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West German Abortion Decision: A Contrast to Roe v. Wade West German Abortion Decision: A Contrast to Roe v. Wade, 9 J. Marshall J. Prac. & Proc. 605 (1976)

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WEST GERMAN ABORTION DECISION: A CONTRAST TO *ROE v. WADE*†

Translated by ROBERT E. JONAS* AND JOHN D. GORBY**

Guiding Principles
applicable to the judgment of the First Senate of the 25th of February, 1975:

— 1 F.C.C. 1/74 —
— 1 F.C.C. 2/74 —
— 1 F.C.C. 3/74 —
— 1 F.C.C. 4/74 —
— 1 F.C.C. 5/74 —
— 1 F.C.C. 6/74 —[A]

1. The life which is developing itself in the womb of the mother is an independent legal value which enjoys the protection of the constitution (Article 2, Paragraph 2, Sentence 1; Article 1, Paragraph 1 of the Basic Law).

The State's duty to protect forbids not only direct state attacks against life developing itself, but also requires the state to protect and foster this life.

2. The obligation of the state to protect the life developing itself exists, even against the mother.

3. The protection of life of the child *en ventre sa mere*[B] takes precedence as a matter of principle for the entire duration of the pregnancy over the right of the pregnant woman to self-determination and may not be placed in question for any particular time.

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† [Hereinafter cited as *Translation*]. Due to certain differences of opinion between the two translators, it is suggested that the reader refer to both the *Remarks* by Robert Jonas, and the *Introduction* by John Gorby.—*Editors.*

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A. *See* pp. 567-68 of the *Introduction.* Note: translator footnotes will be indicated by letters; footnotes of the German Constitutional Court will be indicated by Arabic numerals; parenthetical remarks within the text of the translation are those of the German Constitutional Court.

B. *See* p. 554 of the *Preface.*

4. The legislature may express the legal condemnation of the interruption of pregnancy required by the Basic Law through measures other than the threat of punishment. The decisive factor is whether the totality of the measures serving the protection of the unborn life guarantees an actual protection which in fact corresponds to the importance of the legal value to be guaranteed. In the extreme case, if the protection required by the constitution cannot be realized in any other manner, the legislature is obligated to employ the criminal law to secure the life developing itself.

5. A continuation of the pregnancy is not to be exacted[C] (legally) if the termination is necessary to avert from the pregnant woman a danger to her life or the danger of a serious impairment of her health. Beyond that the legislature is at liberty to designate as non-exactable other extraordinary burdens for the pregnant woman, which are of similar gravity and, in these cases, to leave the interruption of pregnancy free of punishment.

6. The Fifth Statute to Reform the Penal Law of the 18th of June, 1974, (Federal Law Reporter I, p. 1297) has not in the required extent done justice to the constitutional obligation to protect prenatal life.

The Federal Constitutional Court

— 1 F.C.C. 1/74 —
— 1 F.C.C. 2/74 —
— 1 F.C.C. 3/74 —
— 1 F.C.C. 4/74 —
— 1 F.C.C. 5/74 —
— 1 F.C.C. 6/74 —

announces a decision

on the 25th of February 1975,

Hempel,
being the chief secretary of the government
acting as clerk of the court,

IN THE NAME OF THE PEOPLE

In the proceeding
for constitutional examination of the Fifth Statute to Reform

C. *See* pp. 586 *et seq.* of the *Introduction* and pp. 595-96 of the *Remarks.*

the Penal Law (Fifth Penal Law Reform Statute) of the 18th of June 1974 (Federal Law Reporter I, p. 1297),

the Petitioners being:

I. 193 members of the German Federal Parliament

1. Prof. Dr. Manfred Abelein,
2. Odal von Alten-Nordheim,
3. Dr. Walter Althammer,
4. Dr. Gottfried Arnold,
5. Dr. Helmut Artzinger,
6. Dr. Walter Becher (Pullach),
7. Dr. Curt Becker (Mönchengladbach),
8. Ursula Benedix,
9. Gerold Benz,
10. Ulrich Berger,
11. Karl Bewerunge,
12. Herman Biechele,
13. Alfred Biehle,
14. Dr. Philipp von Bismark,
15. Dr. Norbert Blüm,
16. Helmut von Bockelberg,
17. Wilfried Böhm (Melsungen),
18. Gerhard Braun,
19. Ferdinand Breidbach,
20. Rolf Bremer,
21. Klaus Bremm,
22. Prof. Dr. Fritz Burgbacher,
23. Albert Burger,
24. Manfred Carstens (Emstek),
25. Prof. Dr. Karl Carstens (Fehmarn),
26. Dr. Herbert Czaja,
27. Carl Damm,
28. Rembert van Delden,
29. Dr. Werner Dollinger,
30. Nicolaus Dreyer,
31. Karl Eigen,
32. Jan Eilers (Wilhelmshaven),
33. Matthias Engelsberger,
34. Benno Erhard (Bad Schwalbach),
35. Leo Ernesti,
36. Richard Ey,
37. Dr. Heinz Eyrich,
38. Otto Freiherr van Fircks,
39. Heinrich Franke (Osnabrück),
40. Dr. Ludwig Franz,
41. Dr. Friedrich Freiwald,
42. Dr. Göke D. Frerichs,
43. Dr. Isidor Früh,
44. Dr. Karl Fuchs,
45. Franz Xaver Geisenhofer,
46. Paul Gerlach (Obernau),
47. Johannes Gerster (Mainz),
48. Karl Heinz Gierenstein,
49. Dr. Georg Gölter,
50. Dr. Hermann Götz,
51. Dr. Herbert Gruhl,
52. Dr. Hansjörg Häfele,
53. Kurt Härzschel,
54. Dr. Hugo Hammans,
55. Franz Handlos,
56. Alo Hauser (Bonn-Bad Godesberg),
57. Hansheinz Hauser (Krefeld),
58. Dr. Hugo Hauser (Sasbach),
59. Dr. Bruno Heck,
60. Hermann Höcherl,
61. Alex Hösl,
62. Dr. Karl Heinz Hornhues,
63. Martin Horstmeier,
64. Agnes Hürland,
65. Dr. Herbert Hupka,
66. Dieter Hussing,
67. Dr. Richard Jaeger,
68. Dr. Friedrich-Adolf Jahn (Münster),
69. Dr. Philipp Jenninger,
70. Dr. Dionys Jobst,
71. Johann Peter Josten,
72. Hans Katzer,
73. Dr. Friedrich Kempfler,
74. Ignaz Kiechle,
75. Walther Leisler Kiep,
76. Dr. h. c. Kurt Georg Kiesinger,
77. Dr. Josef Klein (Stolberg),
78. Prof Dr. Hans Hugo Klein (Göttingen),
79. Dr. Georg Kliesing,
80. Dr. Herbert W. Köhler (Duisburg),
81. Dr. Volkmar Köhler (Wolfsburg),
82. Gottfried Köster,
83. Wilhelm Krampe,
84. Dr. Konrad Kraske,
85. Hermann Kroll-Schlüter,
86. Gerhard Kunz (Berlin),
87. Dr. Max Kunz (Weiden),
88. Karl-Hans Lagershausen,
89. Egon Lampersbach,
90. Albert Leicht,
91. Dr. Carl Otto Lenz (Bergstrasse),
92. Christian Lenzer,
93. Helmut Link,
94. Paul Löher,
95. Dr. Manfred Luda,
96. Dr. Werner Marx,
97. Eugen Maucher,
98. Dr. Alois Mertes (Gerolstein),
99. Josef Mick,
100. Prof. Dr. Paul Mikat,
101. Dr. Karl Miltner,
102. Peter Milz,
103. Heiner Möller (Lübeck),
104. Adolf Müller (Remscheid),
105. Johannes Müller (Berlin),
106. Dr. Ernst Müller-Hermann,
107. Dr. Karl-Heinz Narjes,

108. Dr. Hanna Neumeister,
109. Lorenz Niegel,
110. Franz-Josef Nordlohne,
111. Dr.-Ing. Martin Oldenstädt,
112. Gerhard Orgass,
113. Doris Pack,
114. Gerhard O. Pfeffermann,
115. Anton Pfeifer,
116. Walter Picard,
117. Elmar Pieroth,
118. Liselotte Pieser,
119. Eberhard Pohlmann,
120. Dr. Helmut Prassler,
121. Dr. Albert Probst,
122. Wilhelm Rawe,
123. Gerhard Reddemann,
124. Dr. Paula Riede (Oeffingen),
125. Dr. Erich Riedl (Munchen),
126. Dr. Gerd Ritgen,
127. Dr. Burkhard Ritz,
128. Paul Röhner,
129. Josef Rommerskirchen,
130. Hans Roser,
131. Hermann Josef Russe,
132. Helmut Sauer (Salzgitter),
133. Franz Sauter (Epfendorf),
134. Botho Prinz zu Sayn-Wittgenstein-Hohenstein,
135. Dr. Wolfgang Schäuble,
136. Albert Schedl,
137. Ursula Schleicher,
138. Peter M. Schmidhuber,
139. Josef Schmitt (Lockweiler),
140. Hans-Peter Schmitz (Baesweiler),
141. Dr. Oscar Schneider,
142. Christa Schroeder (Detmold),
143. Dr. Gerhard Schröder (Düsseldorf),
144. Horst Schröder (Lüneburg),
145. Dieter Schulte (Schwäbisch Gmünd),
146. Dr. Max Schulze-Vorberg,
147. Rudolf Seiters,
148. Emil Solke,
149. Dr. Adolf Freiherr Spies von Büllesheim,
150. Karl-Heinz Spilker,
151. Carl-Dieter Spranger,
152. Gerd Springorum,
153. Dr. Rudolf Sprung,
154. Dr. Anton Stark (Nürtingen),
155. Franz Ludwig Schenk Graf von Stauffenberg,
156. Dr. Lutz G. Stavenhagen,
157. Maria Stommel,
158. Richard Stücklen,
159. Egon Susset,
160. Hans-Adolf de Terra,
161. Kurt Thürk,
162. Ferdinand Tillmann,
163. Dr. Jürgen Gerhard Todenhöfer,
164. Irma Tübler,
165. Dr. Hermann Josef Unland,
166. Max Vehar,
167. Roswitha Verhülsdonk,
168. Friedrich Vogel (Ennepetal),
169. Wolfgang Vogt,
170. Günter Volmer,
171. Dr. Horst Waffenschmidt,
172. Dr. h.c. Leo Wagner (Günzburg),
173. Dr. Carl-Ludwig Wagner (Trier),
174. Dr. Theodor Waigel,
175. Dr. Walter Wallmann,
176. Kurt Wawrzik,
177. Karl Weber (Heidelberg),
178. Dr. Richard Freiherr von Weizsäcker,
179. Herbert Werner,
180. Dr. Helga Wex,
181. Waltrud Will-Feld,
182. Heinrich Windelen,
183. Hans Wissebach,
184. Dr. Manfred Wörner,
185. Olaf Baron von Wrangel,
186. Dr. Otto Wulff,
187. Prof. Dr. Gerhard Zeitel,
188. Werner Zeyer,
189. Erich Ziegler,
190. Dr. Friedrich Zimmermann,
191. Otto Zink,
192. Siegfried Zoglmann,
193. Kai-Uwe von Hassel

—authorized representatives:

a) attorney Benno Erhard, MP, Bonn, Federal Building,

b) Prof. Dr. Peter Lerche, Gauting, Junkersstrasse 13—

— 1 F.C.C. 1/74 —

II. The government of the State of Baden-Württemberg represented by the Minister of Justice, Stuttgart, Schillerplatz 4
—authorized representatives:

a) Prof. Dr. Fritz Ossenbühl, Meckenheim, Bergstrasse 15,

b) Prof. Dr. Hans-Joachim Rudolphi, Bonn-Lengsdorf, Am Käferberg 5—

— 1 F.C.C. 2/74 —

III. The government of the Saarland represented by the Prime Minister, Saarbrücken, Ludwigsplatz 14—

—authorized representatives: a) Prof. Dr. Fritz Ossenbühl, Meckenheim, Bergstrasse 15,
b) Prof. Dr. Hans-Joachim Rudolphi, Bonn-Lengsdorf, Am Käferberg 5—

— 1 F.C.C. 3/74 —

IV. The government of the Free State of Bavaria represented by the Prime Minister, Munich 22 Prinzregentenstrasse 7
—authorized representative: Director of the Ministry Prof. Dr. Walter Odersky, Munich, Elisenstrasse 1a—

— 1 F.C.C. 4/74 —

V. The government of the State of Schleswig-Holstein, represented by the Prime Minister, Kiel, State Capital

— 1 F.C.C. 5/74 —

VI. The government of the State of Rhineland-Pfalz, represented by the Minister of Justice, Mainz, Ernst-Ludwig-Strasse 3

— 1 F.C.C. 6/74 —

the Federal Constitutional Court - First Senate -
President of the Court Dr. Benda, presiding,
and Justices Ritterspach,
Dr. Haager,
Rupp von Brünneck,
Dr. Böhmer,
Dr. Faller,
Dr. Brox,
Dr. Simon, participating,
on the basis of the oral argument of the 18th and 19th of November 1974, recognizes as law by this opinion:

HOLDING

I. Section 218a of the Penal Code in the version of the Fifth Statute to Reform the Penal Law (5 PLRS) of June 18, 1974, (Federal Law Reporter I, p. 1297) is incompatible with Article 2, Paragraph 2, Sentence 1, in conjunction with Article 1, Paragraph 1, of the Basic Law and is null insofar as it excepts the interruption of pregnancy from criminal liability when no reasons are present which, in the sense of the reasons for this decision, have validity in the ordering of values of the Basic Law.

II. Until a new statutory regulation goes into effect the following is ordered under the authority of §35 of the Statute of the Constitutional Court:

1. §218b and §219 of the Penal Code in the version of the Fifth Statute for the Reform of the Penal Law (5 PLRS) of June 18, 1974 (Federal Law Reporter I, p. 1297) are to be applied to interruptions of pregnancy during the first twelve weeks after conception.

2. An abortion performed by a physician with the consent of the pregnant woman within the first twelve weeks after conception is not punishable under §218 of the Penal Code if an illegal act pursuant to §§176-179 of the Penal Code has been committed against the pregnant woman, and compelling reasons demand the assumption that the pregnancy is a result of the act.
3. If the interruption of the pregnancy is performed by a physician within the first twelve weeks after conception with the consent of the pregnant woman to avert from the pregnant woman danger of a serious calamity which cannot be averted in any other way which is exactable from her, the court may forgo a punishment under §218.

Reasoning:[D]

A.

The subject matter of the proceeding is the question whether the so-called regulation of terms of the Fifth Statute to Reform the Penal Law according to which termination of pregnancy remains free of punishment during the first twelve weeks after conception under certain conditions is consistent with the Basic Law.

1. The Fifth Statute to Reform the Penal Law (5 PLRS) of June 18, 1974 (Federal Law Reporter I, p. 1297) has regulated punishability of the interruption of pregnancy in a new manner. Sections 218 to 220 have been replaced by provisions which vis-a-vis the previous state of the law contain primarily the following alterations:

As a matter of principle, anyone who interrupts a pregnancy more than 13 days after conception shall be punished (§218, Par. 1). An abortion performed by a physician, however, with the consent of the pregnant woman is not punishable under §218 if not more than twelve weeks have elapsed since conception (§218a—Regulation of Terms.). Furthermore, an interruption of pregnancy performed by a physician with the consent of the pregnant woman after the expiration of the twelve week period is not punishable under §218 if the abortion is indicated, according to the judgment of medical science, to avert from the pregnant woman either a danger to her life or the danger of a serious impairment of the condition of her health to the extent that these dangers cannot be averted in a fashion which is otherwise exactable (§218b, No. 1—Medical Indication).[E] Furthermore, abortion

D. *See* pp. 574 *et seq.* of the *Introduction.*
E. *See* note 3 of the *Introduction.*

is not punishable if compelling reasons demand the assumption that the child, because of an hereditary disposition or harmful influences before birth, will suffer impairment to its health which cannot be alleviated and which are so weighty that the continuation of the pregnancy cannot be demanded of the pregnant woman, and not more than 22 weeks have elapsed since conception (§218b, No. 2 - Eugenical Indication). Anyone who interrupts a pregnancy without the pregnant woman first having received social and medical counseling at a counseling center or from a physician shall be punished (§218c). Even so an individual makes himself liable to punishment if he interrupts a pregnancy after the expiration of twelve weeks from conception without a competent counseling center having previously certified that the prerequisites of §218b (Medical or Eugenic Indications) have met (§219). The pregnant woman herself shall not be punished either under §218 or under §219.

In particular, the provisions which are essential for the present proceeding provide as follows:

§218

Interruption of Pregnancy

(1) Anyone who interrupts a pregnancy after the 13th day following conception shall be punished by incarceration up to three years or fined.

(2) The punishment shall be six months to five years if the actor

1. acts against the will of the pregnant woman, or,
2. wantonly causes the danger of death or serious impairment of health to the pregnant woman.

The court can set up a supervision authority. (§68, Par. 1, No. 2).

(3) If the pregnant woman commits the act, the punishment is incarceration up to one year or a fine.

(4) The attempt is punishable. The woman shall not be punished for an attempt.

§218a

Freedom from Punishment for Interruption of Pregnancy in the First Twelve Weeks

An interruption of pregnancy performed by a physician with the consent of the pregnant woman is not punishable under § 218 if no more than twelve weeks have elapsed since conception.

§218b

Indications for Interruption of Pregnancy After Twelve Weeks

An interruption of pregnancy performed by a physician with the consent of the pregnant woman after the expiration of twelve

weeks after conception is not punishable under §218 if, according to the judgment of medical science:

1. The interruption of pregnancy is indicated in order to avert from the pregnant woman a danger to her life or the danger of a serious impairment to the condition of her health insofar as the danger cannot be averted in a manner that is otherwise exactable (reasonably expected) from her, or
2. Compelling reasons require the assumption that the child will suffer from an impairment of its health which cannot be remedied on account of an hereditary disposition or injurious prenatal influences which is so serious that a continuation of the pregnancy cannot be exacted (reasonably expected) of the pregnant woman; and not more than 22 weeks have elapsed since conception.

§218c

Interruption of Pregnancy Without Instruction and Counseling of the Pregnant Woman

(1) He who interrupts a pregnancy without the pregnant woman:

1. first having, on account of the question of the interruption of her pregnancy, presented herself to a physician or to a counseling center empowered for the purpose and there been instructed about the public and private assistance available for the pregnant women, mothers and children, especially such assistance which facilitates the continuation of the pregnancy and eases the condition of mother and child, and
2. having been counseled by a physician,

shall be punished up to one year incarceration or by a fine if the act is not punishable under §218.

(2) The woman upon whom the operation is performed is not subject to punishment under Paragraph one.

§219

Interruption of Pregnancy Without Expert Opinion

(1) Anyone who interrupts a pregnancy after the expiration of twelve weeks after conception without a competent counseling center having confirmed that the prerequisites of §218b No. 1 or No. 2 are satisfied, shall be punished with incarceration up to one year or by fine if the act is not punishable under §218.

(2) The woman upon whom the operation is performed is not subject to punishment under Paragraph one.

2. According to previous law the killing of a child in the womb of its mother was generally a punishable act (§218 of the Penal Code). To be sure, at latest since the decision of March 11, 1927, of the Reich's Court (Penal Law Decision of the Reich's Court 61, 242) the justifying reason, in the case of the so-called medical indication, of an extra-legal emergency according to the principles of a balancing of underlying values and corresponding

duties was recognized by legal opinions. After that the act lost its illegality in the case of a serious danger to the life or health of the pregnant woman which could not be averted by other means to the extent the operation was undertaken by a physician with the consent of the pregnant woman according to the standards of the medical art. By Paragraph 14 of the Statute for the Prevention of Hereditarily Ill Offspring in the edition of the amendatory law of June 26, 1935, (Reich's Reporter of Law I, p. 773) these prerequisites for the terminations of pregnancy permissible on medical grounds were legally established. This provision was valid in some states of the Federal Republic even after 1945; where it was repealed, the prerequisites quoted therein, pursuant to the decision of the Federal Court of January 15, 1952 (Penal Law Decisions of the Federal Court of Justice 2, 111), were to be considered as the minimum requirements for the permissability of the interruption of pregnancy according to the principles of supra-legal emergency.

3. The penal provision of §218 derives its essential meaning from §§181 and 182 of the Penal Code for the Prussian states of April 14, 1851 (Collection of Statutes, p. 101) because these provisions served as a model for the regulation, in the Penal Code of the North German League of May 31, 1870 (Federal Law Reporter of the North German League, p. 197), which were incorporated word for word in the Penal Code for the German Reich of May 15, 1871 (Reich's Reporter of Law, p. 127). The provision read in its original version as follows:

§218

A pregnant woman who intentionally aborts her fetus or kills it in her womb shall be punished with up to five years in the penitentiary.

If extenuating circumstances are present, an incarceration for not less than six months will result.

The same penal provisions have application to anyone who, with the consent of the pregnant woman, applies the means for the abortion or killing or supplies them to her.

The penal provision remained unchanged for more than 50 years. The Statute for the Revision of the Criminal Code of May 18, 1926, (Reich's Reporter of Law I, p. 239) first mitigated the sanctions (in principle incarceration, however, penitentiary imprisonment for the professional abortionist).

Under the Order for the Realization of the Decree for the Defense of Marriage, Family and Motherhood of March 18, 1943 (Reich's Reporter of Law I, p. 169), the penal sanctions were once again considerably increased.

The First Statute for the Reform of the Penal Law (1 PLRS)

of June 25, 1969, (Federal Law Reporter I, p. 645) mitigated the penalty in the case of the self-administered abortion in which the especially difficult case was present. An abortion by a professional was reduced to a misdemeanor.

4. a) The general proscription of abortion was an object of attack from the beginning. Especially after the turn of the century a lively discussion began within the field of legal science about the wisdom of punishing abortion. Doubts were already setting in about the question of which legal values should be protected by the prohibition of abortion. The allowance of exceptions from the unlimited prohibition and the proper assessment of the penalties to be applied were also discussed.

The original draft for a German Penal Code published in 1909 by the Ministry of Justice of the Reich; the counterproposal of 1911 by Professors Kahl, von Lilienthal, Franz v. Liszt and Goldschmidt; the draft based on the conclusions of the Commission of Penal Law of 1913; and, the Draft of 1919 proposed merely to lessen the penalty. In the reasoning for the Draft of 1919, freedom from punishment for interruption of pregnancy was rejected "in view of the serious harm to the public good which results from the spread of abortion."

b) During the Weimar Republic, within the scope of the efforts to bring about a sweeping reform of the penal law—although such efforts came to no conclusion—§218 was once again the object of a lively discussion. A large number of bills and proposals for the reform of this penal provision were introduced into the parliament. Some of them pursued the goal of eliminating §§218 to 220 without replacement. Others suggested removal of the criminal penalty for the first three months of pregnancy. A proposal which Mrs. Schuch, Prof. Radbruch and 53 other members of the Social Democrat Party introduced into the Reichstag on July 31, 1920, provided for freedom from punishment for abortion "if the abortion is performed by the pregnant woman or by a physician recognized (approved) by the state, during the first three months of pregnancy" (also *cf.* Radbruch's reasoning in Grotjahn-Radbruch, "The Abortion of the Child *en ventre sa mere*," 1921). None of the applications was ultimately successful.

The draft of a General German Penal Code, which Radbruch proposed in 1922 when he was the Reich's Minister of Justice and which became the foundation for further work on the reform of the penal law, proposed imprisonment for abortion (*cf.* "Gustav Radbruch's Draft for a General German Penal Code (1922)," Tübingen 1952, p. 28, Section 225). The Drafts of 1925, 1927 and 1930 proposed similar regulations.

c) During the National Socialistic period abortion was seen principally from the points of view of the "defense of the people's strength," "attacks on the vital energy of the people," and "attacks on race and heredity." The goal of these endeavors, with the exception of several indicated cases which were to remain without punishment, was to increase punishment severely (*cf.* also §10a of the Statute for the Prevention of Hereditarily Ill Offspring).

5. As a provisional result of the work of reform on the penal code which was resumed after 1945, the Federal Ministry of Justice in the year 1960 drew up a comprehensive draft together with reasoning on the basis of the conclusions of the Great Criminal Law Commission. The draft made use of the recommendations of a commission of the states (Draft of a Penal Code-Draft 1960-with Reasoning, Bonn 1960).

Thereafter abortion remained punishable as a matter of principle (§§140, 141); in the case of a medical indication, however, freedom from punishment was allowed (§157). Further, according to §160 the penalty would be disregarded in the case of a killing of the child *en ventre sa mere* undertaken by a physician with the consent of the pregnant woman if the court has determined that someone has committed rape against the woman or an indecent assault while she was mentally ill, without will to resist, unconscious, or physically incapable of resistance; or she is carrying sperm from a man other than her husband without her consent and compelling reasons demand the assumption that the pregnancy is a result of the act, provided that not more than twelve weeks have elapsed from the end of the month in which the inception of the pregnancy occurs.

This ethical indication was, however, not contained in the version of the draft of 1960 proposed by the Federal Government to the lawmaking bodies (*cf.* Federal Press, 270/60, p. 38 and p. 278). This draft did not come up for consideration in the third election period.

In the year 1962 a new governmental draft was submitted to the lawmaking bodies, which adopted §§140, 141, 157 of the Draft of 1960 in an essentially unchanged form (*cf.* Federal Press, 200/62, p. 35/36, 38). Even this draft could not be ratified in the fourth election period of the Federal Parliament.

In November 1965 the Draft of 1962 was introduced as the draft of a private bill by a group of members to Federal Parliament (Federal Parliamentary Press, V/32). The Federal Parliament referred the draft to the Special Committee for the Reform of the Penal Law, which, basing its conclusions upon the so-called Alternative Draft of a Criminal Code (General Part) published

in 1966 by German and Swiss criminal law scholars, submitted two partial drafts for the reform of the penal law which were enacted in 1969 as the First and Second Statute for the Reform of the Penal Code. By virtue of the first statute the penalties of §218 of the Penal Code were placed within the milder framework of punishment already mentioned. In the deliberations in the Special Committee on Penal Law there was unanimous agreement that the problematic presented by §218 was not resolved with the adjustment of the measure of punishment but rather that a comprehensive reform of this area must follow (*cf.* the statements of Deputy Dr. Müller-Emmert, Fifth Election Period, 144th session of the Special Committee for the Reform of the Penal Law, Stenographic Reports, p. 3195).

The Special Part of the Alternative Draft published in 1970 was based on this idea (Alternative Draft, Special Part, Criminal Acts against the Person, First half volume, Tübingen 1970, p. 25 ff.). Interruptions of pregnancy were—so it was represented—almost without exception forbidden and punishable. The social reality, however, was so far removed from these legal norms that the penalties could hardly exercise any effect. According to this view, this would be in large measure injurious and insufficient since the destruction of developing life is, apart from exceptional situations, not only ethically reprehensible but also represents the destruction of an intrinsic legal value. The authors could not, however, agree about legislative measures with which an effective protection of developing life could be achieved.

The majority decided to leave the interruption of pregnancy free from punishment during the first three months of pregnancy; and, indeed absolutely so within four weeks after conception; and in the second and third month on the condition that the interruption is performed by a physician after the pregnant woman has sought out a counseling center (§105, Alternative Draft). The following considerations were presented on this point:

> The fundamental conception of this suggestion is that the decision of a woman to interrupt her pregnancy and the realization of the decision can only be effectively countered by guaranteeing to the pregnant woman, within the boundaries of the possible, help for the alleviation of the material, social and familial difficulties which drive her to abortion and by enabling her to make a considered and responsible decision through a personal consultation and frank discussion. The institution of the counseling centers should serve this purpose. . .
>
> The counseling centers should, therefore, possess the capability to provide financial, social and familial assistance. Further-

> more, they should provide spiritual care for the pregnant woman and her relatives through suitable associates and thereby make it quite clear to those involved that the interruption of pregnancy, from the medical standpoint as well, is no trifling matter but rather a serious operation having, under certain circumstances, momentous consequences and that the interruption itself, even for the most pressing motives, represents the destruction of developing life and therefore interferes with and violates a high ethical responsibility. (*loc. cit.*, p. 27).

The woman inclined to abortion, according to this view, should be able to make use of the counseling center without having to fear that the realization of her intention will thereby be rendered legally impossible. An interruption of pregnancy performed later than three months after conception should remain free of punishment only if medical or eugenical indications are present, in which case the prerequisites of such indication are to be determined at a medical speciality center (§106, Alternative Draft).

The minority did not see in this suggestion any effective protection of developing life, but at most an indirect protection, a protection that would be abandoned in all cases in which the pregnant woman could not be convinced at the counseling center. For this reason, the representatives of this opinion, as a matter of principle, adhered to the punishability of the interruption of pregnancy with the exception of the first four weeks. They proposed freedom from punishment, however, "if carrying the pregnancy to term was not exactable from the pregnant woman upon consideration of the total circumstances of her life," and made this general clause concrete with a catalog of five indications. A further prerequisite for freedom from punishment should be the consent of the pregnant woman as well as the approval of a medical speciality center and that the interruption be performed in the first three months after conception.

6. At the beginning of 1972 the Federal Government submitted the draft of a Fifth Statute for the Reform of the Penal Law (5 PLRS) (Federal Press, 58/72). The draft adhered to the fundamental punishability of the interruption of pregnancy. In the reasoning it was explained that human life even before birth is a legal value which is worthy of protection and which requires protection. The Basic Law, in Article 1 and Article 2, Paragraph 2, has made a value decision for life. In the reform of the abortion provisions it is accordingly not a question of the elimination of criminal offenses which have as their object behavior which is not socially destructive. A reform of the penal law which is oriented to the basic legal order must so structure the regulations governing abortion that the protection of developing life is

guaranteed at the first opportunity under the circumstances. For this purpose, according to this view, the reform must do justice to the principle of the legal inviolability of developing life and at the same time strike a balance between the right of the unborn child and the human dignity of the pregnant woman as well as her right to the free development of her personality. Therefore, an absolute precedence cannot be granted either to the one right or to the other. In especially difficult conflict situations, it is of importance to find solutions which take into account the value judgment of the constitution (*loc. cit.*, p. 8).

According to this view, the regulation of terms could only fulfill the expectations of public health, to which it is bound, if every interruption of pregnancy within the first three months appears to have the approval of the law. This would be incompatible with the hierarchy of values in the constitution. If society recognizes developing life as a legal value worthy of protection and of comparably high rank, it could not make the destruction of this legal value dependant upon the untrammeled pleasure of the individual without coming into conflict with this premise (*loc. cit.*, p. 9).

From this point forward the draft rejected the "term solution which was discussed in such a lively fashion in the time of the Weimar Republic as well as at the present," and determined that exceptions from the fundamental prohibition of the interruption of pregnancy could only acquire validity by establishing a statutory indication. An indication should be assumed,

a) if the interruption of the pregnancy was indicated in the judgment of medical science in order to avert from the pregnant woman the danger for her life or the danger of a serious impairment of the state of her health insofar as the danger could not be averted in any other way which was exactable for her (§219 Medical Indication).

b) if, according to the judgment of medical science, compelling reasons require the assumption that the child, as a consequence of an heriditary disposition or the consequence of harmful influences before birth, will suffer damage to its condition of health which cannot be alleviated and which condition is so serious that the continuation of the pregnancy cannot be demanded from the pregnant woman, provided that not more than 20 weeks have elapsed since the beginning of the pregnancy (§219b Eugenic or Indication from the Condition of the Child).

c) when an illegal act has been committed against the pregnant woman pursuant to §176 (the sexual abuse of children), §177 (rape) or §179, Par. 1 (the sexual abuse of those incapable of resistance) and compelling reasons require the assumption

that the pregnancy resulted from the act, provided that no more than twelve weeks have elapsed since the beginning of the pregnancy (§219c Ethical or Criminalogical Indication).

d) if the interruption of the pregnancy is indicated in order to avert from the pregnant woman the danger of a grave calamity, provided that the danger cannot be averted in another way that is exactable from her and if not more than twelve weeks have elapsed since the beginning of the pregnancy (§219d Social or Emergency Indication).

In the presence of one of these indications an interruption of pregnancy performed by a physician with the consent of the pregnant woman should not be punishable under §218. The commencement of pregnancy within the sense of the statute was fixed at the conclusion of the process of implantation of the fertilized egg in the uterus (§218, Par. 5).

At the same time, Representatives Dr. DeWith and colleagues proposed the draft of a statute for amending §218 of the Penal Code (Federal Parliamentary Press, VI/3137) which would have left interruption of pregnancy free of punishment in the first three months provided it was performed by a physician with the consent of the woman after medical consultation (regulation of terms).

Both drafts were considered together in the Special Committee for the Reform of the Penal Law. On April 10, 11 and 12, 1972, a public hearing took place in which all of the questions connected with the reform of the provisions governing abortion were discussed in a comprehensive fashion by experts and specialists in all relevant fields of speciality (*cf.* German Federal Parliament, Sixth Election Period, 74, 75, 76 Session of the Special Committee for Penal Law Reform from April 10, 11, 12, 1972, Stenographic Reports, p. 2141 to 2361). The premature adjournment of the Sixth German Parliament led to the interruption of this deliberation.

In the seventh election period the Federal Government did not introduce its own statutory draft. Instead, four drafts for a statute were proposed from the membership of the Parliament. The draft of Representatives Dr. Müller-Emmert and colleagues contained a regulation of indications and provided in addition that the pregnant woman should, in all cases, remain free of punishment (Federal Parliamentary Press, 7/443). The draft of the SPD[F] and the FDP,[G] on the other hand, suggested a regula-

F. Social Democratic Party [hereinafter referred to, by the Court, as SPD].

G. Free Democratic Party [hereinafter referred to, by the Court, as FDP].

tion of terms (Federal Parliamentary Press, 7/375). In a draft of the CDU/CSU[H] a narrower regulation of indications was proposed (medical—which included eugenic—and an ethical indication; disregard of the penalty in the situation of non-exactability — Federal Parliamentary Press, 7/554 —). A draft introduced by Representatives Dr. Heck and colleagues proposed to limit freedom from punishment for the interruption of pregnancy essentially to the case of a broadly-formulated medical indication (Federal Parliamentary Press, 7/561).

All four drafts were referred to the Special Committee for the Reform of the Penal Law for joint consideration. None of these drafts, however, received the required majority (*cf.* Federal Parliamentary Press 7/1982, p. 4). The Committee, therefore, did not think itself in a position to recommend definite conclusions to the full legislature but proposed all four drafts for decision in separate reports—*cf.* Federal Parliamentary Press, 7/1982, 7/1981 (new), 7/1983, 7/1984 (new). Regarding the regulation of terms proposed by the SPD/FPD factions, which was later adopted by the Federal Parliament, the following considerations were, according to the report of the Special Committee—Federal Parliamentary Press, 7/1981 (new), p 9/10—especially decisive:

> In the area of penal law the proponents of this draft suggest that we revoke the sanction for the first three months of pregnancy in the interest of improving the counseling situation. That is to say, the only duty imposed by penal law is for one to undergo comprehensive counseling and to allow the operation to be performed by a physician. Furthermore, this means that in the first three months the protection of developing life will no longer be guaranteed by a uniform penal sanction but rather by a counseling system, utilization of which will be required by a penal sanction. The supporters of the regulation of terms proceed from the premise that the penal sanction has a real effect only after the third month. It has become evident that a general criminal prohibition is not suited to guarantee the protection of unborn life. A pregnant woman who will allow her pregnancy to be interrupted will do this in any case without consideration of the penal statute. She will, in every case, find a way to obtain an abortion. The causes of the ineffectiveness of the penal provision were persuasively clarified by, among others, the experts in the public hearing who pointed out that the decision to interrupt the pregnancy has its origin in circumstances of serious conflict and is made in the depths of her personality, which a threat of punishment is not capable of reaching (Rolinski, AP VI, p. 2219, 2225; Schulte, AP VI, p. 2200; Brocher, AP VI, p. 2209). . .
>
> The regulation of terms does not abandon the idea that the unborn life requires defense and is worthy of it. The advocates

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H. Christian Democratic Union/Christian Social Union [hereinafter referred to, by the Court, as CDU and CSU respectively].

> of this draft are only of the opinion that the penal law, properly conceived, is not the suitable means. . .
>
> In the case of an interruption of pregnancy, consultation and assistance must (and can) intervene before the pregnant woman has taken the decisive step. So long, however, as the woman must fear any penal sanction, she will scarcely seek out consultation and assistance. A woman who, for whatever reasons, wants to interrupt her pregnancy will rather either perform it herself or seek out a physician or other person whom she knows will perform the operation without asking very many questions. . . . So long as there is a penal provision, it is difficult to reach such women for consultation and assistance because, for the most part, they only turn to such persons for "help" whom they are certain will bring them closer to the desired interruption of pregnancy. For the most part, they do not come within reach of anyone who could or would offer them genuine assistance.

In the voting in the second deliberation of the German Parliament, neither of the drafts received the required majority of votes. Thereupon, the two party drafts which had received the highest number of oral votes were presented for decision. Two hundred forty-five representatives voted for the draft of of the SPD/FDP factions, 219 representatives for the application of the CDU/CSU faction (*cf.* for particulars, German Federal Parliament, Seventh Election Period, 95th Session, Stenographic Reports, p. 6443).

In the final roll call vote on the draft of the SPD/FDP faction, in the third deliberation, 247 deputies of a total number of 489 with full voting rights answered with yes, 233 with no, and nine abstained (German Federal Parliament, Seventh Election Period, 96th Session, Stenographic Reports, p. 6503).

The Federal Council designated the law which had been decided upon as needing concurrence, but denied the concurrence after a fruitless convoking of the Mediation Committee and made a timely objection according to the provisions of Article 77, Paragraph 3, of the Basic Law (Federal Council, 406th Session from May 31, 1974, Stenographic Reports, p. 214). This objection was rejected by the Federal Parliament, which did not regard this statute as requiring concurrence, on June 5, 1974, with 260 votes against, 218 votes for, and with four abstentions (German Federal Parliament, Seventh Election Period, 104th Session, Stenographic Reports, p. 6947).

7. To support the penal law reform through socio-political measures, the German Federal Parliament on March 21, 1974, passed a bill of the SPD/FDP factions (Federal Parliamentary Press, 7/376), entitled the Statute to Supplement the Fifth Statute to Reform the Penal Law (Statute to Supplement the Penal Law Reform—SSPLR). In this statute, provision is made

for, *inter alia*, claims for medical counseling regarding questions of the regulation of conception as well as claims for medical assistance for those abortions which are free of punishment. These services are to be provided through statutory health insurrance and social assistance (Federal Parliamentary Press, 7/1753 and German Federal Parliament, Seventh Election Period, 88th Session, Stenographic Reports, p. 5769).

The Federal Council refused to concur in this statutory decision after an unsuccessful appeal to the Mediation Committee (Federal Council, 410th Session from July 12, 1974, Stenographic Reports, p. 324). Thereupon the Federal Government, on its own initiative, called upon the Mediation Committee. Up to this time the Committee had not arrived at any decision.

8. On June 21, 1974, the Federal Constitutional Court, upon application of the government of the federal state of Baden-Württemberg, issued a provisional order, according to which, *inter alia*, §218a of the Penal Code in the version of the Fifth Statute to Reform the Penal Law (5 PLRS) would not, for the time being, take effect, although the interruption of pregnancy which is indicated medically, eugenically or ethically within the first twelve weeks after conception would remain free of punishment (Decisions of the Federal Constitutional Court, 37, 324; Federal Law Reporter, 1974 I, p. 1309). The provisional order was extended until the announcement of this judgment.

II.

One hundred ninety-three members of the German Parliament as well as the state governments of Baden-Württemberg, Bavaria, Rhineland-Pfalz, the Saarland and Schleswig-Holstein, according to the provisions of Article 93, Paragraph 1, No. 2, of the Basic Law and Section 13, No. 6, Statute of the Federal Constitutional Court, petitioned for constitutional review of §218a of the Penal Code, in the version of the Fifth Statute to Reform the Penal Law. They considered the provision to be inconsistent with the Basic Law because the availability of abortion made possible thereby during the first twelve weeks after conception runs afoul of Article 2, Paragraph 2, Sentence 1, in connection with Article 1, Paragraphs 1, 2 and 4 of the Basic Law as well as the principle of the just state. The governments of the petitioning states are further of the opinion that the concurrence of the Federal Council was necessary for the Fifth Statute for the Reform of the Penal Law.

By way of reasoning, essentially the following is offered:

1. The statute contains in Articles 6 and 7 amendments to the Code of Penal Procedure and to the Introductory Statute

of the Penal Code and therefore to statutes which in their own right were enacted with concurrence of the Federal Council. This alone establishes the necessity of concurrence. The contrary interpretation of the Federal Constitutional Court (Decisions of the Federal Constitutional Court, 37, 363) should be reexamined.

Regardless, the Fifth Statute to Reform the Penal Law itself contains provisions which create the necessity for concurrence according to Article 84, Paragraph 1, of the Basic Law, since in §218c, Par. 1, No. 1, of the Penal Code, there is provision for the creation of "authorized counseling centers" and in §219, Par. 1, of the Penal Code, provision for verification of an indication by a "competent center." Furthermore, even according to the decision mentioned (*loc. cit.*, p. 383), an amendatory statute is in need of concurrence even if in fact it limits itself to the ordering of substantive questions if it puts into effect innovations in the area which lend an essentially different meaning and scope to the provisions for administrative procedures which themselves have not explicitly been amended. This necessarily leads to a requirement for concurrence in the amendatory statute, if the original statute in fact contains no provisions concerning administrative procedure, although the amendatory statute encroaches in such a way on the necessary provisions for the conduct of administrative proceedings through the structuring of its substantive provisions that the states are committed on decisive points. This would be the case here, since only a very slight latitude would be allowed to the states in the structuring of the administrative process.

Finally, according to this view, this Statute and the Statute to Supplement the Penal Law Reform must be viewed as a unity because these statutes, in the nature of the case, are from a legal point of view inextricably connected. The goal of the project of reform is a "regulation of terms with counseling"; the counseling, for its part, is, however, first made possible for all the cases which are in the focal point of the reform by the Statute to Supplement the Penal Law Reform. Both statutes represented a unified political decision. It would be, therefore, contradictory if the repeal of the penal sanction and the provisions which make counseling possible would be introduced in two separate bills. Clearly, so the argument continues, this was done to circumvent the concurrence of the Federal Council, since the Statute to Supplement the Penal Law Reform without any doubt required the concurrence of the Federal Council. The Federal Parliament would, therefore, so this reasoning concludes, exceed the bounds of the discretion granted it by dividing the legal subject matter to be regulated into several statutes.

2. The fundamental right guaranteed by Article 2, Paragraph 2, Sentence 1, of the Basic Law, as the most fundamental and most original human right, protects, in comprehensive fashion, unborn life as well. This conception of the law is in agreement with the history of its origin and with dominant opinion, is in the tradition of German legal thinking, and can find support in the literal wording of the constitution. Above all, however, only this view of the law does justice to the recognizable function of a constitutional norm.

Article 2, Paragraph 2, Sentence 1, of the Basic Law, contains according to this view, not only a right of defense against direct attacks by the state but at the same time forms a foundation for a positive demand for protection against the state. The duty of protection can be inferred from the fundamental value decision of the constitution for developing life, the specific function of which is to allow valuation expressed in Article 2, Paragraph 2, Sentence 1, of the Basic Law to become fruitful in its relationship to third parties. This obligation also flows directly from Article 1, Paragraph 1, Sentence 2, of the Basic Law.

The protection corresponds to constitutional requirements only if, in principle, it is comprehensively structured. This conclusion rests not only on the particularly high rank of the legal values of Article 2, Paragraph 2, of the Basic Law and on the fact that every individual life enjoys the protection of the fundamental right but even more decisively that violations of the fundamental right with respect to (biological) life lead to the total annihilation of the basis of human existence.

The legislature may certainly consider, in formulating a protection for developing life, the spheres of rights of third parties which will eventually collide, particularly those of the mother, insofar as the third party interests, for their part, are supported by the constitution. Such a situation exists in the case of danger to the life of the pregnant woman. The legislature, however, can also come to the conclusion, in the case of grave dangers for the woman of a different kind, that the involuntary carrying of the child to term cannot be exacted. This is not to say that the developing life is to be less respected as a legal value than, for example, the health or other legal interests of the woman. No doubt, the complete realization of the protection of the developing life touches upon the borders of the legally possible. The authority should be granted to the legislature, therefore, to specify the factual basis of individual indications in greater detail. In this way, adequate room would be given to take account of an eventual change of social value conceptions in the course of the constitution. This point of view,

however, must be rejected where no relevant legal interests of the mother are in any way touched upon or where abortion results from indifference or pure convenience.

The obligation of the state to protect unborn life, according to this view, takes on a special significance when the elimination of a protection of the penal law which has existed for a hundred years is at stake. Therefore, an especially stringent examination is required to determine whether the elimination of the protection does not conflict with the value decision of the Basic Law regarding life.

With the regulation of terms solution, the state would offend in several respects against the duty of protection incumbent upon it:

a) The legislature would violate its duty by legally allowing the destruction of unborn life within the first twelve weeks of pregnancy, if the only condition of the destruction is that it be performed by a physician with the consent of the pregnant woman. The allowance of abortion by the penal law cannot be interpreted in any other way than in the sense of legal approval.

b) Furthermore, the legislature, by repealing the punishability of abortions during the first twelve weeks, deprives prenatal life in the future of the socio-ethical appreciation of its value among people. That penal norms possess power to form the standards of socio-ethical judgment for the citizenry corresponds to proven findings of legal sociology.

c) If one should suggest that the state should further differentiate the interruption of pregnancy, it would violate its constitutional duty of protection by repealing the present penal sanctions without exception for the first twelve weeks of pregnancy. Social welfare measures alone could not prevent pregnant women who desire abortion from realizing their intention. Thus, if they are not disposed to accept the offer of help, the protection of unborn life will not be guaranteed by this means. The disappearance of the penal sanction leaves behind it a relevant gap in protection. The result is that the counseling proposed, as the sole measure of assistance, as it is regulated in the statute, will be proven ineffective in practice. If the pregnant woman knows that the decision ultimately depends upon her alone, she will feel little inclination to allow this decision to be made more difficult by the admonitions of a counselor. The counselors are also in a contradictory position: if a pregnant woman should explain that she has decided for an abortion, the counselors would be faced with the alternatives either of mechanically issuing the permission for the abortion or of forcing on the pregnant woman, against her will, scruples of conscience

which would only burden her later life even more. Furthermore, too much is demanded of the physicians who would bear the main burden of medical counseling.

According to the view of the petitioners, it is true that the legislature would have a certain latitude in determining whether a penal sanction would be more harmful than useful. This latitude, however, would be narrowly limited by the overriding constitutional principle of demandability (the prohibition of excess). If one would follow the theory of practical concordance which has become dominant and the theory of balancing which preserves the most from the standpoint of both sides, the conflicting legal values must be so ordered to each other that each of them retains its reality. It would verge on the total inversion of these principles if an absolute precedence is conceded generally to either of the conflicting values. On this concession, however, is based the terms solution which awards to the power of self-determination of the woman an exclusive precedence, which in truth places the power of decision in another person vis-a-vis the fetus. In addition, according to such a theory, individual lives would be weighed against other individual lives (or the interests of health). Accordingly, what is involved is a kind of abstract governmental counting out and reckoning of life against life. In this way, however, the dominant and primary content of the Basic Law, as it regards individual rights, found in Article 2, Paragraph 2, Sentence 1, of the Basic Law is placed in question; there is no other fundamental right which aims directly at the protection of the individual as such.

Furthermore, according to the petitioner's view, one could attempt to legitimatize such a balancing only with the assumption that the number of lives saved could clearly be expected to exceed the number of those sacrificed. It is, however, the contrary which is well established. During the parliamentary deliberations, the representatives of the Government explained on the basis of comprehensive investigations and comparisons, that even following the lower estimate, one could count on a 40% increase in the total number of legal and illegal abortions.

Finally, according to this view, it ought to be noted that the regulation of terms is precisely what takes every opportunity away from the woman in distress to mitigate pressure for an abortion from the father or from others involved by pointing to the illegality, the punishment and the risk of the behavior demanded of her. In addition, counseling would be able to change nothing, least of all counseling which does not permit effective counter measures. Therefore, it is precisely the regulation of terms solution which would drive the pregnant woman

into isolation and subject her to prejudicial pressures. The regulation of terms is in truth an anti-social regulation.

3. The allowance of abortion in the first twelve weeks would also violate Article 3 of the Basic Law, because a regulation of terms within which no legal defense exists for developing life cannot be justified by any objective point of view. Further, the regulation of terms violates Article 6, Paragraph 1, and Paragraph 4 of the Basic Law as well as the principle of the just state.

III.

Of those constitutional organs which have been given the opportunity for expression under Section 77 of the Statute of the Federal Constitutional Court, the Federal Parliament and the Federal Government have taken positions. The government of the federal state of North Rhine-Westphalia has explained that it joins in the position taken by the Federal Government.

1. The Federal Minister of Justice, who expressed himself on behalf of the Federal Government, contends that the petitions are unfounded.

a) According to the decision of the Federal Constitutional Court on June 25, 1974, the Fifth Statute to Reform the Penal Law did not require the concurrence of the Federal Council (Decisions of the Federal Constitutional Court, 37, 363). It contains neither new provisions which establish the necessity for concurrence nor does it alter regulations which were subject to the requirement for concurrence. The legislature should not be prevented from considering and ratifying separately the Fifth Statute to Reform the Penal Law and the Statute to Supplement the Penal Law Reform.

b) The regulation of terms proposed in the Fifth Statute to Reform the Penal Law is compatible with Article 2, Paragraph 2, Sentence 1, of the Basic Law.

The Federal Government has consistently proceeded from the principle that unborn life is included in the protection of Article 2, Paragraph 1, Sentence 1, of the Basic Law. Also in the extensive deliberations in the Federal Parliament and the Federal Council the constitutional status and the obligation to protect the life of the unborn were beyond dispute.

Regardless of the obligation to provide an appropriate and effective protection of the unborn life, Article 2, Paragraph 2, Sentence 1, of the Basic Law does not require a protection of the unborn life which is identical to that provided born persons. The legislature, therefore, need not provide protection without exception under the penal law for unborn life if the protection

corresponds in another way with the requirement of the need and worthiness of protection of unborn life.

This concept is confirmed above all by the history of the origin of Article 2, Paragraph 2, Sentence 1, of the Basic Law. From this history, it is clear that one need not proceed to the defense of unborn life with compulsory and uniform penalization.

Uniformity of the protection would be necessary, to be sure, so far as attacks by the state are to be averted. The point at issue, however, is neither attacks by the state nor defense against attacks by third parties, because the relationship of the child *en ventre sa mere* to the mother is of a special kind. Even if the child is recognized as an intrinsic legal value, the child *en ventre sa mere* is united with the body and the life of the mother in the most intimate manner conceivable. Nature has already placed the protection in the direct care of the mother. The possibilities for the legal order to protect unborn life even against the mother are limited by the nature of the situation. Penal sanctions, according to previous experience, can only induce pregnant women to bearing the child to term in a limited measure, if the willingness is not already present. The duty to protect, therefore, cannot establish for the state a thoroughgoing duty to punish. With the withdrawal of the penal sanction for an interruption of pregnancy in the first weeks of pregnancy the state does not bestow upon the mother a right to the operation. The legislature merely limits the penal sanction with reference to the fact that other arrangements for protection would be seen as more appropriate and effective or to take account of interests of the pregnant woman which are worthy of protection.

Constitutionally, it would not be possible to proceed from a general duty on the part of the state to punish because the legislature is obliged to consider opposing fundamental rights of the pregnant woman herself and constitutional value decisions. Article 2, Paragraph 2, Sentence 1, of the Basic Law works to the benefit of pregnant women as a fundamental right, which also belongs to them, to life and bodily integrity. In view of the large number of interruptions of pregnancy not performed by physicians, considerable weight must be given to the protection of the life and the health of pregnant women. Quackery has indeed receded in comparison with earlier times but still constitutes a considerable danger for the life and health of pregnant women. In the case of illegal interruptions of pregnancy by physicians, in critical cases, the required emergency and after care is not always guaranteed. Furthermore it is necessary to consider the personal responsibility of pregnant women. The value decision in favor of the personal responsibility of the

human being would have in this case a decisive constitutional meaning to the extent that the legislature must directly take personal responsibility as a basis in regulating an area of life which in large measure is impressed with the natural responsibility of the woman for her child *en ventre sa mere*. The legislature, according to this view, has the task, in the face of the reciprocally influencing and limiting value decision and fundamental rights, of taking account of all legal positions and bringing them into balance.

Beyond that, in enacting penal law norms, it should be considered that limits should be set to the penal law from the "precept of sensible and moderate punishment." The guarantee of constitutional value decisions through penal sanctions is not required in every instance in which such a decision is present. A thoroughgoing parallel of the ordering of values in constitutional and penal law cannot be created; the two realms are not identical.

No more extensive requirement for the structuring of the general legal order can be inferred as a matter of principle from Article 2, Paragraph 2, Sentence 1, of the Basic Law than that of guaranteeing appropriate and effective protection of unborn life. The legislature should take account of the guiding principles and spirit emanating from a constitutionally fundamental decision. Beyond that, however, it has a free hand in structuring these measures.

c) The regulations of terms of the Fifth Statute to Reform the Penal Law meet, in content and structure, the constitutional demands of Article 2, Paragraph 2, Sentence 1, of the Basic Law. The counseling of pregnant women during the first twelve weeks of pregnancy, the basic part of the regulation of terms, guarantees even without penal sanction, the necessary protection of unborn life.

The legislature should accordingly proceed from the view that the decision for an interruption of pregnancy as a rule has its origin in a grave situation of conflict for the pregnant woman and is made in the depths of the personality. A penal provision, therefore, would not be able regularly to reach women inclined to, or ready for, an interruption of pregnancy. On the other hand, if a woman should consider an interruption of pregnancy in spite of the risk of her own health or indeed her own life, a situation is presented which would require a program of counseling and assistance. Both appear as not without prospects since many of these women still vascillate in their decision and have definitely not decided upon an interruption of pregnancy from the beginning. Such women could be brought to a posi-

tive attitude regarding pregnancy by means of thorough counseling. A thoroughgoing threat of punishment even for the first period of pregnancy as it is proposed in the regulations for indications decisively weakens the effectiveness of the counseling and offers of assistance. Since a regulation of indications inevitably presupposes in a certain form a system of expert opinion, it subjects the pregnant woman to the compulsion of abiding by this expert opinion. This, however, would be harmful to a candid participation of the pregnant woman in the counseling and would frequently lead in the cases of women inclined toward and ready for abortion to the result that the path to counseling and to the expert opinion center would be avoided from the beginning.

Furthermore, constitutional conclusions cannot be drawn from the prognosis made in connection with the reform of §218 of the Penal Code. They must be based on unknown quantities and therefore do not allow dependable conclusions. Moreover, the mistaken prognoses accumulate, if the regulation lying at the basis of the Fifth Statute to Reform the Penal law is explained as decriminalization and is compared with the legal situation in other countries in which this must actually be so understood. The aim of this statute is not the decriminalization of abortion but rather the guaranteeing of an appropriate and effective protection for unborn life, even if in the place of a thoroughgoing punishment for abortion an obligatory regulation is proposed which for the first twelve weeks of pregnancy attributes to counseling as a preventive measure a greater aptitude than the threat of punishment.

The legislature has, according to the view of the respondents, effectively designed the counseling. Side by side with a counseling in which the medical viewpoint would stand in the forefront, there is the instruction about the public and private assistance available for pregnant women, mothers and children as well as instruction regarding such help, which will facilitate the continuation of the pregnancy and the situation of mother and child. That the counseling must be directed to the continuation of the pregnancy is clear. The legislature ensures the counseling through a penal sanction. By means of the Statute to Supplement the Penal Law Reform it is certain that the route to the physician or to the counseling center will not be impeded by financial considerations. The fear that the regulation of terms would lead to "a bursting of the dike" in the legal consciousness of our people is already convincingly refuted in scientific literature.

d) The qualified removal of the penal sanction for abortion in the first twelve weeks of pregnancy does not violate Article

3 of the Basic Law. The various provisions for protection are not based upon a differing valuation of the child *en ventre sa mere* according to its age, but are part of a unified regulation which not only as a whole but also in its parts is directed towards equal protection for the child *en ventre sa mere* and arranges this protection in a manner which is effective and appropriate to the respective stage and development. Also, Article 6, Paragraphs 1 and 4 of the Basic Law as well as the principle of the just state are not violated.

2. Representative Dr. Ehmke, who is an attorney as well as a professor, delivered a statement of position on behalf of the German Federal Parliament. He is likewise of the opinion that the regulation of terms of the Fifth Statute to Reform the Penal Law would be compatible with the Basic Law. He denies the need for concurrence for this statute for the same reasons as the Federal Government.

He further explained:

The statute contains not a "perfect," but rather a sensible solution of this problem of reform which has been discussed for decades. The high number of illegal abortions, the small number of convictions—which resulted in only light punishments—which have had a negative effect on the social effectiveness of §218 of the Penal Code, the disadvantage to women from socially weaker classes who had to entrust themselves to quacks as well as the consequent criminality compellingly demanded a reform of §218. From the standpoint of public health as well as from the social-political point of view the term-solution is preferable. It will especially, with higher probability, decrease the number of illegal abortions and the dangers to health connected with them for the mothers and, furthermore, can check the consequent criminality. In contrast to a solution based on indications, the regulation of terms excludes both regional and individual inequality and thus excludes injustice in the application of the elements of the indication as well as social inequality with respect to possibilities for evasion of going to other countries. It eliminates the anxiety of women about being rejected, which once again will drive them toward illegality, and offers the mother, for the first time, the opportunity for subsequent counseling without time pressure and for responsible reflection. Strengthening the insight and the personal responsibility of the women promises much more success than building on their fear of the penal sanction.

The question of the constitutionality of the term solution cannot be answered from the language of Article 2, Paragraph 2, Sentence 1, of the Basic Law and the history of the origin of

this provision alone. From the proceedings of the Parliamentary Council it was only concluded that the Council did not consciously desire to prejudice a reform of the penal provisions regarding abortions and therefore did not expressly determine whether and how far Article 2, Paragraph 2, Sentence 1, of the Basic Law would protect unborn life. Therefore, clarity with respect to the interpretation of Article 2, Paragraph 2, Sentence 1, of the Basic Law is to be achieved by another route.

The use of the word "everyone" speaks against the assumption of a fundamental right for unborn life, since both in common speech as well as in legal language a human person is denoted clearly with "everyone." Also in the legal sense, the personal and human being first begins with birth.

With this, it is, to be sure, not yet decided whether and to what extent unborn life represents a legal value protected by Article 2, Paragraph 2, Sentence 1, of the Basic Law. In harmony with the opinion dominant in the literature and unanimously represented in the German Parliament, Article 2, Paragraph 2, Sentence 1, of the Basic Law in conformity with its meaning and purpose is to be so construed that it, as a fundamental norm of the constitution, protects unborn life as the preliminary stage of human life. With that, however, it remains completely undecided when the legal protection begins, what form the protection is to take and how it is to differentiate among various potential offenders.

This question can be answered neither by reference to teachings of the church or religious convictions nor with the methods of natural science. Also, an appeal to Article 1, Paragraph 1, and Article 19, Paragraph 2, of the Basic Law cannot offer any additional knowledge. In the interpretation of the concept "human being" the same questions of interpretation are presented in unanswered form. Article 19, Paragraph 2 of the Basic Law determines not the scope of a fundamental right but rather its essential meaning; before this determination can be approached, the question must therefore be examined, whether and to what extent unborn life is protected at all by Article 2, Paragraph 1, Sentence 1, of the Basic Law.

The question of penal protection for unborn life requires different answers which depend upon the potential offenders against whom the protection is directed and the stage of development in which the unborn life finds itself. Even the history of law shows that unborn life—both in the secular as well as canon law—has always been protected differently and less strictly than born life.

Under canon law until the end of the 19th century only the killing of an "ensouled" child *en ventre sa mere* was punishable and in practice the 80th day after conception was accepted as the point of ensoulment. Secular law, to begin with, has been enduringly influenced by ecclesiastical theory and by canon law; since the emergence of natural scientific thinking, penal protection attached at the commencement of the child's movement (in the Common Law: quickening), until which time the interruption of pregnancy would be punished in an essentially milder way. For population considerations, the General Provincial Law of Prussia punished the interruption of pregnancy from conception forward, although it graduated the penal sanction after the 30th week of pregnancy, thus according to the viability of the child.

That unborn life is not to be equated under penal law with a human life is made evident by the fact that even the opponents of the term solution had suggested elements for indications over and above the medical indication. From this mistaken point of departure, namely that unborn life is a legal value of as much worth as a human life under the penal law, this theory of penal law encountered difficulties in the cases of the eugenic and ethical indications. Lastly, it is decisively a question of the maintenance of the interests of the mother, along with which one should simultaneously endeavor to protect those of the one about to be born as much as possible. One should therefore consider here the question from the point of view of the rights of the mother and understand the penal provision of §218 of the Penal Code in a dogmatically correct fashion as a statute that, to protect the objective legal value of unborn life, preserves the fundamental rights of the mother. This assessment of the interruption of pregnancy is generally to be observed in the legal consciousness of the free world, as a comparison of law in the other countries of the Western World will show.

If one should view the situation in this way, the regulation of terms would strengthen the fundamental rights of the woman contained in Article 1, Paragraph 1, and Article 2, Paragraph 1, of the Basic Law. This is not to say, of course, that her individual freedom could be unlimited. One should, in the question of abortion, chiefly rely upon the personal responsibility of the woman which, to be sure, ought not be misunderstood in the sense of a "right of disposal" of the woman over the child *en ventre sa mere*, which is not a part of the body of the woman. A penal provision against interruption of pregnancy demands of the woman not only, as in the case with third parties, a mere omission, but rather the assumption of dangers to body and life,

of physical and psychic burdens, as well as of duties which result from the condition of being a mother and the responsibility for the education, care and control of her children. Furthermore, Article 6, Paragraph 1, of the Basic Law guarantees a realm of private, familial structuring of life, which in principle is removed from encroachments by the state. Today Article 6, Paragraph 1, of the Basic Law is to be interpreted in the light of the developing human right of family planning. Further a positive social duty of protection on the part of the state results from Article 6, Paragraph 4, of the Basic Law. Finally, in Article 2, Paragraph 2, Sentence 1, of the Basic Law, the life and health of the mother, in contrast to the unborn life, are protected not merely as objective legal values but also as genuine fundamental rights.

In balancing all of the considerations, Article 2, Paragraph 2, Sentence 1, of the Basic Law, which as a fundamental norm also protects unborn life, could not be construed to mean that it requires a universal penalization of the interruption of pregnancy from the beginning of life forward.

The legislature has finally entered upon the way of a positive protection of unborn life. The proposed counseling should, on the one hand, show the woman what help she could expect from society for the carrying of the pregnancy to term and for her motherhood and, on the other hand, should bring to her attention all of the medical viewpoints regarding pregnancy as well as the interruption of pregnancy. The Statute to Supplement the Penal Law Reform should secure the counseling through a claim for consultation and, beyond that, improve the social insurance for the mother-to-be and therewith for the developing life.

Prognoses about the future effect of a statute are naturally burdened with considerable uncertainty. This is especially true in an area in which one can only proceed, in the face of the extraordinarily high number of illegal abortions, from estimated statistics. Valid here as well is the principle laid down by the Federal Constitutional Court that a statutory measure may not be viewed as being contrary to the constitution merely because the measure might rest on a mistaken prognosis. Rather the Constitutional Court has only to examine whether the assumptions of the legislature are so in error that they must be labeled as legally unsound and indefensible.

IV.

The following persons addressed themselves to the constitutional questions at the oral proceedings on November 18 and 19, 1974:

For the Petitioners: the Minister of Justice of the State of Baden Württemberg, Dr. Bender, the Minister for Family, Health and Social Matters of the Saarland, Ms. Rita Waschbüsch, Professors Dr. Lerche, Dr. Ossenbühl and Dr. Rudolphi, attorney Erhard, MP, as well as the Directors of the Ministries, Professor Dr. Odersky (Bavaria) and Dr. Fischer (Rhineland-Pfalz; for the German Parliament, its Vice-president Ms. Liselotte Funcke, attorney Professor Dr. Ehmke and Professor Dr. Stratenwerth; for the Federal Government, the Federal Minister of Justice, Dr. Vogel, Professors Dr. Baumann and Dr. Peter Schneider, as well as the Director of Ministry Bahlmann and the Ministerial Counselor, Harsdorf.

On the motion of the Federal government, Professor Dr. Jürgens was heard as an expert.

B.

The Fifth Statute to Reform the Penal Law did not need the concurrence of the Federal Council.

1. The statute, in Articles 6 and 7, alters, it is true, the Order of Penal Procedure and the Introductory Statute to the Penal Code which, for their part, were passed with the concurrence of the Federal Council. This reason by itself, however, does not necessitate concurrence (Decisions of the Federal Constitutional Court, 37, 363). Further, the statute alters no statutory provisions, which, for their part, were in need of concurrence.

2. The Fifth Statute to Reform the Penal Law itself contains no provisions which under Article 84, Paragraph 1, or any other provision of the Basic Law require concurrence. Neither §218 nor §219 of the Penal Code regulates the establishment of authorities or administrative procedure. Rather, they merely establish the substantive legal prerequisites of nonpunishable interruption of pregnancy. This is also true, insofar as §218c, Par. 1, No. 1, of the Penal Code, requires that the pregnant woman, before the abortion, present herself to an authorized counseling center and describe the object of the counseling. The setting up and establishment of counseling centers as well as the decreeing of administrative provisions for procedures to be followed by these centers are completely relegated to the federal states. For the same reasons §219 of the Penal Code does not create a need for concurrence of the Federal Council by requiring the verification of the substantive prerequisites by "an authorized center" before performing an abortion indicated under §218b.

3. The petitioning state governments cannot be followed in concluding that concurrence is necessary insofar as they refer

to the legal principle established in the decision of June 25, 1974, according to which an amendatory statute required the concurrence of the Federal Council "if, through the alteration of substantive legal norms, provisions regarding the administrative procedures which are not expressly altered experience an essentially different meaning and scope in a construction which is oriented to the purpose of the statute" (Decisions of the Federal Constitutional Court, 37, 363, Fourth Guiding Principle and 383). The actual prerequisites for a direct application of this guiding principle are unquestionably not present here. Whether a continued extension of this legal principle in the sense proposed by the government of the federal state of Rhineland-Pfalz could come into consideration at all is uncertain. Even according to this view of the law, no requirement for concurrence for the Fifth Statute to Reform the Penal Law arises since an even greater latitude to structure remains with the federal states under the substantive provisions for the administrative regulations incumbent upon them.

4. Finally, no requirement for concurrence can be inferred from the close connection of the Fifth Statute to Reform the Penal Law with the Statute to Supplement the Penal Law Reform which, with the content given it by the Federal Parliament, is viewed as needing concurrence. Regardless of that, the Statute to Supplement the Penal Law Reform has not yet taken effect. The legislature is not prevented as a matter of principle in the excercise of its legislative freedom from dividing a statutory plan into several individual statutes. The Federal Constitutional Court has, up to this time, proceeded upon the principle that such divisions were permissible (*cf.* Decisions of the Federal Constitutional Court, 34, 9 28; 37, 363 382). In the decision (Decisions of the Federal Constitutional Court, 24, 184 199f.)—Apostille—the Court left unanswered the question whether there are constitutional limits to the authority and where these limits are to be found. In any event, such limits are not transgressed in this case.

The Fifth Statute to Reform the Penal Law and the planned Statute to Supplement the Penal Law Reform were indeed voted upon consecutively. However, they must not necessarily be considered a statutory and technical unity. The first named statute contains in essence only penal law and penal procedure. In contrast, the Statute to Supplement the Penal Law Reform contains social and labor law measures. The independence in content of the Statute to Supplement the Penal Law Reform from the Fifth Statute to Reform the Penal Law obviously results from the fact that the Statute to Supplement the Penal Law Reform, accord-

ing to its very wording, would be applicable to all of the proposed solutions for the new regulation of pregnancy termination, namely the "term solution" as well as the three indication solutions.

C.

The question of the legal treatment of the interruption of pregnancy has been discussed publicly for decades from various points of view. In fact, this phenomenon of social life raises manifold problems of a biological, especially human-genetic, anthropological, medical, psychological, social, social-political, and not least of an ethical and moral-theological nature, which touch upon the fundamental questions of human existence. It is the task of the legislature to evaluate the many sided and often opposing arguments which develop from these various ways of viewing the question, to supplement them through considerations which are specifically legal and political as well as through the practical experiences of the life of the law, and, on this basis, to arrive at a decision as to the manner in which the legal order should respond to this social process. The statutory regulation in the Fifth Statute to Reform the Penal Law which was decided upon after extraordinarily comprehensive preparatory work can be examined by the Constitutional Court only from the viewpoint of whether it is compatible with the Basic Law, which is the highest valid law in the Federal Republic. The gravity and the seriousness of the constitutional question posed becomes clear, if it is considered that what is involved here is the protection of human life, one of the central values of every legal order. The decision regarding the standards and limits of legislative freedom of decision demands a total view of the constitutional norms and the hierarchy of values contained therein.

I.

1. Article 2, Paragraph 2, Sentence 1, of the Basic Law also protects the life developing itself in the womb of the mother as an intrinsic legal value.

a) The express incorporation into the Basic Law of the self-evident right to life—in contrast to the Weimar Constitution—may be explained principally as a reaction to the "destruction of life unworthy of life," to the "final solution" and "liquidations," which were carried out by the National Socialistic Regime as measures of state. Article 2, Paragraph 2, Sentence 1, of the Basic Law, just as it contains the abolition of the death penalty in Article 102, includes "a declaration of the fundamental worth of human life and of a concept of the state which stands, in

emphatic contrast to the philosophies of a political regime to which the individual life meant little and which therefore practiced limitless abuse with its presumed right over life and death of the citizen" (Decisions of the Federal Constitutional Court, 18, 112 117).

b) In construing Article 2, Paragraph 2, Sentence 1, of the Basic Law, one should begin with its language: "Everyone has a right to life . . ."[I] Life, in the sense of historical existence of a human individual, exists according to definite biological-physiological knowledge, in any case, from the 14th day after conception (nidation, individuation) (*cf.* on this point the statements of Hinrichsen before the Special Committee for the Reform of the Penal Law, Sixth Election Period, 74th Session, Stenographic Reports, p. 2142 ff.). The process of development which has begun at that point is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of the human life. The process does not end even with birth; the phenomena of consciousness which are specific to the human personality, for example, appear for the first time a rather long time after birth. Therefore, the protection of Article 2, Paragraph 2, Sentence 1, of the Basic Law cannot be limited either to the "completed" human being after birth or to the child about to be born which is independently capable of living. The right to life is guaranteed to everyone who "lives"; no distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life. "Everyone"[J] in the sense of Article 2, Paragraph 2, Sentence 1, of the Basic Law is "everyone living"; expressed in another way: every life possessing human individuality; "everyone" also includes the yet unborn human being.

c) In opposition to the objection that "everyone" commonly denotes, both in everyday language as well as in legal language, a "completed" person and that a strict interpretation of the language speaks therefore against the inclusion of the unborn life within the effective area of Article 2, Paragraph 2, Sentence 1, of the Basic Law, it should be emphasized that, in any case, the sense and purpose of this provision of the Basic Law require that the protection of life should also be extended to the life developing itself. The security of human existence against encroachments by the state would be incomplete if it did not also embrace the prior step of "completed life," unborn life.

This extensive interpretation corresponds to the principle

I. "Jeder hat das Recht auf Leben . . . ."
J. "Jeder."

established in the opinions of the Federal Constitutional Court, "according to which, in doubtful cases, that interpretation is to be selected which develops to the highest degree the judicial effectiveness of the fundamental legal norm" (Decisions of the Federal Constitutional Court. 32, 54 71; 6, 55 72).

d) In support of this result the legislative history of Article 2, Paragraph 2, Sentence 1, of the Basic Law may be adduced here.

After the German Party (DP) had made repeated moves to make explicit reference to "germinating life" in connection with the right to life and bodily inviolability (Federal Council Press 11.48 - 298 and 12.48 - 398), the Parliamentary Council deliberated on this circle of problems for the first time in its Committee for Fundamental Questions, the 32nd session, held on January 11, 1949. In the discussion of the question whether a provision should be incorporated into the Basic Law which would forbid medical operations which do not serve health, Representative Dr. Heuss (FDP) explained, without encountering opposition, that compulsory sterilization and abortion in connection with the right to life were at issue. The Main Committee of the Parliamentary Council in its 42nd session on January 18, 1949, thoroughly dealt with, during the second reading on fundamental rights (proceedings of the Chief Committee of the Parliamentary Council, Stenographic Reports, p. 529 ff.), the question of the inclusion of developing life in the protection of the constitution. Parliamentary Representative Dr. Seebohm (DP) proposed to add both of the following sentences to Article 2, Paragraph 1, of the Basic Law as it existed at that time: "Germinating life is protected" and "the death penalty is abolished." On this point Dr. Seebohm (*loc. cit.*, p. 533 f.) commented that the right to life and bodily inviolability possibly does not unconditionally embrace germinating life as well. Therefore, he concluded, it must be specially mentioned in this context. At the least, he continued, one must expressly enter into the record that germinating life is explicitly included in the right to life and bodily inviolability, if another interpretation is possible.

Parliamentary Representative Dr. Weber explained in the name of the CDU/CSU that her faction, when it intercedes for the right to life, means life simply; and, in the faction's view, germinating life, and above all, the defense of germinating life is contained in the right (*loc. cit.*, p. 534). Dr. Heuss (FDP) agreed with Dr. Weber that the concept of life also embraces developing life; however, matters should not be placed in the constitution which are regulated in the penal law. As a consequence, he considered both the mention of germinating life as

well as the death penalty as a special question to be superfluous (*loc. cit.*, p. 535).

"After the unopposed explanations according to which germinating life is embraced in the right to life and bodily inviolability," Dr. Seebohm desired to withdraw his motion (*loc. cit.*, p. 535). However Parliamentary Representative Dr. Greve (SPD) declared: "I must explicitly say here, for the record, that at the least as far as I am concerned, I do not understand the right of germinating life to be within the right to life. I would also like on behalf of my friends, at least for the great majority of them, to deliver a clarification of like content in order to establish for the minutes that the Main Committee of the Parliamentary Council in its entirety does not adopt the standpoint which my colleague Dr. Seebohm just expressed." The motion of Dr. Seebohm was presented once again at that point but was indeed rejected by eleven votes to seven (*loc. cit.*, p. 535). In the written report of the Main Committee (page 7), however, Parliamentary Representative Dr. von Mangoldt (CDU) explained with regard to Article 2 of the Basic Law: "With the guaranteeing of the right to life, germinating life should also be protected. The motions introduced by the German Party in the Main Committee to attach a particular sentence about the protection of germinating life did not attain a majority only because, according to the view prevailing in the Committee, the value to be protected was already secured through the present version."

The plenary Parliamentary Council concurred in Article 2, Paragraph 2, of the Basic Law on May 6, 1949, in the second reading, there being two votes in opposition. At the third reading on May 8, 1949, both Parliamentary Representatives Dr. Seebohm as well as Dr. Weber stated that, according to their conception, Article 2, Paragraph 2, of the Basic Law would also include germinating life within the protection of this fundamental right (proceedings of the Parliamentary Council, Stenographic Reports, p. 218, 223). The comments of both speakers stood without opposition.

The history of the origin of Article 2, Paragraph 2, Sentence 1, of the Basic Law suggests that the formulation "everyone has the right to life" should also include "germinating" life. In any case, even less can be concluded from the materials on behalf of the contrary point of view. On the other hand, no evidence is found in the legislative history for answering the question whether unborn life must be protected by the penal law.

e) Furthermore, in the deliberations on the Fifth Statute to Reform the Penal Law there was unity regarding the value of protecting unborn life, although, to be sure, the constitutional

structure of the problem has not been treated definitively. In the report of the Special Committee for the Reform of the Penal Law on the statutory draft introduced by the Factions of the SPD and FPD, *inter alia*, it was stated on this point:

> The legal value of unborn life is to be respected in principle equally with that of born life.
>
> This determination is self-evident for the stage in which unborn life would also be capable of independent life outside of the mother's womb. The determination, however, is already justified for the earlier stage of development which begins approximately 14 days after conception, as, among others, Hinrichsen convincingly established in the public hearing (AP, VI, p. 2142 ff.). . . . That in the entire later development no corresponding point of demarcation may be established in the process is the completely overwhelming view in medical, anthropological, and theological science. . .
>
> Therefore, it is impermissible to deny the existence of unborn life from the end of nidation on or to contemplate it merely with indifference. The question debated in the literature whether, and if the occasion arises, to what extent the Basic Law should include unborn life in its protection, need not be answered at this point. In any case, if one disregards the extreme ideas of individual groups, the concept of unborn life as a legal value of high rank corresponds to the general public's understanding of the law. This understanding of the law also lies at the basis of this draft.
>
> (Federal Parliamentary Press, 7/1981, new, p. 5)

Nearly of the same tenor are, to an extent, the committee reports regarding the remaining drafts (Federal Parliamentary Press, 7/1982, p. 5, Federal Parliamentary Press, 7/1983, p. 5, Federal Parliamentary Press, 7/1984, new, p. 4).

2. The duty of the state to protect every human life may therefore be directly deduced from Article 2, Paragraph 2, Sentence 1, of the Basic Law. In addition to that, the duty also results from the explicit provision of Article 1, Paragraph 1, Sentence 2, of the Basic Law since developing life participates in the protection which Article 1, Paragraph 1, of the Basic Law guarantees to human dignity. Where human life exists, human dignity is present to it; it is not decisive that the bearer of this dignity himself be conscious of it and know personally how to preserve it. The potential faculties present in the human being from the beginning suffice to establish human dignity.

3. On the other hand, the question disputed in the present proceeding as well as in judicial opinions and in scientific literature whether the one about to be born himself is a bearer of the fundamental right or, on account of a lesser capacity to possess legal and fundamental rights, is "only" protected in his right to life by the objective norms of the constitution need not

be decided here. According to the constant judicial utterances of the Federal Constitutional Court, the fundamental legal norms contain not only subjective rights of defense of the individual against the state but embody, at the same time, an objective ordering of values, which is valid as a constitutionally fundamental decision for all areas of the law and which provides direction and impetus for legislation, administration, and judicial opinions (Decisions of the Federal Constitutional Court, 7, 198 205 —Lüth—; 35, 79 114—High School Decisions—for further sources). Whether and, if so, to what extent the state is obligated by the constitution to legal protection of developing life can therefore be concluded from the objective-legal content of the fundamental legal norms.

II.

1. The duty of the state to protect is comprehensive. It forbids not only—self-evidently—direct state attacks on the life developing itself but also requires the state to take a position protecting and promoting this life, that is to say, it must, above all, preserve it even against illegal attacks by others. It is for the individual areas of the legal order, each according to its special function, to effectuate this requirement. The degree of seriousness with which the state must take its obligation to protect increases as the rank of the legal value in question increases in importance within the order of values of the Basic Law. Human life represents, within the order of the Basic Law, an ultimate value, the particulars of which need not be established; it is the living foundation of human dignity and the prerequisite for all other fundamental rights.

2. The obligation of the state to take the life developing itself under protection exists, as a matter of principle, even against the mother. Without doubt, the natural connection of unborn life with that of the mother establishes an especially unique relationship, for which there is no parallel in other circumstances of life. Pregnancy belongs to the sphere of intimacy of the woman, the protection of which is constitutionally guaranteed through Article 2, Paragraph 1, in connection with Article 1, Paragraph 1, of the Basic Law. Were the embryo to be considered only as a part of the maternal organism the interruption of pregnancy would remain in the area of the private structuring of one's life, where the legislature is forbidden to encroach (Decisions of the Federal Constitutional Court, 6, 32 41 ; 6, 389 433 ; 27, 344 350 ; 32, 373 379). Since, however, the one about to be born is an independent human being who stands under the protection of the constitution, there is a social dimension to the

interruption of pregnancy which makes it amenable to and in need of regulation by the state. The right of the woman to the free development of her personality, which has as its content the freedom of behavior in a comprehensive sense and accordingly embraces the personal responsibility of the woman to decide against parenthood and the responsibilities flowing from it, can also, it is true, likewise demand recognition and protection. This right, however, is not guaranteed without limits—the rights of others, the constitutional order, and the moral law limit it. *A priori*, this right can never include the authorization to intrude upon the protected sphere of right of another without justifying reason or much less to destroy that sphere along with the life itself; this is even less so, if, according to the nature of the case, a special responsibility exists precisely for this life.

A compromise which guarantees the protection of the life of the one about to be born and permits the pregnant woman the freedom of abortion is not possible since the interruption of pregnancy always means the destruction of the unborn life. In the required balancing, "both constitutional values are to be viewed in their relationship to human dignity, the center of the value system of the constitution" (Decisions of the Federal Constitutional Court, 35, 202 225). A decision oriented to Article 1, Paragraph 1, of the Basic Law must come down in favor of the precedence of the protection of life for the child *en ventre sa mere* over the right of the pregnant woman to self-determination. Regarding many opportunities for development of personality, she can be adversely affected through pregnancy, birth and the education of her children. On the other hand, the unborn life is destroyed through the interruption of pregnancy. According to the principle of the balance which preserves most of competing constitutionally protected positions in view of the fundamental idea of Article 19, Paragraph 2, of the Basic Law;[K] precedence must be given to the protection of the life of the child about to be born. This precedence exists as a matter of principle for the entire duration of pregnancy and may not be placed in question for any particular time. The opinion expressed in the Federal Parliament during the third deliberation on the Statute to Reform the Penal Law, the effect of which is to propose the precedence for a particular time "of the right to self-determination of the woman which flows from human dignity vis-a-vis all others, including the child's right to life" (German Federal Parliament, Seventh Election Period, 96th Session, Stenographic Reports, p. 6492), is not reconcilable with the value ordering of the Basic Law.

K. Article 19, Paragraph 2, of the Basic Law provides: "In no event may a fundamental right be impaired in its essential meaning."

3. From this point, the fundamental attitude of the legal order which is required by the constitution with regard to the interruption of pregnancy becomes clear: the legal order may not make the woman's right to self-determination the sole guideline of its rulemaking. The state must proceed, as a matter of principle, from a duty to carry the pregnancy to term and therefore to view, as a matter of principle, its interruption as an injustice. The condemnation of abortion must be clearly expressed in the legal order. The false impression must be avoided that the interruption of pregnancy is the same social process as, for example, approaching a physician for healing an illness or indeed a legally irrelevant alternative for the prevention of conception. The state may not abdicate its responsibility even through the recognition of a "legally free area," by which the state abstains from the value judgment and abandons this judgment to the decision of the individual to be made on the basis of his own sense of responsibility.

III.

How the state fulfills its obligation for an effective protection of developing life is, in the first instance, to be decided by the legislature. It determines which measures of protection are required and which serve the purpose of guaranteeing an effective protection of life.

1. In this connection the guiding principle of the precedence of prevention over repression is also valid particularly for the protection of unborn life (Decisions of the Federal Constitutional Court, 30, 336 350). It is therefore the task of the state to employ, in the first instance, social, political, and welfare means for securing developing life. What can happen here and how the assistance measures are to be structured in their particulars is largely left to the legislature and is generally beyond judgment by the Constitutional Court. Moreover, the primary concern is to strengthen readiness of the expectant mother to accept the pregnancy as her own responsibility and to bring the child *en ventre sa mere* to full life. Regardless of how the state fulfills its obligation to protect, it should not be forgotten that developing life itself is entrusted by nature in the first place to the protection of the mother. To reawaken and, if required, to strengthen the maternal duty to protect, where it is lost, should be the principal goal of the endeavors of the state for the protection of life. Of course, the possibilities for the legislature to influence are limited. Measures introduced by the legislature are frequently only indirect and effective only after completion of the time-consuming process of comprehensive education and the

alteration in the attitudes and philosophies of society achieved thereby.

2. The question of the extent to which the state is obligated under the constitution to employ, even for the protection of unborn life, the penal law, the sharpest weapon standing at its disposal, cannot be answered by the simplified posing of the question whether the state must punish certain acts. A total consideration is necessary which, on the one hand, takes into account the worth of the injured legal value and the extent of the social harm of the injurious act—in comparison with other acts which socio-ethically are perhaps similarly assessed and which are subject to punishment—and which, on the other hand, takes into account the traditional legal regulation of this area of life as well as the development of concepts of the role of the penal law in modern society; and, finally, does not leave out of consideration the practical effectiveness of penal sanctions and the possibility of their replacement through other legal sanctions.

The legislature is not obligated, as a matter of principle, to employ the same penal measures for the protection of the unborn life as it considers required and expedient for born life. As a look at legal history shows, this was never the case in the application of penal sanctions and is also true for the situation in the law up to the Fifth Statute to Reform the Penal Law.

a) The task of penal law from the beginning has been to protect the elementary values of community life. That the life of every individual human being is among the most important legal values has been established above. The interruption of pregnancy irrevocably destroys an existing human life. Abortion is an act of killing; this is most clearly shown by the fact that the relevant penal sanction—even in the Fifth Statute to Reform the Penal Law—is contained in the section "Felonies and Misdemeanors against Life" and, in the previous penal law, was designated the "Killing of the Child *en ventre sa mere*." The description now common, "interruption of pregnancy," cannot camouflage this fact. No legal regulation can pass over the fact that this act offends against the fundamental inviolability and indisposability of human life protected by Article 2, Paragraph 2, Sentence 1, of the Basic Law. From this point of view, the employment of penal law for the requital of "acts of abortion" is to be seen as legitimate without a doubt; it is valid law in most cultural states—under prerequisites of various kinds—and especially corresponds to the German legal tradition. Therefore, it follows that the law cannot dispense with clearly labeling this procedure as "unjust."

b) Punishment, however, can never be an end in itself. Its employment is in principle subject to the decision of the legislature. The legislature is not prohibited, in consideration of the points of view set out above, from expressing the legal condemnation of abortion required by the Basic Law in ways other than the threat of punishment. The decisive factor is whether the totality of the measures serving the protection of the unborn life, whether they be in civil law or in public law, especially of a social-legal or of a penal nature, guarantees an actual protection corresponding to the importance of the legal value to be secured. In the extreme case, namely, if the protection required by the constitution can be achieved in no other way, the lawgiver can be obligated to employ the means of the penal law for the protection of developing life. The penal norm represents, to a certain extent, the "ultimate reason" in the armory of the legislature. According to the principle of proportionality, a principle of the just state, which prevails for the whole of the public law, including constitutional law, the legislature may make use of this means only cautiously and with restraint. However, this final means must also be employed, if an effective protection of life cannot be achieved in other ways. The worth and the importance of the legal value to be protected demand this. It is not a question of an "absolute" duty to punish but rather one of a "relative" duty to use the penal sanction, which grows out of the insight into the inadequacy of all other means.

On the other hand, the objection that a political duty to punish can never be deduced from a norm of the Basic Law which guarantees freedom is not decisive. If the state is obligated by a fundamental norm which determines value to protect an especially important legal value effectively even against the attacks of third parties, measures will often be unavoidable which touch upon the areas of freedom of other bearers of fundamental rights. In this respect, the legal situation in the employment of social-legal or civil law means is not fundamentally different than the enactment of a penal norm. Differences exist, perhaps, with respect to the intensity of the required interference. In any case, the legislature must resolve the conflict which arises from this situation through a balancing of both of the fundamental values or areas of freedom which are in opposition to each other according to the standard of the ordering of values in the Basic Law and in consideration of the constitutional principle of proportionality. If one were to deny that there was any duty to employ the means of the penal law, the protection of life which is to be guaranteed would be essentially restricted. The seriousness of the sanction threatened for the destruction

is to correspond to the worth of the legal value threatened with destruction. The elementary value of human life requires criminal law punishment for its destruction.

3. The obligation of the state to protect the developing life exists—as shown—against the mother as well. Here, however, the employment of the penal law may give rise to special problems which result from the unique situation of the pregnant woman. The incisive effects of a pregnancy on the physical and emotional condition of the woman are immediately evident and need not be set forth in greater detail. They often mean a considerable change of the total conduct of life and a limitation of the possibilities for personal development. This burden is not always and not completely balanced by a woman finding new fulfillment in her task as mother and by the claim a pregnant woman has upon the assistance of the community (Article 6, Paragraph 4, of the Basic Law). In individual cases, difficult, even life-threatening situations of conflict may arise. The right to life of the unborn can lead to a burdening of the woman which essentially goes beyond that normally associated with pregnancy. The result is the question of exactability, or, in other words, the question of whether the state, even in such cases, may compel the bearing of the child to term with the means of the penal law. Respect for the unborn life and the right of the woman not to be compelled to sacrifice the values in her own life in excess of an exactable measure in the interest of respecting this legal value are in conflict with each other. In such a situation of conflict which, in general, does not allow an unequivocal moral judgment and in which the decision for an interruption of pregnancy can attain the rank of a decision of conscience worthy of consideration, the legislature is obligated to exercise special restraint. If, in these cases, it views the conduct of the pregnant woman as not deserving punishment and forgoes the use of penal sanctions, the result, at any rate, is to be constitutionally accepted as a balancing incumbent upon the legislature.

In determining the content of the criterion of non-exactability, circumstances, however, must be excluded which do not seriously burden the obligated party, since they represent the normal situation with which everyone must cope. Rather, circumstances of considerable weight must be present which render the fulfillment of the duty of the one affected extraordinarily more difficult, so that fulfillment cannot be expected from him in fairness. These circumstances are especially present if the one affected by fulfilling the duty is thrown into serious inner conflicts. The solution of such conflicts by criminal penalty does not appear in general to be appropriate (*cf.* Decisions of the Fed-

eral Constitutional Court, 32, 98 109 - Gesundbeter), since it applies external compulsion where respect for the sphere of personality of the human being demands full inner freedom of decision.

A continuation of the pregnancy appears to be non-exactable especially when it is proven that the interruption is required "to avert" from the pregnant woman "a danger for her life or the danger of a grave impairment of her condition of health" (§218b, No. 1, of the Penal Code in the version of the Fifth Statute to Reform the Penal Law). In this case her own "right to life and bodily inviolability" (Article 2, Paragraph 2, Sentence 1, of the Basic Law) is at stake, the sacrifice of which cannot be expected of her for the unborn life. Beyond that, the legislature has a free hand to leave the interruption of pregnancy free of punishment in the case of other extraordinary burdens for the pregnant woman, which, from the point of view of non-exactability, are as weighty as those referred to in §218b, No. 1. In this category can be counted, especially, the cases of the eugenic (*cf.* Section 218b, No. 2, of the Penal Code), ethical (criminalogical), and of the social or emergency indication for abortion which were contained in the draft proposed by the Federal Government in the sixth election period of the Federal Parliament and were discussed both in the public debate as well as in the course of the legislative proceedings. During the deliberations of the Special Committee for the Reform of the Penal Law (Seventh Election Period, 25th Session, Stenographic Reports, p. 1470 ff.), the representative of the Federal Government explained in detail and with convincing reasons why, in these four cases of indication, the bearing of the child to term does not appear to be exactable. The decisive viewpoint is that in all of these cases another interest equally worthy of protection, from the standpoint of the constitution, asserts its validity with such urgency that the state's legal order cannot require that the pregnant woman must, under all circumstances, concede precedence to the right of the unborn.

Also, the indication arising from general emergency (social indication) can be integrated here. Finally, the general social situation of the pregnant woman and her family can produce conflicts of such difficulty that, beyond a definite measure, a sacrifice by the pregnant woman in favor of the unborn life cannot be compelled with the means of the penal law. In regulating this case, the legislature must so formulate the elements of the indication which is to remain free of punishment that the gravity of the social conflict presupposed will be clearly recognizable and, considered from the point of view of non-exactability,

the congruence of this indication with the other cases of indication remains guaranteed. If the legislature removes genuine cases of conflict of this kind from the protection of the penal law, it does not violate its duty to protect life. Even in these cases the state may not be content merely to examine, and if the occasion arises, to certify that the statutory prerequisites for an abortion free of punishment are present. Rather, the state will also be expected to offer counseling and assistance with the goal of reminding pregnant women of the fundamental duty to respect the right to life of the unborn, to encourage her to continue the pregnancy and—especially in cases of social need—to support her through practical measures of assistance.

In all other cases the interruption of pregnancy remains a wrong deserving punishment since, in these cases, the destruction of a value of the law of the highest rank is subjected to the unrestricted pleasure of another and is not motivated by an emergency. If the legislature wants to dispense (even in this case) with penal law punishment, this would be compatible with the requirement to protect of Article 2, Paragraph 2, Sentence 1, of the Basic Law, only on the condition that another equally effective legal sanction stands at its command which would clearly bring out the unjust character of the act (the condemnation by the legal order) and likewise prevent the interruptions of pregnancy as effectively as a penal provision.

D.

If the challenged regulation of terms of the Fifth Statute to Reform the Penal Law is examined according to these standards, the result is that the statute does not do justice, to the extent required, to the obligation to protect developing life effectively which is derived from Article 2, Paragraph 2, Sentence 1, in conjunction with Article 1, Paragraph 1, of the Basic Law.

I.

The constitutional requirement to protect developing life is directed in the first instance to the legislature. The duty is incumbent on the Federal Constitutional Court, however, to determine, in the exercise of the function allotted to it by the Basic Law, whether the legislature has fulfilled this requirement. Indeed, the Court must carefully observe the discretion of the legislature which belongs to it in evaluating the factual conditions which lie at the basis of its formation of norms, which discretion is fitting for the required prognosis and choice of means. The court may not put itself in the place of the legislature; it

is, however, its task to examine carefully whether the legislature, in the framework of the possibilities standing at its disposal, has done what is necessary to avert dangers from the legal value to be protected. This is also fundamentally true for the question whether the legislature is obligated to utilize its sharpest means, the penal law, in which case the examination can extend beyond the individual modalities of punishment.

II.

It is generally recognized that the previous §218 of the Penal Code, precisely because it threatened punishment without distinction for nearly all cases of the interruption of pregnancy, has, as a result, only insufficiently protected developing life. The insight that there are cases in which the penal sanction is not appropriate has finally led to the point that cases actually deserving of punishment are no longer prosecuted with the necessary vigor. In addition, with respect to this offense, there is, in the nature of the case, the frequently difficult clarification of the factual situation. Certainly, the statistics on the incidence of illegal abortion differ greatly and it may hardly be possible to ascertain reliable data on this point through empirical investigations. In any case, the number of the illegal interruptions of pregnancy in the Federal Republic was high. The existence of a general penal norm may have contributed to that, since the state had neglected to employ other adequate measures for the protection of developing life.

The legislature, in the final version of the Fifth Statute to Reform the Penal Law, proceeded from the guiding consideration of the primacy of preventive measures over repressive sanctions (*cf.* in this regard, the motions of the factions of the SPD and FDP for resolution which were accepted by the Federal Parliament in connection with the enactment of the Fifth Statute to Reform the Penal Law—Federal Parliamentary Press, 7/2042). The statute is based upon the idea that developing life would be better protected through individual counseling of the pregnant woman than through a threat of punishment, which would remove the one determined upon the abortion from every possible means of influence, which from a criminological point of view would be mistaken and, in addition, has proven itself without effect. On this basis the legislature has reached the decision to abandon the criminal penalty entirely for the first twelve weeks of pregnancy under definite prerequisites and, in its place, to introduce the preventive counseling and instruction (§§218a and 218c).

It is constitutionally permissible and to be approved if the legislature attempts to fulfill its duty to improve protection of unborn life through preventive measures, including counseling to strengthen the personal responsibility of the woman. The regulation in question, however, encounters decisive constitutional problems in several respects.

1. The legal condemnation of the interruption of pregnancy required by the constitution must clearly appear in the legal order existing under the constitution. Therefore, as shown, only those cases can be excepted in which the continuation of the pregnancy is not exactable from the woman in consideration of the value decision made in Article 2, Paragraph 2, Sentence 1, of the Basic Law. This absolute condemnation is not expressed in the provisions of the Fifth Statute to Reform the Penal Law with regard to the interruption of pregnancy during the first twelve weeks because the statute leaves unclear whether an interruption of pregnancy which is not "indicated" is legal or illegal after the repeal of the criminal penalty through §218a of the Penal Code. This is true without reference to the fact that §218a of the Penal Code presents itself technically as the creation of an exception to the general penal provision of §218 of the Penal Code. It is also true, independent of the view one should take in this question whether the provision factually restricts §218 of the Penal Code or whether it creates a legally justifying reason or finally has as its content only a basis for excluding guilt or punishment. With the unbiased reader of the statute the impression must arise that §218a completely removes, through the absolute repeal of punishibility, the legal condemnation—without consideration of the reasons—and legally allows the interruption of pregnancy under the prerequisites listed therein. The elements of §218 of the Penal Code recede into the background since by far most interruptions of pregnancy, experience shows, are performed in the first twelve weeks—over 9/10—according to the statements of the representative of the government (*loc. cit.*, p. 1472). The picture which results is of a nearly complete decriminalization of the interruption of pregnancy (*see also* Roxin in: J. Baumann, editor, The Proscription of Abortion,[L] §218, p. 185). Also in no other provision of the Fifth Statute to Reform the Penal Law is the notion expressed that the interruption of pregnancy which is not indicated in the first twelve weeks will be legally condemned for the future. Even Article 2 of the statute, according to which no one in principle is obligated to participate in an interruption of pregnancy, mentions nothing about the legality or illegality of such a measure;

L. Title in German: "Das Abtreibungsverbot."

this provision aims in the first place at making allowance for the freedom of conscience of the individual and at protecting the freedom of the ethical conviction of one who sees himself faced with the question whether he can and should actively participate in an interruption of pregnancy which is free of punishment in conformity with §218a of the Penal Code.

A look at the proposed regulations in the Statute to Supplement the Penal Law Reform for the area of social law further compels the conclusion that in the case of an interruption of pregnancy in the first twelve weeks a procedure is involved which is apparently legally unobjectionable and which therefore should be socio-legally promoted and facilitated. Legal claims under statutes for social services presuppose that the elements, upon the fulfillment of which the services are guaranteed, do not represent a legally prohibited (condemned) act. The proposed regulation, as a whole, can therefore only be interpreted to mean that an interruption of pregnancy performed by a physician in the first twelve weeks of pregnancy is not illegal and therefore should be allowed (under law).

The Federal Government also proposed this concept in the statutory bill introduced in the sixth election period of the German Federal Parliament; there, in the commentary to Article 1, one reads as follows (Federal Parliamentary Press, VI/3434, p. 9):

> Although the legislature may trust in other areas that a repeal of penal prohibitions will not be understood as legal approbation of the behavior previously punishable, special points are to be considered in the new regulation of the interruption of pregnancy: the term solution can only fulfill the public health task expected of it, if every interruption of pregnancy during the first three months appears as legally approved. The operation must be performed within the framework of general medical care. The contract for medical treatment must be effective. Not least, because of the inapplicability of Sections 134-138 of the Civil Code, these and other circumstances can only be interpreted in the sense that the legal order recognizes the operation, before the expiration of the three month period, in every case as a normal social process.

The representative of the Government expressed himself similarly before the Special Committee for Penal Law Reform (Seventh Election Period, 25th Session, Stenographic Reports, p. 1473):

> It is important to keep this much in mind: medical interruption of pregnancy during the first trimester of pregnancy is, within the framework of the regulation of terms, not contrary to law; it is permitted. Only in this way can its integration into the system of the penal law—with freedom from punishment even for the participants (exception of emergency service)—be justi-

fied and only in such a way can the civil law implications—the validity of the contract for treatment in spite of Section 134—, the promotion of the procedure through public health measures and, above all else, the social insurance planned in the Statute to Supplement the Penal Law Reform, be established.

2. A formal statutory condemnation of the interruption of pregnancy would, furthermore, not suffice because the woman determined upon abortion would disregard it. The legislature which passed the Fifth Statute to Reform the Penal Law has replaced the penal norm with a counseling system in §218c of the Penal Code on the judgment that positive measures to protect developing life are also required for an interruption of pregnancy performed by a physician with the consent of the pregnant woman. Through the complete repeal of punishability, however, a gap in the protection has resulted which completely destroys the security of the developing life in a not insignificant number of cases by handing this life over to the completely unrestricted power of disposition of the woman. There are many women who have previously decided upon an interruption of pregnancy without having a reason which is worthy of esteem within the value order of the constitution and who are not accessible to a counseling such as §218c, Par. 1, proposes. These women find themselves neither in material distress nor in a grave situation of emotional conflict. They decline pregnancy because they are not willing to take on the renunciation and the natural motherly duties bound up with it. They have serious reasons for their conduct with respect to the developing life; there are, however, no reasons which can endure against the command to protect human life. For these women, pregnancy is exactable in line with the principles reiterated above. The behavior even of this group of women, legitimatized by law through the absence of a constitutionally important motive for the interruption of pregnancy, is fully covered under §218a of the Fifth Statute to Reform the Penal Law. The life developing itself is abandoned without protection to their arbitrary decision.

The objection against this is that women not subject to influence understand best from experience how to avoid punishment so that the penal sanction is often ineffective. Furthermore, the legislature is confronted with the dilemma that preventive counseling and repressive threat of punishment in their life protecting effect are necessarily partially exclusive: the penal sanction of the indication solution would, in truth, through its deterrent effect prevent unmotivated interruptions of pregnancy to an extent not exactly ascertainable. At the same time, according to this objection, the threat of punishment, by discouraging counseling of women susceptible of influence, impedes saving life in other cases because it is precisely women in whose cases the

prerequisites of an indication are absent and, beyond that, also those who do not trust the result of a procedure to determine an indication who will, in the face of the penal threat, carefully keep the pregnancy secret and who to a large extent withdraw themselves from helpful influence available through counseling centers and surroundings. On the basis of such an analysis, there could not be a defense of unborn life which was free of gaps. The legislature, so this objection continues, would have no other choice than to weigh off life against life, namely the life which through a definite regulation of the abortion question could probably be saved against the life which would probably be sacrificed on account of the same regulation, since the penal sanction would not only protect but at the same time destroy unborn life. Thus, since no solution would unequivocally better serve the protection of the individual life, the legislature would not have transgressed its constitutionally drawn boundaries with the regulation of terms.

a) To begin with, this concept does not do justice to the essence and the function of the penal law. The penal norm directs itself fundamentally to all subjects of the law and obligates them in like manner. It is true that public prosecutors practically never succeed in administering punishment to all those who have broken the penal law. The unknown incidence is variously high for the various offenses. It is uncontested that the unknown incidence of acts of abortion is especially high. On the other hand, the general preventive function of the penal law ought not be forgotten. If one views as the task of the penal law the protection of especially important legal values and elementary values of the community, a great importance accrues to its function. Just as important as the observable reaction in an individual case is the long range effect of a penal norm which in its principal normative content ("abortion is punishable") has existed for a very long time. No doubt, the mere existence of such a penal sanction has influence on the conceptions of value and the manner of behavior of the populace (*cf.* the report of the Special Committee for the Penal Law Reform, Federal Parliamentary Press, 7/1981 new p. 10). The consciousness of legal consequences which follows from its transgression creates a threshold which many recoil from crossing. An opposite effect will result if, through a general repeal of punishability, even doubtlessly punishable behavior is declared to be legally free from objection. This must confuse the concepts of "right" and "wrong" dominant in the populace. The purely theoretical announcement that the interruption of pregnancy is "tolerated," but not "approved," must remain without effect as long as no

legal sanction is recognizable which clearly segregates the justified cases of abortion from the reprehensible. If the threat of punishment disappears in its entirety, the impression will arise of necessity in the consciousness of the citizens of the state that in all cases the interruption of pregnancy is legally allowed and, therefore, even from a socio-ethical point of view, is no longer to be condemned. The "dangerous inference of moral permissibility from a legal absence of sanction" (Engisch, In the Quest for Justice,[M] 1971, p. 104) is too near not to be drawn by a large number of those subject to the law.

Also corresponding to this is the view of the Federal Government in the commentary to the draft of the statute introduced in the sixth election period of the German Federal Parliament (Federal Parliamentary Press, VI/3434, p. 9):

> The term solution would lead to the disappearance of the general awareness of the worthiness of protection of unborn life during the first three months of pregnancy. It would lend support to the view that the interruption of pregnancy, in any case in the early stage of pregnancy, is as subject to the unrestricted right of disposition of the pregnant woman as the prevention of pregnancy. Such a view is not compatible with the constitutional classification of values.

b) The weighing in bulk of life against life which leads to the allowance of the destruction of a supposedly smaller number in the interest of the preservation of an allegedly larger number is not reconcilable with the obligation of an individual protection of each single concrete life.

In the judicial opinions of the Federal Constitutional Court the principle has been developed that the unconstitutionality of a statutory provision, which in its structure and actual effect prejudices a definite circle of persons, may not be refuted with the showing that this provision or other regulations of the statute favor another circle of persons. The emphasis of the general tendency of the statute as a whole to favor legal protection is even less adequate for this purpose. This principle (*cf.* Decisions of the Federal Constitutional Court, 12, 151 168; 15, 328 333; 18, 97 108; 32, 260 269) is valid in special measure for the highest personal legal value, "life." The protection of the individual life may not be abandoned for the reason that a goal of saving other lives, in itself worthy of respect, is pursued. Every human life—the life first developing itself as well—is as such equally valuable and can not therefore be subjected to a discriminatory evaluation, no matter how shaded, or indeed to a balancing on the basis of statistics.

M. Title in German: "Auf der Suche nach der Gerechtigkeit."

In the basic legal political conception of the Fifth Statute to Reform the Penal Law a concept, which cannot be followed, of the function of a constitutional statute is recognizable. The legal protection for the concrete individual human life required by the constitution is pushed into the background in favor of a more "socio-technical" use of the statute as an intended action of the legislature for the achievement of a definitely desired socio-political goal, the "containing of the abortion epidemic." The legislature may, however, not merely have a goal in view, be it ever so worthy of pursuit; it must be aware that every step on the way to the goal must be justified before the constitution and its indispensable postulates. The fundamental legal protection in individual cases may not be sacrificed to the efficiency of the regulation as a whole. The statute is not only an instrument to steer social processes according to sociological judgments and prognoses but is also the enduring expression of socio-ethical—and as a consequence—legal evaluation of human acts; it should say what is right and wrong for the individual.

c) A dependable factual foundation is lacking for "a total accounting"—which is to be rejected on principle. A sufficient basis is lacking for the conclusion that the number of interruptions of pregnancy in the future will be significantly less than with the previous statutory regulation. Rather, the representative of the government has come to the conclusion before the Special Committee for Penal Law Reform (Seventh Election Period, 25th Session, Stenographic Reports, p. 1451), on the basis of detailed considerations and comparisons, that after the introduction of the regulation of terms into the Federal Republic a 40% increase of the total number of legal and illegal abortions should be expected. This calculation, to be sure, was brought into doubt by Professor Dr. Jurgens, who was heard in the oral proceedings. The available statistics from other countries, however, especially from England after the Abortion Act of 1967 went into effect (*cf.* the statement in the report of the Committee on the Working of the Abortion Act—Lane Report) and from the German Democratic Republic (East Germany) after the decreeing of the statute on the interruption of pregnancy of March 9, 1972 (*cf.* Journal of German Physicians, 1974, p. 2765), allow no certain conclusion that there will be a substantial decline in abortions. Experiments, however, are not permissible considering the great worth of the legal value to be protected.

The representatives of all parties in the Special Committee for the Reform of the Penal Law, however, declined systematically to apply statistics regarding abortion from other countries to the Federal German Republic (Seventh Election Period, 20th

Session, Stenographic Reports, p. 1286 ff.). The effects of varying social structures, mentalities, religious affiliations and modes of behavior hardly permit such calculations. Even if one takes into account all of the peculiarities of the relationships in the Federal Republic of Germany only in favor of the regulation of terms, an increase in abortions is to be counted on because—as shown—the mere existence of the penal norm of §218 of the Penal Code has exerted influence on the value conceptions and manner of behavior of the populace. It is important that as a consequence of punishability the opportunity to obtain an abortion generally or indeed *lege artis* has up to this time been considerably limited (for, among other things, financial reasons). That even a mere quantitive strengthening of the protection for life could result from the term solution, is, in any case, not evident.

3. The counseling and instruction of the pregnant woman provided under §218c, Par. 1, of the Penal Code cannot, considered by itself, be viewed as suitable to effectuate a continuation of the pregnancy.

The measures proposed in this provision fall short of the concepts of the Alternative Draft of the 16 criminal law scholars, upon which the conception of the Fifth Statute to Reform the Penal Law is, after all, largely based. The counseling centers provided for in §105, Par. 1, No. 2, of the Fifth Statute to Reform the Penal Law should themselves have the means to afford financial, social, and family assistance. Furthermore, they should provide to the pregnant woman and her relatives emotional care through suitable co-workers and work intensively for the continuation of the pregnancy (*cf.* for particulars, above, p. 11 ff.).

So to equip the counseling centers, in the sense of this or similar suggestions, so that they are able to arrange direct assistance, would come much nearer the mark, since according to the report of the Special Committee for the Reform of the Penal Law (Printed Materials of the Federal Parliament, 7/1981, new, p. 7, with evidentiary support from the hearings) the unfavorable living situation, the impossibility of caring for a child while pursuing an education or working as well as economic need and special material reasons, and, especially in the case of single mothers, anxiety about social sanctions are supposed to be among the most frequently given causes and motives for the desire for the interruption of pregnancy.

On the other hand, the counseling centers will give instruction about "the public and private assistance available for pregnant women, mothers, and children," "especially regarding assistance which facilitates the continuation of the pregnancy and

alleviates the situation of mother and child." This could be interpreted to mean that the counseling centers should only inform, without exerting influence directed to the motivational process. Whether the neutral description of the task of the counseling centers may be attributed to the opinion advocated in the Special Committee for the Reform of the Penal Law that the pregnant woman should not be influenced in her decision through the counseling (Representative von Schöler, FDP, Seventh Election Period, 25th Session, Stenographic Reports, p. 1473) can remain an open question. If a protective effect in favor of developing life is to accrue to the counseling, it will depend, in any case, decisively upon such an exertion of influence. Section 218c, Par. 1, Nos. 1 and 2, to be sure, allow the interpretation that counseling and instruction should motivate the pregnant woman to carry the pregnancy to term. The report of the Special Committee is probably to be understood in this sense (Printed Materials of the Federal Parliament, 7/1981 new, p. 16); accordingly, the counseling should take into account the total circumstances of life of the pregnant woman and follow up personally and individually, not by telephone or by distributing printed materials (*cf.* also the previously mentioned resolution of the Federal Parliament, Printed Materials of the Federal Parliament, 7/2042).

Even if one might consider it thinkable that counseling of this kind could exercise a definite effect in the sense of an aversion from the decision for abortion, its structure, in particular, exhibits in any case deficiencies which do not allow the expectation of an effective protection of developing life.

a) The instruction about the public and private assistance available for pregnant women, mothers and children, according to §218c, Par. 1, No. 1, can also be undertaken by any physician. Social law and social reality are, however, very difficult for the technically trained person to comprehend. A reliable instruction regarding the demands and possibilities in the individual case cannot be expected from a physician, especially since individual inquiries regarding need are frequently required (*e.g.*, for assistance with rent or social assistance). Physicians are neither qualified for such counseling activity by their professional training nor do they generally have the time required for individual counseling.

b) It is especially questionable that the instruction about social assistance can be undertaken by the same physician who will perform the interruption of pregnancy. Through this provision the medical counseling under §218c, Par. 1, No. 2, which itself falls within the realm of medical competence will be

devalued. The counseling should be structured in conformity with the views of the Special Committee for the Reform of the Penal Law as follows:

> Therefore, what is meant is counseling regarding the nature of the operation and its possible consequences for health. That the counseling may however not be limited to this purely medical aspect is emphasized through the conscious choice of the term 'by a physician'. Rather the counseling as far as possible and appropriate must speak to the present and future total situation of the pregnant woman to the extent that she can be affected by the interruption of pregnancy and, at the same time, correspond to the other task of the physician, which is to work for the protection of the unborn life. The physician must, therefore, make it clear to the pregnant woman that human life is destroyed by the operation and explain its stage of development. Experience shows, as confirmed in the public hearing, for example, by Pross (AP, VI, p. 2255, 2256) and Rolinski (AP, VI, p. 2221) that in this respect many women do not have clear ideas and that this circumstance, if they later learn it, is frequently the occasion for burdening doubts and questionings of conscience. Accordingly, the counseling must be directed to preventing this kind of conflict situation.
>
> (Printed Materials of the Federal Parliament, 7/1981, new, p. 16)

An explanation, in the manner proposed here, which has the required constitutional goal of working for a continuation of the pregnancy cannot be expected from the physician who has been sought out by the pregnant woman precisely for the purpose of performing the interruption of pregnancy. Since, according to the result of the previous inquiries and according to the position statements of representative medical professional panels, it must be assumed that the majority of physicians decline to perform interruptions of pregnancy which are not indicated, only those physicians will make themselves available who either see in the interruption of pregnancy a money-making business or who are inclined to comply with every wish of a woman for interruption of pregnancy because they see in it merely a manifestation of the right to self-determination or a means to the emancipation of women. In both cases, an influence by the physician on the pregnant woman for the continuation of the pregnancy is highly improbable.

The experiences in England show this. There the indication (very broadly conceived) must be determined by any two physicians of the patient's choosing. This has led to the result that almost every desired abortion is carried out by private physicians specializing in such activity. The appearance of professional agents who guide women to these private clinics is an especially unfortunate by-product which is very difficult to avoid (*cf.* Lane Report, Vol. 1, No. 436 and 452).

c) Furthermore, the prospects for success are poor since the interruption of pregnancy can immediately follow the instruction and counseling. A serious exchange with the pregnant woman and others involved in which the arguments in the counseling are contrasted with hers is not to be expected under these circumstances. The alternative formulation proposed by the Federal Ministry of Justice to the Special Committee for Penal Law Reform for §218c provided as a consequence that the interruption of pregnancy could first be performed after a minimum of three days had elapsed after the instruction about available assistance (§218, Par. 1, No. 1) (Special Committee, Seventh Election Period, 30th Session, Stenographic Reports, p. 1659). In conformity with a report of the Special Committee, however, "a waiting period, enforced by the penal law, between the counseling and the operation . . . was rejected. This could in individual cases bring with it unreasonable difficulties for the pregnant woman according to her place of residence and her personal situation, with the consequence that the pregnant woman will dispense with the counseling." (Printed Materials of Federal Parliament, 7/1981 new, p. 17). For the woman decided upon an interruption of pregnancy it is only necessary to find an obliging physician. Since he may undertake the social as well as the medical counseling and finally even carry out the operation, a serious attempt to dissuade the pregnant woman from her decision is not to be expected from him.

III.

In summary, the following observations should be made on the constitutional adjudication of the regulation of terms encountered in the Fifth Statute to Reform the Penal Law:

That interruptions of pregnancy are neither legally condemned nor subject to punishment is not compatible with the duty incumbent upon the legislature to protect life, if the interruptions are the result of reasons which are not recognized in the value order of the Basic Law. Indeed, the limiting of punishability would not be constitutionally objectionable if it were combined with other measures which would be able to compensate, at least in their effect, for the disappearance of penal protection. That is however—as shown—obviously not the case. The parliamentary discussions about the reform of the abortion law have indeed deepened the insight that it is the principal task of the state to prevent the killing of unborn life through enlightenment about the prevention of pregnancy on the one hand as well as through effective promotional measures in society and through a general alteration of social concepts on the other. Neither the assistance of the kind presently offered and guaranteed nor the

counseling provided in the Fifth Statute to Reform the Penal Law are, however, able to replace the individual protection of life which a penal norm fundamentally provides even today in those cases in which no reason for the interruption of pregnancy exists which is worthy of consideration according to the value order of the Basic Law.

If the legislature regards the previously undifferentiated threat of punishment for the interruption of pregnancy as a questionable means for the protection of life, it is not thereby released from the obligation to undertake the attempt to achieve a better protection of life through a differentiated penal regulation by subjecting the same cases to punishment in which the interruption of pregnancy is to be condemned on constitutional grounds. A clear distinction of this group of cases in contrast to other cases in which the continuation of the pregnancy is not exactable from the woman will strengthen the power of the penal norm to develop a legal awareness. He who generally recognizes the precedence of the protection of life over the claim of the woman for an unrestricted structuring of her life will not be able to dispute the unjust nature of the act in those cases not covered by a particular indication. If the state not only declares that these cases are punishable but also prosecutes and punishes them in legal practice, this will be perceived in the legal consciousness of the community neither as unjust nor as anti-social.

The passionate discussion of the abortion problematic may provide occasion for the fear that in a segment of the population the value of unborn life is no longer fully recognized. This, however, does not give the legislature a right to acquiesce. It rather must make a sincere effort through a differentiation of the penal sanction to achieve a more effective protection of life and formulate a regulation which will be supported by the general legal consciousness.

IV.

The regulation encountered in the Fifth Statute to Reform the Penal Law at times is defended with the argument that in other democratic countries of the Western World in recent times the penal provisions regulating the interruption of pregnancy have been "liberalized" or "modernized" in a similar or an even more extensive fashion; this would be, as the argument goes, an indication that the new regulation corresponds, in any case, to the general development of theories in this area and is not inconsistent with fundamental socio-ethical and legal principles.

These considerations cannot influence the decision to be made here. Disregarding the fact that all of these foreign laws

in their respective countries are sharply controverted, the legal standards which are applicable there for the acts of the legislature are essentially different from those of the Federal Republic of Germany.

Underlying the Basic Law are principles for the structuring of the state that may be understood only in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism. In opposition to the omnipotence of the totalitarian state which claimed for itself limitless dominion over all areas of social life and which, in the prosecution of its goals of state, consideration for the life of the individual fundamentally meant nothing, the Basic Law of the Federal Republic of Germany has erected an order bound together by values which places the individual human being and his dignity at the focal point of all of its ordinances. At its basis lies the concept, as the Federal Constitutional Court previously pronounced (Decisions of the Federal Constitutional Court, 2, 1 12), that human beings possess an inherent worth as individuals in order of creation which uncompromisingly demands unconditional respect for the life of every individual human being, even for the apparently socially "worthless," and which therefore excludes the destruction of such life without legally justifiable grounds. This fundamental constitutional decision determines the structure and the interpretation of the entire legal order. Even the legislature is bound by it; considerations of socio-political expediency, even necessities of state, cannot overcome this constitutional limitation (Decisions of the Federal Constitutional Court, 1, 14 36). Even a general change of the viewpoints dominant in the populace on this subject—if such a change could be established at all—would change nothing. The Federal Constitutional Court, which is charged by the constitution with overseeing the observance of its fundamental principles by all organs of the state and, if necessary, with giving them effect, can orient its decisions only on those principles to the development of which this Court has decisively contributed in its judicial utterances. Therefore, no adverse judgment is being passed about other legal orders "which have not had these experiences with a system of injustice and which, on the basis of an historical development which has taken a different course and other political conditions and fundamental views of the philosophy of state, have not made such a decision for themselves" (Decisions of the Federal Constitutional Court, 18, 112 117).

E.

On the basis of these considerations, §218a of the Penal Code in the version of the Fifth Statute to Reform the Penal Law

is inconsistent with Article 2, Paragraph 2, Sentence 1, in conjunction with Article 1, Paragraph 1, of the Basic Law to the extent that it excepts interruption of pregnancy from punishability if no reasons are present which, according to the present opinion, have standing under the ordering of values of the Basic Law. Within this framework, the nullity of the provision is to be determined. It is a matter for the legislature to distinguish in greater detail the cases of indicated interruption of pregnancy from those not indicated. In the interest of legal clarity, until a valid statutory regulation goes into effect, it appeared necessary, under §35 of the Statute for the Federal Constitutional Court, to issue a directive, the contents of which are obvious from the tenor of this judgment.

There is no occasion to declare further provisions of the Fifth Statute to Reform the Penal Law to be invalid.

Dr. Benda Ritterspach Dr. Haager
Rupp-von Brünneck Dr. Böhmer Dr. Faller
Dr. Brox Dr. Simon

Dissenting Opinion

Of Justice Rupp von Brünneck and Justice Dr. Simon to the judgment of February 25, 1975, of the First Senate of the Federal Constitutional Court,

—1 F.C.C. 1/74
—1 F.C.C. 2/74
—1 F.C.C. 3/74
—1 F.C.C. 4/74
—1 F.C.C. 5/74
—1 F.C.C. 6/74

The life of each individual human being is self-evidently a central value of the legal order. It is uncontested that the constitutional duty to protect this life also includes its preliminary stages before birth. The debates in Parliament and before the Federal Constitutional Court dealt not with the *whether* but rather only the *how* of this protection. This decision is a matter of legislative responsibility. Under no circumstances can the duty of the state to prescribe punishment for abortion in every stage of pregnancy be derived from the constitution. The legislature should be able to determine the regulations for counseling and the term solution as well as for the indications solution.

A contrary construction of the constitution is not compatible with the liberal character of the fundamental legal norms and

shifts the competence to decide, to a material extent, onto the Federal Constitutional Court (A). In the judgment on the Fifth Statute to Reform the Penal Law, the majority neglects the uniqueness of abortion in relation to other risks of life (B.I.1. = p. 671 *et seq.*). It insufficiently appreciates the social problematic previously found by the legislature as well as the aims of urgent reform (B.I.2. = p. 673 *et seq.*). Because each solution remains patchwork, it is not constitutionally objectionable that the German legislature—in consonance with the reforms in other western civilized states (B.III. = p. 683 *et seq.*)—has given priority to social-political measures over largely ineffective penal sanctions (B.I.3.-5. = p. 675 *et seq.*). The constitution nowhere requires a legal "condemnation" of behavior not morally respectable without consideration of its actual protective effect (B.II. = p. 681 *et seq.*).

A. - I.

The authority of the Federal Constitutional Court to annul the decisions of the legislature demands sparing use, if an imbalance between the constitutional organs is to be avoided. The requirement of judicial self-restraint, which is designated as the "elixer of life" of the jurisprudence of the Federal Constitutional Court,[1] is especially valid when involved is not a defense from overreaching by state power but rather the making, via constitutional judicial control, of provisions for the positive structuring of the social order for the legislature which is directly legitimitized by the people. The Federal Constitutional Court must not succumb to the temptation to take over for itself the function of a controlling organ and shall not in the long run endanger the authority to judicially review constitutionality.

1. The test proposed in this proceeding departs from the basis of classical judicial control. The fundamental legal norms standing in the central part of our constitution guarantee as rights of defense to the citizen in relation to the state a sphere of unrestricted structuring of one's life based on personal responsibility. The classical function of the Federal Constitutional Court lies in defending against injuries to this sphere of freedom from excessive infringement by the state power. On the scale of possible infringements by the state, penal provisions are foremost: they demand of a citizen a definite behavior and subdue him in the case of a violation with grievious restrictions of freedom or with financial burdens. Judicial control of the constitutionality of such provisions therefore means a determina-

1. Leibholz, VVD St RL 20 (1963), p. 119.

tion whether the encroachment resulting either from the enactment or application of penal provisions into protected spheres of freedom is allowable; whether, therefore, the state, generally or to the extent provided, may punish.

In the present constitutional dispute, the inverse question is presented for the first time for examination, namely whether the state *must* punish, whether the abolition of punishment for the interruption of pregnancy in the first three months of pregnancy is compatible with fundamental rights. It is obvious, however, that the disregard of punishment is the opposite of state enchroachment. Since the partial withdrawal of the penal provision did not occur to benefit interruptions of pregnancies but rather, because the previous penal sanction, according to the unrefuted assumption of the legislature which has been confirmed by experience, has thoroughly proved itself ineffective, an "attack" on the unborn life by the state is not even indirectly construable. Because no such infringement exists, the Austrian Constitutional Court has denied that the regulation of terms there violates the catalog of fundamental rights recognized by the law of Austria.[2]

2. Since the fundamental rights as defense rights are from the beginning not suitable to prevent the legislature from eliminating penal provisions, the majority of this Court seeks to find the basis for this in the more extensive meaning of fundamental rights as *objective value decisions*.[3] According to this, the fundamental rights not only establish rights of defense of the individual against the state, but also contain at the same time objective value decisions, the realization of which through affirmative action is a permanent task of state power. This idea has been developed by the Federal Constitutional Court in the laudable endeavor to lend greater effectiveness to the fundamental rights in their capacity to secure freedom and to strive for social justice. The majority of this Court insufficiently considers differences in the two aspects of fundamental rights, differences essential to the judicial control of constitutionality.

As defense rights the fundamental rights have a comparatively clear recognizable content; in their interpretation and application, the judicial opinions have developed practicable, generally recognized criteria for the control of state encroachments—for example, the principle of proportionality. On the other hand, it is regularly a most complex question, *how* a value decision is to be realized through affirmative measures of the

2. *Cf.* the Judgment of October 11, 1974 - G 8/74 - II.2.b, Reasons for the decision, European Journal for Fundamental Rights, 1975, p. 74 (76).
3. C.I.3. and C.III.2.b. of the Judgment (pp. 641 *et seq.*, 646 *et seq.*).

legislature. The necessarily generally held value decisions can be perhaps characterized as constitutional mandates which, to be sure, are assigned to point the direction for all state dealings but are directed necessarily toward a transposition of binding regulations. Based upon the determination of the actual circumstances, of the concrete setting of goals and their priority and of the suitability of conceivable means and ways, very different solutions are possible. The decision, which frequently presupposes compromises and takes place in the course of trial and error, belongs, according to the principle of division of powers and to the democratic principle, to the responsibility of the legislature directly legitimatized by the people.[4]

Certainly, because of the growing importance of promoting social measures to effectuate fundamental rights even in this area, every judicial control of constitutionality cannot be renounced; the development of a suitable instrument which respects the freedom of the legislature to structure will probably be among the main tasks of judicial decision making in the next decades. As long as such an instrument is lacking, the danger exists that judicial control of constitutionality will not limit itself to reviewing decisions of the legislature but rather will substitute another decision which the Court determines to be better. This danger will exist in a heightened degree, when—as here—in sharply controversial questions a decision made by the parliamentary majority after long debate is challenged before the Federal Constitutional Court by the defeated minority. Without prejudice to the legitimate authority of those entitled to petition the Court to resolve constitutional doubt in this manner, the Federal Constitutional Court is unwarily falling in this case into the position of a political arbitration board to be used for the choice between competing legislative projects.

The idea of objective value decisions should however not become a vehicle to shift specifically legislative functions in the formation of social order onto the Federal Constitutional Court. Otherwise the Court will be forced into a role for which it is neither competent nor equipped. Therefore, the Federal Constitutional Court should maintain the restraint which it exercised prior to the High School-Decision (*cf.* Decisions of the Federal Constitutional Court, 4, 7 [18]; 27, 253 [283]; 33, 303 [333 f.]; 35, 148—dissenting opinion—[152 ff.]; 36, 321 [330 ff.]). This Court should confront the legislature only when the latter has completely disregarded a value decision or when the nature and manner of its realization is obviously faulty. On the other hand,

4. *Cf.* in this regard for more particulars our dissenting opinion in the High School Judgment, Decisions of the Federal Constitutional Court, 35, 148 (150, 153, 155 f.).

in spite of supposed acknowledgement of legislative freedom to structure, the majority effectively charges the legislature with not realizing a recognized value decision in, according to the majority's view, the best manner possible. Should this become the general standard for judicial examination, the requirement of judicial self-restraint would accordingly be sacrificed.

II.

1. Our strongest reservation is directed to the fact that for the first time in opinions of the Constitutional Court an objective value decision should function as a *duty* of the legislature to enact *penal norms*, therefore to postulate the strongest conceivable encroachment into the sphere of freedom of the citizen. This inverts the function of the fundamental rights into its contrary. If the objective value decision contained in a fundamental legal norm to protect a certain legal value should suffice to derive therefrom the duty to punish, the fundamental rights could underhandedly, on the pretext of securing freedom, become the basis for an abundance of regimentations which restrict freedom. What is valid for the protection of life can also be claimed for other legal values of high rank—for example, inviolability of the body, freedom, marriage, and family.

Quite obviously the constitution presupposes that the state can also resort to its power to punish to protect an orderly social life; the thrust of fundamental rights, however, does not go to the promotion of such a utilization but rather to the drawing of its boundaries. In this way the Supreme Court of the United States has even regarded punishment for the interruption of pregnancy, performed by a physician with the consent of the pregnant woman in the first third of pregnancy, as a violation of fundamental rights.[5] This would, according to German constitutional law, go too far indeed. According to the liberal character of our constitution, however, the legislature needs a constitutional justification to punish, not to disregard punishment, because, according to its view, a threat of punishment promises no success or appears for other reasons to be an improper reaction (*cf.* Decisions of the Federal Constitutional Court, 22, 49 [78]; 27, 18 [28]; 32, 40 [48]).

The opposite interpretation of fundamental rights necessarily leads to an extension of judicial control of constitutionality which is subject to equal if not more doubt: it is no longer necessary merely to determine alone whether a penal provision encroaches too far into the sphere of rights of the citizens, but

5. Roe v. Wade, 410 U.S. 113 (1973) - 93 S. Ct. 705 - 41 U.S. Law Week 4213.

also the inverse, whether the state punishes *too little*. Therefore the Federal Constitutional Court will, contrary to the majority opinion,[6] not be able to restrict itself to the question whether the enactment of any particular penal norm regardless of its contents is required, but in addition must clarify which penal sanction suffices for the protection of the respective legal value. In the last consequence the Court may find it necessary to determine whether the application of a penal norm in the individual case satisfies the concept of protection.

A constitutional determination of penal norms—as the majority requires—is ultimately to be rejected, precisely because the guiding ideas concerning penal law, according to the experiences of the last decades and the expected developments in the field of social sciences, are subject to quick and powerful change. This shows not only a picture of fundamental changes in perhaps the judgments concerning moral offenses—*e.g.*, homosexuality, wife-pandering, exhibitionism—, but also covers in a special way the penal provisions against abortion. The freedom from punishment for ethically (criminologically) indicated abortion, which today corresponds to the predominant legal view, was still sharply debated in the sixties.[7] The drafts of a penal code submitted by the federal government in 1960 and 1962 expressly rejected this indication;[8] for the social and eugenic indications they were content with the reference that the rejection was "self-explanatory."[9]

2. Even the *history of the origins* of the Basic Law speaks against deriving a duty to punish from norms of fundamental rights. Where the Parliamentary Council deemed penal sanctions to be constitutionally required, it expressly incorporated them in the Basic Law: Article 26, Paragraph 1, for the preparation for aggressive warfare and Article 143, in the original draft, for high treason.

On the other hand, in the materials of Article 2, Paragraph 2, of the Basic Law, as the majority concedes,[10] no bases are to be found for a duty to protect unborn life with penal laws.

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6. D.I. (p. 649).

7. *Cf.* the debates in the Federal Council and Federal Parliament (Notes of the 254th Session of the Legal Committee of the Federal Council of June 26, 1963, p. 30 ff.; Proceedings of the Federal Council, 1962, p. 140 f., 173, 154 f.; Proceedings of the German Parliament, Fourth Election Period, Stenographic Reports of the 70th Session of March 28, 1963, p. 3188, 3208, 3210, 3217, 3221); see further information in Lang-Hinrichsen, Jurists Journal, 1963, p. 725 ff.

8. *Cf.* Sections 140 f., 157 and the reasoning, Printed Materials of the Federal Parliament, III/2150, p. 262, 274 f.; Printed Materials of the Federal Parliament, IV/650, p. 278, 292 f.

9. Printed Materials of the Federal Parliament, III/2150, p. 262, IV/650, p. 278.

10. C.I.l.d. (pp. 639 *et seq.*).

A closer analysis of the history of the origins of the article shows, moreover, that the penal evaluation of the interruption of pregnancy should be left consciously to the responsible decision of the legislature alone. The statements of Representatives Heuss and Greive, which are important to that extent, and the defeat of the motion of Representative Seebohm[11] must be understood in their historical context. During the Weimar period, punishment of abortion was extraordinarily debated; involved at that time was an incomparably more serious problem, because the widespread and easily applicable means of contraception of today were not yet in existence. This situation continued unchanged to the time of the Parliamentary Council. If under these circumstances the proposed incorporation of an express provision for the protection of germinating life was rejected, this, in conjunction with the aforementioned statement, is to be understood only in the sense that the reform of the controversial §218 of the Penal Code should not be prejudiced by the constitution.

A contrary standpoint cannot be supported with the argument that the reception of Article 2, Paragraph 2, of the Basic Law unquestionably originated from the reaction to the inhumane ideology and practice of the National Socialist regime.[12] This reaction refers to the mass destruction of human life by the state in concentration camps and, in the case of the mentally ill, sterilizations and forced abortions directed by authorities, to involuntary medical experiments on human beings, to disrespect of individual life and human dignity which was expressed by countless other measures of state.

Drawing conclusions concerning the constitutional assessment of the killing of a child *en ventre sa mere* by the pregnant woman herself or by a third party with her consent is less pertinent than drawing conclusions from such a killing by the state, as, for example, by the Nazi regime which had taken up a rigorous standpoint corresponding to its biologically oriented ideology towards population. Alongside of new provisions against advertising for abortions or abortion methods, a stricter application of penal provisions was worked out through corresponding state measures in contrast to the Weimar period.[13] This penal sanction which was already severe was significantly sharpened in 1943. Until that time only imprisonment was provided for the pregnant woman and her non-professional helper; by this time,

11. C.I.1.d. (pp. 639 *et seq.*) with the sources indicated there.
12. *Cf.*, however, C.I.1.a. and D.IV. of this Judgment (p. 637, pp. 661 *et seq.*).
13. *Cf.* The rise of sentencings in the Third Reich: Dotzauer, Abortion, in Handbook of Criminology (Ed. von Sieverts), 2nd Ed., Vol. 1 (1966), p. 10 f. (In German, the title is Handwörterbuch der Kriminologie—*Trans.*).

however, self-abortion, in especially aggravated cases, was punished with imprisonment in the penitentiary. The professional abortion was, apart from less serious cases, always punished with imprisonment in the penitentiary; and, even with the death penalty, if the perpetrator had "thereby continually injured the vitality of the German people." In the face of these provisions, which remained unchanged when the Basic Law was adopted and was mitigated solely through the Allied prohibition of cruel or excessively severe punishments, the reasons which led to the adoption of Article 2, Paragraph 2, of the Basic Law can by no means be adduced in favor of a constitutional duty to punish abortions. Rather, the decisive renunciation completed with the Basic Law of the totalitarian National Socialist state demands rather the reverse conclusion, that is, restraint in employing criminal punishment, the improper use of which in the history of mankind has caused endless suffering.

B.

Even if one, contrary to our position, agrees with the majority that a constitutional duty to punish is conceivable, no constitutional violation can be charged to the legislature. Although it is not necessary to go into every detail, the majority reasoning encounters the following objections:

I.

Even according to the opinion of the majority a constitutional duty to punish should only come into consideration as *ultima ratio*.[14] If one considers this seriously, such a duty immediately presupposed that suitable means of a milder form are not available or that their employment has proved to be ineffective; moreover, the penal sanction must be suitable and required to achieve the desired goal at all or more effectively. Both must—if one follows the previous decisions (*cf., e.g.*, Decisions of the Federal Constitutional Court, 17, 306 [313 f.])—be proved beyond doubt. Since the allowance of an existing penal provision depends on whether it is suitable and required for the protection of the respective legal value, such proof is needed even when the legislature is compelled to punish even against its will. In its adjudication of the factual basis and the effectiveness of the intended measures, the Court must accept as a basis the view of the legislature so long as it has not been refuted as obviously erroneous (*cf.* Decisions of the Federal Constitutional Court, 7, 377 [412]; 24, 367 [406]; 35, 148—dissenting opinion—[165]).

14. C.III.2.b. (pp. 646 *et seq.*).

The reasoning of the judgment does not satisfy these requirements. It is repeatedly entangled with contradictions and in the end directly shifts the burden of proof: the legislature shall be allowed to forgo penal sanction, only when it is established without doubt that the milder measures favored by it to fulfill the duty of protection are "at least" equally effective or more effective.[15]

1. The immediately impressive statements about the undisputed high rank of the protection of life neglect the *uniqueness of the interruption of pregnancy* in relation to other dangers of human life. Involved here is not the academic question of whether it is proper to employ the power of the state to protect against murderers and killers, who can be deterred in no other way. In the European legal history, which has been influenced by the Church, a distinction has been constantly made between born and unborn life. Even the value decision of the constitution leaves room for such a differentiation in the choice of measures of protection precisely because the fundamental right of Article 2, Paragraph 2, of the Basic Law is not—as the majority formulates[16]—"comprehensively" guaranteed, but rather is subject to statutory restriction. Otherwise neither the ethical nor the eugenic or even the social indications could be established.

Even the majority does not question the authority for this distinction,[17] but does not distinguish, once again, between the different aspects of fundamental legal norms. Where the defense against state encroachments is involved, a distinction cannot, of course, be made between prenatal and postnatal stages of development; the embryo is, insofar as it is a potential bearer of fundamental rights, to be protected without exception in the same way as each born human life. This equal treatment under the law has only limited applicability to the injury to unborn life by a third party against the will of the pregnant woman, in no way however can it be applied to the refusal of the woman to allow the child *en ventre sa mere* to become a human being.

The unusual circumstances that in the person of the pregnant woman there is a unique unity of "actor" and "victim" is of legal significance,[18] because much more is demanded of the pregnant woman than mere omission—as opposed to the demands on the one addressed by penal provisions against homicide: she

15. D.III., C.III.3. (pp. 660 *et seq.*, 647 *et seq.*); *cf.* D.II.2.c. (pp. 656 *et seq.*).
16. C.II.1. (p. 642).
17. C.III.2.a. (pp. 645 *et seq.*).
18. The majority concurs, *see* C.II.2., C.III.3. (pp. 642 *et seq.*, 647 *et seq.*).

must not only tolerate the far-reaching changes in her health and well-being associated with carrying the child *en ventre sa mere* to term, but also submit to encroachments upon her way of life which result from pregnancy and birth, and especially accept the maternal responsibility for the further development of the child after birth. Otherwise than in the case of homicide mentioned, the legislature can and must proceed, furthermore, from the idea that the object of protection—the child *en ventre sa mere*—is most effectively protected by the mother herself and that her willingness to carry the child *en ventre sa mere* to term can be strengthened through measures of the most varied kinds. Since no penal provision is required by nature to produce and secure the maternally protective relationship, the question arises whether a disturbance of this relationship, as is evident in the case of interruptions of pregnancy, can be obviated directly through a penal sanction in an appropriate manner. In any case the legislature may, because of the special circumstances mentioned, react differently here than to the killing of human life by a third party.

According to the *view of the undersigned Madame Justice*, the refusal of the pregnant woman to permit the child *en ventre sa mere* to become a human being is something essentially different from the killing of independently existing life, not only according to the natural sensitivities of the woman but also legally. For this reason the equating in principle of abortion in the first stage of pregnancy with murder or intentional killing is not allowable from the outset. Firstly, it is mistaken, if not irrelevant, to relate the term solution to euthanasia or even the "killing of unworthy life" in order to distinguish it therefrom, as has occurred in the public discussion. The fact that an independently existing living being separable from the maternal organism first exists after a lengthy process of development rather suggests or at least permits with regard to legal judgment consideration of lines of demarcation based on time, which correspond to this development.[19] The biological continuity of the entire development until birth[20]—the beginning of which is to be set, not at implantation, but rather at conception, if the majority view is consistently applied—does not alter the fact that a change in the attitude of the pregnant woman, in the sense of a growing maternal relationship, corresponds to the different

19. *Cf.* the Judgment of the Austrian Constitutional Court under II.5.b. of the Reasoning of the Decision, European Journal for Fundamental Rights 1975, p. 74 (80); Lay, Juristic Journal 1970, p. 465 ff.; going even further, Roman Herzog (JR 1969, p. 441) designates it as a matter for the legislature to determine "from which stage of development on the protection of the state shall become effective."

20. *See* C.I.1.b. (p. 638).

embryonic stages of development. Accordingly, for the legal consciousness of the pregnant woman as well as for the general legal consciousness, there is a difference between an interruption of pregnancy which takes place in the first stage of pregnancy and one which takes place in a later phase. This has resulted at all times in domestic and foreign legal systems in a different penal assessment which is tied to such stages which are based on time, as, for example, the Supreme Court of the United States impressively stated.[21] Regarding German law, it deserves emphasis that canon law, based on the theory of ensoulment, considered until the end of the nineteenth century abortions performed up to the 80th day after conception to be free from punishment; even secular penal law had established, until the Enactment of the Penal Code of 1871, temporal stages as a basis for the degree of punishment.[22]

The *undersigned Justice* is inclined from a legal standpoint to attribute less significance to these further considerations about the relationship between the pregnant woman and her child *en ventre sa mere.* If however the repeal of the penal sanction during the first three months of pregnancy is not constitutionally objectionable on other grounds—those already mentioned or to be discussed later—then the legislature does not in any case act in ignorance when it takes account in it regulation of the circumstances mentioned.

2. The examination whether, despite the aforementioned special circumstances, a duty to punish in order to protect unborn life is to be required as *ultima ratio* must proceed from the *social problem,* which provided the occasion for the legislature to pass this regulation. In the reasoning of the majority, one finds only slight allusion to the complexity of this problem and—in connection with the regulation of indications—some discussion about the social causes of abortion;[23] as a whole, however, because of the more dogmatic manner of consideration, there was insufficient appreciation, for a reform which was recognized on all sides as necessary, of the conditions found by the legislature and of the difficulties flowing therefrom.

a) These conditions are in the first place complicated by the enormous number of illegal abortions, which cannot be dis-

21. 410 U.S. 113 (132 ff., 160 f.).

22. *Cf.* Dähn in: "The Proscription of Abortion in Section 218 of the Penal Code (Ed. von Baumann), 2d Edition, 1972, p. 331 f.; Supreme Court, *loc. cit.,* 134; Simpson-Geerds, Criminal Acts against the Person and Moral Offenses from the Perspective of Comparative Law, 1969, p. 87; Special Committee for Penal Law Reform, Seventh Election Period, Outline of the 15th Session, Stenographic Reports, p. 690 ff., 697 f.

23. C., C.III.2, C.III.3, D.II., D.II.3., (pp. 637 *et seq.,* 645 *et seq.,* 647 *et seq.,* 650 *et seq.,* 657 *et seq.*).

missed by the fact that—understandably—no certain data can be obtained. According to the reports of the Special Committee for Penal Law Reform, there are, "according to investigations which are to be taken seriously," from 75,000 to 300,000 illegal abortions annually;[24] the figures mentioned by the experts at the public hearing before the Special Committee also fluctuated within this range.[25] Until recently, *i.e.*, until the beginning of discussions in Parliament, much higher figures were generally assumed.[26]

Even if one takes only the lowest estimates as a basis, the number remains shockingly high. In contrast, there is a negligible number of abortion cases which have become known to authorities and judicially condemned: in 1971 there were 584 known penal offenses and 184 convictions; in 1972, 476 cases, 154 convictions.[27] In the great preponderance of these, the sentence was only a monetary fine; the exceptionally imposed short term incarceration was usually suspended for probation.[28] The failure to observe the penal provision recognized herein does not by itself signify a depreciation of developing life, but rather has a detrimental effect on the general validity of law, especially since under these circumstances prosecution becomes pure chance.

Furthermore, the legislature cannot be indifferent to the fact that illegal interruptions of pregnancy lead even today to injuries of health; and this is true not only in the case of abortions by "quacks" and "angel-makers," but also, to a greater extent, in the case of procedures undertaken by physicians because illegality discourages the full use of modern equipment and assistance of the required personnel or hinders the necessary follow-up treatment. Further, the commercial exploitation of women inclined to an abortion in Germany and in foreign countries and the social inequality connected with it appears as a drawback; better situated women can, especially by traveling to neighboring foreign countries, much more easily obtain an abortion by a physician than poorer or less clever ones. Finally, the resulting possibility of subsequent criminality must be added to this; thus

24. *Cf.* Printed Materials of the Federal Parliament 7/1981 (new) p. 6; 7/1982, p. 5; 7/1983 p. 5, each with further sources.

25. *Cf.* Special Committee for Penal Law Reform, Sixth Election Period, 74, 75 and 76th Session, Stenographic Reports, p. 2173, 2218, 2241.

26. *Cf.* the evidence in the answer of the Federal Minister of Justice to the small interrogation of the faction of the CDU/CSU, Printed Materials of the Federal Parliament, VI/2025, p. 3; *see also* E.W. Böckenförde, who established the basis of the 200,000 to 400,000 illegal abortions, (Voice of the Time) Vol. 188, (1971), p. 147 [152]).

27. Statistical Yearbook for the Federal Republic of Germany, 1973, p. 117, 121; 1974, p. 116, 121.

28. *Cf.* Federal Office of Statistics, Speciality Series A, "Populace and Culture", Row 9, "Care of the Law", 1972, p. 100 f., 144 f., 160 f.

extortion with the knowledge of an illegal abortion stands in third place among the types of extortion.[29]

b) It was especially significant for the legislature in deciding how best to reform these situations that the decision for an abortion generally grows out of a conflict situation based on varied motivations which are strongly imprinted with the circumstances of the individual case. In addition to economic or material reasons—for example, inadequate living conditions, insufficient or uncertain income for a perhaps already large family, the necessity for both spouses to be employed—stand personal reasons: the social discrimination against unwed mothers, which continues to exist, the pressure of the father or the family, fear of endangering the relationship with the partner or of strife with parents, the desire or the necessity of continuing education already begun, or of continuing to practice a profession, difficulties in marriage, the feeling of not being physically or emotionally equal to the care and control of more children, and with singles, also the unwillingness to educate the child at home in an irresponsible way. The anxiety of the pregnant woman that the unwanted pregnancy would lead to a rupture in her personal life-style or in the standard of living of the family, the perception that in bearing the child *en ventre sa mere* she could not count on effective help from the world about her, but must meet alone the adverse consequences of behavior for which she alone is not accountable, often make interruption of pregnancy appear to be the only way out for her. Even when in the individual situation the imprudent motivations of comfort, of egotism, and especially of consumer aspiration are in the foreground, the burden cannot rest exclusively with the woman, but reflects at the same time the widespread materialistic and child-hating attitude of the "affluent society." Also neither the state nor society have developed up to this time sufficient institutions and life-styles which would enable the woman to combine motherhood and family life with personal development of equal opportunity, particularly in the professional area.[30]

3. In this whole situation, "the containing of the abortion

29. Geerds, Extortion, in Handbook of Criminology, *loc. cit.*, p. 182.

30. *Cf.* with all of this, *e.g.* the Memorandum of the Bensberger Circle to Reform Section 218 of the Penal Code (Special Printing of the Public Forum) under I.1. as well as the Statements of the experts and the representatives of the Government before the Special Committee for Penal Law Reform, Sixth Election Period, 74, 75 and 76th Session, Stenographic Reports, p. 2219, with tabulated overview in Appendix 3, p. 2368 (Rolinski); p. 2233 (Dotzauer); p. 2251 ff. (Pross); Seventh Election Period, 23rd Session, Stenographic Reports, p. 1390 f.; see further the Reports of the Special Committee for Penal Law Reform, Printed Materials of the Federal Parliament, 7/1981, (new) p. 7; 7/1982, p. 7; 7/1983, p. 7; 7/1984, (new) p. 5.

epidemic" is not only a "goal desired socially and politically,"[31] but also is urgently required precisely for a better protection of life and to restore the credibility of the legal order. In striving toward the solution of this most difficult problem the legislature has exhaustively evaluated all essential points of view. The reform of §218 of the Penal Code has, for some time now, thoroughly occupied a public deeply split on the issue. Against this background, the parliamentary deliberations were carried out with great seriousness and uncommon thoroughness. Express reference was made to the value decisions of the constitution; unanimity existed about the state's duty to protect unborn life. In ascertaining the authoritative factors and arguments for a sound decision, the proceeding of the legislative bodies corresponded totally to that which the decision on the Communist Party of Germany held to be characteristic of a legitimate formation of a popular mandate in a liberal democratic state (Decisions of the Federal Constitutional Court, 5, 85 135, 197 f.).

In the solution chosen the legislature was within its authority to proceed on the assumption that, in view of the failure of the penal sanction, the suitable means toward a remedy are to be sought in the social and community realm and that involved is, on the one hand, facilitating the bearing of the child to term by the mother through preventive psychological, *social, and social-political promotional measures* and strengthening her willingness to this end; and, on the other hand, decreasing the number of unwanted pregnancies through better information about the possibilities for preventing conception. Even the majority[32] does not apparently doubt that such measures seen as a whole are the most effective and are in accord with the earliest effectuation of fundamental rights in the sense of greater freedom and increased social justice.

Promotional measures of this kind can, of course, because of the differing competencies of the state, be enacted only partially in a penal code. The Fifth Statute to Reform the Penal Law contains consequently merely a duty to consult. According to the conception of the legislature the pregnant woman shall thus—without fear of punishment—be brought out of her isolation; the surmounting of her difficulties shall be facilitated by open contacts with her environment and by an individual counseling addressed to her personal conflict situation. That the consultation provided should serve the protection of developing life, since it awakens and strengthens the willingness to carry the child *en ventre sa mere* to term where important reasons are

31. D.II.2.b. (pp. 655 *et seq.*).
32. C.III.1., D.II., D.III. (pp. 644 *et seq.*, 650 *et seq.*, 660 *et seq.*).

not in opposition, follows directly from the statutory materials cited in the reasoning for the judgment and the decision of the majority of the Federal Parliament mentioned there.[33]

We do not dispute that this counseling regulation—as explained in the judgment[34]—still displays weaknesses. To the extent that these weaknesses could not have been removed by a construction of the statute which conforms to the constitution and by a corresponding implementation of regulations of federal states, a constitutional objection would have to be limited solely to these shortcomings and may not challenge the regulation of terms and counseling in their fundamental conception. Furthermore, the success of the counseling regulation depends essentially on whether help can be offered to or arranged for the pregnant woman which opens for her ways out of her difficulties. If this fails, even the penal law is nothing other than an alibi for the deficit of effective help; the responsibility and the burdens would be shifted onto the weakest members of society. The majority—in agreement with previous judicial opinions—finds itself unable to limit the freedom of formulation of the legislature and prescribes for it an expansion of the social-preventive measures.[35] If, however, judicial self-restraint has validity, the Constitutional Court *a fortiori* should not compel the legislature to employ the power of punishment, which is the strongest means of state coercion, to compensate for the social neglect of duty[36] with the threat of punishment. This certainly does not correspond to the function of penal law in a liberal social state.

4. Even the majority recognizes the legislative intention to preserve life through counseling as a "goal worthy of respect",[37] but holds in agreement with the petitioners the ordering of *flanking penal sanctions* to be unalterable because comprehensive forgoing of punishment leaves a "gap in protection" in the cases in which the interruption of pregnancy is based on reasons which are in no way worthy of respect.[38]

a) The ability of penal sanctions to protect life as intended, however, immediately appears to be doubtful. Even the major-

33. A.I.6.d., D.II., D.II.3., D.II.3.b. (pp. 619 *et seq.*, 650 *et seq.*, 657 *et seq.*, 658 *et seq.*); see further the Statements of representatives of the Government and representatives in the Second and Third Deliberation (Rep. de With, Mrs. Funcke, Mrs. Eilers, Dr. Eppler, Scheu, Federal Minister Mrs. Dr. Focke and Federal Chancellor Brandt), 95th Session, Stenographic Reports, p. 6383 [D]; 6384 [A]; 6391 [A]; 6402 [B]; 96th Session, Stenographic Reports, p. 6471 [B]; 6482 [B]; 6499; 6500 [B].

34. D.II.3. (pp. 657 *et seq.*).

35. C.III.1. (pp. 644 *et seq.*).

36. *Cf.* in this regard Rudolphi, Penal Acts against the Developing Life, ZStrW 83 (1971), p. 105, 114 f., 128 f., 134.

37. D.II.2.b., D.II.1. (pp. 655 *et seq.*, 651 *et seq.*).

38. A.II.2.c., C.III.2.b., D.II.2. (pp. 625 *et seq.*, 646 *et seq.*, 653 *et seq.*).

ity concedes that the previous general punishability of abortion has not sufficiently protected developing life and possibly has even contributed to the neglect of other effective measures of protection.[39] It believes—even if it is not completely sure of it[40]—that this forgoing of protection by punishment would be remedied through a differentiated threat of punishment, according to which interruption of pregnancy should remain without punishment in the cases in which there are indications and which were discussed in the legislative proceedings. Regarding the previously recognized or practiced medical, ethical, and eugenic indication, this indications solution certainly brings no essential alteration of the previously existing unsatisfactory state of the law. An actual difference exists only in the recognition of the social indication, so far as the legislature does not proceed in an excessively strict manner with respect to the limitation incumbent upon it and, at least here, observes the correlation mentioned between social help due and justifiable punishment: the less the state, for its part, is able to help, the more questionable and, at the same time, the less effective are the threats of punishment against women who, for their part, do not feel equal to the duty of bearing the child *en ventre sa mere* to term.

The matters considered by the majority which as a whole favor the indications solution certainly deserve attention from the standpoint of legal policy. It is, however, constitutionally decisive that, upon realistic consideration, protection of life without gaps cannot be achieved even with differing penal sanctions and therefore no solution can be "constitutionally required." The majority still owes the explanation incumbent upon it of how, in the era of "abortion-tourism," domestic penal provisions will directly and favorably influence those women who are decided upon abortion for imprudent reasons. Such a success is possible, if at all, only in a certain number of cases—especially with those belonging to socially weaker groups. With women subject to influence the ambivalent effect of penal threats is shown *inter alia* by the fact that, on the one hand, penal threats might offer support against the abortion demands of the father or of the family, but, on the other hand, can contribute to an increase in abortions by driving the pregnant woman into isolation, thereby exposing her more than ever to such pressures and occasioning short-circuited treatment.

b) However the protective effect of penal sanctions may be judged, its partial revocation is, in any case, based on considerations which from the point of view of protecting life have

39. D.II. (pp. 650 *et seq.*).
40. *Cf.* D.III. (pp. 660 *et seq.*).

weight and, at least under an improved regulation of counseling, can, in no event, be refuted as clearly mistaken.

The legislature had in its conception the whole spectrum of the abortion-problematic in view, especially the large number of those pregnant women who are susceptible to influence. It must have proceeded from the idea that women do not normally undergo such an operation with a light heart and without reason. As a rule, a conflict exists which is to be taken seriously and which in any case is understandable; the decision to interrupt pregnancy is made in the "depths of the personality, into which the summons of penal law does not penetrate."[41] Exactly in these cases, according to the view of the legislature, the successful realization of the counseling system compellingly presupposes that a simultaneous threat of punishment is ineffective because women inclined to abortion will not seek out the counseling centers as long as they must fear that by so doing they lose their freedom of decision and that, by making their pregnancy known, they expose themselves to criminal prosecution in the event of a later illegal operation. This view, supported by the judgment of many experts and corresponding to experience, has been refuted by neither the petitioners in their oral proceedings nor by the majority of this Court.

The legislature found itself therefore in the dilemma that in its judgment preventive counseling and repressive penal sanction are partially exclusive. The legislature's decision to forgo penal sanctions which could possibly prevent abortions in a probably small number of cases, conceivably to save other life in a greater number of cases, cannot be dismissed with the comment that it would be a "lump sum weighing of life against life," which would be incompatible with the constitutional duty of protection of each individual unborn life.[42] With this argumentation the majority closes its mind in a manner difficult to understand to the fact that it is itself doing that for which it reproaches the legislature. This is so because the majority requires, for its part, for constitutional reasons an accounting from the legislature by compelling it through a requirement to retain the penal provision to leave such unborn life without protection, which could be preserved by the repeal of the penal sanction and through suitable counseling.

The rigorism of the majority is difficult to reconcile with the express allowance of a balancing not only of life against life, but even of life against legal values of a lesser rank in the case

41. Rolinski, Special Committee for Penal Law Reform, Sixth Election Period, 74, 75 and 76th Session, Stenographic Reports, p. 2219.
42. D.II.2.b.-c. (pp. 655 *et seq.*).

of indicated abortions. To the extent that state authorized specialty centers for this balancing must exist, the legislature must consider it a definite disadvantage of this solution that the destruction of a child *en ventre sa mere* is expressly and officially legitimatized. The majority leaves unanswered the question of whether in the case of the social indication the examination for the existence of prerequisites is to be undertaken beforehand by a specialty center or left to a later criminal proceeding.[43] The second way would however miss an essential aim of reform, because it would result in a highly questionable and unjust insecurity for the affected woman and the participating physicians.

5. Since, after all, each solution remains patchwork from the viewpoint of protecting life, the legislature may have considered in favor of the term solution *further points of view of a constitutional, hygenic, and criminological-political nature*—not considered by the majority—which supported the term solution. The legislature could have proceeded from the point of view that this regulation best respects the personal responsibility of the woman and mother in a question affecting her life's destiny and avoids exposing her to the encroachments into the sphere of her personality connected with a procedure before a specialty center. The legislature also should have considered that the protection of developing life goes beyond the physical existence and that the opportunities in life are better for a child, responsibly accepted after counseling, than for a child borne only out of fear of punishment. In essence it could further be that the impairments to health connected with illegal abortions would disappear and that legal consciousness no longer would be undermined by an empty threat of punishment or its sporadic application.

Furthermore, it was not clearly erroneous when the legislalature, supported by experiences in foreign countries, saw an essential disadvantage in the indications solution, in that it appears as difficult, if not impossible, to find verifiable, uniform characteristics of demarcation for the social indications which are relevant only from the viewpoint of reform.[44] The heated controversies in the legislative deliberations have made it obvious that precisely in this area there exists no consensus about the limit of the permissible. Presumably the judgment of the authorities concerning whether the danger of a serious social emergency exists and whether other measures are to be taken to avert this danger to the pregnant woman will differ widely

43. C.III.3. (pp. 647 *et seq.*).
44. *Cf.* Printed Materials of the Federal Parliament, 7/1981 (new) p. 12 as well as cited Alternative Draft, *loc. cit.*, p. 27, under A.I.5. (pp. 18 *et seq.*).

depending on the region or on the personal attitude of the experts and judges. The result would be a legal uncertainty which is difficult to tolerate and an inequality for the affected women and the participating physicians as well as a further slipping into illegality.

For all these reasons the legislature could risk the attempt to reform the presently untenable conditions by a counseling and term solution, even if a safe prediction of further developments is not possible. Since even the majority correctly proceeds on the assumption that the well-known statistical data do not permit a safe conclusion[45] in one or the other direction, one need not go further into the critical utterances against the prognosis of the legislature.[46]

II.

The majority emphatically bases the maintenance of a—differentiated—penal sanction upon the idea that the constitutionally required "condemnation" of unindicated abortions must be clearly expressed.[47] Insofar as the general preventive effect of penal law should be discussed, *i.e.*, the endeavor to condemn an act by inflicting an evil and thereby to influence the actual behavior of those subject to the law, it has—as discussed—not been demonstrated that the indications solution guarantees for its part effective protection of life. It is therefore perhaps no accident that the majority's argument proceeds in two directions: it demands, even independently of the desired actual effect, a condemnation as an expression of a social-ethical negative value judgment, which clearly characterizes unmotivated abortions as unjust.

1. It remains undecided how far modern science of penal law is in accord with such a conception about the function of penal law and its relationship to ethics[48] and whether penal law would not thereby be elevated to an end in itself. Unmotivated

45. D.II.2.c. (pp. 656 *et seq.*).

46. According to the most recent reports from the German Democratic Republic, which has had the terms solution since 1972, the number of interruptions of pregnancy in the past two years has reportedly significantly receded. This has resulted from intensive measures by the state to promote young families and from the development of marital and sexual counseling (*cf.* Mehlan, The State of Health in Germany 1974, p. 2216 ff.).

47. C.II.3., C.III.2.b., C.III.3., D.II.1., D.II.2., D.III. (pp. 644 *et seq.*, 646 *et seq.*, 647 *et seq.*, 651 *et seq.*, 653 *et seq.*, 660 *et seq.*).

48. *Cf.* Baumann, Penal Law, General Part, 6th Ed., 1974, p. 7 f., 27 f., Baumann, The Relationship between Morals and Law, in Morals (edited by Anselm Hertz, 1972) p. 60 ff.; Hanack, Proceedings of the 47th D.J.T. 1968, Vol. I, p, A 29 ff.; Sax, Principles of the Administration of Penal Justice, in Bettermann-Nipperdey-Scheuner, The Fundamental Rights, Vol. III/2, 1959, p. 930 f., 955 f.; Arthur Kaufmann, Law and Morals, 1964, p. 42 ff.

interruptions of pregnancy obviously are ethically objectionable. With respect to the majority reasoning one questions whether disregarding of punishment here as elsewhere does not compel the conclusion that conduct no longer punishable would be approved. There is especially no place for the legislature to abolish a penal provision because it, according to the legislative opinion, is ineffective or even harmful or because the previously punishable, socially harmful behavior should be dealt with in another way. Hardly a person will conclude, because of the repeal or limitation of penal provisions against prostitution, drug-abuse, adultery or wife-pandering, that the corresponding acts now enjoy official recognition as legal and moral. The discussions about the reform of §218 of the Penal Code offer no reason for concluding that the destruction of unborn life was seriously regarded as a "normal social occurrence."

Insofar as the majority in this connection draws upon the Statute to Supplement the Penal Law Reform, which has not been completely dealt with by the legislative bodies, in judging the counseling and regulation of terms, it is not of consequence because both statutes are, in their content,[49] independent of one another, even according to the view of the majority.[50] Only if the Statute to Supplement the Penal Law Reform were enacted would it be proper to examine whether the planned general restitution of costs and continued payment of wages for abortions not subject to punishment contains an impermissible state requirement for the cases which are not indicated or whether this remains to be resolved, for certain important reasons, perhaps for combating the dangers to health connected with illegal abortions, which occasioned the Supreme Court even to forbid punishment constitutionally.[51] In the first case this deficiency within the Statute to Supplement the Penal Law Reform can be corrected, for example, through the restriction of restitution of costs to indicated cases, whereby the required examination could also be undertaken even after the interruption of pregnancy without time pressure. (In this manner, incidentally, the desired condemnation of unmotivated abortions would be simultaneously attained.)

2. Our most important objection is directed to the majority's failure to explain how the requirement of condemnation as an independent duty is constitutionally derived. According to our view the constitution nowhere requires that ethically objectionable behavior or conduct deserving of punishment must *per*

49. D.II.1. (pp. 651 *et seq.*).
50. B.4. (pp. 636 *et seq.*).
51. 410 U.S. 113 (148 ff., 162 ff.).

se be condemned with the help of the statutory law without regard to the desired effect. In a pluralistic, ideologically neutral and liberal democratic community, it is a task for the forces of society to codify the postulates of opinion. The state must practice abstention in this matter; its task is the protection of the legal values guaranteed and recognized by the constitution. For the constitutional decision it matters only whether the penal provision is imperatively required to secure an effective protection of developing life, having taken into consideration the interests of the woman which are deserving of protection.

III.

That the decision of the German legislature for the regulation of terms and counseling neither arises from a fundamental attitude which is to be morally or legally condemned nor proceeds from apparently false premises in the determination of the circumstances of life is confirmed by identical or similar *provisions for reform in numerous foreign states.* In Austria, France, Denmark, and Sweden an interruption of pregnancy, performed during the first twelve weeks (in France, ten) of pregnancy by a physician with the consent of the pregnant woman, is not punishable; in Great Britain and in the Netherlands a regulation of indications is in effect which amounts to the same thing in its practical application.[52] These states can boast that they are a part of an impressive constitutional tradition and all-in-all certainly do not lag behind the Federal Republic in unconditional respect for life of each individual human being; some of them likewise have historical experience with an inhuman system of injustice. Their decision required coming to grips with the same legal and social problems which exist in the Federal Republic. In all of these countries, the European Human Rights Convention is legally binding, Article 2, Paragraph 1, of which ("Everyone's right to life shall be protected by law.") is similar to the constitutional provision of Article 2, Paragraph 2, Sentence 1, of the Basic Law and which as a whole could easily go further than the domestic German norm. The Constitutional Court of Austria has expressly determined that the term solution of that country is compatible with the Human Rights Convention, which in Austria enjoys constitutional rank.[53]

IV.

On the whole therefore, in our opinion, the legislature was not prevented by the constitution from dispensing with a penal

52. For the United States, *cf.* A.II.1 (pp. 667 *et seq.*), *with* footnote 1 of the dissenting opinion.

53. *Loc cit.* in II.3.b. of the Reasoning for the Decision, European

sanction which, according to its unrefuted view, was largely ineffective, inadequate, and even harmful. Its attempt to remedy through socially adequate means the manifestly developing inability of state and society in the present conditions to serve the protection of life may be imperfect; it corresponds, however, more to the spirit of the Basic Law than the demand for punishment and condemnation.

Rupp-von Brünneck Dr. Simon

Journal for Fundamental Rights, 1975, p. 74 (77f.). Likewise, in France the Convention enjoys precedence over domestic French Laws, *cf.* Article 55 of the French Constitution; *see also* the decision of the Constitutional Council of January 15, 1975, Official Journal of January 16, 1975, p. 671 - European Journal for Fundamental Rights, 1975, p. 54.