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DISSENTING REMARKS†

by ROBERT E. JONAS*

In view of the inability of the translators to reach an agreement about certain key ideas in the West German opinion or about the contents of the *Introduction*, the reader may find it helpful to consider a different interpretation, as well as some supplemental considerations.

I. THE GERMAN OPINION

1. *Exactability*: I believe that this rather subtle concept can best be understood in the following terms. The Court, by way of providing the legislator with guidelines for his statutes sets about differentiating cases of abortion which *must* be visited with penal retribution from those in which the state can substitute counseling as a method of fulfilling its obligation to protect life.¹

The criterion by which one separates the two sets of cases is that of “exactability,” “or whether the carrying of the pregnancy to term can be compelled with the penal law.”² In discussing “exactability” one must keep in mind that the Court clearly affirms (as do the Dissent and the representatives of the government) that the state can never abdicate its responsibility to protect human life³—its very *raison d’etre*. Neither the German constitution nor reason however, supposes that the threat of punishment before and its reality after an act of killing (*Tötenhandlung*⁴) are the only, effective methods of protecting life.

The Court is saying that abortion cannot be legal because every unborn child has a right to life which the state *must* protect.⁵ *How* unborn life is to be protected is first to be decided by the legislature and the method of protection need not be a penal sanction.⁶ For practical purposes, the Court holds that there are two principal means of protecting unborn life; the

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1. *Translation* at 605-06. See also *id.* at 645.

2. *Id.* at 647.

3. *Id.* at 642.

4. *Id.* at 645.

5. *Id.* at 637, 644.

6. *Id.* at 645, 650.

first is the criminal penalty and the second is education and assistance in the individual case. "Exactability" is the judicially developed criterion by which the legislature may decide which method of protection is appropriate to a corresponding group of cases. Exactable conduct is conduct that can or should be required or exacted by the penal law. I say judicially developed criterion because although the word *zummutbar* (exactable) is prominent in the language of the statute, it is nowhere defined in the law itself.

The German Court therefore divides abortions into two sets of cases: those in which the woman's duty to respect the right to life of the unborn is exactable and those in which it is not.⁷ Formulated from the state's viewpoint, the first class of cases is comprised of those in which the state must protect life with the sharpest of its weapons, the penal sanction. The second classification of cases contains those in which the state should fulfill its obligation to protect by instructing the woman that abortion is the killing of a human being; by informing her that it is an act which may be physically dangerous to her; and by offering her every financial, social, and human assistance to turn her from the act.⁸

How and by what standard(s) does the Court decide which cases are exactable and which are subjects for the educational and assistance approach?

The Basic Law guarantees to the woman certain rights, a right to life, the right to physical inviolability, and the right to free development of her personality. These are also rights which belong to the unborn child.⁹ Now, if the decision for an abortion should proceed from a reason which has no recognition in the eyes of the Basic Law, from a "value" such as convenience, (there is no right to convenience in the Basic Law), legally there is no doubt about the result.¹⁰ There is not even a contest. The legally protected rights of the child *en ventre sa mere* take precedence over a legal non-right.

The Court first encounters a real contest and a legal problem when the decision for an abortion emanates from a reason which is within a constitutionally protected legal sphere of the woman. To resolve the conflict of rights encountered here, legal rights, values and obligations must be balanced each against the other; their nature and origin must be ascertained; precedence

7. *Id.* at 647-49.

8. *Id.* See also discussion beginning at 651 *id.*

9. *Id.* at 638, 642-43.

10. *Id.* at 647, 662. See *id.* at 643, 649.

and subordination must be assigned, and finally one right emerge victorious.¹¹

In an abortion, the unborn child's right to life, the most important and fundamental of all human rights (as the Court affirms *passim*) is always in the balance. Viewed solely from a legal point of view, except when the life of the pregnant woman is at stake and the right to life is pitted against right to life, the legally protected values which she has to place on the other side of the scale will necessarily be of lesser weight. Indeed, the right to life might be compared to the scale itself rather than any weight placed upon it, since the Court holds that the right to life is the "living foundation"¹² of human dignity and of all human rights. Thus, although the precedence of the right to life is clearly recognized, lesser rights still exist and must, in cases of conflict, be preserved to the extent possible. Therefore, the West German Court holds that if the state can fulfill its obligation to protect life through other measures, the penal law may not be employed to exact from the woman respect for the life of the fetus, if her decision proceeds from a reason which is within a constitutionally protected area.¹³ Instead, the state attempts to educate, assist and influence her to accept the child on her personal responsibility.

2. Although the Court's holding that the Basic Law guarantees the right to life of the unborn child precludes the conclusion that unpunished abortions can be legal, one is still faced with the question of the legal classification of abortions for which the law prescribes only preventive counseling. For the following reasons, I suggest that the act remains, although unpunished, both criminal as well as illegal:

a. The sections under consideration (§§218 *et seq.*) are sections of the *Penal Code*, and the entire discussion revolves around a penal law statute.

b. The statute itself as well as the opinion refers to the acts merely as being "punishable" (*strafbar*) or "free of punishment" (*straflos*).

c. One searches the opinion as well as the statutes in vain for any statement that the termination of pregnancy is not *rechtswidrig*, *i.e.*, criminal.

d. According to one commentator, the idea of *nicht Zumutbarkeit* goes to *Schuld* or "guilt" rather than the objective criminality of the act.¹⁴

11. *Id.* at 647-48.

12. *Id.* at 642.

13. *See, e.g., id.* at 609, Holding I.

14. *See* Schönke-Schröder, *Strafgesetzbuch: Kommentar*, 17 Auflage (1974), München.

e. Although I realize that this concept must seem somewhat unusual to an American lawyer, it appears that the Parliament, in the hope of creating greater utilization of the counseling, legislated a kind of mandatory suspension of sentence for cases where it was in fact utilized. Punishment is imposed, however, if the counseling is not utilized.

3. This concept of preventive counseling is perhaps the most original and unique contribution of the German constitutional debate. It emanates not from the Court but from the Parliament. It is revised, amplified and strengthened by the Court. The counseling envisaged by the Parliament in § 218c is twofold. First, the pregnant woman must be instructed about the public and private assistance available for mothers and children, especially assistance which facilitates the continuation of the pregnancy and the situation of mother and child. Second, she must be counseled by a "physician."¹⁵

It is important to note that the Constitutional Court does not reject the concept of counseling as such, but rather introduces two modifying considerations. First, it points out that there are some cases (the exactable) in which a penal sanction which functions in part as a social condemnation of the act of abortion, is *required* to fulfill the constitutional norm.¹⁶ The didactic function of the law, the Court holds, is a very important element in the formation of a social conscience. The penal sanction therefore, can never be repealed *in toto* without serious disruptive effects.¹⁷ Second, the Court concludes that although a properly structured counseling system could protect unborn life,¹⁸ the system designed by the Federal Parliament does not do so, for the reasons enumerated by the Court, principally because it is not intensively oriented to the continuation of the pregnancy and does not have the resources to offer actual material assistance.¹⁹ Thus, any future regulation of abortion in West Germany which incorporates pre-abortion counseling must of necessity conform to the constitutional guidelines put down by the Court.

The Court's critique of the counseling structured by the Federal Parliament is premised in part on an attitude toward the medical profession which is cautious at times and actually sarcastic at others.²⁰ An extensive discussion of some reasons

15. See § 218c of the Fifth Statute, *Translation* at 612.

16. *Translation* at 651.

17. *Id.* at 654-55.

18. *Id.* at 644.

19. See discussion beginning at 657 *id.*

20. *Id.* at 658-60.

for the attitude drawn from historical experience to be found in *A Sign for Cain* by Frederic Wertham, M.D.²¹

The Court seems to accept the argument that counseling and the penal sanction, as deterrent measures, are to some extent mutually exclusive,²² and for this perhaps, as well as other reasons, does not seriously consider the possibility of employing both, *i.e.*, counseling before and punishment after abortion. That utilization of both approaches is not actually self-defeating is suggested by the fact that in the United States, since *Roe and Doe*, the case loads of voluntary problem-pregnancy counseling agencies may actually have decreased in relationship to the number of abortions performed.²³ In other words, the absence of a penal sanction after the fact in this country apparently has not encouraged counseling.

Any potential tendency of the penal sanction to discourage utilization of counseling might be minimized either by administering the program anonymously or by legally exempting the counseling centers' records from scrutiny by police and prosecuting authorities. These are but two possible solutions.

Employing the vast resources of the state to save life through a counseling and assistance program made available without charge to all women with problem pregnancies is a humane approach which in conjunction with a criminal penalty for abortion would probably guarantee effective protection both of unborn life as well as maternal health. This supposes, of course, that the counseling and social assistance would be, as the German Court requires, intensively oriented to the continuation of the pregnancy. In this country, enactment of both measures in conjunction with a human life amendment²⁴ would probably be conducive to making such an amendment a lasting reform.

To those trained in Anglo-American jurisprudence, which relies almost exclusively on punishment after the fact to enforce legal norms, the concept of counseling before the fact must appear novel. In any case, in view of the limited effectiveness of penal sanctions unaccompanied by other measures, the applicability and value of counseling for this as well as other areas of the penal law should certainly be considered.

21. FREDRIC WERTHAM, *A SIGN FOR CAIN* (1966).

22. The argument is made at *Translation* at 653-54. The theory of the Court and the solution which it settles upon seem to imply concurrence.

23. Although there is little in the way of reliable and publicly available statistics on this point (the conclusion has been suggested to me by those actively engaged in such counseling), the argument does not stand or fall on the direction of contemporary social statistics. One of the reasons counseling is not utilized to a greater extent is that it is not sufficiently available.

4. Albert Speer in his *Erinnerungen* makes the observation that one of the great deficiencies of German education in the post World War I era was its failure to inculcate a faculty for social and political criticism.²⁵ Against this background, then, the active participation in the parliamentary debate, as well as the arguing of the decision by diverse, academically and legally accredited members of German society, appears worthy of note.

There exists an unanimity among these parties as to first principles which makes the entire abortion debate in West Germany appear somewhat unique. The majority of the Court, the dissenting justices, the petitioners, the representatives of the government, and the drafters of the Fifth Statute, after years of debate and "extraordinarily comprehensive" legislative proceedings, seem to concur in at least three basic premises: 1. The state has an obligation to protect life, 2. that obligation extends to the protection of unborn life, and 3. because human life is present from implantation at latest.²⁶

It is also noteworthy that in a scientifically and philosophically sophisticated country such as West Germany, this latter conclusion appears to have been taken as established by all parties and assumed to be the point of departure for the discussion. Although the Court supports its conclusion with a reference to the testimony of experts before the Federal Parliament,²⁷ one can easily conclude from the tone of the proceedings as a whole that the scientific testimony and conclusion did not come as a surprise to anyone. As the dissent says, the argument is only about how that life should be protected.²⁸

5. Against this background we are now in a position to consider whether the Federal Parliament legislated "abortion on demand" or "abortion on request with counseling."²⁹ The

24. One example of the wording of a proposed human life amendment to the United States Constitution can be found at S.J. Res. 141, 94th Cong., 1st Sess., 121 CONG. REC. S18194 (daily ed. Oct. 20, 1975). The proposed amendment reads as follows:

'SECTION 1. With respect to the right to life, the word 'person', as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

'SEC. 2. No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

'SEC. 3. Congress and the several States shall have the power to enforce this article by appropriate legislation within their respective jurisdictions.'

25. ALBERT SPEER, *INSIDE THE THIRD REICH* 34 *et seq.* (1970).

26. *Translation* at 623, 627, 637-38, 640, 642, 663, 672.

27. *Id.* at 637-38.

28. *Id.* at 663.

29. As stated in *Introduction*.

inaccuracy of the description will be seen I think if the avowed object and purpose of the Fifth Statute are considered. The intention of the Parliament was to guarantee a more effective protection of unborn life by substituting preventive counseling for the penal sanction, to make abortion less rather than more frequent.³⁰ Abortion on demand or request as it exists in the U.S. is just that, not an operation which can be obtained *only* after medical and social counseling, which itself is penally enforced. The conclusion will not be otherwise, I believe, even if one assumes that the pro-life attitude of the majority of Federal Parliament is merely a tactical facade assumed for reasons of expediency.

The question of the compatibility of the West German Court's solution with an "indications solution" can be resolved in a similar fashion. If one means that the Basic Law can be construed to mean that in certain situations abortion need not be punished, if the state employs other measures to protect life, that is one thing; but it is not an indications solution as the term is customarily used in American law. The Court should be taken to mean what it says: "[T]he protective duty of the state is comprehensive."³¹

II. *Roe* AND *Doe*

In view of the fact that the *Roe* decision is the primary analogue of Mr. Gorbby's *Introduction* and its holding is presented without the benefit of the arguments made by the state of Texas and the *amici curiae* in support of the constitutionality of the Texas statute, some of those arguments should briefly be summarized here, since I believe they represent the better reasoning. The summary may also be of some practical use to the American lawyer.

Summary of the argument in part:

Abortion is a civil rights issue. The right to life is the most fundamental of human rights.³² As the Supreme Court has said in another context, it is the "right to have rights."³³ It is guaranteed in the Constitution³⁴ and mentioned in the Declaration of Independence,³⁵ in light of which the Constitution may

30. *Translation* at 650.

31. *E.g., id.* at 642.

32. Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied* 377 U.S. 985.

33. *Furman v. Georgia*, 408 U.S. 238, 290 (1972).

34. U.S. CONST. amend. V and XIV.

35. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men."

safely be read.³⁶ The government of the United States as well as of the states themselves are obligated to protect human life. That obligation has been emphasized even in the case of convicted felons.³⁷

The unborn child is a "person" within the meaning of the Constitution and is included within the protection of the fifth and fourteenth amendments and consequently is entitled to legal protection.³⁸ The incongruity of a conclusion to the contrary is emphasized by the fact that corporations are recognized as legal persons.³⁹ A holding that the unborn child is not a legal person might fairly be compared in soundness to the *Dred Scott* case⁴⁰ which held the black man was not a citizen, or to the non-personhood arguments of the U.S. Government in cases involving the American Indian.⁴¹

The *amici* in *Roe* and others have argued that human life, according to scientific consensus, begins at conception,⁴² that a distinct human being is present from the onset of the pregnancy and that neither quickening,⁴³ viability,⁴⁴ nor birth⁴⁵ substantially alter the human life present from the beginning. Even prescinding from these conclusions, the state has a compelling interest in protecting fetal life.⁴⁶

As a fundamental, enumerated right necessary for ordered liberty, it is contended that the right to life takes precedence over the woman's right to privacy, which however genuine, is not enumerated in the Constitution, was probably not within the contemplation of the Founding Fathers and, as it developed historically, was thought to be subordinate to the right to life.⁴⁷

It is further urged that since abortion as a medical procedure is more dangerous than childbirth physically and psycho-

36. *Gulf, Colorado & Santa Fe R.R. v. Ellis*, 165 U.S. 150, 160 (1897).

37. *Furman v. Georgia*, 408 U.S. 238, 295-97 (1972).

38. See, e.g., *ABORTION AND SOCIAL JUSTICE* 130 *et seq.* (Hilgers & Horan eds. 1972).

39. *Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394 (1886).

40. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

41. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (No. 14,891) (C.C.D. Neb. 1879). See D. BROWN, *BURY MY HEART AT WOUNDED KNEE* (1970), chapter entitled "Standing Bear Becomes a Person."

42. Hymie Gordon, *Genetical, Social, and Medical Aspects of Abortion*, *SOUTH AFRICAN MED. J.* 721-30 (1968). This conclusion was also reached at the First International Conference on Abortion held in Washington, D.C. in 1967.

43. DAVENPORT HOOKER, *THE PRENATAL ORIGIN OF BEHAVIOR* (1952).

44. Address by Andre Hellegers, M.D., National Symposium on Abortion, May 15, 1970, Prudential Plaza, Chicago, Illinois.

45. DR. & MRS. J.C. WILLKE, *HANDBOOK ON ABORTION* (1971).

46. *Roe v. Wade*, 410 U.S. 113, 155-56, 159 (1973).

47. *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 253 (1891).

logically, the state has an interest in prohibiting abortion to protect maternal health.⁴⁸

I hope that these incomplete considerations and sources will assist in giving the attorney some insight into why the *Roe* and *Doe* holdings have been so vigorously challenged and criticized by legal scholars⁴⁹ and why they are the focal point of such public controversy.

For the American lawyer litigating cases arising within the areas of law affected by *Roe* and *Doe*, especially for the advocate engaged in the increasing volume of litigation directed at limiting or bringing about a reversal of those decisions, the reasoning and principles of the West German opinion will be of value. The West German debate and its results may also assist the American judiciary in revising its premises and conclusions to conform to the charter from which its authority is derived.

48. Thomas Hilgers, *The Medical Hazards of Legally Induced Abortion*, in *ABORTION AND SOCIAL JUSTICE* (Hilgers & Horan eds. 1972).

49. See, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973).

