Articles

Section 219a: A Eulogy

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The article discusses whether the repeal of section 219a of the German Criminal Code - the infamous prohibition on advertising for abortion- was motivated and justified by virtue of the ban being unconstitutional. It is observed that the provision in its latest iteration did not criminalise medical professionals for publicising the very fact that they perform abortions at at all, but rather the manner in which they are performed. It is then examined whether the provision could have been interpreted and applied more restrictively, by reference to the concept of advertising.

Coming to a negative conclusion as regards the necessity for a restricted interpretation, it is tested if the provision was proportionate in relation to its goal of protecting unborn life. Due to a lack of concrete evidence, either for any information or supply crisis, or for any apparent unsuitability in reducing the number of abortions, the prohibition is held to be proportionate. Conversely, it is argued in light of the indeterminate success of the ban that the repeal did not infringe on the German state's duty to protect the unborn either. However, it is concluded that rehabilitating physicians that have been sentenced under the section 219a constitutes a violation of the principle of the separation of powers. Furthermore, the legislature might well find itself being obliged to reintroduce an advertising ban if abortion rates were to rise in the future. Lastly, it is warned that the rhetoric and arguments in favour of the repeal set a dangerous precedent contradicting settled constitutional jurisprudence.

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A. Introduction

Up until July of last year, the German criminal system punished the deed of advertising abortion services, means, objects or procedures by up to two years imprisonment, under section 219a of the German Criminal Code (*Strafgesetzbuch – StGB*).[1] Spectators, both foreign and domestic, were quick to point out that the repeal occurred on the same day of the Dobbs decision wherein the US Supreme Court overturned Roe v Wade.[2] Some also reproduced the usual criticisms of section 219a, among which the (supposed) criminalization of mere information provided by doctors to their patients,[3] its Nazi-era background and its utility for anti-abortion activists harassing abortionists,[4] or its obsession with protecting the unborn being founded on, or at least bordering on, religious fundamentalism.[5]

At first sight, depending on the reader's prejudice, one of two aspects of this scenario must seem rather strange. Some will undoubtedly be surprised to learn that merely advertising for abortion was deemed worthy of prosecution. Others will be confused by the German parliament's decision to scrap the advertising ban without also getting rid of the abortion

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1 Note on translation: In dealing with German legal terminology, I have elected to keep the original terms and abbreviations in cursive and in brackets, accompanied by English clarifications. On any further occurrence, I have paraphrased German vocabulary as far as possible. Wherever there is a somewhat commonly used English abbreviation, I have included it for the reader's information but have kept the German shorthand.

2 Christopher F Schuetze, 'Germany Ends Ban on Abortion Advertisement' (*New York Times*, 25 June 2022) <www.nytimes.com/2022/06/24/world/europe/germany-abortion-law.html> accessed 10 August 2022); Johann Justus Vasel, 'Liberalisierung und Deliberalisierung – Zeitenwenden im Abtreibungsrecht' (2022) 75 NJW 2378, 2381.

3 Associated Press, 'German lawmakers vote to end ban on 'advertising' abortions' (*ABC News*, 24 June 2022) <abcnews.go.com/Health/wireStory/german-lawmakers-vote-end-ban-advertising-abortions-85629124> accessed 10 August 2022.

4 Philip Oltermann, 'Germany scraps Nazi-era law that barred doctors' abortion ads' (*The Guardian*, 24 June 2022) <www.theguardian.com/world/2022/jun/24/germany-scraps-nazi-era-abortion-law-that-criminalises-doctors> accessed 10 August 2022.

5 Alexej Ulbricht, 'Who can talk about abortion? Information, offence, freedom of speech, and the advertising ban in Germany' (*Politics*, 7 May 2021) <journals.sagepub.com/doi/10.1177/02633957211024489> accessed 27 May 2023, 1.

ban itself. Abortion in Germany is, at least in principle, still considered criminal behaviour – yet it is not widely discussed in the context of crime and punishment. Naturally a very delicate matter, it is handled with great care by legal professionals and the legislature. The complexities it has generated in constitutional jurisprudence had to be implemented into the concerned provisions of the StGB. As it will turn out, section 219a is simultaneously a symptom of that problem, but also a very different animal on its own. Indeed, in addressing the relationship between sections 218, 218a and 219a quite a lot may be learned about the nature of statutory law, the limits of legal dogmatism, as well as the constitutional justification of criminal law in Germany.

The following evaluation is exclusively juridical. The author does not purport to discuss the morality of abortion or advertising for abortion in themselves in any way, shape, or form. He simply intends to examine the common criticisms of section 219a and discuss whether the abolition of section 219a was required or proper, or whether it was unwise or even unconstitutional. To that end, the article will

- (II.) briefly describe the history and the system of German abortion law, with special regards to the limits imposed on legislation by the jurisprudence of Germany's Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*/FCC)
- (III.) outline exactly what behaviour section 219a used to criminalise,
- (IV.) argue in favour of section 219a as a legitimate means to protect the unborn, as well as in favour of the compatibility of the rule with other fundamental rights,
- (V.) analyse to what extent abortion ads are still regulated by law.

B. The Legality of Abortion under German Law

The problematic nature of section 219a cannot be understood without reference to attempts at decriminalisation aimed at abortion in and of itself. To harken back to US-based debate, the Constitution of the United States does not allow for a comprehensive rights-based treatment but is really only concerned with limits to government power. Therefore, American constitutional law posits a negative right to have an abortion without the state intervening on behalf of the child. Accordingly, the American „pro-life" side has to make recourse to the doctrine of states' rights. In stark contrast, German constitutional law is directly concerned with weighing the mother's negative self-determination and self-responsibility against the child's positive right to life.[6]

[6] cf Vasel (n 2) 2379-80.

I. The 1975 Decision

In 1974,[7] the ruling social democratic and liberal coalition attempted to introduce a rule according to which anyone who terminated a pregnancy within twelve weeks of conception would go unpunished – as the abortion would not be considered criminal (*nicht strafbar*).[8] The bill passed both chambers of parliament (*Bundestag* and *Bundesrat*, respectively) and came into force as statutory law,[9] but was struck down the next year by the BVerfG in its first landmark abortion ruling.[10] Unlike the US Supreme Court, the BVerfG did not deny the foetus' personhood.[11] Consequently, they argued that the German state was obliged to safeguard both the unborn child and its mother. In case of a conflict between these two constitutionally protected rights, the life of the child was awarded precedence over the mother's right to self-determination. If it could not be adequately protected by other means or varieties of means, the legislator would have to resort to making use of the criminal law. Exceptions could only be granted where the mother's life was endangered, where there was risk of severe bodily harm, or other similarly grave reasons.[12]

The legal order as a whole would then have to visibly condemn the concept of abortion, in order to avoid the impression that abortion was equivalent to a healing procedure, or even an alternative to contraception. The state was also prohibited from excusing himself of any intervention, by recognizing a legal vacuum where women were free to do as they pleased.[13] Although criminal justice could be employed if necessary, the state would first and foremost have to prevent the abortion from happening in the first place. It could do so by means of welfare and other alms. As long as the legislature created conditions favourable for the expecting woman to keep her child, the Court would not exercise strict control.[14] However, the Court decreed that the doctor who counselled the woman or attested to the necessity of the abortion could never be the same doctor as the one who actually terminated the pregnancy. They assumed that most doctors were averse to

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7 For an historical overview of German abortion law leading up to that point, as well as academic developments in legal policy from the 1960s onwards, see Albin Eser, 'Reform of German Abortion law: First Experiences' (1986) 34 Am J Comp Law 369, 369-73.

8 Government legislative proposal: BT-Drs 7/375, 3.

9 5. Gesetz zur Reform des Strafrechts (5. StrRG), BGBl I 1974, 1297.

10 BVerfGE 39, 1 – Schwangerschaftsabbruch I (1975). For an explanation how the proceedings were initiated see Donald P Kommers, 'Abortion and Constitution: United States and West Germany' (1977) 25 Am J Comp Law 1977, 255, 259-60.

11 Donald P Kommers, 'The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?' (1994) 1 Contemp Health Law Policy 10, 1, 30.

12 BVerfGE 39, 1 (headnotes 1 to 5).

13 BVerfGE 39, 1, 44 (fn 127).

14 BVerfGE 39, 1, 44-45 (fn 129).

performing any abortions at all, and therefore feared that the ones ending up performing them would have their own commercial or ideological stakes in them.[15]

II. The 1993 Decision

In 1992, in an attempt to compromise with the "liberal" abortion law of the former East Germany, the government once again attempted to introduce a time limit to the equation.[16] According to this version of the statute, an abortion performed after counselling and within twelve weeks after conception would expressly not be unlawful.[17] In its 1993 decision, the BVerfG mostly upheld their 1975 ruling. An abortion lacking necessity could never be viewed as justified or "legal". The ban would, notwithstanding exceptions in cases of unreasonable burdens, have to be maintained, not for any population policy but for the sake of the individual foetus' right to life, being rooted in its fundamental human dignity.[18] The Court reaffirmed that the state would have to keep the rights of the unborn alive in the public consciousness.[19]

However, the Court still somewhat loosened their fixation on enumerative indications. While section 218c reserved punishment for an abortion performed without proper counselling, the Court essentially inverted this approach. In what became known as the Counselling Scheme (*Beratungslösung*), they conceded that an abortion performed within the initial stages of pregnancy would be allowed to go unpunished, if such counsel had taken place. The Court recognized that, in the end, the mother would have to bear the final responsibility for her decision. The goal of fighting abortion as a social phenomenon could, to an extent, be more efficiently realised if the authorities opened up the prospect of procuring a legitimate abortion – provided certain procedural requirements were met. In a welcoming atmosphere, the women affected would be confronted with the prospects of motherhood in a way that would be open-ended in its ultimate outcome, yet life-affirming throughout.[20] Thus, the counselling scheme is concerned with winning the expectant mother as an ally.[21] It has been rightfully criticised that this bargain effectively negates the foetus' right to life, contradicting the Court's earlier dicta that the state may create no legal vacuum.[22] On the other hand, the Court made sure to make it perfectly clear

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15 BVerfGE 39, 1, 62 (fn 166).

16 More Details: Kommers (n 11).

17 Gesetz zum Schutz des vorgeburtlichen/werdenden Lebens, zur Förderung einer kinderfreundlicheren Gesellschaft, für Hilfen im Schwangerschaftskonflikt und zur Regelung des Schwangerschaftsabbruchs (Schwangeren– und Familienhilfegesetz), BGBl I 1992, 1398, 1402.

18 BVerfGE 88, 203 – Schwangerschaftsabbruch II (1993).

19 BVerfGE 88, 203 (headnote 10).

20 BVerfGE 88, 203, 270 (fn 197); 306 (fn 292).

21 Walter Gropp and Liane Wörner, 'Vorbemerkung zu § 218' in Günther M Sander (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 4* (4th edn, C.H. Beck 2021) fn 11.

22 Reinhard Merkel, '§ 218a' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (5th edn, Nomos 2017) fn 63a.

that abortions performed solely on the basis of counselling could never be deemed legal.[23] More generally, they could only be treated equal to abortions performed with indication insofar as is necessary to implement the counselling scheme.[24]

Treatment contracts with doctors and hospitals would be valid,[25] but they could not be paid for by mandatory insurance.[26]

III. Implementation

The rulings have been dutifully implemented into sections 218 and following, under the chapter heading "offences against life".[27] Both the performing doctor and the pregnant women are, in principle, liable to a fine or up to three years imprisonment (section 218 paragraph 1 sentence 1) or up to one year imprisonment, respectively (paragraph 3). An attempted abortion is punishable to the same extent, except as far as the woman is concerned (paragraph 4). If the abortion is performed within twelve weeks after conception and after at least three days have passed since the woman has been counselled in accordance with criteria specified in section 219, the elements (*Tatbestand*) of section 218 are deemed not to have been fulfilled (section 218a paragraph 1). This elaborate feat of legal engineering does nothing more than clarify that abortions under paragraph 1 are decriminalised but still illegal, although the implications will be reviewed further below. Simply put, it acts as a legal fiction.[28]

In addition, the abortion is "not unlawful" (*nicht rechtswidrig*) in cases of medical or psychological necessity or if there is suspicion that the pregnancy is the result of a sex crime, as long as it is still performed by a physician with the woman's consent (section 218a paragraphs 2 and 3). Dogmatically speaking, these exceptions are manifestations of the principle of necessity in the face of a state of emergency. [29] The principle is codified into sections 34 and 35 of the StGB, granting, under different conditions, justification (*rechtfertigender Notstand*) or exculpation (*entschuldigender Notstand)*. Originally, the Reich Court (*Reichsgericht)* – the supreme German court in the period between 1879 and 1945 – had, in 1927, invented a "supra-legal state of necessity" (*übergesetzlicher*

[23] BVerfGE 88, 203 (headnote 15).
[24] BVerfGE 88, 203, 280 (fn 219).
[25] BVerfGE 88, 203, 295 (fn 263).
[26] BVerfGE 88, 203 (headnote 16).
[27] For an English-language overview, see Michael Bohlander, *Principles of German Criminal Law* (Hart Publishing 2009) 179-82, 185-187. There is also a semi-official English translation of the StGB, provided by Bohlander and published by the Federal Ministry of Justice, accessible under https://www.gesetze-im-internet.de/englisch_stgb.
[28] On the difference between *Tatbestand* and *Rechtswidrigkeit* see *Bohlander* (n 27) 16.
[29] Albin Eser and Bettina Weißer, '§ 218a' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 22; Perdita Kröger, 'Vor §§ 218 ff' in Gabriele Cirener and others (eds), *Leipziger Kommentar StGB Online* (De Gruyter 2019) fn 37; BGHSt 38, 158 = NJW 1992, 763, 768.

Notstand) for extreme cases where a pregnancy had to be terminated.[30] Similarly to section 34, paragraphs 2 and 3 of section 218a render the abortion as fully justified.[31]

Section 218a paragraph 4 exempts the woman from punishment[32] if she has been counselled and more than twelve but no more than twenty-four weeks have passed, or in situations of exceptional distress (*nicht strafbar)*. Sections 218b and 218c criminalise certain breaches of duty on the doctors' part. The rather notorious sections 219a and 219b both deal with "upstream" actions, namely advertising abortion and providing the means or objects for an abortion, the former of which being the focus of this article.

The counselling scheme has been statutorily organised into section 219 of the StGB and into the 1992 Act on Pregnancies in Conflict Situations (*Schwangerschaftskonfliktgesetz* – SchKG),[33] last augmented in 2022.[34] The counsel in question is not supposed to lecture or talk down but is nevertheless obliged to protect the unborn (section 5 paragraph 1). The German states (*Bundesländer*) are required to institute a sufficient and pluralist supply of counselling centres in close range to anyone who might need them. Doctors may also function as counsellors (section 8). Any centre that is to be recognized has to provide enough qualified personnel, including at least one person that has been specially medically, psychologically, socio-pedagogically, socially or legally trained. They may not be connected by organization or economic interest to a terminating institution in a way that would call their neutrality into question (section 9). There is no legal obligation to participate in the ensuing abortion, unless necessary to save the pregnant woman from death or severe injury to her health (section 12).[35] Even if never discussed under that aspect in Parliament,[36] the doctors' right of refusal partially serves to promote their freedom of conscience.[37] This is proved by its immunity to contractual abrogation.[38] Abortions performed without indication are subject to proper medical advice, but are not paid for by medical insurance (section 24b paragraphs 4 and 5 of the German Social Code, Book 5 – *Sozialgesetzbuch/SGB V*).

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30 *Bohlander* (n 27) 13; RGSt 61, 252; 62, 137.

31 Gropp and Wörner, 'Vorbemerkung zu § 218' (n 21) fn 29; Eser and Weißer, '§ 218a' (n 29) fn 21; Thomas Fischer, *Strafgesetzbuch mit Nebengesetzen. Kommentar* (69th edn, C.H. Beck 2022) section 218a fn 14.

32 „*Strafausschließungsgrund*", Gropp and Wörner, 'Vorbemerkung zu § 218' (n 21) 35. Compare *Bohlander* (n 27) 17.

33 Gesetz zur Vermeidung und Bewältigung von Schwangerschaftskonflikten, BGBl I 1992, 1398.

34 BGBl I 2022, 1082.

35 Compare BVerfGE 88, 203, 294 (fn 260).

36 KC Horton, 'Abortion Law Reform in the German Federal Republic' (1979) 28 Int Com Law Q 288, 292.

37 Bernhard Maier, 'Mitwirkungsverweigerung beim Schwangerschaftsabbruch' (1974) 27 NJW 1404, 1405.

38 BVerfGE 88, 203, 294; Klaus Ulsenheimer, 'Der Schwangerschaftsabbruch' in Adolf Laufs, Bern-Rüdiger Kern and Martin Rehborn (eds), *Handbuch des Arztrechts* (5th edn, C.H. Beck 2019) fn 71; Mathias Nebendahl, 'Arbeitsrecht im Krankenhaus' in Heinrich Kiel, Stefan Lunk and Hartmut Oetker (eds), *Münchener Handbuch zum Arbeitsrecht. Band 2 – Individualarbeitsrecht II* (5th edn, C.H. Beck 2021) fn 67.

IV. Intermediary Conclusion

Leaving aside all issues of social engineering and judicial activism, the Court's rulings on abortion may safely be treated as settled case law. There is currently no future decision in sight that might overturn the currently existing jurisprudence. As far as this article is concerned, it therefore represents enforceable constitutional law and will be taken as absolute gospel in evaluating the constitutionality of statutes.

Readers may have already noticed that the idea of a prohibition on advertising did not yet come up during the summary of the BVerfG rulings. Indeed, section 219a was not mentioned in either of the BVerfG rulings.[39] The idea of section 219a predates the counselling scheme entirely.[40] However, the provision was not the subject matter of the proceedings and was not controversial at the time.[41] It will be the objective of the following few parts to shed a light on the exact role and meaning of section 219a.

C. The Interpretation of Section 219a

The following part will describe the technical problems in the application of section 219a.

I. Punishable Deeds (Section 1)

According to the prevailing views with regards to its different elements, section 219a criminalised a fairly wide array of actions, even when considering that they must have been performed with criminal intent (*Vorsatz*, see section 15).

1. Objects

One possible object of an advertisement within the meaning of section 219a were the perpetrator's own services, or the services of another, for performing terminations of pregnancy or for supporting them (*eigene oder fremde Dienste zur Vornahme oder Förderung eines Schwangerschaftsabbruch*) (number 1). A service in this sense may have been any positive contribution,[42] such as giving the addresses of willing physicians,

[39] Benedict Pietsch, 'Verbot als Gebot? Zur geplanten Streichung des „Werbeverbots" für den Abbruch der Schwangerschaft (§ 219a StGB) aus verfassungsrechtlicher Perspektive' [2022] KriPoZ 74, 74; BT-Drs 20/1635, 1-2.

[40] Detlef Sasse, 'Anmerkung zu AG Gießen, Urteil vom 24. November 2017 – 507 Ds 501 Js 15031/15' (2018) 72 NJ 434, 434.

[41] Michael Kubiciel, 'Schriftfassung der Stellungnahme in der öffentlichen Anhörung des Ausschusses für Recht und Verbraucherschutz des Deutschen Bundestages am 18.5.2022' (18 May 2022) <www.menschenrechte.online/wp-content/uploads/2022/05/stellungnahme-kubiciel-data.pdf> accessed 18 November 2023, 3.

[42] Walter Gropp and Liane Wörner, '§ 219a' in Günther M Sander (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 4* (4th edn, C.H. Beck 2021) fn 4; Reinhard Merkel, '§ 219a' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (5th edn, Nomos 2017) fn 6.

arranging contact, or organising a journey for the sake of procuring an abortion.[43] The scope of application also included any means, objects or procedures capable of terminating a pregnancy, as long as this capacity was referenced (*Mittel, Gegenstände oder Verfahren, die zum Abbruch der Schwangerschaft geeignet sind, unter Hinweis auf diese Eignung*) (number 2). What was meant by number 2 were lay abortions in the sense of section 219b, but not at all contraception.[44]

2. Acts

The "advertising act" within the meaning of section 219a included offers, announcements, commendations or "any such declaration" (*anbieten, ankündigen, anpreisen oder Erklärungen solchen Inhalts bekanntgeben*). The last variant served to criminalise the spread of statements that were not claimed by the perpetrator as his own.[45] The different variants of section 219a paragraph 1 corresponded to the phrasing of various provisions (at least in their version applicable at the time 219a was introduced) condemning the dissemination of materials inciting hatred (section 130), depictions of violence (section 131) or the distribution of pornography (section 184).[46] Their interpretation was very plain and simple. An offer would have been any one-sided declaration that one is willing to perform an abortion or provide the means to do so.[47] An offer in the generic sense, which may or may not lead to an offer in the sense of the law of obligations, was deemed sufficient by German lawyers, even for the purposes of section 219a.[48] An announcement was any communication directed towards a specific (and timely) opportunity of being supplied with means or objects, or being provided with procedures.[49] A commendation was, unsurprisingly, any positive mention or description.[50]

As the Reich Court put it back in 1904, concerning the spread of pornography, any "praising or recommendatory mention or description, any accentuation of merits, recognition of advantageous effects honourable depiction, or assignation of high value" is sufficient, regardless of how scientific the presentation turns out to be.[51]An element all

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43 Ralf Eschelbach, '§ 219a' in Bernd von Heintschel-Heinegg (ed), *Beck'scher Online-Kommentar zum StGB* (53rd edn, C.H. Beck May 2022) fn 7; cf Perdita Kröger, '§ 219a' in Gabriele Cirener and others (eds), *Leipziger Kommentar StGB Online* (De Gruyter 2019) fn 3; cf Christoph Safferling, '§ 219a' in Holger Matt and Joachim Renzikowski (eds), *Strafgesetzbuch Kommentar* (2nd edn, Vahlen 2020) fn 2; cf Fischer (n 31) section 219a fn 8, 9.

44 Eschelbach, '§ 219a' (n 43) fn 8; Albin Eser and Bettina Weißer, '§ 219a' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 4.

45 Eschelbach, '§ 219a' (n 43) fn 12; Kröger, '§ 219a' (n 43) fn 5.

46 Eschelbach, '§ 219a' (n 43) fn 11; Klaus Rogall, '§ 219a' in Jürgen Wolter (ed), Systematischer Kommentar zum Strafgesetzbuch (9th edn, Carl Heymanns Verlag 2015-17) fn 8; cf Merkel, '§ 219a' (n 42) fn 11.

47 OLG Frankfurt aM, Beschluss vom 22.12.2020 – 1 Ss 96/20, NStZ-RR 2021, 106, 107 (22 December 2020 decision by the Higher Regional Court of Frankfurt, Hesse).

48 Fischer (n 31) section 219a fn 11; cf Merkel, '§ 219a' (n 42) fn 12.

49 Eschelbach, '§ 219a' (n 43) fn 12; Kröger, '§ 219a' (n 43) fn 4; Merkel, '§ 219a' (n 42) fn 12.

50 ibid.

51 RGSt 37, 142, 143.

variants had in common, even if not explicated in their common definitions, is that their object needed to be presented as accessible to their "consumer base", so to speak.[52] Said restriction was regarded as the distinguishing feature separating more concrete recommendations from mere praise.[53] Without any actual opportunity for termination, all that would be left for prosecutors to rely on were accusations of fraud (*Betrug* – section 263).[54] The same was said to apply to offers that are not meant to be taken seriously, but only because of the lack of objective suitability towards the abortive purpose.[55] On the other hand, any serious and effective offering was also seen as sufficient. The positive connotations associated with "recommending" products or services cannot be read into the other variants. As far as the fundamental question of punishment or no punishment is concerned, the addition of the recommendation was merely declarative, as it did not add any factual situations that would not already fall under offering or announcing opportunities for termination.[56]

3. Medium

An advertising act needed to be performed publicly, in a meeting or through dissemination of written materials (*öffentlich, in einer Versammlung oder durch Verbreiten eines Inhalts*). Public in this sense is any declaration made in the presence of, or witnessable by an undefined, no longer manageable group of people.[57] In accordance with section 11 paragraph 3, "written materials" were extended to include audio-visual media, data storage media, illustrations and other depictions. Non-public offerings, meaning ones targeted at specific women, do not fall under section 219a, and are therefore punishable exclusively in cases where an actual abortion which the offeror could aid or abet was at least attempted (sections 26, 27 and 30, see below).[58] Interestingly, due to the wide definition of where an offence is deemed to have "taken place", online ads hosted abroad or even exclusively targeted at a foreign audience might still have fallen under German criminal jurisdiction, due to the ubiquity of their presence on the internet.[59]

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52 BT-Drs 7/1981 (neu), 18; Gropp and Wörner, '§ 219a' (n 42) fn 6; Rogall, '§ 219a' (n 46) fn 8; Eser and Weißer, '§ 219a' (n 44) fn 6; Kristian Kühl, '§ 219a' in Karl Lackner and Kristian Kühl (eds), *Strafgesetzbuch Kommentar* (29th edn, C.H. Beck 2018) fn 3.

53 *Anpreisen* vs *Preisen,* Merkel, '§ 219a' (n 42) fn 11.

54 Merkel, '§ 219a' (n 42) fn 14; cf Eschelbach, '§ 219a' (n 43) fn 8.

55 As per the Commission for the Criminal Justice Reform, BT-Drs. 7/1981, 18; See also Eser and Weißer, '§ 219a' (n 44) fn 6; Kröger, '§ 219a' (n 43) fn 4; Merkel, '§ 219a' (n 42) fn 14; Gropp and Wörner, '§ 219a' (n 42) fn 7.

56 cf Eschelbach, '§ 219a' (n 43) fn 12.

57 Eschelbach, '§ 219a' (n 43) fn 13; cf Merkel, '§ 219a' (n 42) fn 13.

58 Eser and Weißer, '§ 219a' (n 44) fn 7.

59 cf Eschelbach, '§ 219a' (n 43) fn 13.

4. Qualifying Circumstances

Even so, the offer was only punishable if it was given for the sake of personal enrichment (*um einen Vermögensvorteil willen)* or in a manner that was grossly inappropriate or offensive (*in grob anstößiger Weise*). Especially the latter variant had to be handled with care, so as not to be too uncertain to violate the principles of the rule of law. The offer had to be excessively distasteful, or unconscionable, with regards to the objective standards of a liberal but ordered society.[60] Primarily, these requirements were without a doubt met by offers for criminally sanctioned terminations of pregnancy.[61] In addition, it was assumed that sensational, glorifying, misleading offers or offers that were in other ways hostile to unborn life could be construed as offensive,[62] although this category was practically irrelevant.[63]

On the surface, it is then safe to say that no factual, objective and sober information (*sachliche Aufklärung)* was banned that was not connected to material gain.[64] Inwardly, the offeror had to actively desire being enriched. Mere knowledge that the offer would result in material gain of some sort did not suffice.[65] If the offeror was both materially and ideally motivated, the material gain had to be the decisive factor in his decision.[66] Offerings with the intent of enriching another person only fell under section 219a if the offender themselves were thereby enriched by proxy.[67]As regards the material gain itself, desiring a fee was seen as sufficient.[68]

II. Exceptions (paragraphs 2 to 4)

Section 219a paragraph 2 exempted from punishment by way of paragraph 1 any information provided by physicians or counselling agencies about who is performing abortions in accordance with section 218a paragraphs 1 to 3 (see above). Paragraph 3

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60 Kühl (n 52) fn 5; Merkel, '§ 219a' (n 42) fn 15.

61 Gropp and Wörner, '§ 219a' (n 42) fn 8; Eser and Weißer, '§ 219a' (n 44) 8; Merkel, '§ 219a' (n 42) fn 15; cf Kröger, '§ 219a' (n 43) fn 7.

62 Eser and Weißer, '§ 219a' (n 44) 8; Fischer (n 31) section 219a fn 14; Eschelbach, '§ 219a' (n 43) fn 18.

63 Eschelbach, '§ 219a' (n 43) fn 17.

64 BT-Drs. 7/1981, 18; Rogall, '§ 219a' (n 46) 12.

65 Gropp and Wörner, '§ 219a' (n 42) fn 12; Eschelbach, '§ 219a' (n 43) fn 15.

66 Kühl (n 52) fn 4; Gloria Berghäuser, 'Die Strafbarkeit des ärztlichen Anerbietens zum Schwanger schaftsabbruch im Internet nach § 219a StGB – eine Strafvorschrift im Kampf gegen die Normalität' (2018) 73 JZ 497, 498.

67 Fischer (n 31) section 219a fn 13; Eser and Weißer, '§ 219a' (n 44) 8; cf Eschelbach, '§ 219a' (n 43) fn 15.

68 LG Bayreuth, Urteil vom 13.01.2006 – 2 Ns 118 Js 12007/04, Zfl 2007, 16 (13 January 2006 judgement handed down by the Regional Court of Bayreuth, Bavaria; Fischer (n 31) section 219a fn 13; cf BT-Drs 19/7693, 7.

exempted other information within the professional sphere, such as publications in medical or pharmaceutical journals.

Most importantly for the purposes of this article, paragraph 4 declared that physicians, hospitals and other institutions authorised to legally perform abortions did not fulfil the provisions of section 219a paragraph 1 merely by stating that they do, in fact, provide services under the conditions of section 218a (section 219a paragraph 4 number 1). In addition, they were allowed to freely refer to authorised institutions when it came to questions concerning their methods (number 2). Paragraph 4 was introduced in 2019[69] expressly in order to address the lack of clarity with regards mere information under paragraph 1, and expressly only exempted from punishment as far as absolutely necessary for the sake of informing pregnant women in their time of strife.[70] In reverse conclusion, doctors could not inform about their methods themselves.[71] Instead, they could link to the online presence of an authorised institution, or copy information from such sources, as long as credit was given.[72] The same reform introduced just such an authorised source, in the form of a list of willing doctors hosted by the Federal Medical Association (*Bundesärztekammer)* (section 13 paragraph 3 SchKG).[73]

III. Attempts at Restriction: A Case Study

In what is most certainly the most prominent case ever prosecuted under section 219a, a physician in Gießen (Hesse) had been using a PDF on her website to describe the technical details, but also bringing forth arguments speaking in favour of or against the methods she was offering for abortions in her clinic. The PDF also included a summary of documents patients were required to take with them, among other the certificate that there had been counsel or that an indication had been ascertained. Finally, there had been notice that she accepted both private payment and insurance.

In November of 2017, the competent Local Court (*Amtsgericht)* held that she had thereby sufficiently connected information with tender, and sentenced her to a payment of forty times 150 euro. There was no further need for any special solicitation, as what was

69 Gesetz zur Verbesserung der Information über einen Schwangerschaftsabbruch, BGBl I 2019, 350.

70 BT-Drs 19/7693, 7.

71 Eschelbach, '§ 219a' (n 43) fn 21; Wiebe Winter, 'Freispruch für Hänel? Die Novellierung des § 219a StGB' (2019) 20 HRRS 291, 292.

72 BT-Drs 18/7693, 11; BT-Drs 19/7965, 9.

73 Liste von Ärztinnen und Ärzten, Krankenhäusern und medizinischen Einrichtungen nach § 13 Abs. 3 SchKG (Bundesärztekammer, 5 July 2023) <www.bundesaerztekammer.de/themen/aerzte/schwangerschaftsabbruch> accessed 29 July 2023).

presented to the court already constituted a "classical form of acquiring patients" with which she had dared to procure for herself a competitive advantage over other doctors.[74]

On appeal, the Regional Court (*Landgericht*) applied all four classical methods of interpretation,[75] but still did not come down in her favour. The plain wording of section 219a not posing any restriction, the provisions could be interpreted so as to give effect to the constitutionally mandated protection of the unborn. Preventing competition between abortionists from arising was imperative. Parliament had mandated that abortion would have to remain an exception to the rule, and that any avoidable terminations of pregnancy should not be normalised nor commercialised. This was in line with the BVerfG's dictum that every abortion without indication would have to be deemed unjust. Doctors would still be able to participate in medical dialogue, and to offer their services by way of other doctors, and counselling centres. The particular doctor in question being motivated by her personal beliefs and not her commercial interest was considered but did not sway the court's overall opinion.[76]

Still, when the Higher Regional Court (*Oberlandesgericht*) in Frankfurt reviewed the case, they reversed the Regional Court's ruling on grounds that, in the meantime, section 219a paragraph 4 had been introduced and would have to be applied as the "milder law."[77] However, the Regional Court maintained that informing about the "how" of the abortion was not covered by paragraph 4, and that doctors could simply include this information by way of references.[78] Upon further review by the Higher Regional Court, it was again proposed that neutral statements made by physicians did not fall under section 219a.[79] In the meantime, in 2019, a different Local Court in Hesse had held that section 219a paragraph 4 had legalised just such information.[80] The Higher Regional Court did not pick up this argument. In their opinion, the addition of paragraph 4 had, in fact, made it logically necessary to include mere information.[81]

Having exhausted all national means of appeal or review, the doctor filed a constitutional complaint with the BVerfG, but was also disappointed. The Constitutional Court denied there was any legitimate interest left in evaluating section 219a's constitutionality, since

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74 AG Gießen, Urteil vom 24.11.2017, Az 507 Ds 501 Js 15031/15, NStZ 2018, 416.

75 Compare *Bohlander* (n 27) 15.

76 LG Gießen, Urteil vom 12.10.2018, Az. 3 Ns 406 Js 15031/15, medstra 2019, 119.

77 OLG Frankfurt aM, Beschluss vom 26.06.2019, Az 1 Ss 15/19, medstra 2019, 309.

78 LG Gießen, Urteil vom 12.12.2019, Az 4 Ns 406 Js 15031/15, medstra 2020, 315.

79 Liane Wörner, 'Anmerkung zum Urteil des AG Gießen vom 24.11.2017 (507 Ds 501 Js 15031/15)' (2018) 38 NStZ 417, 418.

80 Decision by the Local Court in Kassel, AG Kassel, Beschluss vom 05.07.2019 – 284 Ds 2660 Js 28990/17, medstra 2019, 383.

81 OLG Frankfurt aM, Beschluss vom22.12.2020, Az. 1 Ss 96/20, medstra 2021, 118. Subsequently maintained by the Higher Regional Court in Hamm, North Rhine-Westphalia (OLG Hamm, 21.10.2021 – 4 RVs 102/21, medstra 2022, 133).

any sentences handed down under section 219a had been repealed by the same act which had repealed section 219a itself. The complainant had submitted that the constitutionality of section 219a would still have to be tested, as the constitutionality of her rehabilitation depended on it. In this regard, she was correct. According to constitutional precedent, the principles of legal certainty and the separation of powers demand that the legislature cannot just for any reason nullify judicial decisions.[82] Thus, rehabilitation requires that the underlying criminal law be unconstitutional, or at the very least that there are other grave and compelling interests involved.[83] The Court still refused any incidental test of the rehabilitation's constitutionality, supposedly because this would blur the line between an individual complaint and more abstract judicial review.[84]

IV. Criticism of the Application of Section 219a

We can thus summarize the problems inherent in the interpretation of section 219a prevailing in the dominant opinion and legal praxis. First, section 219a, although titled as a ban on advertising, did not require any extolment of the supposedly advertised service.[85] Secondly, not only was as any offer sufficient actus reus (*objektiver Tatbestand*), but the expectation of the usual doctor's fee was also sufficient mens rea (*subjektiver Tatbestand*). Advertisements for abortions performed without charge are, however, practically nonexistent.[86] Thirdly, after the introduction of paragraph 4, there was no longer any space left to reasonably interpret section 219a so as not to cover mere information. Last but not least, the aforementioned wide interpretation of the desire for material gain was in line with general principles insofar as direct intent (*Absicht*) generally does not require the motivation in question to be the sole motivator.[87] That said, all doctors realistically desire to make a profit out of their office. Consequently, section 219a inevitably criminalised any doctor who was making it known that he performs abortions.[88] Its application also did not take account of activist doctors for whom the belief in the right of

[82] BVerfG, Beschluss vom 08.03.2006 – 2 BvR 486/05, BeckRS 2006, 22732.

[83] BVerfGE 2, 380, 405.

[84] see BVerfG, Beschluss vom 10.05.2023 – 2 BvR 390/21.

[85] Klaus Ferdinand Gärditz, 'Das strafrechtliche Verbot der Werbung für den Abbruch der Schwangerschaft (§ 219a StGB) – Anachronismus oder sinnvolle Schutzergänzung' (2018) 27 ZfL 18, 21; cf Klaus Rogall, '§ 218a StGB in neuer Gestalt. Anmerkungen zu einem Lehrstück zeitgenössischer Rechtspolitik' in Jan Christoph Bublitz and others (eds), *Recht – Philosophie – Literatur. Festschrift für Reinhard Merkel zum 70. Geburtstag* (Duncker & Humblot 2020) 1181, 1191; cf Tonio Walter, 'Was sollen und was dürfen Kriminalstrafen? Eine Antwort am Beispiel des § 219a StGB' (2018) 27 ZfL 26, 28.

[86] Eschelbach, '§ 219a' (n 43) fn 15.

[87] cf Hartmut Schneider, '§ 211' in Günther M Sander (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 4* (4th edn, C.H. Beck 2021) fn 83; cf Martin Heger, '§ 211' in Karl Lackner and Kristian Kühl (eds), *Strafgesetzbuch Kommentar* (29th edn, C.H. Beck 2018) fn 4; Frank Saliger, '§ 211' in Urs Kindhäuser, Ulfrid Neumann, Hans-Ullrich Paeffgen and Frank Saliger (eds), *Strafgesetzbuch* (6h edn, Nomos 2023) fn 31.

[88] Walter (n 85) 28.

self-determination or the right to enjoy the correct medical procedure might actually be the dominant factor.[89]

V. Criticism of the Scope of Section 219a

Section 219a going way too far with its concept of what constitutes an "advertisement" is also a common complaint. In response, there have been frequent attempts to demonstrate how the objective elements of section 219a combined with the amount to something that could be called an ad.[90] This is completely in line with the law of the European Union, where advertising is defined as the "making of a representation in any form in connection with trade, business, craft or profession in order to promote the supply of goods or services."[91] Correspondingly, in German law, an action of commercial relevance for the purposes of private competition is any act with the intent to foster one's own or another's business by promoting the sale or procurement of commodities, or the performance or procurement of services (Law on Unfair Competition Practices – *Geschäft gegen den unlauteren Wettbewerb*/UWG, section 2 paragraph 1 number 2).[92] Mere information fulfilling the elements of section 219a is deemed „advertising masked as information."[93] Neither Merriam Webster nor the Encyclopaedia Britannica even make commercial intent a necessary element of an advertisement.[94] Consciously making a specific offer alone would then be enough to warrant the term.

There has even been the accusation that hinting at the opportunity for procuring an abortion without being allowed to inform about the methods as well "allows for something much closer to advertising while still limiting valuable information."[95] Of course, this is ridiculous, since no serious competition with other clinics is entered into simply by making it known that one performs abortions. Competition arises where more specific circumstances become known. A clinic would gain a competitive advantage with

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89 cf Paula Fischer and Henrike von Scheliha, 'Anmerkung zu AG Gießen, Urt. v. 24.11.2017 – 507 Ds 501 Js 15031/15' (2019) 37 MedR 79, 79.

90 Nino Goldbeck, 'Die Werbung für den Abbruch der Schwangerschaft. Eine Darstellung des § 219 a StGB unter besonderer Berücksichtigung des Lauterkeitsrechts' (2005) 14 Zfl 102, 106-07; cf Michael Rahe, 'Strafbare Werbung bei Hinweis auf legalen Schwangerschaftsabbruch' [2018] JR 232, 235.

91 Directive 2006/114/EC of the European Parliament and the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) [2006] OJ L 376/21, art 2 lit a.

92 Like the StGB, the UWG is accessible in an English translation under www.gesetze-im-internet.de/englisch_uwg/index.html.

93 BT-Drs 7/1981, 17.

94 Editors of Merriam Webster, 'Advertisement' (*Merriam-Webster*) <www.merriam-webster.com/dictionary/advertisement> accessed 1 August 2023; The Editors of Encyclopaedia Britannica, "advertising" (*Encyclopedia Britannica*, 17 July 2023) <www.britannica.com/money/topic/advertising> accessed 1 August 2023.

95 Ulbricht (n 5) 7.

statements like "offering a safe atmosphere."[96] This is the very idea paragraph 4 is based on.

Even so, the judiciary may have been correct in neither limiting nor extending section 219a by referencing the faint terminological concept of advertising. Like any written law, section 219a has to be given proper effect with reference to its purpose – inhibited by respect to its plain meaning. Even constitutional requirements do not empower the judiciary to set aside the word of the law (*Wortlautgrenze*) or the intent of the legislature completely.[97] Proposals such as punishing exclusively offenders who acted both for material gain *and* in an objectively grossly offensive fashion, cannot seriously be considered.[98]

Conversely, it is possible to limit section 219a beyond its phrasing with reference to its purpose, as this would be advantageous for the offender.[99]

VI. Intermediary Conclusion

Section 219a cannot be understood properly on the basis of its text alone. In order to evaluate whether and how section 219a ought to have been interpreted, one must first inquire about its teleology. As mentioned, this might result in a narrower or broader application "from within." However, in any case, any application of section 219a is also subject to the limits imposed by the German constitution. First and foremost, its purposes will be held to the standard of whether or not they infringe upon the fundamental rights of the persons involved.

D. The Constitutionality of Section 219a

The matter of section 219a's constitutionality is essentially one of its compatibility with the fundamental rights guaranteed under the first few Articles of the German Fundamental Law (*Grundgesetz – GG*). Naturally, even the ends of protecting the life of the unborn do not justify all means. The fundamental condition for any restriction of fundamental rights under the German constitution is its proportionality

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96 Judgement handed down by the Local Court in Tiergarten, Berlin, AG Tiergarten, Urteil vom 14.06.2019–253 Ds 143/18. Upheld by the Higher Regional Court for Berlin, KG-Berlin, Beschluss vom 19.11.2019, Az (3) 121 Ss 143/19 (80 and 81/19 – juris.

97 Bernd von Heintschel-Heinegg, '§ 1' in Bernd von Heintschel-Heinegg (ed), *Beck'scher Online-Kommentar zum StGB* (57th edn, C.H. Beck May 2023) fn 30; Walter Kargl, '§ 1' in Urs Kindhäuser, Ulfrid Neumann, Hans-Ullrich Paeffgen and Frank Saliger (eds), *Strafgesetzbuch* (6h edn, Nomos 2023) fn 110a; Martin Heger, '§ 1' in Karl Lackner and Kristian Kühl (eds), *Strafgesetzbuch Kommentar* (29th edn, C.H. Beck 2018) fn 6; Roland Schmitz, '§ 1' in Bernd von Heintschel-Heinegg (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 1* (4th edn, C.H. Beck 2020) fn 99.

98 cf Theresa Schweiger, 'Werbeverbot für Schwangerschaftsabbrüche – Das nächste rechtspolitische Pulverfass' (2018) 51 ZRP 100.

99 Bernd Hecker, '§ 1' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 7; Schmitz (n 97) fn 9; von Heintschel-Heinegg (n 97) fn 19.

(*Verhältnismäßigkeit),* meaning that it has to be suited and necessary to serve a legitimate purpose, and that the relation between the success of the measure and the severity of the restriction is appropriate.[100]

I. Fundamental Rights in Question

The exact standards that are to be applied depend on which of these rights were being affected by the advertising ban.

1. Occupational Freedom

The BVerfG has explicitly conceded that doctors' professional conduct in accordance with the counselling scheme is necessarily protected by his occupational freedom under Article 12 GG.[101] In other decisions, placing limits on representations of one's professional conduct, including doctors' advertising for their own services, was recognized to constitute restrictions on the right to exercise one's chosen profession.[102] Combined, it is safe to assume that section 219a is subject to justification by the standards of Article 12. However, being situated on the lowest level of protection as regards occupational freedom, restrictions on the mere exercise of a profession only need to pass the generic proportionality test outlined above.[103]

2. Freedom of Speech and Information

As far as the right to free speech under Article 5 GG is concerned, mere statements of fact are covered (only) insofar as they are necessary to form an opinion, meaning a value judgement.[104] If someone takes part in the public discussion on abortion and, for that purpose, names a certain abortionist, they are protected by Article 5.[105] The same has to apply to doctors stating their opinions on the topic and in that process making it known that they perform abortions, or even praising them.[106]

Likewise, any commercial speech preparing or itself posing an opinion falls under Article

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100 BVerfGE 59, 231, 265; 71, 162, 181; 77, 308, 332; 93, 362, 369.

101 BVerfGE 98, 265, 297 (1998) – fn 157, with reference to BVerfGE 88, 203, 295 Rn, 157.

102 BVerfGE 71, 162, 172 f; 94, 372, 389; 105, 252, 266; 106, 181, 192; 111, 366, 373; 112, 255, 262.

103 BVerfGE 7, 377; 30, 336, 351; 77, 308, 332; 85, 248, 259; 93, 362, 369.

104 BVerfGE 61, 1, 8; 65, 1, 41; 85, 1, 15; 90, 1, 15; 90, 241, 247.

105 Ralf Müller-Terpitz, 'Art 5 GG' in Andreas Spickhoff (ed), *Medizinrecht* (4th edn, C.H. Beck 2022) fn 5; BVerfG, Beschluss vom 08.06.2010 – 1 BvR 1745/06, NJW 2011, 47.

106 cf Tamina Preuß, 'Strafbare Werbung für den Abbruch der Schwangerschaft, § 219a StGB – Unerlässlicher Schutz für das ungeborene Leben oder sachwidrige Kriminalisierung im Vorfeld eines erlaubten Verhaltens?' [2018] medstra 131, 132.

5.[107] What constitutes an opinion, is a certain element of commentary, consideration or deliberation, hence, subjectivity.[108] Merely calling attention to one's business is insufficient.[109] In cases of non-activist doctors, it is questionable whether the public offer of an abortion can be construed as expressing an opinion. In any case, section 219a certainly restricted affected women's right to inform themselves without hindrance from generally accessible sources.[110]

Both freedom of speech and freedom of information are limited by "the provisions of general laws, the laws for protection of the youth, and the right to personal honour." A law is general, abstract or universally applicable in this sense if the fact that it suppresses an opinion or multiple opinions is collateral to other goals.[111] Whenever said law is then applied to a singular case, it in turn needs to be interpreted so as to give effect to freedom of speech and information in a manner that is worthy of their fundamental value for liberal democracy (theory of reciprocity – *Wechselwirkungslehre*).[112] In effect, like Article 12, Article 5 GG requires that section 219a and its interpretation be proportional.[113]

3. Equality Before the Law

Article 3 paragraph 1 GG prohibits any unequal treatment of fundamentally equal situations, but also equal treatment of fundamentally unequal cases, unless there is a reasonable cause.[114] For the purposes of our inquiry, there therefore needs to be reasonable cause for (1) the unequal treatment of doctors and pro-life activists, (2) the

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[107] Jürgen Kühling, 'Art 5 GG' in Hubertus Gersdorf and Boris P Paal, *Beck'scher Online-Kommentar Informations- und Medienrecht* (40th edn, C.H. Beck May 2023) fn 26; Anna-Bettina Kaiser, 'Art 5 I, II GG' in Horst Dreier (ed), *Grundgesetz-Kommentar. Band 1* (4th edn, Mohr Siebeck 2023) fn 60; Christoph Grabenwarter, 'Art 5 GG' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz Kommentar* (100th supp, C.H. Beck January 2023) fn 64; BVerfGE 30, 336, 352; 71, 162, 175; 95, 173, 182; 102, 347, 359; BVerfG, Beschluss vom 01.08.2001 – 1 BvR 1188/92, GRUR 2001, 1058, 1059; 05.03.2015 – 1 BvR 3362/14, GRUR 2015, 507, 508 (fn 16). With special respect to physicians: BVerfGE 71, 162, 175.

[108] Grabenwarter (n 107) fn 47; BVerfGE 61, 1, 8; 90, 241, 247; 124, 300, 320.

[109] cf BVerfGE 107, 275, 280 – Benetton II.

[110] Christoph Knauer and Johannes Brose, '§ 219b StGB' in Andreas Spickhoff (ed), *Medizinrecht* (4th edn C.H. Beck 2022) fn 2; Frauke Brosius-Gersdorf, 'Der Fall Kristina Hänel: Rechtsgutachten zur Verfassungswidrigkeit des § 219a StGB' (*Institut für Weltanschauungsrecht*, 29 October 2020) <weltanschauungsrecht.de/meldung/rechtsgutachten-verfassungswidrigkeit-219a> accessed 18 November 2023, 25-26.

[111] BVerfGE 7, 198, 209; 97, 125, 146; 113, 63, 79; 117, 244, 260; 120, 180, 200; 124, 300, 322.

[112] BVerfGE 7, 198, 208-09 – Lüth; 20, 162, 177 – Spiegel; 59, 231, 265 – freier Rundfunkmitarbeiter; 71, 206, 214 – Anklageschrift; 85, 248, 263; 102, 347, 362; 111, 147, 155.

[113] Grabenwarter (n 107) fn 139; Herbert Bethge, 'Art 5 GG' in Michael Sachs (ed), *Grundgesetz Kommentar* (9th edn, C.H. Beck 2021) fn 146; Hans Jarass and Martin Kment, *Grundgesetz für die Bundesrepublik Deutschland. Kommentar* (17th edn, C.H. Beck 2022) Article 5 fn 68; Rudolf Wendt, 'Art 5 GG' in Ingo von Münch and Philip Kunig (eds), *Grundgesetz Kommentar. Band 1* (7th edn, C.H. Beck 2021) fn 120.

[114] Uwe Kischel, 'Vor Art 3 GG' in Volker Epping and Christian Hillgruber (eds), *Beck'scher Online-Kommentar Grundgesetz* (55th edn, C.H. Beck May 2023); Alexander Thiele, 'Art 3 I GG' in Horst Dreier (ed), *Grundgesetz-Kommentar. Band 1* (4th edn, Mohr Siebeck 2023) fn 31; Ferdinand Wollenschläger,' Art 3 GG' in Hermann von Mangoldt, Friedrich Klein and Christian Starck (eds), *Grundgesetz Kommentar. Band 1* (7th edn, C.H. Beck 2018) fn 40; BVerfGE 1, 14, 52; 4, 144, 155; 67, 186, 195; 110, 141, 167.

unequal treatment of persons acting for material gain, and persons acting out of conviction, and (3) the equal treatment of advertising for abortions with and without indication. With time, the requirement to present a "reasonable cause" so as to exclude arbitrary decision-making has given way to a full test of proportionality.[115]

II. Legitimate Purpose

1. The History of Section 219a

Neither the Criminal Code of the Northern German Confederation[116] nor its successor, the Criminal Code of the German Empire (*Reichsstrafgesetzbuch – RStGB*)[117] contained a provision equivalent to section 219a. There was an initial proposal in 1913,[118] but the first ever implemented prohibition came into force in June of 1933 – at the dawn of the National Socialist dictatorship.[119] It seems to have been based on a 1927 draft aimed at countering an actual or perceived increase in the number of ads encountered during the more liberal times of the Weimar Republic.[120] In 1953, the 1933 version was transitioned over into the refurbished Criminal Code of the Federal Republic,[121] and all subsequent re-publications since then. The Allies had not ascribed any substantial National Socialist ideological background to it, and had therefore left it standing where it otherwise would have been nullified.[122] Ultimately, section 219a can be cleared of all charges levelled against it on an historical basis, by virtue of having been repeatedly appropriated by a democratically legitimate legislator acting within the parameters of the rule of law.[123] The version of section 219a that was reformed in 2019 and scrapped in 2022 corresponded to the version adopted in 1974.[124]

2. The Criminalization of Abstract Endangerment

The German Parliament intended for section 219a to counteract a normalisation of abortion in the public consciousness and protect women in precarious circumstances

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115 cf BVerfGE 129, 49, 68 f – Mediziner-BaföG (2011); 141, 1, 38 (fn 93); 145, 106, 142 (fn 98).

116 BGBl 1870, 197– 273.

117 RGBl 1871, 127-205.

118 Wissenschaftliche Dienste BT, Sachstand Entstehungsgeschichte des § 219a StGB, Az. WD 7 – 3000 – 159/17, 8.12.2017, 4 fn 7.

119 Gesetz zur Änderung strafrechtlicher Vorschriften vom 26. Mai 1933, RGBl I 1933, 295, 296.

120 Michael Kubiciel, 'Reform des Schwangerschaftsabbruchrechts?' (2018) 51 ZRP 13, 14; Fischer (n 31) section 219a fn 1.

121 BGBl I 1953, 1083, 1111.

122 Wissenschaftliche Dienste des Bundestags, Sachstand Entstehungsgeschichte des § 219a StGB, Az. WD 7 – 3000 – 159/17, 8.12.2017, p 7.

123 Rogall, '§ 218a StGB in neuer Gestalt' (n 85) 1186; Kubiciel, 'Reform des Schwangerschaftsabbruch-rechts?' (n 120) 14.

124 BGBl I 1974, 503; Rogall, '§ 219a' (n 46) fn 2.

from being commercially exploited.[125] According to the prevailing opinion, section 219a is an offence that seeks to punish advertisers for merely abstractly endangering unborn life (*abstraktes Gefährdungsdelikt*).[126] It is not disapplied simply because the danger in question is realised, i.e. because an abortion actually took place.[127] Accordingly, section 219a paragraphs 2, 3 and 4 are not justifications but exemptions on the elemental level (*Tatbestandsausschlüsse*) because they typify situations where the advert in question – supposedly – does not increase the level of danger facing the unborn.[128] Of course, this judgement fully applies to paragraph 3, which merely minimises the threat for the mother if the abortion is taking place anyhow, by ensuring that there is sufficient medical equipment and know-how. Paragraphs 2 and 4, on the other hand, are concerned only with directing women towards authorised institutions and personnel and thereby do not contribute towards commercialising or normalising abortion publicly. Therefore, they also do not interfere with the immediate teleology of section 219a.

Nevertheless, these references may still be suspected of (indirectly) causing any subsequent termination. Thus, it has been said that the legislator, in allowing any exemptions from section 219a paragraph 1 effectively "capitulated" to the moral imperative that abortions, even those enabled by the counselling scheme, should be performed safely and correctly.[129] Then again, the BVerfG obliged the legislature not to prevent every single abortion but to reduce the number of abortions in the abstract.[130] Thus, the nature of section 219a as an offence constituted by "abstract endangerment" perfectly complements sections 218 and following.

Within the Maternity Protection Act (*Mutterschutzgesetz* – MuSchG), only concrete or specific endangerment is criminalised (section 33), while abstract endangerment constitutes a mere civil offence (summary offence, violation of administrative matters – *Ordnungswidrigkeit*) (section 32). In this light, section 219a might unwittingly have created a blanket clause (*Generalklausel*) where the legislator actually intended for a self-contained provision. However, section 219a StGB is set apart from section 33 MuSchG twofold. For one, it is unclear whether section 33 of the MuSchG requires intent both towards the dangerous action in question and the ensuing danger (*Gefährdungsvorsatz*),

[125] BT-Drs 7/1981, 17. Cited in many of the already referenced commentaries and decisions.

[126] Kröger, '§ 219a' (n 43) fn 1: Fischer (n 31) section 219a fn 2, 3; Gropp and Wörner, '§ 219a' (n 42) fn 2.

[127] cf Eschelbach, '§ 219a' (n 43) fn 25; Merkel, '§ 219a' (n 42) fn 19; Kühl (n 52) fn 7; Safferling (n 43) fn 10; Gropp and Wörner, '§ 219a' (n 42) fn 13; Eser and Weißer, '§ 219a' (n 44) fn 14. The only source which assumes the subsidiarity of section 219a in favour of section 218 which the author encountered is Helmut Satzger, 'Der Schwangerschaftsabbruch (§§ 218 ff. StGB)' (2008) 30 JURA 424, 433.

[128] Eser and Weißer, '§ 219a' (n 44) fn 9; Kröger, '§ 219a' (n 43) fn 8; Gropp and Wörner, '§ 219a' (n 42) fn 9; Reinhart Maurach and others, *Strafrecht Besonderer Teil. Teilband 1 – Straftaten gegen Persönlichkeits- und Vermögenswerte* (11th edn, C.F. Müller 2019) § 6 fn 63; Rogall, '§ 219a' (n 46) 15.

[129] Merkel, '§ 219a' (n 42) fn 17; Satzger, 'Der Schwangerschaftsabbruch (§§ 218 ff. StGB)' (n 127) 425.

[130] cf Helmut Satzger, '§ 219a StGB ist verfassungsrechtlich und strafrechtsdogmatisch nicht zu beanstanden, aber jedenfalls kriminalpolitisch zu überdenken' (2018) 27 ZfL 22, 23.

or whether the offender may act merely negligently in causing the danger.[131] Furthermore, advertisements can affect a multitude of women and children, not even limited to the ones immediately affected by any specific ad. Some commentators have likened the advertising ban to a sort of "social climate protection."[132]

III. Suitability

Section 219a needed to be suited to further one of its stated goals,[133] although it suffices if it was not absolutely impossible that it might have contributed to just one of them.[134]

1. Thwarting Risks of Commercialization or Normalisation

As mentioned above, it is thought that advertising for abortions of any kind would allow abortionists to enter into competition with each other, introducing an unwanted commercial element into the equation. It is also feared that the sheer presence of the "supply" would serve to normalise not just the public discussion but increase demand as well. Certainly, thwarting a productive public debate would infringe upon the very idea of freedom of speech

One may deny that the value of life is called into question by the mere offer for an abortion.[135] Even so, it has been demonstrated that this behaviour does not fall within the parameters of section 219a, at least following the introduction of paragraph 4 (see above). There is a certain threshold above which this trivialization becomes seriously problematic. In countries without an equivalent for section 219a, like the US, one can find slogans such as "10-week-after-pill. Fast. Private. $450" or "Abortion pill in less than 60 minutes", or, perhaps more nefarious, "competent and tender counsel." Even if one were to replace section 219a with a generic ban on advertising, competition would arise pertaining to whoever publishes the most attention-grabbing yet still permissible ad.[136]

Conversely, there is a certain symbolic force in criminal provisions, positively raising

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131 In favour of the former: Katharina Dahm, '§ 33 MuSchG' in Christian Rolfs and others (eds), *Beck'scher Online Kommentar Arbeitsrecht* (66th edn, C.H. Beck December 2022) fn 7. In favour of the latter: Peter Häberle, '§ 33 MuSchG' in Georg Erbs and Max Kohlhaas (eds), *Strafrechtliche Nebengesetze Band 1* (246thsupp, C.H. Beck April 2023) Ergänzungslieferung) fn 4. Unclear: Angie Schneider, '§ 33 MuSchG' in Wiebke Brose, Stephan Weth and Annette Volk (eds), *Mutterschutzgesetz und Bundeselterngeld– und Elternzeitgesetz Kommentar* (9th edn, C.H. Beck 2020) fn 6.

132 Merkel, '§ 219a' (n 42) fn 2; cf Günther Jakobs, 'Kriminalisierung im Vorfeld einer Rechtsgutsverletzung' (1985) ZStW 97, 751, 776.

133 BVerfGE 30, 292, 316; 33, 171, 187; 63, 115; 96, 10, 23.

134 BVerfGE 100, 313, 373 – TKÜ I (1998); cf BVerfGE 16, 147, 183; 67, 157, 175; 96, 10, 23.

135 Kriminalpolitischer Kreis, 'Stellungnahme zum Straftatbestand der Werbung für den Abbruch der Schwangerschaft (§ 219a StGB)' (2018) 27 ZfL 31, 31.

136 Wolfang Vorhoff, 'Stellungnahme zur Änderung des §219a StGB' (Bundestag, 19 February 2019) <www.bundestag.de/resource/blob/595558/69d6526a1e0681ea170a7e1ebbfc478f/vorhoff.pdf> accessed 25 August 2023, 5.

awareness for the value attributed to the protected good.[137] Admittedly, the public's conscience is not easily swayed by rules without sanctions. The approach taken by the BVerfG has been criticised since its inception[138] for its failure in informing people about the technical illegality of abortions. However, the proceedings summarised earlier in this article were controversial enough and of such public relevance that the Federal Government explicitly cited them as reason for repealing section 219a.[139] Evidently, some awareness is raised.

2. "Consumer Protection"

Section 219a may also have protected the women affected being misled on the internet.[140] People, especially those in precarious circumstances, place more trust in – sometimes anonymously posted – information online than they perhaps should. On the other hand, if anyone was allowed to post information but doctors, section 219a would indeed be counterproductive.[141] What has to be emphasised again and again is that section 219a required a specific offering. The distribution of general information about abortion was never criminal. On the other hand, if a specific opportunity to procure an abortion was presented, misleading information connected to said offering was covered under the prevailing interpretation (see above) as "grossly offensive" advertising – regardless of where it originated.

Consequently, section 219a could, ironically enough, only be criticised for not banning enough. Specifically, being presented by medical professionals might lend credence to abortion procedures and methods. That said, without a specific offer, all anyone could gather from such general statements is the knowledge that there are actual, trustworthy doctors providing abortion services in accordance with the law, and that one does not need to rely on quacks in back-alleys. From that realisation onward, a doctor need only be contacted who would then refer to the counselling centre.

3. Ensuring the Functioning of the Counselling Scheme

It has to be noted that, if section 219a were to reduce the number of abortions by simply blocking access to clinics, this would have to be taken as an illicit curtailment of the counselling scheme. Although the BVerfG never mentioned section 219a or any of its predecessors, they did declare that there would have to be a framework, or certain parameters, preparing and guiding troubled women in acting in the best interest of the

[137] Gärditz (n 85) 19-20.
[138] cf BVerfGE 88, 338, 354 ff (dissenting opinion concerning BVerfGE 88, 203 – Abtreibung II).
[139] BT-Drs 20/1635, 1.
[140] cf Nino Goldbeck, 'Zur Verfassungskonformität des § 219 a StGB' (2007) 16 ZfL 14, 15.
[141] cf Ulsenheimer (n 38) fn 82.

child. Otherwise, an abortion without indication could not be permitted.[142] Therefore, section 219a may even have complimented the scheme.[143] If anyone could advertise for abortions in any way they saw fit, they could counteract the life-affirming purpose of the counsel.[144] In addition, it might contribute to the enforcement of the separation between the performing doctor and the counsellor.[145]

Of course, any situation in which a pregnant woman ends up in the doctor's office first carries the (insurmountable) risk that, behind closed doors, the doctor tries to circumvent the counselling, for whatever reason. At the very least, making it less known which doctors perform abortions under which circumstances and using which methods might direct more women to the counselling centres first, even in case they stumbled across the list provided by the Bundesärztekammer beforehand.

IV. Necessity

Section 219a was necessary if it was the mildest means among all available and equally effective means.[146] The legislature is limited in evaluating the necessity of a new piece of legislation only where it can be objectively disproven by facts or experience.[147] Critics of criminal justice are always quick to point out how the criminal law is meant to serve exclusively as a last resort if all other means the state could employ are exhausted. The criminal law as *ultima ratio* may only be used against behaviour that, by reason of its especially harmful effect and insufferableness for society, exceeds the need to be banned and is to be urgently restricted. These were the very words used by the BVerfG to describe the idea. However, they quickly returned to emphasising the legislature's prerogatives and the general criteria of proportionality, in the very next paragraph.[148] Hence, there are no special requirements that would need to be met.

Blindly trusting in the isolated functioning of the counselling scheme[149] would not be as effective as the (limited) monopolisation within the counselling centres. Demotion to a

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142 BVerfG 88, 203, 270.

143 Elisa Marie Hoven, 'Stellungnahme zur Öffentlichen Anhörung des Ausschusses für Recht und Verbraucherschutz des Deutschen Bundestages zum Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Aufhebung des Verbots der Werbung für den Schwangerschaftsabbruch (§ 219a StGB), zur Änderung des Heilmittelwerbegesetzes und zur Änderung des Einführungsgesetzes zum Strafgesetzbuch (BT-Drs. 20/1635 und BR-Drucksache 161/22)' (*Bundestag*, 18 May 2022) <www.bundestag.de/resource/blob/594128/07edb4eba12ad59cf0df810e37f18fa9/hoven.pdf> accessed 25 November 2023, 3.

144 Thomas Weigend, 'Autonomie als Grenze des strafrechtlichen Lebensschutzes' in Martin Böse, Kay H Schumann and Friedrich Toepel (eds), *Festschrift für Urs Kindhäuser* (Nomos 2019) 841, 853.

145 Goldbeck, 'Zur Verfassungskonformität des § 219 a StGB' (n 140) 15.

146 BVerfGE 30, 292, 316; 67, 157, 176; 126, 112, 144-45; 134, 204, 227 (fn 79).

147 cf BVerfGE 25, 1, 20; 40, 196, 223; 77, 84, 106; 102, 197, 218; 125, 112, 145.

148 BVerfGE 120, 224, 240.

149 Schweiger (n 98) 101.

mere administrative offence[150] is a popular alternative to criminalization both as regards section 219a and elsewhere, but tearing section 219a out of the overall concept of sections 218 and following, removing it from the more „prestigious" or much-noticed Criminal Code overall, and banishing it to the much less prominent *Ordnungswidrigkeitengesetz* (OWiG) seems improper.[151] One is tempted to accuse its proponents of suggesting that unborn life is about as important to the state as violations of traffic laws.[152] Of course, traffic laws do protect from death or bodily harm. The problem is highlighted more effectively by what actually happened concurrently with the repeal of section 219a. Namely, the scope of application of the Law on Advertising in the Health Care System (*Heilmittelwerbegesetz* – HWG) was extended by adding abortion to a list of procedures among which was plastic surgery.[153]

V. Objections Regarding Inconsistency

The most prominent objection to the adequacy of section 219a is that it is supposedly plainly contradictory to criminalise medical practitioners for merely advertising services which they are legally and individually required to provide, or even just services which are collectively required of them for the sake of the functioning of the counselling scheme. Its most noteworthy exponent has been the BVerfG themselves, in a case where a doctor was being targeted by a pamphlet describing his activities as "illegal." The Court held that, in everyday speech, the pamphlets made it seem like the doctor was performing criminal abortions. Spreading them therefore constituted the dissemination either of an untrue statement of fact, which is not covered by freedom of speech, or of an opinion that inappropriately singled out the doctor affected, violating his persona. The Court also stated that a doctor should be able to advertise his services without negative consequences – not literally translated but, with the above-said, functionally identical. The injunction against the activist was therefore valid.[154]

The decision has been used to argue that, if a private party may not infringe on an abortionist's personal honour for informing about his services, the state may– a fortiori – not criminally sanction them.[155] The ruling was even quoted in the Federal Government's explanation of why section 219a was repealed.[156] One the other hand, the Court's opinion

[150] Merkel, '§ 219a' (n 42) fn 3a; cf Kriminalpolitischer Kreis (n 135) 32.
[151] cf Nora Kaiserl and Martin Eibach, 'Aufhebung oder Änderung des § 219a StGB – Plädoyer für eine rationale Kriminalpolitik' [2018] medstra 273, 277.
[152] Carina Dorneck, 'Das Gesetz zur Verbesserung der Information über einen Schwangerschaftsabbruch – eine erste Analyse' [2019] medstra 137, 141.
[153] cf Pietsch (n 39) 81.
[154] BVerfG, Beschluss vom 24.05.2006 – 1 BvR 1060/02, Zfl 2006, 135.
[155] Preuß (n 106) 133.
[156] BT-Drs 20/1635, 2.

in a civil matter need not necessarily imply the unconstitutionality of section 219a.[157] The regulation of the behaviour of private parties under specific circumstances may be considered a fundamentally different matter than the legislature's power to pass a general law imposing criminal sanctions. Moreover, even if the Court had addressed the legislator through the passage in question, the advertisement in question was likely one that would have met the requirements of section 219a paragraph 4. More important, however, the negative consequence in the case concerned was the accusation that illegal abortions were being performed. The devil in the details was, of course, the plain meaning of "illegal abortions."

1. Advertising Abortions Performed Under Section 218a Paragraph 1

Unlike paragraphs 2 and 3, the wording of paragraph 1 does not hint at any categorization within the legal-illegal-binary. It has been suggested that deeds covered by section 218a paragraph 1 belong to a third category couched in between "lawful" and "unlawful", namely "not unlawful" or "not illicit."[158] However, the 1975 decision absolutely precludes the state from capitulating and leaving behind such a legal vacuum (see above). Furthermore, the expression "not unlawful" is already used in paragraph 2, where (as described above) it is universally read as synonymous with "lawful." The legislator's intent to treat behaviour falling under paragraph 1 as generally unlawful (unless stated otherwise in other contexts, perhaps) cannot just be ignored for the sake of a rhetorical compromise that would please all the opposing parties.

The BVerfG was, of course, also very explicit in deeming all abortions without indication as "unlawful" even if they were not "criminal" if counsel was properly involved. Yet even if decriminalisation alone did not go hand in hand with legalisation, one is left to wonder whether the sum of the BVerfG's demands warrant that impression. In fact, the exclusion of insurance coverage seems to be the only negative consequence attributed to an abortion – and even that is undercut, since the abortion may be funded by welfare payments instead.[159] Third parties are not allowed to exercise their right to defence of another person for the sake of the unborn child.[160] While the Court set forth that this would be achieved simply by exempting the counselled abortion from the area of application of section 218, this is not strictly correct as far as the dogma of German criminal law is concerned. Section 32 paragraph 2, which defines the right to self-defence

[157] Goldbeck, 'Zur Verfassungskonformität des § 219 a StGB' (n 140) 15; Scarlett Jansen, 'Anmerkung: Werbung für Schwangerschaftsabbruch auf ärztlicher Homepage, zu AG Gießen, Urteil vom 24.11.2017 – 507 Ds 501 Js 15031/15' [2018 issue 7] jurisPR-StrafR fn 2.

[158] „*unverboten*", see Arthur Kaufmann, 'Strafloser Schwangerschaftsabbruch: rechtswidrig, rechtmäßig, oder was?' (1992) 47 JZ 983.

[159] BVerfGE 88, 203, 321 – headnote 16; 316 (fn 321); 321 (fn 335);

[160] BVerfGE 88, 203, 278 (fn 216); BT-Drs 13/1850, 25.

(*Notwehr*) as well as the right to defend another person (*Nothilfe*), only requires an "imminent illegal attack" (*gegenwärtiger rechtswidriger Angriff*), not the commission of "an imminent illegal deed" (crime, felony or misdemeanour) that would fulfil a provision of the Criminal Code (*rechtswidrige Tat*). If the Court is to be taken at face value, an "imminent illegal attack" would actually be at hand. This has led commentators to search for another explanation. Convincingly they have posited that the right to defence was limited on grounds of its inadequacy in the particular case.[161] Whoever acts in contradiction to the counselling scheme would not be motivated by upholding the law and would therefore not be justified if he committed crimes against the physician, for instance.[162]

Even so, this was neither an oversight nor a contradiction on the Court's part. In the opinion of the BVerfG, the most effective way to serve the overarching goal of protecting the life of the unborn in the abstract did not lie in employing the verdict of illegality in a manner corresponding to the principle of the uniformity of the legal system. Instead, singular legal consequences otherwise protruding from the illegality of the abortion would be waived if necessary. In the end, the overall impression would be all that counts.

Admittedly, section 219b does not punish the distribution of means to perform non-criminal abortions but lay abortions that are deemed to be especially dangerous.[163] If the opposite were the case, and the layman were empowered as opposed to the medical professional, the counselling scheme would without question be hindered to an entirely inappropriate extent. It remains to be discerned whether section 219a had such an effect.

2. Advertising Abortions Performed under Section 218a Paragraphs 2 and 3

However, any law would fall short of that impression, if it led people to believe that abortions performed under an indication were just as bad as those performed without. Logically speaking, they would instead conclude that abortions falling under paragraph 1 were just as legitimate. Section 219a might therefore be unconstitutional not just on

[161] Perdita Kröger, '§ 218' in Gabriele Cirener and others (eds), *Leipziger Kommentar StGB Online* (De Gruyter 2019) fn 44; Fischer (n 31) section 218a fn 4.

[162] Helmut Satzger, 'Der Schutz ungeborenen Lebens durch Rettungshandlungen Dritter' (1997) 37 JuS 800, 802-03.

[163] BT-Drs 7/1981 (neu) 18; Albin Eser and Bettina Weißer, '§ 219b' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 1; Ralf Eschelbach, '§ 219b' in Bernd von Heintschel-Heinegg (ed), *Beck'scher Online-Kommentar zum StGB* (53rd edn, C.H. Beck May 2022); Reinhard Merkel, '§ 219b' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (5th edn, Nomos 2017) fn 1; Walter Gropp and Liane Wörner, '219b' in Günther M Sander (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 4* (4th edn, C.H. Beck 2021) fn 1; Perdita Kröger, '219b' in Gabriele Cirener and others (eds), *Leipziger Kommentar StGB Online* (De Gruyter 2019) fn 5.

grounds of disproportionately limiting fundamental freedoms, but also on grounds of unwarranted equal treatment of these inherently unequal situations.[164]

More generally, the question has been raised, how advertising lawful services could suddenly be rendered as criminal.[165] In fact, before the wording of paragraph 2 explicitly categorised them as such, the fact that advertising for them was also a criminal act was utilised as an argument in favour of their illegality.[166] Treating legal abortions differently than illegal abortions is in principle also imperative, as demanded by the BVerfG in its second ruling.[167]

There are plenty of offences that are characterised by abstract endangerment where the event that is supposed to be prevented is not in turn also a criminal offence. For example, accepting or granting bribes or benefits to public officials is criminal behaviour even if the official act that it is aimed at turns out to be perfectly permissible otherwise.[168] It is quite common practice to ban ads for products whose use or consumption is perfectly legal. The state may try to prevent people from becoming addicted to nicotine, for example, by restricting tobacco ads, while the question whether smoking itself might be banned is much more difficult to answer. By analogy, actions that are constitutionally viewed much more negatively, such as abortion, may be banned from being advertised for.[169] This has to be doubly true in light of abortion not being mere self-harm. Indeed, advertising for legal abortions still signifies an inimical position towards a highly valuable, legally protected good belonging to another person, that should not be underestimated or understated.[170]Advertising for legal abortions might normalise the topic of abortion just as much as advertising for illegal ones.[171]

3. Intermediate Conclusion

The phrasing of paragraph 1 serves the practical purpose of decriminalising the termination of pregnancies in accordance with the counselling scheme, while simultaneously upholding their illegality and differentiating the situation from the mere exclusion of punishment in cases falling under paragraph 4. The lawgiver is free to treat the procedure as illegal in all contexts and all areas of law where this was not in turn precluded by the Court – hence the exceptions pertaining to the law of defence and the law

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164 BVerfGE 83, 273, 280 (fn 219).

165 Friedrich-Christian Schroeder, 'Unaufrichtigkeit des Gesetzes' (1992) 25 ZRP 409, 410; Eschelbach, '§ 219a' (n 43) fn 2.

166 cf Claus Belling, *Ist die Rechtfertigungsthese zu § 218a StGB haltbar?* (De Gruyter 1987) 106.

167 see n 24.

168 cf Ralf Krack, 'Sportwettbetrug und Manipulation von berufssportlichen Wettbewerben. Regierungsentwurf zu §§ 265c, 265d StGB' (2016) 11 ZIS 540, 543.

169 cf Rogall, '§ 218a StGB in neuer Gestalt' (n 85) 1196-97.

170 Berghäuser (n 66) 500.

171 Goldbeck, 'Die Werbung für den Abbruch der Schwangerschaft' (n 90) 102.

of insurance. Therefore, special forms of participation might still be criminalised, as is the case with sections 219b and – formerly– 219a. In the end, the question is whether the stated goal of reducing the number of abortions is achieved, in a manner that does not contradict the counselling scheme, and to an extent so that its success justifies its extremes.

VI. Measuring Severity and Success

1. Reduction in the Number of Abortions

Compared to other European countries, Germany has very low abortion rates.[172] After a steady decrease in the number of abortions from 106,815 in 2012 to 98,721 in 2016, the number increased to 101,209 in 2017. By 2021, it had once again fallen to 94,596. For the next year, it has to be noted that the repeal of section 219a correlates with an increase to 103,927 abortions in 2022 to 103,927. When sorted by their legal basis, abortions on the basis of section 218a paragraph are by far the most prevalent, with a relatively constant share around 96%, with 107,330 (97,19%) in 2012, 90,643 (95,82%) in 2021 and 99,968 (96,19%) in 2022.[173]

The number of abortions relative to the number of women has also been relatively stable, with about 50 around 2005, shrinking to 43 in 2021, with numbers for 2022 not yet available. The number of abortions relative to the number of live births, on the other hand, has decreased in disparate phases from 175 in 2000 to 128.5 in 2020.[174] Considering how the short-term trend of slowly decreasing abortion numbers from 2017 onward was interrupted in 2022 of all years, it is absolutely necessary to observe whether this phenomenon develops into a long-term upward trend in the future, and especially whether the relative shares mentioned follow suit.

2. Prosecutions and Sentences Carried Out Under Section 219a

As far as its relevance in criminal justice is concerned, section 219a has had next to no

[172] Franziska Prütz, Birte Hintzpeter and Laura Krause, 'Schwangerschaftsabbrüche in Deutschland – Aktuelle Daten aus der Schwangerschaftsabbruchstatistik' [2022] Journal of Health Monitoring 42, 42.

[173] Statistisches Bundesamt, 'Anzahl der Schwangerschaftsabbrüche in Deutschland nach rechtlicher Begründung, Dauer der Schwangerschaft und vorangegangenen Lebensgeborenen im Zeitvergleich ab 2012' (*Statistisches Bundesamt*, 27 March 2023) <www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Schwangerschaftsabbrueche/Tabellen/03-schwangerschaftsabbr-rechtliche-begruendung-schwangerschaftsdauer_zvab2012.html;jsessionid=57AE6AF8552E4933035510BF527EE5000A.live722> accessed 24 August 2023; Gesundheitsberichterstattung des Bundes, 'Tabelle (gestaltbar): Schwangerschaftsabbrüche, u.a. nach Merkmalen der Schwangerschaftsabbruchstatistik' (*GBE*, 24 August 2023) <www.gbe-bund.de/gbe/pkg_isgbe5.prc_menu_olap?p_uid=gast&p_aid=17119310&p_sprache=D&p_help=2&p_indnr=240&p_indsp=&p_ityp=H&p_fid=> accessed 24 August 2023.

[174] Prütz, Hintzpeter and Krause (n 172) 45-46.

actual impact.[175] 85 to 90 percent of investigations initiated were discontinued without indictment.[176] All in all, there had been no more than eight sentences for sections 219a and 219b put together between 2010 and 2020.[177] In the Federal Crime Statistic (*Bundeskriminalstatistik*), there had been exactly zero cases in 2021 and 2022, with one case each in 2019 and 2021.[178] Until 2019, when paragraph 1 was introduced, there had been significantly more, with 17 in 2018 and 21 and 2017.[179] If nothing else, that last statistic is evidence for the introduction of paragraph 4 being a powerful corrective force against the broad scope of paragraph 1. These exact legal insecurities for doctors had been cited by the Government as one reason for the repeal,[180] but their subsistence after the introduction of paragraph 4 is in turn highly uncertain.[181]

3. Ready Availability of Information and Services

It has been posited that opportunities for counselling have been severely limited by section 219a, leading to a narrower timeframe for the procedure to take place.[182] In the face of the importance of the protected good in question, the legislature is generally best advised, if not bound, to refrain from unwarranted experimentation.[183] Confronted with the hitherto determined lack of any substantial intrusion, it has to be carefully assessed

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[175] Kröger, '§ 219a' (n 43) fn 1

[176] Michael Kubiciel, 'Schriftliche Fassung der Stellungnahme in der Öffentlichen Anhörung des Ausschusses für Justiz und Verbraucherschutz des Deutschen Bundestages' (Bundestag) <www.bundestag.de/resource/blob/593464/222dab5c86e958a13b2115f3629d087b/kubiciel.pdf> accessed 25 November 2022, 1.

[177] Kubiciel, 'Schriftfassung der Stellungnahme in der öffentlichen Anhörung des Ausschusses für Recht und Verbraucherschutz des Deutschen Bundestages am 18.5.2022' (n 41) 8.

[178] Bundeskriminalamt, 'Polizeiliche Kriminalstatistik 2022 Bund, T01 Grundtabelle – Fälle (V.10)' (*BKA* 2023) <www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2022/PKSTabellen/BundFalltabellen/bundfalltabellen.html?nn=211724>; 'Polizeiliche Kriminalstatistik 2021 Bund, T01 Grundtabelle – Fälle (V1.0)' (*BKA* 2022) <www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2021/PKSTabellen/BundFalltabellen/bundfalltabellen.html?nn=194190>; 'Polizeiliche Kriminalstatistik 2020 Bund, T01 Grundtabelle– Fälle (V1.0)' (*BKA* 2021) <www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2020/PKSTabellen/BundFalltabellen/bundfalltabellen.html?nn=145488>; Polizeiliche Kriminalstatistik 2019 Bund, T01 Grundtabelle – Fälle (V1.0)' (*BKA* 2020) <www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2019/PKSTabellen/BundFalltabellen/bundfalltabellen.html?nn=130872>; all accessed 24 August 2023.

[179] Bundeskriminalamt, 'Polizeiliche Kriminalstatistik 2018 Bund, T01 Grundtabelle – Fallentwicklung' (*BKA* 2019) <www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2018/BKATabellen/bkaTabellenFaelle.html?nn=108686>; 'Polizeiliche Kriminalstatistik 2017 Bund, T01 Grundtabelle – Fallentwicklung' (*BKA* 2018) <www.bka.de/DE/AktuelleInformationen/StatistikenLagebilder/PolizeilicheKriminalstatistik/PKS2017/BKATabellen/bkaTabellenFaelle.html?nn=96600>.

[180] BT-Drs 20/1635, 3.

[181] Pietsch (n 39) 79. Completely denied by Wolfgang Vorhoff, 'Leserbrief zum Artikel „LG Gießen zur Werbung für Schwangerschaftsabbruch: Berufung von Ärztin Hänel abgewiesen"' (*LTO Online*, 2 November 2018) <www.lto.de/recht/leserbriefe/k/leserbriefe-kw-43-44-2018-ruestungsexporte-palandt-umbenennung-examen-computer/4/> accessed 5 January 2023.

[182] BT-Drs 20/1635, 10.

[183] BVerfGE 39, 1, 159.

whether section 219a caused any actual lack of information among pregnant women.[184] The evidence seems to point in the opposite direction.[185] The aforementioned doctor from Gießen raised the concern that women in her experience were struggling to get an appointment with their regular gynaecologist, or that doctors who were unwilling to perform abortions themselves were clueless about the medical aspects of abortion or about the addresses of willing colleagues.[186] In her statement, she did not pose that there was any problem with performing the abortion in time, though. Neither did she prove any problems with section 219a that do not stem directly from the counselling scheme, or its lacklustre implementation and that have not already been disproven in this article.

On the contrary, another gynaecologist reported that all his patients get the procedure done within two weeks after noticing the pregnancy around its eighth week. Effectively, they would have six to eight weeks before running out of time for the purposes of section 218a paragraph 1.[187] They would procure an appointment with their gynaecologist, be informed medically and then be referred to both counselling authorities and abortion clinics.[188]

In his personal view, the eye-to-eye conversation would in any case be much more helpful in finding an abortionist one could personally trust.[189]

A third (tenured) gynaecologist likewise knew of no complaints, neither from her own patients, nor ones made to colleagues or patient associations. Her statement reads as essentially congruent to the second statement. However, she was able to give an estimate of about one counsellor for a population of 40,000.[190] In addition, she remarked that it was simply common for doctors (in all areas) to refrain from individual advertising in favour of being referred to from within professional circles.[191]

Section 219a has also been implied to cause a decrease in the number of doctors willing to perform abortions. In a timespan of twenty years, said number is said to have decreased by as much as 40 percent, resulting in a commute of up to 90 miles, or 150

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184 cf Kröger, '§ 219a' (n 43) fn 7.

185 Gropp and Wörner, '§ 219a' (n 42) fn 2; Fischer (n 31) section 219a fn 5.

186 Kristina Hänel, 'Stellungnahme zur Anhörung im Rechtsausschuss des Deutschen Bundestags am 18.5.2022' (*Bundestag*, 18 May 2022) <www.bundestag.de/resource/blob/895620/a0a3be16ec4ff1821c2651cd0217eae0/Stellungnahme-Haenel.pdf> accessed 25 November 2023, 1-2.

187 Vorhoff (n 136).

188 ibid p 1.

189 ibid p 2.

190 Angela Königer, 'Stellungnahme als Sachverständige zur öffentlichen Anhörung zum Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Aufhebung des Verbots der Werbung für den Schwangerschaftsabbruch (§ 219a StGB), zur Änderung des Heilmittelwerbegesetzes und zur Änderung des Einführungsgesetzes zum Strafgesetzbuch' (*Bundestag*, 18 May 2022) <www.bundestag.de/resource/blob/895868/dcd9669250e31fed8c7c70487bc2e03f/Stellungnahme-Koeninger-data.pdf> accessed 25 August 2023.

191 ibid 4.

kilometres, to the nearest abortion clinic.[192] In the "last days" of section 219a, the previously mentioned list hosted by the Federal Medical Association contained and still contains, as counted by the author of this article, 365 entries, some of which are duplicates.[193] The list uniformly gives the name of the clinic, its address, its telephone number and e-mail, commanded foreign languages as well as methods and procedures. Therefore, the list would fall under section 219a if it were not for the express authorization by the SchKG (see above). The unequal treatment between the list and individual advertising, in this regard, is exactly the uniformity imposed on the portrayal, preventing competition. The website also allows for the depiction as a Street Map, observing which one can spot noticeable gaps in rural Bavaria and Lower Saxony, the southern Rhineland and Hesse. There are at least two cities in every German state that is not a city state, in which abortion clinics are visibly located.

All things considered, the evidence suggests that any "supply problems" related to abortion services are not owed to section 219a but to the necessary barriers erected in the form of paragraphs 218a and following, to naturally occurring specialisation, and the individual conscience of doctors.[194] The latter two may be interlinked, for many prenatal physicians would be confronted with the massive inequality between one group of children to whom they provide intensive prenatal care, and the other group of children they are hired to abort.[195] It was a conscious (and rectifiable) decision on the part of the legislature to extend the right to deny an abortion beyond reasons of conscience, and to corporate bodies.[196] Among 309 public, non-denominational clinics, only 60 percent were found to be willing to perform abortions at all, with 38 percent allowing for abortions without indication. The percentages are as low as 40% and 10%, respectively, in Bavaria,[197] indicating cultural and religious differences between regions, or also between cities and rural areas.[198] Beyond that, institutional shortcomings may be explained by, or post hoc justified by, the BVerfG's dictum that the illegality of abortion also has to be a guiding principle for medical training.[199]

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192 cf Elizabeth Schumacher, 'Germany moves to reform abortion law' (*DW*, 24 June 2022) <www.dw.com/en/germany-moves-to-reform-abortion-law/a-62014740> accessed 3 August 2022.

193 see n 73.

194 ibid 3; Vorhoff (n 136) 4.

195 Königer (n 190) 5.

196 cf Eser and Weißer, '§ 218a' (n 29) fn 84.

197 Antonia Groß and others, 'Welche öffentlichen Kliniken keine Abbrüche durchführen' (*Correctiv*, 3 March 2022)<https://correctiv.org/aktuelles/gesundheit/2022/03/03/keine-abtreibungen-in-vielen-oeffentlichen-kliniken> accessed 6 January 2022.

198 Dinah Riese and Hanna Voß, 'Immer weniger Ärzt*innen. Der lange Weg zur Abtreibung' (*TAZ*, 8 March 2018) <https://taz.de/Immer-weniger-Aerztinnen/!5487589> accessed 6 January 2023.

199 BVerfGE 88, 203, 280 (fn 219).

4. Harassment By Anti-Abortionists

Thirdly, it is thought that fear of falling victim to militant pro-lifers led to many doctors not applying to be listed by the Federal Medical Association.[200] It is reasonable to assume that the "urbanisation" of abortion has less to do with harassment and more to do with the broader desire for anonymity.[201] Even if approached by pro-lifers in the vicinity of the clinic, any behaviour covered by the protestor's freedom of speech has to be treated as licit. One may argue that the protester is not only exercising his freedom of speech but positively has the constitutionally warranted protection of the unborn on his side.[202] The latter would probably violate the principle of neutrality between different opinions. In any case, the women affected are free to interact, or not interact.[203]

Having said that, there is no discernible reason why any actual harassment would be avoided by allowing for individual advertising. With or without the Federal Medical Association's list, certain pro-lifers in Germany were able to compile an extensive list, including addresses, all by themselves. Again, this incident has led to criticism concerning an unequal treatment between making offers for financial benefit, and spreading multiple offers for idealistic reasons.[204] However, said private website, in its complete lack of taste, and in its absolutely primitive html-glory, does nothing to normalise abortion in the public consciousness, even if misused by individuals to procure abortions. The comparison is, therefore, inept.

VII. Intermediate Conclusion

For all of the reasons given, it seems highly unlikely that section 219a would ever have been declared unconstitutional. Between 2019 and 2022, doctors were subject to criminalization but could easily have avoided any prosecution. If there would have ever been a conflict with their freedom to express their opinion in connection to their profession, section 219a could have easily been bent or disapplied. In light of the broad prerogatives of the legislature, the relationship between this extent of section 219a's burden, and its success seems adequate. It did not run counter to the Counselling Scheme envisioned by the BVerfG, and may be assumed to indirectly add to that grand but

[200] BT-Drs 20/1635, 10; cf Brosius-Gersdorf (n 110) 37.
[201] Vorhoff (n 136) 4.
[202] cf Bernward Büchner, 'Anmerkung zu BGH, Urteil des 6. Zivilsenats vom 7. Dezember 2004 – BGH VI ZR 308/03' (2005) 14 Zfl 16, 16-17 (referencing a decision handed down by the BGH on 1 April 2003 – VI ZR 366/02).
[203] ibid 17.
[204] Brosius-Gersdorf (n 110) 38; Ulbricht (n 5) 8.

controversial compromise. Conversely, the part of the Act that rehabilitated already sentenced offenders is likely unconstitutional.

On the other hand, the legislature also acted well within its prerogatives when it repealed section 219a and substituted sub-criminal mechanisms for it. Harkening back to the 1975 decision and other precedent, the lawgiver is relatively free in deciding when to resort to punishment, even with regards to the abortive act itself. In the next few years, though, this favourable verdict might be called into question by steadily rising abortion rates. At that point, the German state might be forced to enforce stronger measures once again, or might try to appeal to the BVerfG to change their view on the matter of abortion.

E. Whatever protection remains

Notwithstanding the repeal of section 219a, the deed of advertising abortions may still fall within the scope of other provisions of German law.

I. Criminal Law

Sections 26 and 27 StGB penalise anyone who induces another person to intentionally commit, or intentionally assists in the commission of another unlawful act (*Anstiftung* and *Beihilfe*). Aiding and abetting are collectively categorised as "participation" (*Teilnahme).* Section 111 ads to this by declaring that "whoever publicly, in a meeting, or by disseminating content incites the commission of an unlawful act incurs the same penalty as an abettor." Since abortions with indication are lawful, they cannot be participated in. Because any "unlawful act" is expressly required by section 11 paragraph 1 number 5 to fulfil all elements of some criminal offence, neither can one participate in abortions performed under section 218a paragraph 1.[205] Notwithstanding this large gap, any other abortion can still be aided or abetted in accordance with general principles.[206]

1. Public Incitement to Commit Offences (Section 111)

It must not be supposed that the government intended to legalise any advertisement for abortions not covered by the Counselling Scheme. Before the repeal of section 219a, it was widely assumed that sections 219a and 111 in combination with 218 would be competing in such cases.[207] Section 111 would have remained applicable if the ad was not offensive

[205] Christoph Sowada, 'Die Werbung für den Schwangerschaftsabbruch (§ 219a StGB) zwischen strafloser Information und verbietbarer Anpreisung' (2018) 27 ZfL 24, 25.

[206] Ralf Eschelbach, '§ 218' in Bernd von Heintschel-Heinegg (ed), *Beck'scher Online-Kommentar zum StGB* (56th edn, C.H. Beck February 2023) fn 13; Kröger, '§ 218' (n 161) fn 32; Walter Gropp and Liane Wörner, '§ 218' in Günther M Sander (ed), Münchener *Kommentar zum Strafgesetzbuch. Band 4* (4th edn, C.H. Beck 2021) fn 42.

[207] Merkel, '§ 219a' (n 42) fn 19; Eser and Weißer, '§ 219a' (n 44) fn 14; Kühl (n 52) fn 6.

or made for the sake of material gain.[208] Inciting illegal abortions as a distinct type of crime is sufficiently specific for the purposes of section 111.[209] However, an incitement in the sense of telling someone that they should get an abortion is to be distinguished from merely endorsing abortions, on the basis of a genuine appeal.[210] Therefore, regular advertisements do not qualify.

2. Aiding and Abetting (Sections 26 and 27)

Section 111 paragraph 2 expressly clarifies that an unsuccessful incitement is still criminal, the inciter being liable for up to five years imprisonment. Meanwhile, participation is characterised by an unlawful act that actually took place or was actually attempted. Consummate participation has to be distinguished from mere attempted abetting. There is a certain gap in the criminal law insofar as mere attempts to abet are punishable according to section 30 only if the main offence was a serious criminal offence (*Verbrechen*), meaning one that is punishable by a minimum term of one year imprisonment (section 12 paragraph 1). In no situation under sections 218 and following, not even serious cases for the doctor, the minimum punishment exceeds one year. An abortion is therefore always a mere *Vergehen* (section 12 paragraph 1).[211]

An abetting requires that the will of another is influenced in a way as to cause their intent to commit the main unlawful act. It is no longer possible once that person is already firmly determined to do the deed.[212] However, it remains possible to give psychic aid by affirming the other person's plan, or by giving advice.[213] Accordingly, naming or otherwise mediating specific people or institutions willing to perform an abortion, constitutes (at least) providing aid to said abortion.[214] Due to the special trust placed in doctors, this

[208] Gunther Arzt and others, *Strafrecht Besonderer Teil* (4th edn, Gieseking 2021) § 5 fn 39.

[209] cf Nikolaus Bosch, '§ 111' in Jürgen Schäfer (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 3* (4th edn, C.H. Beck 2021) fn 13, 27; Albin Eser, '§ 111' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 13; cf Hans-Ullrich Paeffgen, '§ 111' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (6th edn, Nomos 2023) fn 15.

[210] Bosch (n 209) fn 6-7; Paeffgen (n 209) fn 11, 13; Heger, '§ 111' in Karl Lackner and Kristian Kühl (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2023) fn 3.

[211] Eser and Weißer, '§ 219a' (n 44) fn 1; Rogall, '§ 219a' (n 46) fn 1.

[212] Wolfgang Joecks and Jörg Scheinfeld, '§ 26' in Bernd von Heintschel-Heinegg (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 1* (4th edn, C.H. Beck 2020) fn 10, 31; Hans Kudlich, '§ 26' in Bernd von Heintschel-Heinegg (ed), *Beck'scher Online Kommentar zum StGB* (57th edn, C.H. Beck May 2022) fn 20; Wolfgang Schild and Bernhard Kretschmer, '§ 26' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (6th edn, Nomos 2023) fn 8.

[213] Joecks and Scheinfeld, '§ 26' (n 212) fn 6-7; Martin Heger, '§ 27' in Karl Lackner and Kristian Kühl (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2023) fn 4; Volker Haas, '§ 27' in Holger Matt and Joachim Renzikowski (eds), *Strafgesetzbuch Kommentar* (2nd edn, Vahlen 2020) fn 23.

[214] Fischer (n 31) § 218 fn 10; Albin Eser and Bettina Weißer, '§ 218' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 52; Reinhard Merkel, '§ 218' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (5th edn, Nomos 2017) fn 151; BGHSt 1, 139.

generally applies even where information would already be available on the internet, even if placed there by the clinics themselves.[215]

However, it is doubtful whether an advertisement would represent aid or abetment to all abortions it ends up causing. In the end, it depends on how specific the participant's intent as regards the main offence needs to be. The abettor's intent (*Anstiftervorsatz*) is generally subjected to a higher standard. Sometimes, it is assumed that only the type of legally protected good that is to be violated needs to be specified, as long as the identity of the persons involved is irrelevant.[216] In any case, the prevailing opinion seems to be that cases falling under section 111, i.e. ones in which a non-select circle of persons is addressed, are insufficient for the purposes of section 26.[217] The intent to provide aid to an illegal act (*Gehilfenvorsatz*), on the other hand, requires that the assistant is aware of the circumstances essential to the main deed, not of any more specific details such as time, place or the identity of the main offender.[218] Therefore, advertising for illegal abortions does not constitute abetting but giving aid, if the likelihood of procuring an abortion is increased. Namely, the advertiser lends psychic aid to the patient, if abortions are not merely approved of but praised, and technical aid, if actual opportunities are provided.

II. Law on Advertising in the Health Care System

In his statement on the repeal, the Federal Minister of Justice had guaranteed that any praise for abortion (whether legal or illegal) would "obviously" stay banned.[219] Section 12, in conjunction with section 15 paragraph 1 number 9, of the Law on Advertising in the Health Care System (*Heilmittelwerbegesetz* – HWG) would serve as replacement for section 219a StGB.[220] Before the changes made in the 2022 Act, the HWG was only

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215 Hans Kudlich, '"Das hätte doch wohl jeder auch so finden können …"' [2013] JA 791, 793; OLG Oldenburg, Urteil vom 18.02.2013 – 1 Ss 185/12, BeckRS 2013, 04777.

216 Joecks and Scheinfeld, '§ 26' (n 212) fn 70.

217 Günter Heine and Bettina Weißer, '§ 26' in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2019) fn 19; Kudlich, '§ 26' (n 212) fn 12.1; Martin Heger, '§ 26' in Karl Lackner and Kristian Kühl (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2023) fn 5; Volker Haas, '§ 26' in Holger Matt and Joachim Renzikowski (eds), *Strafgesetzbuch Kommentar* (2nd edn, Vahlen 2020) fn 13.

218 Wolfgang Joecks and Jörg Scheinfeld, '§ 27' in Bernd von Heintschel-Heinegg (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 1* (4th edn, C.H. Beck 2020) fn 103-4; Kudlich, '§ 26' (n 212) fn 20; Wolfgang Schild and Bernhard Kretschmer, '§ 27' in Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen (eds), *Strafgesetzbuch* (6th edn, Nomos 2023) fn 17.

219 Statement made by *Bundesjustizminister* Marco Buschmann on 25 January 2022, <www.bmj.de/SharedDocs/Artikel/DE/2022/0124_Aufhebung_Vorschrift_Paragraph_219a_Strafgesetzbuch.html> accessed 3 August 2022.

220 BT-Drs 20/1635, 3; see also: Statement made on behalf of the Federation of German Female Lawyers (*Deutscher Juristinnenbund* – djb) by Maria Wersig, Leonie Steinl and Inga Schuchmann, 'Stellungnahme zum Gesetzesentwurf zur Aufhebung des Verbots der Werbung für den Schwangerschaftsabbruch (§ 219a StGB)' (Bundestag, 16 May 2022) <www.bundestag.de/resource/blob/895656/b9cc4647401687206b5e0360a98db216/Stellungnahme-Schuchmann-UND-Steinl_djb.pdf> accessed 26 November 2023, 8; statement by statement by Anna Katharina Mangold (Bundestag, 18 May 2022) <www.bundestag.de/resource/blob/895972/60a356c1cc9ad1e8a76e13dd572850ba/Stellungnahme-Mangold.pdf> accessed 26 November 2023, 5.

applicable in cases of medical necessity, since it required either schemes against diseases or sickly afflictions, or for the restoration of normal bodily functions (compare section 1 HWG).[221] Means, procedures, treatments and objects relating to abortion were then added as section 1 number 1 number 2 letter b. Running contrary to what the Government has promised, abortions were awarded a special privilege for advertising outside of expert groups (section 12 paragraph 2 sentence 2 number 1), though this does not extend to illegal lay abortions.[222] The extensive list of illicit advertising outside of expert circles has not been updated to include examples more typical of abortion cases, such as the promise of refuge.

Section 3 puts a ban on misleading advertising. Intentional contraventions are punishable by up to one year of imprisonment, or with a fine (section 14).[223] However, section 3 does not prohibit praising one's products and services. It covers unprofessional conduct, such as exaggeration.[224] In line with the purpose of the HWG in general, not the unborn but the mother's freedom of decision is meant to be protected.[225] Adding further to the HWG's lack of efficiency when it comes to abortion, any breach of a rule under it requires that it (indirectly) cause some sort of health hazard.[226]

III. Law on Fair Trading Practices

Section 17 of the HWG clarifies that the more general Law on Fair Trading Practices *(Gesetz gegen den unlauteren Wettbewerb – UWG)* is not disapplied. The only hard sanctions imposed by that law are the criminalization of misleading advertising (section 16 paragraph 1) and pyramid schemes (paragraph 2) and the imposition of administrative penalties on widespread infringements with a European Union dimension (section 19). Threatened by injunctions (section 8), damages (section 9) and confiscation of profits (section 10) are any unfair commercial practices, among which misleading practices (section 5), unacceptable nuisances (section 7) and aggressive practices (section 4a).

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221 Ulf Doepner and Ulrich Resse, *Heilmittelwerbegesetz Kommentar* (5th edn, C.H. Beck 2023) Introduction fn 68b.

222 Doepner and Reese (n 221) section 12 fn 104a, 104b.

223 Markus Zimmermann, 'Anforderungen an Arzneimittelwerbung nach dem Heilmittelwerbegesetz (HWG) und dem Gesetz gegen den unlauteren Wettbewerb (UWG)' in Stefan Fuhrmann, Bodo Klein and Andreas Fleischfresser (eds), *Arzneimittelrecht. Handbuch für die Rechtspraxis* (3th edn, Nomos 2020) fn Rn 140; Klaus Ulsenheimer, 'Strafbare Werbung und gewerbliche Betätigung des Arztes' in Adolf Laufs, Bern-Rüdiger Kern and Martin Rehborn (eds), *Handbuch des Arztrechts* (5th edn, C.H. Beck 2019) fn 31.

224 Kubiciel, 'Schriftfassung der Stellungnahme in der öffentlichen Anhörung des Ausschusses für Recht und Verbraucherschutz des Deutschen Bundestages am 18.5.2022' (n 41) 7.

225 Pietsch (n 39) 80.

226 Zimmermann (n 223) fn 17; Clemens Bold, 'Wettbewerbsrechtliche Fragen des Krankenhauswesens' in Stefan Huster and Markus Kaltenborn, *Krankenhausrecht. Praxishandbuch zum Recht des Krankenhauswesens* (2nd edn, C.H. Beck 2017) fn 96; BGH, Urteil vom 06.05.2004 – I ZR 265/01, NJW-RR 2004, 1267 – Lebertrankapseln; Urteil vom 01.03.2007 – I ZR 51/04, NJW-RR 2007, 1338, 1340 – Krankenhauswerbung.

1. Definition of Commercial Practices

A commercial practice (*geschäftliche Handlung*) is "any conduct by a person for the benefit of that person's or a third party's business before, during or after the conclusion of a business transaction, which conduct is directly and objectively connected with promoting the sale or the procurement of goods or services." (section 2 paragraph 1 number 2). Said business (*Unternehmen*) is not defined in the Act itself, but it is identical to the organisational unit of the entrepreneur, hence the organization of any trade, craft or profession (compare section 2 paragraph 1 number 8).[227] "Professions" in the sense of the UWG are all self-employed freelancers (*Freiberufler)* such as lawyers, pharmacists, architects, or – most relevant – physicians.[228]

2. Aggressive Commercial Practices (Section 4a)

Section 4a of the UWG prohibits any commercial practice that is capable of substantially impairing the consumer's freedom of choice, be it by harassment, duress or other undue influence (*aggressive geschäftliche Handlungen*; section 4a paragraph 1 sentence 2). While undue influence does not necessarily require market power, the pressure in question has to be of such a nature as to be, for economic, legal, sociological, religious, intellectual, psychological or structural reasons, inescapable.[229] Advertising using time pressure is undue if the advertiser uses an excessively temporary offer to motivate the consumer to make a rash and badly thought-out decision.[230] Therefore, advertising for abortion services while making reference to the impending expiration of the twelve-week limit would fall under section 4a. Advertising while utilising fear generally also qualifies for section 4a, as long as there is some weight behind it.[231] Section 4a protects consumers in any situation where they are being deliberately exploited in specific misfortunes or other circumstances of enough weight to impair their judgement (section 4a paragraph 2 sentence 1 number 3). Therefore, serious worries about the financial and economic prospects of life with a child, the difficulties of parenthood in general, social ostracism et

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227 Christian Alexander, '§ 2 UWG' in Jörg Fritzsche, Reiner Münker and Christoph Stollwerck (eds), *BeckOK UWG* (21st edn, C.H. Beck July 2023) fn 76; BGH GRUR 2021, 1400, 1405 (fn 35); Helmut Köhler, '§ 2' in Helmut Köhler and others (eds), *Gesetz gegen den unlauteren Wettbewerb* (41st edn, C.H. Beck 2023) fn 2.22.

228 Patrick Pommerening, 'Unternehmer' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 12; Peter Bähr, '§ 2 UWG' in Peter W Heermann and Jochen Schlinghoff (eds), *Münchener Kommentar zum Lauterkeitsrecht. Band 1* (3rd edn, C.H. Beck 2020) fn 70, 95; Alexander (n 227) fn 360.

229 Benjamin Raue, '§ 4a UWG' in Peter W Heermann and Jochen Schlinghoff (eds), *Münchener Kommentar zum Lauterkeitsrecht. Band 1* (3rd edn, C.H. Beck 2020) fn 165.

230 cf Isolde Hannamann, 'Aggressive geschäftliche Handlungen (§ 4a UWG)' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 102.

231 ibid fn 85.

cetera, should they ever be explicitly or implicitly utilised in an advertisement, are still prohibited. In contrast, emotionally charged advertising is, in principle, allowed.[232]

3. Non-Compliance With Professional Diligence Opposite Consumers (Section 3 Paragraph 2)

Section 3 paragraph 2 obliges the physician to follow the requirements of professional diligence, meaning decent market customs, as well as the principle of bona fide (section 2 paragraph 1 number 9). While relevant for evaluating what qualifies as a market custom, section 3 paragraph 2 does not flatly refer to sector-specific guidelines or policies.[233] However, the imperative to act in good faith has been interpreted, in line with the interpretation of other blanket clauses in private law, to give effect to the fundamental values of the German legal order, especially the fundamental rights laid down in the Constitution.[234] The Government explicitly assumed that the UWG would combat the worst excesses previously falling under section 219a StGB by way of enforcing the right to human dignity, though they attributed that protection to section 3 paragraph 1.[235] In any case, in view of the Government's intentions in repealing section 219a StGB, not every single advertisement for abortion is to be subsumed under the UWG. Neither does every tasteless advertisement violate human dignity.[236]

4. Breach of Law (Section 3a)

Section 3a declares any action as unfair that is in breach of a law intended to regulate market conduct in the interest of market participants in a way that is suited to harm consumer interests, other market participants or competitors. Section 219a StGB may have protected consumers simply out of pure reflex, without any – even secondary – such purpose.[237] However, it is general opinion that, via section 3a UWG, section 3 HWG is given effect for the purposes of the UWG's mechanisms and sanctions.[238] Furthermore, the

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[232] Peter W Heermann, '§ 3 UWG' in Peter W Heermann and Jochen Schlinghoff (eds), *Münchener Kommentar zum Lauterkeitsrecht. Band 1* (3rd edn, C.H. Beck 2020) fn 351; BGH GRUR 2006, 75 Rn. 18 – Artenschutz;2007, 247 Rn. 21 – Regenwaldprojekt I; 2007, 251 Rn. 18 – Regenwaldprojekt II.

[233] Andreas Lubberger, 'Unlauterkeit' im Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 10; Olaf Sosnitza, '§ 3 UWG' in Peter W Heermann and Jochen Schlinghoff (eds), *Münchener Kommentar zum Lauterkeitsrecht. Band 1* (3rd edn, C.H. Beck 2020) fn 63.

[234] Patrick Pommerening, 'Unternehmerische Sorgfalt' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 14; Sosnitza (n 233) fn 42.

[235] BT-Drs 20/1635, 11.

[236] Sosnitza (n 233) fn 44.

[237] Wolfgang Schaffert, '§ 3a UWG' in Peter W Heermann and Jochen Schlinghoff (eds), *Münchener Kommentar zum Lauterkeitsrecht. Band 1* (3rd edn, C.H. Beck 2020) fn 562; Goldbeck, 'Die Werbung für den Abbruch der Schwangerschaft' (n 90) 107-109; Kaiserl and Eibach (n 151) 276.

[238] Zimmermann (n 223) fn 145; Doepner and Reese (n 221) section 3 fn 48; Matthias Sonntag and Benedikt Burger, 'Heilmittelwerbung' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 26; Bold (n 226) fn 102.

"laws" incorporated via section 3a are not limited to statutory provisions. They also include the byelaws of the federal and state medical association, and thus the professional law of physicians.[239] Therefore, the prohibition of any praising, misleading or comparative advertising according to section 27 paragraph 3 of the Exemplary Code of Medical Professional Conduct (*Muster-Berufsordnung für die in Deutschland tätigen Ärztinnen und Ärzte* – MBÖ-A) is in full effect as regards statutory competition law. Although hospitals are not bound to these strict professional ethics, they are still required by BVerfG jurisprudence to keep their information sober, objective and factual.[240]

5. Unfair Commercial Practices in General (Section 3 Paragraph 1)

So far, it has been demonstrated that the special clauses of the UWG prohibit advertisement that would put undue stress on the women afflicted, and really any subjectively loaded advertisement. One has to wonder which other practices can be deemed as "unfair" under the general clause of section 3 paragraph 1. Up until 2004, the UWG prohibited any „immoral", „indecent" or „improper" commercial practices (*Sittenwidrigkeit*). After the phrasing was changed to „unfair practices", this grammatically and historically empty choice of words had to be filled with new meaning. Namely, any interpretation would have to orient itself mainly around the purpose of the Act, and around the specifications already mentioned.[241] Section 1 paragraph 1 states the purpose of the Act to be the "protection of competitors, consumers and other market participants against unfair commercial practices" – which should not ring any new bells for the reader of this article – but also, at the same time, the protection of "the interests of the public in undistorted competition." Whether consumers are to be protected from unfair commercial practices in their rights and interests unrelated to their market behaviour is highly controversial. Due to section 3 paragraph 2, in all probability, one cannot draw any original consequences from section 3 paragraph 1 outside of business-to-business interactions.[242] The Federal Court of Justice (*Bundesgerichtshof* – BGH) has, for example, decided that advertising for foreign events, products and services that are banned in Germany does not constitute an unfair commercial practice if the ban in question does not qualify for section 3a.[243]

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[239] Nikolas Gregor, 'Rechtsbruch (§ 3a UWG' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 22; Schaffert (n 237) fn 51; Michael Jänich, 'Wettbewerbsrecht der freien Berufe' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 13.

[240] Bold (n 226) fn 95; Schaffert (n 237) fn 247; BVerfG NJW 2000, 2734.

[241] Lubberger (n 233) fn 2; Helmut Köhler, '§ 1' in Helmut Köhler and others (eds), *Gesetz gegen den unlauteren Wettbewerb* (41st edn, C.H. Beck 2023) fn 8.

[242] Lubberger (n 233) fn 15-16; cf Köhler (n 241) fn 20.

[243] Sosnitza (n 233) fn 104 ff; Harro Wilde and Bettina Linder, 'Internationales Wettbewerbsprivatrecht' in Wolfgang Gloy, Michael Loschelder and Rolf Danckwerts (eds), *Handbuch des Wettbewerbsrechts* (5th edn, C.H. Beck 2019) fn 64; BGH GRUR 2016, 513 – Eizellspende.

IV. Intermediary Conclusion

Aside from the special matter of misleading adverts, undue influence and advertising for criminal abortions (that end up actually taking place), the repeal of section 219a StGB retroactively decriminalised any advertising for abortion. German competition law has been mildly adjusted but largely treats becoming mothers akin to any other consumer. While praise for abortion is banned, this is done in a quite secretive fashion.

F. Conclusion and Future Prospects

In life, section 219a of the German Criminal Code was tasked with lowering the number of abortions twofold: by ensuring that the proper procedure would be followed, and by holding symbolic value against the normalisation of abortion. Simultaneously, the law allowed for anything but the unnecessary publicization of abortion. Neither its efficiency nor its unsuitability can be proven from the data available. In the opinion of the author, section 219a is not subject to any serious constitutional concerns.

It follows then, that the repeal was really a political decision, although it was mistaken for – or masked, in any case framed as –an injustice of constitutional importance. In their manifesto, the ruling coalition gave justification for the repeal by associating it with the "opportunity to have abortions without cost", "security of supply" and "women's right to self-determination."[244] These are all parameters that are, in the end, foreign to the BVerfG's approach to adjudicating on abortion. In his individual statement, the Federal Minister of Justice also dubbed the circumstance of women not being able to be informed by their own doctors an "anachronism."[245]

At the same time, section 219a is delegitimized even further by relocating provisions protecting other goods such as environmental protection or, ironically, animal rights, into the Criminal Code.[246] These actions, in conjunction with the aforementioned rhetoric might signify a slippery slope that will end up in the repeal of sections 218 and following and the complete legalisation of abortion. When this course is followed, or if rising abortion rates do end up calling the repeal of section 219a into question, all will be set for a third confrontation with the Constitutional Court.

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[244] Mehr Fortschritt wagen: Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit – Koalitionsvertrag zwischen SPD, Bündnis 90/Die Grünen und FDP (*Bundesregierung*, 24 November 2021) <www.bundesregierung.de/resource/blob/974430/1990812/1f422c60505b6a88f8f3b3b5b8720bd4/2021-12-10-koav2021-data.pdf?download=1> accessed 26 November 2023, 116.

[245] see n 219.

[246] Anna Leisner-Egensperger, 'Tanz um das geborene Kind. Der Schutz des ungeborenen Lebens und das Selbstbestimmungsrecht der Frau' (*Verfassungsblog*, 24 June 2022) <verfassungsblog.de/tanz-um-das-geborene-kind> accessed 28 September 2022; Pietsch (n 39) 81-82.