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No Best Answer.

Principled Compromise and Checkerboard Solution¹

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Disagreement is almost as much at the heart of law as it is in politics. Disagreement over justice and rights, about what it means to call something a right or what rights we have, is at the core of both judicial review and legislation. And even if there is a rough consensus on a set of basic rights, philosophers and judges may disagree in their interpretation of the laws and the constitution, above all when moral convictions are at stake.

However, whereas disagreement in politics is often best solved by compromise solutions, this way out may appear inadmissible in the justice system. We demand of legal requirements that they possess a rational justification. Compromise solutions resulting from negotiations between opposing political parties are difficult to foresee and remain arbitrary as they depend upon the positions initially defended and the power relation between the parties. They can also be messy because they try to split the difference between options with no overarching (moral) principle guiding the choice and making the solution right once and for all for every similar case. In contrast legal decisions should reflect principled reasons for adopting or rejecting proposals for actions, public or private, and thus represent a community's aspiration to justice.

Nevertheless, judges may disagree in their interpretation of the law and the constitution, above all when moral convictions are at stake, and continue to disagree even after thorough exchanges of arguments. The intractability of disagreement, even among experts, i.e., the fact that there may be *reasonable* dissent even after the exchange of arguments, makes it necessary to consider procedures for finding a way out.

¹ This paper was presented at the International Conference on Global Ethics of Compromise, EHES (CESPRA), Paris, in March 2019 [Editor's note].

“Judges vote when they disagree and [...] many important U.S. Supreme Court cases are settled by a vote of five to four among the Justices, even when the Court is reviewing legislation and deciding whether to overturn the result of a majority vote among elected representatives.”²

Although there is a clear difference between the German and the American procedure within the court,³ in both cases the court resorts to majority voting when no agreement between the judges has been reached.

Reasons of political equality and of efficiency are supposed to justify the majority procedure. Epistemic reasons are also mentioned, majority being viewed as a way to get closer to the truth or to a well-founded position. It is, however, very questionable whether there is any intrinsic link between the number of supporters and the quality of decisions, above all when moral convictions are at stake. On issues of expert judgment, a majority among experts might well indicate that contrary views can be dismissed as wrong. But as Waldron points out, it is not at all clear that the epistemic argument can survive for cases in which there is a bare majority (five to four for example).⁴

Other procedures connected to criteria of epistemic quality could as well be defended, for example, giving more votes to senior judges who have more experience. Or giving more votes to junior judges, who are more likely to represent popular opinion.⁵ Counting votes, all the same, leads to a “winner takes all” solution and, when dealing with a moral issue, the minority is required to cope with a solution they consider immoral. That is particularly true regarding decisions about abortion and about research on embryos, for the parties defending a pro-life conception based on the conviction that embryos are persons.

Compromise solutions are confronted with the same paradox. In moral compromise, people refrain from doing what they, for moral reasons, consider the right thing to do,

² Jeremy Waldron, ‘Five to Four: Why Do Bare Majorities Rule on Courts?’, *The Yale Law Journal*, 123 (2014), pp. 1692-1729.

³ See for example Gertrude Lübbe Wolff’s illuminating analysis of the cultural differences between the German and the Anglo-Saxon tradition within the Constitutional Court: Gertrude Lübbe-Wolff, ‘Cultures of Deliberation in Constitutional Courts’, in P. Maraniello (ed.), *Justicia Constitucional*, 1 (Resistencia, Chaco: ConTexto, 2016), pp. 37-52.

⁴ Waldron, ‘Five to Four: Why Do Bare Majorities Rule on Courts’, p. 1713.

⁵ Ronald Dworkin, Response. *90 B.U.L. Rev.* 1059, 1086 (2010). Quoted in: Waldon, ‘Five to Four: Why Do Bare Majorities Rule on Courts’, p. 1703.

settling instead for a second-best course of action, simply because a compromise would be acceptable to the others involved. Compared to majority decisions, however, compromise solutions are fairer, since they require both parties to renounce a portion of their demands. They are a result of a “give and take” in which a middle position may give something to both sides.

Compromises have a bad reputation and are often regarded as a stopgap solution. When dealing with divisible goods or with quantifiable issues, splitting the difference sometimes offers a practicable way out of a conflict. Traffic regulations in a city where air pollution is too high might, for example, one day let in automobiles with even number plates and the other day those with odd number plates. With regard to moral or important political issues, however, we intuitively condemn such a procedure because it lacks a reasonable ground and might lead to absurd results.

It is worth examining more thoroughly our reason for condemning compromises in legislation. The question is well resumed by S. Besson, “how can we explain our hostility towards compromise of principle within the law in the face of the widespread practice of bargaining and compromising over matters of fact, interest and even, sometimes, of principle within the political arena?”⁶

In what follows, I will question our intuitive rejection of compromises in legislation. With reference to the German abortion law, I will argue that, in cases where no common value between the positions can be found, a compromise solution may be required and that it may be fairer than decision by majority. I will concentrate on what Dworkin calls internal compromises and the resulting checkerboard statutes and show that the German abortion regulation offers a compromise solution, which under a certain point of view can be considered as morally absurd as well as juristically incoherent. Nevertheless, it is widely accepted. It must be examined why. My suggestion is that we prefer a rational explanation, even if considered as wrong, to a random solution. As Raban states, “the root of the problem is one of rationality, not of morality.”⁷

⁶ Samantha Besson, Four Arguments against Compromising Justice Internally, *Oxford Journal of Legal Studies*, 23 (2), 2003, pp. 211-241; p. 213.

⁷ Ofer Raban, The Rationalization of Policy: On the Relation between Democracy and the Rule of Law, 18 *N.Y.U. Journal of Legislation and Public Policy* 45, 2015, p. 57.

1. Checkerboard Statute and Arbitrary Legislation

Compromises are largely ignored in the philosophical and legal literature. In this respect, it is remarkable that Ronald Dworkin devoted an important chapter to them in his book *Law's Empire*.⁸

Dworkin distinguishes between internal and external compromise. Compromises are external if they are made according to an independent principle. To take an example from David Luban,⁹ half the people in a community defends an “each according to his need” view on justice and the other half “each according to his work”. Each vehemently rejects the view defended by the other party. They eventually agree on a compromise solution, “each according to his work, unless his work does not suffice to meet his most basic needs. Then we keep him afloat with transfer payments”. Each side considers that the compromise violates what she or he considers to be the right conception of distributive justice and sees it as being morally wrong. The compromise is substantial in that it finds a middle position between the content of two demands. The resulting exception, though, by setting a base line of existence under which people should not fall is based on a principle logically connected to the law. It is principled, because it offers reasons of justice.

In contrast, an internal compromise is unprincipled. It results from a procedural decision, when even after a thorough exchange of argument between the parties no consensus may be found and an unbridgeable conflict of opinion remains. Internal compromise offers a Solomonic solution to a conflict by splitting the differences and giving each side its equal share. It reflects the neutrality of the decision with regard to its content by abstaining to take a side. The worry is that it tends to generate ‘checkerboard’ statutes. Checkerboard statutes are logically defective type of rules. Being issued out of a purely procedural basis, notwithstanding the content of the law, they may create a body of inconsistent laws.

On the one hand, internal compromises are *fair*: by allowing competing conceptions to be reflected in the rules, they are consistent with our convictions that legislation on moral issues should be a matter not just of enforcing the will of the numerical majority (Dworkin 1986: 178). On the other hand – that is at least Dworkin’s

⁸ Ronald Dworkin, *Law's Empire*, Cambridge Mass. 1986.

⁹ David Luban, ‘Bargaining and Compromise: Recent Work on Negotiation and Informal Justice’, *Philosophy and Public Affairs*, 14/4, 1985, pp. 397-416, p. 415.

accusation – they appear to be *unjust* because they are random. That is what needs to be scrutinized.

What is so condemnable about internal compromises and why we even prefer a majority decision to them, even where we have no real chance of influencing the law in the direction we favor?

Imagine, says Dworkin, that because the people of Alabama disagree about the morality of racial discrimination, the government statues a law permitting discrimination in restaurants but not in buses. Imagine, further, that because roughly 50% of the American people are in favour of criminalizing abortion, and the other 50% are strongly opposed to it, the legislation forbids abortion only for pregnant women who were born in even---numbered years. Women who were born in odd---numbered years, in contrast, would legally obtain abortions. The two solutions have in common that they give something to each side. Each body of opinions is equally represented for equality's sake.

Why would we intuitively reject such a law in both cases as lousy although it reflects and respects the extreme split of public opinion? As in the case of the automobiles, the compromise follows a fair principle of distribution of an item, as if it were a quantifiable commodity to be distributed equally. Persons are no objects, though, and they expect rightly a justification when the law forbids them to do something they wish to do. Checkerboard laws don't offer the required rational justification for the very reason that they abstain from taking side in the debate and are not grounded in a principle.

Is it really the case that an internal compromise lacks principle? Not necessarily. The procedure after all can reflect the wish for neutrality. It can be articulated by the following rule: "whenever conflicts are fundamentally unsolvable, the difference should be split". Such a procedure, we may say, takes the disagreement between the positions seriously by abstaining from taking sides in the debate.

According to Dworkin, to be acceptable a compromise should be grounded on a shared principle. "If there must be a compromise because people are divided about justice, then the compromise must be external, not internal; it must be a compromise about which scheme of justice to adopt rather than a compromised scheme of justice." (...). Notwithstanding the question whether such a compromise can still be named as

such,¹⁰ it cannot be excluded that even among experts there may be no shared view on which scheme of justice should be adopted.

Clearly, Dworkin defends a monistic view on morals, despite his repeated acknowledgment of the plurality of our normative conceptions and his claim to take it seriously. Value pluralists, though, reject the idea of a hierarchy of values according to a principle or set of principles capable of solving moral conflicts in a way that all reasonable persons may endorse. According to them, there is no *summum bonum*, and the idea of a lexicality of a certain sort of goods over others is, at best, an instrument for dealing with problems within a particular theory. Dworkin sticks to it, however, “We are looking for a reason of justice we all share for rejecting the checkerboard strategy in advance”.¹¹

What, if Dworkin’s advice may not be concretized? When what is at stake is precisely which scheme of justice should be adopted, no common value is available on a higher level to serve as a guide. As Waldron says, we cannot play trumps if we disagree about the suits.¹² In that case, recurring to a principle means privileging one of the convictions. Another way for the parties to solve the problem is to agree upon a procedure. They may choose to take a vote. But they may also go for a compromise, since it offers a fairer solution than the “winner---take---all” formula. Internal compromises, so it may be argued, express a concern for neutrality between the warring opinions.

Still, it may be replied that the given justification explains *what brought about* the legislative requirement but doesn’t make the requirement itself rational.¹³ The Checkerboard law in both mentioned cases not only lacks rationality but it may even be declared irrational. Indeed, the same rule declares discrimination, respectively abortion, as being simultaneously legal and illegal, which is contradictory. Checkerboard laws, therefore, are unacceptable because they violate the principle of equality before the law by treating people differently.

¹⁰ In that case, indeed, we must ask ourselves if we are still dealing with a compromise or if it has not rather given way to a consensual decision instead. I don’t want to pursue this discussion in this context, as I am concentrating on the reasons Dworkin evokes for rejecting “internal compromises”.

¹¹ Dworkin, *Law’s Empire*, p. 180.

¹² Waldron, Jeremy, “Moral Truth and Juridicial Review”, 43 *The American Journal of Jurisprudence* pp. 75-97; p. 77.

¹³ Raban, *The Rationalization of Policy*, p. 58.

In reality the problem is not one of unequal treatment. This happens constantly. Firefighters or ambulances for example have special permission in case of emergency to exceed speed limits in localities so that in the end, excessive speed limit is both tolerated and forbidden. The problem is rather that the same category of person (black people, respectively pregnant women) are treated differently, and this without understandable reason. We expect from a legal system that it declares certain things impermissible or permissible according to rational principles.¹⁴ We want to make sure that what is allowed today will not be arbitrarily outlawed tomorrow. Laws must be predictable in accordance with comprehensible and acceptable reasons. The justifiability must work in both directions, backward as well as in the prospect of what we intend to do. This requirement, according to Dworkin, is expressed in the notion of “equality before the law”: similar cases are to be treated similarly, according to a well---grounded justification. “Integrity is flouted [...] whenever a community enacts and enforces different laws each of which is coherent in itself, but which cannot be defended together as *expressing a coherent ranking of different principles of justice or fairness or procedural due process*.”¹⁵

Keeping this assertion in mind, we may be surprised, however, that on another occasion Dworkin is not troubled by the fact that the American Constitution grants states sovereignty over internal legislation on the death penalty. The different treatment of the convicted resulting from federalism, in Dworkin’s view, is grounded on a higher---order decision on the division of power between the national level and the state level. The higher value of federalism deals as ultimate justification¹⁶

Accordingly, the solution is no checkerboard solution. From a moral point of view, however, it means that the principle of federalism operates as a higher---order principle that trumps a human right to be treated equally before the law. If we believe Dworkin, “[T]he Supreme Court relies on the language of equal protection to strike down state legislation that recognizes fundamental rights for some and not others.”¹⁷

A citizen from Texas, however, doesn’t enjoy equal protection from being “legally

¹⁴ Dworkin, *Law’s Empire*, pp. 183-4: The most natural explanation of why we oppose checkerboard states appeals to [integrity]: we say that a state that adopts these internal compromises is acting in an unprincipled way (...) [I]t must endorse principles to justify part of what it has done that it must reject to justify the rest.”

¹⁵ Dworkin, *Law’s Empire*, p. 184. I underline, VZ.

¹⁶ Dworkin, *Law’s Empire*, p. 186.

¹⁷ Dworkin, *Law’s Empire*, p. 185.

killed” by the state if he is proven guilty of murder. For those radically opposed to capital punishment, federalism doesn’t offer a better *moral* justification for tolerating a violation of a core value than a quota solution would do by limiting the number of executions to slightly under the yearly global average in the United States.

Again, checkerboard laws are said to be logically defective because they declare something as permissible as well as impermissible according to an arbitrary criterium. They therefore violate the principle of equality before the law by treating people differently without good reason. I will show in the next chapter that the German abortion law is a law of compromise whose consistency and morality can be put into question. It must be asked if it should be viewed as an internal compromise or not. But before I turn to the German abortion law, I would like to examine further what speaks against internal compromises.

The main reason why a checkerboard statute is said to be shocking is that the law offers no reason for treating people differently. More precisely: the justification offered for treating people differently is not grounded in the law. Being born in an odd-or-even-number year is a random criterion and has indeed nothing to do with aborting.¹⁸ By contrast, a law declaring abortion illegal for all women unless the pregnancy is the result of rape is not random, because the distinction of "voluntary pregnancy versus pregnancy by rape" has some logical connection to abortion.¹⁹ However, splitting the difference must not necessarily be as random and absurd as to forbid abortion only for pregnant women who were born in even years. We could imagine instead a system of quotas for abortions, establishing a maximum number each month, which is statistically slightly lower than the average of abortions in the previous years. From a consequentialist as well as from a deontological point of view, if the criterion for exemption results in even a slight reduction in the number of abortions, this may be a valuable policy for those defending the intrinsic value of human life from the moment of the nidation on.

¹⁸ “The flaw in this abortion statute is not simply the lack of a justification for treating women born in even years differently than those born in odd ones, but, more fundamentally, the lack of a justification for prohibiting abortions to the category of women born in even years. We may have a justification for forbidding all women to abort, but why forbid it based on whether they were born in an even or an odd year?” (Raban, *The Rationalization of Policy*, p. 58).

¹⁹ See this helpful internet link on “checkerboard law”: https://rationalwiki.org/wiki/Checkerboard_rule.
Called on the 12.1.19.

It may still be objected that what makes a checkerboard statute in that case outrageous is that it doesn't make room for a morally founded exception in case of rape. Rape violates per definition the women's ability to decide upon such an important issue as giving life. It is not only that women impregnated by rape lack responsibility for the pregnancy, but the newborn would risk to be particularly unwanted.²⁰ Two subjects would remain accordingly unprotected by the law. Moreover, a checkerboard law makes a great a difference with regard to our well-grounded expectancy that the system of law should be predictable and allow us to plan our life. It introduces an element of arbitrariness in an important dimension of our life.²¹

I don't see why, however, it should not be possible to introduce grounded exceptions to the application of the law, keeping in general the neutral criterion in place. The compromise doesn't have to extend all the way through. Where a justification can be provided which may convince the parties, there is no reason not to make use of it. The pro-life party may not *endorse* the justification. They may say: "We think that rape does not *justify* an abortion. Still, we see that this statute has some rational justification for the distinction it makes."²¹

Let us pause a moment. We will certainly ask whether all this is not just a game with arguments, the opposing party constantly playing the devil's advocate. We cannot *seriously* opt for a legislation granting women born in odd-number years the right to abort but sanctioning those born in even-years for doing so and prefer that to a time limit solution or even a prohibiting law.

Indeed, I think we do expect from a state and from the legislation that it endorses principles held to justify decisions even though we don't approve them. A bad reason may even appear better than none. We can more easily cope with a rationally justified solution we disagree with than with a random solution we disapprove. And an even-or-odd year solution is a random solution for the very reason that it is a pure procedural solution due to the lack of consensus. We may consider this as a strange psychological fact. Indeed, it remains to be explained why we sometimes prefer a majority decision we reject to splitting the difference, even if there is little hopes for the minority to overthrow the majority.

²⁰ Ofer Raban, *The Rationalization of Policy*, pp. 56-57.

²¹ Note however that this last consideration does not concern the moral conviction itself. It imposes at most side - constraints for asking if the compromise should be taken into consideration. ²¹ Ofer Raban, *The Rationalization of Policy*, p. 57.

2. German Abortion Law

In Germany, abortion is generally punishable by law for all parties involved according to § 218 of the German Criminal Code (StGB). But an abortion is not punishable if the woman concerned follows the guidelines of the so-called counselling regulation (§ 218 a sect. 1 StGB) and if the abortion is carried out by a doctor no later than 12 weeks after conception.

The German abortion law is a law of compromise. The time limit solution offers a compromise regarding the conditions under which abortion is to be punished: the embryo may be destroyed until its 12th week, but not later. But it also compromises on a further issue. In imposing certain restrictions upon a liberal position by requiring counselling, it expects from radical liberals some concessions.

The time solution, however, praised by many as the “third way”, has been condemned by many others as therefore *legally inconsistent*.²² Based on Article 1 § 1 (protection of human dignity) and Article 2 § 2 (basic right to life), the court indeed constitutionally affirms that the state is committed to protect all human life, including that of the embryo, and thus considers abortion as fundamentally illegal. The 1975 justification makes it explicit: “The life which is developing itself in the womb of the mother is an independent legal value which enjoys the protection of the constitution”²³. The 1993 decision confirms: “The Basic Law requires the state to protect human life, including that of the unborn. [...] Even unborn human life is accorded human dignity.”²⁴ Both judgements (1975 and 1993) underline the state’s *positive duty* to protect unborn human life in gestation. Legal protection is due during the whole period of pregnancy and it is in force regarding the mother as well as regarding anybody else. At the same time, however, the legislation guarantees women who wish to abort that the state will provide, in “sufficient coverage”, clinical opportunities for carrying out medically assisted abortion.²⁵ Considering that the

²² See Merkel, *Forschungsobjekt Embryo*. See also Merkel, ‘Rechte für Embryonen’.

²³ BVerfG 39, 1 ff (1975).

²⁴ BVerfG 39, 1 ff; E 88, 203 ff. (1993).

²⁵ “Ein ausreichendes und flächendeckendes Angebot sowohl ambulanter als auch stationärer Einrichtungen zur Vornahme von Schwangerschaftsabbrüchen sicherzustellen“. (The highest competent state authority shall ensure sufficient and geographically continuous availability of both outpatient and in-patient pregnancy termination facilities). BVerfGE 88, 328 f. See Merkel, *Forschungsobjekt Embryo*, pp. 65-66.

explicit official allowance and subsidy of an unlawful act is itself illegal, it results in the state legally committing an illegal act, which is self-contradictory.²⁶

In short: we may have doubts that the time solution fulfils the requirement of integrity, having in mind the commitment of constitutional law to the dignity of the individual, a commitment extended explicitly to embryos (as expressed in judgments 1975 and 1993). Embryos whose dignity is anchored in the constitutional law are treated unjustly with regard to a criterion (time) that has no logical foundation within the law.

Moreover, from the point of view of morality, the solution may be said to be absurd. For a pro-life person convinced that human beings are person right from the time of nidation, it makes indeed no sense. Abortion represents for her as much an attack on human life in the second month as later on. Accepting the “time limit” solution is tantamount to accepting that murder be legally authorized. From the point of view of her *moral conviction*, it doesn’t make a difference whether the killing of embryos is allowed within a certain time or on the basis of some other criterion. The compromise touches the moral principle itself. So understood the compromise is evidence of moral inconsistency. It treats the same category of people (the embryo) differently along a line which is irrelevant according to the considered criterion, that of being a moral subject.

The question is, therefore, why the abortion compromise is widely accepted in Germany, although it is suspected to be morally unconvincing and legally incoherent.

3. Way Out of the Conflict

I see two possible ways to answer. One points at the pragmatic attitude of the participants, based on their common political willingness to value the pursuit of a social and political commitment higher than their personal moral conviction. The second way aims at an independent common principle, one which is not in the set of norms of the parties being contested.

²⁶ „Damit ist der selbstdestruktive Grundwiderspruch der Entscheidung fixiert: Eine Rechtspflicht zum Unrecht ist normenlogisch unmöglich.“ (This fixes the self--destructive basic contradiction of the decision: A legal obligation to injustice is from the logic of the norm impossible). Merkel, *Forschungsobjekt Embryo*, p. 72.

As for the first way: We often make pragmatic compromises in order to best realize our moral goals.²⁷ By that I mean that the motivating reason for making a concession on a moral issue is *extrinsic* with respect to the moral issue in question and it is not necessarily based on a moral principle. I can for example express my concern that the state should remain neutral in relation to questions of good life. But I can also want to make sure that the legislation will limit as far as possible the negative effects of a liberalisation/ an interdiction. My opting for a time limitation in that case is strategic and instrumental with regard to an issue I want to promote.

The direction of argumentation is in line with Rawls' division between the public and private sphere. On a first level, on the level of their private conviction, people express their moral view on an important issue of social life. On a second level, they offer second-order reasons for making concessions, reasons that concern how firmly they want to stick to their moral conviction in the face of disagreement.²⁸ On that second level they leave the field of (private) morality and make a pragmatic political move. When asked why political reasons should take precedence over moral imperatives, they may answer: because it is sometimes strategic to make concession or it is advisable to be tolerant, to be responsive to others, etc. With this recommendation, however, they move within the field of politics - whereby 'politics' is understood in the general (Aristotelian) sense: as the area in which the relationship among people is regulated.

Political goals, I argue, are extrinsic to the moral issue at state. The trouble, however, is that they don't necessarily rule out internal compromises by giving the best answer on the moral issue at the center of the dispute. The solution they offer leave indeed room for an internal compromise *on the matter in question* precisely because they bracket out the substantial principle from which further norms derive. The requirement that the state should remain neutral with regard to private conviction doesn't take side whether abortions are just or unjust.

As for the second way: The abortion compromise, as we know, splits the difference on a matter of time. It suggests a time limit along which abortion is forbidden or not. For at least one of the parties in conflict the solution is morally unconvincing. On the

²⁷ See Fabian Wendt, *Compromise, Peace and Public Justification. Political Morality Beyond Justice*, London 2016, 47 ff. See also Simon Cabulea May, *Principled Compromise and the Abortion Controversy*, *Philosophy & Public Affairs* 33 (4), 2005, pp. 317-348.

²⁸ See May, *Principled Compromise*, p. 319.

point of view of legal integrity, it can moreover be argued that it contradicts the Article 1, Paragraph 1 of the Constitution. Yet people put up with it.

My suggestion is that the time solution, even if not morally and legislatively convincing, presents a rational argument. The rationale is a shared intuition that an embryo is more susceptible to suffer at a later stage of development. Twelve weeks offers an estimation at when pain may begin to be felt. In contrast, the question whether embryos are persons or not can be put in brackets. In other words, what matters is rationality, not primarily morality.

In both cases, the compromise is not internal, because it doesn't split the difference for justice's sake. The compromise is not principled either, though: it *issues out of the dispute and of the negotiation* and doesn't ground on a shared principle previous to it.

4. Conclusion

To briefly rephrase the argument: Pro-life proponents reject abortion, because they consider embryos to be persons from their earliest stage on. The protection of the life of embryos falls consequently under the same general principle as the principle which forbids killing an innocent against her or his will. There is no way an embryo can give its consent and no compensation can ever be offered for the tort it suffers. Radical liberals, on the other side, favor of a liberal abortion law, because individual sovereignty upon the own body is a high good to be protected from state interference. As personhood begins on their view at earliest with the birth, it doesn't trump the liberal expectation. Both parties ground their position on a different principle, giving rise to an intractable moral disagreement.

Should judges in a constitutional court be unable to find a consensus, they might vote and go for the majority. I questioned the rationale behind the procedure, considering that it doesn't ensure to get us to the right answer. Splitting the difference is dismissed out of hand for legislative jurisdiction if it is not grounded on a principle because of the possible incoherency and arbitrary of its result. I argued that this criticism is not *per se* a reason to reject the compromise. The German law of delay splits the difference on the issue of time, which is morally unconvincing for at least one party into the conflict as well as incoherent with regard to the article 1 of the convention. Yet people put up with it. My suggestion was that the time solution can count on a

largely shared intuition about when pain may begin to be felt. The compromise found is not an internal compromise. It doesn't split the difference on time for the sake of justice in an unprincipled way. It is not a principled compromise either. If people (judges at court included) disagree fundamentally about moral principles, they may be required to set aside their moral conviction and opt for an altogether different goal or principle, which was not originally in the set of principles being disputed. They may do it for principled reasons, but they may do it for pragmatic or strategic reasons as well.