the desire to die when in pain was largely temporary.

Interestingly, Sensburg's bill had the least speakers come to the floor in support of it. Gröhe's had ten, Lauterbach's had seven, Künast's had four, and Sensburg's had only three. There was also a sense (one that would continue into the November 2015 debates) that everyone had accepted that Sensburg's law would not pass. Rather, it seemed, it was perceived that his

[53] Ibid., 11047.
[54] Ibid., 11051.

group was there to make a statement. While their law likely wouldn't receive many supporters, they at least introduced their side of the argument into the conversation and made their voices heard.

Proposal by Künast and Others: Draft law on the impunity of assisted suicide

The four speakers who came to the floor in support of Künast's bill had five core tenets that they expressed through their speeches. The first of those was that assisted suicide was a topic that is personal to everyone. Künast expressed in her speech that she, as a former social worker, had seen many people at moments in their life where sickness was present and they felt like they had run out of options. While she noted that palliative care is an excellent resource, she also expressed a belief that it had limits and, when those limits were reached, then assisted suicide might step in as another potential resource. As everyone was likely to experience illness, and everyone eventually passes away, this topic was highly applicable to everyone's lives.

In that vein, Künast also expressed a desire for openness. This is one of the instances where the door analogy came up, as she spoke directly to Brand, saying that the door to assisted suicide had already been opened and that to close it now would be irresponsible. She also expressed a fear of "euthanasia tourism" if the practice was banned. Speaking on the topic of openness, Kai Gehring of the Greens said, "A humane society needs empathy; because nothing is more terrible than losing a loved one."[55] While some might believe that this statement was contradictory to advocating for assisted suicide, this links to another point made by speakers for Künast: they feared over-romanticizing a "natural-death," with the belief that assisted suicide could be used for circumstances where dying "naturally" could be incredibly painful for the person dying; Gehring noted that every patient has their own "personal definition of dignity."[56]

[55] Ibid., 11049.
[56] Ibid., 11050.

At the core of the argument made for this bill was that everyone would eventually die–dying is a part of life–and that everyone ought to be able to make their own personal decision about the end of their life. Gehring expressed this sentiment in his speech, saying, "Our draft law on impunity of assisted suicide secures those willing to die maximum self-determination and legal certainty."[57] Petra Sitte of the Left spoke of the importance of dignity, freedom, and self-determination in her speech defending the bill, and Detlef Müller echoed that sentiment, saying, "Life, death, and dignity are humanity's highest goods."[58] Müller also noted that everyone participating in the debate believed in the importance of autonomy and dignity, but that they were all approaching the issue from different directions. This links to the idea of both sides being mirror images, or perhaps flip sides of the same coin. To borrow from an oft-used analogy throughout the debate, the two sides were standing on either side of a door, with one side trying to push it open and the other trying to pull it closed.

Proposal by Hintze and Others: Draft of a law to regulate the medically supervised termination of life ("Lauterbach's law")

At the heart of Lauterbach's law were doctors, which made sense, as Lauterbach himself is a doctor. The speakers defending this bill had four main points, three about their bill and one about the debates as a whole. Their issue with the debates as a whole had to do with Gröhe's proposal; this, of course, made some sense, as they were on opposing sides of the debate, but the issue was less with the position of speakers supporting Gröhe's bill and more with the wording of the bill itself–specifically, the term "businesslike." This debate over terminology would intensify in November 2015, but at this point things were already tenuous. The word used in German was "geschäftsmäßig," and specific issues with the term in the context of this debate itself were later discussed in the article "The meaning of the adjective 'businesslike' in legal and mass media

[57] Ibid., 11050.
[58] Ibid., 11054.

colloquial usage" (originally published in German) in 2019, before Section 217 was repealed. Much like the speakers for Lauterbach's bill, the authors of the article posited that the drafters of Gröhe's bill intentionally used a term that created a legal gray area, where doctors weren't explicitly banned from assisting in suicide, but one could view a physician's practice as a "business" and therefore assisting in suicide as "businesslike."[59] Another term that may be useful in conceptualizing the meaning of "businesslike" in these debates is "quasi-commercial." Assisted suicide under the Gröhe bill could be considered a quasi-commercial issue because while euthanasia organizations and doctors are not necessarily commercial entities, the repeated use of the practice and the generation of income off of said practice could be considered commercial–hence the heavy debates around the use of "businesslike."

In his speech, Peter Hintze of the CDU (the first drafter on the bill), said that the word "businesslike" could also be related to actions that were repeated, i.e. it might be permissible for someone to assist once, but not multiple times, and as a doctor might see more than one patient experiencing circumstances leading to seeking assisted suicide, that would count as "businesslike." Other speakers for Lauterbach's bill, including the CDU's Katherina Reiche and the SPD's Carola Reimann, expressed that Gröhe's bill created legal uncertainty, and Lauterbach himself noted that this legal uncertainty affected all doctors, including him, and that he felt like if passed the bill would limit doctors in helping patients.

On that note, the speakers expressed the importance of the doctor-patient relationship, and the belief that that relationship couldn't be properly cultivated if doctors were criminalized by unclear regulations. Katherina Barley of the SPD said in her speech that, "They (doctors) usually know the patients well and for a long time, know their suffering, and can talk to them

[59] Friedemann Vogel, Benjamin Bäumer, Fabian Deus, et al., "Die Bedeutung des Adjektivs geschäftsmäßig im juristischen Fach- und massenmedialen Gemeinsprachgebrauch," *LeGes* 30, no. 3 (2019).

about what's in store for them."[60] She also expressed a belief that, if patients couldn't speak to their doctors about what they were going through for fear of their doctors being criminalized, it would lead to tragedies "all the greater."[61]

They also noted, much like Künast, that there are limits to palliative care. Barley noted, much like Gehring, that, "We too shall die - all of us."[62] Lauterbach said that many people are afraid of death and don't want to talk about it, but everyone, many of the speakers stated, wants to die with dignity. As everyone is different, and therefore has a different definition of death with dignity, why close off the available options? As Lauterbach said, "We must make a law for many people and not against very few."[63] Reimann noted in her bill that part of allowing people autonomy, something every side in the debate advocated for in their own way, was to not "dictate…how much loss of control they have to endure."[64]

What was most interesting about those defending this bill is that while they did in some ways address why they believed their bill was the optimal choice for the German people–a clear set of regulations and an aide when other types of care couldn't fill in the gaps–they spent most of their speaking time refuting Gröhe's bill, paying no attention to Sensburg's proposal. Based on the number of speakers for each bill and the way the debates shaped themselves, it seemed a foregone conclusion that either Gröhe or Lauterbach's bill would win the vote; it was merely a question of who could be the most convincing.

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[60] Deutscher Bundestag, "Stenografischer Bericht 115. Sitzung," Plenarprotokoll 18/115, July 2, 2015, 11060.
[61] Deutscher Bundestag, "Stenografischer Bericht 115. Sitzung," 11061.
[62] Ibid., 11060.
[63] Ibid., 11053.
[64] Ibid., 11045

November 2015 Debates: One Bill Becomes a Law

On November 6, 2015, the final debate on the four proposals from July occurred. It is worth noting that the day before this discussion the Bundestag passed the Hospice and Palliative Care Improvement Act. This created a complicated backdrop, as those hoping to regulate assisted suicide instead of banning it had used the belief that palliative care wasn't always enough as one of their talking points; now, palliative care had, at least in the realm of policy, been strengthened. The debate that took place on this day was also noticeably less civil than the one in July, although there were some similar themes that emerged. Once again, a metaphor was used throughout the debate; in this instance, it was the "sword" of criminal law. The debate also primarily focused on Gröhe and Lauterbach's laws, with a special emphasis on the term "businesslike." At the heart of every speech was a sentiment that the debates, regardless of what ended up occurring, had changed the sociopolitical landscape of Germany in some way. Death had been, as Michael Brand put it in his speech, "pushed out of the taboo zone."[65]

None of the sides offered any particularly new arguments, as they were debating the same bills as before. What was notable was that in this debate there were technically five options: select one of the four bills and enshrine it into the criminal code, or none of the bills would end up with a majority, meaning that the regulations already enforced would remain in place and things would remain as they were. In this debate, three speakers came to the floor on the behalf of this fifth option: Katja Keul from the Greens, Sabine Sütterlin-Waack of the CDU, and Brigitte Zypries of the SPD. Keul and Sütterlin-Waack expressed similar beliefs that the regulations already surrounding assisted suicide should remain in place, as the issues with assisted suicide were, in their opinion, small and isolated.

[65] Deutscher Bundestag, "Stenografischer Bericht 134. Sitzung," Plenarprotokoll 18/134, November 6, 2015, 13070.

Zypries, on the other hand, offered a speech that, for being five minutes long, packed in an incredible amount of information. Zypries formerly served as a Federal Minister of Justice; the Ministry of Justice in Germany oversees the Constitutional Court, and also analyzes whether or not laws that are brought forth by other groups are legal and constitutional. In her speech, she offered a legal assessment of every bill and reasons that she thought the bill might be challenged if codified into law, based on her training and experience. Sensburg's proposal was, in her opinion, likely unconstitutional due to the fact that it went against precedent and made the attempt in an assisted suicide situation a criminalizable act. She believed that Lauterbach's law was unnecessarily complicated and that doctors might face issues with regulation if assisted suicide became a widespread practice. Künast's law was not as controversial in her mind, but she felt like other terms that could be used to replace "businesslike" offered similar complications–which was the reason she expressed dislike for Gröhe's proposal. She cited that unclear term would likely open Gröhe's bill up to lawsuits. At the end of her speech, she directly addressed Gröhe:

> Mr. Gröhe, you said earlier: We need a wise application of the law. I can only say: You are absolutely right about that. The only problem is: the legislature no longer decides on this. The legislature makes a law, and application is incumbent, then the courts have to deal with those who complain against it.[66]

In many ways, this debate seemed like a self-fulfilling prophecy for the drafters and supporters of Gröhe's bill. The very thing that much of it centered around–the term "businesslike"–was the very thing that would eventually lead to its repeal. In some ways it seemed like the speakers knew this, but that didn't matter; they knew that they would win the votes and their proposal would become reality. One of the speakers for Gröhe even accused Lauterbach's speakers of criticizing the term "businesslike" instead of offering support for their

[66] Deutscher Bundestag, "Stenografischer Bericht 134. Sitzung," 13087.

own bill because they were unable to support it.[67] And perhaps that was the case, perhaps those advocating for Lauterbach's bill knew that they wouldn't win–so they might as well poke holes in their opponent's case. It seemed, however, that the holes were already there; the draft had been designed to have holes, but those holes would eventually cause the policy to cave in.

Codification of Section 217

Despite the fact that there were many complaints about "Draft law on the criminal liability of businesslike promoting suicide," on that same day, the vote was conducted and that bill won. On the first round of voting, the voting record was as follows:

Gröhe's Bill	309
Lauterbach's Bill	128
Künast's Bill	52
Sensburg's Bill	37
No to All Bills	70

As Gröhe's proposal not only received more votes than the other choices, but also more votes than all other choices combined (287 votes), there was a second vote to actually pass the bill instead of more rounds of voting to choose a bill. The voting record was 360 yes votes, 233 no votes, and 9 abstentions. It was not quite the overwhelming majority that the drafters could have hoped for, but it had passed, and for the time being, the assisted suicide debate was settled. In early December 2015, the bill was officially codified, and § 217 joined the criminal code. The final wording was as follows:

[67] However, another speaker for the bill noted that they–Gröhe's fellow drafters–had consulted with legal experts to determine if "businesslike" was unclear, indicating that they had doubts about their own legislation.

> § 217 Facilitating suicide as recurring pursuit
>
> (1) Whoever, with the intention of assisting another person to commit suicide, provides, procures or arranges the opportunity for that person to do so and whose actions are intended as a recurring pursuit incurs a penalty of imprisonment for a term not exceeding three years or a fine.
>
> (2) A participant whose actions are not intended as a recurring pursuit and who is either a relative of or is close to the person referred to in subsection (1) is exempt from punishment.[68]

Section 217 immediately faced challenges, and those challenges would eventually lead to a hearing with Germany's Constitutional Court and an official repeal of the section in February 2020. At the heart of that decision would be the three key issues in the 2015 debates: human dignity, the right to personality, and unclear language use. These challenges would be one that had been brought up throughout the debates and in some ways; indeed, the issues of human dignity and the right to personality were hotly debated as the ultimate decision of the Constitutional Court would serve as ruling to which side actually had the most "rights" in the debates. Nevertheless, for the moment, the Bundestag had spoken, and from 2015 until 2020, the ban on assisted suicide remained in place.

[68] Federal Ministry of Justice, "German Criminal Code (Official English Translation," Federal Office of Justice, last amended November 22, 2021.

Chapter Three: Re-Legalizing Assisted Suicide: The February 2020 Repeal of Criminal Code Section 217

For the roughly four years between the codification of § 217 in December 2015 and its subsequent overturn in February 2020, the issue of assisted suicide in Germany was seemingly settled. However, the legal landscape was still murky and there was a lack of true clarity regarding the legality of the practice. This chapter will cover the repeal of section 217; in the headnotes to the decision and the press release regarding the repeal, the court emphasizes a link between autonomy, self-determination, and human dignity. Those analyzing and commenting on the decision note that the decision has brought up a myriad of questions regarding next steps for assisted suicide legislation; the Constitutional Court shifted the debate from the legality of assisted suicide to its regulation. The decision is also significant in that it shows an evolution of Constitutional Court decision-making processes and a reorientation of the court regarding the links between human dignity and the right to life. Previously, the Court had used the principle of human dignity to reinforce the idea that life-ending measures were unconstitutional (typically in cases involving abortion); however, in this case, the Court ruled that permitting life-ending measures was, in fact, constitutional and that the banning of them would be unconstitutional. This chapter will begin with an exploration of the background to the repeal using Constitutional Court documents, along with other interviews, and will then move onto an analysis of the headnotes of the court's decisions. Following that, I will then look at responses to the court's decision and conclude with a discussion of the influential nature of the decision and where the debates have gone since the release of the decision.

Background to the Repeal

Following the final debate and vote in November of 2015, there were instant challenges to § 217. On December 3, 2015, a group of four lawmakers filed a preliminary injunction against § 217, in hopes of stalling the codification. Section 217 became a part of the criminal code on December 10, and on December 21, the Constitutional Court released a decision rejecting the injunction. However, that did not prevent the pushback against § 217 from continuing. In 2016, a report from the Bundestag's Committee on Legal Affairs and Consumer Protection was filed that requested information on a variety of Constitutional Court disputes, including the case against § 217. It was filed by Renate Künast, who was a key drafter of one of the bills aiming to regulate (rather than ban) assisted suicide and who also served as chairwoman of the committee from 2014-2017.

As the case progressed, more challenges emerged, including in the positionality of one of the judges on the issue of assisted suicide. Peter Müller, who had been on the Constitutional Court since 2011, was removed from the proceedings owing to "circumstances that may give reason to doubt the impartiality of the judge."[69] Beginning in 2001, when he was the Prime Minister of Saarland, Müller had publicly decried euthanasia and assisted suicide. This in of itself was not considered an issue by the Constitutional Court, as they recognized that the judges on the court came from a variety of backgrounds and political parties and would therefore have differing views. However, what did cause issues was that in 2006 then- "Prime Minister Müller sent the draft of a law prohibiting the commercial brokering of opportunities for suicide"[70] to the Bundesrat. This specific law did not pass, but "Section 217 of the Criminal Code that is the

[69] Deutsches Bundesverfassungsgericht, "Pressemitteilung Nr. 11/2018: Verfahren zum Verbot der geschäftsmäßigen Förderung der Selbsttötung (§ 217 StGB) wird ohne Mitwirkung von Bundesverfassungsrichter Müller entschieden," March 13, 2018.
[70] Deutsches Bundesverfassungsgericht, "Pressemitteilung Nr. 11/2018."

subject of the proceedings is based on a draft law that largely corresponds to the draft submitted by Prime Minister Müller in 2006 and repeatedly refers to this."[71] As Müller had publicly not only espoused but actively advocated for a legal opinion that pertained to the case, he was removed.

Much of the proceedings are difficult to access owing to the Constitutional Court's data protection laws. The court's website notes that personal information will only be used "to the extent necessary to perform the duties of the Federal Constitutional Court"[72] and that only specific employees of the court that are considered a part of the proceedings are allowed to access personal data. What is known about the proceedings is that they took about a year from the complainants bringing forth their grievances to the court to the final decision. First, the court heard oral arguments and received statements from a variety of professional organizations associated with the issue. Some of the complainants were Swiss, and those arguments were thrown out, as Germany does not recognize constitutional rights for non-residents of Germany. However, there were still some complainants left, both patients seeking to utilize the practice and physicians. Their main issue with 217 was a perceived lack of clarity; patient complainants stated that it was unclear if they were able to use assisted suicide underneath the law, and physicians stated that it was unclear if they were able to offer the treatment to the patients. In a way, this was what the drafters of what would become 217 had intended–while the law did not explicitly ban assisted suicide, it technically fell under their "businesslike" banner, and when defending the bill in the Bundestag, the drafters explicitly stated that they hoped to also prohibit assisted suicide with their bill.

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[71] Ibid.
[72] Proceedings, "Information regarding data protection in court proceedings and in matters of judicial administration," Deutsches Bundesverfassungsgericht.

One of the complainants was a man by the name of Dr. Gerhard Strate. Strate was a part of the proceedings as a representative of the Swiss chapter of DIGNITAS (the motto of which is "Live with Dignity–Die With Dignity.")[73] As a representative of a Swiss organization, Strate's arguments were rejected by the court, but following the release of the decision, he conducted an interview with the *Saarland Lawyer's Journal*. In some ways, Strate's interview was interesting; while defending the right to assisted suicide, he was also defending his perception that, despite representing a Swiss organization, his arguments should have been listened to in the German court, positing that if foreign legal entities find their rights violated in a country, they have the right to complain (although the Constitutional Court did not have the same perception). Nevertheless, in the interview, he offered some meaningful defense of assisted suicide and support for the court's overall ruling. Strate said that regulating instead of banning assisted suicide causes a decrease in what he terms "high-risk suicides"[74] and that people should be allowed the "dignity…to depart from life."[75] Strate emphasized that the decision to take one's life or not was extremely personal and cited a similar source as the Constitutional Court: "The self-determined decision on the continuation or termination of one's own life is an exercise of the general right to personality, but ultimately also an outflow of the human dignity guarantee."[76] He also called out those using personal religious beliefs to restrict assisted suicide, stating that "the constitutional understanding of the human dignity guarantee goes beyond Christian teaching,"[77] although he also acquiesced that there are difficulties in ensuring that someone is making a decision regarding assisted suicide voluntarily.

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[73] Marthe Gampfer, "Interview mit Dr. h.c. Gerhard Strate," *Saarländisches Anwaltsblatt* 2 (2019): 24.
[74] Gampfer, "Interview mit Dr. h.c. Gerhard Strate," 26.
[75] Ibid, 26.
[76] Ibid., 27.
[77] Ibid., 27.

While Strate's interview was conducted after the decision to repeal the 2015 ban on assisted suicide, the beliefs he held existed before February 26, 2020, and despite being pushed out as an official claimant, he still held a stake in the eventual outcome of the case. Strate wasn't the only one; at the heart of the assisted suicide debates was a handful of strongly held convictions based on personal experience, medical training, religion, family stories, and many more factors. However, under the judgment of Germany's top court, those convictions would be forced to bow to whatever the ultimate decision on the ban was; someone was going to have to lose.

Constitutional Court Repeal Issued on February 26, 2020

In the Constitutional Court's interpretation of the Basic Law, the decision to repeal the ban on assisted suicide is outlined at the start of the headnotes from February 26 as follows:

> a) As an expression of personal autonomy, the general right of personality (Art. 2(1) in conjunction with Art. 1(1) of the Basic Law) encompasses a right to a self-determined death.
>
> b) The right to a self-determined death includes the freedom to take one's own life. Where an individual decides to end their own life, having reached this decision based on how they personally define quality of life and a meaningful existence, their decision must, in principle, be respected by state and society as an act of personal autonomy and self-determination.
>
> c) The freedom to take one's own life also encompasses the freedom to seek and, if offered, make use of assistance provided by third parties for this purpose.

> Respect for the fundamental right to self-determination, encompassing self-determination in decisions regarding the end of one's life, of a person making the free and voluntary decision to end their life and seeking assistance to this end collides with the state's duty to protect the autonomy of persons wanting to commit suicide and, additionally, its duty to protect life, a legal interest of high standing.
>
> The prohibition of assisted suicide services in § 217(1) of the Criminal Code reduces the options for assisted suicide to such an extent that there is de facto no scope for the individual to exercise their constitutionally protected freedom.[78]
>
> The provision is incompatible with the Basic Law and void.[79]

The rest of the headnotes detail the arguments from the complainants, the information submitted by the drafters of what became 217, and how, at each juncture, they are using the right to personality and a self-determined life. In essence, they believe that the law isn't clear enough and bans too many things too broadly to serve as adequate regulation for the practice. In short, as they put plainly in the headnotes, "The burden § 217 StGB imposes on persons wanting to die goes beyond what is reasonable."[80] As a ruling centered around tenets put forth by the Basic Law, the *Bundesverfassungsgericht's* ruling on the matter was not markedly impassioned or leaning in a certain political direction. What it declared in essence was that 217, as it stood in its wording and practical application, was unconstitutional. They also bolstered their argument by noting that their ruling was in accordance with the European Convention on Human Rights and

[78] Deutsches Bundesverfassungsgericht, "Leitsätze Zum Urteil des Zweiten Senats vom 26. Februar 2020, 2 BvR 2347/15, 2 BvR 651/16, 2 BvR 1261/16, 2 BvR 1593/16, 2 BvR 2354/16, 2 BvR 2527/16," February 26, 2020, 1.
[79] Deutsches Bundesverfassungsgericht, "Leitsätze Zum Urteil des Zweiten Senats," 1.
[80] Ibid., 76.

the European Court of Human Rights and that, "Improvements in palliative care…cannot compensate for the disproportionate restriction of the individual's self-determination."[81]

At the end of their ruling, the court notes that this ruling does not mean that regulations of assisted suicide cannot be passed–in fact, they actively encourage regulations, as long as they follow the tenets of the Basic Law;

> It is not objectionable under constitutional law that the legislator derives a mandate to take action from its duty to protect personal autonomy in end-of-life decision-making…any legislative concept of protection must be guided by the notion– which is at the heart of the Basic Law… – of human beings as intellectual-moral beings that seek to freely pursue self-determination and personal growth.[82]

Interpretations and Impact of the Repeal

Needless to say, the ultimate ruling of the Constitutional Court in 2020 led to a wide variety of reactions. As *Die Zeit,* one of Germany's most prominent newspapers, wrote in an article released on the same day as the decision, "The verdict ends, at least for the time being, a bitter and highly emotional dispute over the legalization of euthanasia."[83] The author of the article also rightly noted that there were "no easy answers, no clear solutions, no obvious right and obvious wrong."[84] There was the confusing issue of the meaning of "businesslike"; some still held that the term was not restrictive to doctors, while others continued to espouse that it was. There was a gray area in that it was difficult, as Dr. Strate and many others throughout the debates noted, to determine if someone was voluntarily seeking assisted suicide or being pressured into taking part in the practice. As the author of the article pointed out, the debates on assisted suicide were not over due to the ruling; they were simply being redirected. Perhaps most interesting from the article was the fact that "so far as is evident, from 2015 to date not a single

[81] Ibid., 84.
[82] Ibid., 93-94.
[83] Heinrich Wefing, "Recht auf Tod," *Die Zeit,* February 26, 2020.
[84] Wefing, "Recht auf Tod."

criminal case has been brought on the basis of paragraph 217."[85] The ruling was, therefore, more symbolic than anything else, but for those invested in the debates, that symbolism was immense.

In his analysis of the Constitutional Court's decision for *Medizinrecht*, Universität Göttingen professor Gunnar Duttge posited that the reactions to the decision could be characterized as perceiving it to be either a "liberation blow" or a "defeat of humanity."[86] While believing that the outcome was, in some ways, inevitable ("Strange inconsistencies were attached to the criminal offense of 'commercially assisted suicide' from the outset"),[87] Duttge admitted that the decision did not make anything simpler for Germany. In a system like Germany's, the Basic Law is held above all else. As mentioned in the first chapter of this work, part of the reason that Germany did not transition to a new constitution after reunification was that the Basic Law was, and still is, entangled in all laws and law-making processes/decisions. Therefore, the Constitutional Court is the highest legal entity, because only it can decisively rule on the constitutionality of a law. Some, however, were upset at the decision of the court, with Duttge saying that opponents of assisted suicide viewed the ruling as "inflated autonomy,"[88] and this brings up a serious question: in a system where the Basic Law is the most important legal document, and there is a body that "enforces" the use of that document, what happens when someone disagrees with the body, especially on an issue as divisive as assisted suicide? Duttge writes that people cannot complain about the decision *because* it comes from the Constitutional Court, and that the court ultimately made the right decision based not only on his analysis of the term "commercial" or "businesslike," along with interpretations of autonomy and self-determination, but also because Germany is a republic, and he believes that, in a republican

[85] Ibid.
[86] Gunnar Duttge, "Anmerkung zu BVerfG, Urt. v. 26.2.2020 – 2 BvR 2347/15, 651/16, 1261/16, 1593/16, 2354/16, 2527/16," *Medizinrecht* 38 (2020): 570.
[87] Duttge, "Anmerkung zu BVerfG," 571.
[88] Ibid., 570.

system, it is better to allow people to regulate practices rather than banning them outright. With this logic, a similar question arises: if it's considered improper to disagree with the court and to ban things in Germany's government system, what does it mean for the state of the system in the future if lawmakers are upset with the court's choices and actively want to ban something?

In Urban Wiesing from Eberhard Karls Universitat Tübingen's "The Judgment of the German Federal Constitutional Court regarding assisted suicide: a template for pluralistic states?" the author notes, as other commentors mentioned here have, the significance of the decision in terms of court evolution: "The significance attributed to this judgment is not only due to liberalizing assisted suicide in Germany but also because the relationship between citizen and state is determined by the highest judicial authority."[89] The decision, in Wiesing's view, demonstrates the relationship between the citizen and the state. As Wiesing notes in his work, the job of the Constitutional Court is not to determine whether or not a law is moral; rather, the job of the justices is to determine whether or not a specific measure is legal, and therefore the court can demonstrate a "clear separation of personal ethical conviction and state intervention."[90] Germany is a pluralistic society, meaning that there are varying (and therefore pluralistic) ideas about what constitutes a good or "moral" death; it is up to, as other analysts noted, the individual to determine what a good death means for them. The state can intervene when they believe that someone is being forced towards assisted suicide, but they cannot intervene when someone freely chooses it. Wiesing closes his analysis with this: "The judgment is difficult to accept for those who cannot accept plurality."[91]

[89] Urban Wiesing, "The Judgment of the German Federal Constitutional Court regarding assisted suicide: a template for pluralistic states?" *Journal of Medical Ethics* 48 (2022): 542.
[90] Wiesing, "The Judgment of the German Federal Constitutional Court regarding assisted suicide," 543.
[91] Ibid., 545.

In the midst of the variety of reactions to the repeal of § 217, there was also a reaction, of sorts, from the Constitutional Court itself. On the same day as the release of the decision, the court issues a press release on the matter entitled "Criminalization of assisted suicide services unconstitutional." This press release focused on distilling the court's justification in making the decisions; while, for the most part, it repeats points expressed in the headnotes, it is also important that the information was condensed to be more readable for the general public. There is an emphasis on self-determination and autonomy, and it is even explicitly stated; when a person decides to end their own life via assisted suicide, "their decision must, in principle, be respected by state and society as an act of autonomous self-determination."[92] The authors of the release link together the right personality with the right to autonomy as well; "as an expression of personal autonomy, the general right of personality encompasses a right to a self-determined death,"[93] which is consistent with typical court decision-making processes, in which the right to personality is considered to be inextricably linked to the right to autonomy.

Of course, what is considered the most important in the decision is how it emphasizes human dignity. As mentioned in chapter one's discussion of the Basic Law and chapter two's analysis of the debates, human dignity is considered to be the highest value underneath the Basic Law and was therefore a key part of arguments both for and against assisted suicide in the 2015 debates; "Respect for and protection of human dignity and freedom are fundamental principles of the constitutional order."[94] Underneath the Constitutional Court's framework, human dignity is inalienable and is the starting point of every other right. The judges found in their analysis of § 217 that the law accounted to "direct interference"[95] of the right to personality (and therefore

[92] Deutsches Bundesverfassungsgericht, "Press Release No. 12/2020: Criminalisation of assisted suicide services unconstitutional," February 26, 2020.
[93] Deutsches Bundesverfassungsgericht, "Press Release No. 12/2020."
[94] Ibid.
[95] Ibid.

autonomy), meaning that "the measure requires constitutional justification."[96] Through the analysis to determine whether the measure was, in fact, constitutionally justified, the court found that it was not, because the ultimate decision should be, in their world, left to the person making the decision:

> The individual's decision to end their own life, based on how they personally define quality of life and a meaningful existence, eludes any evaluation on the basis of general values, …it is thus not incumbent upon the individual to further explain or justify their decision; rather, their decision must, in principle, be respected by state and society as an act of autonomous self-determination.[97]

What Does the Repeal Mean for Constitutionalism?

The controversial decision by the Constitutional Court brought up many questions for those on both sides of the debate. What the decision had established was this: assisted suicide could not be outright banned in Germany, although no one was obligated to participate in the practice, including doctors. The Bundestag, representing the people, was now charged with generating new legislation regarding the issue. While new legislation would not emerge until April of 2021, when it did, the two sides of the debate had narrowed as a result of the decision. As neither could ban assisted suicide after February 26, 2020, the two sides were now more in line with each other, although, as will be outlined in the afterword to this thesis, they would still use the same values of the Basic Law to support their argument. The values of the Basic Law, in turn, had been interpreted in the decision in a way that was evolutionary for the Constitutional Court. Having previously tied the right to life to human dignity, the court now chose to reorient and value self-determination and autonomy directly underneath human dignity instead. The objective now is for the Bundestag to come up with a new way to regulate assisted suicide that does not violate autonomy in the same manner.

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[96] Ibid.
[97] Ibid.

Afterword: Post-Repeal Progress

Following the repeal of § 217, Germany's Bundestag took nearly a year to address assisted suicide again; the discussions were in part derailed by the onset of the coronavirus pandemic, which brought other healthcare issues to the forefront of the Bundestag's docket. However, many of the issues related to the pandemic were also linked to discussions of assisted suicide, such as what to do with an aging and vulnerable population and the quality of nursing homes, hospices, and palliative care. As previously mentioned, in its February 2020 ruling that repealed Section 217, Germany's Constitutional Court charged Jens Spahn, then-Minister of Health, with creating new assisted suicide legislation. On April 19, 2021, the first piece of that prescribed legislation was released, led by Karl Lauterbach and Katrin Helling-Plahr, of the SPD and FDP, respectively. This may seem like an innocuous pair, but Karl Lauterbach became the Minister of Health under the 20th Bundestag, and while he and Helling-Plahr represented the governing coalition and the opposition, respectively, at the time of their April 2021 proposal, the SPD and FDP, along with the Greens, now make up the governing coalition, meaning that they are proverbially "on the same team."

Regardless of what was to come of Lauterbach and Helling-Plahr's partnership, the debate in the Bundestag on April 21, 2021, about the legislation was fierce. At face value, their legislation seems similar to the regulations surrounding the usage of physician-assisted suicide in other countries. The authors of the draft legislation note that, at the time of the writing of the bill, it is impossible to even get a prescription for lethal narcotics in Germany in the first place, so their first provision was to allow that to occur. They then discussed counseling centers and emphasized that while physician-assisted suicide is a decision that one should choose of their own free will and without pressure, patients should also receive counseling on other options for

their particular illness and for their mental health. Additionally, patients who have an "acute mental illness" would not be able to access physician-assisted suicide, per the legislation.

At the heart of the debate over this piece of legislation were a few key things; first, the Basic Law's protection of life was mentioned many times by both supporters and opponents of the practice. Supporters of assisted suicide used it as a justification, saying that, if the Basic Law protected life, then didn't it protect the ability of those alive to do what they wanted with their lives, i.e. the "right to personality?" On the other hand, opponents of assisted suicide looked at the protection of life at face value: protecting life means not creating legislation to allow people to end their lives. Volker Munz of the AfD even took it a step further in his speech, mentioning not only an opposition to assisted suicide but also to abortion. To Munz's point, many politicians from the more right-wing parties mentioned religion, specifically Christianity, in their speeches, much like in the debates from 2015.

In fact, the debate in April of 2021 was quite similar to the debate from nearly five years earlier in many other ways. The Basic Law's right to personality, self-determination, and life were once again at the center, and perhaps even more so owing to the decision from the Constitutional Court that centered around those very things. Those against assisted suicide once again feared normalization. "I fear that a disastrous new normal could emerge in which assisted suicide could become the norm if we set up suicide counseling centers nationwide, as other drafts call for,"[98] stated Kerstin Griese of the SPD, who had participated in the 2015 debates. There was an emphasis from both sides on suicide prevention and counseling–those in favor of assisted suicide wanted counseling so that people could determine if they actually wanted to follow through with the practice, whereas those opposed wanted it to be used as a preventative measure.

[98] Deutscher Bundestag, "Stenografischer Bericht 223. Sitzung," Plenarprotokoll 19/223. April 21, 2021, 28279.

The next time physician-assisted suicide came up on the floor was on June 24, 2022. In the week prior, four bills had been introduced: a cross-party proposal on suicide prevention, a proposal entitled “Draft of a law on criminal liability for commercial assistance suicide and to ensure the personal responsibility of the decision to commit suicide” (drafted, in part, by Gröhe), and a proposal that appeared in public announcement on more than just the Bundestag page, because it was also announced by the Federal Ministry of Health: “Draft law regulating assisted suicide,” written in part by Katrin Helling-Plahr and Karl Lauterbach. They were all up for discussion on that day in June, an eerie reflection of July debates seven years prior. The main difference at this point was that Germany had now been through a ban and a repeal, and far more debates, and the current Minister of Health supported physician-assisted suicide. The new draft proposal differed from the one from April of 2021 in very few ways.

Both sides in this debate had to work in the confines of the constitutional court’s ruling. If the opposing side, Gröhe’s, wanted to get another law through, they were going to have to equivocate. If they gave a little bit, they would get a lot. At the center of the debates between the proposals, at the core were similar principles as in previous debates, as in 2021. The fear of normalization was a constant, as was looking towards other countries for advice. There were multiple mentions of death with dignity, and the gap between the sides seemed to be narrowing in this respect as well. An especially powerful moment of the debate came when Helge Lindh of the SPD gave a speech in defense of Lauterbach and Helling-Plahr’s proposal. He advocated, as many did, for counseling and adequate information being given to patients, and said that death was a “deeply personal decision.”

Conclusion: Predictions for the Future

The 2015 assisted suicide debates in the German Bundestag, the codification of § 217 into law, and its subsequent repeal by the Constitutional Court in 2020 demonstrate an evolution in the interpretation of the Basic Law over time, especially as it relates to the principle of human dignity. When the Basic Law was originally ratified in 1949, the German people had just emerged from a period of rampant human rights violations and a profound lack of human dignity. The concept was enshrined into Article 1 and considered foundational as a way to turn the Federal Republic towards a newer, brighter future. Euthanasia was banned in the Basic Law for the same reason. However, the Federal Republic has now been in existence for over seventy years, and during that time, it has become one of the most prominent players on the global stage. The decision of the Constitutional Court in 2020 to rule someone choosing to take their own life as they see fit as in line with human dignity, and prohibiting that choice as a violation of human dignity, demonstrates that, during those seventy years, the societal and legal consciousness in Germany has changed. While human dignity is still paramount to legal decision-making in the country, there is now room for discussion and debate on the interpretation of the concept.

At the time of this writing, it does not appear that there are any more discussions or votes planned for assisted suicide for any time in the near future. However, I do not believe that doesn't mean that assisted suicide is a topic that will disappear from the interests of Germans. As previously mentioned, the ongoing pandemic has brought to the forefront of not only German society but many societies across the globe, issues related to assisted suicide. Germany's current Minister of Health, Karl Lauterbach, shows a vested interest in the topic of assisted suicide; he served as a drafter and speaker in the 2015 debates, introduced the bill in April 2021 before he was Minister of Health, and in June 2022, as Minister of Health, introduced yet another bill, this

one promoted on the Ministry of Health's website. By that logic, there is hope for Lauterbach to get his law passed as minister, especially as the Constitutional Court has prohibited assisted suicide from being completely banned. There is also a chance that the Bundestag needs a catalyst. In 2014 and 2015, Roger Kusch's suicide machine and assistance in an elderly woman's suicide served as an instigator for a renewed interest in assisted suicide. However, Kusch assisted in the suicide in 2008, and the topic did not broach discussion in the Bundestag for six more years, so it is hard to tell if a catalyst would truly help.

Lauterbach's term as Minister of Health will end in 2025, and I feel that, based on the timeline of the debates thus far, I can confidently project that the topic will come up again before the end of his term. However, the debates will struggle in the future from the similarity of the bills. As assisted suicide can no longer be completely banned, the two sides of the debate now seem to be nitpicking at each others' bills as much as possible. There is also the case of other countries surrounding Germany to consider. Throughout the debates, many examples of assisted suicide regulations in other countries, especially the Netherlands, Switzerland, Sweden, and Belgium came up, as reasons to either expand the practice or restrict it. However, some of these countries are undergoing their own renewed debates; the Netherlands recently had a series of protests following talks of restricting assisted suicide following a notable uptick in suicide that many in the Bundestag noted in their speeches throughout the debates. There are also countries outside of Europe that are experiencing debates around assisted suicide policies.

With all of these factors in play, I cannot say whether I believe that Germany's Bundestag will eventually pass a bill regulating assisted suicide in a way that is satisfactory to the majority or not, and whether or not it will happen soon. What is certain is that the debates have had a profound impact on not only the German conversation surrounding assisted suicide but also

global conversation. As many Bundestag members mentioned repeatedly during the debates, whichever direction policy eventually goes in, the debates have reduced the taboo on speaking about death in German society and have caused many people to reflect on their wishes at the end of life. The debates have also led to the passing of the Hospice and Palliative Care Improvement Act and discussion of how to further improve care for Germany's rapidly aging population, an issue that is applicable to many industrialized countries, including the United States. And, most importantly to this work, the debates led to new interpretations of human dignity by the Constitutional Court that show that Germany has evolved throughout time. At the time of the writing of the Basic Law, there was fear that Germany could not be reformed or brought out of the shadow that the Nazi regime cast; an emphasis on human dignity in the Basic Law and the banning of euthanasia in the Constitution were attempts to get out from under that shadow. And in many ways, these attempts seemed to have worked; in the twenty-first century, Germany's Constitutional Court has allowed the interpretation of human dignity to reinforce the right to take one's life in the way that one chooses.

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