Headnote

Nos. 2 BvF 2/90, 2 BvF 4/92, and 2 BvF 5/92
Decided May 28, 1993

1. **The Basic Law requires the state to protect human life, including that of the unborn. This obligation to protect is based on Article 1, Paragraph 1 of the Basic Law; its object, and following from that, its extent are more precisely defined in Article 2, Paragraph 2. Even unborn human life is accorded human dignity. The legal system must create the statutory prerequisites for its development by granting the unborn its independent right to life. The right to life does not commence first with the mother's acceptance of the unborn.**
2. **The obligation to protect unborn human life is related to the individual life and not human life in general.**
3. **The unborn is entitled to legal protection even vis-à-vis its mother. Such protection is only possible if the legislature fundamentally forbids the mother to terminate her pregnancy and thus imposes upon her the fundamental legal obligation to carry the child to term. The fundamental prohibition on pregnancy termination and the fundamental obligation to carry the child to term are two integrally connected elements of the protection mandated by the Basic Law.**
4. **Termination must be viewed as fundamentally wrong for the entire duration of the pregnancy and thus prohibited by law (reaffirmation of BVerfGE 39, 1 <44>). The right to life of the unborn may not be surrendered to the free, legally unbound decision of a third party, not even for a limited time, not even when the third party is the mother herself.**
5. **The extent of the obligation to protect unborn human life must be determined with a view, on the one hand, to the importance and need for protection of the legal value to be protected and, on the other hand, to competing legal values. Listed among the legal values affected by the right to life on the part of the unborn are - proceeding from the right of the pregnant woman to protection of and respect for her human dignity (Article 1, Paragraph 1 of the Basic Law) - above all, her right to life and physical inviolability (Article 2, Paragraph 2 of the Basic Law) and her right to free development of her personality (Article 2, Paragraph 1 of the Basic Law). However, the woman cannot claim constitutionally protected legal status under Article 4, Paragraph 1 of the Basic Law for the act of killing of the unborn which is involved in a pregnancy termination.**

6. **To fulfill its obligation to protect [unborn human life], the state must undertake sufficient normative and practical measures which lead - while taking the competing legal values into account - to the attainment of appropriate and, as such, effective protection (prohibition on too little protection). This necessitates a concept of protection which combines elements of preventative and repressive protection.**
7. **The woman's constitutional rights do not extend far enough to set aside, in general, her legal obligation to carry the child to term, not even for a limited time. The constitutional positions of the woman, however, do mean that not imposing such a legal obligation in exceptional situations is permissible, in some cases, perhaps even mandatory. It is up to the legislature to determine in detail, according to the criterion of non-exactability, what constitutes an exceptional situation. "Non-exactable" means that the woman must be subject to burdens which demand such a degree of sacrifice of her own existential values that one could no longer expect her to go through with the pregnancy (reaffirmation of BVerfGE 39, 1 <48 et seq.>).**
8. **The prohibition on too little protection does not permit free disregard of the use of criminal law and the resulting protection for human life.**
9. **The state's obligation to protect human life also encompasses protection from threats to unborn human life which arise from influences in the family or from the pregnant woman's social circle, or from the present and foreseeable living conditions of the woman and the family, and counteract the woman's willingness to carry the child to term.**
10. **Moreover, the state's mandate to protect human life requires it to preserve and to revive the public's general awareness of the unborn's right to protection.**
11. **The Basic Law does not fundamentally prohibit the legislature from shifting to a concept for protecting unborn human life which, in the early phase of pregnancy, emphasizes counseling the pregnant woman to convince her to carry the child to term; it could thus dispense with the threat of criminal punishment based on indications and the ascertainment of grounds supporting the indications by third parties.**
12. **A counseling concept of this type requires guideline legislation which creates positive prerequisites for action on the part of the woman in favor of the unborn. The state bears full responsibility for implementation of the counseling procedure.**
13. **The state's obligation to protect human life requires that the involvement of the physician, which is necessary in the interests of the woman, simultaneously serve to protect the unborn.**

14. **Characterization in law of the existence of a child as a source of injury is excluded on constitutional grounds (Article 1, Paragraph 1 of the Basic Law). Thus the obligation to support a child cannot be construed as an injury either.**
15. **Pregnancy terminations performed without ascertainment of the existence of an indication pursuant to the counseling regulation may not be declared to be justified (not illegal). In accordance with the inalienable principles prevalent in a state governed by the rule of law, a justifying circumstance will apply to an exceptional situation only if the existence of its conditions must be ascertained by the state.**
16. **The Basic Law does not permit the granting of a right to benefits from the statutory health insurance for the performance of a pregnancy termination whose legality has not been established. The granting of social assistance benefits in cases of economic hardship for pregnancy terminations which are not punishable by law according to the counseling regulation, on the other hand, is just as unobjectionable from a constitutional point of view as continued payment of salary or wages is.**
17. **The fundamental principle of the organizational power of the federal states applies without restriction if a federal regulation merely provides for a task of state to be fulfilled by the federal states, but does not make individual provisions that would be enforceable by government agencies or administrations.**

FEDERAL CONSTITUTIONAL COURT

2 BVF 2/90
2 BVF 4/92
2 BVF 5/92

Pronounced May 28, 1993
Kling
Administrative Secretary
as Clerk of the Court

IN THE NAME OF THE PEOPLE

**In the proceedings
for abstract judicial review of**

1. a) the provisions of § 218b, Section 1, Sentence 1 and Section 2 and § 219, Section 1, Sentence 1 of the Penal Code in the version of the Fifteenth Penal Law Amendment Act of May 18, 1976 (Federal Law Gazette I, p. 1213) and

   b) the provisions of §§ 200f, 200g of the Reich Insurance Code in the version of the Act on Supplementary Measures in Conjunction with the Fifth Penal Reform Act (Penal Reform Act - Supplementary Act) of August 28, 1975 (Federal Law Gazette I, p. 2289)

- 2 BVF 2/90 -,

2. Articles 13, No. 1 and 15, No. 2 of the Act to Protect Unborn/Gestating Life, Promote a Society More Hospitable Toward Children, Provide Assistance in Pregnancy Conflicts, and Regulate Pregnancy Terminations (Pregnancy and Family Assistance Act) of July 27, 1992 (Federal Law Gazette I, p. 1398) and § 24b of the Fifth Volume of the Code of Social Security Law in the version of Article 2 of the Pregnancy and Family Assistance Act

- 2 BVF 4/92 -

Petitioners under 1) and 2):
The Free State of Bavaria, represented by the minister-president, Prinzregentenstrasse 7, Munich 22,

- Prof. Dr. Udo Steiner, Am Katzenbuehl 5, Regensburg -

3. Articles 13, No. 1 and 15, No. 2 of the Act to Protect Unborn/Gestating Life, Promote a Society More Hospitable Toward Children, Provide Assistance in Pregnancy Conflicts, and Regulate Pregnancy Terminations (Pregnancy and Family Assistance Act) of July 27, 1992 (Federal Law Gazette I, p. 1398)

Petitioners under 3): 249 members of the German Federal Parliament (Bundestag)
. . .

- . . .

- 2 BVF 5/92 -

the Second Senate of the Federal Constitutional Court, with the participation of the justices

Deputy Chief Justice Mahrenholz,
Böckenförde,
Klein,
and Justices Grasshof,
Kruis,
Kirchhof,
Winter,
Sommer

and on the basis of the oral proceedings of December 8 and 9, 1992, finds by

JUDGMENT

that:

I. 1. § 218a, Section 1 of the Penal Code in the version of the Act to Protect Unborn/ Gestating Life, Promote a Society More Hospitable Toward Children, Provide Assistance in Pregnancy Conflicts, and Regulate Pregnancy Terminations (Pregnancy and Family Assistance Act) of July 27, 1992 (Federal Law Gazette I, p. 1398) contravenes Article 1, Paragraph 1 in conjunction with Article 2, Paragraph 2, Sentence 1 of the Basic Law inasmuch as the provision declares a pregnancy termination under the preconditions set forth in the aforementioned statute to be not illegal and, in No. 1, refers to counseling which, in turn, fails to satisfy the constitutional requirements pursuant to Article 1, Paragraph 1 in conjunction with Article 2, Paragraph 2, Sentence 1 of the Basic Law.

The entire provision is invalid.

2. § 219 of the Penal Code in the version of the aforementioned Act contravenes Article 1, Paragraph 1 in conjunction with Article 2, Paragraph 2, Sentence 1 of the Basic Law and is invalid.

3. In keeping with the grounds of the Judgment, § 24b of the Fifth Volume of the Code of Social Security Law conforms to Article 1, Paragraph 1 in conjunction with Article 2, Paragraph 2, Sentence 1 of the Basic Law.

4. In keeping with the grounds of the Judgment, §§ 200f, 200g of the Reich Insurance Code in the version of the Act on Supplementary Measures in Conjunction with the Fifth Penal Reform Act (Penal Reform Act - Supplementary Act) of August 28, 1975 (Federal Law Gazette I, p. 2289) were, inasmuch as they provided for benefits

from the statutory health insurance in the event of pregnancy terminations performed pursuant to §218a, Section 2, No. 3 of the Penal Code in the version of the Fifteenth Penal Law Amendment Act of May 18, 1976 (Federal Law Gazette I, p. 1213), in conformity with Article 1, Paragraph 1 in conjunction with Article 2, Paragraph 2, Sentence 1 of the Basic Law.

5. Article 15, No. 2 of the Pregnancy and Family Assistance Act contravenes Article 1, Paragraph 1 in conjunction with Article 2, Paragraph 2, Sentence 1 of the Basic Law and is invalid, inasmuch as the aforementioned Act revokes the provision regarding federal statistics on pregnancy termination previously included in Article 4 of the Fifth Penal Reform Act of June 18, 1974 (Federal Law Gazette I, p. 1297), as amended by Articles 3 and 4 of the Fifteenth Penal Law Amendment Act of May 18, 1976 (Federal Law Gazette I, p. 1213).

6. Article 4 of the Fifth Penal Reform Act in the version of Article 15, No. 2 of the Pregnancy and Family Assistance Act contravenes the federal principle (Article 20, Paragraph 1 and Article 28, Paragraph 1 of the Basic Law) and is invalid, inasmuch as the provision places obligations on the highest competent state authorities; for the rest, it conforms to the Basic Law.

7. The petitions in Case No. 2 BvF 2/90 for constitutional review of § 218b, Section 1, Sentence 1 and Section 2 and § 219, Section 1, Sentence 1 of the Penal Code in the version of the Fifteenth Penal Law Amendment Act of May 18, 1976 (Federal Law Gazette I, p. 1213) are hereby dismissed.

II. Pursuant to § 35 of the Federal Constitutional Court Act, this court orders that:

1. The provisions, which have been in force since the Judgment of August 4, 1992, shall remain in force until June 15, 1993. From then on until new statutory provisions take effect, nos. 2 through 9 hereof shall apply by way of supplementation to the provisions of the Pregnancy and Family Assistance Act, to the extent that the provisions of the said Act have not been declared invalid by No. I of this Judgment.

2. § 218 of the Penal Code in the version of the Pregnancy and Family Assistance Act is not applicable if the pregnancy termination is performed by a physician within twelve weeks from conception, the woman demands the termination and proves to the physician by production of a certificate that she has received counseling from a licensed counseling center at least three days prior to the medical procedure (cf. infra No. 4). The fundamental prohibition on pregnancy termination remains unaffected even in these cases.

3. (1) Counseling serves to protect unborn life. It has to be guided by the effort to encourage the woman to continue the pregnancy and open up perspectives to her for a life with the child; it should help her make a responsible and conscientious decision. In the process, the woman must be aware of the fact that, in every stage of pregnancy, the unborn has an independent right to life even vis-à-vis her, and thus, according to the legal system, pregnancy termination can only be considered in exceptional situations where bearing the child to term would place the woman under a

burden which - comparable to the circumstances specified in § 218a, Section 2 and 3 of the Penal Code in the version of the Pregnancy and Family Assistance Act - is so severe and exceptional that it exceeds the limits of exactable sacrifice.

(2) Counseling offers the pregnant woman advice and assistance. It contributes to the surmounting of conflict situations in connection with the pregnancy and the overcoming of an emergency. To this end, counseling encompasses:

a) entering into conflict counseling; to this end, it is expected that the pregnant woman shall inform the counselor of the circumstances that have led her to consider a pregnancy termination;

b) provision of whatever medical, social, and legal information is warranted by the facts and circumstances of the case, presentation of the legal rights of mother and child and the available practical assistance, in particular, assistance which facilitates continuation of the pregnancy and eases the situation of mother and child;

c) the offer to assist the woman in asserting legal rights, finding housing and childcare, and continuing her training/education, as well as follow-up counseling.

Counseling shall also include information on ways of avoiding unwanted pregnancy.

(3) If necessary, medical, psychological, or legal experts or other persons shall be included in counseling. In every instance, it should be ascertained whether it is advisable, with the consent of the pregnant woman, to inform third parties, in particular the father of the unborn and the immediate relatives of both parents of the unborn.

(4) If she so chooses, the pregnant woman may remain anonymous vis-à-vis the counselor.

(5) The counseling session shall be continued at once if, according to the content of the counseling session, it serves the goal of counseling (Paragraph 1 <Sentence 1>). If the counselor holds that the counseling session has reached its conclusion, the counseling center shall, upon request, issue a certificate to the woman, under her name and bearing the date of the last counseling session, which certifies that counseling took place according to Paragraphs 1 through 4.

(6) The counselor shall protocol, in a way which does not permit tracing of the identity of the woman counseled, her age, marital status, and nationality, the number of times she has been pregnant, how many children she has, and how many previous pregnancy terminations she has undergone. Furthermore, the counselor shall record the essential grounds stated for the pregnancy termination, the duration of the counseling session, and, if applicable, the additional persons present. The protocol must also show what information was conveyed and what assistance was offered to the woman.

4. (1) Counseling centers pursuant to No. 3 supra must - regardless of licensing pursuant to § 3, Section 1 of the Pregnancy and Family Assistance Act - be licensed separately by the state. Privately funded institutions and physicians can also be licensed as counseling centers.

(2) Counseling centers shall not be so organizationally or economically connected with institutions in which pregnancy terminations are performed that a material interest in the performance of terminations cannot be excluded on the part of the counseling center. The physician who performs the termination is excluded as a counselor, nor may he be affiliated with the counseling center that conducted the counseling.

(3) Only those counseling centers can be licensed which guarantee counseling in accordance with No. 3 supra, have sufficient numbers of personally and professionally qualified personnel to conduct such counseling, and cooperate with all centers that provide public and private assistance to mother and child. The counseling centers are required to render an annual written account of the standards on which their counseling work is based and the experience they have gained in the process.

(4) Licenses may only be granted under the proviso that they must be confirmed by the responsible authority within a period to be determined by law.

(5) The federal states shall provide a sufficient number of counseling centers near the women's places of residence.

5. The physician from whom the woman demands a pregnancy termination is subject to the duties arising from the grounds of the Judgment (cf. Nos. 1. and 2. supra).

6. The licensing procedure provided for in No. 4 shall also be conducted for existing counseling centers. Until completion of this procedure, at the latest until December 31, 1994, these centers are empowered to conduct counseling pursuant to No. 3 supra.

7. The obligation to maintain federal statistics and the obligation to report pursuant to Article 4 of the Fifth Penal Reform Act of June 18, 1974 (Federal Law Gazette I, p. 1297), as amended by Articles 3 and 4 of the Fifteenth Penal Law Amendment Act of May 18, 1976 (Federal Law Gazette I, p. 1213) also apply in the territory specified in Article 3 of the Unification Treaty.

8. The provisions of § 37a of the Federal Social Security Act also apply in the event of pregnancy terminations performed in accordance with No. 2 supra.

9. Until the legislature reaches a decision as to the possible introduction and means of ascertaining a criminological indication, women insured with the statutory health insurance and those eligible for benefits pursuant to the regulations on public assistance can draw benefits upon application if the preconditions of No. 2 supra are fulfilled and the responsible public medical examiner or a medical referee of the statutory health insurance has certified that, in his opinion as a physician, the pregnant women is the victim of a crime pursuant to §§ 176 - 179 of the Penal Code and there are compelling grounds for believing that the pregnancy is due to this crime. The physician is authorized to obtain, with the consent of the woman, information from the department of public prosecution and inspect any pertinent investigative records; any knowledge gained in this manner is subject to physician-patient privi-

lege.

Grounds:

A.

At issue in these joint proceedings for abstract judicial review is above all whether various penal, social security, and organizational provisions on pregnancy termination satisfy the state's constitutional duty to protect unborn human life. The provisions in question are part of the new laws in the Fifteenth Penal Law Amendment Act and in the Penal Reform Act - Supplementary Act brought about by the German Federal Constitutional Court's Judgment of February 25, 1975 (BVerfGE 39, 1 et seq.) or are part of the Pregnancy and Family Assistance Act that was newly enacted for the whole of Germany following the reunification of Germany. 1

I.

1. The issue of whether and in what way, in the field of tension between protection of unborn human life and a pregnant woman's right of self-determination, the problem of pregnancy termination can be resolved in a more satisfactory manner than through penal measures has been the subject of controversial discussion for many years. A 1974 attempt on the part of the legislature to originally limit the general criminal liability for pregnancy termination, mainly through a time-phase solution for the first twelve weeks of pregnancy, was rejected by the Federal Constitutional Court. In its Judgment of February 25, 1975 (BVerfGE 391 et seq.), the First Senate of the Court declared that § 218a of the Penal Code in the version of the Fifth Penal Reform Act of June 18, 1974 (Federal Law Gazette I, p. 1297) is inconsistent with Article 2, Paragraph 2, Sentence 1 in conjunction with Article 1, Paragraph 1 of the Basic Law and is invalid, inasmuch as it exempts pregnancy termination from punishment even if there are no grounds that - in the sense of the grounds for the Judgment - are of lasting duration in the face of the order of values of the Basic Law. 2

2. Thereupon, the German Federal Parliament enacted the Fifteenth Penal Law Amendment Act of May 18, 1976 (Federal Law Gazette I, p. 1213); this amended the provisions of §§ 218 et seq. of the Penal Code (hereinafter referred to as §§ 218 et seq. Penal Code, old version) to their currently valid form, which is based on the promulgation of the Penal Code in the version of March 10, 1987 (Federal Law Gazette I, p. 945, 1160). 3

Pursuant to this Act, anyone who [has or performs] a pregnancy termination after conclusion of nistation is, as a matter of principle, subject to punishment (§ 218, Article 1, Section 3, Sentence 1, § 219d of the Penal Code, old version). A pregnancy termination within certain periods of time, however, is not punishable if it is performed by a physician, if the pregnant woman consents, and if, according to medical knowledge (taking into consideration certain severe emergencies of the pregnant woman) it is indicated (indications for pregnancy termination). The relevant provision reads as fol- 4

lows:

"§ 218a

Indication for Pregnancy Termination

(1) A pregnancy termination performed by a physician is not punishable pursuant to § 218 if:

1. the pregnant woman consents and

2. according to medical knowledge and considering the present and future situation in life of the pregnant woman, the pregnancy termination is indicated to avert a threat to the life of the pregnant woman or the threat of grave physical or mental distress on the part of the woman, and the threat cannot be averted in another way which is exactable from her.

(2) The preconditions of Section 1, No. 2 are also considered to have been fulfilled if, according to medical knowledge

1. there are compelling grounds for assuming that, due to heredity or detrimental influences, the child will suffer from irreversible injury to his or her health so grave that a continuation of the pregnancy cannot be exacted of the pregnant woman,

2. the pregnant woman was the victim of an illegal act pursuant to §§ 176 - 179 and there are compelling grounds to assume that the pregnancy was caused by the illegal act, or

3. the pregnancy termination is otherwise indicated to avert the threat of an emergency which

a) is so severe that a continuation of the pregnancy cannot be exacted of the pregnant woman and

b) cannot be averted in another way that can be exacted of the pregnant woman.

(3) In the cases in Section 2, No. 1, not more than twenty-two (22) weeks may have elapsed since conception, in the cases in Section 2, Nos. 2 and 3, not more than twelve (12) weeks."

Furthermore, the pregnant woman is not subject to punishment even in the absence of an indication if a physician performs the pregnancy termination within twenty-two (22) weeks after conception following counseling pursuant to § 218b of the Penal Code, old version (§ 218, Section 3, Sentence 2 of the Penal Code, old version). Even if these preconditions are not met, the court can refrain from punishing the woman if she was especially distressed at the time of the procedure (§ 218, Section 3, Sentence 3 of the Penal Code, old version). In these cases, only the physician consulted by the woman is affected by the punishment. Physicians are subject to stricter standards in general as well: anyone who terminates a pregnancy although the woman has not been informed by a counselor at least three days in advance about

the private and public assistance available (cf. § 218b, Section 2 of the Penal Code, old version) and has not received counseling from a physician about the medically relevant aspects is punishable, even if the pregnancy termination is indicated, for performing a termination without prior counseling of the pregnant woman (§ 218b, Section 1 of the Penal Code, old version). Furthermore, even if the pregnancy termination is indicated, anyone who performs a termination without written certification by another physician that the termination is indicated is also punishable (§ 219 of the Penal Code, old version). The counseling of the pregnant woman about social assistance and the counseling about the medically relevant aspects may also be conducted by the physician who certifies that the pregnancy termination is indicated; the consultation about the medically relevant aspects can also be conducted by the physician who performs the termination procedure. The pregnant woman is not punishable pursuant to §§ 218b, 219 of the Penal Code, old version.

3. The objective of the Act on Supplementary Measures in Conjunction with the Fifth Penal Reform Act (Penal Reform Act - Supplementary Act) of August 28, 1975 (Federal Law Gazette I, p. 2289) is to bolster the reformative efforts of the Fifth Penal Reform Act through supporting social policy measures (cf. German Federal Parliament Publication 7/376, p. 1). 18

It is based on a draft bill by the Social Democratic and Free Democratic parliamentary groups (German Federal Parliament Publication 7/376) that takes up a draft bill introduced by the Federal Government in 1972 (German Federal Council Publication 104/72). Among other things, the draft provides that insured women have a right to benefits from the statutory health insurance in the event of a pregnancy termination performed by a physician. 19

According to the legislative history of the bill, the draft should supplement the reformative efforts of § 218 of the Penal Code, which takes too little account of the emergencies in which a pregnant woman may find herself and thus fails to do justice to the problem of illegal pregnancy terminations. The measures provided for were also intended to prevent illegal pregnancy terminations; moreover, they were intended to ensure that, "in cases where the law guarantees exemption from punishment", pregnant women would not be placed at a disadvantage because of their financial situations. The legislative history goes on to state (German Federal Parliament Publication loc. cit. p. 5 et seq.): 20

"Counseling and treatment in the event of a pregnancy termination are covered by benefits of the statutory health insurance because in this way it is possible to ensure that the termination procedure is performed properly. 21
Performance of these tasks is also in the general public interest. Thus the group of health insurance policy holders should not bear the costs alone. For this reason, provision has been made for partial federal funding."

Upon the recommendation of the Committee on Labor and Social Order, the German Federal Parliament enacted the draft with a few amendments (German Federal 22

Parliament Publication, 7th Legislative Period, 88th Session, March 21, 1974, shorthand verbatim record of session, p. 5763 et seq.). These consisted mainly in the extension of health insurance benefits and social assistance to also include non-punishable sterilization by a physician and in the express allowance of the right to sickness benefits and continued payment of wages in the event of incapacity for work due to sterilization or pregnancy termination, which was controversial during debates (cf. German Federal Parliament Publication 7/1753, pp. 5 - 11). After the Federal Council refused to approve the bill, the mediation committee suggested a version of the Act which was intended to ensure that, following new statutory provisions on the criminal liability for pregnancy termination in the wake of the Federal Constitutional Court's Judgment of February 25, 1975, benefits would be granted only in all cases considered by the legislature to be cases of "non-illegal" pregnancy termination by a physician (German Federal Parliament Publication 7/3778, p. 2 et seq.). This version was enacted.

The pertinent provisions of the Act read as follows: 23

"IIIa. Other Assistance 24

§200e 25

Insured persons have a right to medical advice on contraceptive issues; medical advice also includes any necessary examination and the prescription of contraceptives. 26

§ 200f 27

Insured persons have a right to benefits in the event of non-illegal sterilization and in the event of non-illegal pregnancy termination performed by a physician. Benefits shall cover medical advice on the continuation and termination of pregnancy, medical examination and appraisal to ascertain the preconditions for non-illegal sterilization or non-illegal pregnancy termination, medical treatment, the supply of pharmaceuticals, dressings, medicaments, and hospitalization. Insured persons have a right to sickness benefits if they are incapable of work due to a non-illegal sterilization or non-illegal pregnancy termination performed by a physician, unless they are entitled to benefits pursuant to § 182, Section 1, No. 2. 28

§ 200g 29

The provisions governing assistance during sickness apply accordingly for the granting of benefits pursuant to § 200e and § 200f unless otherwise stipulated. § 192, Section 1 does not apply to the granting of sickness benefits in the event of non-illegal sterilization and in the event of non-illegal pregnancy termination performed by a physician. 30

4. The indications solution, especially the statutory definition of the general emergency indication, and health insurance funding of pregnancy terminations remained the subject of intense legal and political debate even afterwards. In March 1990, the 31

State of Bavaria petitioned the German Federal Constitutional Court for abstract judicial review of the provisions on the consultation and indication ascertainment procedure and health insurance benefits in the event of pregnancy terminations on the basis of the general emergency indication; this petition (2 BvF 2/90) is the subject of the present Judgment.

II.

The reunification of Germany on October 3, 1990 and the related task of standardizing legislation in both parts of a reunited Germany lent new impetus to efforts at reform. 32

1. At first laws on criminal liability for pregnancy termination still differed in the two parts of Germany. On the basis of the Unification Treaty of August 31, 1990 in conjunction with the Act on the Unification Treaty of September 23, 1990 (Federal Law Gazette II, p. 885; cf. Appendix II, Chapter III, Subject Area C, Section I, No. 1), criminal liability in the acceding territory extends, pursuant to § 153 of the GDR Penal Code of January 12, 1968 in the new version of December 14, 1988 (GDR Law Gazette I 1989, p. 33), amended by the Sixth Penal Revision Act of June 29, 1990 (GDR Law Gazette I, p. 526), to anyone who interrupts the pregnancy of a woman "contrary to the statutory provisions". Likewise, anyone who prompts a woman to terminate her pregnancy or supports her in interrupting a pregnancy herself or having an illegal termination performed is also punishable. The provisions of the Pregnancy Termination Act of March 9, 1972 (GDR Law Gazette I, p. 89) and the related implementing regulations of the same date (GDR Law Gazette II, p. 149) that continue in force pursuant to the Unification Treaty (loc. cit., Appendix II, Chapter III, Subject Area C, Section I, Nos. 4 and 5) contain a time-phase solution. Pursuant to § 1, Section 2 of the Act, the pregnant woman has the right to have a medical pregnancy termination in an obstetric / gynecological institution within twelve weeks from the beginning of the pregnancy. Pursuant to § 2, a pregnancy termination may be performed at a later point in time only if it is to be expected that continuation of the pregnancy will endanger the life of the woman or if there are other grave reasons; the decision as to whether this is the case shall be made by an expert medical commission. Pursuant to § 3, pregnancy termination is fundamentally prohibited in cases where it may lead to gravely injurious or life-threatening complications (Section 1) or if less than six (6) months have elapsed since the last pregnancy termination (Section 2). § 4, Section 1 states that the preparation, performance, and subsequent treatment of the legal pregnancy termination is a case of sickness for the purposes of labor and insurance laws. 33

2. Article 31, Paragraph 4 of the Unification Treaty of August 31, 1990 calls for the legislature of the reunified Germany to enact, at the latest by December 31, 1992, laws that ensure protection of gestating life and constitutionally valid surmounting of the conflict situations of pregnant women better than is currently the case in both parts of Germany. 34

a) Thus in 1991, the Free Democratic Party parliamentary group (German Federal Parliament Publication 12/551), the Members of Parliament Christian Schenck, et al., and the group Bündnis 90/Die Grünen (German Federal Parliament Publication 12/696), the Social Democratic Party parliamentary group (German Federal Parliament Publication 12/841), the Members of Parliament Petra Bläss, et al., and the group Party of Democratic Socialism / Linke Liste (German Federal Parliament Publication 12/898), the Christian Democratic Union / Christian Social Union parliamentary group (German Federal Parliament Publication 12/1178 <new>) and the Members of the Parliament Herbert Werner, et al. (German Federal Parliament Publication 12/1179) introduced draft bills on the subject of new, uniform laws on pregnancy termination for all of Germany. 35

During parliamentary deliberation, the above were joined by a draft bill by Members of Parliament Inge Wettig-Danielmeier, Uta Würfel, et al. (German Federal Parliament Publication 12/2605, superseded by German Federal Parliament Publication 12/2605 <new>). The crucial point of the penal law portion of this bill, which was later enacted with amendments, is a fundamental transformation of § 218 of the Penal Code as well as a revised counseling regulation (§ 219 of the Penal Code). According to this, pregnancy terminations performed by a physician within twelve weeks after conception and with the consent of the pregnant woman shall no longer be included in the statutory definition of crime found in § 218 of the Penal Code, as long as the woman has received counseling at a licensed counseling center at least three (3) days prior to the procedure. The previous statutory definitions of the criminological indication and the general emergency indication are to be abolished, leaving only medical and embryopathic indications as grounds of justification for pregnancy termination. 36

The legislative history of the statute emphasizes that, in light of the significance of the gestating life as a legal value and the constitutional guarantee of it, penal protection is indispensable. Experiences with the indications solution introduced in 1976, however, had shown that it was impossible to standardize sufficiently concrete, medically and judicially verifiable criteria for ascertaining the presence of an emergency which would justify pregnancy termination. In the end, observed the lawmakers, only the pregnant woman herself could assess the conflict situation in which she finds herself. Thus it was necessary to find a solution that would take both the high value of unborn life and the self-determination of the woman into account. The Federal Constitutional Court did not declare all indications solutions to be constitutionally invalid in its Judgment of February 25, 1975. The degree to which the Penal Code must be used to protect unborn life depends on whether other provisions exist through which effective protection of gestating life really is guaranteed. The precondition for constitutionally valid embodiment of the amendments of the Penal Code provided for in the draft bill was, on the one hand, that the state provide sufficient sociopolitical means to protect unborn life in this way. The suggested sociopolitical measures served to meet this requirement. On the other hand, steps must be taken to ensure that the woman 37

does not make her responsible decision of conscience regarding a pregnancy termination in isolation from the fundamental decision for the protection of the gestating life that is prescribed by the Basic Law. This would be ensured procedurally through the compulsory counseling, by means of which the woman would be offered advice and assistance in her conflict as well as sufficient information about governmental assistance as the basis for thorough reflection on her situation. In doing this, it was thought that preparedness to decide in favor of gestating life is greatest when the woman does not have the feeling that she must subjugate herself to the verdict of others, but rather is able, after receiving qualified counseling and carefully considering the situation, to decide for herself whether to continue the pregnancy. The woman's freedom of choice does not leave the gestating life entirely without protection. In this way, there is a chance that the woman - without being patronized in the counseling session - would accept the assistance offered to her in her conflict situation and decide in favor of the child. Because the responsible contact between the pregnant woman and the counselor that is necessary for a counseling session of this kind cannot be forced, no onus to present her case and no obligation to justify her actions would be imposed on the woman. At her request, however, she would receive individual suggested solutions for surmounting her conflict situation. Counseling should establish a trusting relationship between the counselor and the pregnant woman, so that the pregnant woman would be open to considering other solutions to the conflict besides pregnancy termination.

Furthermore, the draft bill adopts the provisions of the Reich Insurance Code on health insurance benefits in the event of pregnancy termination as §§ 24a, 24b in the Fifth Volume of the Code of Social Security Law. In this regard, the legislative history states (cf. German Federal Parliament Publication 12/2605 <new>, p. 20): 38

"§ 24b corresponds essentially to the previous § 200 f of the Reich Insurance Code. … This also covers pregnancy terminations that are performed, following counseling, within the first twelve (12) weeks after conception, because Article 11 excludes pregnancy termination from the statutory definition of a crime in § 218, Section 5 of the Penal Code. Thus it has been ensured that the present legal situation will not change with regard to the defraying of costs and expenses." 39

The amendment of Article 4 of the Fifth Penal Reform Act (cessation of federal record keeping on pregnancy terminations, provision for a comprehensive network of pregnancy termination institutions) that is likewise contained in the draft bill is justified as follows (German Federal Parliament Publication 12/2605 <new>, p. 23): 40

"The previous Article 4 is superfluous. The new Article 4 requires the states to provide sufficient pregnancy termination facilities. This applies for both outpatient and in-patient facilities. This ensures that there will be no wholesale refusal to license outpatient pregnancy termination facilities." 41

b) The Special Committee on "Protection of Unborn Life" deliberated the first six draft bills in seventeen sessions, devoting three sessions to debating the draft bill in 42

the German Federal Parliament Publication 12/2605 (revised).

On November 13 - 15, 1991 and on December 4 and 6, 1991, the committee held public hearings on the issues of counseling, prevention, and sex education and concerning the constitutional, penal, and medical law issues (cf. "Zur Sache, Themen parlementarischer Beratung", published by the German Federal Parliament, Volume 1/92, pp. 9 -1027). 43

In revising the draft bills, the committee broke with general legislative practice. In view of the fact that the draft bills contained contradictory provisions in decisive points, the individual issues were deliberated jointly, but the decision about them and thus about any amendments and the final version of the respective draft bills was left to each bill's proponents and sponsors represented on the committee. No final vote was held on the individual bills. The committee came to a unanimous agreement that the decision about future regulation of issues in connection with unwanted pregnancy should be made by all of the members of the German Federal Parliament without a specific bill being put forward by the committee. This, so the committee, was to be understood as a recommendation; in the second reading, the German Federal Parliament should deal with the bills in the versions in which they returned from committee and vote on these (cf. Recommendation and Report of the Special Committee on "Protection of Unborn Life", German Federal Parliament Publication 12/2875, p. 111). 44

c) In the roll-call vote during the second reading in the German Federal Parliament, the bill sponsored by Members of Parliament Inge Wettig-Danielmeier, Uta Würfel, et al. (German Federal Parliament Publication 12/2605 <new>) in the committee's version (cf. in this regard the Recommendation and Report of the Special Committee on "Protection of Unborn Human Life", German Federal Parliament Publication 12/2875, pp. 85 et seq., especially 99 et seq.) received the majority of the votes (German Federal Parliament Publication, 12th Legislative Period, 99th Session, June 25, 1992, shorthand verbatim record of session, p. 8374). In the final roll-call vote on this bill in the third reading, 357 of the 657 members voted "Yea" and 284 voted "Nay". Sixteen members abstained (German Federal Parliament, 12th Legislative Period, 99th Session, June 25, 1992, shorthand verbatim record of session, p. 8377). 45

The Federal Council approved the enactment of the German Federal Parliament pursuant to Article 84, Paragraph 1 of the Basic Law against the vote of the State of Bavaria, with the State of Baden-Württemberg, the State of Mecklenburg-Vorpommern, and the State of Thuringia abstaining (Federal Council, 645th Session, July 10, 1992, shorthand verbatim record of session, p. 375). Furthermore, the Federal Council adopted a resolution introduced by the State of Hesse (cf. German Federal Council Publication 451/3/92), which called for the costs and expenses of the accompanying social measures to be distributed appropriately among all levels, especially by increasing, at the expense of the Federal Government, the share of the value added tax distributed to the states. 46

3. The essential provisions of this Act of July 27, 1992 (Federal Law Gazette I, 47

p. 1398), which is entitled "Act to Protect Unborn/Gestating Life, Promote a Society More Hospitable Toward Children, Provide Assistance in Pregnancy Conflicts, and Regulate Pregnancy Termination (Pregnancy and Family Assistance Act) " - hereinafter referred to as "Pregnancy and Family Assistance Act" - are as follows:

a) Article 1 of the Pregnancy and Family Assistance Act ("Act on Sex Education, Contraception, Family Planning, and Counseling") requires the Federal Center for Health Education to create concepts and prepare materials for sex education (§ 1) and creates a legal right to counseling (§ 2) through licensed counseling centers (§ 3). The information that the state is required to provide under this Act includes sex education, information about contraception and family planning, benefits for promoting families and assistance to children and families, social and economic assistance for pregnant women, pregnancy termination methods and the related risks as well as possible solutions for psycho-social conflicts in connection with pregnancy. Moreover, the pregnant woman is to be supported in asserting legal rights and obtaining housing, finding childcare for the child, and continuing her education or training. The federal states must ensure that the counseling centers provide at least one (1) counselor for every 40,000 inhabitants. The counseling centers have a right to appropriate public funding of personnel and materials costs (§ 4). 48

§§ 24a, 24b of the Fifth Volume of the Code of Social Security Law newly introduced by Article 2 of the Act replace the previous §§ 200e, 200f, and 200g of the Reich Insurance Code. Pursuant to § 24a of the Fifth Volume of the Code of Social Security Law, insured persons have a right to medical advice about contraceptive issues; moreover, insured persons of up to 20 years of age have a right to be supplied with contraceptives if they are prescribed by a physician. In § 24b of the Fifth Volume of the Code of Social Security Law, insured persons are guaranteed a right to benefits in the event of non-illegal pregnancy termination performed by a physician, if the pregnancy termination is performed in one of the institutions provided for this purpose. This provision reads: 49

"§ 24b 50

Pregnancy Termination and Sterilization 51

(1) Insured persons have a right to benefits in the event of non-illegal sterilization and in the event of non-illegal pregnancy termination performed by a physician. The right to benefits in the event of a non-illegal pregnancy termination exists only if the pregnancy termination is performed in a hospital or in another institution provided for this purpose within the meaning of Article 3, Section 1, Sentence 1 of the Fifth Penal Reform Act. 52

(2) Benefits shall cover medical advice on the continuation and termination of pregnancy, medical examination and appraisal to ascertain the preconditions for non-illegal sterilization or non-illegal pregnancy termination, medical treatment, the supply of pharmaceuticals, dressings, medicaments, and hospitalization. Insured 53

persons have a right to sickness benefits if they are incapable of work due to non-illegal sterilization or non-illegal pregnancy termination, unless they are entitled to benefits pursuant to § 44, Section 1."

The Child and Youth Welfare Act was expanded (Article 5 of the Pregnancy and Family Assistance Act) so that a child who has reached the age of three years has a right to attend a kindergarten "subject to the laws of the respective federal state"; effective January 1, 1996, this right exists without restriction. Moreover, from this point in time on, places in daycare centers and daycare openings shall be reserved for children under the age of three and school-age children as needed. The approved amendments of the Act on Federal Public Assistance (Article 8 of the Pregnancy and Family Assistance Act) concern improvements in the recognition of the increased need of expectant mothers and single parents as well as an extension of the prohibition on recourse for maintenance claims against immediate relatives of a woman receiving assistance who is pregnant or who cares for her natural child until it attains the age of six. Further amendments in the area of social assistance affect, among other things, the Employment Promotion Act (Article 6 of the Pregnancy and Family Assistance Act, the Vocational Training Act (Article 7 of the Pregnancy and Family Assistance Act), the Second Residential Construction Act (Article 9 of the Pregnancy and Family Assistance Act), the Controlled Tenancies Act (Article 10 of the Pregnancy and Family Assistance Act), and the Housing Utilization Act (Article 11 of the Pregnancy and Family Assistance Act). 54

b) Article 13, No. 1 of the Act replaces §§ 218 - 219d of the Penal Code in the version promulgated on March 10, 1987 (Federal Law Gazette I, pp. 945, 1160) with new §§ 218 through 219b (hereinafter referred to as §§ 218 et seq. of the Penal Code, new version), the relevant provisions of which read as follows: 55

"§218 56

Pregnancy Termination 57

(1) Whosoever terminates a pregnancy shall be punished with imprisonment of up to three (3) years or a fine. Acts of which the effects occur before completion of the nistation of the fertilized egg in the uterus are not considered to be pregnancy terminations within the meaning of this Code. 58

(2) In aggravated cases, the punishment shall be imprisonment of six (6) months to five (5) years. An aggravated case is generally present when the perpetrator: 59

1. acts against the will of the pregnant woman or 60

2. recklessly endangers the woman's life or causes grave injury to the health of the pregnant woman. 61

(3) If the pregnant woman commits the offense, then the punishment shall be imprisonment of up to one year or a fine. 62

(4) The attempt to commit the crime is punishable. The pregnant woman shall not be punished for attempted pregnancy termination.

§ 218a

Exemption of Pregnancy Termination from Punishment

(1) Pregnancy termination is not illegal if:

1. the pregnant woman demands the pregnancy termination and proves to the physician by means of a certificate pursuant to § 219, Section 3 , Sentence 2 that she has received counseling at least three (3) days prior to the procedure (counseling of the pregnant woman in an emergency and conflict situation),

2. the pregnancy termination procedure is performed by a physician and
3. not more than twelve weeks have elapsed since conception.

(2) A pregnancy termination performed by a physician with the consent of the pregnant woman is not illegal if, according to medical knowledge, the pregnancy termination is necessary to avert a threat to the life of the pregnant woman or the threat of grave physical or mental distress on the part of the woman, inasmuch as this threat cannot be averted in another way which can be exacted of the woman.

(3) The preconditions of Section 2 are also considered to have been fulfilled if, according to medical knowledge, there are compelling grounds for assuming that, due to heredity or detrimental influences, the child would suffer from irreversible injury to his or her health so grave that a continuation of the pregnancy cannot be exacted of the woman. This applies only if the pregnant woman has proved to the physician by means of a certificate pursuant to § 219, Section 3, Sentence 2 that she has received counseling at least three (3) days prior to the procedure, and if not more than twenty two (22) weeks have elapsed since conception.

(4) The pregnant woman shall not be punishable pursuant to § 218 if the pregnancy termination is performed by a physician after counseling (§ 219) and not more than twenty-two (22) weeks have elapsed since conception. The court can refrain from imposing punishment pursuant to § 218 if the pregnant woman was in an especially distressed situation at the time of the pregnancy termination.

§ 218b

Pregnancy Termination Without Medical Certification; False Medical Certification

(1) Whosoever terminates a pregnancy under the circumstances described in § 218a, Section 2 or 3 without written certification from a physician (other than the physician performing the pregnancy termination) as to whether the preconditions of § 218a, Section 2 or 3, Sentence 1 have been fulfilled shall be punished by imprisonment of up to one (1) year or a fine, unless the offense is punishable pursuant to § 218. A physician who, against his better judgment, provides a false certification for submission pursuant to Sentence 1 that the preconditions of § 218a, Section 2 or 3,

Sentence 1 have been fulfilled shall be punished with imprisonment of up to two (2) years or a fine, unless the offense is punishable pursuant to § 218. The pregnant woman is not punishable pursuant to Sentence 1 or 2.

(2) A physician may not issue certificates pursuant to § 218a, Section 2 or 3, Sentence 1 if he has been forbidden to do so by the responsible authority because there is a binding conviction against him for an offense pursuant to Section 1, §§ 218, 219a or 219b, or due to another illegal act that he has committed in connection with a pregnancy termination. The responsible authority can temporarily forbid a physician to issue certificates pursuant to § 218a, Section 2 and 3, Sentence 1 if main proceedings have been opened against him on suspicion of one of the illegal acts described in Sentence 1.

§ 219

Counseling of the Pregnant Woman in an Emergency and Conflict Situation

(1) Counseling serves to protect life through advice and assistance for the pregnant woman while acknowledging the high value of gestating life and the woman's own responsibility. Counseling shall contribute to the surmounting of the emergency and conflict situation in connection with the pregnancy. It shall enable the pregnant woman to make her own responsible decision of conscience. The task of counseling is to provide comprehensive medical, social, and legal information to the pregnant woman. Counseling encompasses the presentation of the legal rights of mother and child and the practical assistance available, in particular those forms of assistance which make it easier to continue the pregnancy and improve the situation of both mother and child. Counseling shall also contribute to the avoidance of unwanted pregnancy in the future.

(2) Counseling must be provided by a counseling center licensed by law. The physician who performs the pregnancy termination cannot act as the counselor.

(3) No records are to be kept of the counseling session, which shall be conducted anonymously at the request of the pregnant woman. The counseling center shall immediately issue a dated certificate verifying that counseling did take place pursuant to Section 1 and that the woman has thus obtained the information for making her decision."

Article 14 of the Pregnancy and Family Assistance Act amends some provisions of the Code of Criminal Procedure and, in particular, expands § 108 of the Code of Criminal Procedure, which affects the seizure of so-called chance discoveries, by the inclusion of a prohibition of exploitation: objects found on the premises of a physician which are related to a patient's pregnancy termination cannot be used in criminal proceedings against the patient for an offense pursuant to § 218 of the Penal Code.

c) Two further amendments in Article 15 of the Pregnancy and Family Assistance Act affect the Fifth Penal Reform Act of June 18, 1974 (Federal Law Gazette I, p.

1297): the new version of Article 3, Section 1 replaces - in any case, with regard to the wording - the necessity for an official license for non-hospital pregnancy termination facilities introduced by Article 3, Section 1 of the Fifteenth Penal Law Amendment Act (Sentence 1), and specifies that the pregnancy termination should be performed at the earliest possible point in time (Sentence 2). Article 4 of the new version now concerns pregnancy termination facilities and thus dispenses with the requirement to keep federal statistics stated in the old Article 4. The provision reads:

"Article 4

Pregnancy Termination Facilities

The highest competent state authority shall ensure sufficient and geographically continuous availability of both outpatient and in-patient pregnancy termination facilities."

The prior version read as follows:

"Article 4

Federal Statistics

The Federal Bureau of Statistics shall keep federal statistics on the number of pregnancy terminations performed pursuant to the requirements of § 218a of the Penal Code. Any physician who has performed a pregnancy termination of such kind shall file a report with the Federal Bureau of Statistics by the end of the respective current quarter, stating:
1. the grounds for the pregnancy termination,

2. the marital status and age of the pregnant woman as well as the number of children under her care,

3. the number of previous pregnancies and the outcomes of these pregnancies,

4. the duration of the pregnancy terminated,

5. the type of procedure performed and any complications observed,

6. the place in which the procedure was performed and, in the event of hospitalization, the length of stay, and,

7. where applicable, the foreign country in which the pregnant woman has her place of residence or habitual abode.

The physician shall not divulge the name of the pregnant woman."

Finally, Article 16 of the Pregnancy and Family Assistance Act revokes the provisions of the laws of the GDR that are still in force on the basis of the Unification Treaty.

III.

By Judgment of August 4, 1992 and on the basis of petitions filed by the State of Bavaria and 248 members of the German Federal Parliament, the Federal Constitutional Court temporarily enjoined, pursuant to (among others) § 32 of the Federal Constitutional Court Act, the coming into force of Article 13, No. 1 and Article 16 of the Law on Assistance to Pregnant Women and Families of July 27, 1992 (Federal Law Gazette I, p. 1398) and ruled that the provisions of Article 4 (federal statistics) of the Fifth Penal Reform Act of June 18, 1974 (Federal Law Gazette I, p. 1297) as amended by Article 3 and Article 4 of the Act of May 18, 1976 (Federal Law Gazette I, p. 1213) shall remain in force temporarily and are also to be applied in the territory specified in Article 3 of the Unification Treaty (cf. BVerfGE 86, 390 et seq.; Federal Law Gazette 1992, I, p. 1585). The temporary order was confirmed by an order issued on January 25, 1993 (Federal Law Gazette I, p. 270). 98

B.

I.

In Proceeding No. 2 BvF 2/90, the State of Bavaria petitioned this Court, pursuant to Article 93, Paragraph 1, No. 2 of the Basic Law and § 13, No. 6 of the Federal Constitutional Court Act, for abstract judicial review of the provisions in § 218b, Section 1, Sentence 1 and Section 2, § 219, Section 1, Sentence 1 of the Penal Code in the version of the Fifteenth Penal Law Amendment Act and of §§ 200f, 200g of the Reich Insurance Code, inasmuch as these provisions pertain to pregnancy terminations due to the general emergency indication (§ 218a, Section 2, No. 3 of the Penal Code in the version of the Fifteenth Penal Law Amendment Act). The State of Bavaria asserts that the provisions of the Reich Insurance Code are invalid to the extent stated; the State of Bavaria alleges that the legislature must replace the provisions objected to with revised, constitutionally valid provisions within an appropriate period of time. 99

1. Petitioner argues that the provisions of §§ 218b, § 219, Section 1 of the Penal Code, old version fail to provide adequate compensation for the fact that pregnancy termination is not punishable in the event of certain indications. 100

(…) 101

2. Petitioner argues that §§ 200f, 200g of the Reich Insurance Code are unconstitutional and invalid on substantive grounds and by reason of transgression of authority, inasmuch as they guarantee insured persons a right to benefits from the statutory health insurance in the event of pregnancy terminations that are not punishable pursuant to § 218a, Section 2, No. 3 of the Penal Code, old version (emergency indication). 102

a) The legislative authority of the Federal Government, so the State of Bavaria, cannot be derived from Article 74, No. 12 of the Basic Law ("Social Insurance"). The social health insurance serves to protect against illness and related risks through asso- 103

ciation of and payment of contributions by persons subject to the same kinds of risks. In the case of the so-called emergency indication, however, protection from motherhood is not a typical indemnifiable risk, the expense of which should be borne by the associated insured persons. Motherhood is not an illness, the State of Bavaria argues; even a pregnancy termination that is indicated pursuant to § 218a, Section 2, No. 3 of the Penal Code, old version, would not be accorded the status of therapeutic treatment.

The legislative authority also cannot be derived from Article 74, No. 7 of the Basic Law ("Public Assistance"). 104

(…) 105

b) Petitioner also holds that the provisions of §§ 200f, 200g of the Reich Insurance Code are unconstitutional on substantive grounds. The obligation to protect unborn life requires that the organs of state act to protect and promote this life in all areas of the legal system. The provisions objected to contravene this requirement: while the Basic Law does not prevent the legislature from refraining from punishing pregnancy terminations on the basis of a general emergency indication, it does prevent the legislature from providing for benefits from the statutory health insurance in this event and thus aiding in the destruction of a legal value. This would be a case of the state using sociopolitical means not for, but rather against gestating life. Moreover, health insurance benefits would provide an incentive for excessive use of the statutory definition of the general emergency indication. Scruples about pregnancy termination in general would be diminished, inasmuch as pregnancy termination would be caught by the "social net". 106

(…) 107

Finally, the petitioner also argues that the provisions of the Reich Insurance Code at issue are unconstitutional because it is impossible to ensure that pregnant women avail themselves of these benefits only in the situations provided for in law; these provisions contain no attempt to prevent misuse. Health insurers are not required to make their benefits dependent on certification of the preconditions for indication by means of a sound medical opinion. The laws in force also fail to specify that the physician can only charge for his services in the event of a pregnancy termination if he has fulfilled his obligation to report pursuant to Article 4 of the Fifth Penal Reform Act in conjunction with Article 3, No. 2 of the Fifteenth Penal Law Amendment Act. This kind of linkage could influence physicians to be more faithful in their observance of § 218a, Section 1 and 2 of the Penal Code, old version and enable state public authorities to enforce adherence to the said statutes by administrative means. 108

II.

1. The German Federal Government and the States of Bremen, Hamburg, Hesse, Lower Saxony, North-Rhine Westphalia, Saarland, and Schleswig-Holstein hold that the petition with regard to counseling and ascertainment of indications is unfounded; 109

moreover, the States hold that this petition has been made obsolete by the Unification Treaty.

(…) 110

2. The State of Baden-Württemberg holds that the legal situation with regard to certification of counseling and indication does not satisfy the requirements of the Federal Constitutional Court's Judgment of February 25, 1975. 111

(…) 112

3. The States of Rhineland-Palatinate and Thuringia restricted their comments mainly to a position on counseling practice in their respective states. 113

(...) 114

4. Of the highest federal courts, the Federal High Court of Justice, the Federal Administrative Court, the Federal Labor Court, and the Federal Social Security Court all filed briefs of individual senates. Counseling centers or counseling center sponsors, insurance providers, and other parties heard that have submitted amicus curiae briefs are: Sozialdienst katholischer Frauen - Zentrale e.V. ("Catholic Women's Social Services Center"), Deutscher Caritasverband, e.V. ("German Association of Catholic Charitable Organizations"), Diakonisches Werk der EKD in Deutschland e.V. ("German Association of Protestant Charitable Organizations"), Pro Familia Deutsche Gesellschaft für Sexualberatung and Familienplanung e.V. ("German Society for Sex Education and Family Planning"), Arbeiterwohlfahrt - Bundesverband e.V. ("German National Association of Worker's Benevolent Societies"), Deutsche Arbeitsgemeinschaft für Jugend und Eheberatung e.V. ("German Working Group on Youth- and Marriage Counseling"), Ulmer Beratungsstelle für Problemschwangerschaften e.V. ("Ulm Counseling Center for Problem Pregnancies"), Hannoversche Arbeitsgemeinschaft für Jugend und Eheberatung e.V. ("Hannover Working Group on Youth- and Marriage Counseling"), Soziale Beratungsstelle der Landeshauptstadt Stuttgart für werdende Mütter ("Social Counseling Center of the state Capital Stuttgart for Expectant Mothers"), Sozialmedizinische Familienberatung in Düsseldorf ("Socio-Medical Family Counseling Services in Düsseldorf"), AOK-Bundesverband ("German National Association of Local Health Insurance Funds"), Bundesärztekammer ("German Medical Association"), and Deutscher Ärztinnenbund e.V. ("German Federation of Woman Physicians"). 115

C.

I.

The State of Bavaria (2 BvF 4/92) and 249 members of the German Federal Parliament (2 BvF 5/92) have petitioned this Court for abstract judicial review of Article 13, No. 1 and 15, No. 2 of the Pregnancy and Family Assistance Act pursuant to Article 93, Paragraph 1, No. 2 of the Basic Law, § 13, No. 6 of the Federal Constitutional Court Act. Petitioner holds § 218a, Section 1 and § 219 of the Penal Code as amend- 116

ed by Article 13, No. 1 (counseling of the pregnant woman in an emergency and conflict situation) and the repeal of Article 4 of the Fifth Penal Reform (federal statistics) provided for in Article 15, No. 2 to be unconstitutional because these provisions violate Article 2, Paragraph 2, Sentence 1 in conjunction with Article 1, Paragraph 1 of the Basic Law.

Furthermore, the State of Bavaria holds for the same reason that the obligation to provide for facilities pursuant to Article 15, No. 2 of the Pregnancy and Family Assistance Act (pregnancy termination facilities) and the provision in §24b of the Fifth Volume of the Social Security Code in the version of Article 2 of the Pregnancy and Family Assistance Act are unconstitutional. Moreover, the State of Bavaria argues that the federal government has no legislative authority in such matters. In support of its position, the State of Bavaria also submitted an expert legal opinion by Prof. Dr. Kriele on the subject of non-therapeutic pregnancy termination and the Basic Law. 117

II.

Its essential grounds are stated as follows: 118

1. Article 2, Paragraph 2, Sentence 1, in conjunction with Article 1, Paragraph 1 of the Basic Law places the gestating life under the protection of the state. The obligation to protect pertains not to life as an abstract, but rather to the individual and unique existence of each individual human being. The human being so protected does not only begin to exist as a unique individual at birth, but rather even prior to birth. 119

The various regulative concepts for pregnancy termination (general legalization; restricted criminalization) cannot be comprehended as just two special legislative "approaches" for protecting the unborn "as effectively as possible". The Basic Law does not permit the legislature to utilize a concept of general legalization of pregnancy termination to better protect life as a whole, since dispensing with the constitutionally imperative criminalization means dispensing with the rights to protection and dignity accorded the individual unborn human being by the Basic Law. Even for lawmakers who would amend the Basic Law, the granting of individual constitutional rights cannot be restricted inasmuch as they are indispensable to the maintenance of an order pursuant to Article 1, Paragraph 1 and 2 of the Basic Law. The general decriminalization of acts of killing intervenes in this core area because it surrenders the most basic legal protection for the threatened legal value. 120

Now as ever, basic illegality - in the opinion of the State of Bavaria, also a fundamental and chronologically unrestricted threat of criminal punishment - is, in addition to all counseling and assistance programs, a necessary and suitable means of protecting the unborn life. It has an influence on the values and behavior of the population. The state avails itself of this legal/ethical signal effect to defend other legal values (environmental criminal law, protection of embryos), apparently regardless of whether there is a realistic chance of criminal prosecution in practice. 121

If § 218a, Section 1 of the Penal Code, new version were adjudged to be constitutional - so argued the State of Bavaria by way of supplementation - this in the end would result in the confirmation in the acceding territory of the concept of the time-phase solution that had been in force there since 1972. The legislature would thus forfeit an opportunity to use the means available to it to create a legal awareness of the value and constitutional protection of unborn life in the population of the new federal states. Specific dangers would also threaten unborn life through medical and pharmaceutical development. If the limited decriminalization of pregnancy termination was compounded by approval of the hormone preparation RU 486 in Germany, this would result in a combination of legal and medical/organizational aids to pregnancy termination. Due to the improvement of prenatal diagnostics parents are often able right now and, in any case will in the foreseeable future be able to determine within the first twelve weeks, whether the expected child will be healthy in every respect. If the woman undergoes a pregnancy termination during the first twelve weeks after conception because the fetus has been diagnosed as injured, then this would be "not illegal" regardless of whether the injury to the state of health was repairable or so grave that a continuation of the pregnancy could not be exacted of the pregnant woman. This would make pregnancy termination possible on purely eugenic grounds. Experience in the United States has shown it is also to be feared that in the future, a large number of women will demand pregnancy terminations because the unborn child is not of the desired gender. The physician cannot counter this desire by saying that the procedure is illegal; even someone who publicly recommended a pregnancy termination on these grounds would still be within the bounds of law. 122

From a constitutional point of view, pregnancy termination can be justified only in individual cases by balancing the interests and legal values involved. This is lacking in the case of the revised § 218a, Section 1 of the Penal Code. This provision would decriminalize pregnancy termination in all instances in which the pregnant woman demands the pregnancy termination, regardless of her grounds for doing so. To this extent, the statute does not incorporate a limitation to justifying exceptional situations. The presence of an emergency and conflict situation is not made a precondition for a legal pregnancy termination during the first twelve weeks anywhere in the provision, but rather is merely generally assumed in the revised version of § 218a, Section 1 and § 219, Section 1, Sentence 2 of the Penal Code. Also, the regular presence of a difficult life situation still does not provide sufficient grounds for justification. There must be an exceptional burden in the individual case which the makes the bearing of the child to term genuinely appear to be a non-exactable hardship for the woman. The statute, however, does not even require that the woman demanding the pregnancy termination subjectively perceive that bearing of the child to term as a non-exactable exceptional hardship. The thesis that woman do not undergo pregnancy terminations "on a whim" reflects only part of the truth. More than a few women hold pregnancy termination to be part of their personal, legally unrestrictable freedom. Moreover, the relatively high number of multiple pregnancy terminations in legal systems with the so-called time-phase solution and public pregnancy termination campaigns suggest that 123

pregnancy termination is also understood and practiced as a means of family planning.

The law fails to provide the pregnant woman with any standard whatsoever of when a continuation of the pregnancy can no longer be exacted of her. Thus it abandons precisely those women who are urged to abort by those around them (parents, father of the child, employer), and this at a time when the pregnant woman is especially vulnerable to such pressures. The argument that we must dispense with standards of exactability altogether, because otherwise crises of conscience would be simulated during counseling and the "communication would be twisted into ritual" is not compelling. It is not apparent why general legalization of pregnancy termination should contribute to a more "open" counseling atmosphere, for even pursuant to the laws in force, the woman is already immune to the threat of criminal punishment in the event of counseling. 124

By classifying pregnancy termination as "not illegal" in § 218a, Section 1 of the Penal Code, new version, the legislature makes a basic value judgment pertaining to the entire legal order. It is clear that the provision mentioned seeks and finds immediate connection to § 24b of the Fifth Volume of the Code of Social Security Law. Health insurance benefits would thus necessarily be granted even for those pregnancy terminations performed for reasons that would not withstand the test of the Basic Law. Furthermore, severe new conflicts would arise in the body of law covering the medical profession and in the law of organizations. 125

The legalization is not fully compensated for by the sociopolitical measures provided for in the Pregnancy and Family Assistance Act. A legal prohibition of pregnancy termination is not expressed in this Act. The only way this could happen in social security law is if the legislature did not provide for social benefits in every case of pregnancy termination. 126

For the rest, the sociopolitical measures have yet to be realized in many essential points and their implementation is - just as the reference to "revenue equalization" shows - highly uncertain. 127

2. The counseling should assume the protective function, which is fulfilled in the indication model by the ascertainment of facts justifying one of the indications. Objective supervision would be replaced by procedural effects on the uncontrollable decision-making process. Thus counseling is the "central point" in the statutory concept. 128

Therefore, it follows that counseling must be mandatory. It must also not be limited to simply conveying information about facilities, benefits, and rights, but rather must be aimed at encouraging the woman to bear the child to term. To this end, the woman must present her emergency and conflict situation and show grounds that cause her to demand a pregnancy termination. At any rate, counseling does not take place if the pregnant woman refuses to divulge any information at all. The plausible idea that only counseling "without pressure" has a certain chance of successfully protecting life, 129

cannot be construed to mean either that the pregnant woman may not be confronted with the valuation of pregnancy termination as wrong. Furthermore, it is necessary to ensure by means of normative and institutional precautions that the counselors and counseling centers conduct counseling in keeping with the constitutional and statutory specifications. This, in turn, requires at least minimal record keeping of the counseling session.

The counseling provided for in § 219, Section 1 of the Penal Code, new version fails to satisfy these constitutional requirements. It is oriented to the principle of self-determination of the woman. Although § 219 uses the term "counseling" not less than nine times, the only substantive obligations it incorporates are obligations to inform. The statute does not even specify that the subject of the counseling session should be the emergency and conflict situation in which the pregnant woman finds herself. The statute does not even define the counseling session as a conversation. Furthermore, it fails to specify the objective of counseling as encouraging the pregnant woman to continue the pregnancy. The statute merely expresses the expectation on the part of the legislature that the counseling session should serve to protect life. The essence of the statute is found in Section 1, Sentence 3, according to which the counseling session should serve to enable the pregnant woman to make "her own responsible decision of conscience". This ill-conceived euphemism creates a false pretext which leads to prohibition of certain types of thinking and argumentation and is suitable for surrounding the uncontrollable decision about the pregnancy termination with the aura of a constitutionally protected decision of conscience. Furthermore, the statute fails to include a legal obligation on the part of the pregnant woman to present her personal emergency or even only an obligation to keep minimal records of the counseling session. 130

3. The unconstitutionality and invalidity at least of § 218a, Section 1 and of § 219, Section 1 and Section 3, Sentence 1 of the Penal Code, new version, cannot be determined in isolation. They lead, on the grounds of the Federal Constitutional Court's Judgment of August 4, 1992, to the invalidity of Article 13, No. 1 of the Pregnancy and Family Assistance Act in its entirety. 131

4. The continued keeping of federal pregnancy termination statistics (cf. Article 4 of the Fifth Penal Reform Act, old version) is constitutionally required from the point of view of the obligation on the part of the legislature to remedy defects in legislation. 132

5. In the opinion of the State of Bavaria, however, the Federal Government lacks the authority to legislate on the obligation to provide for pregnancy termination facilities contained in Article 15, No. 2 of the Pregnancy and Family Assistance Act. The obligation to provide for facilities in Article 15, No. 2 of the Pregnancy and Family Assistance Act is unconstitutional on its face and thus invalid. It extends far beyond an obligation on the part of the highest state authorities to act within the framework of the legal and practical possibilities to provide a sufficient and geographically continuous network of pregnancy termination facilities. The legislature places an obligation upon 133

a specific state authority and thus upon the state to perform an act that is legally and practically impossible or unreasonable. This violates the principles of due process (Article 20, Paragraph 3, Article 28, Paragraph 1, Sentence 1 of the Basic Law) and federal allegiance.

6. Finally, the State of Bavaria holds that § 24b of the Fifth Volume of the Code of Social Security Law in the version of Article 2 of the Pregnancy and Family Assistance Act is unconstitutional on its face and by reason of transgression of authority as stated in No. 2 BvF 2/90. 134

III.

The following parties have filed amicus curiae briefs with the Court pursuant to § 77 of the Federal Constitutional Court Act: the German Federal Parliament, which, by way of supplementation, refers to an expert legal opinion by Prof. Dr. Eser, and - in a joint opinion - the States of Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, North Rhine Westphalia, Rhineland-Palatinate, Saarland, and Schleswig-Holstein. They hold the petitions to be unfounded; the German Federal Parliament refrained from taking a position on the keeping of federal pregnancy termination statistics. 135

1. The legislators of the Pregnancy and Family Assistance Act proceeded from a comprehensive obligation on the part of the state to protect life, including gestating life. They argued in their own favor that the recognition that effective protection of life could not be obtained through the threat of criminal punishment alone and based their legislation on the principle of "help instead of punishment". This strategy likewise promises significantly better protection of life in the middle and long-term than a mere deterrent punishment which makes the woman a virtual minor subject to legal standards; it also achieves a higher degree of integration of law and ethics. 136

(…) 137

2. (...) 138

3. (...) 139

4. (...) 140

IV.

In preparation for the decision in the proceeding 2 BvF 4, 5/92, the Second Senate of the Federal Constitutional Court commissioned the professors, Dr. Stürner and Dr. Schulin, with the drafting of an expert legal opinion covering the following issues: 141

(1) What would be the effects under current law on various areas of the legal system (e.g., labor law, family law, social security law, the body of law governing the medical profession, general civil law), if the legal system disapproved of pregnancy termination? 142

What would be the effects on this legal situation if, under certain preconditions (cur- 143

rently: indication solution; challenged law: within the first twelve weeks and after counseling) the criminal law provided grounds of justification for pregnancy termination?
(2) In what other conceivable ways could legal disapproval of pregnancy termination be expressed (aside from in the criminal law) in individual areas of the legal system? What legal effects would they have?

V.

144 In the oral proceedings on December 8 and 9, 1992, in which members of the 12th German Federal Parliament belonging to all parliamentary groups participated, the petitioners, the German Federal Parliament, and the States of Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, North-Rhine Westphalia, Rhineland-Palatinate, Saarland, and Schleswig-Holstein reiterated their written positions. The legal experts, Prof. Dr. Stürner and Prof. Dr. Schulin, explained and expounded upon their written expert legal opinions. The Court also consulted, as informants in issues concerning the laws governing the medical profession, members of the German Medical Association and other professional associations of physicians as well as members of the State Medical Board of Baden-Württemberg. By order of the Senate, it also heard, evidence on issues of counseling and social assistance practice from other experts called by the petitioners and by other persons authorized to give opinions.

D.

I.

145 1) The Basic Law requires the state to protect human life. Human life includes the life of the unborn. It too is entitled to the protection of the state. The Basic Law does more than just prohibit direct interference by the state in the life of the unborn, it enjoins it to protect and support such life, i.e. above all to guard it against illegal interference by third parties (cf. BVerfGE 39, 1 <42>). The obligation to protect is based on Article 1, Paragraph 1 of the Basic Law, which expressly requires the state to respect and protect human dignity; its object, and following from that, its extent are more precisely defined in Article 2, Paragraph 2 of the Basic Law.

146 Unborn human life - and not just human life after birth or an established personality - is accorded human dignity (cf. § 10 I 1 ALR; "Unborn children, even prior to their conception, are entitled to general human rights."). These proceedings do not require us to decide whether human life begins, as medical anthropology would suggest is the case, when an egg and a semen cell unite. Pregnancy termination is the subject of the challenged provisions, in particular the penal provisions. Thus, what is relevant is the duration of a pregnancy. According to the Penal Code (and this was not disputed by the petitioners and is in conformity with the constitution), the duration of a pregnancy is measured from when a fertilized egg is implanted in the uterus (implantation; cf. § 218, Section 1, Sentence 2 of the Penal Code as amended by Article 13, No. 1 of the Pregnancy and Family Assistance Act) until when a birth begins (cf. § 217 of the

Penal Code and in relation thereto BGHSt 32, 194 et seq.). In any case, during the duration of pregnancy what we are dealing with in the case of the unborn is an individual life, with a genetically determined identity, which is thus unique, unmistakable and inseparable. As it grows and unfolds, such life does not just develop into a human being, but develops as a human being (cf. BVerfGE 39, 1 <37>). Irrespective of how the different phases of prenatal development can be assessed from the biological, philosophical, even theological standpoint and irrespective of how they have been judged historically, in any case what is involved are the indispensable stages of development of individual human life. Wherever human life exists, it should be accorded human dignity (cf. BVerfGE 39, 1 <41>).

The dignity accorded to human life and also that accorded to unborn life exists for its own sake. In order for it to be respected and protected, the legal system must guarantee the legal framework for its development by providing the unborn with its own right to life (cf. BVerfGE 39, 1 <37>). This right to life which does not depend upon acceptance by the mother for its existence, but which the unborn is entitled to simply by virtue of its existence is an elementary and inalienable right stemming from the dignity of the person. It applies irrespective of any particular religious or philosophical views, which the state is anyway not entitled to pass judgment on, because it must remain religiously and ideologically neutral. 147

b) The duty to protect unborn life relates to an individual life not to human life generally. Its fulfillment is a prerequisite for orderly living together in a state. It is subject to the authority of the state (Article 1, Paragraph 1, Sentence 2 of the Basic Law). That means it is subject to the state in all its functions, including especially the state's legislative authority. The duty to protect relates to dangers which stem from other persons. It encompasses protective measures, whose aim is to avoid emergencies resulting from a pregnancy or to overcome them, and legal standards of conduct. The two complement each other. 148

2. The standards of conduct for the protection of unborn life are set by the state when it enacts legislation containing regulations and prohibitions as well as duties to act or desist from acting. This also applies to the protection of the unborn vis-à-vis its mother, notwithstanding the bond which exists between the two and which leads to a relationship of "joined twosomeness" between mother and child. Protection of this kind for the unborn vis-à-vis its mother is only possible if the legislature fundamentally forbids her to terminate her pregnancy thereby imposing on her a fundamental duty to carry the child to term. The fundamental prohibition on termination of pregnancy and the fundamental duty to carry a child to term are two inseparably bound elements of the constitutionally required protection. 149

Moreover, protection is necessary against influences which are exerted by third persons - even by the woman's family and wider social circle. Such influences could be aimed directly at the unborn or even take an indirect form if the pregnant woman were refused needed help, if things were made difficult for her because of the pregnancy, 150

or if she were pressured into terminating the pregnancy.

a) Such rules of conduct cannot be left voluntary, but must take legal form. They must be binding and make provision for legal consequences in accordance with the nature of the law as a system of rules concerned with practical application. Nevertheless, a threat of criminal punishment is not the only conceivable sanction in such a case. It can, however, strongly influence a person to respect and heed legal rules. 151

Legal rules of conduct should provide two kinds of protection. First, they should have a preventative and repressive effect in an individual case if injury to the protected legal value is threatened or has already occurred. Second, they should strengthen and support values and opinions on what is right and wrong among the public and promote legal awareness (cf. BVerfGE 45, 187 <254, 256>), so that from the start, due to such legal orientation, the injury of a legal value is not even contemplated. 152

b) The obligation to protect life is not so absolute that it even takes priority, without exception, over every other legal value. This is evidenced by Article 2, Paragraph 2, Sentence 3 of the Basic Law. However, the obligation to protect is not fulfilled simply by applying any kind of protective measure. The extent of the obligation to protect must be determined by viewing, on the one hand, the importance and need for protection of the legal value to be protected by law (in this case unborn human life), and on the other hand, by viewing competing legal values (cf. G. Hermes, Das Grundrecht auf Schutz von Leben und Gesundheit, 1987, p. 253 et seq.). Listed among the legal values which are affected by the right to life of the unborn are - proceeding from the right of the pregnant woman to protection and respect for her human dignity (Article 1, Paragraph 1 of the Basic Law) - above all her right to life and physical inviolability (Article 2, Paragraph 2 of the Basic Law) and her right to free development of her personality (Article 2, Paragraph 1 of the Basic Law). 153

It is the legislature's task to determine the nature and extent of protection. The Basic Law identifies protection as a goal, but does not define the form it should take in detail. Nevertheless, the legislature must take into account the prohibition on too little protection (regarding the meaning of this term see Isensee in: Handbuch des Staatsrechts, Volume V, 1992, § 111 marginal note No. 165 et seq.) so that, to this extent, it is subject to constitutional control. What is necessary - taking into account conflicting legal values - is appropriate protection, but what is essential is that such protection is effective. The measures taken by the legislature must be sufficient to ensure appropriate and effective protection and be based on a careful analysis of facts and tenable assessments (see I. 4. *infra*). The amount of protection required by the Basic Law does not depend on what stage the pregnancy has reached. The unborn's right to life and its protection under the Basic Law are not graded according to the expiration of certain deadlines or the development of the pregnancy. Thus the legal system also has to provide the same degree of protection in the early phase of a pregnancy as it does later on. 154

c) If the prohibition on too little protection is not to be infringed, the form of protection 155

by the legal order must meet minimum standards.

aa) In line with the above, a termination must be regarded for the duration of the pregnancy as fundamentally wrong and thus forbidden by law (cf. BVerfGE 39, 1 <44>) . If there were no such prohibition, control over the unborn's right to life - be it only for a limited time - would be handed over to the free, legally unbound decision of a third party, who might even be the mother herself, and the legal protection of the life within the meaning of the abovementioned standards of conduct would not be guaranteed. Even reference to a woman's human dignity and her ability to make responsible decisions herself does not demand that unborn life be abandoned in such a way. Legal protection presupposes that the law lays down conditions governing to what extent and how far one person can interfere with another and does not leave it to the will of one of the parties concerned. 156

A woman's constitutional rights do not take precedence over the fundamental prohibition on termination of pregnancy. Although such rights also exist vis-à-vis the unborn and must accordingly be protected, they do not extend so far as to allow the constitutional duty to carry the child to term to be suspended even for a limited time. Nevertheless, in certain exceptional circumstances the woman's constitutional rights make it possible for the legal duty not to be applied and, in some cases, it is in fact even necessary for the duty not to be applied. 157

bb) It is the task of the legislature to determine which exceptional situations will go to make up exceptional circumstances. However, so as not to breach the prohibition on too little protection, it must take into account that conflicting legal values cannot be proportionately balanced because what is being weighed up on the side of the unborn life is not just a matter of a greater or fewer number of rights nor the acceptance of disadvantages or restrictions, but life itself. A balance which guarantees both the protection of the unborn's life and, at the same time, grants the pregnant woman a right to terminate is not possible because the termination of a pregnancy is always the killing of an unborn life (cf. BVerfGE 39, 1 <43>). A balance cannot be achieved (although alleged that it can be - cf. Nelles in "Zur Sache, Themen parlamentarischer Beratung", published by the German Parliament, Vol. 1/92, p. 250) whereby for a certain time in the pregnancy the woman's right to free development of her personality takes precedence and thereafter the unborn is given precedence. If that were the case, then the unborn's right to life could only have effect if the mother had not decided in favor of killing during the first phase of the pregnancy. 158

Nevertheless, this does not mean that the existence of an exceptional situation, which under the constitution permits the duty to carry a child to term to be dispensed with, can only be considered where there is a grave danger to the woman's life or a serious impairment to her health. Other exceptional situations, in addition to the ones just mentioned, are imaginable. The criterion used to recognize them is, as determined by the Federal Constitutional Court, that of exactability (cf. BVerfGE 39, 1 <48 et seq.>). This criterion - irrespective of the fact that the woman's involvement in a 159

pregnancy termination is not to be regarded under the criminal law as an omission - is justified because the prohibition on pregnancy termination, due to the unique relationship between mother and child, is not limited to a woman's duty not to injure another person's rights. Instead, the prohibition contains a duty of an intensive nature, affecting the woman's very existence, a duty to carry and bear the child as well as a further duty to act on behalf of, look after and be responsible for the child such latter duty being an ongoing duty lasting years after the birth (cf. on this M. von Renesse, ZRP 1991, p. 321 <322 et seq.>). Looking ahead at the burdens associated with those duties, it can be seen that in individual cases, severe, and under some circumstances, also life threatening conflict situations can arise in the particular psychological state in which expectant mothers often find themselves during the early phase of a pregnancy. In these conflict situations protection of the woman becomes so essential that the legal order - irrespective of any other duties based on moral or religious views - cannot demand that the woman must under all circumstances allow the right to life of the unborn precedence (cf. BVerfGE 39, 1 <50>).

However, non-exactability cannot arise from circumstances which are within the bounds of a normal pregnancy. What is required are rather burdens which force the woman to sacrifice her own existential values to a degree beyond that which can be expected of her. 160

It follows from the above that in respect of a woman's duty to carry a child to term, in addition to the usual medical and the criminological indications, an embryopathic one - provided that it has been adequately defined in advance - can also be constitutionally valid as an exceptional circumstance. In the case of other emergencies, this will only occur if the severity of the social, psychological or personal conflict is so clearly recognizable that, viewed from the point of view of exactability, congruence with the other indications is retained (cf. too BVerfGE 39, 1 <50>). 161

cc) To the extent that non-exactability limits the woman's duty to bear the child, it does not relieve the state of its obligation of protection vis-à-vis every unborn human life. The state is compelled by its obligation of protection to support the woman with help and advice thereby convincing her, where possible, to decide in favor of carrying the child to term. This is also assumed by the provision in § 218a, Section 3 of the Penal Code (new version). 162

dd) If the task of protecting human life from killing is one of the state's elementary protective tasks, then the prohibition on too little protection forbids it from relinquishing its use of the criminal law and the protective measures afforded by the criminal law. 163

It has been from the beginning and still is the criminal law's task today to protect the elementary values of community life. This includes respect for human life and the inviolability of human life. Accordingly, killing of other human beings is widely punishable. The criminal law is not the primary means of legal protection because of its sharpness. Its application is subject to requirements of proportionality (BVerfGE 6, 389 164

<433 et seq.>; 39, 1 <47>; 57, 250 <270>; 73, 206 <253>). It is, however, applied as the ultimate measure of protection where certain conduct is not just forbidden, but considered so socially damaging and unbearable for orderly communal living that it must be prevented at any cost.

It follows that the criminal law is usually the place to anchor the fundamental prohibition on pregnancy termination and the woman's ensuing fundamental legal duty to carry the child to term. If, however, there are other constitutionally adequate protective measures it is possible, in a limited number of cases, not to punish unjustified pregnancy terminations. In these cases, the legal system's prohibition can be clearly expressed in other ways which are in keeping with the constitution (cf. BVerfGE 39, 1 <44, 46>). 165

3. The state does not satisfy its obligation to protect unborn human life simply by hindering life-threatening attacks by third parties. It must also confront the dangers attached to the existing and foreseeable living conditions of the woman and family which could destroy the woman's willingness to carry the child to term. This is where the obligation to protect touches upon the requirement to protect arising from Article 6, Paragraphs 1 and 4 of the Basic Law (on Article 6, Paragraph 1 cf. BVerfGE 76, 1 <44 - 45, 49 - 50>; on Article 6, Paragraph 4 cf. BVerfGE 84, 133 <155 - 156>). The obligation to protect requires the state to attend to problems and difficulties, which the mother could encounter during the pregnancy. Article 6, Paragraph 4 of the Basic Law contains a mandate to protect which is applicable to all areas of private and public law and extends to the pregnant woman. Viewing motherhood and childcare as work, which lies in the interests of the community and is deserving of its recognition, meets this requirement. 166

The First Report of the Special Committee for the Reform of the Penal Law (German Federal Parliament Publication 7/1981 <new> p. 7) lists as reasons often given for wishing to terminate a pregnancy the following: an unfavorable housing situation, the impossibility of looking after a child parallel to vocational training or working, economic hardship and other material reasons, and in the case of single women, fear of discrimination by the community. 167

a) The care owed to the mother by the community includes an obligation on the part of the state to ensure that a pregnancy is not terminated because of existing material hardship or material hardship expected to occur after the birth. Similarly, if at all possible, disadvantages for the woman in her vocational training or work resulting from a pregnancy ought to be removed. In fulfillment of its obligation to protect unborn human life, the state must attend to problems likely to cause a pregnant woman or mother difficulty, and try, to the extent legally and realistically possible and justifiable, to alleviate or solve those problems. All of this applies not just to the legislature, but to the government and administration as well. 168

Of course, the state cannot and does not have to relieve parents of all burdens and restrictions associated with the "care and raising" of children (Article 6, Paragraph 2, 169

Sentence 1 of the Basic Law). Meanwhile, provisions offering further opportunities for relief - beyond those laid down in Articles 5 to 12 of the Pregnancy and Family Assistance Act - have been enacted. In the public sphere opportunities for more effective protection of mother and child have already been created such as in the fields of housing, in the public service and in regulations concerning work and vocational training.

Nevertheless, the state can - and where necessary must - involve third parties to achieve effective protection. Parents who raise children are performing tasks whose fulfillment lies in the interests of the community as a whole as well as in the interests of the specific individuals concerned. For this reason, the state is bound to promote a child-friendly society which in turn also has repercussions for unborn life. The legislature must bear this in mind when making rules, not just in the area of labor law, but also in other private law areas. Thus there are provisions prohibiting the termination of a lease because of the birth of a child as well as provisions regarding consumer loans, their wording and government contract assistance which make it possible or easier for parents to meet their financial obligations following the birth of a child. 170

b) The obligations to protect unborn life, marriage and the family (Article 6 of the Basic Law) and to ensure equal rights for men and women in the workplace (cf. Article 3, Paragraph 2 of the Basic Law as well as Articles 3 and 7 of the International Agreement on Economic, Social and Cultural Rights dated December, 1966 <Federal Law Gazette 1973 II, p. 1570>) compel the state and especially the legislature to lay the right foundations so that family life and work can be made compatible and so that childraising does not lead to disadvantages in the workplace. To achieve this it is necessary for the legislature to invoke legal and practical measures which allow both parents to combine childraising and work as well as to return to work and progress at work after taking a break from work for childraising purposes. Relevant in this context are also the amendments to the Labor Promotion and Vocational Training Act brought about by Articles 6 and 7 of the Pregnancy and Family Assistance Act . In this respect the legislature is on the right track. The same applies to regulations aimed at improving institutional (cf. Article 5 of the Pregnancy and Family Assistance Act) or family childcare (cf. the payments under the so-called equalization of burdens for families such as the childraising benefit or the provisions for a childraising break and advance maintenance payments). The significance of such payments as life protecting measures must be taken into consideration by the legislature when examining state payments if there is a shortage of funds. 171

c) Furthermore, the state must ensure that a parent, who gives up work to devote herself or himself to raising a child, be adequately compensated for any resulting financial disadvantages. We, the Senate, concur with the statements made in this respect by the First Senate in its Judgment dated 7 July, 1992 - 1 BvL 51/86, 50/87 and 1 BvR 873/90, 761/91 (reprint, p. 55 - 56 -BVerfGE 87, 1 et seq.). 172

d) Finally, the mandate to protect also obliges the state to maintain and raise in the 173

public's general awareness the unborn life's legal right to protection. Thus the state organs at both the federal and state levels must show that they uphold the protection of life. This relates in particular to school curricula. Public institutions whose job it is to provide health information, family counseling or sex education must strengthen the will to protect unborn life. This is especially true for the sex education provided for in Article 1 § 1 of the Pregnancy and Family Assistance Act. Public and private broadcasters are obliged to respect human dignity when taking advantage of their freedom to broadcast (Article 5, Paragraph 1 of the Basic Law). (Regarding private broadcasting see Article 1, Paragraph 23, Section 1, Sentences 1 and 2 of the Treaty on Broadcasting in Unified Germany dated 31 August, 1991). Therefore, their programs also play a part in protecting unborn life.

4. In accordance with what has been stated in points 2. and 3. *supra*, in order to fulfill its duty to protect unborn life, the state must adopt sufficient legal and practical measures, while at the same time considering the conflicting legal values so as to ensure that appropriate, and as such effective, protection is achieved. For this to be done, it is necessary to create a clear protection concept which combines preventative and repressive elements. It is up to the legislature to develop and transform into law such a protection concept. In doing so, it is not free under the existing constitution to treat termination of pregnancy - other than in exceptionable situations which are constitutionally unobjectionable - as not illegal i.e. allowed. Nevertheless, according to standards still to be more precisely defined, the legislature can decide how it will put into effect the fundamental prohibition on termination of pregnancy in other areas of the law. All in all, the protection concept must be defined in such a way as to make it suitable for providing the required protection without its becoming or appearing like limited permission for pregnancy terminations. 174

The protection concept chosen by the legislature and the form it takes must be sufficient to protect unborn life as is demanded by the constitutional prohibition on too little protection. To the extent that the legislature's choice amounts to a prognosis about actual developments, especially the effects of its rules, it must be reliable. The Federal Constitutional Court will examine whether the prognoses are warranted when measured by the following criteria. 175

a) The legislature has scope to assess, weigh up and create even where, as is here the case, the constitution binds it to undertake effective and adequate measures to protect a legal value. How its scope is limited depends on various types of factors, in particular, on the characteristics of the relevant area, on the possibility of accurately predicting future developments - such as the effects a rule will have - and on the significance of the legal values at stake (cf. BVerfGE 50, 290 <332 - 333>; 76, 1 <51 - 52>; 77, 170 <214 - 215>). There is no need to decide whether or not three distinguishable standards of control for a constitutional examination can be derived from the above (cf. BVerfGE 50, 290 <333>). Constitutional examination extends in any case to checking whether the legislature has sufficiently taken the named factors into account and used its scope for assessment in a "justifiable manner". The statements 176

regarding the admissibility of a constitutional complaint against an omission by the state which are contained in the Senate's Judgment dated 29 October, 1987 (cf. BVerfGE 77, 170 <214 - 215>) should not be understood as allowing measures "which are not entirely unsuitable or completely inadequate" to be enough to satisfy the state's duty to protect human life.

b) When deciding whether the legislature's assessment of the effectiveness of a new protection concept is justified, the constitutional court must take into account the fact that the legislature is acting to fulfill the duty placed on it by the constitution to protect unborn human life. The legal values of the unborn and woman at issue here enjoy a high constitutional position. This indicates the special nature of the area to be regulated, and is just as relevant for assessing a legal provision for the protection of unborn life, as the fact that in the event of conflict the unborn life will be killed if the pregnant woman decides to discontinue her pregnancy. Of further significance is the circumstance that a pregnancy in its early stages is often only known to the mother and thus the unborn has to rely on her in every way for its protection and the continuation of its own existence. The state has the task of protecting a life whose existence is still unknown to it. This explains why experience with all penal provisions to date has not been very encouraging. Finally, what is important is that when the legislature decides on a fundamentally new provision, its ability to accurately predict the new provisions' effects is naturally limited. It is only possible to rely on foreign experience to a limited extent because one can not be sure of how comparable the position in another country really is. In this situation the legislature must use the material obtainable for making its prognosis as to the protective effect its concept will have and for evaluating, whilst taking the necessary care, whether the concept can sufficiently supports its own assessment. 177

II.

According to the above arguments, constitutional law does not, as a matter of principle, bar the legislature from adopting a concept of protection for the protection of unborn life which emphasizes counseling of the pregnant woman during the early phase of pregnancy so as to encourage her to carry her child to term. At the same time, in view of the openness necessary for counseling to be effective, the law dispenses with a threat of criminal punishment based on indications and the ascertainment of grounds supporting indications by third parties. 178

The promulgators of the Pregnancy and Family Assistance Act have completed the changes in the protection concept based on justified assessments. 179

1. Issues related to pregnancy termination have been newly regulated in Article 31, Paragraph 4 of the Unification Treaty. Such provision allocates the all-German parliament the task of "establishing rules which guarantee the protection of prenatal life and provide solutions consistent with the Basic Law for pregnant woman in conflict situations by granting them legal rights, in particular, to counseling and social assistance and which does the aforementioned in a better way than is presently the case in both 180

parts of Germany". There were two apparent possibilities. In view of the experience had with implementing the indications solution created by the Federal Constitutional Court's Judgment on 25 February, 1975 (BVerfGE 39, 1 et seq.) - whose questionable constitutionality is reflected by the applications made in proceedings 2 BvF 2/90 - it was possible for the legislature to replace that solution with clearer, and inevitably, narrower grounds for an indication and also to place stricter requirements on the ascertainment of the existence of an indication. The second option was for the legislature to make provision for counseling. In the latter's favor, the all-German legislature could argue that counseling would appear better suited to unifying the separate German legal systems - one of which had been applying the time-solution while the other had been applying the indications solution. Furthermore, counseling would also be better suited to joining the sense of legal awareness felt by the people in the two parts of Germany.

2. When developing a new concept of protection the legislature is not just entitled, but actually obliged to assess what has happened in previous legal practice and use this as orientation. Different forms of far-reaching penal protection for unborn life - such as the strict pregnancy termination provision in § 218 of the Penal Code 1871, under which the jurisprudence only recognized a narrow medical indication, or such as the more sophisticated indication solution after 1976 - have not been able to prevent pregnancy termination from becoming and remaining a mass occurrence. In this context, it is not important which pregnancy termination estimates for the years before and after 1976 are more reliable and accurate. Even just the low estimates are enough to be disturbing to the legislature. The high number of terminations cannot be sufficiently explained by reference to difficulties encountered in the application of the relevant penal provisions nor can the high number be explained by an unwillingness to enforce existing provisions. As long as we continue to be faced with this situation, there is reason to investigate its causes and to deal with the problems it evidences. 181

Constitutional law is not critical of the legislature's conclusion from the foregoing analysis that the way the threat of criminal punishment is integrated into the law at present is likely to cause a pregnant woman in a conflict situation to decide against carrying her child to term because she would experience the conflict as something deeply personal and would consequently reject an evaluation by a third party. The relevant circumstances making it difficult for a woman to decide to carry her child to term or making it non-exactable, should not be determined only by objective factors, but also by looking at her physical and mental condition and her personal characteristics. The criteria for establishing exactability must be viewed together and they can at times be contradictory. Gaining a reliable assessment of them requires considerable effort on the part of an experienced expert. However, the further third persons intrude into a woman's personal sphere, the greater the danger that she will seek to avoid this by inventing reasons for wishing to terminate or by resorting to the illegal. If this happens, any chance of using understanding and professional counseling to explore her conflict and to help her to decide in favor of the child is lost straightaway. 182

3. Thus constitutional law does not object to the legislature's choice of a protection concept which is based on the assumption - at least in the early phase of pregnancy - that effective protection of unborn human life is only possible with the support of the mother. Only she and those initiated by her know at this stage of the pregnancy about the new life which still belongs to her alone and which is fully dependent on her. The secrecy pertaining to the unborn, its helplessness and dependence and its unique link to its mother would appear to justify the view that the state's chances of protecting it are better if it works together with the mother. 183

Support for the above view is also given by the fact that a woman, who discovers an unwanted pregnancy, will often find her very existence threatened. She might have to make drastic changes to the plans she has for her life. She can also expect, in addition to the inevitable inconveniences associated with pregnancy, to be subject to incalculable and long-lasting duties to act and care for a child, and there may be additional risks to her life. In addition, a woman in the early phase of a pregnancy has often not yet adjusted mentally to the idea of motherhood and does not yet feel an attachment to the life growing inside of her in the way she does later on. A threat of criminal punishment is of little effect at this point so that it is obvious that the law must use preventative means to help her to overcome her conflict and to meet her responsibility to the unborn. The special situation of the woman and the unborn in the early phase of pregnancy can therefore be a reason for replacing penal sanctions with special protective measures. However, as already stated, it may not lead to a woman's fundamental rights being given precedence over those of the unborn. If a human being's dignity lies in its very existence, and if this applies to unborn life, then we must refrain from making distinctions in the duty to protect based on age or stage of development of the unborn life or based on the willingness of the woman to allow the life to continue to live within her. 184

4. The state acts in conformity with the respect owed to a woman and future mother if, instead of threatening her with punishment, it seeks to persuade her from rejecting the task of motherhood either by providing her with individual counseling or by appealing to her sense of responsibility to the unborn life or by providing her with economic and social support as well as any information she might need. The legislature may assume that the likelihood of her rejection of motherhood will be increased if a third party has to examine and evaluate the reasons which make her regard carrying the child to term as non-exactable. 185

This is not to say that after professional, individual counseling, the only women who terminate their pregnancies are those who find themselves in conflict situations so grave that carrying the child to term would be non-exactable in the sense required under the constitution. To believe this would be to ignore reality, which shows that men and women often attach too much importance to their own expectations from life and are not prepared to lower these, even when to do so would objectively appear exactable. The legislature may assume for the reasons given above (cf. 2. and 3. *supra*) that even an examination of indications during the first stage of pregnancy would not 186

be successful in stopping women from being guided by their own personal interests. Leaving final responsibility for terminating a pregnancy with the women themselves displays respect for their sense of responsibility; this could be motivating and generally suitable for strengthening their responsibility vis-à-vis unborn life - so long as it was done against a background of what is and what is not permitted by the constitution. The legislature may take into account that women who are subject to such expectations will feel a stronger and directer sense of responsibility. There is thus more likelihood of them exercising the responsibility vested in them conscientiously than if a third party is involved. If a third party examines and evaluates reasons supplied to him/her (which can vary in their credibility), and then concludes that a termination is permissible, this will at the same time rob the woman of some degree of responsibility.

5. If the legislature gives women who receive counseling final responsibility for deciding to undergo a termination and makes it possible for them, where necessary, to have the termination performed by a physician, then it can reasonably expect pregnant women in conflict situations to accept counseling and disclose details of their situation to the counselor. 187

a) Notably, the legislature can argue that experience has shown that even where the existence of an indication was ascertained independently of counseling and subsequent in time to it, and even where it was ascertained by persons and institutions not involved in the counseling, it still had an unfavorable prior effect on the counseling and considerably impaired the chances of the counseling being effective. This is so because women in such cases focus on demonstrating grounds needed to support an indication and do not openly discuss the conflict situation they find themselves in. 188

b) These considerations only apply, however, in relation to the general emergency indication. In the case of this indication, we are dealing with the results of the interaction of varied and complex factors personal to the pregnant woman. The factors must be evaluated by a third party when ascertaining the existence of an indication, and they must be explored during conflict counseling as is required for the protection of life. A woman's full cooperation in resolving her conflict could be hindered by requiring a third party to make such evaluation. The position is different when a medical, embryopathic or criminal indication is being dealt with. In these cases there will be a tangible emergency situation provided a physician determines that the woman will be exposed to serious danger to her health if she continues with the pregnancy, or that there is a considerable danger of the child being severely handicapped, or determines that the woman has been the victim of a crime. The objective set of facts available change the nature and function of counseling; women have little reason to avoid the existence of such an indication being ascertained or not to approach counseling with the necessary openness. 189

c) Nevertheless, there has been and still is contention among sociologists and legal policy makers as to whether making counseling a prerequisite for terminations during 190

the early phase of pregnancy would grant better protection to unborn life than the previous regulation. Although there is agreement that the previous indication provision has in practice provided insufficient protection against terminations, sociologists and counselors involved in everyday counseling hold different views on whether the necessity for ascertaining the existence of an indication really reduces the protective effect pregnancy counseling has. In spite of the arguments advanced - which would seem to weigh against retaining the previous indication provision - these uncertainties should not, as a matter of principle, prevent the legislature from introducing a counseling regulation. Naturally, the legislature is bound to observe the effects of its new concept of protection (duty of observation and subsequent improvement).

III.

191 If the legislature adopts a counseling concept in order to fulfill its duty to protect, the protective effect for unborn life is then supposed to be achieved through preventative means - i.e. by the woman who is contemplating a termination being positively influenced during counseling. The counseling concept is directed towards strengthening the woman's sense of responsibility. Irrespective of the responsibilities borne by her family or the persons belonging to her wider social circle or her physician (see V. and VI. *infra*), it is she who must ultimately decide in favor of the termination and take responsibility for it (final responsibility). All this requires the creation of a framework with the prerequisites necessary for making a woman want to act in favor of the unborn life. Only when such framework exists, can it be assumed, even without the ascertainment of grounds supporting an indication, that the counseling concept protects unborn life (1.). However, it is not permissible to declare a non-indicated pregnancy termination justified (not illegal) if demanded by a woman following counseling during the first twelve weeks (2.). Furthermore, the legislature is not bound in all respects to accept the consequences arising from the fundamental prohibition on pregnancy termination, if the counseling concept demands that exceptions be made in order for it to be effective (3.).

192 1. a) The first and foremost condition of a counseling concept is that counseling be made obligatory for the woman and that it be directed to encouraging her to carry her child to term. The content of the counseling, its conduct and organization must all be suitable for providing the woman with the insight and information which she needs to make a responsible decision about the continuation or termination of the pregnancy (see for details IV. *infra*).

193 b) Furthermore, those persons who are able to exert an influence over the woman - be it negative or positive - should be included in the protective concept. This applies in particular to the physician whom the pregnant woman consults to perform the termination. Apart from the woman herself and her counselor, he is often the only one who knows of the existence of the unborn and a physician is anyway bound by his professional oath to protect unborn life (see on this V. *infra*). Family members and persons in the pregnant woman's wider social circle must also be included in the pro-

tective concept. It is well-known from the reports of counselors, physicians and scientific studies that these persons often influence the woman - sometimes illegally - against the child (see on this VI. *infra*).

c) For the reasons given under D. II. 5. a) and b) *supra*, the counseling regulation must refrain from allowing a general emergency indication as a justification ground. A justification would run counter to the concept. In order to retain the woman's openness towards counseling and so as to achieve effective protection, the counseling regulation does not require a woman to prove the existence of a justifiable emergency nor itself test such existence. The inevitable consequence of the foregoing is that the counseling regulation cannot promise that a justification based on the general emergency indication will be available. It is only if the counseling regulation dispenses categorically, and without exception, with the need to ascertain the existence of a social emergency that it can succeed in getting women to accept counseling. Only this way can it avoid women closing their minds to counseling because they are striving to have their decision considered within the law and are striving to obtain the associated favorable legal consequences. Thus, the counseling regulation expects women to forego the personal relief which they could obtain from having their intended termination deemed legal, even when in their particular case, the existence of a general emergency appears perfectly clear. 194

The woman's constitutional rights do not require a general emergency indication as a justification ground. Her rights can be respected using other means (see D. III. 3.). However, even where there is a counseling regulation, which inevitably dispenses with the emergency indication, one must not lose sight of the legal duty to carry a child to term and its limits. Even where there is a real pregnancy conflict, rules directed to the protection of unborn life can not be set aside; the constitutional position of the legal value of unborn human life must continue to remain present in the general legal awareness (so-called general prevention). Thus, a counseling regulation must give expression under the constitution to the idea that a pregnancy termination can only be legal in those exceptional circumstances where carrying a child to term would place a burden on the woman which is so severe and exceptional - such as in the cases of the medical and embryopathic indications (§ 218 a, Sections 2 and 3 of the Penal Code, new version) - that it would exceed the limits of exactable self-sacrifice. Such expression would provide a woman who acts responsibly with a basis for judging her actions. This is exactly the core of responsibility which the counseling regulation leaves to a woman; of course, no justification can follow from her availing herself of it (cf. D. III. 2. b) aa). 195

d) Finally, it is essential for a counseling regulation relying primarily on preventative protection that social help for mother and child really be available which removes or eases distress and social hardship. This way parents can be given support to enable them to decide in favor of a child and women encouraged to carry their children to term (cf. above D. I. 3.). 196

2. The counseling regulation's goal of not punishing terminations carried out by a physician during the first twelve weeks of pregnancy at the pregnant woman's demand after counseling, without the existence of an indication having been ascertained, can only be achieved if the legislature deletes such pregnancy terminations from the statutory definition of crime found in § 218 of the Penal Code. They may not be declared justified (not illegal). 197

a) If pregnancy terminations are allowed under the constitution where specified exceptional circumstances exist, this does not mean that they may be regarded at the same time as allowed under penal law under different, but more far-reaching circumstances. The legal system must support and elaborate on the constitutional prohibition on pregnancy terminations. Penal law, in particular, lends itself well to this task because it protects legal values falling into a special category which are particularly at risk. It is also the penal law which most clearly influences general public awareness of what is right and wrong. When the penal law provides for grounds of justification, the general legal awareness would have to understand this to mean that the conduct covered by the justifying facts is allowed. Moreover, other parts of the legal system would assume in their rules regarding right and wrong that the protection of life had been removed through the penal justification grounds. Such a result would not satisfy the constitutional duty of protection. The significance enjoyed by a penal justification ground vis-à-vis the whole legal system - wherever protection of basic legal values is concerned - precludes reducing its effectiveness by confining it to the penal law. Thus, a pregnancy termination may only be regarded as justified under penal law if, and to the extent that, the grounds for it are within the constitutionally permissible exceptions to the prohibition on pregnancy termination. 198

If, however, pregnancy terminations are excluded from the definition of a penal offense, then that only means they are not punishable. Thus, a decision by the legislature on whether or not pregnancy terminations are to be treated by other areas of the legal system as legal or illegal remains open. (cf. Lenckner in: Schönke/Schröder, Strafgesetzbuch, 24th ed., 1991, preamble to §§ 13 et seq., marginal note 18; Eser/Burkhardt, Strafrecht I, 4th ed. , 1992, No. 9, marginal note 41). In other areas of the legal system, independent rules can be made based on pregnancy terminations being illegal. If no such rules are made, the exclusion from the definition of a penal offense has the effect of a justification ground, and this means that the minimum requirements of the duty to protect are no longer satisfied. 199

While exclusion from the definition of a penal offense leaves open the possibility of compliance with the minimum standards in other areas of the legal system, the introduction of a ground of justification into the Penal Code will from the outset remove to a large extent the fundamental prohibition on pregnancy termination required by the constitution. In as much, limits are placed on the legislature's creative scope. 200

b) The inalienable fundamental principles prevalent in a state based on the rule of law demand that an exceptional situation will only be justified, if its prerequisites have 201

to be ascertained - be it by the courts or by third parties whom the state trusts on account of the office they hold and whose decisions do not escape state control. If counseling as the concept of protection chosen by the legislature does not allow the indications solution to apply to general emergency cases (which are the cases most often alleged) because ascertaining the existence of the necessary prerequisites would hinder the effectiveness of counseling, then the legislature must refrain from declaring such pregnancy terminations justified.

aa) Neither the abandonment of the indications solution resulting from the protection concept nor the unique connection between mother and child during pregnancy make it possible to alter this. It cannot be raised as an objection that the general emergency indication as a ground for justification should be subject to other criteria because its prerequisites escape ascertainment. What is more, such ascertainment is in spite of the existing difficulties (see II. 2. *supra*) neither practically nor legally impossible. To the extent it deals with subjective circumstances, it is no different from many other evaluations regarding a person's personality, willpower and psychological state, which the state requires and even makes when it is dealing with punishment of an injury to a fundamental legal value or its protection (see §§ 46 et seq., 56 et seq., 63 et seq., 70 of the Penal Code). 202

However, it would be necessary in many cases to investigate a woman's highly personal relationships and liaisons. She may not use her own rights to object to this, when the question of whether the killing of the protected life of the unborn is allowed is at issue. If ascertaining the existence of the indication really is especially troublesome, this alone cannot be sufficient ground for refraining from doing so or for replacing doing so with a woman's "self indication". Even if the counseling regulation reflects confidence in the woman's ability to act responsibly in her decision on whether or not to carry the child to term and even if counseling itself is a procedure which can provide her with the necessary legal orientation and encouragement to decide in favor of having the child, nevertheless it would be irreconcilable with the Basic Law's constitutional order for the woman who is essentially affected by the conflict to be able to legally determine whether a situation existed which made carrying a child to term non-exactable and thus whether the pregnancy termination could be allowed under the constitution. The woman would then be judging right from wrong in her own case. A state based on the rule of law does not allow this and this is especially true in a situation of "joined twosomeness". The constitution promises the unborn, who is dependent on its mother in every way, protection even against her. The special connection between the mother and the unborn life, which provides protection but at times gives rise to danger, cannot be used as a reason for leaving the mother to decide whether the preconditions exist which would allow her to kill the unborn and be within the law. If this were so, the minimum amount of legal protection would no longer be guaranteed. 203

bb) Proof of the existence of an emergency cannot be provided by relying on guidelines derived from experience or on circumstantial evidence. In each individual case 204

the existence of an emergency indication needs to be ascertained after counseling.

It is not unusual for the legal system - especially the penal law - to regard a body of facts as legally relevant even though external as well as internal facts go to make up its whole. Often such facts can only be ascertained by establishing circumstances, which our experience of life tells us point to the existence of the fact to be ascertained (indications), for instance where guidelines derived from experience help us to infer that certain external events point to internal facts. Only in this way can all the facts be established which are prerequisites for an emergency indication as a justification 205

It cannot be concluded with sufficient certainty from applying the counseling regulation and taking into account guidelines derived from experience that a demand for termination is always based on a conflict situation, which is really so severe that carrying the child to term would be non-exactable and that the termination of the pregnancy thus would have to be allowed under the constitution. The counseling concept relies on counseling's effectiveness in protecting the threatened legal value and in strengthening and promoting the parties' willingness to have the child. It also assumes with good reason that generally speaking women do not take the decision to terminate a pregnancy lightly or without feeling themselves to be in a conflict situation. The counseling concept may also be suitable for persuading women, who have been encouraged during counseling to carry a child to term and who have had explained in a comprehensible way the law's dividing line between prohibited pregnancy terminations and those allowed by way of exception, to conscientiously consider and analyze their conflict and to make a responsible decision with full knowledge of the pros and cons. Such analysis is not contrary to the constitution. It would, however, no longer be acceptable if the legislature were to go further and assume the following as a matter of experience: namely, that counseling and a patient/physician discussion can regularly influence women, who find themselves in conflict situations precipitated by an unwanted pregnancy, to the extent that they only subject themselves to pregnancy terminations with the inherent physical and psychological strains, if the preconditions necessary for a non-exactable emergency situation really are satisfied. A woman who does not wish to have a child - whatever her reasons may be - sees pregnancy termination as her only escape. If carried out by a physician within the first twelve weeks of pregnancy this appears significantly less of a burden for a woman (even taking into account long-term psychological effects) than carrying a child to term, giving birth to it and raising it. Experience thus shows that women who have become pregnant unwillingly often seek refuge in pregnancy termination. This is confirmed by the large number of pregnancy terminations taking place. Nevertheless, there is no rule of thumb that says that they only then undergo pregnancy terminations when in an exceptional situation carrying a child to term would be non-exactable for them for serious reasons. 206

If the legislature were to assume that a demand for a termination following counseling and a consultation with a physician was a decision normally taken responsibly, with the guidance of the law, and that such decision could thus replace the need for a 207

third party to ascertain the existence of an indication in an individual case, then it would not be satisfying the minimum requirements of the legal protection owed to every unborn. As already explained, this protection presupposes that the killing of an individual life may only be allowed if, in a specific case and as an exception, carrying the child to term would be non-exactable for the woman. It will not be sufficient if there is a determination that a situation exists in which - according to the legislature's view - women mostly only abort because there are exceptional circumstances which justify such abortion.

cc) The counseling regulation's protective effect does not depend for its effectiveness on the woman's demand for termination, after she has been counseled, justifying the termination. There is no basis for the assumption that the effectiveness of counseling presupposes that the woman is certain her decision in favor of the termination, taken after counseling, is expressly approved of by the law. On the contrary, it is more likely to be detrimental for counseling whose aim it is to protect the unborn, if the law were to allow every demand for termination after counseling. Counseling could not strengthen the woman's sense of responsibility if her decision in favor of termination taken after she had received counseling were anyway to be recognized by the law. 208

The assessment of a termination as legal, even in cases where it has not been determined that the woman's situation is non-exactable and exceptional, weakens the legal protection of unborn human life, which the prohibition on pregnancy terminations seeks to achieve through upholding legal awareness (positive general prevention). Legal awareness can be compromised by conflicting legal assessments. There would be such a conflict if the pregnant woman were told by way of legal orientation during counseling that termination was only allowed when there were indications, but told her decision to terminate would be viewed as justified and allowed after receiving counseling, although the existence of an indication had not been ascertained. 209

Consequently, under the constitution the legislature can only use the counseling regulation to achieve its desired result of not threatening a woman with punishment where she has had her pregnancy terminated by a physician in its early phase, after counseling, if it excludes such terminations from the definition of a penal offense. It must, of course, then ensure that the fundamental prohibition on pregnancy terminations during the entire duration of a pregnancy, which thereafter would no longer be contained in a penal provision because it was subject to the exclusion, is expressed elsewhere in the legal system in a suitable way (cf. D. III. 1. c) *supra*). 210

3. As already stated, the exclusion of pregnancy terminations from the definition of a penal offense leaves room for the fundamental prohibition on pregnancy terminations in respect of which no justifying exceptions have been ascertained, to be accommodated in other areas of the legal system. In this connection, the special nature of the counseling concept also requires the creation of conditions for late terminations, which do not counteract the woman's willingness to be open from the start to the 211

counseling to protect life, to reveal why she is faced with a conflict, and to cooperate responsibly in seeking its resolution. Thus, the legal position must be made such that it does not have the effect of encouraging women to reject counseling from the start and opting for illegality. Apart from excluding pregnancy terminations from the threat of criminal punishment, steps must be taken to ensure that third parties are not able to provide emergency help to the unborn in opposition to the actions taken by the woman and her physician. The woman must also be in a position to have the termination carried out by a physician on the basis of a valid private contract (cf. V. 6. *infra*). Similarly, it is important to protect the woman from having to reveal the termination and the reasons behind it to other people in a manner which would infringe on her privacy rights (cf. E. V. 3. b) and 4. b) *infra*). In order to create such conditions, it must be possible in specific legal areas to refrain from treating pregnancy terminations undergone after counseling, but still unjustified, as illegal.

The duty to protect unborn human life allows this. The legislature is not bound to draw the obvious conclusions which follow from a fundamental prohibition on pregnancy termination, if a concept of protection sufficiently aimed at protecting life demands certain exceptions to be made. The protective effect, derived from the fundamental prohibition on pregnancy termination's influence on general legal awareness, is not lost, if the consequences of such prohibition (in view of other useful methods of protection) are restricted in some legal areas and applied in others. 212

These requirements can be satisfied in spite of the restrictions on the consequences from the prohibition. The legal consequences of terminations carried out under the counseling regulations may only be put on a par with justified terminations to the extent this is necessary to achieve the intended protection. The restrictions on the consequences from the prohibition are only necessary in specific legal relations. Furthermore, legal consequences which require an act to be legal may not be attached to such terminations. The required evaluation of the terminations as not legal by the constitution has an influence on contract law. It should also be a guide in the training of physicians, medical assistants and social workers. Generally speaking, the constitutional rule stemming from the duty of protection, whereby a pregnancy termination must, as a matter of principle, be treated as illegal, should be interpreted and applied in other areas of law - especially blanket clauses - in such a way that justified and unjustified pregnancy terminations are not treated equally unless the protection concept requires so. 213

4. As a result of the counseling regulation, a woman who terminates a pregnancy following counseling is committing an act which the legal system does not allow. The counseling concept cannot supply her justification grounds in the form of the general emergency indication without contravening its own underlying protection concept. The counseling concept can exact this from a woman without degrading her to a mere object of protection. It respects her as an autonomous person by trying to win her over as an ally in the protection of the unborn and expects her responsible cooperation. It creates other conditions which respect the woman's legal position (see 3. 214

supra) and avoids those legal disadvantages which could cause her to withdraw from the counseling procedure and from consultations with physicians. Only when such conditions do not apply must the fundamental prohibition on pregnancy terminations be applied. This means, for example, that not all of the legal advantages pertaining to legal terminations can be accorded to pregnancy terminations carried out under the counseling regulation.

IV.

If the legislature decides in favor of a counseling concept, its duty to protect unborn human life imposes on it restrictions in relation to the rules for the counseling procedure (see III. 1. a) *supra*). This is of central importance for the protection of life because the emphasis of the guarantee of protection is shifted to preventative protection using counseling. Therefore, the legislature must take into account the prohibition on too little protection and make rules regarding the content of counseling (1.), rules on how the counseling regulation is to be implemented (2.), and rules on how counseling is to be organized - including the choice of people to be involved. These rules must be effective and adequate to persuade a woman, who is considering termination, to carry the child to term. Only then is the legislature's conclusion that effective protection of life can be achieved through counseling justified. 215

1. In determining the content of the counseling, the legislature may assume that counseling only has a chance of really protecting unborn human life if it is conducted in a way which leaves its outcome open. In order to be successful, it must be aimed towards the woman participating in the search for a solution. This justifies refraining from forcing the woman to participate in the counseling discussion and cooperate in it, or obliging her to identify herself during counseling. 216

The goal of counseling in pregnancy conflict situations must be the protection of the unborn child. Counseling of a simply informative nature, which does not deal with the specific pregnancy conflict at hand nor make the pregnancy the subject of a personal conversation nor try to provide concrete help to solve the conflict would be the kind of counseling that abandons women and fails to achieve its task. The counselors must try to encourage the woman to continue her pregnancy and show her opportunities for a life with the child. 217

Such encouragement does not conflict with the conditions necessary for effective counseling, if it respects the personal freedom of the woman seeking advice and her sense of responsibility, and if it is thus conducted in an open-ended fashion. Open-ended counseling does not mean that a counselor may not mention legal expectations and values. Indeed, counseling should provide a chance to discuss the attitude of the law and different views including those of the woman seeking advice. A pregnancy conflict arises usually from a conflict, on the one hand, between the knowledge that one is carrying within one's body human life in need of care and a desire to have the child and, on the other hand, the worry that one will not be able to cope with the tasks associated with motherhood or that one will be exposed to difficulties in one's 218

own circle or that one will have to subordinate one's own expectations in life. If counseling recognizes this conflict and tries to overcome the obstacles standing in the way of the wish to have a child and if it encourages the woman to carry her child to term, it will no longer be seen as an outside interference. The fact that women are in need of such help is confirmed by the not infrequent occurrence of psychological problems after a termination.

Counseling which is manipulative or which seeks to indoctrinate will fail. If it is neutral or leaves a woman alone with her conflict, it is actually denying her sympathetic advice. Even counseling which simply considers a description of the woman's situation without going into the details of the existing conflict is not carrying out its task. Furthermore, if counseling were to try to make the woman feel guilty and influence her that way, it would reduce her willingness to be open to counseling and her awareness of her conflict. 219

Counseling should encourage rather than intimidate, raise understanding not preach, strengthen the woman's sense of responsibility, not patronize her. All this places high demands on the form the counseling takes and the counselors. Accordingly, appropriate legal guidelines are needed. 220

a) So that the pregnant woman's responsibility for the unborn life can become the basis for a conscientious decision, she must be aware of the special responsibility which the counseling concept imposes on her. She must know that the unborn has its own right to life vis-à-vis her and thus that it enjoys the special protection of the legal system - even in the early phase of pregnancy. Furthermore, she must realize that the legal system only considers allowing pregnancy terminations in exceptional situations - namely in those situations where the woman would be subject to such a severe and exceptional burden that to have the child would be to exceed the limits of exactable self-sacrifice. The counselor must make sure of this and correct any false impressions the woman might have in a comprehensible way. 221

No objection can be made that if a counselor indicates to a woman that she will not be subject to penal sanctions, that this automatically means there is no protection. There is nothing to show that pregnant women in conflict situations are generally impervious to such information or that they interpret it as preaching by the state and wish to ignore it. On the contrary, the counseling concept assumes that a pregnant woman in an emergency and conflict situation is able to make a responsible decision respecting the interests of the unborn. It is then only logical to assume that she will take into account in her decision what the law regards as right and wrong. It is counseling's task to provide her with the necessary criteria for this in a comprehensible way. In any case, thereafter the woman will be able to judge her acts from a legal point of view - just as everyone else who takes action does. 222

b) Science has developed methods for providing help in overcoming conflicts. These methods should also be applied. A concept that wishes to protect unborn human life during the first twelve weeks of pregnancy primarily through counseling can- 223

not afford to ignore them. Every counseling session must therefore be aimed at carrying on a conversation and employing methods of conflict resolution. This presupposes that the counselor possesses the necessary capabilities and has enough time to devote him or herself to every woman. Furthermore, counseling is only feasible if from the start the pregnant woman informs the counselor of the real reasons motivating her to consider terminating her pregnancy.

Even if the very nature of counseling prohibits forcing a woman to talk and participate, nevertheless for counseling to fulfill its task of protecting life, it is essential that she indicate her reasons for considering termination. 224

Expecting the woman to do so neither impairs the open-endedness of the counseling procedure nor does it detract from the responsibility given to her. What is decisive in this context is that the concept for protecting life using counseling neither makes the reasons given by the woman for the termination subject to examination by a third party to see if they support an indication nor does it confer penal sanctions on a decision taken, after counseling, against carrying the child to term. If the essence of the counseling concept is that a woman should communicate her reasons for wanting to terminate, then it proceeds from the woman's sense of responsibility and her capacity to make a conscientious decision. 225

c) For the fulfillment of the duty of protection vis-à-vis unborn human life, it is necessary during counseling that the woman be made acquainted with the social and other measures offered by the state and that she be supported as much as possible in taking advantage of them. The same applies to help for the protection of life provided by third parties such as churches and other foundations. This is the only way of guaranteeing that help really reaches the women who most need it so as to promote their wish to carry to term. 226

d) The counseling procedure would not be fulfilling its task satisfactorily if it did not take into account that persons close to the pregnant woman - in particular the father of the unborn child and the parents of a pregnant minor - are called upon to support her and that they could thus influence her in her decision for or against having the child. Accordingly, in every counseling session it must be considered whether it would be appropriate to include the father, close relatives or friends and whether the pregnant woman could be persuaded to do this. If the pregnant woman is accompanied at a counseling session by someone near to her, but whose influence it is to be feared will have a damaging effect on the unborn life, then the counselor must consider whether it would be appropriate to ask her to come to another counseling session alone. 227

2. The ground which a counseling session has to cover will also determine how it needs to be conducted. 228

a) It should be so that the pregnant woman is not necessarily able to demand she be handed a counseling certificate after the first session. Although the application of 229

pressure during counseling is detrimental to its effectiveness, provision must nevertheless be made for the counseling center not to supply a certificate until such time as it believes counseling to have been properly concluded. This approach still allows enough account to be taken of the woman's particular psychological state and, it is for this reason, that counseling centers are bound to keep available enough short notice appointments. Nonetheless, counseling centers may not withhold the supply of a certificate with the aim of causing a woman, who is determined to undergo a pregnancy termination, to postpone the termination until the expiry of the twelve-week limitation period.

b) The pregnancy termination may not be carried out directly after counseling. In many cases, the pregnant woman will not be able to digest what has been said during counseling immediately and will need some time to do this. The woman will need a chance to talk to people close to her about her decision, if her decision is to be made responsibly (see already BVerfGE 39, 1 <64>). 230

3. If the state wishes to fulfill its duty to protect unborn human life by relying on a counseling procedure, then it must bear full responsibility for the procedure's conduct. It is obliged to ensure that enough counseling centers exist, and it may not shirk responsibility by allowing private organizations to take over counseling, uncontrolled and each one according to its own religious, philosophical or political persuasion. Even if the counseling is conducted by non-state organizations, this does not change the fact that the concept of protection makes counseling an essential instrument for protecting life and it remains a duty of the state. So as not to jeopardize the effectiveness of the protection, the state may not relinquish control over counseling. From this follows: 231

a) The state may only allow institutions to offer counseling - irrespective of whether they are financed by the state, the communes or privately - if their organization and approach to the protection of unborn life, as evidenced in their binding and public declarations, and those of their staff, guarantee that counseling will be conducted as required under the constitution and the law. 232

b) For counseling to satisfy the requirements described, it must be conducted by personally and professionally qualified staff. There must be enough staff to ensure that counseling sessions are not conducted under time pressure. In especially difficult cases, it must be possible to consult experts who possess the necessary expertise. For example, when an embryopathic indication is at issue it must be possible to draw upon the expertise and experience of specialized physicians and associations for handicapped persons. 233

c) The person who is to perform the termination may not act as the counselor. Furthermore, any kind of organizational, institutional or economic connection between the counseling center and the institution performing the termination is forbidden, if the likelihood that the latter has a material interest in the termination cannot be excluded. Any such interest would make the institution unsuitable for the task of protecting the 234

unborn life or encouraging the pregnant woman to carry her child to term or for compassionately discussing the woman's emergency situation with her.

d) The state does not satisfy its responsibility for the organization and conduct of counseling simply by making an initial examination of the suitability of a counseling institution in the sense described above, and thereafter continuing to regard its operations as legal unless it commits a significant breach of its counseling duty in violation of the constitution and the law. 235

Under the counseling concept the counseling centers are charged with a special responsibility. Thus, the state must examine their credentials - by way of statute - regularly, and at not too lengthy intervals, to ensure all counseling requirements are being satisfied. Only when this is so may a license be continued or be renewed. 236

e) The state's duty to supervise presupposes that the law also creates means of effective supervision. It is up to the legislature to decide on a method of supervision. An obvious method is to oblige counselors to record in writing the essential details of the counseling session and to outline the measures of assistance offered. Such records may only be used to check on the counseling, not to examine and evaluate individual terminations. Counseling centers where counseling is supervised would anyway find such records useful. It would be possible to respect the privacy of the participants at a counseling session by prohibiting the records from containing traces of the identity of the woman or third parties involved. This would also eliminate the danger of the trust, essential to the effectiveness of counseling, being jeopardized by the keeping of records. 237

For there to be effective control of the counseling centers, it is necessary that they provide regular reports on their work. Such reports could also be important in forming a basis for examining the concept of protection and considering ways of improving it. 238

V.

The concept of protection underlying counseling sees in the physician another party who owes the woman help and advice - albeit from a medical viewpoint. A physician may not simply perform a demanded termination without considering his behavior as a medical practitioner. He has a duty to guard health and life, and thus may not be indiscriminately involved in a termination. 239

The state's duty of protection requires that the physician's involvement on behalf of the woman provide at the same time protection for the unborn life. The physician is bound by professional ethics and his medical oaths to work to save human life including that of the unborn. The state must ensure that the physician can fulfill his duty to protect when providing medical advice and when deciding to be involved in a termination. In particular, where the legal system fails to require the ascertainment of grounds justifying a termination in an individual case, the state must oblige the physician to perform his task of protecting unborn life. 240

1. The duties which generally apply to a physician when performing an operation can be used as a guideline for his duties in the case of a pregnancy termination. However, his duties in respect of his findings, his duties to inform and advise his patients and keep records have to be adapted to take account of the special requirements for a termination laid down by the counseling concept. 241

a) In order for a physician to make a responsible decision on whether or not to be involved in a pregnancy termination, he must ensure that he knows the conditions under which the counseling regulation will exclude the threat of criminal punishment. In addition to investigating whether the woman has been counseled and whether the necessary time between counseling and termination has elapsed, he must establish how advanced the pregnancy is. In doing so it is not enough to rely on the woman's statements. The physician must use a reliable method of investigation such as ultrasound. 242

Furthermore, in addition to the purely medical aspects of the termination, the physician has a duty to assess the woman's pregnancy conflict within the framework of medical diagnostic possibilities. For this purpose, he must ask the woman to explain her reasons for wishing to terminate. If the reasons relate to a medical matter such as the woman's health, he must make his own examination and use his own judgment. Where other reasons are given, the physician may rely on these as long as they appear feasible. He should also attempt to expose all the hidden causes of the conflict. In particular, his attention should be on whether the woman herself is really in favor of the termination or whether she is being pressured by her immediate family or wider social circle, for example, by her husband, by her partner, by her parents or by her employer. In such cases, there is an increased danger of the woman suffering subsequent psychological problems and the physician should take this into account when counseling her. He should also make her aware of the danger in an appropriate way. In addition, the physician may not ignore circumstances which suggest that a pregnancy termination will not assist the woman in her conflict. 243

b) During counseling the physician must convey to the woman in an appropriate way, without increasing existing fears and emotional anxieties, that a termination involves the destruction of human life. The relevant literature contains reports from women showing that they had an incorrect idea of what really happens during a termination, and that if they had known otherwise, they would not have undergone the termination. In those cases the physician's duty to inform the patient was not satisfied. 244

However, due to the duty to protect unborn life, limitations must be placed on medical examinations and the supply of information so that pregnancy terminations are not related to the gender of the child. The constitutional order disapproves of gender related terminations. Therefore, persons other than the physician and his staff should be excluded from knowledge of the child's sex during the early phase of pregnancy unless there is a medical reason for making the knowledge available. 245

c) In order to act responsibly under the rules protecting unborn life, the physician 246

must take into account the legal order's rules for regarding a termination as not illegal. This requires him to make a medical assessment - faithful to the law - of the conflict situation which can serve as a basis for his discussion with the woman and for his own decision. The physician must inform the woman of the points which he regards as persuasive.

d) The general principles of the medical code require a physician to keep records of his observations and treatment in relation to patients (cf. § 11, Subsection 1 of the Model Regulations for the Medical Profession). This documentation duty must extend to the duties to inform and advise in relation to a pregnancy termination as expounded above. This must be made clear in the rules governing professional conduct. 247

e) The requirements that there be a discussion between the physician and the pregnant woman and that there be a responsible medical decision by the physician do not conflict with the concept of a counseling regulation: the woman is not subject to the pressure of having her reasons for desiring the termination examined by a third party. The physician is not being asked to determine and evaluate an indication - instead he is supposed to be finding out whether he as a physician can justify his own involvement in the desired termination. 248

A medical decision of this kind is inseverably connected with a physician's duties as a medical practitioner and his primary task of protecting life. Accordingly, the representatives of organizations of medical practitioners have declared unanimously in the oral proceedings that even if the penal law does not require physicians to ask pregnant women to provide reasons for wishing to terminate, nevertheless the provision of reasons is as essential for physicians to be able to act responsibly as is a discussion with the woman to examine whether the desire for a termination is based on responsible reasons deserving respect. 249

2. a) It is constitutionally unobjectionable for a woman to still wish to have a termination after she has received counseling and medical advice in the form described above, if under the counseling concept whether or not she is subject to a threat of criminal punishment (exclusion from the definition of a penal offense cf. III. 2. a) *supra*) no longer depends on whether the physician considers the termination permissible. Under the concept it is not for the physician to make the final decision on whether a termination in an individual case may take place. 250

b) If the physician believes a termination would be a medically responsible choice, he must be able to be involved in it himself without being subject to punishment. Where he does not believe a termination to be a medically responsible choice, the rules governing medical conduct impose a duty on him to refuse involvement. In practice it is difficult to prosecute breaches of such rules. The constitutional duty to protect unborn life does not require infringements to be criminally punishable. For the fulfillment of the duty of protection it is not just sufficient, but also necessary for the physician's duty and its enforcement to be regulated in the provisions governing the medical profession. This must occur independently of the criminal law. 251

c) It is necessary under the counseling concept for the physician to require the woman to explain the reasons for seeking a termination and that he satisfy himself that counseling has taken place. He must also check that the necessary time between counseling and termination has elapsed and ensure that he has fulfilled his duty to inform and advise so beneficial to the protection of life. Failure to do so will lead to his being subject to criminal sanctions. In addition, the duties to diagnose the stage of the pregnancy and not to reveal the sex of the child within the first twelve weeks of the pregnancy must also be reinforced through the penal law. The counseling concept, aimed as it is at protecting the unborn, cannot afford not to ensure that the physician acts as above, even though these duties stem from his professional duties. The purpose of requiring the physician to act as described above is not just to serve the woman's interests, but at the same time to lend important support to the protection of unborn life. 252

Simply regulating the physician's conduct under the medical code would be insufficient to satisfy the duty to protect unborn life. The previous medical code provision regulating pregnancy termination contained references to the penal law. The representatives of the professional medical bodies indicated during the oral proceedings that in the event of the counseling concept being employed, the relevant bodies did not see any need to alter professional rules to impose higher standards on physician's conduct than those which are already imposed by the penal law. This leads us to conclude - at least for the present - that there is little chance of the physician's duty to conduct himself as described above being lent support by stricter medical code rules and sanctions as is indispensable for the effective protection of unborn life. 253

3. To ensure that a physician dealing with a woman in respect of a termination can fulfill his duties to inform and advise, it would be appropriate to make provisions concerning training and advanced training courses for physicians. This should enable each physician make a medical assessment of pregnancy conflicts going beyond his gynecological expertise. 254

4. A physician will only be able to reliably fulfill his role within the protective concept of the counseling regulation, if he is not made to suffer any legal or other disadvantages from refusing to carry out a termination. His right to refuse involvement in pregnancy terminations - except those medically indicated - falls within the protective sphere of his right to free development of his personality (Article 2, Paragraph 1 together with Article 12, Paragraph 1 of the Basic Law). This was taken into account by the legislature when it enacted Article 2 of the Fifth Penal Reform Act. The constitutional requirements for the regulation of terminations do not allow this provision to be dispensed with by contract. Sections 627 and 628 of the German Civil Code are applicable with regard to the right to refuse treatment. Also when a physician is an employee and he refuses to carry out terminations unless they are medically indicated, he should not have to suffer professional disadvantages. Ending the physician's contract of employment may only be considered if his employer has no other work for him. A physician may not be refused specialized training because he refuses to be in- 255

volved in terminations in the manner described.

5. Article 3, Section 1, Sentence 1 of the Fifth Penal Reform Act as amended by Article 15, No. 1 of the Pregnancy and Family Assistance Act lays down that a termination may only be carried out in an institution which can provide the necessary aftertreatment. Obviously, as a result of this provision institutions will emerge whose activities are primarily directed towards terminations and which specialize in carrying out terminations. The resulting danger for the fulfillment by a physician of his duty under the counseling regulation to protect unborn human life is evident. Thus, the legislature is required by its constitutional duty to protect human life to examine ways of effectively combating such danger and to make the necessary rules. This examination could take into account French experience whereby the number of terminations is limited to a certain proportion of the total medical procedures at an institution and where there is a uniform fee for a termination (cf. Eser/Koch, Schwangerschaftsabbruch in internationaler Vergleich, Part 1, Europe, 1988, p. 520 et seq.). 256

6. The state's duty to protect unborn life does not demand that contracts be regarded as legally invalid if made with physicians and hospitals regarding terminations not punishable under the counseling concept. On the contrary, the concept requires that the services provided by a physician to a woman be granted legal status. Irrespective of the specific legal consequences of a contract, Sections 134 and 138 of the German Civil Code thus do not apply. The physician and hospital operators should only be involved in a termination if there is an effective agreement governing their rights and obligations and securing, in particular, their fees. It is of foremost importance that the protection owed by the physician to unborn life and the woman's health be guaranteed by contract. Bad performance of the duties to advise and inform must therefore, as a matter of principle, give rise to contractual and tortious remedies. 257

However, from a constitutional viewpoint a distinction must be made here. Civil sanctions are necessary, as a matter of principle, for defective performance of a contract and for a tortious interference with a woman's bodily integrity. This not only applies to an obligation to repay a fee paid futilely, but also to compensation for damage including - within the provisions of §§ 823 and 847 of the German Civil Code - fair compensation for a woman for intangible suffering associated with a failed pregnancy termination or the birth of a handicapped child. The constitution (Article 1, Paragraph 1 of the Basic Law) does not permit the existence of a child to be characterized legally as an injury. The obligation on all state powers to respect each person's existence for its own sake (cf. I. 1. a) *supra*) prohibits treating the duty to support a child as an injury. In view of this, the civil courts' jurisprudence on liability for errors in medical advice and for unsuccessful pregnancy terminations must be reexamined (regarding terminations cf. BGHZ 86, 240 et seq.; 89, 95 et seq., 199 et seq.; BGH, NJW 1985, p. 671 et seq.; VersR 1985, p. 1068 et seq.; VersR 1986, p. 869 et seq.; VersR 1988, p. 155 et seq.; NJW 1992, p. 1556 et seq.; on sterilization see BGHZ 76, 249 et seq.; 76, 259 et seq.; BGH, NJW 1984, p. 2625 et seq.). Unaffected by the aforegoing is the physician's duty to pay damages to a child injured by an unskillful and unsuccess- 258

ful termination (cf. BGHZ 58, 48 >49 et seq.>; BGH, NJW 1989, p. 1538 <1539>).

VI.

The state's duty to protect unborn life extends to protection from dangers emanating from third parties - not the least from persons belonging to the pregnant woman's family or social circle (see I. 2 and III. 1. b) *supra*). This duty increases in significance where there is a shift to a protection concept whose aim it is during counseling to convince a woman in the early phase of pregnancy in a conflict situation to carry her child to term. 259

1. The effectiveness of the concept of protection makes it especially necessary to protect the woman from interferences which could distress her or pressure her to abort. Such interferences are also capable of ruining the success of counseling, for example, if while at the same time seeking to avoid their own (joint) responsibility, persons in the social circle of a woman who feels encouraged by counseling to continue her pregnancy, try even harder to convince her to undergo a termination by emphasizing that she will not face punishment and that final responsibility lies with her. 260

As is shown by reports based on counseling experience, questionnaires and scientific studies, pregnancy conflicts which ultimately lead to terminations more often than not do not have their origins in economic/social distress, but rather in broken relationships, in the father's rejection of the child or the woman's parents' rejection of the child or in the pressure exerted by these persons (cf. Renate Köcher, Schwangerschaftsabbruch - betroffene Frauen berichten, in: Aus Politik und Zeitgeschichte B 14/90, p. 37 et seq.; Deutscher Caritasverband, 13th Study: Werdende Mütter in Not- und Konfliktsituation, Period of time 1989, p. 45 et seq.; Roeder/Sellschopp/Henrich, Die Rolle des Mannes bei Schwangersschaftkonflikten, Final Report October, 1992). This shows what a serious – perhaps even hopeless - predicament a woman can find herself when the persons closest to her and from whom she should be able to expect the most help and comfort when involuntarily pregnant, abandon her. 261

2. The legal system must counteract this. Where counseling is to have a chance at being effective, it must guarantee the woman scope for personal responsibility independent of external influences. The concept of protection should include people in the family circle who also bear responsibility for the pregnancy: people such as the father of the unborn or people who have a special responsibility as a result of the pregnancy such as the parents of a pregnant minor. Even persons belonging to the pregnant woman's wider social circle such as landlords and employers should be included. 262

a) Therefore, it would be insufficient as part of a counseling concept aimed at protecting unborn life simply to appeal to the named persons’ senses of responsibility. It is more important to make legal rules or apply existing legal provisions to work towards creating conditions in which family responsibility and care from persons in the woman's wider circle can be demanded (cf. I. 3. a) *supra*). 263

b) In addition to the above, penal laws allowing and forbidding conduct are to a certain extent indispensable for persons within the family circle. On the one hand, they must be aimed at preventing such persons - who can be expected to help the woman - from refusing her the help she needs on account of the pregnancy. On the other hand, they must be aimed at preventing the same persons from pushing her to have a termination. Punishability can be made to depend on whether or not a termination is carried out. Provisions of this kind would follow on from considerations such as those made in the 1962 Draft Penal Reform in § 201 (cf. German Federal Parliament Publication 200/62, p. 45). 264

It must also be examined whether provision should be made for comparable sanctions to apply to persons belonging to the woman's wider social circle if, knowing she is pregnant, they push her to have a termination or force her into an emergency situation leading to a pregnancy termination. 265

E.

If the challenged provisions of the Pregnancy and Family Assistance Act are examined against the background of these standards, then it would appear that in respect of the shift to a counseling concept during the first twelve weeks of pregnancy, which in itself is permissible, the Act does not fulfill its duty to effectively protect unborn life arising from Article 1, Paragraph 1 read together with Article 2, Paragraph 2, Sentence 1 of the Basic Law. By comparison, the jurisdictional doubts raised against individual provisions apply only partially to Article 4 of the Fifth Penal Reform Act (new version). 266

I.

§ 218 a, Section 1 of the Penal Code (new version) whereby pregnancy terminations are "not illegal" if undertaken by a physician during the first twelve weeks of pregnancy following counseling pursuant to § 219 of the Penal Code (new version) at the demand of the pregnant woman, is irreconcilable with the duty to protect unborn human life (Article 1, Paragraph 1 read together with Article 2, Paragraph 2, Sentence 1 of the Basic Law) and thus invalid. 267

1. The section provides for a justification ground whose effect is similar to that of the justification grounds contained in § 218a, Sections 2 and 3 of the Penal Code (new version) (medical and embryopathic indications). This was also intended as is confirmed by the meetings of the special committee "Schutz des ungeborenen Lebens" (cf. the statements by the members of parliament Baum and Pflüger in the Protocoll of the 17th Session of the Special Committee, pages 11 and 12). The consequences of the justification ground are not restricted to an exclusion of penal liability because a penal justification ground has an overriding effect on the whole of the legal system whenever the protection of elementary legal values is concerned (cf. D. III. 2. a) *supra*). 268

2. If § 218a, Section 1 of the Penal Code (new version) establishes a general justification ground for pregnancy terminations, nevertheless the prerequisites for its operation do not meet constitutional requirements (cf. D. I. 2. c) bb) *supra*). A justification for pregnancy termination can only be considered where there is an emergency situation, which must be ascertained and clearly defined. Just as in cases of medical, embryopathic or criminal indications, the emergency situation must be so extreme as to make it non-exactable for the woman to have to carry the child to term. An emergency of this kind is not required by § 218a, Section 1 of the Penal Code (new version). 269

The elements of § 218a, Section 1 of the Penal Code (new version) do not cover non-exactability: no more than twelve weeks may have elapsed since conception, the pregnancy termination must be undertaken by a physician, the pregnant woman must demand the termination, and she must prove that she received counseling pursuant to § 219 of the Penal Code (new version) at least three days prior to the procedure. The reference in § 218a, Section 1, No. 1 of the Penal Code (new version) to the heading of § 219 of the Penal Code (new version) ("Counseling of the Pregnant Woman in an Emergency and Conflict Situation) does indeed show that the law assumes an emergency and conflict situation will exist. The situation is, however, not defined in any more detail and, furthermore, the justification is not made dependent on an ascertainment of its existence. 270

According to the constitutional standards described above, a counseling concept, like the one § 218a, Section 1 of the Penal Code (new version) is based on, cannot lead to a justification of pregnancy termination (cf. D. I. 2. c) and III. 2. *supra*). The counseling concept only allows the legal effects of a general prohibition on pregnancy termination to be restricted in individual areas of the legal system under certain conditions such as when the protection concept requires such restrictions for its effectiveness. This allows terminations carried out pursuant to the counseling concept to be excluded from the statutory definition of a penal offense and non-punishable. 271

3. An interpretation of § 218a, Section 1 of the Penal Code (new version) so as to exclude the elements constituting a penal offense - as is proposed in the draft by Wettig-Danielmeier, Würfel and other parliamentarians (German Federal Parliament Publication 12/2605 <new>) - is not in keeping with the constitution and is not possible. The wording, statutory context and goal pursued by the legislature prevent this. The legislature did not wish to limit the provision simply to the retraction of a penal prohibition. What it really sought to achieve was an effect going beyond that of the penal law - especially in relation to § 24b of the Fifth Volume of the Code of Social Security Law. This emerges from the statements during oral proceedings of those parliamentarians directly involved in the drafting of § 218a, Section 1 of the Penal Code (new version). Thus, the new version of § 218a, Section 1 of the Penal Code incorporates the relevant wording from non-penal provisions providing for legal benefits in cases of "non-illegal terminations of pregnancy" (cf. § 616, Section 2, Sentence 3 of the German Civil Code, § 1, Section 2 of the Act on Continued Payment of Wages, § 133c, Sentence 4 of the Industrial Code, § 63, Section 1, Sentence 2 of the Com- 272

mercial Code, § 12, Section 1, Sentence 1, No. 2, letter b, Sentence 2 of the Vocational Training Act, § 24b of the Fifth Volume of the Code of Social Security § 37a of the Federal Social Security Act). Just as with the other grounds needed to support an indication in § 218a, Section 2 and Section 3 of the Penal Code (new version), the words "not illegal" in the provision adopted can only be interpreted as a general justification ground.

4. Another reason why § 218a, Section 1 of the Penal Code (new version) is irreconcilable with Article 1, Section 1 read together with Article 2, Section 2, Sentence 1 of the Basic Law and invalid is that the provision relies on counseling which is regulated in § 219 of the Penal Code (new version) - which itself does not satisfy the constitutional requirements (see II. *infra*). 273

II.

§ 219 of the Penal Code (new version) does not in its present form satisfy the constitutional requirements placed on the protection of unborn human life (Article 1, Section 1, Article 2, Section 2, Sentence 1 of the Basic Law). It is therefore irreconcilable with the Basic Law and invalid. 274

Counseling is of central importance to the concept of protection underlying the law. The legislature must make counseling a state task so that the state is able to fully assume responsibility for carrying it out (cf. D. IV. 3) *supra*). In conformity with the principles developed from the constitution, the legislature must regulate the goal and content of counseling as well as the procedures it should adopted (cf. D. IV. 1. and 2. *supra*). In the case of the special legal value to be protected and its high exposure to danger, particularly at the time the pregnant woman is considering terminating her pregnancy and thus visiting a counseling center, the legislature must act to regulate counseling so clearly and understandably that the Act can be applied without the help of additional explanations. 275

1. The regulation of counseling for pregnant woman in an emergency and conflict situation (§ 219 of the Penal Code (new version)) is constitutionally inadequate because there are not enough state powers and duties to guarantee the organization and supervision of the counseling institutions. The state is not given a basis for meeting its responsibility to provide counseling institutions which will provide effective counseling as required by the protection concept. 276

a) § 219, Section 2 of the Penal Code (new version) determines that counseling be so organized that it take place at a legally-recognized counseling center and that the physician, who carries out the pregnancy termination, not be allowed to act as a counselor. 277

aa) The above does not ensure that the state will only entrust those counseling institutions with the task of counseling pregnant women in emergency and conflict situations whose organization, whose attitude to the protection of unborn life and whose personnel can guarantee that counseling within the meaning of the constitutional and 278

legal guidelines will take place (D. IV. 3. a) *supra*). There is also no guarantee that only counseling centers with enough personnel, where counseling sessions are not held under time pressure, will be recognized (cf. D. IV. 3. b) *supra*). Finally, there are no rules to prevent institutions being recognized as counseling centers whose organization or economic interests are linked to institutions where terminations are carried out . Hence the possibility of the counseling institution having a financial interest in the carrying out of the pregnancy termination cannot be excluded (cf. D. IV. 3. c) *supra*).

The gaps cannot be closed by having resort to the Act on Sex Education, Contraception, Family Planning and Counseling (Article 1 of the Pregnancy and Family Assistance Act). § 3, Section 3 of that Act provides only for centers to be recognized which have sufficient qualified personnel, which can call up certain experts if necessary, which work together with centers offering help to mothers and children, and which are in a position to provide the counseling (especially counseling with information) intended by § 2 of the same Act. The substantive requirements laid down by the Act for the general recognition of counseling centers as well as its guarantee of pro life counseling and the resolution of pregnancy conflicts through encouraging women to continue their pregnancies, lag behind the constitutional expectations placed on § 219 in relation to counseling centers. The constitution makes it necessary for such requirements to be placed on counseling institutions within the meaning of § 219 of the Penal Code (new version). § 4 of the same Act does not comply either; it places limits on the number of terminations carried out, but does not deal with recognition requirements for individual counseling centers. 279

bb) The legal rules dealing with the organization of conflict counseling are also incomplete because § 219, Section 2, Sentence 1 of the Penal Code (new version) does not make it clear that the recognition required "by statute" must apply to the type of conflict counseling offered. The state entrusts the task of counseling to those centers fulfilling the requirements for counseling by granting state recognition, and it is the state which must withdraw the task by rescinding the recognition, if the requirements cease to be fulfilled (cf. D. IV. 3. d) *supra*). Not even in the Act on Sex Education, Contraception, Family Planing and Counseling (Article 1 of the Pregnancy and Family Assistance Act) is such a provision to be found. Recognition under § 3, Section 2 of the Act is granted by a government authority, corporation, public institute or foundation. In this respect the Act follows the provision in § 218b, Section 2 of the Penal Code (old version). It assumes there will be a pluralistic offer of recognized counseling centers (cf. German Federal Parliament Publication 12/551 and 12/2605 <new>, with reasoning on Article 1, § 3). As was the case previously, the details of recognition are left to state law to define (cf. on previous law Dreher/Tröndle, 46th ed. , marginal note 5 on § 218b of the Penal Code, old version). In individual states, § 218 b of the Penal Code (old version) has been applied so that corporations, public institutes or foundations, whose legal or statutory tasks include counseling pregnant women, have been able to recognize their own institutions or those of related opera- 280

tors as counseling centers (§ 2, Section 3 of the Hesse Act on the Implementation of §§ 218 b and 219 of the Penal Code and Article 3 of the Fifth Penal Reform Act dated 2 May, 1978, GVBl. p. 273; § 1, Section 2 of the corresponding Berlin statute dated 22 December, 1978, GVBl. p. 2514). In North Rhine Westphalia there is provision for the churches to be responsible for recognition of counseling centers which are church financed as long as they have the status of public law corporations (§ 1 of the Order on Jurisdiction for Pregnancy Counseling and Pregnancy Termination dated 12 December, 1978, GVBl. p. 632).

This may not be objectionable as far as the counseling in Article 1 of the Pregnancy and Family Assistance Act is concerned. However, the organization of counseling offered under the counseling regulation is a significant part of the protection concept. The federal legislature, in keeping with its penal law jurisdiction (Article 74, No. 1 of the Basic Law) has to develop such organization, if necessary, with the help of the powers contained in Article 84, Section 1 of the Basic Law and with reference to the prohibition on too little protection. If the federal legislature were to leave it to the states to enact organizational provisions for the implementation of the protection concept, it would have to make the coming into force of the entire rule dependent on all states having enacted the necessary legal provisions. This path has obviously not been adopted by the legislature. 281

b) There are also not enough provisions guaranteeing sufficient state supervision of the counseling centers. The state must have a legal basis for examining the validity of the counseling centers' recognition regularly, and at not too lengthy intervals, and it must be satisfied that the requirements placed on counseling are being met. Only where this is taking place, may the recognition be allowed to continue or be reconfirmed (cf. D. IV. 3. d). Such examination presupposes that the Act also contains powers of information and examination (cf. D. IV. 3. e). Although necessary under the counseling concept, the legislature has made no provision in this respect and the counseling regulation is thus deficient. 282

c) The constitution demands that the effectiveness of the protection concept be guaranteed and the deficiencies described above relating to the organizational and procedural inclusion of counseling centers within state responsibility apply to the counseling regulation contained in § 219 of the Penal Code (new version) as a whole. Declarations on the goal and content of counseling are useless for the protection concept's effectiveness, if the necessary organizational and supervisory precautions for their implementation are missing - they are, so to speak, empty words. 283

2. Viewed against this background it becomes unnecessary to make a final decision on whether the provisions in § 219 of the Penal Code (new version) on goal, content and conduct of counseling can stand up to constitutional examination. Moreover, when new legal rules are made, as is necessary, this provision must be reformulated in such a way that it is clear on its face, generally understandable, and thus able to be applied without requiring additional explanations. Finally, all constitutional require- 284

ments based on the state's duty to protect laid out under D. IV. 1. and 2. must be satisfied.

a) According to § 219, Section 1, Sentences 1 - 3 of the Penal Code (new version) counseling aids in the protection of life by providing the pregnant woman with advice and assistance while recognizing the high value of gestating life and the woman's own responsibility. Counseling should help to overcome the emergency and conflict situation in connection with the pregnancy and should put the pregnant woman in a position to make a responsible decision in keeping with her own conscience. 285

The goal and content of counseling as determined by the constitution (cf. D. IV. 1.) *supra*) do not find sufficiently clear expression here. It is true that counseling must be conducted in an open-ended way because there is then the greatest likelihood that the woman will involve herself in the search for a solution to her conflict. Despite what has been said, however, counseling may not be open-ended and have an open goal, but must be orientated towards the protection of unborn life. The counselors must endeavor to encourage the pregnant woman to continue her pregnancy and try to open up chances for her for a life with the child. In doing so it may be necessary for them to rectify mistaken ideas on the fundamental precedence of the unborn's right to life and the weight to be attached to an exceptional situation in which a pregnancy termination is allowed. 286

The reasoning behind the draft legislation makes reference to the protection of unborn human life as a counseling goal (cf. German Federal Parliament Publication 12/2605 <new>, p. 22 <individual reasoning for § 219>). However, the actual wording, which is what is significant, does not make this evident with the necessary clarity and explicitness. § 219, Section 1 of the Penal Code (new version) does not contain a clear mission to encourage the pregnant woman to carry the child to term. Finally, it is not clear from the Act that the woman must be aware that the protection of unborn life must be given fundamental precedence provided there is no emergency situation allowed by the constitution. 287

The counseling goal will, therefore, have to be much more clearly expressed in the new version of § 219 of the Penal Code. 288

b) § 219, Section 1, Sentences 4 and 5 of the Penal Code (new version) names the provision of comprehensive medical, social and legal information to the pregnant woman as a task of counseling. It is intended that counseling include an explanation of the mother and child's legal rights and an explanation of potential practical assistance. Pursuant to § 219, Section 3, Sentence 2 of the Penal Code (new version) a certificate relating to the conduct of counseling under section 1 and the information "thus" given to the woman to help her with her decision must be issued "immediately“. 289

Irrespective of the fact that the initiators of the legislation sought more than the provision of mere information (cf. the protocol of the 17th Session of the Special Commit- 290

tee "Protection of Unborn Life" dated 17 June, 1992, p. 12), this creates the impression that the emphasis of counseling under § 219, Section 1 of the Penal Code (new version) lies in giving information. The legislature must correct such impression because it does not meet the constitutional requirements placed on counseling pursuant to § 219 of the Penal Code (new version). Mere informative counseling, which does not deal with the specific pregnancy conflict at hand and try to make it the subject of conversation, is bound to fall short of its function under the protection concept - namely to help to encourage the woman to protect life. Additionally, it is necessary for conflict counseling that the counselor attempt to find out from the woman her motives for considering the pregnancy termination. The counseling certificate evidencing the conclusion of counseling may not be issued while the counselor believes that there are still chances of resolving the conflict - if necessary with the help of third parties.

An amended version of the Act must, therefore, make clear that counseling should extend beyond the provision of information; it should provide conflict counseling which protects life by first exhausting all avenues of protection. 291

c) Irrespective of the regulation in Article 1, Section 2, Sentence 2 of the Pregnancy and Family Assistance Act, it still needs to be made clear that under § 219 of the Penal Code (new version) counseling centers not only have to inform the woman of public assistance, but also present her with available offers of help or assist her in obtaining help. 292

d) § 219, Section 1, Sentence 3 of the Penal Code (new version) calls the decision made by the woman following counseling a "decision of conscience". The legislature was clearly intending to follow on from the wording used by the Federal Constitutional Court in its previous Judgment (cf. BVerfGE 39, 1 <48>) whereby a decision in favour of a termination can qualify as a decision of conscience worthy of respect. However, a woman, who decides in favor of a termination after counseling, cannot claim protection under Article 4, Paragraph 1 of the Basic Law for the related killing of the unborn. To be constitutionally permissible the Act can only mean a decision taken conscientiously and, in this way, deserving of respect. This must be made clear in an appropriate way. 293

III.

Irrespective of the constitutional deficiencies found in § 218a, Section 1 and § 219 of the Penal Code (new version), the regulation of terminations in the Pregnancy and Family Assistance Act based on the counseling concept does not fulfill the duty to protect life because the legislature has failed to lay down to the extent described in more detail above, the special duties of the physician whom the woman asks to perform a termination (cf. D. V. 1 and 2), and the special duties of the people in the pregnant woman's circle (cf. D. VI. 2.), and because it has not made certain breaches of duty punishable. The provisions, which are missing, must be added to the new regulation made necessary by the declaration of §§ 218 a, Section 1 and § 219 of the Penal Code (new version) as invalid. 294

IV.

Article 15, No. 2 of the Pregnancy and Family Assistance Act is irreconcilable with Article 1, Paragraph 1 read together with Article 2, Paragraph 2, Sentence 1 of the Basic Law and invalid to the extent that it rescinds the provision contained in Article 4 of the Fifth Penal Reform Act concerning federal statistics on pregnancy terminations. 295

1. a) The legislature's duty to protect unborn human life is not fulfilled for all time by its passing a statute regulating pregnancy terminations whose goal is protection and, which appears in the legislature's view, suited to providing the amount of protection demanded by the Basic Law. On the contrary, due to its duty to protect the legislature continues to remain responsible for ensuring that the statute really provides appropriate and, as such, effective protection against pregnancy terminations. In doing so it must take into account opposing legal values. If it becomes apparent after a long enough observation period has elapsed that the statute is unable to guarantee the amount of protection demanded by the Basic Law, then the legislature is obliged to work to remove deficiencies and to ensure protection sufficient to comply with the prohibition on too little protection by amending or extending existing provisions (duty of correction and subsequent improvement). 296

This duty is also a consequence of the fact that the legislature is bound, as a matter of principle, by the constitution to rectify the unconstitutionality of a statute as quickly as possible (cf. BVerfGE 15, 337 <351>). It is especially significant when a statute which was originally constitutional, later becomes unconstitutional because there is a fundamental change in the circumstances it applies to, or because the reasonable constitutional expectation at the time of its enactment as to how it would work in practice, later proves completely or partially false (cf. BVerfGE 50, 290 <335, 352>; 56, 54 <78 - 79>; 73, 40 <94>). The legislature's obligation to the constitutional order (Article 20, Paragraph 3 of the Basic Law) is not fulfilled by its respecting constitutional limits when enacting a law. The obligation extends to responsibility for the enactment's remaining in harmony with the Basic Law (cf. BVerfGE 15, 337 <350>). 297

b) The duty of subsequent improvement does not generally include continual controls of legislation by the legislature. Mostly it only then becomes relevant when the unconstitutionality of a statute is recognized or in any case becomes clearly recognizable (cf. BVerfGE 16, 130 <142>). However, special demands arise from the duty to protect life, which is a continuing obligation placed on all state organs (cf. BVerfGE 49, 89 <130, 132>). The high position of the legal value to be protected, the kind of danger to unborn life, and the change in social conditions and attitudes noticeable in this area, make it necessary for the legislature to observe how its legal protection concept applies in social practice (duty to observe). It must ascertain at reasonable intervals whether the law really is having the protective effect expected or whether deficiencies in the concept or its practical application have manifested themselves so much so that they constitute a breach of the prohibition on too little protection (cf. BVerfGE 56, 54 <82 et seq. >). This duty to observe exists especially after the change in the concept of protection. 298

c) The duty to observe includes the legislature ensuring, to the extent within its powers, that the necessary data be collected and evaluated regularly. For this it is essential to have reliable statistics with sufficient information on the total number of pregnancy terminations, on the number of pregnancy terminations as compared to the whole population, on the total number of pregnancy terminations as compared to the number of women of childbearing age, on the total number of pregnancy terminations as compared to the number of pregnancies, on the total number of pregnancy terminations as compared to the total number of live or dead births, and finally on the total number of pregnancy terminations as compared to the number of terminations not subject to punishment because of extenuating legal reasons. It is up to the legislature to decide for itself which relevant facts its statistical survey will extend to (such as multiple terminations, the woman's age, family status, number of children) and to decide on the details of how it will collect and analyze the data. In any case, to dispense with all state statistics on pregnancy terminations would not be reconcilable with the duty of protection. If it did so, the legislature would be robbing itself of the material it needs for the observation of the effects of its protection concept. One cannot raise the objection here that previous statistical information showed itself to be unreliable. To the extent that it did, there are grounds for improving the data. Suggestions on how to do this were made in the oral proceedings before the federal parliament's special committee for "protection for unborn life". 299

2. Measured by this constitutional standard, the rescission of the existing provision on federal statistics in Article 4 of the Fifth Penal Reform Act is irreconcilable with the duty to protect unborn human life. 300

The change in the statutory protection concept brought about by the Pregnancy and Family Assistance Act is - as outlined above - associated with uncertainty as to the future effects the new legislation will have. The change in concept reflects an attempt by the legislature following the unsatisfactory experience had with the indications solution, to secure better protection for unborn life in another way. This obliges the legislature to carefully observe the actual effects of the new law and to conscientiously collect the data necessary for an empirical assessment of the pregnancy terminations carried out under the new law. 301

Article 4 of the Fifth Penal Reform Act provides for the gathering of federal statistics on terminations conducted pursuant to the conditions laid out in § 218a of the Penal Code. The provision originally applied to the indications solution contained in § 218a of the Penal Code (old version). It can, however, also provide information about terminations undertaken under the counseling concept within the first twelve weeks of pregnancy, and thus provide information about the significant effects of the new protection concept. Such information is indispensable. Of course, the legislature was not bound by the constitution to retain the previous provision on federal statistics. It was, however, forbidden from deleting it without providing for a substitute. Such deletion was invalid. A new regulation is already necessary for the fulfillment of the duty of protection because the previous provision's area of application did not extend to cover 302

the new federal states. It has applied there until now by reason of a temporary order of the Senate (BVerfGE 86, 390 et seq.).

V.

303 The provision in § 24b of the Fifth Volume of the Code of Social Security Law is reconcilable with the Basic Law (1. and 2. a). It would, however, not be in conformity with the Basic Law to allow claims against the statutory health insurance for the carrying out of terminations, whose legality has not been established according to the constitutional standards already developed (2. b). Moreover, in cases of financial need there are no constitutional objections to the granting of social assistance for terminations which are not punishable, nor are there any constitutional objections to the continued payment of a salary (3. and 4.). Under existing law, the constitutional duty of protection for unborn life does not preclude health insurance benefits for a pregnancy termination based on the general emergency indication. Whether it would otherwise be reconcilable with the Basic Law for social insurance benefits to be payable for terminations based on § 218a, Section 2, No. 3 of the Penal Code (old version), does not need to be decided (5.).

304 1. The enactment of the provisions in § 24b of the Fifth Volume of the Code of Social Security Law was constitutionally valid in form. The federal government's jurisdiction derives from Article 74, No. 12 of the Basic Law ("social insurance including unemployment insurance"). The same applies to the extent that pregnancy terminations based on the general emergency indication are affected (§ 218a, Section 2, No. 3 of the Penal Code (old version)).

305 a) As often decided by the Federal Constitutional Court (most recently BVerfGE 75, 108 <146 - 147>), the term "social insurance" in Article 74, No. 12 of the Basic Law should be understood broadly as a "constitutional generic term". It covers everything which has the character of social insurance. New circumstances in life can be included in the "social insurance" system, if the essential structural elements of the new social payments, particularly their organization and the risks they cover, correspond to the image attached to the "classic" social insurances. In any case, social insurance includes covering a potential need, calculable in its entirety, by spreading it across an organized multitude (cf. BSGE 6, 213 <218, 227 - 228). Social insurance is not restricted to employees and to the existence of an emergency. Apart from the social need to compensate certain burdens, what is significant is how the task is managed organizationally. The bodies financially responsible for social insurance are, of course, independent establishments and public law corporations, whose means stem from payments by "contributors".

306 b) The extension of health insurance benefits to cover "non-illegal pregnancy terminations" by a physician, first introduced by the Penal Reform Extension Act and adopted in the Pregnancy and Family Assistance Act, can be included in the social insurance sphere of jurisdiction. What is relevant for the jurisdictional classification is not whether jurisdiction is assumed for a regulation which is either legal or illegal, but

rather whether the subject matter of the regulation falls within the sphere of jurisdiction.

aa) Covering precautionary health measures has always been among the tasks of the statutory health insurance. However, a pregnancy termination - except for one based on a medical indication - even if undertaken by a physician, can neither be categorized as a precautionary health measure nor as an operation to heal (cf. BVerfGE 39, 1 <44, 46>; cf. too BSGE 39, 167 <169>). Thus, it cannot be treated as being on the same footing as motherhood assistance, medical check-ups and precautionary measures to prevent inheritable diseases. These services improve health or protect against dangers to health (cf. Gitter/Wendling in: Eser/Hirsch, Sterilisation und Schwangerschaftsabruch, 1980 p. 215). Such elements are missing in the case of pregnancy terminations under § 218a, Section 2, No. 3 of the Penal Code (old version) as well as under § 218a, Section 1 of the Penal Code (new version). The pregnant woman's need for treatment arises as a rule through the operation whose financing by the whole community of insured persons is at issue. 307

All the same, pregnancy terminations undertaken by a physician are related to the topic of preventative health care, which is necessary for the establishment of jurisdiction. Pregnancy terminations, even when they are not medically indicated, are still medical operations performed on women, and thus pose a risk to women’s health. In order to avoid any danger to health, § 218a, Section 1 of the Penal Code (old version) and § 218a, Section 1 of the Penal Code (new version) provide that a pregnancy termination (when undertaken under the conditions laid out) must be performed by a physician so that the rules for medical procedures are followed. 308

bb) The payment of insurance benefits is organized according to the scheme applicable to "traditional" health insurance; payments are made by the body financially responsible for health insurance in the same way as happens when a person is incapable of working for health reasons or needs medical treatment. The necessary financial means for this is supplied by insured persons and their employers in the form of insurance contributions. 309

2. a) In granting a right to benefits from the statutory health insurance in the case of a "non-illegal pregnancy termination" § 24b of the Fifth Volume of the Code of Social Security Law follows the provisions in § 218a, Section 1 - 3 of the Penal Code (new version) which lay down the conditions for when a termination is not illegal. A right to benefits is also supposed to exist in cases falling under § 218a, Section 1 of the Penal Code (new version). However, this provision does not stand up to constitutional scrutiny - it is unconstitutional and invalid. If, however, the constitution prevents the legislature from treating a pregnancy termination as justified under the conditions contained in that provision, then the wording of § 24b of the Fifth Volume of the Code of Social Security Law must indicate that there can be no question of a right to health insurance benefits. The provision is reconcilable with the Basic Law in this limited area of application. 310

b) Where the legality of a termination cannot be determined, the constitutional duty to protect life forbids interpreting 24b of the Fifth Volume of the Code of Social Security Law as allowing social insurance benefits to be paid in the same way as for a termination which is not illegal. A state governed by the rule of law can only finance an act of killing if it is legal and the state has assured itself of this legality. 311

aa) Without the operation demanded by the woman, which destroys the life of the unborn and, for that reason only, endangers the woman's health, there would be no reason to allow a claim against the state health insurance. If the state were to make such a medical procedure the subject of a claim for benefits against the statutory health insurance, then unlike all the other benefits provided by the statutory health insurance, the benefit would not exclusively serve the protection of life and health. The assumption of medical costs and social insurance costs for medical services in relation to the carrying out of a termination are not directly related to the killing of unborn life. They amount, however, to involvement by the state in the act of killing. Such involvement is only permissible, if the circumstances fall within the justified exception to the fundamental prohibition on pregnancy termination, and the state is suitably satisfied of this. The state may not be involved in the killing of unborn life unless it convinced that the act is legal. Counseling's protection concept leaves no room for imparting this conviction to the state (cf. D. III. 1. c) *supra*). 312

If it is not possible to tell whether a termination undergone in the early phase of pregnancy under the counseling regulation can be viewed as permissible because of the existence of a general emergency indication, the state is not allowed, as a matter of principle, to be directly involved financially or through third parties such as the community of insured persons. If it were to be involved, the state would accept coresponsibility for acts which, on the one hand, the constitution does not allow it to regard as legal, and which, on the other hand, it is prevented from treating as legal under the protection concept. 313

bb) The conditions for the effectiveness of the protection concept do not require exceptions (cf. D. III. 3.) *supra*). 314

(1) The protection concept extends to pregnancy terminations taking place under medically unobjectionable conditions or circumstances, which protect the woman's right to free development of her personality. Such protection can only be secured if no woman is prevented for financial reasons from consulting a physician. If the means are available, experience shows that women will consult a physician in order to avoid the risks to their health posed by improperly carried out terminations. Illegal terminations by physicians did not occur very often even before §§ 218 et seq. came into force (cf. the First Report by the Special Committee for the Penal Law Reform, German Federal Parliament Publication 7/1981 <new> , p. 5 - 6). Nevertheless, if a woman's income or assets are insufficient the state can cover her needs by applying the principles of social assistance law (cf. 3.) *infra*). In determining the woman's neediness what is relevant are her available income and assets at the time of the termina- 315

tion. Reference may not be made to any possible maintenance claims she may have against her parents or her husband, nor may recourse be had to these persons if the woman is not in agreement.

(2) Normally, private health insurance only covers "medically necessary treatment on account of a pregnancy" (§ 1, Section 2, Sentence 4, (a), General Insurance Conditions for Health Insurance Costs and Daily Benefits Insurance During Hospitalization <Standard Conditions of the Association of Private Health Insurers 1976> printed in Prölss/Martin, Versicherungsvertragsrecht, 24th ed. 1988, p. 1222). Included are only those terminations which are medically indicated as a cure for pathological findings or to avert a physical or psychological danger for the pregnant woman (cf. Wriede in Bruck/Möller, Kommentar zum Versicherungsvertragsgesetz, 8th ed., Vol. VI 2, 1990, G 43; cf. too LG Berlin, VersR 1983, p. 1180 - 1181; LG Detmold, VersR 1986, p. 336). If insurance contracts went further and provided benefits in respect of terminations whose legality had not been established, they would conflict with the basic prohibition on terminations. Such contracts would be invalid (cf. D. III. 3). 316

According to the above, women without health insurance or who only have private health insurance anyway have to pay out of their own pockets for medical services in relation to a termination non-punishable under the counseling regulation. If counseling's protective concept is to be effective, it would seem that such women should not be treated differently to those who are insured by statutory health insurers. 317

cc) In spite of its not being subject to the threat of criminal punishment, under counseling's protective concept a woman who has received social and medical counseling must take responsibly for whether a termination occurs. However, the counseling concept does not make it necessary for such responsibility to be recognized under social security law. It does not require that a woman, who has had a termination not subject to the threat of criminal punishment pursuant to the counseling regulations, be granted the same social benefits as women in whose cases medical, embryopathic or criminological indications – after all justification grounds – were established. 318

(1) The responsibility borne by the woman in deciding in favor of a termination under the counseling regulation should not be treated as a kind of "self indication" whereby the woman herself can make a binding determination that a justifying emergency situation exists (see D. III. 2. b.) aa) *supra*). The counseling concept is based on the view that unborn life can be better protected in the early phase of pregnancy with the mother. For this reason, and in order to exhaust counseling’s avenues for providing encouragement to carry a child to term, no legal or practical obstacles to its protective effect should be placed in the way of a decision to still go ahead with a termination. Additional recognition of the woman's decision, through counseling as a way of influencing her, is not required to ensure protection. 319

(2) The welfare state principle (Article 20, Paragraph 1 of the Basic Law) does not permit the state to treat terminations not subject to the threat of criminal punishment under the counseling regulation as allowed because there is no assessment of legali- 320

ty in individual cases. It is only possible to build a welfare state on the foundations of the Basic Law, if the tools of a state based on the rule of law are employed. The principle of maintaining the rule of law would not just be minimally affected, but rather violated in its substance, if without making distinctions taking into account the goals of a welfare state, the state were to assume (co-) responsibility directly or indirectly for occurrences whose legality it cannot be certain of.

dd) The granting of social insurance benefits for terminations whose legality has not been determined although they are not subject to the threat of criminal punishment, is irreconcilable with the state's duty to protect unborn life. If this were not so, the awareness in the population that the unborn also has a right to life vis-à-vis its mother and that a termination is therefore wrong, as a matter of principle, would be lowered considerably. 321

A refusal to grant social benefits will only be of limited use in making clear that the law takes a negative view of certain circumstances, if the refusal to grant relates to benefits - such as those for a termination - which do not actually come within the insurer's domain. However, conversely, the granting of such benefits in circumstances which cannot be categorized as a normal insurance risk, gives members of the public the impression that what is involved is in fact a risk comparable to one of the usual risks and thus a normal routine occurrence. The expert, Prof. Dr. Schulin, pointed this out in his evidence (Expert Opinion, p. 97). 322

In this context it cannot be ignored that the circumstances under which the social insurance will grant benefits are of significance for about 90 percent of the population (cf. Schulin, op. cit. p. 2). The whole community of insured persons keeps a close eye on social insurance because it affects spheres of life of personal interest, and is thus well-suited to influencing public values. 323

The counseling regulation concept can only fulfill the minimum requirements of the state duty to protect, if it pays special attention to preserving and strengthening legal awareness. It is only when awareness of the unborn's right to life is kept alive that the woman's responsibility under the counseling regulation to protect such right, will, as a matter of principle, be suitable to protect the unborn. It would run counter to this protection if the state were to support terminations by generally allowing claims for social insurance benefits; doing so would inevitably create the impression that terminations are sanctioned by the legal system after all. In addition, those persons close to the pregnant woman, who also share a responsibility for her and the unborn, could feel their consciences eased because they would regard something which social insurance benefits are paid for as normal and legal. 324

c) The constitution rules out a grant of social insurance benefits for the performance of an illegal pregnancy termination and for post operational medical treatment where no complications have arisen. Furthermore, the principles stated do not allow a woman who has become unable to work as the result of a termination to be granted a right to receive sickness benefits pursuant to § 24b, Section 2, Sentence 2 of the Fifth 325

Volume of the Code of Social Security Law. Nor can the provision be used in cases going beyond its express preconditions (terminations which are not illegal) as a basis for granting benefits for terminations which are not threatened by criminal punishment. The question whether a claim can be made in these cases under §§ 44, 53 of the Fifth Volume of the Code of Social Security Law remains open.

Other benefits payable under § 24b, Section 2, Sentence 1 of the Fifth Volume of the Code of Social Security Law are not touched by the prohibition. They are suitable for and designed to maintain the woman's health to the extent it is affected by pregnancy. The medical services received by an insured woman prior to a termination are - like subsequent treatment made necessary by complications arising from a termination - services which directly promote her health. Furthermore, if a termination is not carried out, the services benefit the child's life. For the reasons already given, the killing of unborn life is so much in the foreground as far as the termination itself is concerned that a claim against the social insurance cannot be considered unless the legality of the pregnancy termination is certain. 326

3. a) Accordingly, the constitution forbids the state, as a matter of principle, from promoting pregnancy terminations by allowing benefits or by making rules allowing benefits from third parties unless the termination's legality has been ascertained. Constitutional law only permits the state to violate such principle, as has already been stated, to the extent this is necessary for the effectiveness of the concept protecting unborn human life - i.e. so that the woman will only have the termination carried out by a physician. If, on the one hand, the legal system requires recourse to a physician for the protection of the health of the pregnant woman and, if on the other hand, it requires recourse to a physician for the protection of the health of the unborn, then these two objectives will not be realized unless the woman possesses the financial means necessary for consulting a physician. In such situations the state cannot be prevented from providing the financial means necessary itself. 327

b) In those cases where the protection concept makes it necessary, the legislature has to lay down the conditions under which the state will assume the costs for a woman who cannot afford a termination. It is evident that the present regulation contained in § 37a of the Federal Social Security Act has to be adapted to conform to the requirements of the counseling regulation as determined by the constitution. By allowing these social benefits, the state is not acting contrary to the requirements of its duty of protection. In doing so, it is simply avoiding from the outset women having to turn to illegal means and thereby not only causing damage to their own health, but depriving the unborn of any chance of rescue which might be available through counseling from a physician. 328

When formulating the right to social assistance, the legislature must protect the right to privacy of the person entitled to benefits. While avoiding a conflict with its duty of protection vis-à-vis unborn life, it must make provisions which spare the woman from having to repeat her explanation of her situation. This rules out recourse to family 329

members pursuant to §§ 91 - 92 of the Federal Social Security Act. For obvious reasons, all procedures connected with the granting of protection and help by the state should as far as possible be concentrated in the hands of one authority - perhaps the statutory health insurance - so that the woman only has to explain her situation once.

4. In view of the labor law origins of the law concerning the continued payment of wages and in view of the requirements of the protection concept, and in conformity with the principles laid out (D. III. 3.) *supra*), it does not appear necessary to exclude terminations which do not fall within the definition of an offence under § 218 of the Penal Code (new version) from the obligation to pay benefits. 330

a) aa) Under § 1, Section 1, Sentence 1 of the Act on Continued Payment of Wages a worker, who is prevented after starting his employment from working as a result of an illness, but without fault on his own part, does not lose his right to pay for a period of up to six weeks. This provision also applies when the inability to work occurs as a consequence of a pregnancy termination undertaken by a physician. In such a case, the ensuing inability to work is regarded as faultless (§ 1, Section 2 of the Act on Continued Payment of Wages). Other labor law regulations contain similar provisions (cf. § 616 of the Civil Code, § 63 of the Commercial Code, § 133c of the Industrial Code, §§ 52a, 78 of the Seaman's Act). § 115a of the GDR Labor Code, which was inserted in the Labor Code by an Act dated 22 June, 1990 (Legal Gazette I, No. 35, p. 371), continues to apply in the area defined in Article 3 of the Unification Treaty (Article 9, Paragraph 2 of the Unification Treaty read together with Annex II, Chapter VIII, Subject Area A, Section III, No. 1a). This provision closely follows the rules in the Act on the Continued Payment of Wages and does not contain a regulation corresponding to § 1, Section 2 of the Act on Continued Payment of Wages. It also applies, as a matter of principle, to all employees. § 4 of the Pregnancy Termination Act of 9 March, 1972 (Legal Gazette I, No. 5, p. 89) provides that the preparation for, conduct of and treatment after a pregnancy termination permissible under the law should be treated in the same way as a normal case of illness. This provision will become inoperative when Article 16 of the Pregnancy and Family Assistance Act becomes effective. 331

bb) The law on the continued payment of wages requires a physician to provide an employee with a letter for his/her employer stating the existence of an inability to work due to illness. The kind of illness and its cause should not be mentioned in the letter (cf. § 3 of the Act on Continued Payment of Wages). Without the receipt of further information, an employer is not in a position to establish whether the prerequisites for the continued payment of wages do not exist because there has been some fault on the part of the employee. He can only refuse to continue paying wages if he has clear indications for the existence of fault or the employee is contractually bound to supply details of his/her illness.. 332

b) Inability to work caused by illness is only relevant if the illness results from conduct which one would not expect a reasonable person out of self-interest to engage in and if it would - in exceptional situations - be unfair to shift responsibility for the conse- 333

quences of such conduct to the employer (cf. BAG, Judgment dated 28 February, 1979, AP No. 44 on § 1 of the Act on Continued Payment of Wages, Judgment dated 7 August, 1991, AP No. 94 on § 1 of the Act on Continued Payment of Wages; Hueck/ Nipperdey, Lehrbuch des Arbeitsrechts, 7th ed. , Vol. 1, 1963, § 44 III a cc; Zöllner/ Loritz, Arbeitsrecht, 4th ed., 1992 § 18 II 2 e; Schmitt, Lohnfortzahlungsgesetz, 1992, § 1 of the Act on Continued Payment of Wages, Marginal Note 60 et seq. with further references).

It is not contrary to the constitutional duty to protect unborn human life to interpret and apply labor law principles in such a way that a duty to continue the payment of wages still exists, even when the inability to work is a consequence of a termination carried out pursuant to the counseling regulation. There is no constitutional objection to viewing inability to work in such cases as faultless under § 1, Section 2 of the Act on Continued Payment of Wages. 334

In order to dismiss a claim by a female employee for continued payment of wages in the case here in question, more is needed than just a statutory regulation excluding the treatment of an inability to work following an illegal termination as the result of an illness. For such a regulation to be effective - either the physician treating the woman would have to be prohibited from confirming her inability to work or the female employee would have to be obliged to disclose to her employer the reasons for her not being able to work. The woman would then only be able to avoid doing so if she took holidays which is not always possible. Other ways of avoiding disclosure are not available under current law. The woman would also have a duty of disclosure if one were to regard a pregnancy termination following counseling as a serious breach of the conduct to be expected from a reasonable person acting in her own interests - i.e. if her conduct amounted to fault as understood under the relevant labor law. In order for counseling's aim, namely the saving of the unborn's life, to be able to be viewed openly, counseling's protection concept requires that a pregnant woman not be made to explain her reasons for wanting a termination to third parties other than counselors or physicians. Openness would in any case be endangered if labor law obliged a female employee in one way or another to reveal to her employer that her inability to work relates to an unjustified pregnancy termination. Under these circumstances, it is also not unfair to place the risk of an employee not being able to work because of a termination on the employer. 335

5. a) The constitutional duty to protect life does not hinder the legislature from making provision for health insurance payments as has been done in § 24b of the Fifth Volume of the Code of Social Security Law in connection with § 200f of the Reich Insurance Code. This also applies to the rules in §§ 218a et seq. of the Penal Code (old version) which are applicable until 15 June, 1993 (cf. II. 1 of the Judgment's orders). 336

aa) In considerable conformity with the previous provision in § 200f of the Reich Insurance Code, § 24b of the Fifth Volume of the Code of Social Security Law establishes claims for statutory health insurance benefits where there is " a non-illegal 337

pregnancy termination performed by a physician", if the termination is performed in a hospital or in another institution provided for this purpose within the meaning of the newly-worded Article 3, Section 1, Sentence 1 of the Fifth Penal Reform Act. A termination is "not illegal" in this context if a general emergency indication is found to exist. § 218a of the Penal Code (new version) describes such a termination simply as "not punishable pursuant to § 218". The Federal High Court has, however, both in its civil as well as in its criminal jurisdiction, interpreted the grounds for a general emergency indication as justification grounds in the same way as the other indication grounds in § 218a of the Penal Code (new version) (cf. BGHZ 86, 240 <245>; 95, 199 <204 et seq.>; BGHR StGB § 218a, Section 1, indication 1). The Federal Social Court (cf. NJW 1985, p. 2215 <2216>) and social security law practice have proceeded from the assumption - without exploring the details of the criminal law theory regarding the classification of indication grounds - that all terminations which are not punishable under § 218a of the Penal Code (old version) are to be viewed as "not illegal" terminations within the meaning of § 200f of the Reich Insurance Code. The same interpretation should be applied to the identical provision in § 24b of the Fifth Volume of the Code of Social Security Law to the extent that it has been applied in connection with § 218a of the Penal Code (old version) as a consequence of the temporary order dated 4 August, 1992.

bb) This interpretation, including its treatment of the grounds needed to support a general emergency indication is, as a matter of principle, constitutionally unobjectionable. Ultimately, doubts about § 218a, Section 2, No. 3 of the Penal Code (old version) sufficiently defining the relevant grounds for emergency situations, do not prevail. Emergency situations are extremely varied, and their significance from the point of view of whether a continuation of the pregnancy is non-exactable or not, depends very much on the circumstances of an individual case. Thus the price for a clearer definition of the grounds for an indication would have been the inability to cover unusual types of cases. In view of this, the legislature must be satisfied with a general description of the grounds and the use of terms which need elaboration. Closer definition must be left to the jurisprudence. Similarly, it can be inferred that potential emergency situations are subject to the requirement that the continuation of the pregnancy would be non-exactable in the same way as this is required in existing indication cases. The inference is apparent from taking into account the provision's developmental history, including the Federal Constitutional Court's Judgment of 25th February, 1975 and the interpretation of the wording that a danger must be so serious "that the continuation of the pregnancy cannot be exacted from the woman" 338

cc) Nonetheless, there is little doubt that in the past the grounds needed to support the general emergency indication were often advanced to justify pregnancy terminations and at the same time to found claims for health insurance benefits. This was done although the social conflict necessary to satisfy the degree of non-exactability was not as high as in the case of the other indications. Even the reasoning behind the enactment of the Pregnancy and Family Assistance Act sees in the expanding practi- 339

cal application of the general emergency indication one reason for a new regulation (cf. German Federal Parliament Publication 12/2605 <new>, p. 3).

In view of the expanding application of the grounds needed to support the general emergency indication, it is not in keeping with the duty to protect unborn life for the bodies in charge of providing health insurance to automatically assume that the operation carried out by the physician is legal and that they should have to pay for it. They must convince themselves that the assumption of the existence of a general emergency indication is warranted. In doing so, they can use as orientation the principles developed by the Federal High Court (cf. BGHR StGB § 218a, Section 2, Result 1; BGHZ 95, 199 <p. 204 et seq.>). Furthermore, they must be convinced that the provisions concerning counseling (§ 218b of the Penal Code (old version)) and the procedure for ascertaining the existence of an indication (§ 219 of the Penal Code (old version)) have not been ignored. Constitutional deficiencies in implementation do not, however, extend to social insurance law provisions if insured persons have been granted benefits by them in respect of non-illegal terminations. Similarly, these provisions are unaffected by structural failings which are inherent in §§ 218b and 219 of the Penal Code (old version) and which impair them in protecting life. Such deficiencies merely provide a reason for the legislature to make subsequent improvements. 340

b) For a number of other constitutional reasons, Petitioner 1) also objected to claims for health insurance benefits being allowed in the case of terminations based on a general emergency indication (§ 218a, Section 2, No. 3 of the Penal Code (old version)). Prior to the coming into force of the Pregnancy and Family Assistance Act, such claims were founded on § 200f, Sentence 1 of the Reich Insurance Code and later they were based on § 24b, Section 1 of the Fifth Volume of the Code of Social Security Law. Petitioner 1) argues that the social insurance, being a compulsory public body, should not have been burdened with this task because it infringes on its members' fundamental rights; what is involved is a burden unrelated to insurance. It argues further that the goal pursued by the legislature, namely the elimination of disadvantages to pregnant women finding themselves in a legally recognized conflict situation on the one hand and, in economic distress on the other hand, could just as easily have been achieved in another way which did not affect the member's fundamental rights. 341

Whether or not this objection is legitimate can remain open. In any case, there is no chance of making benefits based on the previous legal position retrospectively invalid. Nor is it necessary in view of the Bavarian State Government's application to decide this question pursuant to § 25 of the Act Governing the Federal Constitutional Court in accordance with No. 1 of the order for the period of time that previous law continues to apply. 342

VI

The duty contained in Article 4 of the Fifth Penal Reform Act, in the version of Article 15, No. 2 of the Pregnancy and Family Assistance Act, to ensure an adequate and 343

comprehensive selection of outpatient as well as in-patient institutions for carrying out terminations is compatible with the jurisdictional rules in the Basic Law if the latter are interpreted restrictively. However, the provision breaches the federal principle and is invalid insofar as it designates the highest competent state authorities as holders of the duty.

1. If the federal legislature provides that the state must guarantee an adequate and comprehensive selection of both outpatient and in-patient institutions for carrying out terminations, it is at the same time setting a state task. 344

A particular need for the establishment of outpatient facilities can be deduced from looking at the materials which were used during the legislative procedure. Such facilities would allow the suction method of termination to be used, which is gentler and which also saves the woman from having to spend several days as an in-patient (cf. reasoning behind the substantially identical provisions in the legislative drafts German Federal Parliament Publication 12/696 < p. 11 - 12> with reference to Renate Sadrozinsky, Die ungleiche Praxis des § 218, Cologne 1990, p. 43, German Federal Parliament Publication 12/889 <p. 12>). Pregnancy terminations, as evidenced by the new version of Article 3 of the Fifth Penal Reform Act introduced by Article 15, No. 1 of the Pregnancy and Family Assistance Act, are no longer exclusively matters for hospitals. Federal law permits any institution to perform a termination which can guarantee the necessary follow up treatment. In connection with this change in the law, the wording of the new Article 4 of the Fifth Penal Reform Act suggests that it is the state's task to guarantee that there is a sufficient selection of institutions spread across the state which would allow a woman to chose between an outpatient or in-patient termination. 345

A guarantee of this kind requires development of a comprehensive concept for the whole state. As is already undertaken in relation to hospitals, state wide inquiries would have to be made to determine the expected need and the number of existing institutions. State-wide, infrastructure planning would be necessary whereby institutions whether financed privately, by charity, by the communes or by the state would have to be considered and coordinated. If private or communal hospital operators are to be obliged to run institutions which carry out terminations, then this must be regulated by law. The law must determine administrative standards and powers with sufficient certainty as to satisfy the demands of a state governed by the rule of law. 346

2. a) The jurisdictional powers granted by the Basic Law do not extend to allow federal law to set such a task and provide for such far-reaching goals by statute. Article 74, No. 7 of the Basic Law, which covers the federal government's concurrent legislative powers, including powers in respect of "public welfare", supplies a jurisdictional basis only if interpreted restrictively. 347

aa) The term "public welfare" as used in the Basic Law itself should not be interpreted narrowly. It includes preventative measures to cover emergencies and exceptional burdens as well as precautions against extreme neediness (Maunz in: Maunz/Dürig, 348

Kommentar zum GG, Article 74, Marginal Note 106; Rengeling in: Handbuch des Staatsrechts, Vol. IV, 1990, § 100, Marginal Note 155). Restrictions arise, in particular, where the subject matter of a provision overlaps to a large degree with the subject of other jurisdictional powers. There is no jurisdiction pursuant to Article 74, No. 7 of the Basic Law in relation to laws governing the care of the sick, the fight against epidemics or which otherwise principally relate to health services. The decision made in the Basic Law (Article 74, No. 19 and No. 19a) to limit the federal government's legislative powers in respect of health services, may not be circumvented by broadly interpreting legislative power in respect of public welfare.

The wide interpretation described above attempts to use Article 4 of the Fifth Penal Reform Act (new version) to bring about structural changes in the health services in the states. The federal government does not have the legislative power to do this. 349

bb) If looked at as a provision supplying help in an emergency situation resulting from pregnancy, the provision under attack can derive some support from Article 74, No. 7 of the Basic Law. 350

On the one hand, it is in the interests of the protection of life if a physician does not feel pressured on the very first day a woman comes to see him into performing a termination for her because she had to travel far to reach him. Where a woman feels uncertain about her situation, it is likely that the physician will first talk with her and give her advice in conformity with his professional duty as a physician to protect life, and finally he may postpone the termination to a later date. This would once again open up the possibility of the woman deciding in favor of the unborn. 351

On the other hand, it can also be of help to a pregnant woman in an emergency situation if she can manage the journey back and forth to visit a physician (even with public transport) in one day. It will be easier for her to organize the care of her own children during her absence and she only has to miss work for a short period. 352

In this form, the federal legislature can make the creation of institutions all over the country for carrying out terminations come within the meaning of public welfare under Article 74, No. 7 of the Basic Law. However, it is not able to prescribe a more far-reaching guarantee without overstepping the boundaries of jurisdictional power in Article 74, No. 7 of the Basic Law. 353

Nor does the federal legislature have power to make additions which it could use to implement an organizational follow-up concept deemed necessary by it (cf. BVerfGe 22, 180 <209 et seq.>; 77, 288 <301>). The legislative powers pursuant to Article 74, No. 1 of the Basic Law allow support for a protection concept enacted by the federal legislature, which is tailored to the protection of the unborn and the woman, and which has its roots in the penal law. Thus, the federal legislature is allowed to fulfill its constitutional duty to protect life. However, the guarantee of a large number of institutions for carrying out terminations, beyond those already described, cannot be understood as part of a necessary follow-up concept. 354

cc) Article 4 of the Fifth Penal Reform Act (new version) cannot - to the extent it creates an obligation to provide public welfare - be declared invalid and unconstitutional because it is open to a narrow constitutional interpretation. 355

According to the established jurisprudence of the Federal Constitutional Court a statute will not be unconstitutional if an interpretation of it is possible which is at the same time in harmony with the Basic Law and still meaningful (cf. BVerfGE 2, 266 <278>; 69, 1 <55>; st. Rspr.). 356

It is in keeping with the wording of Article 4 of the Fifth Penal Reform Act that it be interpreted as placing an obligation on the state to provide medical assistance for terminations in locations not requiring a woman to be absent from home for longer than a day. If this interpretation is applied, the statute still remains meaningful because it can serve to protect life. Nor are the boundaries overstepped, which the clearly recognizable will of the legislature draws for a constitutionally valid interpretation (cf. BVerfGE 18, 97 <111>; 71, 81 <105>; st. Rspr.), because the statute in any case complies with this will even in the dimensions of the restricted interpretation. 357

3. If the federal legislature entrusts the highest competent state authority with the carrying out of a state task created by it, it is then interfering with the states' organizational powers and at the same time interfering with their constitutional order. In doing so, it is excluding the organs granted jurisdiction under the state constitutions and preventing the states from themselves dealing with the execution of state tasks - for instance in areas affecting the communes - as well as preventing them from using their own discretion as to how to meaningfully organize the execution of state tasks. 358

a) According to the federal principle, interference by federal powers in the states' constitutional order is only permissible if this is expressly declared or allowed by the Basic Law. Especially in cases where it draws a line between federal and state jurisdiction, the Basic Law generally refrains from determining which state constitutional organs are to assume jurisdiction in state matters (cf. BVerfGE 11, 77 <85 at p. 86>). 359

This is the position when the execution of federal legislation is made a matter for the states in their own right (Article 83 of the Basic Law): The states - not the state governments or individual state ministries - must regulate the establishment of the authorities and their administrative procedures insofar as federal legislation enacted with Bundesrat consent does not provide otherwise (Article 84, Section 1 of the Basic Law). The principle that the states have power in organizational matters applies without restriction, if a federal rule simply makes provision for a state task to be fulfilled by the states, but does not, however, make individual rules which could be administratively implemented. 360

According to the express directive of Article 80, Section 1 of the Basic Law, the federal legislature is only allowed to authorize "state governments" and not state ministries or the highest competent state authorities, to issue statutory instruments (cf. BVerfGE 11, 77 <86>). 361

b) Article 4 of the Fifth Penal Reform Act (new version) does not satisfy this standard. It establishes the task of providing a guarantee of facilities, which merely amounts to a goal for action for the state. It does not provide individual administrative rules for implementing such goal. The task of providing a guarantee of facilities as specified by federal legislation is not assigned as such to the states, but rather to the highest competent state authorities and thus the state ministries. A rule of this kind is neither expressly provided for by the Basic Law nor allowed by it. 362

c) As such the provision should be declared invalid pursuant to § 78 of the Federal Constitutional Court Act. Article 4 of the Fifth Penal Reform Act (new version) is not open to an interpretation in conformity with the constitution to the extent that it entrusts the highest competent state authority with the performance of a state task. The requirement that a statute should be interpreted in conformity with the constitution does not allow its wording or meaning to be changed or ignored (cf. BVerfGE 8, 28 <34>; 72, 278 <295>). The provision has a precisely formulated, legal content whose interpretation cannot be so construed as to mean that it is the state and not the public authority which is entrusted with performing the task. 363

4. The invalidity of appointing the highest competent state authority to be in charge does not affect the task of providing a guarantee itself, which has been interpreted as being in conformity with the constitution. According to the legal concept contained in § 139 of the Civil Code, the Federal Constitutional Court can restrict itself to declaring part of a law invalid if it is certain that the legislature would have enacted the rest of the law even without the unconstitutional part (cf. BVerfGE 4, 219 <250>). This is the case in view of the importance of the physician who is responsible for medical advice and who, if necessary, undertakes the termination. This rule is also enforceable because according to the division of powers in the Basic Law, the states anyway have powers in respect of the execution and implementation of federal legislation (Articles 30, 70, 83 of the Basic Law) and inasmuch there is no need for a special jurisdictional rule. 364

5. Therefore, it remains up to the states to provide for the necessary medical treatment of pregnant women despite the limitations set by the right of medical practitioners to refuse treatment (Article 2 of the Fifth Penal Reform Act) and the constitutional restrictions placed on the task of providing a guarantee of facilities. Nonetheless, the states are constitutionally bound when exercising their powers in respect of health matters by the duty to protect unborn human life. They must stop additional measures when these serve to actively encourage pregnancy terminations. 365

F.

1. The Judgment in the proceedings for judicial review of the Pregnancy and Family Assistance Act disposes of the application by the Bavarian State Government to the extent that its application for judicial review in proceedings 2 BvF 2/90 is directed at § 218b, Section 1, Sentences 1 and 2 and § 219, Section 1, Sentence 1 of the Penal Code in the version of the Fifteenth Penal Amendment Act. An application for abstract 366

judicial review is only admissible where there is a special, objective interest in clarifying the operation of a rule (cf. BVerfGE 6, 104 <110>; 52, 63 <80>). This interest does not exist here.

The Petitioner has only challenged the abovementioned provisions in respect of pregnancy counseling and the ascertainment of the existence of an indication to the extent that these regulate the procedural requirements of a pregnancy termination based on a general emergency indication (§ 218a, Section 2, No. 3 of the Penal Code in the version of the Fifteenth Penal Reform Act). This emerges from the arguments contained in the application dated 28 February, 1990. The grounds needed to support a general emergency indication are thus set aside by Article 13, No. 1 of the Pregnancy and Family Assistance Act which to this extent is not constitutionally challenged. It is true that § 218a, Section 1 of the Penal Code (new version), which is supposed to replace the general emergency indication, is unconstitutional and invalid. Nevertheless, this does not change the fact that a legal provision governing pregnancy termination, which is based on a counseling concept, is as a matter of principle constitutionally admissible. The Senate has ordered transitional provisions under § 35 of the Federal Constitutional Court Act for the period up until the time when the legislature enacts new constitutional rules. It has done so in the belief that for the reasons which led to the amendment to the law in the first place, the legislature will not revert to an emergency indication. The provisions on this will only remain in force for a short transitional period until 15 June, 1993. Thus, in future the Petitioner's constitutional complaint is deprived of its subject matter. 367

Nor can the sought after determination of unconstitutionality have any legal effect for the period up until 15 June, 1993. The Petitioner correctly pointed out that its own complaints (assuming they are founded) cannot lead to the criticized provisions dealing with pregnancy terminations based on an emergency indication being declared retrospectively invalid. If this were otherwise, it would result in the their not being applicable to emergency indications and thus a situation which was even further away from the Basic Law in its protective effect than the criticized provisions. Consequently, only a duty on the part of the legislature to make subsequent improvements comes into consideration, and until this occurs the criticized provisions have to remain in force unchanged (cf. BVerfGE 61, 319 <356>). Subsequent improvements taking effect in the future, must be ruled out because the old emergency regulation is soon to become inapplicable. 368

2. The case is different as far as the application to declare §§ 200f, 200g of the Reich Insurance Code invalid is concerned, inasmuch as these provisions grant the insured a right to benefits from the statutory health insurance even where a pregnancy termination is based on the general emergency indication. Of course, as from 5 August, 1992 the aforementioned provisions have been rescinded by Article 3 of the Pregnancy and Family Assistance Act and replaced by § 24b of the Fifth Volume of the Code of Social Security Law in the wording of Article 2 of the Pregnancy and Family Assistance Act. The Petitioner has, however, argued that insurance benefits in old 369

cases where terminations were undertaken on the basis of an emergency indication should be calculated using the criticized provisions of the Reich Insurance Code, and furthermore it has alleged that there are still legal disputes pending whose outcome can depend on the validity of the provisions. That means that the necessary objective interest in a decision on the merits continues (cf. BVerfGE 5, 25 <28>; 79, 311 <327>).

On the merits the same applies here as applies for § 24b of the Fifth Volume of the Code of Social Security Law to the extent that such provision covers pregnancy terminations performed since 5 August, 1992 on the basis of the general emergency indication (cf. supra E. V. 1. and 5.). 370

G.

In the proceedings for abstract judicial review, the Federal Constitutional Court declares pursuant to § 78, Sentence 1 of the Federal Constitutional Court Act the statute under examination invalid, if it is not reconcilable with the Basic Law. This gives expression to the finding that the statute can not have its intended effect. Consequently, the declaration of § 218a, Section 1 of the Penal Code (new version) to be invalid, results in the provision not developing its effect as a justification ground. § 219 of the Penal Code (new version), which has been declared invalid, cannot be used to measure the content and implementation of counseling. 371

There is a close connection between the contents of §§ 218a, Section 1 and § 219 of the Penal Code (new version) and the statutory definition of a crime under § 218 of the Penal Code (new version) inasmuch as the legislature when implementing Art. 31, Section 4 of the Unification Treaty wanted to base the protection of life during the first twelve weeks on the effectiveness of a counseling concept, and also wanted to exclude pregnancy termination from criminal liability (Article 103, Section 2 of the Basic Law) subject to the conditions of § 218a, Section 1 of the Penal Code (new version). In the territory referred to in Article 3 of the Unification Treaty, it is necessary to ensure that the protection concept does not lose its intended effect as a result of § 218a, Section1 and § 219 of the Penal Code (new version) being declared invalid. It is permissible, and in fact required by the constitutional duty of protection, that the protection concept really have the effect of protecting life. Loss of the intended effect can be avoided by making a transitional order pursuant to § 35 of the Federal Constitutional Court Act for a counseling regulation, which is constitutionally adequate, and which excludes criminal liability under § 218 of the Penal Code (new version) subject to the conditions laid down by the legislature in § 218a, Section 2 of the Penal Code (new version). Article 103, Section 2 and Article 104, Section 1 of the Basic Law do not preclude this course of action. The termination cases whose facts give rise to criminal liability are outlined in the penal provisions of Article 13, No. 1 of the Pregnancy and Family Assistance Act. Thus the conditions and boundaries of criminal liability for a termination are regulated by statute. Although the justification grounds contained in § 218a, Section 1 of the Penal Code (new version) have been declared 372

invalid, this does not affect criminal liability for a termination if the facts of the termination do not fall within § 218a, Section 1 of the Penal Code (new version) or another provision excluding criminal liability. The Senate's Judgment does not extend liability beyond the boundaries drawn by the legislature. On the contrary, the order made pursuant to § 35 of the Federal Constitutional Court Act under No. II. 2 of this Judgment's order ensures that those pregnancy terminations whose facts fall within § 218a, Section 1 of the Penal Code (new version) remain excluded from the threat of criminal punishment in § 218 of the Penal Code (new version). This is so irrespective of the declaration that § 218a, Section 1 of the Penal Code (new version) is invalid and remains the case until a new provision is enacted. From the point of view of penal law, the significance of the court order is limited to the fact that the exclusion of criminal liability is no longer brought about by the existence of a justification ground, but instead by exclusion from the definition of a criminal offense. Terminations not undertaken pursuant to the counseling regulation, which are subject to the threat of criminal punishment under Article 13, No. 1 of the Pregnancy and Family Assistance Act , will be punishable according to statute and not according to the Senate's order based on § 35 of the Federal Constitutional Court Act. This will satisfy the special constitutional requirements of Article 103, Section 2 and Article 104, Section 1 of the Basic Law and be satisfactory because the Pregnancy and Family Assistance Act, whose penal provisions will come into force, contains more far-reaching provisions than those contained in the German Democratic Republic law which has applied until now in the new federal states.

Mahrenholz Böckenförde Klein

Graßhof Kruis Kirchhof

Winter Sommer

Dissenting Opinions

of Vice-President Judge Mahrenholz and Judge Sommer

The legal regulation of pregnancy termination grips the innermost area of human life and affects central questions of human existence. One of the fundamental conditions of human life is that sexuality and the desire for children do not correspond. Women have to bear the consequences of this divergence. At all times, and in all cultures, irrespective of differences in moral and religious values, they have looked for and found ways out of the predicament of an unwanted pregnancy. Women have not let themselves be stopped from killing unwanted unborn life by the threat of severe and cruel punishments nor even by the existence of a danger to their own lives. In accordance with the change in their social status, women today largely solve this fundamental conflict by asking themselves whether they see in their personal circumstances a chance that they will be able to responsibly fulfill the tasks of motherhood. 373

Every regulation of pregnancy termination raises questions as to what belongs to the area of inviolable human autonomy and what right the state has to regulate. The legislature touches here on the boundary of whether an area of life can be regulated at all. It can approach the problem of pregnancy termination with a rule which is either better or worse, but it cannot "solve" the problem. In this case the state has lost its ability to be certain that it is passing the "right" legislation. This is shown by the lengthiness of the legislative process which began little more than a decade and a half after the last fundamental reform. It is also reflected in the length of the Senate's consultations and the fact that it views the consequences to be drawn from the legislature's duty of protection differently to the First Senate in its Judgment dated 25 February, 1975 (BVerfGE 39, 1 et seq.). The provisions of the Judgment make it possible for the legislature to continue along the path of the counseling solution which it started upon when it enacted the Pregnancy and Family Assistance Act. 374

There is no question that we too, like the Senate, believe that the state has a constitutional duty to protect unborn human life from its very beginning. We agree with the Senate that the duty to protect does not bar the legislature from shifting to a protection concept, which emphasizes counseling the pregnant woman and which avoids the threat of criminal punishment and the ascertainment of grounds needed to support an indication. However, we are of the view that the woman's final responsibility for the termination in the early phase after she has received counseling (recognized by the Senate as a legislative possibility), is necessary because of the woman's status under the constitution. To this extent limitations are placed on the duty of protection.(1). In our opinion, for the counseling regulations to provide effective protection for unborn life there must be a clear rule on which terminations are permitted and which are not. Here the Basic Law in any case allows a pregnancy termination following counseling to be justified (II.). It follows from this that § 218a, Section 1 of the Penal Code (new version) is constitutional and that a right exists to benefits from the statutory health insurance for terminations following counseling under § 24b of the 375

Fifth Volume of the Code of Social Security Law (III.).

I.

376 In the opinion of the Senate, a woman has a legal duty during the entire duration of a pregnancy to carry her child to term. Such duty only terminates after counseling if there are exceptional circumstances recognized by statute which satisfy the non-exactability criteria (cf. Judgment, D. I. 2. c). We do not agree with this. Within the constitutionally preset triangle between the woman, the unborn life and the state, the duty of protection, derived from the Basic Law, only places demands on the state and not directly on the woman. Duties placed by the state through its legislation on the woman for the protection of unborn life must at the same time take into account her position under the Basic Law.

377 Every statutory regulation of pregnancy termination must thus be reconcilable with not only the duty of protection for unborn life under Article 2, Paragraph 2 read together with Article 1, Paragraph 1 of the Basic Law, but also with the woman's right to have her dignity respected and protected (Article 1, Paragraph 1 of the Basic Law), her right to life and physical inviolability (Article 2, Paragraph 2 of the Basic Law) and her right to free development of her personality (Article 2, Paragraph 1 of the Basic Law) (cf. Judgment, D. I. 2. b)). The legislature is obliged to strike an appropriate balance between its duty to the unborn and the woman's position under the Basic Law. The Basic Law does not indicate what the balance should be. For this reason the legislature is given scope to weigh up considerations and make decisions, but the scope is restricted, on the one hand, by the prohibition on too little protection vis-à-vis the unborn life, and restricted, on the other hand, by the prohibition on too much protection vis-à-vis the woman, and ultimately restricted by the principle of proportionality. If the legislature makes it possible for a woman in the early phase of a pregnancy, following counseling which is a duty whose breach is punishable, to make a responsible decision regarding the continuation of the pregnancy and, in doing so, to disregard the prohibition on pregnancy termination and the legal duty to carry a child to term, then it is not exceeding its scope for weighing up considerations and making decisions. As long as the woman has no legal duty, her conduct is permissible as part of the exercise of her basic rights.

378 1. A pregnancy conflict is different from all other dangers to human life. The woman and the unborn do not face each other as potential "criminal" and potential "victim". Instead they form a unique entity in the shape of the pregnant woman - a "joined twosome" as it is called in the Judgment. According to the Senate, during the first weeks of pregnancy the new life still belongs completely to the mother and is totally dependent on her. The secrecy attached to the unborn, its helplessness and its unique dependence on its mother would appear to justify the view that the state has a better chance of protecting it when it works together with the mother (cf. Judgment, D. II. 3.).

This is really the starting point for describing the woman's constitutional position under the Basic Law in the early phase of a pregnancy. Further clarification is offered by the statements in the Judgment to the effect that the counseling regulation rests and is allowed to rest on final responsibility lying with the woman for a decision on whether to continue or interrupt her pregnancy. The legislature's assessment that effective protection for human life can only be achieved by working **with** and not against the mother, is constitutionally unobjectionable (cf. Judgment, D. II. 2., 3. and 4.; as well as the alternative draft on the Special Part of the Penal Code dated 1970, cf. BVerfGE 39, 1 <10 at p. 11> and the dissenting opinions of Rupp-von Brünneck/Simon, supra, p. 79).,

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It follows from the above (as clearly indicated by the Judgment) that the counseling regulation is not a frustrated escape from the frustrating failure of the indication solution. The new regulation is much more the result of an altered understanding of the personality and dignity of the woman. The Judgment's finding that a woman is capable of a responsible choice regarding the continuation or interruption of her pregnancy must, however, have consequences for the interpretation of the constitution. In our opinion, it forces us to solve the collision between the human dignity of the unborn on the one hand, and the dignity of the pregnant woman on the other, by achieving a balance between the two. This did not occur in the Judgment. Constitutionally-speaking the unique comparative problem raised by "joined twosomeness" cannot be dealt with by **simply juxtaposing** the embryo and the woman. The woman's **own** constitutional position is co-determined by her responsibility for another life because she carries such life within her. In saying this, we do not rule out that the other life with its own human dignity **also** "stands opposite" the woman. These **two** findings taken together make evident what is so special about the balance which has to achieved between the woman's position under the Basic Law and the duty of protection.

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The "joined twosomeness" changes in the course of the pregnancy. Whereas during the first weeks of pregnancy the woman and the unborn - as just stated - still appear as one entity, as the embryo grows their "twosomeness" becomes stronger. This developmental process is also of legal significance. It is true that the woman remains directly responsible, nevertheless she no longer bears final responsibility. The statutory affirmation of the balance between the pregnant woman's constitutional position and the duty of protection owed the unborn must take into account a **developmental element in the pregnant woman's constitutional status** because a pregnancy itself represents a developmental process. As the pregnancy progresses and the unborn grows, the weights in the balance shift. The nature of the woman's constitutional rights and the state's role in carrying out its duty to protect should be judged differently during the early phase of pregnancy and at an advanced stage of pregnancy.

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2. The developmental process requires the legislature to provide different kinds of state protection during the early and late phases of pregnancy. The state fulfills its duty to protect in the early phase by obliging a woman in a conflict situation, under threat of criminal punishment pursuant to § 218 of the Penal Code, to attend counseling

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whose focal point is the unborn life. After the conclusion of counseling, the woman's personal responsibility and her ability to reach a final decision come into play. Here the woman is a conversation partner and not an opponent. By not treating the woman simply as a container for the embryo, the state pays respect to the existence of "joined twosomeness", while fulfilling its special duty to protect. During the late phase of pregnancy the duty to protect defends the embryo's right to life by providing a threat of criminal punishment. As in other cases of collision, the duty to protect assumes, as a matter of principle, that there will be conflicting legal values. The legislature is left with the task of determining from which week of pregnancy the threat of criminal punishment should apply.

Whether or not the state's exercise of its duty to protect by using counseling has a stronger or weaker effect can only be decided empirically. What is important is that the state should not provide inadequate protection. This was the complaint made against the indication provisions which ultimately led to the conception of the Pregnancy and Family Assistance Act. As is quite justifiably thought by the legislature, protection must be effective (cf. Judgment, D. I. 2. b). We agree with the Senate that the legislature's assessment of the situation is justified. Namely, that protection is better provided during the early phase of pregnancy by counseling and later on by the penal law. 383

Nevertheless, the final responsibility conferred on the woman after counseling shows that she is given precedence regarding the decision on discontinuing or continuing the pregnancy. If one follows what the Senate says in its Judgment, there is actually no distinction between the two. However, we believe that this is an established constitutional right. As far as we are concerned, the image of "joined twosomeness" is not simply the description of an actual state of affairs, but in truth reflects the woman's constitutional status. In this case we are not simply dealing with the "woman's right to free development of her personality" (cf. Judgment, D. I. 2. c) bb), nor a variation of her "right to self-determination". If that were so, the woman would simply be the "opposite" of the embryo and the latter would not also be a part of her. Contrary to what the Senate believes (cf. Judgment op. cit.), if one assumes that the woman enjoys legal precedence during the early phase of pregnancy, the right to life of the unborn will only come into play if the mother does not interrupt the pregnancy. Here the Senate must ask itself how it can accord the unborn's right to life significance in its Judgment in a more effective way than through counseling. 384

The legal system has taken into account the developmental process described since the enactment of the Fifth Act to Reform the Penal Law dated 18 June, 1974 (Federal Law Gazette I, p. 1297), which introduced for the first time the twelve-week time limit into the penal law on pregnancy termination. The early phase of pregnancy characterized by that legislation has been retained by the First Senate's Judgment over and beyond very different forms of penal law, and in each case, it has been done with significant consequences for the limits of the state duty to protect. In addition, all of the legislative drafts preceding the adoption of the Pregnancy and Family Assis- 385

tance Act which were introduced by fraction or parts of fractions of the German parliament, assumed the existence of this early phase.

386 The enactors of the Pregnancy and Family Assistance Act took into account the woman's constitutional rights by granting her the chance of resolving her conflict for a limited period of time at the beginning of the pregnancy. In doing so they were fulfilling their duty of protection by placing an obligation on the woman to attend counseling before undergoing a termination. It is only after such limited period of time has elapsed that the woman has a duty to take responsibility for the unborn life. This way a reasonable balance between the fundamental rights involved in a pregnancy conflict is created.

387 3. The term "joined twosomeness " can be understood as a terminological approach to the right way of comprehending a unique fundamental rights situation. The natural developmental aspect of pregnancy encaptured in the term should be understood in terms of fundamental rights theory - namely as the development from the woman having a final responsibility for the unborn life, which has its roots in the respect for her personality (Article 1, Paragraph 1 read together with Article 2, Paragraph 1 of the Basic Law) to the acceptance of final responsibility for the unborn child by the state. The Dutch Penal Code has logically allowed the elements which constitute a pregnancy termination to end (around) the 24th week of pregnancy and punishes from this time on termination as manslaughter if "it can honestly be expected that it (the fetus) will be able to survive outside the mother's body" (Article 82a of the Penal Code, cited from Eser/Koch, Schwangerschaftsabbruch im internationalen Vergleich, Part 1, Europe, 1988 at p. 1073). This penal law thus regards the unborn life during the last phase of pregnancy as a person in the complete criminal sense.

388 In contrast, non-exactability (Judgment, D. I. 2. c) bb) as a criterion does not do justice to the uniqueness of the situation. The Senate adheres to it in the shape of counseling. Even without a general emergency indication as a justification ground, the legal system has to make it clear that a pregnancy termination is only permissible in exceptional circumstances where the exactable level of sacrifice for the woman is exceeded. This is in order to provide the necessary guidance for the pregnant woman involved and for general legal awareness regarding the legal duty to carry a child to term and its limits (cf. Judgment, D. III. 1. c).

389 We consider that non-exactability is an unsuitable criterion for providing such guidance. We think it is asking too much of a woman that she should have to subsume her conflict situation under the criterion of an exactable level of sacrifice which uses the two statutory indications for orientation (cf. Judgment, D. I. 2. c) bb). After all the conflict situation associated with an unwanted pregnancy is experienced differently by every woman depending on her physical and psychological state. In such a situation she will only be able to accept an "exactable level of sacrifice" where she sees the chance of, and a future for, responsible motherhood extending beyond the bearing of the child (cf. Article 6, Paragraph 2 of the Basic Law).

From the legal point of view, non-exactability as a criterion leads (and misleads) to subsumations whose standards become vaguer the more a conflict situation depends on the woman's subjective view. Such subsumations can only be influenced by legal rules to a limited extent. It is inevitable that they will be strongly influenced by sociological factors (differences in religion, city/country differences etc.) This made the general emergency indication under the previous law doubtful especially from the point of view of the principle of clarity and definiteness contained in Article 103, Paragraph 2 of the Basic Law (cf. on this too the dissenting opinions of Rupp-von Brünneck/Simon, BVerfGE 39, 68 <91>). No special elaboration is needed on the fact that "self subsumation" by the woman during and after counseling made the difficulties greater. 390

Considerations based on non-exactability as a criterion assume the existence of conflicting legal values of which one is destroyed. Where such assumption is made, the state's duty to protect can logically only be limited by the justifying emergency in § 34 of the Penal Code. If not, there is a danger of the exactability criterion leading to the woman's being give "priority" - something which the Senate rejects (cf. Judgment, D. II. 3.). Of the initiators of the statutory drafts submitted to parliament, obviously only the initiators of the so-called Werner draft (German Federal Parliament Publication 12/1179), which was restricted to the medical indication, were aware of the problem. The conversion into law of the idea behind exactability in or since the Judgment of the First Senate in BVerfGE 39, 1 et seq. (in particular in the wording of the general emergency indication in the Judgment's order) did not match the status of unborn human life as a legal value to the extent that the unborn human life's position as compared to the woman's position under the Basic Law was, not taken into consideration. 391

In hindsight, in our view, the limits of the state duty to protect therefore manifest themselves in the grounds needed to support an indication, especially in the general emergency indication, as an expression of the comparative balance between fundamental rights, which are related to each other in a unique way, and as an expression of the recognition of the final responsibility the woman has to protect the embryo in the early phase of pregnancy - even if restricted up to now to circumstances which let themselves, in the opinion of the Federal Constitutional Court and the legislature, be objectified. 392

The Senate does not use the exactability idea in the way the First Senate did - that is to really and effectively distinguish for the protection of life between justified and reprehensible terminations (cf. BVerfGE 39, 1 <58>). In order to keep counseling open, the term non-exactable is no longer juxtaposed against the term exactable continuation of pregnancy leading to punishable termination. This way the exactability criteria changes its legal meaning. By only serving the orientation of the woman making a decision in the case of an emergency indication (which is legally irrelevant) and because termination is **in any case** illegal, the criterion is only rooted in the moral rather than in the legal sphere. A duty to protect according to certain standards and a practical duty to protect can no longer be combined. To this extent the counseling regulation is 393

at loggerheads with the indication model.

5. These considerations cannot make a pregnancy conflict practically- speaking any less severe. They do show, however, **why** the Judgment of the Federal Constitutional Court of 25th February, 1975 (BVerfGE 39, 1 et seq.) for the first time adopted a approach which drew distinctions, and above all, why the step towards a counseling solution could be justified. The present decision makes this change clear. It treats the rights of the woman and the unborn as being rooted in their human dignity (cf. Judgment, D. I. 2. b) whereas the First Senate regarded this as true only in respect of the unborn life (cf. BVerfGE 39, 1 <41>). In its opinion, the woman only had a right to free development of her personality (Article 2, Paragraph 1 of the Basic Law) so that by using Article 1, Paragraph 1 of the Basic Law for orientation, it was predestined in its decision to give precedence to the protection of unborn life over the pregnant woman's right to self-determination (cf. p. 43 op. cit.). 394

II.

Notwithstanding the remarks made under I., the Basic Law does not in our view require that terminations carried out in the early phase of pregnancy by a physician following counseling, which are not punishable, should be refused (penal) justification unless a third party has determined that the continuation of the pregnancy would be non-exactable. 395

The justification of terminations which take place following counseling is the indispensable keystone of the counseling regulation. The acceptance of an exceptional situation, which justifies a termination, is reconcilable with the Basic Law even without a third party ascertaining that the preconditions for the exceptional situation exist. (1.). A judgment outside the penal law that pregnancy termination is illegal does nothing in our opinion to help fulfill the state's duty to protect unborn life (2.). 396

1. The counseling regulation relies on the woman’s assuming final responsibility after attending a counseling session. The woman's retention of the wish to terminate the pregnancy, even following counseling and a consultation with a physician, amounts, as a matter of principle, to a responsible decision. This decision must be recognized by the legal system, if counseling is to develop the protective effect it is supposed to have. Counseling cannot succeed if a woman's decision against continuing a pregnancy is excluded from penal sanctions, but nevertheless treated outside the penal law as not justified and made subject to legal disadvantages. In its approach to these cases the legislature may normally attach a justification to the woman's decision without being in breach of the constitution. There is no need to provide for a third party to make a finding of facts, which would anyway be irreconcilable with the prerequisites for the effectiveness of the counseling regulation. When the counseling regulation takes this form and is consistently put into practice, it is better suited than the previous law to offering effective protection for unborn life generally. This also leads to there being more effective protection for each individual unborn. 397

a) The state can only achieve protection for the unborn during the early phase of pregnancy by making the woman its ally in fulfilling its task of protection. It can only succeed in doing this if it takes her ability to make a responsible decision as well as her special sensitivity at the beginning of a pregnancy seriously. The female counselors who were heard during oral proceedings on the way counseling is in practice, agreed unanimously that women have a natural willingness to protect the unborn growing inside of them and experience their pregnancy conflict as an emergency situation in which they want to act responsibly and conscientiously. They experience their conflict as highly personal and thus protest against having it judged by a third party according to standards of exactability. Consequently, if the legal system wishes to protect unborn life, it must leave the woman room to make a responsible decision - in other words it is not enough to place responsibility on the woman, it must trust her to exercise it. For this reason, we see in the woman's option to remain silent during counseling an important element of openness. Here our opinion differs to that of the Senate (see Judgment, D. IV. 1. b). If the woman is to make a responsible decision, her decision must be recognized without legal reservations. Only then can she really be open during counseling. 398

b) The starting point for statutory regulation must be that the pregnant woman is, as a matter of course, generally capable of making a responsible decision sufficient to support a justification. She will be aware of the conflict associated with a pregnancy termination at the latest after completing the obligatory counseling and will know that the unborn growing inside of her is of high value. Women do not decide in favour of a termination light-heartedly or without reason (cf. the dissenting opinions of Rupp-von Brünneck/Simon, BVerfGE 39, 68 <88>). It also goes without saying that in deciding whether to continue or terminate a pregnancy a pregnant woman is not unconcerned about right and wrong. As she well knows, in a pregnancy conflict fundamental legal values clash. Even if she decides not to carry the child to term, she would rather be accepted than rejected by others. In having the termination she does not only claim advantages for herself. At the same time she is perhaps turning her back on the expectation of having a child and the wish to actually have it. Whatever the case there is serious self-hurt involved and an operation which affects her very being. All this was confirmed by counselors with practical experience during the oral proceedings. 399

From what has been said above, the legislature may conclude there is sufficient evidence of, and no further need to verify, the fact that there is a conflict situation behind a wish to terminate. In such situations, the interests of the woman which are worthy of protection, make themselves felt with such intensity that the state cannot demand that the pregnant woman still give precedence to the rights of the unborn (cf. BVerfGE 39, 1 <50>). To say this is not to recognize a woman's unlimited right to "self-determination" nor to abandon the legal protection of unborn life as is shown by the threat of criminal punishment for terminations undertaken without prior counseling contained in § 218 of the Penal Code (new version). The Senate's opposing view (cf. Judgment, D. III. 2. b) that the legislature may not conclude that an emergency exists 400

because the wish to terminate is maintained even after counseling has taken place, leads to a dilemma: either one does not trust the counseling to have any real influence or one does not trust the pregnant woman to make a responsible decision. The Senate did, however, express its trust in both. There is no third possibility.

The danger that there might be some abuse does not change any of this. Every freedom to make a responsible decision, without which protection of life through counseling would be unimaginable, includes the possibility of abuse. A complete defense against abuse would cancel the freedom's chances of protecting life. Besides, the requirement of indication grounds has also lent itself to abuse. 401

c) In regulating pregnancy termination, the Basic Law does not stand in the way of the admissibility of a special justification based on supporting indications because from the start a termination in the early phase of pregnancy is not subject to the traditional distinction between an act and an omission (cf. § 13 of the Penal Code). It is not sufficiently covered by evaluating it as an injury to a legal value through commission of an act. On the contrary, the woman, in whose person legal values simultaneously unite and conflict in a unique way, relies on the limits on self-sacrifice of personal rights to refuse to assume the position of a guarantor with particularly onerous duties to answer and care for another. 402

2. The constitutional duty to protect demands effective protection of unborn life (cf. Judgment, D. I. 4.). If protection depends on a counseling regulation, this can result in protection not being given because the woman is denied justification for her behavior. This applies to the direct protection of each individual embryo (a) as well as to the indirect protection of unborn human life through the upholding and strengthening of general legal awareness (b). 403

a) The fulfillment of constitutional duties of protection should occur, as does the resolution of conflicts between fundamental rights, by statute. What should emerge from the constitutional duty to protect, vanishes unless it can be reflected in a statute. The counseling regulation contained in the Pregnancy and Family Assistance Act only makes a termination in the early phase of pregnancy without counseling punishable. In this way, the legislature guarantees legal protection for the unborn life - using the penal law - even if it does use a different method to the indication solution. Nevertheless, in respect of the counseling regulation the Senate still considers it necessary that the limits on a woman's legal duty to carry a child to term be laid down according to criteria based on exactability because this will provide guidance for counseling and for awareness of the law generally (cf. Judgment, D. III. 1. c). In doing so, the judges rely on the First Senate's Judgment (BVerfGE 39, 1 <48 et seq.>), but they do not take into account that the distinction made there between permitted and forbidden pregnancy terminations was also correctly carried over into the formulation of the grounds needed to support an indication. **This** function of a decision on exactability does not apply in the case of the counseling regulation as far as general emergency situations are concerned. Moreover, according to the Senate's view, the statutory 404

standards should not have a bearing on the legal assessment of a termination, which a woman demands and has carried out, following counseling in the early phase of pregnancy. The woman will in any case be denied justification for her action due to the presumed compulsory requirements of the protection concept (cf. I. 4.) *supra*). The Senate transfers the legal consequences demanded by it (cf. Judgment, D. III. 2. a) to the interpretation of § 24b of the Fifth Volume of the Code of Social Security Law (cf. Judgment, E. V. 2. b). Irrespective of the fact that the refusal of entitlement to benefits from the statutory health insurance is not a suitable means for expressing legal disapproval, such refusal cannot in any case (as the Senate agreed) directly protect individual unborn life.

Indirect protection for the unborn life cannot be achieved through giving the pregnant woman "legal orientation" regarding the protection of life. As emphasized by it, the Senate sees denying individual women the certainty that a termination, undertaken after counseling is sanctioned by the legal system, as a component of protection in the counseling solution (cf. Judgment, D. III. 2. b), cc). We regard this as a retrogressive step vis-à-vis the previous legal position with the indication solution. The refusal of the justification means the woman is made to pay the price for the new protection concept. The legal clarity provided by a rule is replaced for her with a situation in which her action is treated as not allowed, in spite of the fact that she might possibly find herself in extreme distress. That for us conflicts with the fundamental idea underlying counseling and undermines the whole effectiveness of the protection concept (cf. above under 1.). We also do not believe that it is permissible for the Senate to channel the state in the fulfillment of its duty to protect the unborn into constitutional boundaries, whose effects include denying pregnant women an answer to the question of whether they are acting rightly in having a termination. That places them almost in the position of minors within the state's system of protecting life. In our opinion, there is no more drastic way of weakening a woman's legal awareness than not letting her know whether what she is doing is legal. But, this is exactly the consequence if a responsible decision made by her is not recognized as justified, in spite of the statutory guidelines which are there for her orientation. This also raises constitutional objections which we do not wish to go into. 405

b) In the Senate's view it is also necessary to disallow the justification so that the impression is not created in the public's general legal awareness that a termination taken after counseling is allowed (cf. Judgment, D. III. 2. a). We, on the other hand, believe that in the area of the protection of life, legal disapproval outside the penal law does not independently shape the population's legal convictions. 406

In our view, legal awareness - particularly in the area of pregnancy termination - arises from individual moral views which are in turn influenced by upbringing, personal fate and social values. A judgment that certain conduct is improper, which is what the Senate has in mind, does not achieve anything in this case. Even penal prosecutions and convictions for terminations under § 218 et seq. of the Penal Code (old version) had little effect. The German parliament has submitted that according to sur- 407

veys of the Allensbach Institute in 1983, 1987 and 1988, two-thirds of Germans regarded pregnancy termination as allowed. Under the new concept, penal law has a more restrictive area as well as a corresponding clearly-defined, preventative area (cf. § 218 of the Penal Code (new version) on the one hand, §§ 218a, 219 of the Penal Code (new version) on the other). Where law is supposed to have determinative force, what is important are such standards and not social insurance law interpretations. The latter have hardly any determinative force. On the contrary: if as part of a protection concept which relies on counseling and final responsibility lying with the woman, the legislature withdraws the threat of criminal punishment because it has proven itself to be a blunt sword, the public's legal awareness must then be shaken if legal disadvantages in insurance law replace the threat of criminal punishment intended to protect a legal value of the highest order. Such legal disadvantages must then - in the Senate's view - bear the burden of the constitutional judgment of impropriety.

Even as a matter of fundamental rights doctrine we believe that it is overstretching 408
the constitutional duty of protection to expect it to be able to mould general legal awareness. There is, in addition, a legal question as to whether, and in the event of an affirmative answer, how, constitutional rules with practically no sanctions attached to them, can determine legal awareness. Conclusive findings on this point do not exist and the mere convictions of those offering ideas on this cannot be decisive. We do not even find the Senate's assumptions plausible. The same rationale could be used for asserting that it must confuse the way the law is generally regarded, if actions taken against a legal value, such as unborn human life, are constitutionally prohibited to a certain degree, but that the limits of the prohibition have two consequences. First, because of the nature of the protection concept they are not able to go so far as to justify the woman's action and secondly, due to this unclarity, and without regard to the distress in an individual case, the grant of benefits by the statutory health insurance is refused.

The First Senate also only referred to the **penal** rule's power to increase legal 409
awareness and indeed the "attempt" to achieve better protection for life through a penal rule which allows for the making of distinctions (cf. BVerfGE 39, 1 <65 et seq.>). It also thought that the mere existence of a threat of criminal punishment was capable of influencing the values and behavior of the population (cf. BVerfGE op cit. p. 57; cf. too BVerfGE 45, 187 <254 et seq. >). That, however, is not the point of the statute under examination here. The legislature has abandoned this "attempt" by the penal law. The Senate approves of this too.

During the oral proceedings concerning the applications in question here, Prof. Dr. 410
Eser alleged that excluding certain circumstances from the category of punishable behavior instead of describing them as "not illegal", must be understood in this area as tantamount to a surrender of the value to be protected (cf. too Lencker in: Schönke/Schröder, StGB, 24th ed., 1991, Preliminary Note to §§ 13 et seq., marginal note 17). The First Senate regarded it as unimportant for legal awareness whether

the previous § 218a of the Penal Code narrowed the definition of an offense under § 218 of the Penal Code or whether it provided a justification ground or whether it only contained grounds which exclude guilt or a penalty. In any case, the impression must arise that a termination is "legally permissible" (cf. BVerfGE 39, 1 <53>) The Second Senate sees the matter differently. This too shows how little certainty exists in the handling of means for shaping legal awareness. In view of this, in fulfilling its state duty to protect it cannot be the Federal Constitutional Court's task to either remove certain actions from the definition of an offense or to declare the actions not illegal, thereby deciding on specific questions of penal law doctrine. These are issues for the legislature and the competent courts.

III.

1. The Senate is of the view that § 218a, Section 1 of the Penal Code (new version) 411
is constitutionally invalid as a justification ground because it does not make the existence of an emergency or conflict situation, in which carrying the child to term would be non-exactable for the pregnant woman, a prerequisite for a termination nor does it define more closely such situation, and because it does not make the justification dependent on ascertainment by a third party (cf. Judgment, E. I. 2.). For the reasons given under I. and II., we consider § 218a Section 1 of the Penal Code (new version) to be constitutionally valid. To the extent that the provision creates a general justification ground for pregnancy terminations, which occur under the conditions more closely defined in it, it does not contravene the state duty of protection arising from Article 1, Paragraph 1 read together with Article 2, Paragraph 2 of the Basic Law. We agree with the Senate's Judgment to the extent that it declares § 218a, Section 1 of the Penal Code (new version) unconstitutional on account of its connection with § 219 of the Penal Code (new version), which contains deficiencies concerning the regulation of counseling's organization and the supervision of counseling institutions (cf. Judgment, E. I. 4. and II. 1.). It is possible that the regulation of the content and goal of counseling required by the Basic Law has not been expressed in § 219, Section 1 of the Penal Code (new version) with the clarity and plainness which would have been appropriate for such regulation (cf. Judgment, E. II. 2.).

2. The payment of social insurance benefits for pregnancy terminations carried out 412
by a physician during the first twelve weeks following conception, does not in our opinion contravene the Basic Law. We do not, of course, regard it as constitutionally **necessary** for the legislature to include the carrying out of non-illegal terminations by a physician, in addition to the carrying out of medically indicated terminations, in its list of services to be provided by the statutory health insurance. If it does do so, which would be in the interests of women's health, it must define the statutory duty to pay benefits borne by the whole community in a way free from distinctions which are not factually justified. No exception can then be made for pregnancy terminations undertaken pursuant to the counseling regulation. § 24b of the Fifth Volume of the Code of Social Security Law is thus not subject to the restrictive interpretation which the Senate views as necessary (cf. Judgment, E. V. 2. b). As far as we are concerned, this

follows from the fact that on the whole pregnancy terminations are allowed following counseling and are to be treated as justified or can indeed be so treated.

We also do not share the constitutional concerns expressed by the Bavarian State Government that social insurers, being compulsory associations under public law whose members' basic rights must be taken into account, may not be burdened with any non-insurance charges. The Senate did not need to decide this issue (cf. Judgment, E. V. 5. b). The provision of benefits by insurers for terminations allowed by the legal system, cannot infringe the basic rights of the insurers' members who pay contributions, even if those members have contrary ethical or moral convictions (cf. BVerfGE 78, 320 <331>). 413

The view of the majority of the Senate that § 24b of the Fifth Volume of the Code of Social Security Law may not be applied to pregnancy terminations following counseling, should still not be followed even if such terminations - as required by the Judgment - could not be declared justified (not illegal). Inasmuch we agree with the dissenting view of our brother Judge, Böckenförde. 414

IV.

We have doubts on two counts regarding the Senate's elaborations on the inclusion of the physician in the protection concept of the counseling regulation (cf. Judgment, D. V.). 415

1. Contrary to the Senate's view (cf. Judgment, D. V. 2. c), the constitutional duty to protect does not in our opinion require that the breach of a medical duty in connection with a pregnancy termination, and in connection with the preceding counseling and supply of information to the woman, be made punishable by the legislature under the **penal** law. 416

2. The subject matter of these proceedings gave no reason for making the statements in the Judgment whereby it was said that the duty to pay maintenance for a child can never be damage (cf. Judgment, D. V. 6.). Such statements amount to obiter dictum and, in addition, dispense with the necessary examination of the exhaustive argumentation which the VI. Civil Senate of the Federal High Court used to explain the conditions (as limited by it) under which damage to property can occur (BGHZ 76, 249 <253 et seq.>; BGH, NJW 1984, p. 2625 - 2626). 417

Mahrenholz Sommer

Dissenting Opinion

of Judge Böckenförde

I concur with the essential points in the Judgment, in particular, the statement that non-indicated pregnancy terminations undertaken by a physician during the first twelve weeks following counseling, should be seen as "not illegal" and therefore as allowed (cf. D. III. above). I do not, however, wish to agree with the comments in the Judgment (under E. V. 2. b) partially anticipated in D. III. 1. c), whereby social security benefits for such terminations are ruled out for constitutional reasons. It is for the legislature to decide on this point. 418

The question is not whether such benefits are perhaps constitutionally advisable - probably they are not - but whether they are forbidden from the outset by the constitution. 419

1. I concur with the Senate, for the reasons set out in the Judgment, that terminations undertaken after counseling should be excluded from the threat of criminal punishment, but not generally declared justified (not illegal). As rightly pointed out by the Senate, only certain exceptional circumstances, which place such a burden on the woman as to make her legal duty to bear the child seem non-exactable (cf. D. I. 2 c) bb) - taken up more closely in D. III. 1. c), can lead to regarding pregnancy terminations as justified. Experience does not tell us that this is the case, nor can we assume that such circumstances generally exist, where terminations occur follow counseling. The same applies vice versa: an assumption that terminations following counseling do not generally fulfill these prerequisites is just as unfounded. Consequently, from the point of view of substantive law terminations following counseling form (irrespective of the non-existence of an ascertainment by a third party) an undivided group of justified and unjustified terminations. 420

2. Thus, the question arises in social security law (which is subordinate law) as to how this undivided group of terminations following counseling should be dealt with in regards to the granting of insurance benefits. As stated by the Senate (cf. D. III. 1. c), the protection concept underlying the counseling regulation is based on the idea that generally, and without exception, there should be no need to ascertain the existence of an indication based on an emergency situation. The group of terminations following counseling cannot be divided into illegal and non-illegal terminations. They must be treated uniformly and can only be treated uniformly. The Senate views the constitutional duty to protect unborn human life as requiring that all such terminations - because their legality has not been established nor can be established for conceptual reasons - be treated as not justified and consequently as illegal. Therefore, according to the Senate, they should not eligible for social insurance benefits. Such ineligibility may possibly be the result of legislative enactment. But, that it be made mandatory by the constitution and that every other solution should be considered a breach of the constitution, does not follow either from the duty to protect unborn human life or otherwise from constitutional law. By regarding this as a necessary consequence of the 421

generally required legal disapproval of pregnancy termination and of the abstract principle that the state is generally not allowed to be involved in acts, whose legality is not established, the Senate is disallowing results which are themselves part of the counseling concept.

a) The whole group of terminations following counseling is removed from the division into the alternatives of legal and non-illegal. As an indivisible whole, the group presents itself as something different to the alternatives. Nonetheless, the Senate considers it constitutionally necessary to treat them uniformly as illegal with the ensuing social insurance law consequences. 422

This is not made necessary by the principle formulated by the Senate, which I also support, namely that the counseling regulation cannot offer a chance of justification through the general emergency indication, because it dispenses with an indication procedure. This principle lays down that the woman - irrespective of how her action is judged according to substantive law criteria - cannot have her actions considered justified formally. It is, however, not a mandatory result of the principle that terminations following counseling, which lack justification, must also be indiscriminately and irrefutably classified as substantive wrong. Nor must such terminations be so classified when they satisfy the substantive criteria for legality formulated by the Senate itself which include - in conformity with the Judgment of the First Senate in 1975 (cf. BVerfGE 39, 1 <49 - 50>) - exceptional situations determined according to the non-exactability criteria as well as a qualified social emergency situation (cf. D. I. 2. c) bb); D. III. 1. c). 423

The Senate finds the uniform treatment of terminations following counseling wrong because it lets itself be guided not by the conflict situation and the position under substantive law, but alone by the non-existence of a formal justification procedure. However, neither the duty to protect unborn life nor the principle of a state based on the rule of law can require that pregnancy terminations, which comply with the legal system's substantive requirements, be irrevocably qualified as substantive wrong in respect of all questions arising from the counseling model. With such "consequences" the state based on the rule of law would turn against itself. 424

b) The uniform treatment of terminations following counseling as illegal for social insurance law purposes leads to a general refusal to provide social insurance benefits. The Senate considers this necessary as a consequence of the required fundamental legal disapproval of pregnancy terminations. All those terminations, which according to the Senate's substantive criteria fulfill the requirements needed to be justified, are thus also made subject to legal disapproval. 425

Legal disapproval of these terminations too seems even more questionable if the Senate (whereby I agree with it) continues to adhere to the indication solution when it comes to the implementation of the counseling concept: Termination of a pregnancy is wrong, as a matter of principle, and forbidden because it is the killing of human life and only special exceptional circumstances, which need narrow definition, will allow it 426

to be seen as justified from a substantive point of view (cf. D. III. 1. c). The counselors are obliged to satisfy themselves that the woman considering a termination is aware of the legal position regarding the extent of the legal duty to carry a child to term and, if necessary, they are obliged to correct any wrong impressions she might have.

If women who are considering pregnancy termination are called upon to show responsibility in this way and if they are expected to act according to the requirements of the law, it is then contradictory to demand at the same time a constitutional prohibition whereby in all legal areas, other than penal law, women who have had a termination are to be treated without distinction as having acting wrongly and are to have no chance to defend themselves. Women are supposed to use the legal system's requirements for the protection of unborn life as orientation, nonetheless even when they do their actions are and remain - by virtue of the constitutional order - wrong. That is not only contradictory - it also affects the woman's person, her honor and legal status. 427

c) There is also no reason to follow the Senate when it states that for the counseling concept to be effective, it is not necessary that the final responsibility for a termination which is left to the woman be given recognition in social security law (cf. E. V. 2. b) cc). It is not important whether the counseling concept in order to be effective requires the payment of insurance benefits for a termination as a sensible protection measure - there is no denying this. What is, however, important is that the counseling concept, as stated by the Senate, excludes the necessity of determining the legality of terminations other than in the case of the special indications. If this is a counseling concept requirement (cf. D. III. 1. c), then at the same time the additional requirement cannot be inferred that women who undertake a termination according to the substantive criteria spelled out by the Senate, should still be regarded as acting illegally if the Senate is to be true to its own premises (cf. D. III. 3.). A situation exists in which it is not necessary to treat terminations as wrong, although it has not been ascertained that they are justified, because to do otherwise would interfere with a woman's right to free development of her personality. The Senate recognizes that a woman must be protected from having to reveal having had a termination and the reasons for it outside of counseling and outside of a medical consultation to other persons, such as her employer, since that would risk infringing her right to free development of her personality, and it justifies for this reason the continuation of the payment of wages in the case of terminations following counseling (cf. E. V. 4.). However, is there not at least to the same extent, if not to a greater extent, an infringement of the woman's right to free development of her personality when all terminations following counseling are uniformly treated as wrong, and she has no chance of changing or questioning this, even if the termination conforms to the substantive requirements of the legal system? 428

d) Although it is necessary to support and strengthen legal awareness regarding the right to life of the unborn, this does not require an absolute constitutional prohibition on the provision of social insurance benefits for terminations following counseling. I do agree with the Senate that strengthening legal awareness and keeping it alive is of 429

great significance for the protection of the unborn, and further that terminations must not be allowed to seem normal in society and be regarded as having been given the legal "go ahead". Accordingly, it is important to create and support some kind of legal awareness, which is able to distinguish between justified and wrongful terminations pursuant to the constitutional measures outlined. This type of legal awareness is not encouraged, but rather damaged if, on the one hand, its importance for legal orientation is strongly emphasized - as is done by the Senate (which I agree with) - and if, on the other hand, in practice the difference between right and wrong is made irrelevant by the constitution. Even the women who find themselves in an emergency situation, which may justify a pregnancy termination, are irrevocably subjected to legal disapproval and excluded from social insurance benefits. Irrespective of the special situation they find themselves in, these women are subjected to the burden of being treated by the law as though they had acted unlawfully; what seems to be most important of all is that nothing has to be paid.

3. My objections to the Senate's view do not, however, imply that I believe that under 430
the constitution terminations following counseling should be financed. State financing is prevented by the principle, rightly recognized by the Senate, that illegal terminations may not be financed by the state or procured by it because of the requirements applying in a state governed by the rule of law and the protective duty owed towards unborn life. This, however, exposes the dilemma caused by treating terminations following counseling as an indivisible entirety. Such dilemma is a necessary consequence of the counseling concept and it cannot be resolved in favor of one side or the other without there being some suffering. If in respect of the entirety of terminations following counseling no distinctions can be drawn between those which are legal and those which are illegal, by using the points given by the constitution, then it is not possible to clarify these points by a financial regulation in one form or another. Criteria for determining when pregnancy terminations will be allowed and when they will be forbidden can be deduced from the constitutional duty to protect. No information is given on how to treat an indivisible entirety. However, it cannot be a requirement of the duty of protection, and consequently a constitutional requirement, that the dilemma be resolved in favor of one side or the other. On the contrary, the legislature is called upon to find a regulation and make a decision.

4. Thus, the essence of the difficulty, which the Senate in my opinion did not ade- 431
quately deal with, emerges:

From the constitutional point of view, the Senate's critical step lies in its shift to a 432
protective concept in the form of the counseling regulation. As a matter of principle, this shift is possible within the limits of the constitutionally required protection of unborn life because the state's protective duty is aimed at achieving effective protection of unborn life through legal rules and practical measures. The duty cannot be fulfilled if there is on the regulatory level a uniform rule directed at the strict protection of unborn life, which, nevertheless, and for whatever reason, is not transferred or able to be transferred into really effective protection for individual human life. The reasons for

this are set out in the Judgment in detail.

If this step is seen as a legitimate way to fulfill the state duty to protect unborn life - irrespective of the details of its implementation - then there must be acceptance of the requirements and conditions for its effectiveness. At the same time such step must be set in relation to other legal positions and views and "be found a place somewhere in the middle". On occasions that requires compromises, which may appear painful when compared to a complete regulatory concept, but which are nonetheless unavoidable. In this sense the counseling concept has its "costs". They cannot be recovered later through, for example, financing - without this raising new objections because other important legal positions are then overlooked. 433

If the legal regulation of the termination problem does not simply wish to concern itself at the legislative level with rules strictly aimed at protecting unborn life, whose practical effect is left open, but if it instead also wishes to be concerned with achieving, as far as possible, effective protection for individual, unborn human life, it will always be and will always have to be a kind of "emergency order". A legal order which concentrates on legal rules only, but does not apply them to provide really effective protection for unborn life, does not contribute to the protection of life and thus does not fulfill the task the law has. However, a legal rule, whose aim it is to be successful in effectively fulfilling the law's social tasks, must also lay down its own conditions for being effective. These emerge just as much from the human condition as from the particular nature of a society. It cannot be the law's task, should the occasion arise, alone or primarily to change such conditions. It is possible for the law to make a contribution, but then only to a limited extent. 434

Böckenförde

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