

The Dam Burst and Slippery Slope Argument in Medical Law and Medical Ethics

Von Prof. Dr. Frank Saliger, Bucerius Law School, Hamburg*

Summary

This article examines structures, practice, functions, and standards of dam burst and slippery slope arguments, which play an important role in medical law and ethics. These arguments warn that permitting a particular act or adopting a particular norm will lead to a result (sliding down the slippery slope) that everyone agrees will end in an catastrophe. Structurally, dam burst and slippery slope arguments designate specific empirical consequential arguments that do more than indicate the mere possibility of results and must be distinguished from related arguments such as the abuse, the mistake, the Nazi, and the domino arguments. This article analyzes how dam burst and slippery slope arguments are used by tacking the examples of active euthanasia, pre-implantation diagnostic, and therapeutic cloning. It reaches the conclusion that the high demands placed on justifying dam burst and slippery slope arguments are often dodged in practice because dam burst arguments solely or primarily mobilize the emotive associative functions of simplification, of “killer punch”, of shifting burdens of proof, and of distraction. To be able to distinguish “good” slippery slope arguments from “bad”, the author makes a case for an open and rational discourse on risks.

I. The Popularity of Dam Burst Arguments

“Dam burst” arguments rank among the standard arguments in politics, morality and law. Whenever a controversy arises within society surrounding the introduction of a radical new technology or norm, objections will be raised that permitting the technology or enacting the norm would cause a dam burst in the familiar worldview with catastrophic consequences. While in the German-speaking world the dramatic image of the dam burst seems to predominate, in English speaking circles talk is more of the slippery slope argument (the steep slope or track). These arguments serve to warn that a particular act or norm will initiate a chain of events leading step-by-step to a final circumstance which is universally considered to be dreadful.¹

The suggestive power of images like the dam burst and slippery slope as well as the invocation of a catastrophic culmination that no involved party can wish for provide an initial explanation for the popularity of dam burst and slip-

pery slope arguments in practical discourse. In addition, these arguments play a particularly prominent role in modern questions of biopolitics, biomorality and biolaw². This is because new medical technologies, such as organ transplant, artificial insemination, prenatal and pre-implantation diagnosis, stem cell research, therapeutic and reproductive cloning as well as controversial procedures such as abortion (termination of pregnancy) and active euthanasia, all present an elemental and emotive challenge to our conventional understanding of ourselves and our world. Accordingly, dam burst and slippery slope arguments are invoked in response as “defensive reflexes”. The situation is even more acute in Germany. In view of National Socialist bestiality in medicine, especially the destruction of life deemed ‘without value’ in the so-called National Socialist euthanasia programme³, there is rightly in this country an ever-present negative historical perspective which renders dam burst and slippery slope arguments particularly telling.

Since dam burst and slippery slope arguments are pervasive, convincing in practice and deeply rooted⁴ in normative issues, it is remarkable that, at least in Germany, they have recently been subject to closer examination. Aside from traditional standpoints – interestingly all on bioethics⁵ – the 1997 dissertation of *Guckes* deserves recognition as the first monograph to have explored⁶ the topic with reference to the preceding Anglo-Saxon discussion.⁷

Whereas, in the meantime, at least a brief mention of dam burst arguments is made almost routinely in new mono-

² Thus for example *Tröndle*, ZStW 99 (1987), 39: “Indeed: no objection carries more weight than that of the dam burst effect [...]”

³ See *Friedlander*, *Der Weg zum NS-Genozid. Von der Euthanasie zur Endlösung*, 1997.

⁴ The famous German physician *Hufeland* remarked as early as 1806 on the position of the doctor along the lines of a classic slippery slope argument: „He should and may do nothing other than preserve life [...], since once the line is crossed, the doctor believes himself as entitled to decide on the necessity of a life, so that it needs only to proceed in steps to apply the lack of worth, and consequently the lack of necessity of a human life to other cases.“ (Journal der praktischen Arzneykunde und Wundarzneykunst, Bd. 23, 3. volumes, 1806, 5 [15 f.]).

⁵ See for example – for a long time alone in the field – *Engisch*, in: Grünwald (Hrsg.), *Festschrift für Friedrich Schaffstein zum 70. Geburtstag am 28. Juli 1975*, 1975, p. 1; also *Hegselmann*, in: ders./Merkel (Ed.), *Zur Debatte über Euthanasie*, 1991, p. 197 (206 ff.); *Birnbacher*, *Tun und Unterlassen*, 1995, p. 289 ff.; *Herzberg*, NJW 1996, 3044 f.

⁶ See Fn. 1.

⁷ Above all the monographs by *Lamb*, *Down the slippery slope. Arguing in applied ethics*, 1988, und *Walton*, *Slippery Slope Arguments*, 1992; also *Lode*, in: 87 Calif. L. Rev. 1469 (1999) and *Volokh*, in: 116 Harv. L. Rev. 1026 (2003).

* I dedicate this paper in gratitude to my teacher, *Ulfrid Neumann*, on the occasion of his 60th birthday on 20 August 2007. Theoretical analysis was always one of his great strengths. I also owe *James Faulkner*, M.A., LL.B., Bucerius Law School, Hamburg, a debt of gratitude for the translation. This paper will be published in German in *Byrd/Hruschka/Joerden* (Eds.), *Jahrbuch für Recht und Ethik*, 15 (2007).

¹ Cf. *Guckes*, *Das Argument der schiefen Ebene. Schwangerschaftsabbruch, die Tötung Neugeborener und Sterbehilfe in der medizinethischen Diskussion*, 1997, p. 5. That there is also a “positive” slippery slope argument (*Guckes*, *ibid.*, p. 13 f.), will be ignored in the following.

graphs⁸, this paper will show that by no means all conceptual, structural and evaluative issues of dam burst and slippery slope arguments have been clarified.

With this as a starting point, the central concern of this paper is a plea for a more rational treatment of dam burst and slippery slope arguments in Germany. It pursues this aim in three steps. The first step clarifies conceptual and structural issues of dam burst and slippery slope arguments. It is particularly necessary to distinguish such arguments from related arguments such as those of abuse, mistake, the Nazi argument or the domino effect (II).

In a second step, with reference to selected areas of dispute, I investigate the empirical treatment of dam burst and slippery slope arguments in the discussion on medical ethics and medical law (III).

Finally in the third step and on the basis of gained insights, there is analysis of the function and a cautious determination of evaluative criteria for dam burst and slippery slope arguments (IV). It will emerge that, despite higher structural requirements and counter-productive emotive associations, a distinction can be drawn between 'good' and 'bad' dam burst arguments.

II. Concepts and Structures of Dam Burst and Slippery Slope Arguments

Embarking on the conceptual and structural discussion of dam burst and slippery slope arguments, we must first establish that dam burst and slippery slope arguments essentially function as projections of specific, practical consequences.

1. Dam Burst and Slippery Slope Arguments as specifically Consequential Arguments

That dam burst and slippery slope arguments belong to the class of practical consequence arguments should be readily apparent. Both the familiar saying of Ovid „*principiis obsta*“ (Beware the beginning)⁹ or the more colloquial “Where will it all lead?” are abbreviated forms of dam burst and slippery slope argument, expressing a consequential structure by means of the analogy of an initiating causal event with ensuing future results. Using the terminology of *Lübbe-Wolff* – ‘*Realfolgen*’ [realised results] involve the actual consequences of the recognition and application of new normative rules in practical contexts.¹⁰

From this practical consequential structure of dam burst and slippery slope arguments we already can derive an initial insight and a delineating line. Both dam burst and slippery slope arguments relate to projected consequential of events (resulting occurrences) linked through degrees of probability

which represent more than mere possibilities. On the one hand the mere possibility of event ‘e’ is a precondition for the resulting occurrence of ‘e’ with a probability greater than nil; the impossibility or exclusion of the occurrence is equivalent to saying its degree of probability equals zero. Nonetheless dam burst and slippery slope arguments presume that resulting occurrences are natural, obvious or even inevitable consequences of the contentious initial act, that is they stand in relation to each other with higher, or high, degrees of probability. Let us suppose that dam burst or slippery slope arguments have the initial act A invoking the probable consequence C1 which in turn precipitates probable consequence C2, which then brings about probable consequence C3. If we interpret a ‘natural’ consequence as ‘likely’, then that indicates that the individual causal relationships – A to C1, C1 to C2 and so on – are connected to each other respectively with a degree of probability of at least 50%. Talk of merely possible consequential events is not compatible with these degrees of probability, since mere possibilities in colloquial speech signify degrees of probability ranging from 1% to under 50%. Hence to invoke merely conceivable negative associations of dam burst or slippery slope arguments will not suffice. Whoever puts forward such arguments must show more than a mere abstract possibility of negative consequences, which, by definition, are given in any event. Accordingly, purely abstract dam burst and slippery slope arguments, that is those couched in terms of *mere possibility*, must be ruled inadequate.¹¹

This observation enables a second distinction to be drawn. To the extent dam burst and slippery slope arguments generally require more than a causal relationship, they project entire chains of events. Thereby it is striking that the grounds for the negative consequential events of each respective step may, but need not, be the same. This insight enables us to determine the relationship between arguments invoking a dam burst or slippery slope on the one hand, as against those, often equated with them, of abuse and mistake.¹² Under the *abuse* argument, a contentious rule is opposed on the grounds of a demonstrable and unavoidable danger that the rule will be abused. The *mistake* argument on the other hand cautions against the introduction of the rule with reference to the real and irremediable risk of its erroneous application. If dam burst or slippery slope arguments are recognised as consequential arguments projecting resulting chains of events, then the delineation results from the following: although dam burst or slippery slope arguments correspond to arguments of misuse and mistake to the extent that they present consequential arguments, they nevertheless are more complex than misuse and mistake arguments in two respects. First, dam burst and slippery slope arguments not only indicate a causal relationship but also a chain of events. Secondly, dam burst

⁸ E.g. *Hoerster*, *Sterbehilfe im säkularen Staat*, 1998, p. 124 ff.; *Merkel*, *Früheuthanasie*, 2001, p. 596 ff.; *Antoine*, *Aktive Sterbehilfe in der Grundrechtsordnung*, 2004, p. 191 f. and 294 ff.; *Ingelfinger*, *Grundlagen und Grenzbereiche des Tötungsverbots*, 2004, p. 189 ff.

⁹ *Ovid*, *remedia amoris*, V. 91.

¹⁰ Cf. Regarding legal rules *Lübbe-Wolff*, *Rechtsfolgen und Realfolgen*, 1981, p. 25.

¹¹ I.E. also *Hegselmann* (Fn. 5), p. 208; *Birnbacher* (Fn. 5), p. 290 f.; *Guckes* (Fn. 1), p. 11; cf. also *Merkel* (Fn. 8), p. 597 against rejection on the grounds of a mere possibility of misuse.

¹² See e.g. *Birnbacher* (Fn. 5), p. 289 ff.; *Merkel* (Fn. 8), p. 595 ff.; *Hoerster* (Fn. 8), p. 124 ff. (129 f.).

and slippery slope arguments are not restricted to abuse and mistake as grounds for the projected negative consequences. In this respect, though, abuse and mistake arguments may be elements of dam burst and slippery slope arguments. Both observations justify the conclusion that dam burst and slippery slope arguments carry more weight than sheer misuse and mistake arguments.¹³

Further, the insight into the consequential structure of dam burst and slippery slope arguments allows a determination of their relation to the frequently cited Nazi argument. Briefly the Nazi argument posits that any relaxation of the prohibition against killing would lead to Nazi-type euthanasia.¹⁴ In modern questions of bioplurality and biopolitics particularly, there is a marked tendency to cite Nazi euthanasia as a worst-case scenario. Logically speaking, however, it must be observed that the category of worst-case scenarios in dam burst or slippery slope arguments is endless, so that the Nazi scenario constitutes a mere subcategory of dam burst or slippery slope argument.

A final question which arises in the reconstruction of the dam burst or slippery slope argument as a specific consequential argument, is its relation to the so-called *domino theory*. The domino theory is another consequential argument type, in which it is prognosticated that allowing an act will precipitate a chain of events which leads, like a falling row of dominoes, to a worst-case scenario. *Guckes* takes the view that the slippery slope argument differs significantly from the domino theory. With a slippery slope argument, the decision maker (after permitting the disputed act) is itself involved in a process which step by step forces it into a further slide down the slope culminating in the worst-case scenario. The domino argument, on the other hand, requires no such step-by-step participation by the decision maker in the ensuing process. Rather the initiation of the chain of events suffices to, as it were, automatically lead on to the worst-case scenario. To this extent the domino argument is only a purely causal argument or simple consequential argument.¹⁵

The basis of the *Guckes* analysis is persuasive. Although all dam burst or slippery slope arguments constitute result arguments, as the domino argument shows, the reverse does not apply and not all result arguments are dam burst or slippery slope arguments. However, two aspects of the analysis by *Guckes* would seem to require more precision. First, with *Guckes* it remains unclear who is meant by the decision maker involved in the progressive steep slope process. As decision maker responsible for permitting the initial event, several natural persons or legal persons could be meant: the legislator, the courts or the addressees of norms. In addition, talk of decision-makers cannot refer only to those persons

who are responsible for the initial event, but also to any person who later permits further events or consequences within the ensuing chain of events. In order to be plausible, therefore, slippery slope arguments must determine precisely which decision-makers should be involved in what decision-making step and in what manner.¹⁶

Second, it may be doubted whether the distinction drawn by *Guckes* between the domino theory and slippery slope argument also applies to the dam burst argument, which *Guckes* does not address. Following the image of the dam burst, the argument clearly focuses on the initiating event which then releases an inundation-like and uncontrollable chain of events. One could add (in distinction to the slippery slope argument) the insight that with dam burst arguments the participation of the decision maker is involved at the beginning while in the flood phase further involvement of the decision maker seems secondary or even dispensable. If this were true, then it would represent a (first) distinction between the two argument types so far treated as synonymous in this paper – the slippery slope and the dam burst. To clarify this it is necessary to determine more closely the relationship between the dam burst and the slippery slope argument.

2. The Relationship between the Dam Burst and the Slippery Slope Argument

In German writing dam burst and slippery slope arguments are treated as broadly synonymous. In particular the structural analyses of slippery slope arguments derived from English writing are largely transferred directly to the dam burst argument.¹⁷ Reasons for this are seldom given. *Ingelfinger* is an exception, stating with regard to the relationship: “The presentations usually orient towards the slide down a steep plane. This implies a rather slower process, contrary to the dam burst metaphor which suggests the rapid arrival at the insupportable final circumstance. In substance, admittedly, the various images describe the same thing so that no differentiated analysis is necessary.”¹⁸ Thus *Ingelfinger* refers primarily to dam burst arguments.

The equal treatment of dam burst and slippery slope arguments in German scholarly writing needs explanation. At first sight, the images of dam burst and slippery slope conjure markedly different associations, and compared to the slippery slope, the dam burst image is certainly the more dramatic. With the dam burst, the demonising of the first step is clearly in the foreground, while with the slippery slope the initial act operates as a less dramatic entry and the negative accentuation of the entire chain of events as a precipitate downwards slide seems to have at least equal significance. Stemming from this difference in the degree of stigmatisation of the initial act, there are different associations, at least in the con-

¹³ Cf. also *Hegselmann* (Fn. 5), p. 222 Fn. 10, who notes: “A steep slope would thus be worse than a mere possibility of misuse. Even so, the precise dividing line would not be easy to draw.”

¹⁴ For a critical view see *Hoerster* (Fn. 8), p. 125 ff.; but against this *Lamb* (Fn. 6), p. 10 ff.

¹⁵ *Guckes* (Fn. 1), p. 39 ff. (43).

¹⁶ Cf. also *Ingelfinger* (Fn. 8), p. 193 f.

¹⁷ Cf. *Merkel* (Fn. 8), p. 595 ff.; *Antoine* (Fn. 8), p. 294 ff.; *Ingelfinger* (Fn. 8), p. 192 ff. By contrast *Guckes* (Fn. 1) deals exclusively with slippery slope arguments.

¹⁸ *Ingelfinger* (Fn. 8), p. 192.

jured visual images, regarding the rapidity and volume of the ensuing chain of events. With the dam burst we involuntarily think of a greater rapidity and a stronger dynamic of negative resulting events, which, if not completely, still to a higher degree than with the slippery slope is beyond human control. The slippery slope image on the other hand conveys the impression of a slower “step-by-step” process where the decision maker as participant slides inexorably downwards under the weight of its own successive (erroneous) decisions.

Aside from the differences in visual associations, a further distinction can be drawn between dam burst and slippery slope arguments. This distinction builds on the investigation by *Engisch* into the ‘next step’, an alternative term for the slippery slope argument. Among other insights, *Engisch* perceived that the ‘next step’ argument can be used at one and the same time either to support the adoption of a rule or to object to that rule. Thus, for example, the close affinity or frequent lack of distinction drawn between participation in suicide and ‘death on request’ (that is the ‘next step’) can lead to arguing for either the impunity of the latter or the punishability of the former.¹⁹ This switch in the direction of a slippery slope argument depending on the normative starting point is not possible with dam burst arguments. Dam burst arguments are always directed against admitting the particular norm which is said to cause the dam burst. To use the illustration of *Engisch*: with the dam burst argument it is perhaps possible to justify the (continued) punishability of death on request, but never its impunity.

What can we draw from these distinctions between dam burst and slippery slope arguments for their analytical treatment? This will depend on how significant the distinctions are to be considered. Here it must be said that, in Germany at least, no further distinction has been drawn between the two forms of argument in either analytical writing or argumentation. As we will see with the analysis of real dam burst and slippery slope arguments,²⁰ the chains of events in real dam burst arguments, despite contrasting visual associations, are constructed, as with slippery slope arguments, on a step-by-step basis. Apparently the visual associations have only a limited impact on the structure of dam burst arguments in particular. While we will return to this point²¹, we hold fast here to the fact that distinctions drawn between dam burst and slippery slope arguments are not seen as significant in scholarly discussion. From this perspective there is no qualitative difference between real dam burst and slippery slope arguments. Nevertheless, with their stronger stigmatisation of the initial event, dam burst arguments are more specific, so that they can be interpreted as a *subcategory* of slippery slope argument. Since, however, German writing overwhelmingly uses the dam burst concept, I will continue in the following to use the two terms synonymously (interchangeably).

3. Conceptual and Empirical Versions of the Dam Burst Argument

The reconstruction of dam burst and slippery slope arguments as specific result arguments is incomplete without a more detailed determination of the *structure of the chain of events*.

Proceeding from Anglo-Saxon investigations into slippery slope arguments, analytical moral philosophy here distinguishes between two fundamentally different versions of dam burst or slippery slope argument: a logical/conceptual version and an empirical/socio-psychological version.²²

The logical/conceptual (also theoretical or conceptual) version of the dam burst or slippery slope argument broadly speaking asserts that on the admission of an act A_0 it is logically or conceptually impossible not to admit the clearly negatively evaluated act_n (A_n), because A_0 and A_n are linked by a chain of acts, A_1 to A_{n-1} , which differ from each other only to a minimal or insignificant extent. In this situation it would be logically inconsistent (unarguable) to allow A_0 but not A_n . Drawing a *limit* within the chain of actions would not solve the problem because in view of the insignificant differences, drawing such a limit would be impossible without being arbitrary and, so the argument goes, an arbitrary imposition of limits is to be rejected.²³

This line of argument is *flawed in a number of respects*. At first it has to be made clear that the question of whether the imposition of a limit is arbitrary is also a question of the underlying set of convictions (*Überzeugungssystem*). Thus the imposition of a limit at, say, A_3 may seem arbitrary in set of convictions C_1 , but not arbitrary against the background of an alternative set of convictions C_2 . Thus the arbitrary element of imposing limits is relative to the set of convictions taken as a reference point.

The view that it is generally inadmissible to impose arbitrary limits is also unconvincing. Looking at actual legal systems, the phenomenon of arbitrary limits is familiar particularly in areas distinguished by a continual development of skills. Take as an illustration the lack of culpability of children under German criminal law. Article 19 of the German Criminal Code provides that any perpetrator of an act under 14 years of age is incapable of being culpable. It is clear that this limit is an arbitrary imposition – viewed under the aspects of maturity, a sense of (in)justice or self-restraint, there is in principle no difference whether the perpetrator commit-

²² On this *Guckes* (Fn. 1), p. 15 ff.; also *Merkel* (Fn. 8), p. 596 ff.; *Antoine* (Fn. 8), p. 294 ff.; *Ingelfinger* (Fn. 8), p. 192 f. The classification of dam burst or slippery slope arguments is anything but unified, however. Among others, apart from the empirical-causal and conceptual-logical versions, the arbitrariness argument or the precedent slippery slope are at times treated as separate types, at times the empirical-causal version is treated as the domino argument (but see II. 1. above), at times the conceptual-logical version is classed as a sorites argument; see *Guckes* (Fn. 1), p. 15 ff. (25 ff., 31 ff., 39 ff., 44 ff.).

²³ For further differentiation of this argument type *Guckes* (Fn. 1), p. 15 ff. (16 ff., 25 ff., 31 ff., 52). One sees here that the logical version is related to the argumentum a fortiori.

¹⁹ *Engisch* (Fn. 5), p. 6. *Guckes* (Fn. 1), p. 6, takes the contrary view that slippery slope arguments always act as conservative blocking arguments.

²⁰ Below III.

²¹ Below IV.

ted the act one day before or one day after his 14th birthday. Nevertheless, the law irrebuttably presumes lack of culpability only in the former case. This imposing of arbitrary limits is not only unobjectionable, it is even *unavoidable*.²⁴

Overdrawn though the generalised views on the arbitrary imposition of limits seem, they also remain conceptually unrealistic when confined to pure logic. To assert that dam bursts and slippery slopes are inevitable results of a consistent set of convictions in moot cases and that consistent convictions should always override inconsistent convictions is as irrelevant in practice as the claim to be confining oneself to the field of purely logical opinion. Arguments will only become actually relevant if the planes of both opinion and of fact are connected, that is if degrees of probability are indicated with which the individual, sequential links in a chain of events are actually to succeed each other.²⁵ Thereby, however, one already arrives at the *empirical version* of the dam burst and slippery slope argument. This version is characterised by adducing exclusively empirical grounds for the risks of the downward slide from A_0 to A_n . This in turn requires complex risk assessment of a sociological, sociopsychological, economic and political nature, which has to account for a vast array of variables: attitudes and potential for change in the approach of decision makers, operating conditions of the health system, politics justice and economy, social and demographic developments, development of the law, etc.²⁶ Additional factors affecting the calculation of probabilities in reality include the logic of opinions, the conceptual proximity of individual successive actions, the capacity for A_0 to set a precedent, or the impracticality of imposing limits and other safeguards.²⁷ In this regard, the validity of empirical dam burst and slippery slope arguments depends decisively on how *rational* and *plausible* the individual risk assessment and evaluation (ratings) are within the projected chain of events, as well as how the *postulated* impractical nature of safeguards is justified.

At this point we have an interim conclusion – the possible candidates for satisfactory (good) dam burst and slippery slope arguments are all empirical lines of argument.²⁸ The validity criteria for dam burst and slippery slope arguments are not easy to fulfil. They not only have to provide plausible risk assessment and evaluate the degree of cohesion of chains of events. They must also cogently demonstrate why arbitrarily imposed limits or other safeguards cannot prevent the final negative circumstance.

III. Dam Burst and Slippery Slope Arguments in Medical Ethics and Law

The conceptual and structural analysis leads us to investigate the factual treatment of dam burst and slippery slope arguments in the German debate on medical ethics and medical law. Here it is less a matter of countering the substance of the premises underlying arguments than of focussing on theoretical analysis, that is whether and to what extent the proponents of dam burst and slippery slope arguments provide convincing justifications. Three areas for investigation stand out for their current relevance and importance: voluntary euthanasia, pre-implantation diagnostic, and therapeutic (clinical) cloning.

1. Voluntary Euthanasia (VE)

Dam burst and slippery slope arguments are most frequently advanced in the discussion on the admissibility of voluntary euthanasia (or ‘killing on request’, currently punishable under Art. 216 German Criminal Code). Dam burst and slippery slope arguments are deployed both in ethics²⁹ and law³⁰

²⁹ Explicit or equivalent damburst or slippery slope arguments in *Eibach*, *Sterbehilfe – Tötung aus Mitleid?*, 1998, p. 203 ff., 218 ff. (222: „slippery steep slope“); Memorandum of German physicians „Gegen die neue Lebensunwert-Diskussion – Arbeitskreis zur Erforschung der ‚Euthanasie‘-Geschichte“, Hamburg, April 1991 (responsible Gerke/Wunder), printed in: *Bönisch/Leyendecker*, *Das Geschäft mit der Sterbehilfe*, 1993, p. 254 ff. (259); *Foot*, in: *Leist* (Ed.), *Um Leben und Tod*, 3. Aufl. 1992, p. 285 ff. (314 f.).

³⁰ E.g. *Tröndle* (Fn. 2), p. 38 ff.: “Whoever seeks to relativise § 216 StGB in any way has to recognise that it would paralyse the strong awareness-building force of this provision to the detriment of the jurisdiction. The results would be difficult to assess: it could create incentives, particularly in the personal intimate field – to kill people, whereby the perpetrator would rely on the earnest requests of the victim who can no longer give testimony to the circumstances of his death [...]. If it is allowed to kill on request, [...] the death wish can also be ‘produced’, especially with the sensitive, helpless and sick (p. 39). Indeed; no objection carries more weight than the dam burst effect [...]. And one should beware the death disguised as an act of welfare, as the benefactors would also soon be able to decide who should be granted a mercy killing [...]” In effect a dam burst argument against admitting active euthanasia is also formulated by the authors of *AE-Sterbebegleitung* (GA 2005, 553, [582 f.]: „The warning against a relaxation of the protection of life by the expectations of the sick, against the danger of a difficulty in detecting misuse and against damaging the ethos of the medical profession as well as the patient-doctor relationship have lost none of their aptness”) as well as the predominant view in criminal law as summarised *Wessels/Hettinger*, *Strafrecht, Besonderer Teil*, Bd. 1, 30. Aufl. 2006, Rn. 28 with further footnotes. They state: “the relaxation of the prohibition of killing is unacceptable because it would lead to a relativisa-

²⁴ Similarly *Antoine* (Fn. 8), p. 295; *Guckes* (Fn. 1), p. 27 ff.

²⁵ *Guckes* (Fn. 1), p. 17.

²⁶ Cf. *Merkel* (Fn. 8), p. 599; *Antoine* (Fn. 8), p. 296 ff.; *Hegselmann* (Fn. 5), p. 207 ff.; *Birnbacher* (Fn. 5), 290 f.; further *Guckes* (Fn. 1), p. 50 ff. and 56 ff.

²⁷ On the various tendencies and combinations *Guckes* (Fn. 1), p. 44 ff.

²⁸ *Guckes* (Fn. 1), p. 53 ff. (54); *Antoine* (Fn. 8), p. 299.

against the admissibility of VE. The physician *Fuchs* has formulated a relatively complex dam burst argument. In his view it is part of the ‘moral logic’ of calls for active euthanasia that euthanasia is divided into two slippery slopes. First, regarding the relevance of the right of self-determination, euthanasia could not be limited to the phase of dying but will also apply to unbearable and chronic suffering, especially mental illness, in all phases of life. Killing and assisted suicide must ultimately result from the autonomous wish of the patient, independent of the nature or degree of fatality of their complaint. A second slippery slope derives from the fundamental concept of humanity. If euthanasia concerns the enabling of human death, it could not be denied to a suffering person since this would mean denying their right of self-determination. Accordingly there would be a short step towards a transfer of the euthanasia decision of an incapable patient to a third party, in particular the physician. The Dutch euthanasia system, which encompasses newborns, the comatose or those suffering from dementia, has shown how rapidly the “autonomy” model of euthanasia passes into a “preventative care” model of “fatal sympathy”. This prefigures death without the wish of the patient, putting an end to suffering and what, from the clinical perspective, has become ‘senseless’ life.³¹

According to *Fuchs*, no sensible stopping points on these two slippery slopes can any longer be perceived: “once the path of decriminalisation and legalisation of euthanasia has first been taken, there is evidently no longer an adequate barrier to secure protection of the disabled, the impaired, or those whose life is nearing its natural end.”³²

Fuchs underlines his double slippery slope argument with several “proofs”. Initially he sees a prognosis of danger “strengthened even more through the currently dominant theoretical utilitarian bioethic, associated with the names of Peter Singer [...] or Helga Kuhse. For them killing on request is chillingly a mere preliminary step towards the killing of ‘worthless lives’ (*lebensunwertes Leben*)³³. [...] Further for *Fuchs*, the danger of a progressive reduction of protection of life is becoming “alarming against the background of rising health costs or the ageing population. This economic and social pressure is today even threatening tolerance towards the chronically sick and those in need of care.”³⁴ The call for euthanasia thereby is irremediably associated with the mate-

tion of the protection of life, which would undermine respect for life, give scope for purely utilitarian considerations, tend not to counter the dangers of misuse, and destroy the patient-doctor relationship“. Critical of the argument in „Höchstwert Leben“ against allowing active euthanasia *Neumann*, in: Kindhäuser/Neumann/Paeffgen (Eds.), *Nomos Kommentar, Strafgesetzbuch*, 2. Aufl. 2005, Bd. 2, vor § 211 Rn. 127; *ders.*, in: Prittwitz/Manoledakis (Eds.), *Strafrecht und Menschenwürde*, 1998, 51 (57 ff.).

³¹ *Fuchs*, in: *ders./Spaemann*, *Töten oder sterben lassen?*, 1997, p. 59 ff.

³² *Fuchs* (Fn. 31), p. 61.

³³ *Fuchs* (Fn. 31), p. 61.

³⁴ *Fuchs* (Fn. 31), p. 62.

rial interests of the healthy and the young. In an atmosphere of increasing competition for resources and social coldness, active euthanasia as propagated by the ‘strong’ of society becomes “a threat to the existence of the weak and those unable to represent themselves.”³⁵ Finally *Fuchs* invokes the horror scenario of Nazi euthanasia. He indeed admits that current discussion on the admissibility of active euthanasia does not involve the racial-hygiene-driven Nazi murder programme against disabled people and that the then criteria of ‘the value of a life’ generally plays no explicit role these days. Nevertheless this last criterion is “the more powerful [...] as an unconscious potential influence on our attitudes: a latent disgust towards mental and physical vulnerability, an atmosphere of animosity towards the elderly.” Therefore the memory of Nazi euthanasia is necessary to *sharpen the awareness* of ‘the danger of fatal sympathy and perverted humanity.’³⁶

I have reproduced the *Fuchs* line of argument rather fully because it stands out among many other slippery slope arguments in the German debate in terms of its differentiated approach, and the scope of its reasoning. As a negative example we can take among others, the well-known ‘Kinsauer Manifesto’ contributed to in 1991 by the philosopher *Spaemann*. Here we read: “50 years after Hitler’s murder programme the campaign for euthanasia in this country has begun again. Various real factors play a role: the ‘abnormal’ demographic structure of our society, the shortage of care facilities, the growing costs of care, the extreme medical technical possibilities for prolonging life. The “entry drug” on the way to the euthanasia society is so-called ‘killing on request’ (physician assisted suicide). Apparently there is no steep slope from killing the victim “on request” to killing against the victim’s will – that is to killing people whose lives seem, not to themselves, but to society to be ‘worthless’. That is a catastrophic illusion.”³⁷

We need not stress that the Kinsauer Manifesto fails to meet the elementary requirements of a validly reasoned slippery slope argument.³⁸ The unfounded assertion, the “real factors” supposedly working in the direction of a steep slope, the unjustified equating of death on request with voluntary euthanasia, the suggestion of killing unworthy life as a repellent horror scenario, and above all the unjustified parallel drawn between the current euthanasia debate and Nazi euthanasia (which tends to undermine even the slippery slope argument itself, in that the final situation of the slippery slope already seems to have been reached) – all these manifest deficits in reasoning which render the entire slippery slope argument in the Kinsauer Manifesto invalid.

³⁵ *Fuchs* (Fn. 31), p. 63.

³⁶ *Fuchs* (Fn. 31), p. 63.

³⁷ Kinsauer Manifest, printed in: *Bönisch/Leyendecker* (Fn. 29), p. 264 ff. (265). Cf. also *Spaemann*, in: *ders./Fuchs* (Fn. 31), p. 12 ff. (21 ff.).

³⁸ Detailed analysis of this and other dam burst and slippery slope arguments in *Guckes* (Fn. 1), p. 210 ff. (225 ff.). Cf. further *Hoerster* (Fn. 8), p. 125 ff.

But the double slippery slope argument of *Fuchs*, which may be accounted an empirical version,³⁹ is also defective in many respects. This applies initially to the reference to utilitarian bioethics. Neither *Singer* nor *Kuhse* employ, as *Fuchs* infers, the concept of life not worth living. Equally erroneous is the supposition that utilitarian bioethics are dominant in Germany. On a very general level the influence of ethical theories on the practical dealings of people is to be rated as limited. All three conditions, however, would have to be met in order to enable the *Fuchs* reference to utilitarian bioethics à la *Singer* to be recognised as promoting a slippery slope.

The references by *Fuchs* to the health system and democratic structure as well as the so-called Nazi euthanasia remain sheer assertion. True it may be plausibly supposed that increasing costs and an imbalanced ageing of society will sharpen competition for the allocation of resources in the health system. It may also certainly not be excluded that these aspects can also influence the degree of overall respect for the sick and aged. However, there is neither a valid supposition of likelihood for this influence, nor a defensible likelihood regarding whether and to what extent the admission of active euthanasia in this situation leads to an irreversible slippery slope. At the same time, so far as can be seen, nobody justifies active euthanasia in terms of rising health costs or the ageing of society. The associations of *Fuchs* with so-called Nazi euthanasia also seem rather subjective. Certainly we must keep this dreadful heritage present in our memory. But to say this heritage forms an unconscious background to our current attitudes in the way asserted, in my view is sheer speculation.

Finally the arguments regarding Dutch euthanasia regulations remain at the level of hypothesis. There is no scope here to examine the sharp criticism *Fuchs* levels at euthanasia in the Netherlands,⁴⁰ although I would add that the Netherlands' euthanasia law does raise substantive and procedural problems.⁴¹ Assuming however that the criticism made by *Fuchs* is correct, then it would only support the opponents of voluntary euthanasia if its proponents were to advocate a transfer of the Dutch regulations to Germany. This, however, is not the case, regardless of whether such a transfer would be at all legally admissible.⁴² The frequent warnings heard against the supposed dreadful conditions of euthanasia in the Netherlands therefore remain pure hypothesis.

In this connection a commonly found gap in the reasoning of dam burst and slippery slope arguments is characteristic. Their proponents⁴³ – including *Fuchs* – not infrequently omit

to provide grounds for why there should be no barriers against the dam burst or an escape route off the slippery slope. Here it is the recognition that procedural safeguards are indispensable which has so enriched the German debate on euthanasia in the last decade.⁴⁴ These safeguards include patient advance statements (living wills), guardianship, documentation obligations, expert consultation, ethical commissions or judicial power of attorney – extending to the real legal and political hope of advance statement (living will) legislation being passed at last in Germany.⁴⁵ Dam burst or slippery slope arguments against the admission of voluntary euthanasia are therefore only complete and valid to the extent they also plausibly argue why procedural safeguards in particular not prevent a flood or a slide.

2. PID

Dam burst and slippery slope arguments also play an important role in the rejection of PID. This is the examination of an artificially produced embryo for certain genetic defects prior to possible transfer into the woman's womb. In Germany the prevailing view is that PID is prohibited under the embryo protection law which, however, is not explicitly provided for PID.⁴⁶ Dam burst and slippery slope arguments against the admissibility of PID are closely related to those against the prenatal diagnosis (PN) as a whole.⁴⁷

A relatively elaborate slippery slope argument, even if not expressly characterised as such, is put forward by the 'Network against Selection through Prenatal Diagnosis'.⁴⁸ According to this argument, the admission of PID would trigger a three-step negative consequential scenario. First, the legalisation of PID would increase the already existing pressure in society for prenatal selection, which is already present in the form of integration of PND into general prenatal care. Secondly, as a result, disabled people would be subject to an even higher degree of discrimination. Thirdly, eugenic ten-

³⁹ Above II. 3.; cf. also *Guckes* (Fn. 1), p. 22 ff. (50 ff.): so-called combined type. A.A. *Antoine* (Fn. 8), p. 295 Fn. 44, who assigns the argument of *Fuchs* to the logical type.

⁴⁰ *Fuchs* (Fn. 31), p. 31 ff.

⁴¹ Cf. *Saliger*, in: *KritV* 1998, 148 with Fn. 192.

⁴² Cf. representative *Fischer*, *Recht auf Sterben?!*, 2004, particularly p. 195 ff.

⁴³ See e.g. *Foot* (Fn. 29), p. 315, for whom it is enough that it would simply be "difficult" to "create procedures which protect people from being persuaded to agree."

⁴⁴ See with further footnotes *Saliger*, in: *Schulz* (Ed.), *Verantwortung zwischen materialer und prozeduraler Zurechnung*, ARSP supplement no. 75, 2000, p. 101 ff.; *ders.*, in: *Bernat/Kröll* (Eds.), *Recht und Ethik der Arzneimittelforschung*, 2003, p. 124 ff.; *ders.*, *MedR* 2004, 237 ff.

⁴⁵ On the current debate regarding a patient advance statement law (living will) see for example *DÄBl.* dated 22.3.2007 and the interview with the Federal Justice Minister *Zypries* in *Die Zeit*, dated 22.3.2007, p. 7.

⁴⁶ See representative with further footnotes *Laufs*, in: *Ethik in der Medizin* 11 (Suppl. 1), 1999, p. 55 ff.; *Keller/Günther/Kaiser*, *ESchG*, 1992, § 6 and § 2.

⁴⁷ On the latter in more detail *Guckes* (Fn. 1), p. 180 ff.

⁴⁸ The network is a loose conglomeration of groups, organisations and individuals, affiliated to the federal association for the disabled (*Bundesverband für Körper- und Mehrfachbehinderte e.V.*).

dencies would be given a further boost.⁴⁹ The Network bases these “fears” among others on hitherto experience with PND techniques. Despite substantive and procedural safeguards, an extension of PID may be expected to all physical features subject to genetic diagnosis, as well as the facilitation of “negative” selection (exclusion of unwanted characteristics) and “positive” selection (choice of desirable characteristics) through PID. As a result, PID would be a “further step towards germline manipulation”.⁵⁰

Others formulate the dam burst or slippery slope of admitting PID even more drastically. PID would mean stepping onto the slippery slope of eugenics and breaking a taboo erected against Nazi bestiality.⁵¹ Alternatively: PID opens the door to the brave new world of the baby ‘consumer’ test, where the wish for children degenerates into the ultimate shopping experience.⁵²

What can we make of these dam burst and slippery slope arguments against PID? Initially, we must admit that the (even limited) admission of PID could increase psychological and social pressure on parents to use the techniques and to abort a handicapped embryo. While this pressure could be mitigated through advice and information by the physician, it could not be relieved entirely. To this extent the first predicted step in the chain of events must be seen as sufficiently plausible. However, this clearly does not apply to the two further steps. The handicapped may feel affected and stigmatised by the admission of PID. However, it remains speculative how PID relating to embryos could encourage discrimination against handicapped people. It is not only that the unfortunately present discrimination against the handicapped has quite different origins. Were the thesis of discrimination of the handicapped through PID correct, then the current PN or late abortion on the grounds of pathological embryo would already have led to such discrimination.⁵³ In fact, however, there are significant conceptual and structural differences between discrimination against the handicapped and PID of embryos. It is no wonder, therefore, that the proponents of dam burst and slippery slope arguments against PID do not further substantiate the thesis of discrimination against the handicapped, and in particular do not rely on sociological or socio-psychological supported estimates of probability.

The horror vision of positive eugenics on the Nazi model is also unfounded. This scenario requires that PID be carried out in terms of evaluating human life according to external characteristics, that is criteria of social usefulness and desirability. This is, however, not the case. Currently in Germany on constitutional grounds the (limited) admission of PID on internal grounds is being discussed, in particular in order to help those affected by hereditary factors to fulfil their justifiable wish for children. Thus it is in no way a question of “positive” eugenics or the selection of “unworthy life”.

Above all the opponents of admitting PID must allow the accuracy and desirability of the results of their own view to be questioned. First, for one thing it is indeed full of contradictions to suppose on the one hand that no substantive and procedural safeguards could “stem the flood” on admitting PID, but on the other hand to assume an unproblematic maintenance of the PID prohibition. Nevertheless there is PID tourism in countries where PID is not prohibited.⁵⁴ Further, the negative costs of a general PID prohibition may not be overlooked when evaluating corresponding dam burst and slippery slope arguments. These include the expectation that women or couples with genetic defects should either become pregnant and terminate pregnancies until a healthy child is born, or entirely give up the idea of having their own children.⁵⁵

3. Therapeutic Cloning

The classic dam burst or slippery slope argument in bioethics is the assertion that permitting therapeutic cloning would inevitably lead to permitting reproductive cloning. A possible illustration is provided by the reactions to the limited legal admission of therapeutic cloning in England. Thus the former president of the EKD, *Kock*, said of the resolution of the British House of Commons in late 2000 that it represented an “ethical dam burst” and that “it opened the door wide” to ‘reproductive cloning’.⁵⁶ The physician *Zylka-Menhorn* spoke of a “scientific and ethical dam burst” in that the value of an embryo would be fundamentally changed: “Its right to life and its dignity would be put behind sick adults. The way is then open in ethical and moral terms towards the industrial exploitation and manipulation of human life.”⁵⁷

Underlying this dam burst argument is the fact that therapeutic and reproductive cloning techniques are identical.⁵⁸

⁴⁹ Opinion on pre-implantation diagnosis (PID), Februar 2001, p. 2; available online at www.bvkm.de/0-10/pranataldiagnostik.netzwerk.stellungn.

⁵⁰ Opinion (Fn. 49), p. 2 f.; a similar line of argument from a Christian viewpoint against PID is to be found for example in the Austrian bishops’ conference on questions of cloning and PID dated 16. June 2004; cf. also the assessment of consequences of PID opponents in Nationaler Ethikrat (National Ethics Board) *Genetische Diagnostik vor und während der Schwangerschaft*, 2003, p. 88 ff.

⁵¹ *Jachertz*, DÄBl. 97 (2000), A-507.

⁵² *Stollorz*, Die Zeit, 2000, Nr. 10 (Bildung und Wissen).

⁵³ Similarly the vice-chair of the Bundesverband Lebensrecht e.V. (Federal Association for the Right to Life); *Büchner*, Die Tagespost, dated 4.1.2007, p. 9.

⁵⁴ Cf. Nationaler Ethikrat (National Ethics Board, Fn. 50), p. 60, according to an unofficial estimate some 50-100 German couples per year undergo PID abroad.

⁵⁵ See the balanced assessment of the consequences by the proponents of a limited admission of PID in: Nationaler Ethikrat (Fn. 50), p. 138 ff. Cf. also in detail on the parallel problems of PND *Guckes* (Fn. 1), p. 180 ff. (182 ff., 197 ff.).

⁵⁶ *Kock*, Erklärung der Pressestelle der EKD vom 20.12.2000.

⁵⁷ *Zylka-Menhorn*, DÄBl. 97 (2000), A-2193. Cf. further the report of *Feldenkirchen*, Der Tagesspiegel, dated 27.11.2001, and *Witteck/Erich*, MedR 2003, 258 (260).

⁵⁸ See Nationaler Ethikrat, *Klonen zu Fortpflanzungszwecken und Klonen zu biomedizinischen Forschungszwecken*, 2004, p. 17 ff., 61 f.

This renders the equating of therapeutic and reproductive cloning all the more explosive. While therapeutic cloning (that is cloning for remedial purposes) is certainly controversial, reproductive cloning is universally prohibited both nationally (Article 6 ESchG) and internationally (see Article 1 Additional Protocol Cloning Biomedicine Convention Council of Europe).⁵⁹ The issue of therapeutic cloning thus directly raises the bio-legal taboo against human reproductive cloning. This explains why the negative consequential scenarios against reproductive cloning, such as a degrading instrumentalisation of human life, “positive” eugenics, the downfall of respect for nature and God, or increased perverted activism,⁶⁰ are also largely levelled at therapeutic cloning.⁶¹

That dam burst and slippery slope arguments are deployed against cloning of living organisms is admittedly in itself no surprise. Of all the technical innovations in reproductive medicine in recent decades, none diverges so widely from our ideas of “natural” reproduction than the artificial production of genetically identical organisms for reproductive purposes. This applies above all to the reproductive cloning of human beings, which is as yet not technically possible.⁶² Dam burst and slippery slope arguments are here immediate and involuntary defensive reflexes against the acceptability of human reproductive cloning, which otherwise casts into doubt our hitherto understanding of ourselves and our world. It is accordingly understandable that therapeutic cloning is regarded as a “Pandora’s box” for reproductive cloning. The conceptual delineation of both forms of cloning is anything but free from doubt.⁶³ As with cloning techniques generally, therapeutic cloning also requires that an at times totipotent embryo is first created. Therefore to the extent that the embryo is defined as a person, we can also speak at times of therapeutic cloning as the reproduction of a human being.⁶⁴ In addition, the category of reproductive cloning comprises cases which evince a remedial purpose alongside the reproductive purpose, for example where a child is cloned in

order to later donate its organs for remedial purposes to its sick sibling.⁶⁵

Despite these partially plausible points, dam burst and slippery slope arguments against therapeutic cloning fail to convince in any respect. Initially it must be insisted upon that the mere identity of cloning techniques does not justify the equivalence of therapeutic and reproductive cloning. The purposes of both forms of cloning differ so widely that their causal merging in a dam burst or slippery slope argument cannot of itself be accepted. Reproductive cloning aims at the birth of a person. By contrast, therapeutic cloning is confined to the cloning of egg cells so as to gain cells for the treatment of identified illnesses such as Alzheimer’s, Parkinson’s or leukaemia, or in order to grow entire organs.⁶⁶ On the basis of this fundamental difference in purposes, dam burst and slippery slope arguments against therapeutic cloning have to demonstrate why substantive and procedural safeguards cannot prevent the dam burst or slide leading to reproductive cloning.

In addition, it must be stressed that the substantive presumptions behind dam burst and slippery slope arguments are also not self-explanatory. This applies above all to the presumption that every human embryo has the same rights to protection as a fully developed human being, a presumption not only far from compelling but highly controversial.⁶⁷ But the unquestioning prohibition of all forms of reproductive cloning would also seem to require differentiation. Thus there are good reasons for distinguishing between cases of ideologically motivated cloning, particularly out of eugenic and military motives and the absolutely impermissible breeding of humans on the one hand, and cases of reproductive gynaecological cloning on the other, for example to fulfil a wish for children, which do not infringe the prohibition on the instrumentalisation of human dignity.⁶⁸

Apart from this we should not forget that the validity of individual future prognostications have different implications for cloning. In particular the forecasts of disadvantageous social and psychological events, plausible though they may be in details, suffer conceptually from a lack of empirical data. The necessarily speculative element of risk scenarios is therefore decisively dependent on the underlying emotional attitude with which the respective author of a dam burst and slippery slope argument approaches technical innovations. Undoubtedly at the moment on the basis of animal cloning experiments only the irresponsible health risks of reproduc-

⁵⁹ See *Saliger*, JRE 14 (2006), 541 ff.

⁶⁰ See *Saliger*, JRE 14 (2006), 552 f. Also supporting arguments for the ban on cloning in Art. 1 BMK-ZP-Klonen dated 12.1.1998 refers to the „serious medical, psychological and social difficulties which such a conscious bio-medical practice could mean for all participants“ (Erwägungsgrund Nr. 6). The announcement by the Italian physician *Antinori* that he wished to clone babies was described, for example, by the politician *Volker Beck* as “an unparalleled ethical dam burst” (see EKD-News Archive 2002, available online at www.ekd.de/aktuell_presse/news_2002_11_27_2_gruene_klonen.html).

⁶¹ Cf. Nationaler Ethikrat (Fn. 58), p. 60 ff. and p. 48 ff.

⁶² Unnoticed counter-prediction such as that of the Raelian sect on the claimed birth of a cloned baby called „Eve“, cf. *Die Welt*, dated 28.12.2002.

⁶³ On the consequences see *Saliger*, JRE 14 (2006), 542.

⁶⁴ Cf. *Rosenau*, in: *Amelung* (Hrsg.), *Strafrecht – Biorecht – Rechtsphilosophie*, Festschrift für Hans-Ludwig Schreiber zum 70. Geburtstag am 10. Mai 2003, 2003, p. 762.

⁶⁵ *Kersten*, *Das Klonen von Menschen*, 2004, p. 17 ff.

⁶⁶ Appropriate *Rosenau* (Fn. 64), p. 762 f.; *Taupitz*, NJW 2001, 3433 ff. (3440).

⁶⁷ See as an example of the assessment in the national ethics board (Nationaler Ethikrat, Fn. 58), p. 52 ff.; cf. also *Taupitz*, NJW 2001, 3433 ff.

⁶⁸ *Kersten* (Fn. 65), p. 484 ff.; *Saliger* (Fn. 59), p. 550 f.; also *Joerden*, JRE 7 (1999), 83 ff. und *Merkel*, *Forschungsobjekt Embryo*, 2002, p. 251 Fn. 327.

tive birth cloning for the clone itself may be criticised. They support a (relative) prohibition of human cloning.⁶⁹

IV. Functions and Standards for Dam Burst and Slippery Slope Arguments

On the basis of the above analysis, we can turn to the third and final step of the (real) functions and (ideal) standards of dam burst and slippery slope arguments. We have seen that these structural reasoning requirements made upon valid dam burst arguments are demanding. As a species of consequential argument, dam burst and slippery slope arguments not only have to precisely describe the underlying events, but also to render credible the active factors between the individual links in the chain of events (including the identity and participation of decision makers). Dam burst and slippery slope arguments are in addition only complete if they demonstrate why the dam burst or the steep slope cannot be prevented by recourse to the constitutional legal order and why the costs of avoiding the precipitating act outweigh the “utility” of its consummation.

This complexity of demands made upon the reasoning contrasts with a troubled treatment of dam burst and slippery slope arguments in practice. This is because in view of the requirements, it would be expected that dam burst and slippery slope arguments would be made rather seldom. In fact, however, they are not only very popular but, as the analysis has shown, their proponents also generally fail to fulfil the requirements for reasoning, whether steps in the reasoning are entirely missing (Kinsauer Manifesto), or incomplete (*Zylka-Menhorn*), differing phenomenon held to be equivalent (Kinsauer Manifesto, *Zylka-Menhorn*) suppositions incorrect (*Fuchs*) or speculative (*Fuchs*, Network against PND). Obviously the stringent requirements for reasoning are in practice no hurdle to frequently citing dam burst and slippery slope arguments.

1. Functions

These findings require explanation. Two factors seem to me to play a role. The first factor lies in the function of attraction which dam burst and slippery slope arguments mobilise in practice. This function derives from the suggestive power of the dramatic images of dam burst and slippery slope. Dam burst and slippery slope arguments are examples of the prophecy of doom phenomenon, which has always held men in its sway. The ultimate horror scenarios in which the dam burst or slippery slope respectively culminate is more influential than any factual argument to successfully prevent the introduction of the disputed technology, norm or act. All dam burst and slippery slope arguments, even when validly informed, possess not only the degree of factual content which should appeal to reason and understanding, but also a signifi-

cant emotive component which sways through visual associations. It is this emotive effect which renders the dam burst and slippery slope argument so attractive in politics.

Looked at in detail, the entire associated emotive dramatic of the dam burst and slippery slope argument implicates a range of practical argument functions. First there is the *simplification* function. Dam burst and slippery slope as images simplify decision-making by reducing it to a choice between two starkly opposed and simplistic options: either to allow the act triggering the dam burst or to reject it. Possible differentiation in the decision-making is thereby masked. In particular, no thought is given to the option of allowing the act supposedly leading to the dam burst but accompanied by safeguards such as continued monitoring, an obligation to cure difficulties, and a reserved right of repeal or reversal.

An even more important function of dam burst and slippery slope arguments is the “killer punch”.⁷⁰ The dramatic nature of dam burst and slippery slope visual images unconsciously (subliminally) stigmatises the dam burst triggering act, forcing its proponents onto the defensive even before those invoking the dam burst arguments have presented their justification. After all, who wishes in proposing a technology or norm to cause a dam burst or literally “stand on a slippery slope”?⁷¹ This defensive tendency of the proponents of the dam burst causing act implicitly *shifts of the burden of proof onto them*, while those invoking the dam burst argument no longer seem required to justify their position. The dramatic visual images of the dam burst and slippery slope shift attention to the cause of the dam burst or slippery slope and demand reasons for admitting the supposedly dam burst triggering act.

Finally, closely related to the “killer punch” function of dam burst arguments is the “distraction” function. The criticism that the proponent of an act will cause a dam burst or slippery slope serves to divert attention away from the flaws in the critic’s own suppositions. Recall the parallel drawn in the Kinsauer Manifesto between the current euthanasia debate and the ‘NS euthanasia’, and the way in which *Zhylka-Menhorn* equates every human embryo with a human being.⁷² The emotive force of dam burst associations thus tends to obscure the questionable nature of individual fundamental assumptions.⁷³

2. Standards

The analysis of the emotive association function only partly clarifies the problematic treatment of dam burst or slippery slope arguments in practice. It is true the emotive functions

⁶⁹ Equally Brock, in: Honnefelder/Lanzerath (Eds.), *Klonen in biomedizinischer Forschung und Reproduktion*, 2003, p. 211 ff.; further *Lilie*, *ibid.*, p. 211 ff. Also Saliger (Fn. 59), p. 552 f. and *Borchers/Czaniera*, in: Beckermann/Nimtz (Eds.), *Argument und Analyse*, 2002, p. 538 ff. (548 ff.).

⁷⁰ In the “killer punch” role it becomes clear how the dam burst argument also functions as conservative blocking argument. Naturally this blocking function is only generally present in slippery slope arguments, see above II. 2.

⁷¹ Cf. also *Guckes* (Fn. 1), p. 1.

⁷² Above III. 1. and III. 2.

⁷³ Cf. also *Ruckenbauer*, *Vom Nutzen und Nachteil der Dammbuch-Argumente in der Bioethik-Debatte*, Abstract, available online at www.univie.ac.at/karlpopper_2002/abstracts/ContributedPapers.

lend plausibility to the attractions of dam burst and slippery slope arguments. However, they cannot explain why many of their proponents seemingly pay little attention to fulfilling the requirements of structural reasoning. This raises a *second circumstance*, a complete lack of clarity on the concrete standards for good dam burst and slippery slope arguments. Certainly there is consensus that the allegation of a slippery slope requires further substantiation.⁷⁴ It is also clear that those invoking a slippery slope argument have to do more than raise a mere possibility and must give an indexed degree of probabilities.⁷⁵ Apart from that, however, we enter uncertain and varyingly judged terrain. This raises delicate issues which may only be touched upon here.

The essential point is *standards for assessment of the consequences of technology* and a *rational policy of risk*.⁷⁶ As is known, the Federal Constitutional Court lays down rather *soft basic principles*. Accordingly, the legislator in the course of fulfilling its *state protective obligation* has to have regard to foreseeable limits on basic rights and thereby the consequences of acts. In particular it has to “exhaust the information sources available to it”, so as to “assess as reliably as possible the foreseeable consequences of its legislation”.⁷⁷ What degree of likelihood of certain negative consequences are necessary to justify a prohibition is a matter of the particular legal interests concerned, the particular substantive nature of the matter, and the scope for adequately reliable formation of judgments.⁷⁸ Also relevant is the possibility of a limitation of the protected ‘interest’ through the accumulation of results and reserving the right to revoke already arrived at decisions. This is because the legislator is under a duty to “monitor and rectify”.⁷⁹ Overall in predicting possible results of a decision, the legislator is accorded further scope for decision-making.⁸⁰ This means the legislator may certainly carry out controlled experiments, in particular with new protective concepts.⁸¹

Beyond these principles the standards are not uniform. As illustrations we may take the actual approach on which the National Ethics Board (*Nationaler Ethikrat*) has based its assessment of PND and PID. In cases concerning the value of life as well as the qualitative increase in the power of humans to dispose over the life of other humans, the National Ethic Board applies the *Jonas* concept of “heuristic of fear”. Ac-

ording to this concept, decision-making involves “taking into account unfavourable risk prognoses and monitoring side-effects. [...] In the evaluation of conflict situations of the type before us, a responsible preventative ethic therefore (would merit) giving priority to a rather pragmatic assessment, even if this at times leads to medical progress being held back.”⁸²

This approach raises problems of its own. The *Jonas* concept of “heuristic of fear” is a central element of his “future ethic”. In the context of “*philosophia negativa*” he explains the view of the “*malum*” to useful, admittedly non-conclusive sources of insight as a “*bonum*”: “We need the ‘threat’ to our view of humanity [...] in order to secure a true view of humanity.”⁸³ In his ethic of long-term responsibility, *Jonas* incorporates the uncertainty of future projections in such a way that he formulates the maxim of “paying more attention to pessimistic than to optimistic prophecies.”⁸⁴ This goes too far, however. Albeit it is correct to allow a “heuristic of fear” to dictate acts where one passes into areas of uncertainty, in the *standard decision-making situations of relative certainty or uncertainty*, it seems all the more *pessimistically paralyzing*.⁸⁵

In this situation a rational treatment of risk is appropriate, going beyond a pessimistic or optimistic outlook, technoscepticism or techno-euphoria. Here there are still many individual points of detail requiring clarification.⁸⁶ In particular, it cannot be demanded that the dam burst and slippery slope arguments are only taken into account if they can be based on empirically secure statements of likelihood. Rather this is often simply not possible. If dam burst and slippery slope arguments are not to ‘drop out’ of the arsenal of forms of argument on rulemaking, cogent and index-based claims for plausibility will have to suffice. On the other hand we should aim for a consensus that structural reasoning requirements may not be undercut, since they are what renders dam burst arguments capable of criticism. On this basis we can distinguish between ‘good’ and ‘bad’ dam burst and slippery slope arguments.

V. Summary

Summarising it may be said:

1. Dam burst and slippery slope arguments play a large role in medical law and medical ethics. 2. From the structural viewpoint they constitute specific empirical consequential

⁷⁴ Thus *Hegselmann* (Fn. 5), p. 208. In agreement *Herzberg* (Fn. 5), p. 3044 f.; *Guckes* (Fn. 1), p. 11; *Ingelfinger* (Fn. 8), p. 194; cf. also *Ruckenbauer* (Fn. 73).

⁷⁵ *Hegselmann* (Fn. 5), p. 208. In agreement *Herzberg* (Fn. 5), p. 3044 f.; cf. also *Birnbacher* (Fn. 5), p. 290 f. and *Merkel* (Fn. 8), p. 596.

⁷⁶ Cf. *Antoine* (Fn. 8), p. 299 ff.

⁷⁷ BVerfGE 50, 290 (334).

⁷⁸ Cf. BVerfGE 50, 290 (332 f.); 73, 40 (92).

⁷⁹ BVerfGE 88, 203 (269); also 49, 89 (132) and 56, 54 (81).

⁸⁰ Cf. BVerfGE 88, 203 (262).

⁸¹ In more detail *Pietrzak*, JuS 1994, 748 (752 f.). On the significance of protecting fundamental rights by procedures in this connection see *Saliger* (Fn. 44), p. 102 ff. (121 ff.).

⁸² *Nationaler Ethikrat* (Fn. 50), p. 89 f.

⁸³ *Jonas*, *Das Prinzip Verantwortung. Versuch einer Ethik für die technologische Zivilisation*, 1986, p. 63; also p. 7 f.

⁸⁴ *Jonas* (Fn. 83), p. 70.

⁸⁵ *Birnbacher*, *Verantwortung für zukünftige Generationen*, 1988, p. 157. In the area of life and death *Birnbacher* himself (Fn. 5), p. 364 calls for a „risk adverse strategy“.

⁸⁶ See *Guckes* (Fn. 1), p. 56 ff.; *Lode* (Fn. 6), p. 1469 (1528 ff.); *Volokh* (Fn. 6), p. 1030 f., 1127 ff.; *Hegselmann* (Fn. 5), p. 208 ff. has suggested six rules of thumb for dealing with slippery slope arguments.

arguments. 3. In practical debate, the stringent reasoning requirements made of dam burst and slippery slope arguments are often 'shortcut', because they simply or primarily mobilise the emotive association functions of simplification, the killer blow, shifting the burden of proof or distraction. 4. Distinguishing between 'good' and 'bad' dam burst arguments requires a rational discourse of risk.