Notes

1. Asch in Parens E, Asch A, editors. *Prenatal Testing and Disability Rights*. Washington, D.C.: Georgetown University Press; 2000:13.
2. Cf. Nelson in note 1, Parens, Asch 2000.

DOI: 10.1017/S096318017070594

Prenatal Testing for Selection against Disabilities

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Disability rights advocates sometimes claim that prenatal tests to select against disabilities discriminate against people with disabilities.[1] The "expressivist argument" that supports this position has been challenged on grounds of the difference between fetuses and born persons.[2] In this essay, I explain why the expressivist argument is valid despite the questionableness of its conclusion, and why the distinction between fetuses and born persons fails to provide an adequate counterargument to the expressivist conclusion. I also consider a compelling argument for prenatal testing to select against disabilities and propose a reformulation of this argument that, I think, supports prenatal testing for disabilities while avoiding discrimination against people born with disabilities.

The Argument

As I understand it, the expressivist argument is as follows:

> Prenatal tests to select against disabling traits express discrimination toward people born with disabilities.
>
> Discrimination toward people with disabilities is unjust.
>
> Therefore, prenatal tests to select against disabling traits are unjust.

The above conclusion necessarily follows from the premises if the subjects of the premises are universal.[3] As articulated by its supporters, this is apparently how the argument is meant to be understood. If the subject of the second premise is universal, the argument would also be valid if the subjects of the first premise and the conclusion were both particular.

In neither premise of the expressivist argument does the term "discrimination" encompass the positive meaning it conveys when the term or its cognates refer to attitudes or practices that reflect an ability to discern or distinguish between morally neutral attributes (e.g., discriminating tastes in wine or music). As used here, the term "discriminatory" adds a moral element to the discernment by which some groups of people are distinguished from others, and it is this element that supports the prescriptive claim of the second premise. The rationale for this claim is that justice demands that people with disabilities be recognized and treated as having the same value as those who are currently able. On this construal of justice, with which most people agree, the second premise is true even when individual decisions, policies, or social practice suggest otherwise.

https://doi.org/10.1017/S096318017070594 Published online by Cambridge University Press

The truth status of the first premise is challengeable on grounds that selection against disabling traits does not necessarily mean selection against people born with disabling traits or even fetuses detected to have these traits. In other words, the selection is against the trait rather than the individual, and evaluation of the individual is separable from evaluation of her traits. Critics respond that separating these evaluations is impossible both theoretically and empirically because a person or fetus with a disability *is* that person or fetus; selecting against the trait is therefore morally equivalent to selection against the person or fetus. As Adrienne Asch puts it, when the selection is made, the part stands in for the whole.[4] Or, as a close relative with cerebral palsy recently said, "I wouldn't be the same person if I were not born this way."

The first premise of the expressivist argument is more effectively challengeable on grounds that many women who undergo prenatal tests to select against disabling traits do not harbor discriminatory attitudes toward people born with disabilities, and their decisions, therefore, do not express discrimination *on their own part*. Women who undergo prenatal tests may be solely or prevalently motivated by considerations such as their responsibilities to children already born, lack of social supports for a child with disabilities and their caregivers, ignorance of the quality and quantity of life that someone with a particular disability is likely to experience, the contribution to society made by many people with disabilities, and pressures from others to terminate a pregnancy after prenatal diagnosis of disability. Women who make their decisions solely for these reasons do not themselves express discrimination against people with disabilities. However, their decisions in many cases express discrimination on the part of those who willingly deprive them of the knowledge and supports needed to bear and raise children with disabilities. Some women undoubtedly harbor and express discriminatory attitudes toward people with disabilities, but the fact that some, perhaps many, do not is all that is necessary to make the expressivist conclusion questionable with regard to pregnant women who make these decisions.

The Counterargument

As already suggested, critics of the expressivist argument usually base their response on the distinction between fetuses and born persons. Their counterargument may be put as follows:

> Selecting against disabling traits is unjust if and only if it is done toward persons.
>
> Fetuses are not persons.
>
> Therefore, selecting against disabling traits in fetuses is not unjust.

Although this argument is also valid, the truth of its conclusion is more problematic than the conclusion of the expressivist argument because both of its premises are disputable. By definition, fetuses are not *born* persons, but this does not necessarily imply that they are not persons. The denial that fetuses are persons, even though broadly supported, is still subject to cogent rebuttal. Even if the second premise were uncontestable, it ignores the ethically relevant empirical connection between fetuses and (born) human beings. The fact that fetuses can only survive within women provides grounds for imputing priority to women's decisions regarding them, but the developmental connection be-

https://doi.org/10.1017/S0963180107070594 Published online by Cambridge University Press

tween fetuses and newborns is indisputable. The reality of this connection, especially as experienced by women who give birth,[5] makes it highly improbable that decisions about fetuses are psychologically separable from those made about children, whether disabled or not. That decisions to terminate fetuses without disabilities are also made with a sense of this connection is clear from the fact that abortion decisions are often based on the desire to avoid parenting rather than the desire to terminate a pregnancy. This rationale persists despite the fact that relinquishment of parental responsibilities through adoption makes it possible to continue pregnancy without taking on the duties of parenthood.

Both premises of the preceding argument rely on a conception of person that is implied but undefended. The implicit conception of the second premise is an exclusionary criterion: that prenatal status, no matter how far advanced, preempts personhood. Because selecting against disabling traits requires termination of affected fetuses, this exclusionary requirement of personhood supports termination that would neither legally nor morally be countenanced after birth, even for newborns with profound disabilities.

As already suggested, support for the counterargument may also be framed in terms of a distinction between selection against a disabling trait and selection against the individual who possesses the trait. This argument is applicable to prenatal testing regardless of whether the fetus is a person. However, because the selection against the trait can only be accomplished by ending the life of the affected fetus, it seems either ignorant or disingenuous to claim that the two are separable. Even if the selection were expressed positively instead of negatively, that is, as selection *for enabling traits*, selection *against disabling traits* that might otherwise be expressed in a born person would be a necessary implication of the selection *for enabling traits*.

A More Compelling Argument

My previous point brings to mind what I consider the most persuasive argument for prenatal testing to select against disabilities: the moral obligation of potential parents to promote the welfare of their potential children. In the following formulation, I narrow the group of potential parents who have this obligation to pregnant women on grounds that they are the only ones capable of undergoing prenatal tests to select against disability:

> Pregnant women (who intend to give birth) are morally obliged to promote the welfare of their potential offspring.
>
> Prenatal testing to select against disabilities promotes the welfare of potential offspring.
>
> Therefore, pregnant women (who intend to give birth) are morally obliged to undergo prenatal testing to select against disabilities in their potential offspring.

This argument too is valid, but its conclusion is more compelling than that of the previous argument because the truth of its premises is apparently independent of controversial definitions of personhood or moral status. Moreover, both premises are supported by a majority of the population. Relevant to the first premise is the fact that most women who choose to continue their pregnancies are not only willing but anxious to do whatever they can, despite the hardships this sometimes entails, to promote the

https://doi.org/10.1017/S0963180107070594 Published online by Cambridge University Press

welfare of their future children. Prescriptively, this premise is supported on grounds of obligations to the newborn that the fetus is expected and intended to become. It is also supportable on grounds of obligations to the fetus, for example, as a living human organism, possibly already sensient, and capable of further development.

Prescriptive support for the second premise is less robust because *selection* is not necessarily equivalent to *promotion*. Promotion of the welfare of a potential child is not as morally compelling as promotion of the welfare of an already existent child, but it is clearly a good thing if it does not involve disproportionate reduction in the welfare of other potential children. Selection of some embryos or fetuses, however, means that the welfare (i.e., further development) of other potential children is prevented rather than promoted. Obviously, it is neither legally nor morally permissible to terminate the life of a child with disabilities in order to promote the welfare of a child without those disabilities. As potential children rather than actual children, embryos and fetuses may be regarded solely as instrumental goods rather than entities that have some independent moral status. They are thus viewed as means of maximizing the welfare of future children. By affirming selection of some embryos as promotion of not-yet-existing children's welfare, the second premise adopts this instrumental conception of embryos. Despite the validity of the argument and its apparent independence from the issue of moral status, therefore, the conclusion is challengeable by those who do not subscribe to the view that developing human embryos are merely instrumental goods.

Some scholars have proposed a totally subjective criterion for resolving the crucial but unavoidable issue of moral status: They argue that the woman's decision to continue her pregnancy confers on the embryo or fetus a moral status that entitles it to treatment even if she refuses her permission for the recommended intervention, which can only occur through her body.[6] In other words, an entity acquires moral status solely by a person determining that it has such status; without such determination, the same entity lacks moral status. Consider, however, the horrendous implications of such a criterion—for example, it could be used by some, as it has in the past, to justify deliberate termination of the lives of people whose moral status is denied by others. Although judgments about what constitutes moral status vary and are fallible, so significant an issue is hardly resolvable on grounds of an individual's decision about whether to sustain or end its life.[7]

That said, gestational mothers experience the continuity of embryonic and fetal development that occurs between pregnancy and birth. Despite the physical separation that childbirth entails, they know that, through that act, they deliver into the world the same organism that was developing within them, with or without disabilities, until the physical tie of pregnancy is ended. They also know that termination of embryonic or fetal life prevents passage of the living organism within them from womb to world.

Regardless of whether women attribute moral status to their embryos, fetuses, or newborns, the unique and intensely personal experience of gestation and childbirth makes it virtually impossible for them to deny continuity between prenatal and postnatal life. If such continuity has not been experienced or cannot be experienced, it is more likely to be denied or ignored. In some cases, however, even

https://doi.org/10.1017/S0963180107070594 Published online by Cambridge University Press

when the continuity of development is acknowledged, prenatal diagnosis may indicate that a particular embryo is incapable of survival after birth, or the continuity may appear more harmful to the potential child than continued existence because the expected outcome for the newborn involves a fate considered worse than death. Termination in the latter set of cases may be defended as fetal or embryonic euthanasia.

A Most Compelling Argument

To avoid the problem raised by the fact that selection is not morally equivalent to promotion, the preceding argument can be reformulated as follows:

> Pregnant women (who intend to give birth) are morally obliged to promote the welfare of their potential offspring.
>
> Prenatal testing to select against disabilities promotes the welfare of potential offspring if it does not involve disproportionate harm to others who are of equal moral weight.
>
> Therefore, pregnant women (who intend to give birth) are morally obliged to undergo prenatal testing to select against disabilities in their potential offspring if it does not involve disproportionate harm to others who are of equal moral weight.

This reformulation takes account of the fact that selected embryos have the same moral weight as rejected embryos, just as people born with disabilities have the same moral weight as those born without disabilities. It allows, nonetheless, for the possibility that born human beings are persons regardless of whether they have disabilities, whereas embryos have less moral status or no moral status regardless of whether they have disabilities. The notion of "disproportionate harm" allows also for the possibility that a woman may morally choose to terminate her pregnancy because continuation of the pregnancy or motherhood entails harms to her that are greater than the harm of termination to the embryo. If embryos have little or no moral weight, the disproportionality between harm to her and harm to the potential child is obviously easier to establish than it would be if the potential child and the pregnant woman have the same moral status.

The limited scope of this reformulation is conducive, I believe, to its acceptance by advocates for people with disabilities as well as advocates for pregnant women. Disagreement is bound to remain for those who impute the same moral status to embryos as to newborns, but that question is different from one involving discrimination against people born with disabilities.

Notes

1. I use the term "disability" rather than "impairment" in this essay because the former term is most prevalently used in this context. In fact, however, the term "impairment" would be more appropriate because it refers to conditions that are obviously not as yet socially disabling.
2. Cf. Parens E, Asch A, editors. *Prenatal Testing and Disability Rights*. Washington, D.C.: Georgetown University Press; 2000:13–7.
3. The subject of the conclusion could be stated either in its particular or universal form, but the latter is obviously more significant.
4. Asch in note 2, Parens, Asch 2000:13.
5. Because some newborns are less developmentally advanced than some fetuses, and some are more advanced, women who have given birth to children prematurely, as I have (twice), as well as postmaturely (once), are particularly observant of this connection.

https://doi.org/10.1017/S0963180107070594 Published online by Cambridge University Press

6. Chervenak F, McCullough L. *Ethics in Obstetrics and Gynecology*. New York: Oxford University Press; 1994:100–8.

7. I have developed this criticism more fully in *Bioethics and Women*. New York: Oxford University Press; 2006:61–9.

DOI: 10.1017/S096318017070600

Testing, Terminating, and Discriminating

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In my previous thinking about the considerations that go under the heading of the "expressivist argument," I have been fascinated chiefly by two of its features: its (implicit) semantic commitments and its independence from disputes about the moral standing of fetuses.[1] Abortions prompted by prenatal testing are undertaken because of indications that the fetus has physical features that would be configured as disabilities in the social world into which it would otherwise emerge. The expressivist argument's allegation, as I have understood it, is that abortions so motivated convey semantic content—"send a message"—to people who are currently living with disabilities that is somehow insulting, hateful, dismissive, or disparaging. It is thus uncontroversial moral subjects who are wronged, not—or, at least, not necessarily—the aborted fetuses. So far as this argument goes, a person might hold strongly pro-choice views about abortion generally and still object to "selective" abortions.

To credit this allegation, we have to understand how is it that such events—events that are not in the ordinary sense sentences or symbols—can have such semantic content. I have concluded that the expressivist argument fails due to problems with both of these distinctive features: its semantic assumptions, once excavated and scrutinized, are dubious and it cannot distinguish properly between the kinds of abortions it wants to criticize and those about which it is officially neutral. Abortions prompted by prenatal testing are insufficiently rule governed to send a specific message as such (the communicative intentions of particular individuals who might terminate their pregnancies out of spite for people with disabilities raise other questions, but I assume this is rare). Further, if for sake of argument, we allowed that abortions sparked by prenatal testing could send morally objectionable messages to people with disabilities, we would be saddled with the problem of explaining how abortions otherwise motivated manage to avoid insulting many other kinds of people: poor people, for instance, if economic considerations motivate the termination, people from single-parent households, if being unpartnered is the reason leading to abortion, people in large families, if the number of her children moves a woman to abort, and so on.

Professor Mahowald's understanding of the expressivist argument, its challenges, and prospects, is different, though fascinating in its own way. Some (unnamed) critics think that the differences between fetuses and born persons derail the discrimination charge; she thinks that they are mis-

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