

**DIFFERENCE, DISABILITY AND DISCRIMINATION:
A PHILOSOPHICAL CRITIQUE OF SELECTIVE
ABORTION**

Susan Hall

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Supervisor: Professor Anton A. van Niekerk

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DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Signature.....

Date.....

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ABSTRACT

The practice of abortion continues to provoke controversy and disagreement. However, within the context of this wider debate, a greater level of consensus appears to have been reached as to the moral acceptability of the practice of prenatal screening, and selective abortion following the detection of foetal abnormality. This study seeks to interrogate whether justifications of this practice lend credence to the moral permissibility of selective abortion. In particular, it considers whether justifications for this practice amount to, or perpetuate, discrimination on the basis of the characteristic of disability, as selective abortion entails choosing against a particular foetus because of its characteristics. This study poses this question in two contexts – where the moral permissibility of selective abortion is regarded as an exception to the general moral impermissibility of abortion, and where selective abortion is regarded as one distinct justification within the context of the general moral permissibility of abortion. This study attempts to show that while justifications of selective abortion are directly discriminatory in the former case, they are not necessarily discriminatory in the latter case. This latter conclusion, however, recommends maintaining vigilance against the possibility that such justifications could rely upon or perpetuate prejudice, or restrict reproductive autonomy. These conclusions are considered within the South African context; in particular, with regard to their application to the Choice on Termination of Pregnancy Act of 1996.

OPSOMMING

Die praktyk van aborsie lok steeds voortgaande kontroversie en meningsverskille uit. Nietemin, dit wil voorkom asof daar binne die konteks van die wyere debat 'n groter mate van konsensus bereik is oor die morele aanvaarbaarheid van prenatale genetiese tipering ("screening") sowel as oor selektiewe aborsie wat volg op die diagnose van fetale abnormaliteite. Hierdie studie ondersoek die vraag of die regverdigings van laasgenoemde praktyk geloofwaardigheid verleen aan die morele toelaatbaarheid van selektiewe aborsie. Die vraag word insonderheid ondersoek of hierdie praktyk neerkom op diskriminasie op die basis van die eienskap van gestremdheid, en of dit selfs sodanige diskriminasie perpetueer, aangesien selektiewe aborsie neerkom op die verwerping (in die sin van die vorgeboortelike doodmaak) van 'n bepaalde fetus vanweë die fetus se besondere eienskappe. Die studie stel hierdie vraag aan die orde in twee kontekste – eerstens waar die morele toelaatbaarheid van selektiewe aborsie beskou word as 'n uitsondering op die algemene morele ontoelaatbaarheid van aborsie, en, tweedens, waar selektiewe aborsie beskou word as een besondere regverdiging van aborsie binne die konteks van die algemene toelaatbaarheid van aborsie. Die studie toon aan dat, terwyl regverdigings van selektiewe aborsie in die eerste geval direk diskriminerend is, hulle nie noodwendig in die tweede geval diskriminerend is nie. Laasgenoemde gevolgtrekking noop 'n mens egter tot volgehoue waaksaamheid ten opsigte van die moontlikheid dat sulke regverdigings mag berus op vooroordeel, of dat hulle reproduktiewe outonomie mag beperk. Hierdie gevolgtrekkings word dan beoordeel binne die Suid-Afrikaanse konteks, en veral met betrekking tot hul toepassing in terme van Suid-Afrika se Keuse op die Terminasie van Swangerskap Wet van 1996.

Contents

1. Introduction	1
The focus and significance of a discussion of selective abortion for disability	3
2. The Facts of the Matter	9
Introduction	9
Prenatal screening for impairment	10
Introduction	10
Impairments detectable by prenatal screening	10
Prenatal screening and testing procedures	12
Counselling and decision making following prenatal diagnosis	14
The South African Context	17
Introduction	17
The Bill of Rights	17
The Employment Equity Act	18
The Promotion of Equality and Prevention of Unfair Discrimination Act	18
The National Health Act	19
The Integrated National Disability Strategy (INDS)	20
The Choice on Termination of Pregnancy Act	21
Concluding Remarks	22
Medical and social models of disability	23
Concluding remarks	28
3. Utilitarianism and Selective abortion	29
Introduction	29
Utilitarianism as Ethical Theory	29
Traditional and Contemporary Versions	29

Personhood	31
Whose interests matter?	32
Selective abortion is in the best interests of the foetus/future person	33
<i>Avoiding suffering</i>	36
<i>Avoiding harm</i>	39
Selective abortion is in the best interests of the next child	41
Selective abortion is in the best interests of the pregnant woman, parents, and family	42
Selective abortion is in the best interests of society	45
Concluding Remarks	46
4. Two Positions on Selective Abortion	48
Introduction	48
The embryo or foetus is morally significant, but may still be aborted in the case of impairment	54
Soft anti-abortion positions	55
Soft pro-abortion positions	55
Summary of these positions	57
Abortion is morally permissible	58
Soft pro-abortion positions	60
Absolute pro-abortion positions	60
Summary of these positions	60
Concluding remarks	61
5. A Critique of Justifications for Selective Abortion as Exception	63
Introduction	63
Selective abortion as exception is in the best interests of the foetus/future person	68
Avoiding suffering	70

Avoiding harm	79
Selective abortion as exception is in the best interests of the next child	84
Selective abortion as exception is in the best interests of the pregnant woman, parents and family	87
Selective abortion as exception is in the best interests of society	92
Concluding remarks	94
6. A Critique of Justifications of Selective Abortion as Distinct	98
Introduction	98
Selective abortion as distinct is in the best interests of the foetus/future person	106
Selective abortion as distinct is in the best interests of the next child	120
Selective abortion as distinct is in the best interests of the pregnant woman, parents and family	131
Selective abortion as distinct is in the best interests of society	138
Concluding remarks	143
7. Conclusions and Recommendations	146
Bibliography	151

1 Introduction

The question of the moral status of abortion has yet to be satisfactorily resolved. Both public opinion and ethical debate seem to indicate that society is very far from reaching an accord with regard to this issue. Within the context of this wider debate, however, one may identify a particular justification for abortion about which a greater level of consensus appears to have been reached. Whereas the larger abortion debate continues to provoke controversy, the moral status of the practice of selective abortion following the prenatal detection of foetal impairment is often perceived as relatively unproblematic. A surprising level of agreement has been attained within society about this issue, even amongst those who are in fierce opposition to one another with regard to the general moral permissibility of abortion. This is evident from the vast spectrum of positions on abortion from within which support for selective abortion for foetal impairment can be garnered. It is not only strong pro-choice advocates who regard this practice as morally acceptable, but also the vast majority of medical professionals, ordinary members of the public who hold moderate positions on abortion, and those who would otherwise identify themselves as pro-life. This particular justification holds that prenatal screening, followed by selective abortion if it is found that the foetus exhibits impairment (Green cited in Sharp *et al.* 2002: 139) is not only morally acceptable, but also, in some cases, the ethically desirable course of action.

This study will seek to interrogate the above justification for abortion. While at first glance, it may appear self-evidently good to prevent the hardships which often accompany the lives of those who live with disability, and the burdens placed upon the immediate family and extended community in caring for affected individuals, it is necessary to examine what philosophical ideas and assumptions about disability underlie such an attitude.

What seems to be at issue here, is the possibility of reconciling a commitment to recognising the equal dignity and respect which should be given to all human persons, regardless of their particular attributes (race, age, gender or health status) and therefore to

non-discrimination based upon these characteristics, with an unproblematic acceptance of justifications for selective abortion following the prenatal detection of foetal impairment. Holding these convictions simultaneously may result in tension. This follows from the fact that the rationale behind choosing to terminate a pregnancy, following the prenatal detection of foetal impairment, is of a particular kind. The choice is based, not on the fact that one does not want a child, but rather one chooses to terminate an affected pregnancy because one does not want *this* child (Botkin 1995:33), because of its *particular characteristics*. This study will investigate whether this choice amounts to, or is motivated by, discriminatory attitudes towards disability.

The distinction which is made between general justifications for abortion and justifications for selective abortion for foetal impairment is particularly clear in its expression in abortion legislation. Internationally, in the legal regulations surrounding this issue, the majority of countries which permit abortion make “some provision...for terminating pregnancy on the grounds of severe impairment” (Sharp *et al.* 2002:139). This kind of provision makes an obvious distinction between able-bodied fetuses who, it is expected, will enjoy species-typical functioning, and those who will not, and is often expressed in the legal cut-off points set beyond which abortion is generally prohibited. In other words, it is often deemed legally acceptable to terminate a pregnancy only until a particular point in the pregnancy, after which the stage of development of the foetus is considered to be advanced enough to merit a legal restriction on abortion. After this point, abortion is legally permitted only in particular situations, one of which is often the foetus’s likelihood of suffering (severe) impairment. South Africa’s Choice on Termination of Pregnancy Act of 1996 (South Africa 1996), for example, makes such a distinction, the details of which will be later examined.

The distinction which is legally entrenched above is also evident in the medical technology which enables it. Various forms of prenatal screening and testing exist, some of which are only directed towards identifying disabling traits before birth (Asch 1999:1649-1650); in other words, this screening serves no other purpose in prenatal care. Prenatal screening for impairment is increasingly constructed as a routine element of

medical care during pregnancy (Pritchard 2005:85) and the detection of impairment often leads in practice to an expectation from the medical professional(s) concerned as well as from other members of society that the women in question will choose to terminate, as it seems to many the self-evidently desirable course of action.

It seems that there may be a tension inherent in simultaneously maintaining a commitment to equality and non-discrimination and accepting and even advocating for the practice of selective abortion for foetal impairment. This tension is particularly evident in legal and moral allowances made for late-term abortion in this case (loosely defined as an induced abortion performed after the 20th week of pregnancy), at a stage where the moral status of able-bodied fetuses is often regarded as sufficient to merit a legal and moral restriction on abortion. It seems that such an attitude is not only an indication or expression of existing attitudes towards individuals with disabilities, but may also serve to entrench or foster discriminatory attitudes. This study will seek to interrogate this attitude by examining and evaluating the general justifications of selective abortion for foetal impairment made by its proponents.

The focus and significance of a discussion of selective abortion for disability

While some reference to the general bioethical problematic of abortion is obviously implied by the issue at hand, this study will be limited to the specific justification for abortion in the case of the prenatal detection of foetal impairment. The scope of the former issue will not allow an exhaustive discussion of the general debate surrounding abortion. Rather, this study will seek to focus upon the particular distinction in ethical deliberation about abortion that is identified above. It will, however, be necessary to identify the backgrounds against which justifications for selective abortion are made, as it shall become apparent that the general position on abortion, from within which support is given to the practice of selective abortion for impairment, is highly relevant in determining whether these justifications are consistent with professions of respect for the lives of persons with disabilities.

There are other justifications for abortion which are also often regarded as distinct from general justifications, and are also treated as exceptional in legislation. Examples include the termination of pregnancies which endanger the life of the pregnant woman, or which result from rape or incest. An evaluation of the ethical validity of these distinct justifications also falls beyond the limits of this study, although they may be referred to in passing, particularly with regard to their similarities to justifications of selective abortion following the detection of foetal impairment. In addition, another instance of abortion which selects between fetuses based on their particular characteristics, sex-selective abortion, will be discussed, with regard to the relevance of this practice to the topic at hand.

The focus on selective abortion for impairment is, in my view, particularly significant in the current South African context. South Africa's infamous history of legally entrenched and unjust discrimination based upon difference need not be described at length here. The atrocities of apartheid (and colonialism) which privileged one group in society based upon racial difference, and the legacy of extensive social and economic inequalities which we are currently grappling with, have engendered a socially and legally entrenched commitment to promoting equality and preventing unjust discrimination in South Africa. Such a commitment, within the context of South African legislation since the advent of democracy in 1994, has included reference to the prevention of discrimination based upon disability, the details of which will be later discussed. In the light of the above, it is especially important to remain vigilant against societal attitudes and governmental legislation that may express and foster similar forms of discrimination.

This does not imply that the significance of this study is limited to the South African context. Those countries in which legal provision is made for abortion are generally characterized by a (sometimes problematic) simultaneous commitment to equality and non-discrimination, and individual rights and freedoms, as typical of liberal democracies. The legalization of abortion often results from this kind of commitment, as abortion is seen to be generally justified by a woman's fundamental right to bodily integrity and reproductive autonomy. It is necessary to interrogate whether these rights, as they are

formulated in current abortion legislation, might have the potential to undermine the rights of persons living with disability to equality and non-discrimination.

As stated above, it is necessary to examine in greater detail the legislation surrounding abortion and disability. For obvious reasons, this study will focus upon South Africa's Choice on Termination of Pregnancy Act of 1996, as well as other South African legislation and governmental recommendations that are relevant to the debate. This will be the focus of Chapter 2, along with a discussion of the medical and biological facts pertinent to a discussion of selective abortion for disability. Some remarks must also be made about the terminology which is to be used in this discussion, particularly the distinctions often made between medical and social models of disability, and between impairment and disability.

Justifications for selective abortion generally rely upon a utilitarian approach to moral reasoning. Chapter 3 will consider how utilitarian theory underpins the position that termination of pregnancy following the prenatal detection of foetal impairment is the morally neutral, or morally preferable, course of action. Utilitarianism, to give a preliminary and superficial definition, considers the moral status of actions in the light of the probable consequences which may arise from a particular action. The morally desirable course of action is that action that will bring about the best consequences. This chapter will therefore consider four parties for whom the consequences of selective abortion are considered to be relevant, namely, the foetus or future person itself, the prospective parents (particularly the pregnant woman) and immediate family, future children who may have replaced the impaired foetus, and society at large.

In order to embark upon a critique of the above utilitarian justifications, Chapter 4 will identify two versions of the arguments for selective abortion for impairment. This will take into account the general positions on abortion from within which support is given for this practice. As shall become evident, this approach is necessary. The vast majority of critics of the practice of selective abortion for impairment, often from within the

disability rights movement¹, proceed from the assumption that the embryo or foetus is not morally significant. In other words, they attempt to criticise the practice of selective abortion while maintaining a commitment to the general moral acceptability of abortion, based on a woman's right to make autonomous reproductive choices. However, this does not take into account another version of the justification for selective abortion, which accepts that the embryo or foetus has (or acquires at some point) moral status, and *still* considers its killing to be morally acceptable in the case of the prenatal detection of foetal impairment. A critique of this justification is especially pertinent, as this is often the position taken by abortion legislation, particularly with regard to distinctions made between able-bodied and disabled fetuses in legal restrictions of late term abortion. This study will proceed from the assumption that one cannot criticize the practice of selective abortion for impairment without taking into account the context within which it is justified. As the aim of this study is not to defend or criticise a general position on abortion, justifications of selective abortion must be criticised on their own grounds. In addition, to ignore the justification of selective abortion, represented as an exception to a general conviction of the moral impermissibility of abortion, is to dismiss a position that is commonly assumed by those who hold a moderate position on abortion. To say that the foetus has moral status, and yet may be killed as an exception to the general rule against killing morally significant beings, because of the presence of foetal impairment, is quite a different matter than to claim that the foetus does not have moral status, and can be killed for any reason, including the detection of foetal impairment. While this study will take the position that the latter conviction is certainly not exempt from criticism, it cannot be criticized in the same way as the former conviction, which appears to have more sinister implications for the status of people with disabilities after birth. Chapter 4 will therefore draw a distinction between, and describe, these two versions of the justification of selective abortion.

Chapter 5 will then proceed to criticize the justification of selective abortion as an exception to the general rule against the killing of morally significant beings. In this

¹ See for examples Fletcher (1998), Shakespeare (1998), Asch (1999 & 2003), Wong (2002) and Parens *et al.* (2003).

section, the utilitarian justifications of selective abortion for foetal impairment will be considered, in the light of the conviction that the foetus is generally morally significant. The aim of this section will be to determine whether the justifications which will be identified in Chapter 3 hold, if we regard the foetus as a morally significant being, and to identify the underlying premises of the argument for selective abortion in this case. This shall also entail a criticism of South African legislation, with regard to its position on late term abortion. As shall become evident, this critique shall largely accuse the proponents of this position of moral inconsistency. This study shall attempt to show that it is likely that such a position may indeed undercut the status of persons with disabilities after birth, and may amount to discrimination, except in a few rare cases of extremely severe impairment.

Chapter 6 will embark upon a far more complex critique of the second version of the justification of selective abortion for impairment. Although this justification does not regard abortion for impairment as an exception to a general rule against the killing of morally significant beings, it can still be regarded as distinct, as it entails deciding to abort an otherwise wanted pregnancy, purely because of the particular characteristics of the foetus. Once again, the utilitarian justifications for selective abortion identified in Chapter 3 will be examined in this context. In this section, the aim will be to investigate whether these justifications hold even if we do not regard the foetus as morally significant. While these justifications cannot be accused of inconsistency, and do not seem to amount to direct discrimination against those who are disabled, this study will attempt to show that they are nonetheless often motivated by prejudice, and inaccurate attitudes about what it means to live with disability. In addition, where these justifications seem to suggest that selective abortion is morally obligatory, they may have dangerous implications for the exercise of the right to reproductive autonomy.

Finally, Chapter 7 will conclude this investigation by discussing the possible implications of the study. In particular, recommendations will be made concerning firstly, abortion legislation, particularly the Choice on Termination of Pregnancy Act, and secondly, the guidelines governing the process of prenatal screening. These recommendations will be

directed towards ensuring that the practice of selective abortion following the prenatal detection of foetal impairment does not amount to disguised discrimination against those who are different.

2 The Facts of the Matter

Introduction

In order to embark upon a critique of justifications for selective abortion following the detection of foetal impairment, it is necessary to have some acquaintance with the facts of the matter. These facts include details of the practice itself, legal guidelines and recommendations around the issues of abortion and disability, and general perceptions of the phenomenon of impairment.

This chapter will, therefore firstly provide a summary of the relevant facts surrounding the practice of selective abortion for foetal impairment. This will entail a discussion of the range of conditions which can currently be detected before birth. The various screening and testing procedures which are used in the detection of impairment will be identified, as well as the optimal gestational age at which they are applied. The process of counselling which normally accompanies prenatal screening will also be discussed, particularly with regard to the ideal of non-directiveness.

Secondly, this chapter will seek to situate this study within the South African context, by examining relevant legislation with regard to disability, and particularly the Choice on Termination of Pregnancy Act of 1996. This will allow us to identify the commitment of the South African government to disability equality, and the position taken by South African law with regard to selective abortion for foetal impairment. This will become relevant later in the study as we evaluate whether the former commitment and the latter position are logically reconcilable.

Finally, this chapter will briefly comment upon terminology used in this study. The choice to use various formulations is based upon a distinction which is often referred to in disability equality literature, between the medical and social models of disability. The final section in this chapter will therefore discuss these models, and will assume a position towards them.

Prenatal screening for impairment

Introduction

In order to embark upon an ethical appraisal of the practice of selective abortion for impairment, it is necessary to begin by providing an overview of what this practice entails. Firstly, the various conditions which are detectable prenatally will be identified. Secondly, screening and testing procedures will be described, and lastly, the role of counselling will be discussed.

As will become apparent, it is necessary to have some familiarity with the facts of the matter, as the morality of prenatal screening followed by selective abortion for foetal impairment is rendered vastly complex by the range of conditions which are identifiable prenatally, and which often subsequently justify a decision to terminate, as well as the various screening procedures used for prenatal diagnosis, which are optimally applied at different stages of gestation. Any attempt to provide a moral evaluation of this practice must take this complexity into account.

Impairments detectable by prenatal screening

It is currently possible to screen prenatally for various impairments, although the accuracy of results varies from likelihood to near certainty. Such conditions include dominant gene disorders, such as achondroplasia (dwarfism) and Huntington disease; recessive gene disorders, such as cystic fibrosis, sickle cell disease, Tay-Sachs disease and beta thalassemia; X-linked disorders, which are linked to the X chromosome and are therefore more prevalent in males, such as haemophilia; chromosomal disorders such as Down syndrome; and multifactorial disorders such as spina bifida and anencephaly (Homeier 1995). Hydrocephalus, heart defects, kidney or bowel abnormalities and general developmental abnormalities may also be detected (Pritchard 2005: 83).

As is apparent from this list, impairments screened for differ vastly in type and severity. This can be regarded as a major complicating factor in the morality of selective abortion for impairment, and is often not taken into account sufficiently in justifications for, or criticisms of this practice.

At one end of the spectrum, anencephaly, a condition where the top half of the brain is completely absent, is so severe as to imply that the foetus, if it survives the gestation period, will not survive more than a few days or weeks, and will not achieve consciousness. A condition like Tay-Sachs implies early degeneration, accompanied by a great deal of suffering and death before the age of four. These conditions are extremely serious, and imply, on the one hand, the total exclusion of any of the experiences we normally associate with human consciousness, and on the other, severe and protracted suffering. In both cases, the condition leads to early death. At the other end of the spectrum, there have been cases where a condition as minor as a cleft palate has been considered a “severe abnormality” justifying abortion, as in the case objected to by Reverend Joanna Jepson in the United Kingdom, who instigated “legal action against West Mercia Police after they failed to investigate doctors who carried out what she claim[ed] was an unlawful abortion”. In this case, a pregnancy was terminated in the 28th week of pregnancy as a result of the prenatal diagnosis of a cleft palate (“Curate takes action” 2003).

There are a vast number of impairments which fall between these two extremes. While conditions like beta thalassaemia or haemophilia may cause a number of severe health problems, they are also treatable to some extent, and do not exclude the possibility of leading a fulfilling life. An impairment such as Down syndrome, which is increasingly diagnosed prenatally, may close off many life possibilities, and, depending on its severity, may imply other medical problems. It is, however, not necessarily incompatible with leading a satisfying life².

² Asch claims, for example, that “people with nearly all prenatally detectable conditions – whether Down syndrome, spina bifida, Fragile X, Duchenne muscular dystrophy, sickle cell anemia, retinitis pigmentation, or achondroplasia – can lead fulfilling lives, notwithstanding the characteristics that distinguish them from the non-disabled” (2003: 319).

It is thus clear that justifications of selective abortion encompass a wide range of impairments, from those which are merely inconvenient, to those which imply terrible suffering and premature death, and a multiplicity of conditions which fall between these two extremes. This must be borne in mind when considering arguments advanced either in favour of or against selective abortion for foetal impairment.

A final point to be considered is that as medical technology advances, it is likely that the range of conditions which can be prenatally diagnosed will expand. As Pilsnick asserts, the Human Genome Project may open up new possibilities in this regard. It is not inconceivable that we may soon be able to screen for “relatively mild disease and late onset disorders” as well as for “elevated risks for common diseases such as heart disease” (2002: 75). This implies that we must carefully consider the question as to what counts as an impairment justifying selective abortion.

Prenatal screening and testing procedures

Prenatal screening for impairment, particularly in Western society, is increasingly regarded as a routine element of prenatal care (Press *et al.* 1997: 980). Pilsnick points out that prenatal screening differs from other forms of genetic testing in that many of the screening procedures are not “genetically based”, but rather serve as an indication of those pregnancies which are at most risk for “developmental disorders”. The initial screening procedures can then be followed by diagnostic testing (2002: 60). In the light of the above distinction, we will consider firstly screening procedures, and secondly diagnostic tests, which are used to identify disabling conditions.

In the first trimester, up to 12 weeks of the gestational period, a transabdominal ultrasound scan is offered as a fairly routine element of prenatal care, so much so that it is often not recognised by pregnant women as a screening procedure at all, but rather “as a chance to ‘see’ the baby” (Pritchard 2005: 86). It also serves as a method of confirmation for the examining physician “that it is a viable pregnancy, that it is a single pregnancy,

and that the gestational age of the baby has been estimated accurately” (Pilsnick 2002: 62). This screening procedure is generally repeated in the 20th week, and may be used to identify possible chromosomal disorders such as Down syndrome, by testing nuchal translucency, which entails measuring the depth of fluid in the space at the back of the foetus’s neck (Centre for Genetics Education 2004).

In the second trimester, from 13 to 27 weeks, maternal serum testing may also identify likely cases of Down syndrome or spina bifida. This is usually carried out by means of a blood test between 15 and 18 weeks and measures the concentration of alpha-fetoprotein. Both of these screening procedures only identify the possibility of the presence of these impairments. Maternal serum testing, for example, only identifies between 60 and 65 percent of cases of Down syndrome, and can also give false positive results (Pilsnick 2002: 63).

The results of the above screening procedures will determine whether further diagnostic testing, such as chronic villus sampling or amniocentesis, is offered. Chronic villus sampling or CVS is generally carried out in the first trimester, from the 11th week onwards (Centre for Genetics Education 2004), by testing the developing placenta. This identifies cases of Down syndrome by testing for abnormal chromosomes. This test carries a small risk of miscarriage in 1 in 100 pregnancies (Pilsnick 2002: 64).

Amniocentesis is performed between 16 and 19 weeks gestation (Centre for Genetics Education 2004). This test is regarded as the most reliable method of identifying prenatal cases of Down syndrome, and entails the testing of amniotic fluid to identify chromosomal abnormalities. It also carries a risk of miscarriage, estimated to be at 1 in 50 pregnancies (Pilsnick 2002: 63).

Once again, the range of screening procedures and tests indicates the moral complexity of the issue at hand. This complexity arises largely due to the various stages of gestation at which impairment may be identified. A pregnant woman making a decision as to whether to terminate a pregnancy may find this choice more difficult to make as the

pregnancy progresses, either because of a conviction that the foetus grows in moral significance as proximity to birth increases, which renders late term abortion contentious, or because she has begun to imagine a future for, and form a bond with, her potential child. When a condition is identified later in pregnancy, subsequent termination may also be regarded as legally distinct, as “normal” pregnancies may not be terminated, in South Africa, after the 20th week of the gestation period. This legally entrenched distinction is fairly common internationally. For example, in the United Kingdom, only foetuses with disabilities may be aborted after the 24th week of pregnancy (Shakespeare 1998: 671).

Counselling and decision making following prenatal diagnosis

Prenatal screening and testing was first used in the 1960s and 1970s in order to detect rhesus disease, which causes complications in the later stages of pregnancy that can be avoided by early delivery (Pilsnick 2002: 60). However, as testing has progressed, it has increasingly been used to detect impairments which do not offer this possibility. As has been noted by some critics, most conditions which can be diagnosed prenatally cannot be treated or cured. The only way to “treat” or “prevent” the impairment is to prevent the birth altogether (Pritchard 2005: 83). In other words, the only *action* that can be taken is termination. The other alternative is inaction; in other words, to do nothing, besides presumably, to prepare for the birth and care of a child with a disability.

This characteristic of prenatal screening may have some bearing on the counselling process following diagnosis, as well as subsequent decisions regarding termination. Counselling ideally advises parents of the relevant facts pertaining to the specific impairment, and the options available to them, without prescribing or recommending a particular course of action. However, parental choice may often be undermined by the unspoken expectations underlying screening programmes, which may influence the attitudes of counsellors. Ward points out that, in the United States, the success of a particular programme is measured by the percentage of parents who choose to terminate upon receiving a positive diagnosis of impairment, so that “[i]f fewer than 50% of parents opted for abortion when a foetus was diagnosed with a disorder, that programme would

be deemed ‘a failure’” (2002: 188). This attitude is also evident in a study conducted by Green, which indicated that a third of obstetricians required the pregnant woman to agree to terminate an affected pregnancy before proceeding with amniocentesis (1995: 229).

The construction of the termination of affected pregnancies as a successful outcome of the screening process may be influenced by the fact that prenatal screening programmes are directed towards cost-effectiveness – unless most parents confronted with a positive diagnosis choose termination, the programme is not cost-effective. These cost-benefit concerns are also expressed in Green’s finding that 13% of responding obstetricians agreed that “[t]he state should not be expected to pay for the specialised care of a child with a severe handicap in cases where the parents had declined the offer of prenatal diagnosis of the handicap” (1995: 229).

Thus, while prenatal screening is ostensibly offered to expand reproductive autonomy, and is perceived as such by many prospective parents, it is often, in practice, directed towards the termination of affected pregnancies. This is also exhibited by the attitudes of women and professionals towards screening respectively. While women generally regard the aim of screening as the provision of reassurance that the pregnancy is healthy, or that “everything is okay” (Botkin 1995: 34), medical professionals perceive the process as directed towards the detection of abnormalities (Green 1995: 228). These factors all play a role in the structure of the counselling process.

Counselling is generally regarded as an integral part of the process of prenatal screening. Some counselling is usually offered before the screening process begins. Once a prenatal diagnosis of impairment has been made, and parents are faced with the difficult decision as to whether to terminate the pregnancy, they are usually offered additional counselling by the relevant medical professionals. Research reveals that this counselling often falls short of the ideal of non-directiveness, perhaps as a result of the factors identified above, as well as personal attitudes towards impairment, or general attitudes on the part of the medical profession to disability as primarily a medical problem to be solved as far as possible, which may neglect the social and psychological issues around disability

(Shakespeare 1998: 677). One study, for example, revealed that none of the groups of health professionals involved in the study uniformly reported counselling non-directively. This was especially true with regard to obstetricians, only 32% of whom reported counselling non-directively (Marteau *et al.* 1994: 866).

This attitude is also evident in statistics indicating how many women choose termination upon learning of a prenatal diagnosis of impairment. Gillam reports the following:

[A]n analysis by Wertz and Fletcher of previous studies of termination decisions after prenatal diagnosis shows that for a diagnosis of trisomy 13, 18 or 21, Tay-Sachs, anencephaly, spina bifida or thalassemia, between 73 and 100% of women chose termination (and most studies showed 100%). The rate for sickle cell anaemia and sex chromosome abnormality was somewhat lower, ranging from 38 to 79%, but still significant...One British study...showed that in a screening programme for Down syndrome, termination was chosen in 81% of cases where it was detected (1999: 167).

Selective abortion only accounts for a small percentage of all abortions performed. For example, in England and Wales in 2002, selective abortion for impairment made up just over 1% of the total number of abortions carried out in this year (Education for Choice 2007). However, this low percentage may conceal the fact that a relatively high percentage of women *who undergo prenatal screening* ultimately choose abortion in the case of a positive diagnosis of foetal impairment. The influence of counselling on these statistics must be taken into account. This influence is evident in the fact that more women chose termination following the detection of chromosomal abnormality if they had only consulted obstetricians (who are more likely to counsel directly), as opposed to those who had consulted other professionals, such as geneticists and paediatricians, as well (Marteau *et al.* 1996: 130).

All of the above bears testimony to the generally unproblematic acceptance of the moral neutrality and even moral desirability of selective abortion for foetal impairment, particularly on the part of the medical profession. This study will seek to interrogate these attitudes.

The South African Context

Introduction

As previously stated, this study will seek to situate itself within the South African context, as it is deemed particularly important that vigilance is maintained against the possibility of fostering discriminatory attitudes in the light of a history of unfair discrimination based upon difference.

The CASE Disability Survey for the Department of Health found that 5.9% of South Africans were living with some kind of disability, although only 19% of this group indicated that the cause of their disability occurred before or during birth (1997:14). In order to evaluate whether South African legislation demonstrates a paradoxical attitude towards people with disabilities, it is necessary to examine South African legislation and governmental recommendations passed since the advent of democracy, as they are relevant to the status of those living with impairments. As shall be shown, legislation in this regard demonstrates a strong commitment to prevent unfair discrimination against people with disabilities, and simultaneously recognises them as a group which is vulnerable to this type of discrimination. Finally, the Choice on Termination of Pregnancy Act of 1996 will be examined, particularly with regard to its position on abortion following a prenatal diagnosis of impairment.

The Bill of Rights

The Constitution of the Republic of South Africa, instituted in 1996, refers in its second chapter, the Bill of Rights, to the state's commitment to promote the equality of all citizens, and to prevent discrimination on any grounds, including "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth" (my emphasis, South Africa 1996). A commitment to prevent discrimination is therefore entrenched in the South African Constitution, particularly discrimination based upon characteristics which

have historically served as justification for various forms of unfair treatment, including the characteristic of disability. Subsequent legislation maintains and extends this commitment, as is evident below.

The Bill of Rights subsequently refers to the right which serves as the motivation for the Choice on Termination of Pregnancy Act - that “[e]veryone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction [and] to security in and control over their body” (South Africa 1996).

The Employment Equity Act

The Employment Equity Act of 1998 also makes particular mention of persons with disabilities by including them in the category of persons who should benefit from affirmative action, and by implication recognising them as a group which is vulnerable to discrimination. The act prohibits “unfair discriminat[ion] against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, HIV status, conscience, belief, political opinion, culture, language and birth” (my emphasis, South Africa 1998). This indicates that the state is committed to preventing the exclusion of those with disabilities from opportunities available in society, particularly when their disability is not relevant to such exclusion.

The Promotion of Equality and Prevention of Unfair Discrimination Act

More recently, Act 4 of 2000, the Promotion of Equality and Prevention of Unfair Discrimination Act, devotes Section 9 of Chapter 2 to the “[p]rohibition of unfair discrimination on the grounds of disability”, which is defined as:

- (a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;

- (b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;
- (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons (South Africa 2000).

This Act explicitly provides for the active accommodation of people with disabilities in society. This implies that *special measures* should be taken to enable their functioning; in other words, that measures should be taken to counter as far as possible the disabling disadvantage experienced as a result of impairment, in order to foster equality of opportunity.

The National Health Act

The National Health Act of 2003 also makes specific reference to persons with disabilities, giving them specific mention in Chapter 1 as a “vulnerable group” whose rights the Act is directed towards “protecting, respecting, promoting and fulfilling”. The Act also specifies in its first chapter that, with regard to the provision of free health services, “the needs of vulnerable groups such as...persons with disabilities” must be given special consideration. This group must also be given special regard with reference to the identification of research priorities, as specified in Chapter 9 (South Africa 2003).

This Act once again emphasises the position of people with disabilities as a vulnerable group. The protection and promotion of their interests and rights are thus deemed to be of particular importance.

There is therefore a great deal of evidence which attests to a commitment on the part of the South African government, not only to combat discrimination, but also to actively counteract disadvantage which people with disabilities may experience, due to historical discrimination, or due to the biological realities of their impairment.

The Integrated National Disability Strategy (INDS)

The White Paper on the Integrated National Disability Strategy (commonly known as the INDS) which reported upon the status of people with disabilities in South African society, and provided recommendations for government as to how to improve the position of this group, is also revealing as to what attitude government intends to establish as policy in this regard. This report draws attention to the pitfalls which have accompanied historical attitudes towards disability, as well as implicitly indicating support for a social model of disability, as opposed to a medical model. Amongst other things, this model proposes that:

the collective disadvantage of disabled people is due to a complex form of institutional discrimination. This discrimination is fundamental to the way [in which] society thinks and operates.

The social model is based on the belief that the circumstances of people with disabilities and the discrimination they face are socially created phenomena and have little to do with the impairments of disabled people (Office of the President 1997).

The social model of disability is contentious, and may underestimate the realities of living with impairment, as shall be discussed later in this chapter, but it is the model which most strongly influences the recommendations which follow, which include the establishment of “national guidelines for the use of disability sensitive terminology and uniform disability related definitions” (Office of the President 1997).

What this study seeks to evaluate is whether there exists a tension between the admirable intentions and attitudes of government as is given expression in the legislation above and the Choice on Termination of Pregnancy Act of 1996. If this is the case, there may be a need to re-examine the advisability of maintaining the Act as it stands. The possibility of revising what may be interpreted as discriminatory legislation is made allowance for by the INDS:

Existing legislation must be scrutinised and amended where necessary. Ultimately, legislation should comply with and give substance to Constitutional requirements...[S]ome new laws and amendments contain sections which directly or indirectly lead to discrimination against people with disabilities (Office of the President 1997).

The Choice on Termination of Pregnancy Act

Act 92 of 1996, the Choice on Termination of Pregnancy Act, also makes specific reference to disability. In this case, the possibility of the foetus exhibiting impairment is referred to as a specific justification for termination, and is the only justification, apart from the endangerment of the pregnant woman's life, which is deemed acceptable throughout the duration of pregnancy.

The Bill makes allowance in its second section, which specifies the "circumstances in which and conditions under which pregnancy can be terminated" for termination on demand during the first 12 weeks of pregnancy, which implicitly includes abortion in the case of disability. It goes on to make allowance for legal termination "[f]rom the 13th up to and including the 20th week of the gestation period...if a medical practitioner, after consultation with the pregnant woman, is of the opinion that there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality" (South Africa 1996). Other justifications which are deemed legally acceptable at this stage of gestation are the risk of physical or mental injury to the pregnant woman, rape and incest which has resulted in pregnancy, or the likelihood of a significant change in the social or economic circumstances of the pregnant woman. This latter justification appears to amount effectively to making allowance for abortion on demand up to the 20th week of pregnancy, as it is difficult to imagine a pregnancy which does not significantly impact upon the social or economic circumstances of the pregnant woman.

After this, in other words, "after the 20th week of the gestation period of a pregnant woman", termination is legally justifiable in only two cases: if "the continued pregnancy...would result in a severe malformation of the foetus [or] would pose a risk of

injury to the foetus” or if the continued pregnancy “would endanger the woman's life” (South Africa 1996). The formulation of the law provides no upper gestational limit for termination in these latter cases, which effectively implies that abortion is legal until the onset of labour if the foetus presents with some severe impairment. Thus, while late term abortion is generally prohibited, termination of pregnancy is endorsed as an exception to this general prohibition in the case of the detection of foetal impairment.

Concluding Remarks

The aim of this study, then, is to evaluate the possibility of reconciling the above legally sanctioned distinction, based upon disability, in justifications for abortion, particularly as regards late term abortion, and the preceding indication of governmental commitment to non-discrimination on the basis of disability.

In other words, this study seeks to investigate whether one can consistently make the following claims simultaneously:

- The lives of all people, including those who are disabled, are equally valuable and worthy of respect. Discrimination on the basis of disability is therefore legally and morally unacceptable.
- It is legally and morally acceptable to terminate a pregnancy for any reason, including the detection of foetal impairment (in the context of the Choice on Termination of Pregnancy Act, until the 20th week of the gestation period).
- It is legally and morally acceptable to terminate a pregnancy as an exception to the general prohibition of abortion, in the case of the detection of foetal impairment (in the context of the Choice on Termination of Pregnancy Act, after the 20th week of the gestation period).

It is important to note that, while the above discussion focuses particularly upon the South African context, the study which follows is by no means limited to this country. While the issues at hand are particularly pertinent to post-apartheid South Africa, the

South African situation serves an example of an international trend, which advocates a new commitment to the equal status of people with disabilities in society, while at the same time offering unproblematic moral approval to the practice of prenatal screening for foetal impairment, followed by selective abortion in the case of a positive diagnosis.

Medical and social models of disability

The debate around selective abortion following the prenatal detection of foetal impairment, and commentary on the topic of disability equality generally, has focused on an important distinction in definitions of disability. Many critics seek to make a distinction between medical and social models of disability³. These models construct the fundamental nature of disability in different ways, and thus have opposing views on what lies at the heart of a decision to terminate a pregnancy affected by foetal impairment. Whereas the social model regards disability as socially constructed to a large extent, the medical model sees disability as primarily a biological divergence from species-typical functioning. In order to enter this debate, it is necessary to assume a position towards these models. As shall become evident, neither of these models are sufficient to explain disability without some reference to the other, although both draw attention to important aspects of disability which must not be overlooked when considering this phenomenon.

The medical model of disability emphasises that “the problems faced by people with disabilities are caused by their impairments, with ‘impairment’ being viewed as a negative health concept” (Sheldon *et al.* 2001: 5). In other words, the problem to be solved is the impairment itself, and is situated within the body of the individual affected by this impairment. The medical model does not deny that there may be social prejudice attached to disability, but argues that its defining characteristic is biological impairment, which is associated with “disease, illness and poor quality of life”, and which is a feature of the individual (Shakespeare 1998: 669). Harris defines disability in this way as “physical or mental conditions that constitute a harm to the individual, which any rational person would wish to be without” (2000: 98). This is the way in which disability has

³ See for examples Wendell (1996), Reindal (2000), and Asch (2003).

traditionally been perceived, and this view remains prevalent within the medical profession. This is unsurprising, as the aim of health-care is to foster, or to remove impediments to, “personal growth and community” *through* a focus on “the bodily and impersonal aspect of human life” which ordinarily involves the “cure and care of *physical and psychic ailments*” (Shutte 2001). It is thus to be expected that the focus of the medical profession falls largely upon the mental or physical ailments which constitute impairment, as it is these aspects of disability with which health-care workers are most involved.

The social model of disability regards an exclusive focus on physical and mental impairment, as the defining characteristic of disability, as overlooking the fundamental role which social structures, discrimination, exclusion and a lack of accommodation play in disablement. This model is closely allied to a “disability equality perspective” which holds that disability may be defined as “a form of social oppression experienced by people with impairments” (Fletcher 1998: 1). In other words, disability is socially constructed, rather than being something which is “wrong” with the individual. The problem to be solved in this model lies in the structure and prevalent attitudes of society, which must be improved upon or corrected in order to improve the situation of those living with disabilities. Gillam defines this social construction as follows:

Some physical and mental inabilities or losses of functioning are made into disabilities, or made more disabling, by the way society works in terms of its physical set-up, and also in terms of the sorts of social interaction and ways of living that are expected of its members (1999: 164).

The social model introduces a distinction between impairment and disability which it believes to have been largely ignored in traditional conceptions of disability. Under this view, impairment is the biological characteristic of a person which constitutes a divergence from species-typical functioning, whereas disability is the result of social barriers which discriminate against those who are impaired (Shakespeare 1998: 669). Thus, a person who is dependent on a wheelchair for mobility is impaired in the sense that it is a biological characteristic of that person that they are unable to walk. However, the disablement which they experience is not primarily attributable to this impairment,

but rather to social factors, such as the design of buildings or modes of public transport, or social attitudes *towards* their impairment. Again, proponents of the social model of disability do not deny that biological impairment contributes towards the experience of disability, but they emphasise that disability results *primarily* from social conditions. This is expressed by Alison Davis as follows:

If I lived in a society where being in a wheelchair was no more remarkable than wearing glasses and if the community was completely accepting and accessible, my disability would be an inconvenience and not much more than that. It is society which handicaps me, far more seriously and completely than the fact that I have spina bifida (cited in Newell 1999: 172).

The social construction of disability can be further illustrated in the controversial issue of culturally Deaf parents⁴ who wish to have children who are also deaf, and in some cases take active steps to ensure that this takes place. A study conducted to determine the attitudes of deaf adults to genetic testing for deafness revealed that persons who consider themselves culturally Deaf “view deafness from the cultural or sociological perspective” and maintain that “deafness is a condition to be...preserved” rather than viewing deafness as a “pathology to be treated or cured” (Middleton *et al.* 1998: 1175). This attitude is given further expression in the finding that 15% of respondents in this study indicated that they would prefer to have deaf rather than hearing children, with only 6% expressing a positive preference for hearing children (Middleton *et al.* 1998: 1179). It has been documented that some Deaf parents wish to make active use of “genetic diagnosis and preimplantation selection” to ensure that they have deaf children (Häyry 2004: 510). Although this phenomenon raises its own set of ethical concerns, it does seem to indicate that these parents do not regard the impairment of deafness as a disability (Newell 1999: 174), as it is, in their cultural context, not disabling, but a positive characteristic. One could argue that they may regard the ability to hear as disabling in their cultural context. Their wish to raise a deaf child is influenced by their desire to pass on their Deaf culture, and this desire would, in their opinion, be thwarted by giving birth to a hearing child,

⁴ Those members of the deaf community who regard themselves as culturally Deaf – “written with an uppercase “D” (Middleton *et al.* 1998: 1175) – perceive themselves as belonging to the Deaf community, and as participating in Deaf culture, rather than merely as persons with a particular impairment.

who would in some ways be excluded from the Deaf community as a result of their ability to hear. This is a good example of how disability is, in some contexts, certainly constructed by the structure of a particular culture or society.

Some disability rights advocates argue that the distinction between impairment and disability is akin to that between sex and gender (Wendell 1996: 35). While sex refers to the biological difference between men and women (for example, that women are born with XX chromosomes, and men with XY chromosomes), gender indicates the social “institutionalization of sexual difference” (Okin 1989: 6). It is the construction of gender roles in patriarchal societies which limits the opportunities of women, rather than the biological fact of their sex. Wong points out that the construction of gender may be similar to the construction of disability, and that historical images of women as “physically weak, delicate creatures of inferior intellectual and moral capacity who would never complete more than a grade school education” are surprisingly similar to the way in which we view people who have impairments such as Down syndrome today (2002: 98).

The social model thus seeks to emphasise that ignoring the social construction of disability as outlined above allows society to situate the problem to be solved within individuals with impairments themselves, rather than encouraging advocacy for the improvement of the circumstances of people with disabilities, through the prevention of discrimination against them, and by taking active measures to bring about a society which is more accommodating and inclusive.

While both the medical and social models draw attention to important features of disability, neither can independently account for the complexity of disablement. As indicated earlier in this chapter, the range of conditions which are considered to be disabilities is vast. While it is clear that some (and with regard to some impairments, many) of the problems encountered by persons with disabilities are socially constructed, it is difficult to defend a stance which attributes the difficulties of living with an impairment entirely to social circumstances. The extent to which disability is the result of biological impairment on the one hand, or social discrimination on the other, differs

widely with regard to the type of impairment. For example, the difficulties faced by a person with a facial disfigurement are caused primarily by prevailing discriminatory attitudes within society, which tend to place a high value on physical appearance. The disablement here is thus the result of social factors, rather than being intrinsic to the impairment itself. However, “there are impairments which cause suffering, pain and premature death...whatever the social context” (Adderley cited in Shakespeare 1998: 670). Conditions like Tay-Sachs or anencephaly are examples of such impairments. The total inability of anencephalic infants to participate in society is not, in this case, due to social structure, but is caused by or is intrinsic to the impairment itself. Between these two extremes lie various impairments which are partially socially constructed, but which also entail very real physical and cognitive difficulties. An inability to walk imposes limits on a person which cannot be entirely countered by creating a more accommodating society, and thus the impairment is in an important sense disabling. It therefore cannot be said that disability is socially constructed in the same way as gender roles are, as biological impairment is often disabling in a way which is not socially mediated. However, for many people who cannot walk, the *primary* cause of their disability is social structure. While Harris rightly points out that “[t]here are things to be seen heard and done, which cannot be seen, or heard, or done by the blind, the deaf and the lame *whatever the social conditions*” (2000: 98), it is also important to note that some people are *more* disadvantaged by “discriminatory attitudes and practices” than “anything intrinsic to the impairment” (Asch 2003: 318). Which of these factors is more disabling for a particular individual is determined by the type and severity of their biological impairment, as well as their particular social context. Thus the extent to which disablement is caused by “primary conditions” as “clinically defined deviations from the norm” or “secondary conditions” as “socially constructed limits” (Koch 2004: 711) may vary from person to person.

This study will therefore follow Shakespeare in adopting a nuanced approach to these two models, in order to acknowledge the complexity of disablement. With regard to terminology, it will distinguish between impairment, as the “medical condition of the body”, and disability. Disability refers, on the one hand, to the “discrimination and

prejudice in society” which negatively affect the life experiences of those living with impairments, and, on the other, to the disabling effect of the impairment itself (1998: 665). Whereas impairments present very real difficulties which cannot be ignored (and can thus be disabling to varying extents), living with such impairments is often rendered far more difficult by the disabling attitudes and structure of society.

Concluding remarks

The facts of the matter with regard to prenatal screening followed by selective abortion for foetal impairment reveal a complex picture. As has been demonstrated, this term refers to selective abortions which may differ vastly with regard to the gestational age of the foetus, as well as the particular impairment which justifies a decision to terminate an affected pregnancy. This complexity must be taken into account when providing a critique of this practice.

The main focus of this study will be to evaluate the morality of the above practice. In particular, this study will situate itself within the South African context, by examining whether the abortion legislation in South Africa which is described above can be reconciled to a legally entrenched commitment to prevent discrimination against persons with disabilities, which has been well documented in this chapter.

Finally, this study situates itself between the medical and social models of disability, denying that the experience of all those living with disabilities is entirely constituted by social context, while simultaneously acknowledging that in some cases, many, or even most of the difficulties and problems faced by those with disabilities are a result of social structure and discriminatory attitudes. One must then carefully consider whether the practice, or unproblematic acceptance, of selective abortion following the detection of foetal impairment expresses, is based upon, or contributes towards these attitudes. If this is the case, one must seriously examine whether South Africa’s abortion legislation is compatible with its attempts to eradicate the vestiges of discrimination against those who are different which has had such tragic consequences in the past.

3 Utilitarianism and Selective abortion

Introduction

The decision to terminate a pregnancy affected by foetal impairment is generally motivated by concerns about the consequences of carrying such a pregnancy to term. As such, it is a decision which is influenced by a utilitarian approach to moral reasoning. This chapter will consider how utilitarian theory underlies the practice of prenatal screening and selective abortion. This will entail, firstly, a brief discussion of utilitarianism as an ethical theory, and secondly, the identification of four parties for whom the consequences of selective abortion are specifically relevant. This will be followed, finally, by a discussion of how the consequences of this practice matter for the parties involved. This approach is necessary to ascertain what philosophical attitudes and assumptions about morality underlie justifications for selective abortion for foetal impairment.

Utilitarianism as Ethical Theory

Traditional and Contemporary Versions

Utilitarianism is a variation of the general moral theory known as Consequentialism. This theory regards the moral rightness or wrongness of actions as derived from the consequences which those actions produce (Graham 2004: 137). This theory rejects moral absolutes, which tend to regard actions as intrinsically right or wrong (as typical of deontological approaches to moral reasoning), and instead posits that consequences are the only relevant yardstick by means of which we can measure the morality of our actions. The moral action is that action which will bring about the best consequences.

Thus, utilitarianism is an approach to moral reasoning which falls under the umbrella of Consequentialist theories. As a particular version of Consequentialism, it was initially proposed by David Hume, and given specific expression by Jeremy Bentham and John

Stuart Mill in the 18th and 19th centuries (Rachels 2003: 91). Mill regarded the rightness or wrongness of actions as dependent upon the principle of utility, or the greatest happiness principle, which he formulated as follows: “actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness”. Thus morality should be directed towards achieving “happiness” by which is intended “pleasure and the absence of pain”, and preventing “unhappiness” by which is meant “pain and the privation of pleasure” (Mill 1863, 1969: 36). The principle of utility was initially formulated by Bentham, who called it “that principle which approves or disapproves of any action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question” (cited in Graham 2004: 125).

Problems inherent in this traditional version of utilitarianism have been pointed out by various critics (Rachels 2003: 103). In particular, the hedonistic nature of the traditional theory, which focuses on happiness as the only good which moral behaviour should be directed towards, seems to ignore other things which human beings regard as intrinsically good and worth acquiring. Utilitarianism has therefore been adapted in various ways throughout its history, and this has resulted in different formulations of the theory. Many contemporary utilitarians have adapted this traditional theory in order to account for people’s individual preferences, and advance what is known as preference utilitarianism, which holds that the consequences to be considered are the “satisfaction or frustration of desires or preferences” (Vehmas 1999: 37). Singer, a prominent proponent of preference utilitarianism, holds that this position arises from the nature of ethical reasoning, which implies the “universalising [of] our own interests” (1993: 94). Thus, “when I make an ethical judgement I...go beyond a personal or sectional point of view and take into account the interests of all those affected” (1993: 21). Singer regards “a person’s interests to be what, on balance and after reflection on all the relevant facts, a person prefers” (1993: 94). Therefore, according to preference utilitarianism, moral behaviour entails taking into account the interests, or preferences, of others.

Personhood

An important contribution of contemporary utilitarianism to bioethical argumentation has been the development of the notion of personhood as a moral category, by, among others, Tooley (1972), Harris (1985), Singer (1993) and Warren (2002). Personhood is a term which is often referred to in the general debate around the morality of abortion. The question here is whether foetuses at any stage acquire the status of personhood, as if they do not, their moral status is either insignificant, or so low that it can legitimately be overridden by the interests of the pregnant woman (who is a full person). Prominent utilitarians have also suggested that personhood is not acquired until some time after birth, which belies the conviction that infanticide is always a moral evil⁵.

Personhood is primarily a moral category (Tooley 1972: 40) which indicates that a particular being has moral significance in such a way that they should not be killed. Personhood is, according to the utilitarian calculus, bestowed by the acquisition of certain cognitive capacities. According to Tooley, a person is a being which is “the subject of experiences and other mental states” who also “possesses the concept of such a subject”. It is this latter condition which confers moral status, as “an entity cannot desire that it itself *continue* existing as a subject of mental states unless it believes that it is now such a subject” (1972: 46-47). In other words, a person is a being who is self-aware, or who is “capable of understanding that they are [a] continuing [self]” (Kuhse *et al.* 1985: 132). John Locke defined a person as “a thinking intelligent being that has reason and reflection and can consider itself as itself, the same thinking thing, in different times and places” (cited in Kuhse *et al.* 1985: 132). Thus a person is a being which can meaningfully be deprived of its interest in continued existence⁶.

⁵ Tooley (1972) and Kuhse & Singer (1985), among others, offer arguments in favour of this position.

⁶ This emphasis upon cognitive capacities has obvious implications for those who are severely mentally disabled. In these cases, impairment may limit to some extent the potential of a foetus to eventually develop full personhood, if the individual affected is mentally impaired to such an extent that they will never develop the level of rationality and conceptual understanding; in other words, the “higher mental functions” (Stretton 2004: 264) which would enable them to fulfil the conditions of personhood as identified above. This would imply that such individuals are unable to have an interest in their own continued existence in the same way that normal adult persons have an interest in continued existence, or that their lives are not worthwhile to them from their own perspective in the same way that persons’ lives

Note that by this standard, the category of personhood is not necessarily limited to the human species. In fact, this concept represents an attempt to provide an account of why it is morally wrong to deprive a particular being of their life, without referring to the arbitrary characteristic of species membership, which, in the context of a secular approach to ethical reasoning, amounts to speciesism, a form of discrimination usually ignored, but which has been emphasised by Singer. If “the biological facts upon which the boundary of our species is drawn do not have moral significance” (Singer 1993: 88), membership of the human species cannot in itself endow moral status which indicates the wrongness of killing beings which possess it. The concept of personhood provides an alternative to this speciesist model which takes into account the interest which beings have in continued existence, rather than their biological identity.

Although personhood is a prominent concept in utilitarian theory, this does not imply that all those who accept the utilitarian justifications for selective abortion described below necessarily accept its notion of personhood as a category bestowing moral status, and its implications for the moral status of the foetus. As shall become evident in the following chapter, some who accept these justifications for the termination of pregnancies affected by foetal impairment nonetheless insist upon the general moral significance of the foetus, or, if we regard personhood as purely a moral category which indicates the high moral status of the being thus described, insist that the foetus *is* a person.

Whose interests matter?

If, then, justifications for selective abortion following the detection of foetal impairment are founded upon a utilitarian approach to moral reasoning, for whom do the consequences matter? In other words, whose interests are affected by a decision to terminate, or carry to term, an affected pregnancy?

are worthwhile to them. If personhood is conditional upon the “presence or absence of defining attributes” (Koch 2004: 702), and those who are severely mentally disabled (in such a way that they are not aware of themselves as continuing selves) will not develop these attributes, this implies that to kill such beings is not seriously wrong.

Rationalizations for selective abortion which approach the moral problematic from a utilitarian perspective generally make reference to four parties whose interests are to be considered when determining the morality of this practice (in other words, for whom the consequences matter). Firstly, the interests of the impaired foetus (or future person) are taken into account. This perspective on selective abortion generally posits that the interests of the foetus or future person are detrimentally affected by a decision to carry the pregnancy to term, as impairment imposes unjustified burdens upon those who suffer them. Secondly, the interests of “the next child” (Kuhse *et al.* 1985: 155) may be considered, in other words, the interest of possible children who may have “replaced” a foetus aborted for impairment, but who will not be conceived (or come into existence) as the burden imposed by caring for a child with a disability is often too great to allow parents to consider having further children. Thirdly, the interests of the pregnant woman, the parents and the immediate family are considered, in that raising a child who is disabled is likely to be more burdensome and involve more difficulties than raising a child who enjoys species-typical functioning. Finally, the interests of wider society are considered, particularly with regard to the extra financial resources which those who suffer from disability may require.

The following sections will therefore consider how selective abortion may impact on the interests of the four parties identified above, and how the consequences for these parties are relevant in determining the morality of this practice, in accordance with utilitarian reasoning.

Selective abortion is in the best interests of the foetus/future person

The first party whose interests are considered relevant in determining the morality of selective abortion is the foetus, or future person, itself. The justification for selective abortion from the perspective of foetal interests is very common among the general public. It is thus likely to result in much of the support which is given to this practice. One study of the attitudes of young people towards selective abortion, for example, found

that “many students believed that the decision to abort an abnormal foetus should be based around the welfare of the child, and the quality of life a child will have”, rather than concerns about the interests of the parents (Lee *et al.*1998:1).

There are two versions of this argument which we can consider. Both stem from the utilitarian principle that “[i]t is morally good to act in a way that results in less suffering and less limited opportunity in the world”, with the first version corresponding to the former prescription within this principle, and the second to the latter.

The first version of this justification may claim that selective abortion is in the best interests of the embryo or foetus in which impairment is detected, because it prevents suffering which necessarily accompanies such impairment. This entails a claim that “termination benefits the foetus by saving it from a life that would involve intolerable suffering” (Pritchard 2005: 87). This first version has its foundation in traditional utilitarianism, which regards the duty to prevent suffering as one of the principle motivations of moral action.

This version of the foetal interests justification for selective abortion implies that the suffering incurred as a result of impairment or disability is so great that it would be better *for the foetus* not to exist. In other words, non-existence would be preferable to the type of life the future person would be likely to lead, from their own perspective. The argument for selective abortion from the perspective of the suffering likely to be incurred by the foetus therefore often amounts, not only to a position which regards this practice as morally neutral, but to an assertion that terminating a pregnancy affected by foetal impairment is the morally desirable course of action. In other words, selective abortion may be what morality demands, as, from a utilitarian perspective, “it is wrong to bring avoidable suffering into the world” (Harris 2000: 96).

The second version of this argument implies that selective abortion prevents the harm which would be inflicted upon the foetus or future person, were the pregnancy to be carried to term. This harm lies not only in suffering, but in the deprivation of certain

experiences and opportunities which are satisfying. This version of the justification is influenced by preference utilitarianism, as it holds that the state of disability which imposes this deprivation is a state which most of us would prefer not to experience, as it closes off many possibilities which are regarded as worthwhile.

The second version of this justification can also lead to a conclusion that terminating an affected pregnancy is morally preferable to carrying it to term. This version is widely represented in bioethical argumentation around this issue. John Harris, for example, regards the moral desirability of selective abortion for foetal impairment as stemming from the fact that disability is “a harmed condition” (2000: 97) as indicated above, and that it is wrong to inflict harm, in other words, to impose upon an individual “a harm...which a rational person would wish to be without” (2000: 98).

These versions are not exclusive and do not occur in isolation from each other. They are in some ways connected, as the experience of limit which is the main concern of the second version may provoke frustration and despondency, or emotional suffering, in the individual who is limited in this way, and this suffering is taken into account by the first version.

Both versions of the argument for selective abortion for impairment from the perspective of foetal interests could also be seen as proceeding in accordance with the bioethical principle of beneficence, which includes the duty to “prevent evil or harm” (Beauchamp *et al.* 1989: 123). This entails both a duty to “actively...prevent and remove harms” and “a *balancing* of benefits and harms” (Beauchamp *et al.* 1989: 195). If the principle of beneficence is applied in support of the foetal interests argument, this implies that the foetus, rather than the pregnant woman, is considered to be the patient, or the subject of the medical intervention of abortion, in whose interests this procedure is carried out. The principle of beneficence has also been specifically applied to reproductive decisions as the principle of “procreative beneficence”, which prescribes that parents should “select the child who is expected to have the best life” (Savulescu 2001: 413). In this sense, selective abortion from the perspective of foetal interests is an instance of beneficence

towards the foetus by the parent(s) making the decision to terminate a pregnancy affected by foetal impairment

We can consider each of the versions of the foetal interests argument for selective abortion in greater detail.

Avoiding suffering

In this context, selective abortion is constructed as an act of mercy. In the same way that euthanasia is regarded by some to be a merciful act⁷ which ends a life which is no longer beneficial to an individual as a result of extreme suffering, termination of a pregnancy affected by foetal impairment is often perceived as a merciful act which prevents the future suffering of the foetus (Smolska 2006: 16).

We must then establish what is meant by suffering in this context. What type of suffering does this justification for selective abortion regard as being intrinsic to the experience of impairment? This question has no easy answer. Those who regard the moral desirability of this practice as dependent upon a moral prescription to avoid or prevent suffering may refer to physical pain, emotional trauma or a generally low quality of life (as a result of some combination of the former aspects) as instances of such suffering. We can consider each of these aspects in turn.

Physical suffering

Many of those who agree that it is in the best interests of the foetus to be aborted in the case of impairment believe that to do so results in the prevention of physical suffering; in other words, the prevention of the experience of physical pain or discomfort. It is indeed undeniable that much impairment involves physical suffering. Impairment is a biological divergence from species-typical functioning. This divergence often implies that those

⁷ The similarities between arguments for selective abortion from the perspective of foetal interests and arguments for euthanasia will be subject to further examination in Chapter 5.

who are impaired experience day-to-day discomfort, pain, and “multiple surgical procedures and numerous periods in hospital” (Kuhse *et al.* 1985: 142).

It is evident that concern about possible physical suffering which may accompany the experience of disability plays a large role in public support for the self-evident moral acceptability of the practice of selective abortion for foetal impairment. For example, one study found that “abnormality which meant that the child would be in pain during its life was most commonly chosen as an acceptable ground for abortion for abnormality (Lee 1998). Comments documented by the study include “if the child was in pain, I think the woman *should* have an abortion” (my emphasis). This attitude expresses the recognition by moral agents of the interest which most sentient beings have in avoiding physical pain and suffering.

This justification of the foetal interests argument is rendered complex by the fact that physical suffering which results from impairment varies greatly in degree from a total lack of physical pain, to varying degrees of discomfort, to intense agony. The extent to which this suffering can be relieved or prevented through medical interventions also varies considerably. One must also bear in mind that physical suffering must be balanced against other benefits which may be enjoyed, as suffering does not always imply that one’s life is necessarily not worthwhile. Asch asserts, for example, that, notwithstanding the negative experience of physical suffering, “[l]ife with nearly all disability potentially contains rewarding personal relationships, stimulations and discovery, self-development, and contributions to others” (2003: 332). These possible benefits must therefore be balanced against the experience of physical suffering, as demanded by the principle of beneficence as defined above. As shall be shown in Chapters 5 and 6, this justification is therefore valid only for some cases of impairment.

Emotional suffering

People with disabilities may also be subject to emotional suffering or trauma. This suffering may arise as a result of frustrations experienced due to limited opportunities,

social isolation experienced as a result of disability, or a number of other factors. As indicated in Chapter 2, a great deal of this emotional suffering, particularly that due to isolation, may be attributed to social structures and discrimination (Wendell 1996: 35). These factors may result in disabled persons experiencing “isolation, powerlessness, unemployment, poverty or low social status” (Asch 1999: 1650). Not all emotional suffering is attributable to social discrimination, however. Frustration at one’s inability to enjoy experiences and opportunities which are available to others who are able-bodied may also arise. Regular medical interventions and the increased complexity of daily tasks may also contribute towards despondency. Emotional suffering of this kind may also be seen as justifying selective abortion for foetal impairment as a mechanism to prevent the experience of such trauma.

Low quality of life

Finally, the justification of selective abortion from the perspective of the likelihood of future suffering may consider the life quality of the foetus or future person (Bromage 2006: 38). The term “quality of life” has been variously defined, but generally refers to one’s level of wellbeing or one’s ability to enjoy normal life activities. Other definitions regard a life with high quality as being “a life that is very meaningful to individuals and that provides [one] with resources” (Brown *et al.* 2003: 3).

Determining one’s quality of life is difficult by the above standards. It implies a cost-benefit analysis which weighs burdens against benefits to come to some judgement about the value of a person’s life from their own perspective. The utilitarian nature of evaluations of life quality is evident in the medical profession’s use of QALYs (quality-adjusted life years) as units of measurement to calculate the desirability of medical interventions by “combining [measurements of] duration and quality of life”. These calculations are based on a “multi-attribute utility theory” (Sassi 2006: 402).

Proponents of selective abortion in this context argue that the suffering incurred as a result of many forms of impairment may weigh heavily against the likely benefits which

may be accrued by the affected individual (particularly as the range of benefits available to such persons may be limited by impairment), and that this may justify a decision to terminate a pregnancy affected by foetal impairment, as the future quality of life of the foetus is likely to be so low as to render such a life not worth living from the perspective of the future person.

Avoiding harm

The distinction between the two versions of the foetal interests argument, which seek to avoid suffering and harm respectively, is not clear cut, as indicated above. However, broadly, while the first version of the argument operates by balancing the extent of suffering against the likelihood of achieving pleasure in a particular life, and by coming to a judgement about the value of that individual's life from their own perspective, the second version operates by comparing life with disability to life without it. In other words, the first version regards the harm done to a person who is disabled as stemming from the *suffering* caused by their disability. The second version however, regards the harm done as stemming from the *disability itself*, regardless of whether this disability brings about suffering. It is the lack of ability which is considered intrinsically harmful here. Thus, under the first view, the decision of Deaf parents to select for a deaf child who will be raised and will live in an accommodating environment is unproblematic, as the child will be unlikely to experience suffering, in the sense described above, as a result of this decision. Under the second version, this decision would indeed be morally controversial, as the parents are inflicting upon the child a characteristic which is harmful in itself, as deafness *necessarily* excludes all the worthwhile experiences which we associate with hearing.

Harris expresses this position in his discussion of how disability should be defined. He situates the harm of disability in the fact that “there are pleasures, sources of satisfaction, options and experiences that are closed to [persons with disabilities]”⁸ (2000: 98), which

⁸ There are parallels between this argument and the argument against killing – what makes killing wrong, according to Marquis, is that “the loss of one's life is...the loss...of all those activities, projects,

are generally regarded as valuable experiences, and which can be enjoyed by the able-bodied. This closing off of experiences is regarded as being intrinsic to impairment. Asch, a prominent disability rights advocate who argues against selective abortion for foetal impairment, confirms this perception:

The inability to move without mechanical aid, to see, to hear, or to learn is not inherently neutral. Disability itself limits some opportunities. Listening to the radio for someone who is deaf, looking at paintings for someone who is blind, walking upstairs for someone who is quadriplegic, or reading abstract materials for someone who is intellectually disabled are precluded by impairment alone (1989: 73).

A similar version of the justification for selective abortion from the perspective of foetal interest in avoiding harm implies that the foetus may be denied of its right to an open future (Feinberg 1992: 78) as a result of its impairment. In other words, an open future is a good which rational people would prefer to have. To carry a pregnancy affected by foetal impairment to term implies depriving the foetus, or future person, of this right, and this constitutes harm to this individual. Because disability closes off some experiences and opportunities (as indicated above), a person born with impairment does not enjoy an open future, but is curtailed in such a way that their limitation cannot be entirely countered through the provision of additional resources or other measures. In other words, disability is likely to “substantially narrow [one’s]...options in the future” (Davis 1997: 14), and this narrowing is not only an effect of social structure, but is intrinsic to impairment itself. Daniels formulates this viewpoint as follows: “Impairments of normal species functioning reduce the range of opportunities open to the individual in which he may construct his plan of life or conception of the good” (1985: 27). This constriction of one’s opportunity range is regarded as intrinsically harmful to the affected individual.

Note that the way in which disability is defined in this argument, as harmful because it deprives the sufferer of worthwhile experiences which are available to those who are able-bodied, provides a convincing account of why it is morally wrong to inflict disability

experiences, and enjoyments which would otherwise have constituted my future personal life [which] are either valuable for their own sakes or are means to something else that is valuable for its own sake” (1989: 189). This shall be revisited in Chapter 5.

upon a person who is able-bodied, and why it is morally desirable to attempt to restore those who are disabled to full functioning if we are able to (Harris 2000: 99). In the former case, we harm a person by depriving them of their interest in future experiences which they would otherwise have been able to enjoy, and in the latter case, we enable a person to enjoy opportunities and experiences which would otherwise not have been available to them.

Selective abortion is in the best interests of the next child

The following party whose interests are considered relevant in determining the morality of selective abortion is “the next child” who would replace the foetus were it to be aborted, but would not otherwise come into existence. The argument from the interests of the next child is probably unfamiliar to many, as it refers to an entity that does not yet exist, but this justification for selective abortion has been given a great deal of attention in bioethical argumentation around this issue. In general, this argument holds that, even if impairment does not impose unbearable suffering on the affected individual, it is nonetheless less likely that parents who are raising a child with a disability will wish to have further children (Kuhse *et al.* 1985: 155). Slater asserts that “keeping a badly damaged child alive...is likely to eliminate the potential existence of a normal one” (cited in Kuhse *et al.* 1985: 155).

Combined with the utilitarian principle that “the basic moral obligation is to maximise quality of life” (Gillam 1999: 169), this suggests that the morally preferable course of action would be to terminate a pregnancy affected by foetal impairment in favour of bringing into existence a future non-disabled child. Note that this argument relies upon similar considerations as the argument from foetal interests which focuses on avoiding harm; in other words, that disability generally implies a life that is harmed, *in comparison* with those who have species-typical functioning, by the limits which impairment imposes. Thus, if the next child is likely to have “a better life” than the impaired child-to-be, and we wish to maximise the “total amount of happiness” in the world, it is morally preferable to terminate pregnancies affected by foetal impairment, provided that

the affected foetus is replaced by a foetus likely to enjoy a better quality of life. Once again, the argument from the interests of the next child regards selective abortion for foetal impairment not as morally neutral but as the morally desirable choice. According to Glover, “[i]f aborting the abnormal foetus can be followed by having another, normal one, then it will be wrong not to do this” (cited in Gillam 1999: 169). In other words, if we must choose between the future existence of a person with disabilities and the future existence of an able-bodied person, it would be preferable (assuming that the quality of life of the former person is lower than that of the latter person) to choose to bring into existence the able-bodied person.

Selective abortion is in the best interests of the pregnant woman, parents, and family

The third party whose interests are considered in justifications for selective abortion following the detection of foetal impairment are the prospective parents, the immediate family and particularly, the pregnant woman. This justification holds that the experience of raising a child with a disability often imposes great burdens upon caregivers, and particularly, the mother of a disabled child, and that this justifies the termination of a pregnancy affected by foetal impairment. If we consider justifications for selective abortion within the context of the abortion debate as a whole, this is also the justification which has the most in common with our thinking around abortion generally, as the decision to terminate a pregnancy in other contexts is usually considered to be motivated by a woman’s personal evaluation of whether she wishes to accept the responsibility of raising a child at that time, taking into account her particular circumstances and the effect that such an experience will probably have on her life. This expresses our determination as a society to promote “the autonomy and wellbeing of [women]” (Gillam 1999: 168). Thus, as Shakespeare points out, it seems that:

[i]f we accept that women may wish not to have babies with impairment because of the impact on their careers or financial situation, then we must also accept that women may not wish to have babies with impairment, because such children may have more complex needs with major implications for both cost and care (1998: 672).

The justification from parental, and particularly maternal interests therefore stems from the same considerations which justify abortion in other contexts; in other words, the pregnant woman's "right to self-sovereignty [and] the right to be a free decision-maker in one's private life" (Daniels 1993: 134).

Selective abortion in this context is also different from the argument from foetal interests (and arguments from the interests of other parties) as the termination of an affected pregnancy can no longer be considered as the ethically desirable course of action in all contexts. The argument for selective abortion from the perspective of the interests of the foetus or future person proceeds from the assumption that it is wrong to bring avoidable suffering into the world, or to inflict avoidable harm on an individual, and that terminating a pregnancy affected by foetal impairment may be the right thing to do as a decision which is motivated by taking into account the effects of our actions on others. Similar considerations will be shown to lend support to the moral desirability of selective abortion from the perspective of the interests of society, while justifications from the perspective of the next child also construct selective abortion as a moral obligation as a result of a general utilitarian duty to maximise quality of lives. The argument from parental interests, and particularly the interests of the pregnant woman, however, does not indicate that a pregnant woman *should* choose abortion because it is the right thing to do for others, but that she should evaluate whether she is willing and able to cope with raising a child with disability. If she decides to go ahead with the pregnancy, this choice is therefore not morally contentious (provided the interests of others are not considered to be morally relevant to her decision) but is rather the result of her autonomous evaluation of the likely effect of her decision on her own life.

This section will consider in greater detail how the interests of the pregnant woman, caregivers and family are affected by the birth of a child with a disability. It will thus consider the particular problems and burdens which are imposed by disability, not to the affected individual themselves, but to those closest to them. Note that this estimation is complicated, once again, by the vast range of impairments which differ both in type and

degree, and which may therefore have quite different implications for the parents and family as to the likely impact upon their lives.

Raising a child with disabilities can impose a considerable burden upon a family. While assuming responsibility for any child is likely to significantly alter the social and economic circumstances of its parents and immediate family, “the strain of caring for a disabled child may be substantially greater than [that] of caring for a non-disabled one” (Sheldon *et al.* 2001: 4). Selective abortion in this context may therefore be an expression of “parental rights” to promote their own wellbeing (Sammons 1978: 237).

Firstly, caring for such a child may demand a great deal more time and energy than if the child was not impaired, and, depending on the level of impairment, may extend for a greater period of time, as the child may never achieve complete independence. This may impose emotional strain upon the parents, as well as impacting upon other areas of their lives, such as the professional and social, detrimentally. Thus “parents...have their interests impinged upon by the efforts, time [and] emotional burdens...added by the disability that they would not have otherwise experienced with the birth of a healthy child” (Botkin 1995: 38). This burden is often carried primarily by the mother of the child, who is frequently regarded as the primary caregiver.

Additionally, parents may be harmed by their “unfulfilled expectations with the birth of an impaired child” (Botkin 1995: 38). In other words, when parents look forward to raising a child, they have a particular experience in mind, with its own particular burdens and benefits. These expectations and hopes may be thwarted by the detection of foetal impairment. According to Tooley, “[m]ost people would prefer to raise children who do not suffer from gross deformities or from severe physical, emotional, or intellectual handicaps” (1972: 39). If this is true, raising a child with a disability frustrates parental preferences for a particular kind of parenting experience.

Finally, raising a child with impairment may impose extreme financial strain upon caregivers which may deplete the family’s resources. This financial strain may be

attributable to medical care, sometimes extending for long periods of time, the provision of supporting technologies, specialised education and care from others, and an extended period of basic support for those who, because of the nature of their impairment, will remain dependent on others for their basic needs. All in all, raising a child with a disability is generally more costly than raising a child without a disability.

What type of conditions might inflict some, or all of, the harms mentioned above? Broadly, we can identify conditions which cause extremely premature death, which would cause emotional trauma to the parents and family; “conditions that result in a child who is chronically ill [and requires] repeated hospitalisation”; disabilities that “will not permit the child to achieve independence in its later years”; and “disabilities of such severity that there are constant demands on the parents for time, effort and financial resources” (Botkin 1995: 39).

Raising a child with any of these conditions may contribute towards parental experiences of “isolation, loneliness, fear, guilt [and] stigmatization” (Botkin 1995: 38). This strain may impact on one’s mental well being, one’s relationships, and the family as a whole, particularly on existing and future siblings, who may be deprived of attention, resources and a family environment which they otherwise would have enjoyed. Thus, the birth of a child with impairment may be perceived by expectant parents, and particularly the pregnant woman herself, as “a potentially divisive, destructive force in the family unit” (Retsinas 1991: 89), an experience which can be avoided through selective abortion.

Selective abortion is in the best interests of society

The final party whose interests are relevant in decision making around selective abortion is society as a whole. This consideration is generally motivated by financial concerns. While the costs of disability to the foetus and the family as described above are not solely monetary, society is often required to dedicate extra financial resources to those who are disabled, both with regard to medical care, and the provision of other services, such as

grants to cover the basic needs of those who are unable to work fulltime, or other support services such as sheltered accommodation or professional caregivers.

Some may therefore argue that the birth of a child with impairment imposes a strain upon financial resources available to others in society, as those who are impaired will enjoy a greater “slice of the pie” than those who are not. The practice of prenatal screening, followed by selective abortion if impairment is detected, can be seen as a cost-effective solution. The cost of providing prenatal screening, counselling and termination is far less than the cost to society of providing extra financial resources to those who are impaired and who would therefore require such assistance. This position amounts, according to Asch, to asserting that “in a world of limited resources, we can reduce disability-related expenditures if all diagnoses of foetal impairment are followed by abortion” (1999: 1652). This position could lead to two conclusions. Firstly, one could argue that prospective parents should feel morally obligated to choose selective abortion in order to protect the interests of others in society. Secondly, it could also lead one to conclude that those parents who turn down prenatal screening, or who decide not to terminate a pregnancy following the positive detection of foetal impairment, should not be entitled to state support in the form of the provision of extra resources, as giving birth to a disabled child would be constructed as an irresponsible choice, for which one must accept the consequences (Green 1995: 229 and Weithman 2002: 115).

Concluding Remarks

This chapter has attempted to identify the utilitarian basis for justifications of selective abortion following foetal impairment, by pointing out that determinations of the morality of this practice are motivated by concerns about the likely consequences of bringing into existence a child who is impaired. The relevant consequences in this regard are the effects of this decision upon the interests of the four parties identified above, namely, the foetus or future person, the parents and family, the next child, and society as a whole.

This broad outline of the utilitarian justifications for selective abortion must now be supplemented by other considerations, in order to critically evaluate whether these justifications are able to provide an account of why selective abortion should be considered a morally neutral, or even the morally desirable course of action. These considerations are the context in which selective abortion is advocated; in other words, one's general position on abortion, and particularly one's position on the moral status of the foetus. Although most proponents of utilitarianism generally do not regard the foetus as morally significant, as a result of its failure to fulfil the utilitarian conception of personhood identified above, some who make use of utilitarian arguments in support of selective abortion do regard the foetus as a morally significant being. These differences as to the moral status of the foetus (or the general moral permissibility of abortion) are highly relevant in evaluating the above justifications for termination of pregnancies affected by foetal impairment. The following three chapters will therefore respectively identify two general positions on abortion in the context of which selective abortion is justified, and will provide separate critiques of motivations for selective abortion in each of these two contexts, in terms of the utilitarian justifications identified above.

4 Two Positions on Selective Abortion

Introduction

The justifications for the practice of selective abortion for foetal impairment identified in the previous chapter are not by any means situated within a homogenous attitude towards the morality of abortion in general. There are a great number of divergent positions on abortion in the context of which selective abortion for foetal impairment is considered to be morally acceptable. This aim of this study is not to provide a general evaluation of the morality of abortion. It is evident that we are very far from reaching a consensus with regard to this issue. However, in order to carry out the proposed aim of this study, which is to interrogate a specific justification for abortion in particular circumstances, it is necessary to examine the contexts in which such a justification may be made. This chapter will therefore seek to outline two general positions on abortion within which one may justify the practice of selective abortion for impairment. In the following two chapters, these positions will be subjected to critique separately. This approach is necessary, as it shall become evident that, depending upon the context within which the justification of selective abortion for foetal impairment is made, quite different attitudes are implied as to the moral status of persons already living with impairments.

These two distinct justifications of selective abortion for foetal impairment can generally be summarized as follows:

- the foetus is morally significant in such a way that it cannot generally be killed, but pregnancy can be terminated in the case of the detection of foetal impairment.
- the foetus is not morally significant, or, any moral significance which it possesses may justly be overridden by the pregnant woman's right to bodily integrity and autonomy, and pregnancy can therefore be terminated for any reason, including the detection of foetal impairment.

The disagreement between these two positions lies in whether the foetus is regarded as the type of being which has moral status to such an extent that its killing is generally prohibited (in that this moral status overrides the pregnant woman's right to bodily integrity and autonomy). In other words, does the foetus have a serious right to life (that overrides the right of the pregnant woman to bodily integrity and autonomy) which moral agents are obliged to consider (Warren 2002: 1) in evaluating their actions?

This study will seek to argue that the first justification described above is undoubtedly discriminatory and undercuts the moral status of persons already living with disabilities, except in a few relatively rare cases, as it represents selective abortion for impairment as an *exception* to the general moral impermissibility of killing morally significant beings. The second justification is far more complex. It considers selective abortion for impairment as one case within the context of the general moral permissibility of abortion, and therefore seems to avoid charges of discrimination. However, as selective abortion often amounts to the termination of an *otherwise wanted* pregnancy, purely on the grounds of the impairment of the foetus, this study will argue that this justification is *distinct* from other general justifications for abortion, and that it may rest upon and have the potential to perpetuate discriminatory assumptions about the lives of persons with disabilities. In addition, it may militate against the transformation of societal conditions which inhibit the possibilities and opportunities of those living with impairments, and particularly where selective abortion is regarded as morally obligatory by some variants of this justification, may restrict the possibility of exercising reproductive autonomy⁹.

The abortion debate is often characterized as a debate between two diametrically opposed groups, often referred to as the "pro-life" and "pro-choice" camps. This perception is reinforced by the militant and vocal positions often taken up by those who represent the

⁹ This study will take the position that, while these consequences are possible, and, even, in some contexts, likely results of the practice of prenatal screening and selective abortion, they are not necessary consequences of this practice, and could be avoided, on the condition that we take active steps to guard against them. This issue will be discussed in Chapter 6.

two poles of this debate. These two poles may be referred to as the extreme positions on abortion, and can be described as follows:

- Those who hold an anti-abortion stance (commonly referred to as the pro-life position) maintain that abortion is *never* morally permissible.
- Those who hold a pro-abortion stance (commonly referred to as the pro-choice position) maintain that abortion is *always* morally permissible.

As is evident from the above formulations, neither of these positions, in their extreme forms, permit of exceptions. The terms used to refer to these camps are rhetorically loaded, as they necessarily construct those who oppose them in a negative light, as either anti-life, or anti-choice. This study will therefore use the more neutral formulation, and refer to the two opposing camps as anti- or pro-abortion.

This strict dichotomy by no means represents the full picture of the abortion debate. In reality, it is likely that many people will hold a position on abortion somewhere between these two polarized positions – in other words, they will think that abortion is morally permissible in some cases and morally impermissible in some cases. When individuals identify themselves as anti-abortion or pro-abortion, it does not always imply “a consistent support for or opposition to [all] abortion” (Lee et al 1998: 1). Such moderate positions are also typical of much legislation in this regard. The circumstances under which abortion may be considered morally permissible may vary widely, resulting in a multiplicity of views situated somewhere between the extreme pro- and anti- abortion camps.

Perhaps the most common factor taken into account when deciding upon the moral permissibility of abortion amongst those who hold moderate positions is foetal age. In other words, a correlation exists in many attitudes towards the morality of abortion between proximity to birth and the moral impermissibility of abortion. This can be called the gradualist developmental approach to abortion, as it takes into account the level of

development of the foetus (Pritchard 2005:90). Under this view, the moral status of the foetus gradually increases as it develops certain characteristics and capacities, which implies that, although early abortion may be entirely morally permissible under any circumstances, this becomes steadily more contentious as the pregnancy progresses.

While foetal age is often taken into account in deciding upon the moral status of abortion generally, at a particular gestational stage, other factors are also taken into account which consider the specific circumstances of conception, pregnancy, or the social and economic context of the pregnant woman. These specific circumstances may weigh heavily in ethical deliberation around the moral permissibility of abortion, and consider the effect of a continued pregnancy upon the woman concerned.

Firstly, the circumstances of conception may be taken into account. For example in the case of rape and incest, the traumatic circumstances of conception impose an often overwhelming and unjustified burden upon the pregnant woman. In these cases, abortion may be considered morally justified in order to avoid further suffering and emotional trauma. In these circumstances, for example in the case of rape, the pregnant woman “has not given the [foetus] a right to the use of her body for food and shelter” (Thomson 1971: 316), as the act which resulted in conception was forced upon her, and it seems that she therefore cannot be expected to carry the pregnancy to term, particularly as this pregnancy will impose a great burden on her as a result of the particular circumstances of conception.

Secondly, another set of factors which also takes into account the effect on the pregnant woman is the case of a pregnancy which represents a danger to the health or life of the pregnant woman. Here, rather than being concerned with the circumstances of conception, one is concerned with the circumstances of the pregnancy, which imply physical danger to the pregnant woman. The pregnancy may therefore, under this view, be terminated in order to prevent adverse health effects, or even death, to the pregnant woman. In this case, abortion could be constructed as an instance of self- defence on the part of the pregnant woman. Although the foetus is an innocent aggressor, the pregnant

woman has the right to defend her own life against a threat, particularly as the foetus is housed within her body (Thomson 1971: 313).

Thirdly, one may also take into account the circumstances of the pregnant woman herself. This also considers the effect of the continued pregnancy upon the pregnant woman, for example, when giving birth to a child would impose a financial strain upon the woman, or would have a detrimental effect on her social or professional circumstances. Therefore, the concern here is the existing social and economic context of the pregnant woman, and whether, in her own estimation, this context is conducive to carrying a pregnancy to term (Warren 2001: 129).

These three factors all have in common a general concern with the effect of a continued pregnancy upon the pregnant woman. They are all given specific mention in the Choice on Termination of Pregnancy Act, and support that Act's purported aims, which seek to advance "the right of persons to make decisions concerning reproduction and to security in and control over their bodies" and "freedom of choice [for] every woman" (South Africa 1996). This choice enables women to evaluate for themselves and make a choice as to whether they are willing to accept the effect which a continued pregnancy would have on their future lives. Generally, a choice to terminate a pregnancy results from a woman's decision that she is unwilling to accept the effect on her life which giving birth to a child would represent at that time.

There is a further set of factors which may be taken into account in determining the morality of abortion, which do not refer to some fact about the circumstances of conception, or about the pregnancy, or about the context of the pregnant woman, but rather, make reference to some fact about the foetus itself. It is this justification for abortion that shall be considered by this study. Under this view, there is some characteristic of the foetus which may be identified prenatally which renders abortion morally permissible or morally desirable. This characteristic may be the sex of the foetus (in sex-selective abortion) or foetal impairment (in selective abortion for disability). As shall become evident, this latter justification is in many ways distinct from those

identified above. While the above motivations provide reasons for aborting “any foetus” under the conditions specified, selective abortion amounts to choosing against a “particular foetus that has a disability” or that is of a specific gender, when this foetus is “otherwise wanted” (Parens *et al.* 2003: 42). In addition, the reasons provided for terminating a pregnancy selectively often refer not only to the interests of the pregnant woman herself, but to other parties, and specifically, amongst those who regard selective abortion for foetal impairment as morally preferable to continued pregnancy, to the interests of the foetus itself, or to the interests of the next child, or to the interests of society (Kuhse *et al.* 1985: 141-163).

A final point to be made in discussing the factors taken into account by those who hold a moderate position on abortion is that these factors do not always present themselves in isolation, but may overlap to some degree. For example, in the case of incest, the circumstances of conception not only imply emotional trauma, but also the possibility of impairment of the foetus, and when making a decision as to whether abortion is morally permissible in this case, foetal age may also be taken into account. All of the above goes to show the immense complexity of decision making around the morality of abortion, as well as the multiplicity of views which may be held. The divergence of positions, which may take one, some or all of the above factors into account, and to lesser or greater degrees, indicates the inadequacy of a simplistic reduction of the debate to polarized positions at war.

As shall become evident from the following discussion, justifications for selective abortion for impairment are no less diverse and complex. For the sake of clarity, however, this chapter will identify two groups of justifications in this regard. The case of selective abortion for foetal impairment is a particularly interesting element of the abortion debate, as there is often evidence of much disagreement between those who are otherwise on the same side, as well as some striking points of agreement between proponents in the abortion debate who are otherwise diametrically opposed to each other. Parens and Asch note that:

[p]renatal testing for genetic disability elicits unexpected responses from both sides of the abortion debate: many of those who are uneasy with abortion based on a prenatal finding of a disabling trait are pro-choice. And many who generally oppose the right to abortion nonetheless approve of abortions performed on a foetus carrying a disabling trait (2003: 41).

This often results in situations where extreme pro-abortion and anti-abortion advocates find themselves in strange agreement with each other, namely in holding the position that there is no moral distinction between abortion for foetal impairment and abortion for any other reason. While the former group regards all abortion as equally morally permissible, the latter group regards all abortion as equally morally impermissible, and the detection of foetal abnormality is thus irrelevant to both. This puts both groups in opposition to general public opinion, which generally tends to find “termination more acceptable in the presence of impairment” (Sheldon *et al.* 2001).

This study will refer only to positions on abortion within which justifications for selective abortion for disability are considered to be acceptable. Some positions within the abortion debate are necessarily excluded from the discussion, namely, those who hold extreme anti-abortion positions, and others who hold moderate or extreme pro-abortion positions, but do not think that the impairment of the foetus suffices as a justification for abortion.

In what follows, the two groupings of positions on selective abortion will be described.

The embryo or foetus is morally significant, but may still be aborted in the case of impairment

Firstly, there are those who hold that, although the embryo or foetus has acquired moral status to such a degree that abortion would be impermissible in general, it may still be aborted if impairment has been detected through prenatal screening. In other words, selective abortion for foetal impairment represents an exceptional case in which abortion is morally acceptable, although the foetus is a morally significant being to such an extent

that it cannot be killed in general (in other words, in normal pregnancies). I shall call this set of justifications the justifications of selective abortion as exception.

Those who hold this view generally belong to one of two groups who hold moderate positions on abortion. I refer to these positions, following Van Bogaert, as the “soft views” on abortion, namely, the soft pro-life (or anti-abortion) positions, and soft pro-choice (or pro-abortion) positions (2000:22-39).

Soft anti-abortion positions

The soft anti-abortion position deems abortion to be, in general, morally unacceptable, as the embryo, and later the foetus, is seen as a morally significant being to such a degree that it cannot be killed. However, the soft anti-abortion positions admit of some exceptions to this general rule¹⁰. These exceptions may make reference to one or more of the factors discussed above, including: some fact about the circumstances of conception (when the pregnancy is a result of rape or when the pregnancy is a result of incest), some fact about the pregnancy (when the pregnancy represents a significant danger to the life or health of the pregnant woman), or some fact about the foetus (when the foetus or embryo has been prenatally diagnosed with impairment). It is this last exceptional case which is relevant for the purposes of this study. In this case, there is some characteristic which the embryo or foetus possesses which justifies abortion as an exception to the general moral rule prohibiting abortion as a result of the high moral status of the foetus.

Soft pro-abortion positions

The soft pro-abortion positions posit that abortion is generally morally acceptable until a particular point in pregnancy, as the embryo or foetus has not yet acquired sufficient moral significance to render its killing impermissible. However, at some point in the

¹⁰ Examples of soft anti-abortion positions include the positions that, even if the foetus is morally significant, it may still be aborted if it is “uninvited” in the case of a pregnancy resulting from rape (Thomson), or that the foetus may be aborted in self-defence (Feinberg *et al.* & English), although it may not be aborted in other contexts (cited in Van Bogaert 2000: 28-30)

pregnancy, the foetus acquires moral status, and from this point onwards, cannot be aborted¹¹. Another, similar version of this argument posits that as proximity to birth increases, the foetus gradually develops moral significance, so that the wrongness of killing it gradually increases. Various characteristics of the foetus may be taken into account in deciding whether it has achieved moral status to such a degree that it cannot be killed, and therefore the moral impermissibility of abortion may come into operation at various stages in the pregnancy, depending on what characteristics one may consider relevant in conferring moral status. Such characteristics may include sentience, which implies the ability to experience pleasure or pain (Warren 1997: 56), viability, quickening and so on. However, the important points to be made are that these positions take into account the first factor identified above, in other words the foetal age (and therefore developmental level) of the foetus, and that at some stage during the pregnancy the foetus has developed to such a level that it acquires moral status and therefore cannot be killed.

The aspect of the soft pro-abortion argument which holds interest for this study holds a similar position towards abortion to the soft anti-abortion position, except that it applies later in pregnancy. In other words, once the foetus is acknowledged to have acquired moral significance to such an extent that its killing is generally regarded as morally impermissible, this version takes the position that exceptions can be made to this general moral rule, as outlined above. Once again, the relevant exception for the purposes of this study is the case of the foetus being prenatally diagnosed with impairment. (It is important to note that not all proponents of a soft pro-abortion position would wish to make such exceptions after the point at which they posit that the foetus acquires moral status. The critique of justifications of selective abortion as exception which follows is not directed at those who hold such a position, although as shall become evident, this position may still be subject to a critique of justifications of selective abortion as distinct).

¹¹ An example of a soft pro-abortion position is Sumner's "third way" (cited in Van Bogaert 2000: 32-35).

Summary of these positions

This is the background against which this study will attempt to critique the first group of justifications of selective abortion for foetal impairment. It regards the case of selective abortion for disability as an exception to the general moral impermissibility of killing, whether this general restriction comes into operation at the moment of conception or at some point later in the pregnancy. I will therefore, as stated above, term these positions the justifications of selective abortion as exception.

It is important to note at this juncture that justifications of selective abortion as exception are extremely prevalent in legislation surrounding abortion internationally – “of the 170 countries that currently permit abortion, the majority have some provision for terminating the pregnancy on the grounds of severe impairment”. This provision often extends beyond the point in pregnancy after which abortion is generally prohibited for other reasons (Sharp *et al.* 2002: 140). It is therefore an important justification to be considered. Foetal abnormality has also been an important contributing factor to the legalisation of abortion in general. Lee *et al.* note, for example, that “the thalidomide tragedy [which led to] the birth of babies with severe limb deformities...acted to increase substantially public support for legal abortion” (1998). This attitude is still widely represented in public opinion, which tends to regard termination of pregnancy for foetal impairment as more acceptable than abortion for other reasons. In other words, more people approve of abortion for foetal impairment than approve of abortion in general (Lee *et al.* 2002: 4-5).

A position which makes an exception to the general moral impermissibility of killing a foetus, after a particular point in pregnancy, for the reason of prenatal detection of impairment, seems to be held by the Choice on Termination of Pregnancy Act of 1996. Although no reference is made to the moral significance of the foetus in this Act, it is clear by implication that such a position is held, as the reasons justifying abortion must legally become more serious as the pregnancy progresses. Any reason is acceptable in the early stages of pregnancy, reasons that are not regarded as frivolous are acceptable

from 13 weeks of pregnancy, and finally, after 20 weeks of pregnancy, abortion can only be carried out to protect the life or health of the mother, or in the case of prenatal detection of foetal impairment (South Africa 1996). The Choice on Termination of Pregnancy Act, especially as concerns the prohibition on abortion after the 20th week except in the case of the impairment of the foetus is therefore by implication included in the critique of selective abortion as exception which follows, and the conclusions which shall bring this critique to a close will also include recommendations in this regard. If the critique against the justification of selective abortion as exception is successful, this study will propose that the South African Choice on Termination of Pregnancy Act (and abortion legislation in other countries which is similar to it in this regard) will need to be reconsidered.

Abortion is morally permissible

The second background against which we can consider justifications for selective abortion are positions which hold that abortion is morally permissible. This general acceptance of the morality of abortion includes selective abortion for impairment by implication. Here, selective abortion is not seen as an exception to a general moral rule, but proceeds in accordance with the general rule. This general rule can be broadly justified in two ways.

Firstly, one could claim that the embryo or foetus is not morally significant, and therefore can be killed. This implies that the embryo or foetus has not yet acquired the characteristics which confer moral status on normal, adult human beings. As the foetus does not have moral status, it cannot be morally wrong to kill it. This is often the justification which is given for early abortion. For example, the claim is often heard that, particularly during the early stages of pregnancy, the embryo or foetus has not yet developed any of the characteristics which we generally associate with moral status. In addition, during the earliest stages of pregnancy, pre-embryos may still divide and form “two or more identical new beings”, or “subdivisions may...reunite to form a single new being” (De Roubaix *et al.* 2006: 624) which indicates the difficulty of bestowing moral

status on the embryo from the moment of conception, as we are not yet sure if we are dealing with a single being. There are various other arguments advanced which argue against the moral significance of the foetus¹², either at the early stages of pregnancy, or throughout pregnancy, which cannot be discussed at length here.

Secondly, one could claim that even if we grant that the foetus has moral status, its resulting right to life is subservient to a woman's right to reproductive autonomy and bodily integrity. Such a position is held, for example, by Thomson, who argues that the pregnant woman is not morally obliged to grant the foetus use of her body against her will, in her famous analogy of the unconscious violinist. Thomson asks us to imagine a situation in which a person has been abducted by "the Society of Music Lovers" and has then been hooked up to "a famous unconscious violinist" who needs to make use of their circulatory system for nine months while recovering from an otherwise "fatal kidney ailment". This person is the only suitable candidate to fulfil this role, as only they have the correct blood type (1971: 309). Thomson does not think that such a person would be obliged to allow the violinist to make use of their kidneys for nine months, as although the violinist is a person, with a right to life, this right to life "does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body" (1971: 315). For Thomson, abortion is an equivalent case. A woman can therefore choose whether she will grant the foetus access to her body, but she is not obligated to do so, because her right to bodily integrity trumps the right of the foetus to life as "two equal rights-bearing subjects cannot exist in one body" (Roth 2000: 188)¹³.

Once again, the claim that abortion is morally permissible appears in the context of two general positions on abortion. I refer to these positions, again following Van Bogaert, as

¹² See for example Tooley (1972), Harris (1985), Singer (1993) and Warren (1997) on the moral insignificance of the foetus from its lack of personhood.

¹³ This is a particularly interesting position on abortion with regard to selective abortion for impairment. Selective abortion implies the termination of an otherwise wanted pregnancy on the basis of foetal impairment. Therefore, in this case, the pregnant woman would have chosen to accept responsibility for the foetus, and to grant it access to her body, but this choice is altered by a diagnosis of impairment. Often, the choice is altered as a result of a concern for the interests of the foetus, or the right of the foetus not to be harmed. In this case, the pregnancy is terminated not from the perspective of right of the woman to bodily integrity, but from the perspective of the rights of the foetus.

the soft pro-choice (or pro-abortion) positions, and absolute pro-choice (or pro-abortion) positions (2000:22-39).

Soft pro-abortion positions

This group of positions on abortion has already been discussed in the preceding section with regard to its attitude towards abortion later in pregnancy. As already indicated, soft pro-abortion positions hold that, until a particular point in pregnancy (which varies widely among proponents of this position) the foetus is not morally significant, but that at this point the foetus acquires moral status and may not be killed. The aspect of soft pro-abortion positions which is relevant here is the period of gestation before which abortion becomes morally impermissible. Before this stage, the embryo or foetus is not yet morally significant and can be killed under any circumstances. This would by implication include the practice of selective abortion for foetal impairment.

Absolute pro-abortion positions

Absolute pro-abortion positions hold the view that abortion is permissible, under any circumstances and at any point in pregnancy. This view is justified by claiming that either, the embryo or foetus is not a morally significant being to an extent which would render its killing morally impermissible, as it has not acquired any of the characteristics which confer moral status on adult persons, or even if it is a morally significant being, it can be killed as its rights can justly be overridden by the pregnant woman's right to bodily integrity, as discussed earlier in this section.

Summary of these positions

This background against which we will consider the second justification of selective abortion for impairment renders a critique of this practice more complex. Why, one might ask, should we consider this justification as distinct at all? Positions which hold that abortion is permissible under any circumstances say exactly that – that we do not

need to distinguish between justifications for abortion, and in fact that these justifications are irrelevant to the morality of any act of abortion, as the act itself is morally neutral, and therefore its moral status cannot be affected by particular reasons for which it is carried out.

This may seem to be a persuasive argument, but this study will argue that although selective abortion for impairment may take place against the background of the general moral permissibility of abortion, it still represents a distinct justification. As Vehmas puts it, “selective abortion is different from other types of abortion” because “parents originally want to have a child, but when they find out that their future child is likely to [be impaired] they decide to withdraw themselves from their parental position and choose termination” (2002: 58). The term by which we refer to this practice bears testament to this. Abortion for impairment is *selective*; in other words, the abortion would not be carried out *unless* there had been a prenatal diagnosis of impairment. If this was the case, and a foetus exhibiting impairment was aborted for some other reason, we would not be justified in calling it selective abortion at all. Selective abortion for impairment takes place when an *otherwise wanted* pregnancy is terminated *purely by merit of the fact that impairment has been detected*. In other words, “knowledge of the single [disabling] trait is enough to warrant the abortion of an otherwise wanted foetus” (Parens and Asch 2003:42).

Thus, although selective abortion for impairment may take place against the background of the general moral permissibility of abortion, it still represents a distinct justification for abortion. I will term these positions, justifications for selective abortion as distinct.

Concluding remarks

It is necessary to examine the above justifications of abortion separately. Whereas the justification from exception makes an exception to a general rule prohibiting the killing of a particular kind of being because of impairment, the distinct justification does not break such a general rule. It does however, make a decision to end a pregnancy based

purely upon the future prospects and consequences of a particular life. The next two chapters will therefore deal with each justification separately. Whereas, I think, the justification from exception primarily faces the difficulty of inconsistency between the claims that we should respect the lives of persons living with impairments, and that we can make an exception to a general moral rule against killing before birth based entirely upon their impairments, the justification as distinct is far more complex, and calls for an entirely different critique. This critique will deal largely with the discriminatory assumptions about impairment which may underlie a decision to terminate an affected pregnancy in this case, as well as the problematic nature of variants of this justification which regard selective abortion as morally obligatory.

5 A Critique of Justifications for Selective Abortion as Exception

Introduction

In the previous chapter, an attempt was made to show that justifications of selective abortion for impairment occur against a background of attitudes towards abortion in general, and that knowledge of these backgrounds is relevant in launching a critique of this practice. As indicated, the proponents of what has been termed the justifications of selective abortion as exception hold that selective abortion for reasons of foetal impairment is morally justifiable, but that this is an exception to the general rule against killing the foetus which would hold in normal circumstances. This general rule is based upon the presumption (which is not the focus of this study) that the embryo or foetus has from conception, or acquires at some point in pregnancy, moral status, and that this moral status is of such a nature that it renders the killing of such a being morally reprehensible.

Moral status implies that those beings which possess it are entities “towards which moral agents have...moral obligations”. These obligations entail the duty to take into account such a being’s “needs, interests, or well-being...not merely because it may benefit ourselves or other persons, but because its needs have moral importance in their own right” (Warren 2002: 3). Moral status does not necessarily imply an automatic prohibition against killing beings which possess it. For example, many would propose that although some animals have moral status, because they are sentient beings with the capacity to suffer, this moral status is not of such a nature that it prohibits their killing. This is because, although they have an interest in avoiding suffering, they do not have and will never achieve the higher level consciousness which would allow them to have an interest in their continued existence. Thus, although moral agents have an obligation to consider their interest in avoiding suffering, by, for example, avoiding or preventing the infliction upon such beings of needless pain, there is no general moral prohibition against killing them, because this would not deprive them of any rights or frustrate their interests. However, the proponents of selective abortion as exception do consider the foetus to be the type of being which is morally significant in such a way, or which has moral status to

such a level, that its killing is generally morally wrong. Thus, if the assertion that the foetus has moral status is tantamount to claiming that it is “worthy of moral consideration” in that we should consider its “rights and interests” (Edwards 1997: 30), they are claiming that the foetus has the relevant right to life, or interest in continued existence¹⁴ which would render its killing morally wrong. In other words, we regard the continued existence of the foetus as being in its best interest, a fact which we are obliged to consider in our ethical deliberations¹⁵. According to those who concur with this conviction, the moral status of the foetus, and the resultant moral wrongness of killing it, may arise, either from the fact that “foetuses...are human beings, and thus have the same right to life as other human beings” or “by virtue of [foetuses’] potential to *become* human beings” (Warren 2001: 127). Because we generally consider the continued existence of adult human beings to be in their best interests, and we therefore seriously harm such beings by depriving them of continued life, foetuses would share this interest by merit of their status as human beings or potential human beings. Under this view, the foetus therefore has moral status either equal to, or closely approximating, the moral status of adult persons.

¹⁴ It is unlikely that the interest in continued existence which is attributed to the foetus could be regarded as an actual interest (in the sense of a conscious desire or preference), as the foetus (or, indeed, newborn) has not reached a level of cognitive development which would allow it to hold such a conscious desire or preference. Rather, it amounts to a judgement made by existing moral agents that continued existence is in the best interests of the foetus (by merit of its similarities to or continuity with adult human persons) as this is the precondition for its enjoying a worthwhile future, constituted by future worthwhile experiences and opportunities.

¹⁵ The other possible motivation for regarding the killing of the foetus as morally wrong is what Kuhse and Singer term the “doctrine of the sanctity of [human] life” (1985: 121). This position holds that it is intrinsically wrong to take human life, regardless of whether the human organism in question is benefited or harmed by the deprivation of their life, or, in other words, regardless of whether continued existence is in their best interest. However, holding such a position would appear to exclude the possibility of simultaneously justifying selective abortion as exception, as the innate sanctity of human life would prevent one making exceptions to the moral wrongness of killing human beings, whatever the circumstances or particulars of specific human lives. Thus, those who hold such a view tend to ascribe to what has been termed in Chapter 2 the absolute anti-abortion position, which is not subject to critique by this study. If allowance is made within a position, which emphasizes the irreducible sanctity of human life, for selective abortion on the basis of impairment, this already seems to amount to direct discrimination, as it implies that while the lives of ordinary members of the human species are sacred, the lives of those members who are disabled are not.

The question which I wish to pose in this chapter, is whether, taking into account all of the above, it is possible to simultaneously make the following set of claims without being accused of inconsistency:

- As a general rule, the embryo or foetus has moral status which renders its killing morally wrong (after the point at which this moral status is acquired).
- As an exception to the above rule, the embryo or foetus can be killed, after the acquisition of moral status, in the case of the prenatal detection of impairment.
- The lives of persons with impairments are, after birth, as worthy of protection as human beings who enjoy species-typical functioning.

If the second claim above cannot be reconciled with the final claim, this would imply that justifications for selective abortion as exception may implicitly deny that the lives of persons with disabilities are as worthy of protection as the lives of other persons after birth. This would seem to amount to a discriminatory attitude towards those who are disabled, and would sanction discriminatory practices (provided that justifications for selective abortion as exception are not able to provide convincing moral reasons for the differential treatment of foetuses, or persons, with disabilities). Discrimination in this context means “to treat a person or particular group of people differently, especially in a worse way from the way in which you treat other people, because of their [particular characteristics]” (Cambridge Advanced Learner’s Dictionary 2007), and in the specific sense that this differential treatment is unfair (or not merited by their particular characteristics). The purpose of this chapter will therefore be to evaluate justifications of selective abortion as exception in these terms.

We can once again point out that a position justifying selective abortion as exception for reasons of foetal impairment is implicitly held by the South African Choice on Termination of Pregnancy Act of 1996. While the Act makes no reference to the moral status of the foetus, it prohibits the killing of the foetus in general after 20 weeks, but identifies selective abortion for foetal impairment as one of the exceptions to this prohibition. While the purported aim of the Act is to “promote female autonomy” with

regard to reproductive decision making, and the failure to discuss the moral status of the foetus appears to “imply its moral insignificance” (De Roubaix *et al.* 2006a: 623), the right of the pregnant woman to reproductive autonomy is legally restricted after 20 weeks. Under South African law, termination of pregnancy can only be carried out after the 20th week of the gestation period if one of two sets of specific conditions are met, namely, if the continued pregnancy:

- “(i) would endanger the woman’s life;
- (ii) would result in a severe malformation of the fetus [sic]; or
- (iii) would pose a risk of injury to the fetus [sic]” (South Africa 1996).

It is difficult to imagine what other motivation there could be for these restrictions on abortion after 20 weeks, except an implicit conviction that the foetus has reached a level of development which confers upon it moral status to an extent which renders its killing generally morally impermissible, although the resultant right to life of the foetus is only legally recognised “indirectly” (De Roubaix *et al.* 2006b: 218). If no considerations of this nature were to be taken into account, it would be difficult to identify a rationale for depriving the pregnant woman of her reproductive autonomy after this point. It therefore seems that the Choice on Termination of Pregnancy Act severely restricts the right to abortion after 20 weeks because the right to “female autonomy” attributed to the pregnant woman (South Africa 1996) begins to come into conflict with the developed foetus’s right to or interest in continued existence. The implicit position of this Act appears to be that the moral status of the foetus at this point, and its resultant right to life, justly overrides the right of the pregnant woman to reproductive autonomy, and thus to unfettered access to abortion.

With regard to the Act’s position on selective abortion as exception, it is noteworthy that other justifications for abortion which are perceived to be particularly weighty, for example, justifications for terminations of pregnancies resulting from rape or incest, are excluded as reasons which legitimately justify abortion after the 20th week of the gestation period. This constructs prenatal detection of impairment (defined in the Act as

“severe malformation” or “injury”), along with the risk of death for the pregnant woman, as the strongest possible motivations for abortion, justifying an exception to the general moral wrongness of killing the developed foetus at a stage when other justifications do not suffice. This is a position shared by “many people who believe that there is a limit during pregnancy beyond which abortion becomes seriously wrong [but] also believe that this limit can be overridden in some cases of severe [disability]” (Norup 1997: 444).

In other legislation mentioned in Chapter 2, a simultaneous commitment is made to recognize the equal status of people with impairments, to advance their interests and to protect their rights as a group vulnerable to discrimination. As a particular instance of the general question posed in this chapter then, is it possible to reconcile this commitment to the exception made in South African law for foetal impairment to the general moral impermissibility of abortion after 20 weeks gestation?

In order to evaluate selective abortion as exception in this way, we must revisit the utilitarian justifications for selective abortion identified in Chapter 3, and interrogate whether these justifications are valid, given the underlying assumption made by justifications for selective abortion as exception that the foetus is a morally significant being which should ordinarily not be killed. We will therefore once again examine the relevance of the interests of each of the four parties identified in Chapter 3 to the morality of the practice of selective abortion following foetal impairment, giving specific attention to the question as to whether these interests are sufficient to outweigh the moral status of the foetus.

Before we embark upon this examination, we can firstly note that we do have precedents for making exceptions to the general moral prohibition against killing beings with moral status which have a right to life, or an interest in continued existence. Most people, for example, think that it is acceptable to kill such a being in self-defence¹⁶. Some people

¹⁶ Note that the other exception to the legal cut-off point of 20 weeks, after which abortion cannot generally be carried out according to the Choice on Termination of Pregnancy Act, is the case of a continued pregnancy representing a danger to a woman’s life (South Africa 1996). Abortion in this case has often been constructed as an instance of self-defence in bioethical argumentation around abortion (Thomson

think that it is also acceptable to make exceptions to the general rule against killing beings with moral status in situations of war, as an instance of capital punishment, or as an instance of euthanasia. According to those who hold these positions, we have good moral reasons for making these exceptions¹⁷. We must therefore determine whether the utilitarian justifications for selective abortion identified in Chapter 3 count as such good moral reasons, in the context of selective abortion as exception. If this is the case, it would appear that such justifications could avoid charges of discrimination, as the differential treatment of disabled and able-bodied fetuses (considered to be morally significant by proponents of this position) would be legitimately motivated by the difference of disability. If these justifications fail, however, and the characteristic of impairment cannot be shown to justify this differential treatment, this treatment would therefore be unjustified or unfair, and selective abortion as exception would indeed be discriminatory.

Selective abortion as exception is in the best interests of the foetus/future person

We can firstly consider whether the interests of the foetus or future person in selective abortion are sufficient to outweigh the interest of the foetus in its continued existence, or its right to life. At first glance, this question seems to amount to a logical contradiction. However, we can reformulate the problem by asking whether the interests of the foetus in avoiding suffering or harm respectively may outweigh the interest of the foetus in continued existence.

If the justification of selective abortion from foetal interests is legitimate, it is likely to be the most persuasive of the arguments for selective abortion as exception, as it does not imply that the interest of the foetus in continued existence, or its right to life, is dismissed for the benefit of others. Although it is possible that this latter justification would hold in some cases, where the interests of others are particularly weighty, it is, as Warren points

1971: 312-313), albeit against an innocent aggressor. Under this view, the pregnant woman has a right to defend her life against a threat, which presents itself in the form of the foetus.

¹⁷ These reasons often refer either to the interests of others (in the case of war or capital punishment) or to the interests of the party concerned (in the case of euthanasia).

out, “at best, morally problematic to allow human beings who have a right to life to be killed simply to prevent bad consequences to other human beings” (2001: 129). Justifications of selective abortion as exception from the perspective of foetal interests avoid the moral complexities inherent in balancing the right to life of one being against the interests of others. Rather, these justifications focus entirely upon the being who possesses this right to life, and thus amount to a display of respect and consideration for the interests of the foetus, as we allow the foetus’s strongest interests (whether they be in continued existence or in avoiding suffering or harm) to determine the direction of our action. Thus, if this justification is valid, it would re-affirm rather than dismiss the moral status of the foetus as a being towards which moral agents have obligations.

This also implies that, if the arguments offered in favour of selective abortion as exception from the perspective of foetal interests are convincing, selective abortion may indeed be morally *obligatory*, rather than morally neutral. If the foetus is a being with moral status, whose interests we must therefore take into account, and its interest in avoiding suffering or harm outweighs its interest in continued existence, we are obliged as moral agents to respect and further that interest. As the foetus is in a highly vulnerable state, and has no choice in its coming into existence, nor control over “any other factor that will affect the kind of life [it] will live” (Vehmas 2002: 53), we are all the more obliged to further the interests of that being, as it is unable to do so itself, and living persons are able to take actions on its behalf. This implies that we (and particularly the pregnant woman who is often the decision maker in this regard) have a responsibility “for preventing harm or suffering that might come to this needy being” (Blustein 1979: 116). As the foetus is considered to be a being with moral status, it is imperative that we carefully evaluate the interests of this peculiarly vulnerable being which currently lacks agency, and whose future is entirely in the hands of others.

The obligation which requires us to consider the interests of the foetus as a being with moral status, however, also indicates that the reverse may apply – if the foetus is a being with moral status and its interest in continued existence outweighs its interests in avoiding harm or suffering, then we must respect this interest too, so that we are morally

obliged not to abort for impairment, in the same way that we are morally obliged not to abort for other reasons, unless it can be shown that the foetus's interests in its continued existence is outweighed by other considerations (namely, the significant interests of others).

As mentioned above, we do have a precedent for moral argumentation in favour of making an exception to the general rule against killing morally significant beings, from the perspective of their own interests, in the practice of euthanasia. Although this topic remains controversial, it clearly has much in common with the argument for selective abortion as exception from the perspective of foetal interests. Both are supported by the principle of beneficence, which seeks to promote the "well-being of individuals", and both rely on the assumption that, in some cases, "continuing to live can inflict more pain and suffering than death" (Baergen 2001: 209). In other words, both acknowledge that there are circumstances in which one's interest in continued existence can be outweighed or negated by one's interest in avoiding suffering or harm, and that this is true from the perspective of the affected individual.

This section will therefore seek to determine whether the foetus has an interest in avoiding suffering or harm which outweighs the interest which it has, according to the proponents of selective abortion as exception, in continued existence.

Avoiding suffering

As mentioned in Chapter 2, those who justify selective abortion from the perspective of foetal interests in avoiding suffering generally have in mind the interest which such beings have in avoiding physical suffering, emotional suffering, or some combination of these two factors, resulting in a very low quality of life. We must therefore consider whether these considerations are sufficient to outweigh the foetus's right to life or interest in continued existence.

It has already been shown that it is indisputable that some impairment is accompanied by suffering. To underestimate or dismiss the burden this imposes upon individuals would certainly be a moral mistake. These persons do have a strong interest in avoiding suffering, as all sentient beings do. However, we must note how the argument for selective abortion from the perspective of foetal interests must be formulated. In order for it to be in one's best interest, from the point of view of suffering incurred, to be killed or to be deprived of future existence, given the moral significance of the being to be killed, this suffering must be so great that it would be better for that being not to exist. In other words, it must be likely that the suffering accompanying a particular condition would cause the benefit acquired from continued existence to be outweighed by the burden imposed by suffering, *from the perspective of the subject of that suffering*. Suffering in this case would diminish the quality of life of the affected individual to such an extent that their quality of life would "not merely [be] low, but negative" (Sheldon *et al.* 2001), so that they would not find their life worthwhile, and their interest in continued existence would therefore be negated.

As indicated above, there are certainly examples of cases where, from the perspective of the individual, this is true. There may be circumstances in which one's suffering is so great that it makes one's life a burden rather than a benefit, and consequently one would prefer not to exist. To support this claim we need not rely upon conjecture – we have for evidence the testimony of many people, affected by illness, disease or infirmity, who assert that they would prefer to end their lives rather than to continue their current afflicted existence, or before the suffering which is likely to accompany their particular ailment arises. This is reflected in requests for, and instances of, voluntary euthanasia. These arguments are put forward by those most intimately involved with such experiences, and their autonomous evaluation of their own quality of life must be taken seriously to avoid charges of paternalism. Thus we can conclude that there may be cases in which suffering implies that "continued life is no longer in [the affected person's] interests" (Landman 1998: 243).

If we accept the moral precedent of euthanasia, it seems that selective abortion as exception following the detection of foetal impairment can be justified, provided this impairment is likely to result in suffering which is so great that it would outweigh or negate the sufferer's interests in continued existence, as we would therefore not be depriving the individual of anything, but would rather be acting to ensure their wellbeing. However, proponents of selective abortion as exception immediately encounter another problem. One of the fundamental motivations for the legalisation of euthanasia is an increased emphasis on the principle of autonomy in medical treatment, which implies that physicians and other health care professionals should respect and recognise their patient's "capacities and perspective, including his or her right to hold views, to make choices, and to take actions based on personal values and beliefs" (Beauchamp *et al.* 1989: 71). This principle would imply that the patient is (best) able to make judgements about their quality of life, which should be respected. Thus the principle of autonomy, or "individual self-determination", is foundational to arguments for voluntary euthanasia and physician assisted suicide. Note that the principle of autonomy can still support the practice of euthanasia if an individual has lost the capacity to make autonomous decisions in this regard, but has previously, while in possession of this faculty, indicated how they would prefer to be treated in a particular situation, either "orally or in a written advance directive" (Hafemeister *et al.* 1996: 18).

This obviously poses a problem for proponents of selective abortion as exception, who rely upon a consideration of foetal interests to support their position. How do we judge whether the suffering of another being, whose moral significance generally precludes its killing, is so great that it would be better, from its own perspective, not to exist, when the nature of that being precludes its being able to express its preference in this regard? In other words, selective abortion carried out to avoid future foetal suffering necessarily implies that a moral agent other than the affected individual make this decision, without real knowledge of what that particular being's preference would be, which seems to undermine the (future) autonomy of the foetus, and to amount to a paternalistic judgement about the quality of life of another being (and, by implication, other beings with similar characteristics). This is further complicated by the fact that, often, disabling

conditions which result in great suffering preclude the possibility of the affected individual *ever* developing the capacity to make autonomous decisions, as a result of severe cognitive impairment or the likelihood of extremely premature death.

This objection, however, can be countered. Until now, we have only referred to voluntary euthanasia; that is “euthanasia carried out at the request of the person killed” (Singer 1993: 176), when that request is made either at the time of death, or in advance by written or oral specifications as to preferred treatment in the future. However, we can also make reference to other types of euthanasia. Firstly, involuntary euthanasia takes place when a competent person is killed without ascertaining their wishes or in opposition to their wishes in this regard. This is obviously in direct conflict with the principle of autonomy, and presumably occurs very rarely. Secondly, non-voluntary euthanasia takes place when “a human being is not capable of understanding the choice between life and death” and is therefore unable to make an autonomous decision in favour of or against euthanasia. This may occur as a result of “severe disab[ility]...accident, illness, or old age” and implies that a particular individual has either never had, or has “permanently lost the capacity to understand the issues involved, without having previously requested or rejected euthanasia in these circumstances” (Singer 1993: 179).

In these cases, advocates of non-voluntary euthanasia suggest that surrogate decision makers could be instated (usually a member of the family) to make these decisions for the incompetent patient. As there is no indication as to the preferences of the individual concerned, such decisions are generally “guided by the best interests principle which looks to what most reasonable persons would want in the circumstances” (Brock 2001: 233). In the case of selective abortion as exception for reasons of foetal impairment, the “proxy chooser, who acts as the [foetus’s] advocate” (Steinbock 1994: 16) may be one of four parties. If the prospective parents of the foetus, or particularly the pregnant woman, are legally responsible for making decisions around termination, they will take up the role of surrogate decision maker. Alternatively, and as is currently the case in the Choice on Termination of Pregnancy Act in its pronouncements on abortion after the 20th week of

the gestation period, “medical practitioner[s]” could be responsible for deciding whether a particular impairment merits termination (South Africa 1996). A third possibility would be that the State establishes guidelines in this regard, possibly in the form of a list of disabilities justifying abortion as exception, or simply by stating the motivations for making exceptions to the general moral impermissibility of abortion explicitly. Finally, and particularly in cases in which disagreement existed about whether a particular condition merited termination, the courts could be responsible for interpreting these guidelines in specific instances¹⁸.

Thus, if we accept the morality of the practice of voluntary and, specifically, non-voluntary euthanasia, governed by the guidelines above, as motivated by the conviction that it is morally good to respect the interest of a being with moral status in avoiding suffering, especially if this interest outweighs its interest in continued existence, the argument for selective abortion as exception from the perspective of foetal interest in avoiding suffering seems legitimate. However, there is more that must be said about this. When we (or the parties responsible for making such decisions) make a judgement about whether the foetus’s interest in avoiding suffering outweighs its interest in continued existence, we must be guided by the best interests principle, in other words, we should determine what a reasonable person would prefer in similar circumstances.

We could therefore formulate the argument for selective abortion from the perspective of foetal interests in avoiding suffering as follows:

- Premise 1: The foetus has moral status which generally renders its killing morally wrong.
- Premise 2: A being with moral status which generally renders its killing morally wrong can be killed if it is evident (from their own testimony, or in the cases of an inability to articulate or hold a preference, from what a reasonable person¹⁹ would

¹⁸ These regulations would apply not only to cases of selective abortion as exception, but also to cases of non-voluntary euthanasia after birth.

¹⁹ This prescription would have to take into account that the standard of reasonableness referred to here would imply that such a person would be trusted to evaluate the best interests of a particular being; in other

prefer in the circumstances) that it is experiencing, or will experience suffering so great that its interest in continued existence is negated.

- Conclusion: The foetus can be killed if it is evident that it will experience suffering, as a result of impairment, so great that its interest in continued existence is negated.

This argument appears to be valid. Its validity lies in the fact that what generally makes the killing of a being with moral status morally wrong (the fact that its continued existence is in its best interests) is negated by suffering of a particular degree (which implies that its continued existence is not in its best interest). Thus an exception can justly be made to the general moral wrongness of killing beings with moral status, as the motivation for this general moral principle no longer applies in this case.

However, what must be noted is that this argument is valid *only* in cases where suffering is so great that, from the perspective of the suffering being, its continued existence will constitute a burden rather than a benefit, so that its continued existence will no longer be in its best interests (and in fact that death will be its best interests). We must now turn to another question: do the majority of disabling conditions which are used to justify selective abortion as exception imply suffering of this nature?

Our standard here should be what has been formulated above as the best interests principle, in other words, what a rational person would prefer, were they afflicted with such a disability. I would like to argue that, from this perspective, the cases where impairment implies suffering of such severity that continued existence is not in one's best interests are rare and exceptional. The vast majority of conditions which can be detected prenatally do not result in this measure of suffering. In other words, the experience of disability does not, in most cases, preclude the possibility of leading a satisfying life. One therefore cannot claim, that, in most cases, the suffering caused by disability "is so

words, that they would not be biased in their evaluation (either by prejudice, or by consideration of their own interests in a particular outcome).

terrible that [continued existence] is no longer a benefit or a good to the one who lives” (Steinbock 1994: 16).

It is true that some conditions imply such a great deal of suffering that most rational persons would prefer not to exist in such a state. Gillon points out that “[t]here may be disabilities that are so awful, like Lesch Nyhan syndrome where people are in constant pain all the time, that everyone would agree potential sufferers would prefer not to exist or to be dead rather than have constant torture” (1998). Asch, too, acknowledges that there are disabling conditions which imply “early degeneration, intractable pain, and early death” (1999:1653). In these cases, the argument formulated above for selective abortion as exception is valid, as it fulfils the requirements of the best interests principle. However, Gillon goes on to point out that “[e]xamples like these are very few and far between” (1998). In fact, “[r]elatively few impaired newborns, even those with the severest anomalies, have lives filled with severe, chronic, and intractable pain” (Steinbock 1994: 16). Asch draws attention to the fact that, for children who do not have these particular conditions, but who experience other disabilities, “life offers a host of interactions with the physical and social world in which people can be involved to their...satisfaction” and that this remains true even if the biological fact of impairment “entail[s] physical pain” or other forms of suffering (1999:1653).

If the judgement that disability does not always imply the negation of one’s interest in continued existence is made without reference to the best interests principle, it is possible that one may be accused of paternalism, by disregarding the impact which suffering may have on the lives of those who live with disability. However, the best interests principle allows us to avoid this charge. This demands that we determine what a rational person would prefer in similar circumstances. Initially, this might seem to undermine the conclusion, as many able-bodied people assert that they would prefer not to exist than to live with a particular impairment, for example, in statements that “they would not want to live if they had to use a wheelchair, lost their eyesight, were dependent on others for care, and so on” (Wendell 1996: 38). However, even if this is true for some people (although it is probably not true for the majority), we must bear in mind that this judgement is made

from the perspective of one who has not yet experienced such impairment, and for whom disability therefore represents the *loss* of valued abilities, or whose preconceived “belief that life would not be worth living with a disability would be enough to prevent them from imagining their own disablement” (Wendell 1996: 38). It would therefore be preferable, when asking what a rational person would prefer in similar circumstances, to take into account the expressed preferences of those who are in the best position to understand the experience of living with disability. Here, we can refer to the experiences of those people who have first-hand experience of disability, in other words, to the testimony of many people who experience the day-to-day reality of living with impairment. As Silvers points out, if the perceptions of the able-bodied expressed above were accurate indicators of what life was like with disability, “the suicide rate among people with disabilities would be much greater than it is” (Silvers 1995: 36). This allows one to safely argue that not all suffering caused by impairment, from the perspective of the affected individual, implies that it would be better not to have lived, or that one’s interest in continued existence is negated. As Gillon asserts in rejecting the foetal interests argument for selective abortion (although she supports the practice for other reasons), “people when confronted with [the] alternative [of non-existence] are jolly pleased that they are alive, disabilities or not”. In fact, this is understating the case. Not only would most people with disabilities prefer to exist with impairment than not at all, but they find their lives with disability stimulating, satisfying, valuable and meaningful in the same way that most able-bodied people do. Asch echoes this assertion by pointing out that “[a]utobiographical writings...testify eloquently to the rich lives and even richer futures that are possible for people with disabilities today” (1999:1653).

Thus “killing [the foetus] cannot be seen as an obligation unless it is undoubtedly in the best interest of [the foetus] to die” (Vehmas 2002: 59). Proponents of selective abortion as exception from the perspective of foetal interests in avoiding suffering fail to show that this is the case for all but a few forms of impairment. The argument can be taken further – in most cases, it is in the best interests of the foetus to continue to exist, and the moral wrongness of killing such beings, given their moral status, stands. Thus, if selective abortion as exception is carried out for foetal impairment which does not negate the

foetus's interest in continued existence (and there are no other good moral reasons for making an exception to killing a being with moral status in such circumstances) this implies that the disabled foetus is unjustly deprived of its interest in continued existence. The foetus is thus treated in a way which is worse than the treatment given to its able-bodied counterparts, on the basis of its impairment, and if this differential treatment is not justified by other good moral reasons, this clearly amounts to discrimination.

It may be that justifying selective abortion as exception from the point of view of foetal interests in avoiding suffering is a hasty reaction to the problematic which often goes unchallenged, but which rests upon inadequate knowledge of what life is like with impairment. While this justification may be indeed be valid in a small number of cases, where a rational person would conclude that one's interest in continued existence is negated by one's interest in avoiding suffering, it does not hold for many of the conditions which currently justify selective abortion.

This has important implications for distinctions in abortion legislation with regard to foetal impairment, such as the distinction after 20 weeks in the Choice on Termination of Pregnancy Act. If these distinctions implicitly rely upon a justification of this nature, the motivations for making exceptions to the general impermissibility of abortion must be taken into account. These motivations could be expressed either in the form of guidelines as to what conditions would justify abortion for reasons of foetal interests in avoiding suffering, or in assertions as to what the rationale should be behind terminations carried out after the legal cut-off point, to allow the relevant decision makers to evaluate the particular circumstances of a pregnancy in these terms.

Before we move on, there are two final remarks to be made. Firstly, the argument from selective abortion as exception from foetal suffering does not provide a justification for the termination of pregnancies affected by foetal impairment which precludes the possibility of the future child developing the capacity to suffer. Thus it would not provide a justification for the selective abortion of fetuses afflicted by anencephaly, as this condition precludes the development of consciousness, which would exclude the

possibility of suffering in the sense recognised in this discussion²⁰. This will become relevant in the following section. Secondly, those who accept selective abortion as exception necessarily accept the premises of the argument as formulated above. This implies that, in order to be morally consistent, they must also accept the practice of euthanasia in similar circumstances after birth, as the morality of this practice is necessarily implied by Premise 2, which holds that a being with moral status which generally renders its killing morally wrong can be killed if it is evident (from their own testimony, or in the cases of an inability to articulate or hold a preference, from what a reasonable person would prefer in the circumstances) that it is experiencing, or will experience suffering so great that its interest in continued existence is negated.

Avoiding harm

The second argument from foetal interests in favour of the practice of selective abortion as exception refers to the foetus's interest in avoiding harm. As indicated in Chapter 3, those who propose this argument contend that the harm of disability is intrinsic, and lies in the deprivation of worthwhile experiences, accessible to those who enjoy species-typical functioning, imposed by the impairment itself. In other words, the harm of blindness lies in the deprivation of the ability to see, and thus the deprivation of all those experiences and opportunities which seeing makes possible, and which are not possible without seeing. This section will seek to evaluate whether this argument is valid, in the context of the general moral wrongness of killing the foetus arising from its high moral status. In other words, is the foetus's interest in avoiding harm strong enough to outweigh its interest in continued existence (or the fact that continued existence is in its best interests), or, given the moral significance of the foetus, is it better from the perspective of the foetus to be killed than to be harmed by disability?

²⁰ In addition, if we consider emotional suffering in particular, and acknowledge that “those...who are handicapped by multi-system defects suffer far more if they have normal intelligence than if they are retarded [because] only the intelligent will realise fully...what they have missed [and] will worry about the future” (Lorber, cited in Kuhse *et al.* 1985: 62), it also seems to imply that selective abortion is *less* justifiable for those foetuses which have severe cognitive disabilities and/or physical disabilities than for those whose disabilities do not affect cognitive functioning.

Before we embark upon a critique of this justification of selective abortion as exception, we can again point out that the account of disability as formulated above provides a good explanation for why it is morally wrong to deliberately bring about impairment, or treat persons in such a way that it is likely that this treatment will result in impairment. If our actions lead, directly or indirectly, to an individual losing the ability to hear, see or walk, or if they bring about the reduction of that individual's level of mental functioning, we can justly be accused of harming that person, as we have deprived them of future worthwhile experiences and opportunities for which hearing, seeing, walking, or higher mental functioning are necessary. Does this imply that we harm the foetus by allowing it to continue an existence which necessarily excludes similar experiences and opportunities?

If we are to accept this particular argument for selective abortion as exception, we would have to accept the following reasoning:

- Premise 1: The foetus has moral status which generally renders its killing morally wrong.
- Premise 2: A being with moral status which generally renders its killing morally wrong can be killed if it is evident that such a being would be harmed by experiencing significantly reduced life options relative to its peers, and by the deprivation of worthwhile experiences available to its peers, as a result of disability.
- Conclusion: The foetus can be killed if it is evident that it would be harmed by experiencing significantly reduced life options relative to its peers, and by the deprivation of worthwhile experiences available to its peers, as a result of disability.

The problem with this argument, in the context of justifications of selective abortion as exception, lies with the implicit motivation for Premise 1; in other words, with the motivations for the general moral impermissibility of killing beings with moral status. Presumably, it is wrong to kill a morally significant being because this amounts to

harming that being by depriving them of their interest in continued existence, or because continued existence is in that being's best interests. Continued existence is in the best interests of a being with moral status because continued existence is the precondition for future worthwhile experiences and opportunities, as "existence precedes experience" (Lovering 2005: 135). We therefore harm a being with moral status by depriving it of the precondition for its future opportunities and experiences – its existence. Even if the foetus's interest in continued existence is not actual (as it has not yet developed the physiological equipment which enables consciousness), but is based upon its status as a potential person, the general wrongness of killing it can still be explained by reference to its deprivation of future experiences:

Pre-personal growth and development is along a progressive continuum, and to interrupt this development will deprive the [foetus] of a future and the ability to eventually become a moral agent...Deprivation of this type of future...explains the fundamental wrongness of killing a pre-person (De Roubaix *et al.* 2006b: 212).

Thus the foetus which is considered to have moral status may be harmed by "termination of pregnancy" (Botkin 1995: 36) which necessarily deprives the foetus of its future, and all the experiences enabled by its continued existence. This is the implicit motivation for the conviction of the general wrongness of abortion held by proponents of selective abortion as exception. Note that this is compatible with the definition of the harm imposed by disability proposed by Premise 2, as the reduction of (future) life options and the deprivation of (future) worthwhile experiences. Therefore, the harm imposed by ending life, which motivates convictions as to the general moral wrongness of killing beings with moral status, and the harm of disability as defined in this argument, derive from the same kind of deprivation. Thus, it seems that we must choose, in this justification for selective abortion, between causing harm to a being with moral status by killing it, or failing to prevent harm to a being with moral status by allowing that being to continue to exist and thus to experience disability. Presumably, to act morally, we should choose to act in a way which is least harmful to beings with moral status (if we cannot eschew harm altogether). We must therefore establish which of these harms is greater, and proceed in a manner which will avoid this greater harm.

Although the worse harm (by the definition of harm established in the premises of the argument) is self-evident, it is worth providing an analysis of why this is so. Disability is seen as harmful because it forecloses certain experiences, options and opportunities which are available to those who are able-bodied. However, this constructs the deprivation of one's continued existence as a far greater harm than disability, in the terms of the argument, because death forecloses the possibility of *any* future experiences, options and opportunities (Marquis 1989: 189). Thus, while disability may indeed exclude the possibility of *some* future experiences and opportunities, death excludes the possibility of *all* future experiences and opportunities.

Therefore, while disability may impose a limit upon one's range of opportunities or future experiences to varying degrees (and may be harmful in this sense), it does not exclude all or even most opportunities. Asch notes the following:

People who use a wheelchair for mobility will not climb mountains; people with the intellectual disabilities of Down syndrome or fragile X chromosome are not likely to read this article and engage in debate about its merits and shortcomings. Yet, as disability scholars point out, such limitations do not preclude a whole class of experiences, but only certain instances in which these experiences might occur. People who move through the world in wheelchairs may not be able to climb mountains, but they can and do participate in other athletic activities that are challenging and exhilarating and call for stamina, alertness and teamwork. Similarly, people who have Down syndrome or fragile X chromosome are able to have other experiences of thinking hard about important questions and making distinctions and decisions. Thus they exercise capacities for reflection and judgement, even if not in the rarefied [sic] world of abstract verbal argument (1999:1652).

In other words, while it may be true that people born with impairments do not enjoy "an open future" and if we grant that impairment imposes "significantly reduced life options" on sufferers (Green 1997: 10), this does not imply, if we follow this metaphor, that the future is therefore "closed". However, to deprive a morally significant being of continued existence in which it has an interest does indeed close off the future altogether.

The argument above is therefore logically contradictory, as it justifies selective abortion for foetal impairment as an exception to the rule against killing morally significant beings, because impairment is considered to be harmful, and one should avoid causing harm. However, it fails to take into account that the method of avoiding this harm (the deprivation of future existence) inflicts a much greater harm upon the morally significant being than disability. If the motivation of selective abortion as exception in this case is an attempt to avoid harming the foetus, this justification is therefore self-undermining, as it avoids harm by causing greater harm, and thus flouts its own implicit premise that we should avoid harming morally significant beings.

The argument for selective abortion as exception from the perspective of foetal interest in avoiding harm therefore fails. However, the critique of this justification, as expressed in this section, relies upon the assumption by proponents of selective abortion as exception that the foetus is a being with moral status which renders its killing morally wrong, and for which being the deprivation of future existence and the experiences which it precedes constitutes a serious harm. This justification must be treated quite differently if it occurs simultaneously with a conviction that the foetus is morally insignificant, and is therefore not harmed by the deprivation of its future existence. This argument will be considered in the following chapter. As it stands however, it fails to provide good moral reasons for the differential treatment of foetuses with high moral status based upon the characteristic of impairment, and thus fails to avoid charges of discrimination.

There is a final implication which can be garnered from the justification of selective abortion as exception from the perspective of foetal interests in avoiding harm. This justification regards the harm of both disability and death as lying in the deprivation of future experiences and opportunities. This has important repercussions for those who suffer from impairments which, because they preclude the development of consciousness, also exclude the possibility of any future experiences and opportunities. Anencephaly is such a condition. Therefore, those who suffer from conditions that rule out any development of even the most minimal level of consciousness cannot be harmed by the deprivation of their continued existence, as this does not deprive them of any future

opportunities and experiences which they could possibly have had. The harm which the deprivation of future existence imposes upon morally significant beings has already been imposed by their impairment. The killing of such a being, either through abortion or through euthanasia, is therefore a morally neutral action, as such a being cannot be meaningfully harmed by the deprivation of future existence, and no wrong is therefore done unless its killing would harm other morally significant beings. Selective abortion in such cases could even be constructed as morally desirable as “non-existence is rationally preferable in the strong sense if all of the impaired person’s interests...are doomed to defeat” (Steinbock 1994: 16). In the case of anencephaly, any future interests which would otherwise have developed are doomed to defeat as a result of a lack of minimal consciousness. For example, Wong suggests, as a “very thin version of the good that would suffice as a baseline below which lives would be considered to be worthless” the following:

A life isn’t worth living unless a person 1) takes pleasure at least occasionally in being alive, and 2) can share her experiences with other people by using body language, or could look forward to doing so” (Wong 2002: 93).

Both of these classes of experiences are excluded by conditions such as anencephaly. We therefore do not harm anencephalic fetuses, or fetuses suffering from similar conditions, by the deprivation of their future existence, as the minimal level of future experiences which would render this existence worthwhile, and which imply that continued existence is in the best interest of other beings with moral status, is inaccessible to them.

Selective abortion as exception is in the best interests of the next child

The following party whose interests are considered relevant in decision making around selective abortion is the next child. This justification entails a comparison not between life with disability and non-existence, as in the previous justification, but between the future quality of life of the disabled foetus, and the quality of life of a future child who is not disabled, and who may “replace” the foetus exhibiting impairment if the affected

pregnancy is terminated. This argument relies on the assumption that those who raise a child with disabilities are less likely to conceive another child (or further children) because of the extra financial and other resources which would be required to support the former child. For example, one study showed that “out of 160 mothers who could have had more children, 101 decided not to and in 90 of these cases the decision appeared to be directly related to the presence of a retarded child” (Kuhse *et al.* 1985: 155). Thus, if we are guided by the utilitarian principle which regards the maximisation of quality of lives as morally commendable, we should sacrifice the life of the first child in favour of bringing a future child into existence with a better quality of life. This stems from the “offsetting [of] the loss of one possible life against the creation of another life with better prospects” (Kuhse *et al.* 1985: 158). Parents should aim to have the child which is likely to have the “best life” (Savulescu 2001: 415). Thus, the argument for selective abortion as exception from the perspective of the next child holds that:

The killing of the [disabled] foetal...is wrong insofar as its life would have contributed some happiness to the sum total; but if one kills it, and conceives and produces another with no disability, then the sum total will be increased by at least the same amount, and probably more (Hursthouse, cited in Sheldon *et al.* 2001).

The argument for selective abortion as exception could therefore be formulated as follows:

- Premise 1: The foetus has moral status which generally renders its killing morally wrong.
- Premise 2: A being with moral status which generally renders its killing morally wrong can be killed if it is evident that its continued existence will prevent the future existence of another being which will enjoy a better quality of life.
- Conclusion: The foetus can be killed if it is evident that its continued existence will prevent the future existence of another being which will enjoy a better quality of life.

The problem with this argument is that it appears to trade off the existing interests of a being with moral status against the potential interests of a future person who does not yet exist. If we consider the foetus to be a being with moral status, this implies that we as moral agents are obliged to consider its interests, including its interest in continued existence. The next child does not yet exist. It is therefore not yet a being with moral status whose interests we should consider. Indeed, it has no interests. If we regarded all possible beings as having an interest in coming into existence which we were obliged to respect, this would have drastic implications, as it would result in a moral duty to reproduce continuously. It is therefore morally contentious to deprive a morally significant being of its interest in continued existence in favour of bringing a future, possible being into existence which has no interest in us doing so. We thus deprive the possible, future child of nothing by failing to bring it into existence. However, we do harm the foetus by depriving it of its interest in continued existence, an interest that we should take into account, if we assume that the foetus is morally significant (as proponents of selective abortion as exception do).

Premise 2 would also have undesirable implications for how we treat persons with what we perceive to be low quality of life after birth. It is possible to imagine that many beings exist whose continued existence prevents the future existence of other beings with better quality of life. This would include not only those with disabilities, but the elderly and infirm, the overworked, or even the highly gifted (if these persons demand resources which prevent couples or single reproducers from considering conceiving another child). We do not consider the maximisation of worthwhile lives as a rationale for depriving such morally significant beings of their interest in continued existence. It would thus amount to discrimination to treat other beings with moral status differently, based purely on a disabling trait.

Thus the motivation for this justification (the maximisation of worthwhile lives) is outweighed by the interest of the foetus in continued existence. However, the argument from the best interests of the next child is rarely, if ever, advanced in favour of selective abortion as exception. In other words, it usually does not propose that the foetus is a

being with moral status which should therefore not be killed. Rather, as Gillam points out, this argument relies upon the assumption that the foetus has low moral status, or that it is “replaceable”. This implies that there is “nothing morally special about an individual foetus, and thus no moral reason to continue this pregnancy, rather than terminate it and start another one at a later date” (1999: 169). This implies that comparisons between the disabled foetus and the next child are not complicated by our obligation to respect the interests of morally significant beings, as neither of these (possible) beings are yet morally significant. Justifications of selective abortion as exception, however, do regard the foetus as morally significant, and do think that we have good reasons not to terminate a pregnancy because of the interest of the foetus in continued existence. Thus, particularly compelling reasons must be provided in order to justify making an exception to the general moral impermissibility of killing morally significant beings. Considerations of the maximisation of quality of lives, particularly with regard to possible future beings which, as yet, have no interests, are clearly not sufficient to warrant depriving an existing, morally significant being of its interest in continued existence. This justification must be reconsidered in the following chapter in the light of the assumption that the foetus is not yet a morally significant being.

Selective abortion as exception is in the best interests of the pregnant woman, parents and family

The second party (or group of parties) whose interests are deemed relevant in utilitarian justifications for selective abortion as exception, is the family of the foetus affected by foetal impairment, and particularly the pregnant woman, who would often be the main future caregiver of a child with disabilities (Wendell 1996: 155). The question which must be posed here is “whether a hereditary or congenital condition” implies “a sufficient burden to the family” (Botkin 1995:33) to warrant terminating a pregnancy affected by foetal impairment as an exception to the general wrongness of abortion.

As indicated in Chapter 3, the interests of the pregnant woman are also deemed relevant in justifying abortion in other contexts. It is also noteworthy, taking into account the

particular context of selective abortion as exception, that, where the Choice on Termination of Pregnancy Act makes an exception to the general prohibition against abortion after the cut-off point of 20 weeks gestation for foetal impairment, it also makes an exception in cases where the pregnancy represents a threat to the life of the pregnant woman (South Africa 1996). Thus, in this latter case, the interests of the pregnant woman, or her particular interest in continued existence, are considered sufficient to warrant making an exception to a general prohibition against abortion. However, other interests of the pregnant woman are not considered sufficient to warrant such an exception to the general rule against abortion at a similar stage. For example, if the social and economic interests of the pregnant woman are detrimentally affected by the continued pregnancy (circumstances which are specifically made allowance for before the 20th week of pregnancy), this does not imply that the prohibition against abortion may be waived after the 20th week. Even termination of pregnancies caused by rape and incest, which is also justified in other contexts by the interests of the pregnant woman, are excluded from the exceptions made to the illegality of late term abortion in South Africa (South Africa 1996).

To which of these two categories of interests does the burden imposed upon the immediate family by the birth of a child with impairment belong? If the interests of the pregnant woman in the case of endangerment to her life legitimately outweigh the interest of the foetus in continued existence, is it possible that the interests of the pregnant woman (and her partner or family) in avoiding the negative effect which raising a child with disability may have on their lives may also warrant an exception to the general prohibition against abortion? In other words, is it legitimate to base a decision to deprive a morally significant being of continued existence, on a desire to prevent disadvantage to the pregnant woman, parents and family? In this case, the benefit to parents lies in the prevention of the impingement on their interests by “the necessary efforts, time, emotional burdens and expenses...added by the disability that they would not otherwise have experienced with the birth of a healthy child” (Botkin 1995: 38). The argument for selective abortion from the perspective of parental and familial interests would have to be formulated as follows:

- Premise 1: The foetus has moral status which generally renders its killing morally wrong.
- Premise 2: A being with moral status which generally renders its killing morally wrong can be killed if it is evident that its continued existence will impose a significant burden on others (specifically, its parents and siblings).
- Conclusion: The foetus can be killed if it is evident that its continued existence will impose a significant burden on others (specifically, its parents and siblings).

Does this argument work? It is particularly Premise 2 which must be interrogated here. Is it legitimate to justify the killing of a morally significant being by reference to the fact that its continued existence would impose a burden on others (even a burden which is significant)?

We can firstly point out that we do not generally regard all our interests as being of equal strength. Most people would regard their most fundamental interest as being their interest in continued existence (Dworkin 1996: 84). This is because, as indicated in the first section of this chapter, continued existence is the precondition for any other interests that we might have (for example, in future opportunities and experiences). This implies that we must have convincing moral reasons for depriving a being with moral status of continued existence. It is possible that the principle of utility might require that this interest could be sacrificed, if we can show that the positive results of depriving a morally significant being of their interest in continued existence would significantly outweigh the negative consequences of this action. Some would argue, for example, that taking such an action in the case of war, or as an instance of capital punishment, would fulfil these conditions, because, although the interests of the being to be killed are detrimentally affected, the interests of society as a whole (in safety and security, for example) are significantly benefited.

Can we make a similar argument for selective abortion from parental and familial interests? I think that, given that the foetus is considered to be a being with moral status,

such an argument would be difficult to defend. The harm which is done to the foetus (given its moral significance) is that we deprive it of its continued existence, and all the future opportunities and experiences which would accompany such existence. Thus we deprive the foetus of the satisfaction of all its future interests. The harms imposed upon the parents and family of a child with disabilities by the experience of raising such a child, is that we deprive them of some of their interests, and even in some cases, and depending on the severity of a particular condition, many of their interests. For example, they may be deprived of their interest in avoiding emotional suffering, their interest in pursuing a particular career, or their interest in raising a particular child. However, they are not deprived of all their interests. In other words, the benefit incurred by the parents and family by avoiding disadvantage by selective abortion does not outweigh the great harm inflicted by depriving a morally significant being of its continued existence, which implies depriving it of all its future interests. This can be compared to the situation where a pregnancy threatens the life of the pregnant woman. Here, the harm inflicted on the foetus by the deprivation of its future existence can be compared to the parallel harm likely to be inflicted on the pregnant woman by the continuation of pregnancy. In each alternative, either party (and in some cases, both parties) is likely to be deprived of their interest in continued existence, thus depriving them of the possibility of having any future interests. These harms are similar in proportion. Taking into account the harm caused to others already in direct relationships with the pregnant woman, who are likely to suffer as a result of her death, one could argue that the pregnant woman would be justified in harming the foetus by depriving it of continued existence, in order to protect her own interest in continued existence, and the interests of those others who would be harmed by her death, particularly as the foetus's right to life is dependent upon its residence in her body.

The conviction that we are not justified in depriving a morally significant being of its interest in continued existence, in order to avoid imposing a burden on others, of the kind discussed in Chapter 3 is not new. This is evident in the manner in which we treat persons with disabilities after birth who do impose a burden on others. We do not consider the imposition of such burdens as a sufficient justification for depriving morally

significant beings of their continued existence after birth, whether these beings are burdensome to others for reasons of disability, or for other reasons. Arguments for selective abortion as exception attempt to justify the killing of a morally significant foetus for reasons of disability, but do not advance similar arguments for the moral permissibility of killing persons with disabilities after birth, regardless of the burden which their existence imposes on others, unless the nature of their disability also implies that their life is not worth living (which is an implication of the justification for selective abortion as exception from the perspective of foetal interests).

In the context of the Choice on Termination of Pregnancy Act, it is noteworthy that the exceptions made to the general rule against killing the foetus after 20 weeks do not include direct considerations of the burden which a continued pregnancy would impose upon others. A continued pregnancy which is not affected by foetal impairment, but which would impose significant strain upon the social and economic circumstances of the pregnant woman (a strain which may, depending on the context of the women, approach the magnitude of the burden imposed by caring for a child with a disability) is not considered sufficient to warrant an exception to the general prohibition against abortion after the 20th week of pregnancy. As previously mentioned, pregnancies resulting from rape or incest are not included as exceptions to this rule either, although these circumstances are likely to impose extremely significant emotional trauma upon the pregnant woman.

Thus, to allow considerations of parental and familial interests to weigh in favour of selective abortion as exception is to risk moral inconsistency. If this inconsistency is to be avoided (which would imply allowing similar considerations to determine our treatment of beings with moral status after birth), this would seem to severely undercut the status of persons living with disabilities. If the likely burden imposed by disability is sufficient to warrant an exception to the general moral impermissibility of killing morally significant beings, but similar burdens imposed by those who are able-bodied are not, this amounts to obvious discrimination against those who are disabled. In general, we do not accept the practice of killing beings with moral status in order to benefit other parties,

unless that burden is particularly weighty (for example, if the continued existence of one individual threatens the continued existence, safety and security, of one or more others). It is therefore unjust to accept this practice merely because the burden imposed on others arises from their disability and not from other factors.

In addition, selective abortion as exception is not the only way to prevent the disadvantage likely to be accrued to the parents and family by the birth of a disabled child. It is possible that the state could take responsibility for such children, if their parents are unwilling to accept the burden of raising them. This raises its own set of concerns, particularly with regard to the limited resources available for the support of those who are disabled. Nonetheless, if the state truly wishes to avoid discrimination and promote equality, this is an alternative which must be considered.

Selective abortion as exception is in the best interests of society

The final party whose interests may weigh in favour of selective abortion as exception is society as a whole. This justification is similar to that advanced in favour of familial interests. Both consider the interests of morally significant beings other than the foetus in determining the morality of selective abortion. In this case, the question posed is whether the resources demanded by disability impose a significant burden upon society which might justify making an exception to the rule against killing morally significant beings, in the practice of selective abortion.

As previously mentioned, the cost of those living with disabilities to society is a major motivation for advocating prenatal genetic screening, as this is seen as a cost-effective solution to an expensive problem. This justification also assumes, presumably, that although people with disabilities will demand a disproportional amount of resources, they will contribute less to society than other, species-typical members, and could thus be regarded as “non-contributing burdens on society” (Wendell 1996: 156). One can thus speculate as to whether programmes of prenatal screening may be “initiated primarily for the benefit of a society unwilling to support disability-related needs” (Hershey, cited in

Wendell 1996: 154). In other words determining “the value of human life in terms of cost to society” may imply that “[i]f people with disabilities increase the cost of health care, require ‘special’ education, and are unable to participate fully in the labour force, then their existence makes life less worth living for those who judge the quality of life by economic measures” (Wong 2002: 94-95).

Once again, and for similar reasons as for the previous justification, this argument is difficult to defend in the context of selective abortion as exception. It would demand that the following argument would hold:

- Premise 1: The foetus has moral status which generally renders its killing morally wrong.
- Premise 2: A being with moral status which generally renders its killing morally wrong can be killed if it is evident that its continued existence will impose a significant burden on others (society as a whole).
- Conclusion: The foetus can be killed if it is evident that its continued existence will impose a significant burden on others (society as a whole).

Once again, Premise 2 is difficult to defend and undercuts the status of people living with impairments after birth. In this case, the burden is likely to be less significant and more widely spread among members of society, and the argument is even less convincing. If we argue that beings which are morally significant may be killed in order to cut costs, this has major implications for the way in which we view members of society who are disabled, as well as other members of society who demand a disproportional amount of resources, for example, those who live in poverty or who are unemployed, and are likely to demand resources in the form of welfare. In other cases where some would defend the morality of killing a morally significant being for the good of society, for example, in the case of capital punishment, the benefit to society must be considerable. Capital punishment could be seen as ensuring that members of society are not deprived of, or are compensated for the deprivation of their right to safety, security, or (most commonly)

their interest in continued existence. Similar levels of benefit cannot be derived from avoiding the burdens imposed by those who live with disability.

Finally, this argument underestimates or ignores that many societies, (and particularly South African society), also regard the promotion of equality among those who are different, and provision for the needs and interests of those who are disabled, through government and social intervention, as a good in its own right. Thus the costs incurred by society as a result of disability may be offset by the benefit to society in promoting the values of equality and non-discrimination.

Concluding remarks

It seems that proponents of selective abortion as exception are guilty primarily of inconsistency in ethical reasoning. This is a major problem for justifications of selective abortion as exception, as “consistency is a minimal requirement for all rational thought [and] an ethical position that fails to be consistent must be rejected” (Kuhse *et al.* 1985: 128). If, as assumed by proponents of selective abortion as exception, the foetus is a being with moral status, this moral status can only be ignored for extremely convincing reasons. As argued in this chapter, most justifications of selective abortion as exception do not provide such reasons. We do not generally accept these reasons as rationales for killing other beings with moral status. It is thus very difficult to defend the proposition that a being who is morally significant and who ordinarily cannot be killed, can nonetheless be killed in the case of impairment for any or some of the reasons listed above, while simultaneously denying that this is the case after birth. In order to maintain logical consistency it is necessary to renounce one of three convictions. One must either renounce one’s conviction that the foetus is (from conception or from a particular point in pregnancy) morally significant in such a way which prohibits its killing, which would allow it to be killed as a result of impairment, but also for (any) other reasons, or one must renounce the conviction that an exception can be made to the prohibition against killing in the particular case of the detection of impairment, or one must renounce the conviction that the same exception cannot be made for beings who are morally significant

but impaired after birth. This is because, “if the foetus [is] regarded as having a high moral status, equivalent to a person, then, by logical extension, [considerations which would justify selective abortion] would also justify the killing of a child or adult with a disability” (Gillam 1999: 169). As Warren points out:

If embryos and foetuses have a right to life, then it would seem to follow that they may not be killed, except under conditions that would equally justify the killing of an older human being. We do not permit parents to kill their already born children [for the reasons identified above]; and if foetuses have a right to life then neither should abortion be permitted for such reasons (Warren 2001: 129).

Thus those who hold that abortion is generally seriously wrong (from conception, or from a particular point in pregnancy) as a result of the moral status of the foetus, but who maintain that abortion is justified following the detection of prenatal impairment, must accept that the logical implication of this stance is that disability merits differential treatment of beings with moral status after birth too. If they consider the justifications discussed above as sufficient to warrant ending the existence of an impaired being with moral status before birth, when the right to life of similar beings who are not impaired may not be sacrificed, this implies that equivalent justifications would hold in cases of disability after birth. This is directly in conflict with the purported commitment which proponents of selective abortion as exception generally profess - that the lives of persons with impairments are, after birth, as worthy of protection as human beings who enjoy species-typical functioning.

If we consider selective abortion as exception in the context of the South African Choice on Termination of Pregnancy Act, in its legislation on abortion after 20 weeks, this implies that the Act is clearly discriminatory towards persons with disabilities. If this charge is to be avoided, legislation would need to introduce guidelines which would specify the best interests of the foetus argument (as the only argument for selective abortion as exception which succeeds) as the guiding principle behind the exception made to the prohibition of abortion after 20 weeks.

For conditions which do not fulfil these criteria, “the law should not discriminate between impaired and non-impaired fetuses: a common time limit should be adopted for all pregnancies” (Shakespeare 1998: 671). The currently entrenched legal distinction, evident not only in the Choice on Termination of Pregnancy Act, but in the majority of international abortion legislation (Sharp *et al.* 2002: 140), may justly be accused of discrimination, as it is “tantamount to declaring that the rights accorded to ‘normal’ fetuses are not applicable to those who are impaired” (Pritchard 2005: 90), without providing good reasons for this differential treatment. This distinction also offends the feminist position on abortion, grounded in the desire to promote female autonomy. Thus, “there is no room within the feminist position for the distinction which the law currently makes: if it is legitimate to terminate a pregnancy on the grounds of impairment...then so should it be on other grounds” (Sharp *et al.* 2002: 141).

The only case in which this conclusion does not apply, is in the case of selective abortion as exception justified from the best interests of the foetus. Thus, “even if the foetus [is] held to be a person and abortion [is] held to be wrong for every other reason...abortion could...be seen as justified in cases where future quality of life would be so poor as to be worse than death” (Gillam 1999: 168), if we generally acknowledge that similar considerations would justify ending the lives of beings with moral status after birth. Selective abortion could also be justified if the foetus, as a result of their impairment, lacks the ability to develop rudimentary consciousness, which implies that they are deprived of nothing when their existence is ended. However, as has been indicated above, the empirical validity of this argument is questionable in most cases of impairment, and only holds in circumstances where life for the individual who is impaired is indeed likely to amount to a burden rather than a benefit. This stance implies that selective abortion in this case would be a form of non-voluntary euthanasia. If we do accept this argument in these rare circumstances, logic demands that euthanasia must be accepted in cases of similar severe impairment after birth.

Thus justifications for selective abortion as exception amount, except in cases of extremely severe impairment, to direct discrimination towards those who are affected by

disability, as they advocate the differential (and worse) treatment of beings with moral status on the basis of characteristics which cannot be shown to justify this differential treatment. However, it is possible to argue for selective abortion without insisting that fetuses are beings with moral status. As shall become evident in the following chapter, these justifications cannot be accused of direct discrimination. However, they may be justly criticised on other grounds. It is to these justifications, of selective abortion as distinct, which we now turn.

6 A Critique of Justifications of Selective Abortion as Distinct

Introduction

The preceding chapter has attempted to show that justifications for selective abortion as exception are, except in extremely severe cases of impairment which would justify euthanasia after birth, directly discriminatory towards people living with disabilities. This charge of discrimination stems from the fact that one cannot consistently claim that the foetus can be selectively aborted for foetal impairment, given its moral status and the resultant general wrongness of killing such beings, and simultaneously, that the lives of those who are impaired are as worthy of respect and protection after birth as those who are not. As has been shown, the former assertion entails an implicit rejection of the latter commitment, and thus amounts to discrimination on the basis of disability. However, this inconsistency results directly from the conviction that the foetus is indeed a being with moral status, whose killing is thus generally morally wrong, as this conviction fails to establish a rationale for the differential treatment of morally significant beings with disabilities before and after birth.

It is therefore possible that this accusation may be avoided in positions on selective abortion which regard abortion generally as morally permissible, as a result of a denial of the foetus's moral significance, or because its moral significance is regarded as being justly outweighed by the right of the pregnant woman to bodily integrity and autonomy. This position appears to avoid charges of discrimination in two ways. Firstly, it does not differentiate between what constitutes morally acceptable treatment of foetuses by making reference to the characteristic of disability²¹. In other words, the foetus's moral

²¹ Selective abortion does indeed amount to differential treatment of foetuses on the basis of disability, as it generally constitutes termination of an otherwise wanted pregnancy. In other words, the foetus is aborted because of foetal impairment, and it would not have been aborted in the absence of disability. However, this does not imply that the *moral status* of the act of abortion is different in the case of selective abortion than it would be in other cases. The abortion act, whether of a disabled or able-bodied foetus, is morally neutral. This can be contrasted to justifications for selective abortion as exception, which posit that the moral wrongness of abortion is negated by the presence of foetal impairment. There is a further point to be made here, however. Justifications of selective abortion as distinct which regard termination as the *morally desirable* course of action (particularly in justifications from the best interest of the foetus, the best interests

insignificance, or the pregnant woman's right to bodily integrity, implies that abortion is morally unproblematic in any circumstances, without reference to the particular characteristics of a pregnancy. Secondly, it provides a convincing explanation for why we are morally obliged to respect and protect the lives of persons with disabilities (and all other persons) after birth, as a result of their acquired moral status, even if this same obligation does not apply before birth (or before a particular gestational stage), as at this stage such foetuses have not yet acquired moral status. Our decision to abort for foetal impairment, therefore, need not impact on our attitude towards persons living with disabilities as "[t]here is simply no connection" between the way in which you can be treated at the "earlier position when you are not yet a person and the moral respect that should be accorded you when you are" (Gillon 1998). In other words, "the low moral status of the foetus drives a moral wedge between foetuses with abnormalities and people with disabilities" (Gillam 1999: 169). Justifications for selective abortion as distinct therefore do not contain an implicit rejection of the commitment to respect and protect the lives of all persons after birth, regardless of their particular characteristics.

Thus, in the case of selective abortion against the background of the "low moral status of the foetus", a similar justification is given for selective abortion and for the moral legitimacy of abortion in general (Gillam 1999: 168). However, as was argued in Chapter 4, selective abortion in this context could still be regarded as motivated in a manner which is distinct from other justifications for abortion, as it generally amounts to a termination of an otherwise wanted pregnancy. Abortion in this case is not carried out as a result of the circumstances of conception, the nature of the pregnancy, or the context of the pregnant woman. Rather, decisions to terminate pregnancies affected by foetal abnormality are concerned with the particular characteristics of the foetus, and represent choosing against a particular future child. These decisions are enabled by the technologies of prenatal testing and screening, which allow prospective parents to make reproductive decisions of a particular kind – "not only [about] when and how many [children they will have] but also [about] what kind of children they will have" (Parens *et*

of the next child, and the best interests of society) imply that the moral status of abortion is indeed different in cases of foetal impairment, as in this case, abortion is constructed as a moral obligation, and failure to abort is regarded as a moral mistake. This shall be discussed later in this chapter.

al. 2003: 41). In other words, “[s]elective abortions are those based on the quality of the foetus, rather than the parent’s desire for a child” (Sammons 1978: 238).

As such, selective abortion for foetal impairment bears structural similarities to sex-selective abortion. As has been argued in Chapter 2, sex and impairment are fundamentally different, as impairment is often accompanied by disadvantage which is not dependent upon the social context, whereas the disadvantage experienced by those who are female in some contexts is primarily the result of the patriarchal structure of society. However, selective abortion for sex and selective abortion for disability both amount to a choice made against a future child with particular characteristics, although it is possible that the latter choice may be justified by the innate nature of those characteristics, whereas the former choice is generally driven purely by societal discrimination.

However, even if we regard justifications of selective abortion (and sex-selective abortion) as distinct from other general justifications for abortion, a critique of these practices is complicated by the underlying assumptions justifying abortion in general. The motivation for the moral permissibility of abortion is inextricably related to the right of the pregnant woman to autonomy. This right is constructed in one of two ways. The foetus is either regarded as morally insignificant, and therefore as posing no obstacle to the exercise of the right to autonomy and bodily integrity attributed to all persons (including the pregnant woman), or, even if the foetus is morally significant to some extent, its resultant rights are deemed to be justly outweighed by the right of the pregnant woman, in whose body it resides, to autonomy. Both these positions imply that the pregnant woman is justified in making reproductive decisions, including decisions around termination, for whatever reason she sees fit. Thus, prenatal screening and selective abortion for foetal impairment, as a particular instance of abortion, are also “inextricably entwined with the concept of autonomy”. As “[a]utonomy necessarily involves the right to terminate an unwanted pregnancy [and] diminish[ing] a woman’s autonomy by rejecting her wishes for a termination would be inherently wrongful” it may appear that embarking upon a critique of a particular way in which this autonomy is exercised is not

only morally questionable, but doomed to failure, as it cannot in practice lead to the restriction of the pregnant woman's right to choose abortion. In other words, if we regard women as having the right to make decisions around termination of pregnancy by virtue of their autonomy, "[t]his view is equally applicable whether a foetus [is] found to have an impairment or not" (Pritchard 2005: 85). It would therefore seem as though the right to autonomy "essentially rules out any discussion of whether one set of reasons for having an abortion are better than others. We could not say that even though two women have an equal right to have an abortion, we consider one to be more ethically justified in doing so than the other" (Sharp *et al.* 2002: 138). If this is the case, it would imply that we cannot criticise selective abortion as distinct as a morally questionable instance of the exercising of one's right to autonomy. In fact, the increasing use of prenatal screening which enables decision making around termination for foetal impairment is often asserted to be explicitly directed towards "allow[ing] parents more informed reproductive choice" (King 1999: 178). To argue against prenatal screening and selective abortion as distinct may therefore have the potential to undermine, threaten or limit the right to autonomy, by depriving prospective parents of information which is relevant to reproductive decision making.

However, there is a feature of motivations for selective abortion as distinct which may be problematic in this regard, and which may justify criticism. As shall become evident, selective abortion is constructed by some of these motivations, not as one alternative among others, but as the morally obligatory, or at least the morally preferable, choice²². In other words, these motivations regard the choice to be made in selective abortion, not as a choice between two actions which are in themselves morally neutral (choosing termination or choosing to continue with a pregnancy) but between a morally wrong action (continuing with a pregnancy affected by foetal impairment) and a morally desirable action (choosing selective abortion). This indeed renders motivations for selective abortion, particularly those that refer to the best interests of the future person, next child, or society in support of this practice, as distinct from general motivations for

²² See Harris (2000) and Glover (1990).

abortion, particularly as those general motivations rely heavily upon the principle of respect for autonomy.

Even if selective abortion is not constructed as the morally obligatory choice, those who deny that this practice can be subject to critique do not take into account that, while we may not be justified in criticising specific instances of the practice of abortion itself, this does not imply that we may not interrogate specific justifications for abortion, particularly if the possibility exists that some motivations for abortion may be based upon erroneous and prejudiced information or discriminatory societal structures. If this is the case, it would not imply that we should advocate for the restriction of the right to abortion, if the decision to terminate a pregnancy is based upon particular justifications which we would regard as unsound. Rather, it would demand that we should make an attempt to correct perceptions based upon prejudice or misinformation (or at least not to contribute towards them) by providing reliable or balanced information, or that we should advocate for the transformation of societal structures which are discriminatory.

For example, if we imagine that a woman with an otherwise wanted pregnancy nevertheless decides upon abortion because she is a member of a cult whose leader has informed her that the foetus is the antichrist, or because her employer threatens to fire her if she continues with the pregnancy, we would question, not whether the act of abortion in this case is in itself morally wrong, but the misinformation or social conditions which have exerted pressure in favour of a particular decision. These factors actually have the potential to reduce or limit her ability to make an autonomous decision, as in the first case, she is acting on erroneous information, and in the second, she is subject to pressures imposed by unjust social conditions. This point may be further illustrated by the example, referred to above, of sex-selective abortion, a practice which is prevalent in India (“India’s Disappearing Females” 2004: 8) and China (Klasen *et al.* 2003: 274). This practice has indeed been subject to a great deal of critique, and even to attempts on the part of governments to introduce measures to prevent such terminations (Sudha *et al.* 1999: 597 and Pilsnick 2002: 65). Similar concerns have been expressed with regard to the possibility of future selective abortions, were it to become possible to identify the

genetic “origin of homosexuality” (Schuklenk *et al.* 1997: 6). The principle of autonomy, and the moral neutrality of the abortion act, seems to indicate that we should reject attempts to restrict the right to abortion on these grounds (Warren 1985: 205). However, we still regard decisions of the type described above as morally problematic, or “moral mistakes”, even if we “leave open the possibility that the individuals who have made the decision did so in good faith”. We regard these decisions as problematic because they stem from, and have the potential to reinforce, prejudicial attitudes and “social conditions” which are biased against people who have particular characteristics (Weiss 1995: 214). Denying that we can ever interrogate specific justifications for abortion because such criticism is necessarily excluded by the principle of autonomy implies that we are not justified in criticising justifications for abortion in the above instances. However, we do (and, as this study will argue, we should) criticise justifications for abortion in these contexts, because they rely upon prejudice, unjust social structures, and as such, have the potential to undermine reproductive autonomy. If the practice of selective abortion for foetal impairment has something in common with these practices, we can rightly subject it to similar criticisms. Note that if this critique is successful, it does not imply that the right to female autonomy should be restricted in this case, or even that the practice of prenatal screening should be discontinued. Rather, it implies that we should take measures to ensure that discriminatory social conditions and attitudes, which may in fact militate against the exercise of full autonomy on the part of the pregnant woman, do not exert pressure in favour of an automatic decision to terminate an affected pregnancy in the case of the detection of foetal impairment.

Thus it is possible that those who seek to criticise the practice of selective abortion as distinct often fail to ask the right questions. Generally, it is suggested that “using prenatal diagnosis to detect genetic and other abnormalities in the foetus is a form of discrimination against the disabled” (Gillam 1999: 163). While this is indeed the case in justifications for selective abortion as exception, it is unlikely that selective abortion as distinct can rightly be regarded as directly discriminatory, as a result of the conviction that abortion is generally morally permissible. The claim that “it is perfectly possible to have one attitude in relation to the foetus, and to have a completely different attitude to

people who are born and have a particular condition” (Furedi 1998), may be plausible. However, as shall become evident, if we reverse the causality denied in the above conviction, this may indeed indicate that selective abortion as distinct is morally problematic, not because it amounts to direct discrimination against the disabled, but because it may result from, and have the potential to reinforce, existing prejudice against these persons. In other words, while it might be possible that one’s attitude to the foetus does not imply that one’s moral respect for people with impairments is abandoned, it is extremely probable that existing attitudes towards disability and persons who live with impairment may have a profound impact on whether we see the foetus as our future child, or as undesirable. This of itself is not necessarily a problem, if our attitudes are based upon accurate information about disability. However, if our attitudes towards disability are informed by the existence of prejudice, misinformation and hostile social structures, this would imply that selective abortion for foetal impairment, driven by such attitudes, would indeed be a “moral mistake” in a comparable way to sex-selective abortion. This also explains why restricting the right to terminate for foetal impairment, when this right is not restricted for other reasons, will not eradicate discrimination against the disabled, as it will not of itself alter the attitudes towards and erroneous perceptions of disability which may, in some cases, contribute towards decisions in favour of such terminations²³.

Therefore, this chapter will seek to examine whether justifications for selective abortion as distinct (as particular motivations, based on the presence of foetal impairment, of a procedure which is not of itself morally problematic) may be problematic, for two reasons.

Firstly, it will consider whether those motivations which construct selective abortion as the morally obligatory or preferable choice may also have the potential to undermine the possibility of autonomous decision making, which demands that those who make such decisions should be “free from...controlling interferences by others” (Beauchamp *et al.*

²³ Restricting the right to abortion for foetal impairment will also constrict the autonomy of those for whom the decision to terminate a pregnancy is not based upon prejudice, but upon a considered evaluation of the effect of the birth of a child with disabilities upon their lives, and whether they are willing or able to accept this effect.

1989: 68). While it is highly unlikely that selective abortion would be legally enforced, prevailing attitudes which regard selective abortion as “the right thing to do” are liable to influence women’s choices by exerting pressure in favour of a particular decision. In this regard, two factors must be considered. Firstly, we must consider whether the claim that selective abortion is morally obligatory is valid; in other words, whether the argument in this regard is successful. Secondly, we must examine whether we are willing to accept the implications of this stance for the possibility of exercising one’s right to reproductive autonomy.

Secondly, it will consider whether such justifications are based upon or contributed towards by discriminatory perceptions and hostile social attitudes towards disability, and whether these erroneous perceptions may mask the contribution of discrimination towards the disadvantage experienced by those who are disabled. This question is important for two reasons. Decisions based on erroneous perceptions or misinformation undermine the demands of the principle of autonomy, which holds that autonomous decisions are those that are “free from...personal limitations, such as inadequate understanding” (Beauchamp *et al.* 1989: 68). In addition, motivations influenced by such perceptions, and decisions made on the basis of these motivations, have the potential to reinforce or support existing prejudice against persons with disabilities in society. This chapter will therefore seek to make recommendations as to how the decision making process around termination of pregnancies affected by foetal impairment could best avoid being unduly influenced by these attitudes, without denying the real difficulties often accompanying disability. As such, it will argue that selective abortion as distinct need not reinforce or perpetuate discrimination, provided that measures are taken to avoid this possibility.

It is against this background, then, that the critique of justifications for selective abortion as distinct is undertaken. Once again, the four parties whose interests are considered relevant in motivations for selective abortion shall be considered.

Selective abortion as distinct is in the best interests of the foetus/future person

The preceding chapter has argued that the arguments for selective abortion as exception from the perspective of foetal interests are, except in cases of extremely severe impairment, not convincing. This is because the moral status of the foetus, assumed in these justifications, implies that that the foetus's interest in continued existence, or the harm inflicted upon it by the deprivation of its future existence, outweighs the possible suffering and harm imposed upon it by disability respectively, which indicates that abortion is rarely in the interests of the foetus. However, arguments for selective abortion as distinct do not suffer from the same problem. Here, as the foetus is not considered to be morally significant, it can have no interest in continued existence which would imply that its killing would be harmful. Thus, the "foetus [does not] exist morally" and therefore cannot be harmed by abortion. However, as Vehmas points out, the foetus may indeed "have moral standing where [its] parents have the intention of bringing [it] into existence" (2002: 57). This does not imply that the foetus has interests which can be affected now, but if the parents intend to carry the pregnancy to term, this will result in a future person who will acquire moral status, who will have interests, and who can indeed be harmed. In other words, if we intend to allow the foetus to develop into a person who is morally significant, we have duties to that future person not to take actions (or to refrain from taking actions) before birth which will result in harm to that person after birth²⁴. This would imply that a pregnant woman, who is intending to carry her pregnancy to term, should not take actions which will damage the foetus, such as, for example, abusing alcohol, as this would (or could) cause the future person to be harmed by impairments which would inflict suffering, or reduce capacity for worthwhile experiences, when this could have been avoided. Proponents of selective abortion as distinct who argue that this practice is desirable from the perspective of foetal interests think that we inflict similar harms upon the future person by allowing it to come into

²⁴ Similarities can be identified between this position and "the *nasciturus* doctrine" (or the *nasciturus* fiction) in South African law. This doctrine holds that, although "a person [only] becomes a legal subject at birth", the rights and interests of the foetus are legally protected in some circumstances, namely when "predating legal subjectivity [is] to the advantage of the person concerned; such advantage [is] accrued after the date of conception; and the beneficiary [is eventually] born alive" (Du Plessis 1991:45-46).

existence, when this could have been avoided by abortion, an act which is morally neutral and harms no-one.

As abortion is considered by this justification to be morally neutral, the critique which follows cannot logically conclude that termination in this case is morally wrong. Rather, this critique will attempt to show, firstly, that this justification cannot explain why, in most cases, selective abortion is in the best interests of the foetus, and therefore cannot persuasively account for why selective abortion as distinct from the perspective of foetal interests is the *morally desirable* course of action (in the sense of a choice which moral agents are obliged to make). Secondly, this critique will address the question as to whether this motivation for selective abortion in some cases rests upon assumptions about life with disability that are prejudiced or erroneous, or whether it is influenced by hostile or discriminatory social structures. The argument for selective abortion as distinct from the perspective of foetal interests could be formulated as follows:

- Premise 1: Abortion is a morally neutral action.
- Premise 2: A person may experience negative consequences as a result of disability (either by experiencing suffering, or by being harmed by experiencing significantly reduced life options relative to their peers and the deprivation of worthwhile experiences available to their peers).
- Premise 3: Abortion following the detection of foetal impairment will prevent a future person experiencing the negative consequences resulting from disability.
- Conclusion: Abortion following the detection of foetal impairment is the morally desirable course of action, from the perspective of the future person.

Note that all the premises of this argument, in the context of the assumptions made by justifications of selective abortion as distinct, are true. A critique of this justification must therefore be directed towards the conclusion, which posits that selective abortion is the morally desirable course of action, from the perspective of the future person whose birth would be prevented by abortion, as choosing to continue with a pregnancy affected by foetal impairment wrongs the future person by bringing him or her into existence with

disabilities. This section will therefore, firstly, ask the following question: can we harm a person by bringing them into existence?

The argument could be interpreted in two ways. Firstly, it could propose that the future person is harmed by the suffering or limited opportunity caused by disability because that suffering or limited opportunity is so bad that their life is not worth living, so that they would literally be better off dead, or so that they are unable to value their lives. This justification has been shown in the preceding chapter to hold, even if the foetus has moral status (either because suffering is of such a magnitude that it negates one's interest in existence, or makes life a burden rather than a benefit, or because the future opportunities available to one are nil, as a result of a lack of minimal consciousness). It will therefore not be discussed at length again here. In this case, it is possible to claim that we do harm the person in question by bringing them into existence, as their future existence will be of such a nature that non-existence is positively preferable. However, as previously indicated, this justification holds only in rare and severe cases of impairment. We must therefore rather turn our attention to the second interpretation of this claim, namely that even if the suffering imposed by disability is not so bad as to render one's life a burden rather than a benefit, the fact that disability results in suffering or limited opportunity at all is a negative consequence, which harms the affected individual, and which can be avoided by an action which does no harm to any morally significant being, or which is inherently morally neutral. It is this version of the justification for selective abortion from the perspective of foetal interests which will be considered here. If this justification is valid, it will provide a motivation in favour of aborting selectively for foetal impairment not only in cases of severe impairment, but in all cases where disability causes any suffering or limited opportunity, even when these experiences do not preclude the possibility of living a satisfying life.

This justification relies upon a specific principle – that we should avoid inflicting suffering upon, or causing harm to, a particular person, as this wrongs that person. In other words, if selective abortion is the morally desirable course of action, this implies that the future person could justly complain of being wronged by a decision to avoid

prenatal screening, or a failure to abort in the case of a positive diagnosis, as we have neglected our moral obligation to avoid causing harm to this person. This is essentially what is argued in wrongful life suits, where a “child [claims] damages for having been born” (Robertson 1982: 697) as a result of some failing on the part of the medical professionals involved which prevented abortion from taking place before birth²⁵. Is it possible then, that the future person can be wronged by a decision not to abort a pregnancy affected by foetal impairment?

The argument for selective abortion as distinct from the perspective of foetal interests, as stated above, relies upon a person-affecting principle, which derives the desirability of abortion from the supposition that the future person is harmed by a decision to continue the pregnancy which will result in their coming into existence (Brock 1995: 269), as opposed to a non-person affecting principle such as “it is morally good to act in a way that results in less suffering and less limited opportunity in the world” (Vehmas 2002: 51). This causes a problem for this justification, because, if we examine the implications of this stance, it does not seem that the child born with impairments whose life is a benefit to it can complain of being wronged or harmed by a failure to abort it at the foetal stage. In the case of foetal impairment, “[a]fter conception, the future child’s...biological individuality is determined” (Vehmas 2002: 49). Therefore, the only way to prevent the suffering or limited opportunity resulting from impairment is to prevent the future child from coming into existence at all²⁶. However, the only way in which coming into existence can harm a person is if they have been made worse off by this outcome. In other words, coming into existence is only harmful to the person if not coming into

²⁵ “Wrongful life” suits are distinct from claims relating to “wrongful birth”. In the latter case, suit is generally brought on behalf of the parents or immediate family of the person whose birth is said to be wrongful, because of the negative consequences accrued to them which would otherwise have been avoided, whereas in the former case, suit is brought on behalf of the affected child or person itself who complains of the negative consequences of disability which could have been avoided by non-existence (Teff 1985:426).

²⁶ This can be compared to a case in which a pregnant woman takes actions during pregnancy which result in a future person being worse off than they would otherwise have been. Such a person could justly complain of having been wronged by the actions of their mother, because the suffering or limited opportunity which they will experience could have been avoided had their mother refrained from taking the damaging actions. In this case, two alternatives exist. Either the future person would have been born with disability, or without disability. The mother’s actions have brought about the former state of affairs, as opposed to the latter state of affairs. However, this implies that such a person would be harmed, not by coming into existence, but by the actions of its mother.

existence is preferable. This is because the choice made in selective abortion is a choice between two alternatives. We either choose to avoid bringing a future person into existence, or we choose to bring that future person into existence. Unless that future person, once brought into existence, would have preferred the latter alternative to the former, we have not wronged that person by our actions. In most cases, disability does not imply that coming into existence is worse than not coming into existence, and therefore the moral desirability of selective abortion, in most cases, cannot be motivated by the interests of the foetus or future person, as this fails to explain why selective abortion is the morally desirable course of action in most cases (Sheldon *et al.* 2001)²⁷.

Gillon therefore addresses this warning to those who advocate for the moral desirability of selective abortion as distinct, from the perspective of foetal interests:

Do not kid yourself that you are going to have an abortion in the interests of that child...If you are really genuinely concerned with the interests of the foetus as a child and as a person to be, then do it properly. Put yourself into the mind of this person in your imagination when he or she has been born and had grown up and had thought about it. Then say to yourself: 'What would this person decide in terms of the disability concerned, and the alternative for that person not to exist at all?' (1998).

In other words, in most cases, we cannot logically argue that abortion is carried out in the interests of the future person, unless the person concerned would have preferred the alternative which would have been brought about by abortion to the alternative which would have been brought about by bringing them into existence.

A further problem with the argument for selective abortion as distinct from the perspective of foetal interests, is that its implications, if taken to their logical conclusions,

²⁷ This does not imply that abortion is morally undesirable. As indicated previously, those who justify selective abortion as distinct hold that abortion is morally neutral, and that it therefore does not wrong the foetus or future person. Nor can we claim that causing the foetus to come into existence benefits the foetus; although existence may be experienced as a benefit by the future person (Parfit 1984: 371), as the foetus as yet has no desires or preferences which we are obligated to satisfy by bringing it into existence. Rather, it implies that consideration of the interests of the future person cannot, in most cases, lend support to a positive moral preference for abortion following the detection of foetal impairment, as coming into existence cannot, in most cases, harm the foetus.

indicate that abortion is always the morally desirable course of action, regardless of the particular characteristics of the foetus. The argument as formulated above regards suffering and limited opportunity as negative consequences, which are to be avoided if possible. It is possible to avoid these negative consequences without performing an action which is morally wrongful (as abortion is morally neutral). If we conclude that it is therefore morally desirable, from the perspective of the future person who will be the subject of these experiences, to terminate a pregnancy to avoid these negative consequences, even if they do not result in a life that is not worth living, or regardless of whether they make non-existence preferable to existence, this has implications which undermine the motivations of the argument. All persons experience suffering, closed opportunities, pain and hardship at some stage in their lives. One would be extremely hard-pressed to find a person who could testify that their life had never included experiences which they regarded as negative. Wendell points out that “[e]very life has its burdens, some of them far worse than disability” (1996: 154). Parents are aware that “[l]ife is always a mixture of good and bad, pleasure and pain [and realise that their] children will have their share of suffering and adversity” (Steinbock 1994: 21). This fact is foreseeable before birth. Thus, if we accept the argument that suffering and limited opportunity are negative consequences that are likely to be harmful in such a way that we should attempt to avoid this harm by abortion, it is always the morally desirable course of action to prevent beings who are likely to experience suffering or limited opportunity from coming into existence.

Note that some do indeed make such claims: David Benatar (2006) argues persuasively, for example, that coming into existence always imposes a serious harm upon persons which would have been better avoided. He supports this claim by referring to the “asymmetry of pleasure and pain”, which implies that, while we regard the absence of pain as a positive good, we *do not* regard the absence of pleasure as bad, unless there is some person who has who experiences the absence of pleasure as a deprivation (which is not the case for the morally insignificant foetus). Therefore, if we wish to behave morally, we should avoid doing wrong by causing pain (or suffering). As the future life of the foetus will be accompanied by pain or suffering to some degree, but the foetus is

deprived of nothing by the absence of its future pleasures, this implies that the question we should be asking is not why abortion should be permissible, but why it should be permissible to avoid abortion. For Benatar, all pregnant women should be morally obliged to choose abortion (cited in Van Niekerk 2007: 5).

This is the logical implication of the argument for selective abortion as distinct from the perspective of foetal interests, even if we avoid justifying this practice by reference to a person-affecting principle, and instead refer to a general principle such as “it is morally good to act in a way that results in less suffering and less limited opportunity in the world” (Vehmas 2002: 51). This study is not in a position to evaluate Benatar’s claims. However, we can assume that general motivations for selective abortion as distinct do not hold that this distinct justification applies to able-bodied fetuses, as termination of pregnancy is advocated as the morally desirable course of action, from the perspective of foetal interests, only in the particular case of the presence of foetal impairment.

For proponents of selective abortion as distinct, this would amount to a *reductio ad absurdum*, as the argument proves too much, and undermines its own motivations. Instead of proving that abortion is positively morally desirable in the case of foetal impairment, but not in normal pregnancies, it proves that abortion is always positively morally desirable, and the argument therefore no longer amounts to a distinct justification for selective abortion.

It therefore seems that the argument for the moral desirability of selective abortion as distinct from the perspective of foetal interests cannot account for why selective abortion for foetal impairment should be the morally desirable course of action in most cases, as “strictly from the standpoint of the future child, it seems that we can very rarely say that it would be wrong to bring a child into existence” (Steinbock 1994: 16). However, we must consider the possibility that many individual decisions in favour of termination in the case of foetal impairment do indeed rely upon the sentiments expressed in this justification, and as such, may “rest...on unrealistic assessments of the quality of life of most people with disabilities” (Gillam 1999: 167) and “a woeful lack of understanding of

what their lives are really like” (Gillam 1999: 169). In other words, able-bodied people may often in good faith choose selective abortion on the basis of foetal interests, when this choice is not merited by the relevant condition, because they have unreasonably negative perceptions of what disability actually means for an affected individual, and thus may erroneously assume that non-existence is preferable from the perspective of the future person. We must therefore interrogate these perceptions, particularly with regard to the implications which they may have for persons already living with disabilities.

Gillam points out that “unfavourable quality-of-life assessments cannot, strictly speaking, be regarded as discriminatory towards people with disabilities...because on the understanding of abortion considered here, fetuses are not persons, and moral decisions about fetuses cannot logically be extended to persons” (1999: 167). Thus even if these quality-of-life judgements, which motivate decisions to terminate affected pregnancies, are erroneous, and even if they are based upon prejudice, they do not amount to direct discrimination. As indicated in the introduction of this chapter, this point appears to be valid. If discrimination is defined as the worse treatment of persons, which is unfair, based upon prejudicial attitudes towards a particular characteristic, then selective abortion cannot be regarded as active discrimination, because although it implies that we treat fetuses differently based on the characteristic of disability, we cannot meaningfully claim that fetuses with disabilities are treated worse than their able-bodied counterparts. This is because, according to proponents of selective abortion as distinct, abortion is a morally neutral action. We therefore cannot claim that abortion is worse for the fetus than continued existence, as it is deprived of nothing which is owed to it. Therefore, as Gillam claims, “[f]or prenatal diagnosis and selective abortion...the vital issue is not whether a quality-of-life assessment is made, but what this assessment is taken to license” (Gillam 1999: 169). If this assessment *only* provides the rationale for selective abortion, which is a morally neutral action and therefore does not amount to treating morally significant beings with disabilities worse than their able-bodied counterparts, then persons with disabilities are not directly discriminated against. However, if these assessments are erroneous, and amount to an overly negative perception of the quality of life of persons with disabilities, another problem arises, if these erroneous assessments

are a result of societal and individual prejudice against those who are disabled, or at least a woeful lack of understanding about what life with disability is really like. This problem is that decisions based upon these perceptions may reinforce prejudice.

Prejudice does not necessarily imply that discriminatory action is taken. It is theoretically possible, for example, that a racist could hold a belief that other races are less inclined towards moral honesty, or that a chauvinist could be convinced that women are less intellectually capable, without these opinions necessarily resulting in discriminatory action, or unequal treatment. Prejudice can be defined as “biased opinion based on insufficient knowledge” (Chambers 21st Century Dictionary 1996) or “[p]reconceived opinion not based on reason or actual experience, [specifically] unreasoned dislike, hostility, or antagonism towards...[a particular] class of people” (Oxford English Dictionary 2007). Generally, even if prejudice does not license discriminatory action, we do not regard these attitudes favourably, for two reasons.

Firstly, in practice, discrimination generally results from prejudice. If, as some critics have pointed out “discrimination results when people in one group fail to imagine that people in some ‘other’ group lead lives as rich and complex as their own” (Parens *et al.* 2003: 41), or in other words, if prejudicial *attitudes* often lead to discriminatory *actions*, then the danger of justifications for selective abortion as distinct may lie principally in the fact that in some cases, they rely upon, and especially, perpetuate and reinforce, prejudiced and negative attitudes towards disability²⁸. As prenatal screening becomes an ever more routine element of care during pregnancy, and the typical reaction to a positive diagnosis of foetal impairment is increasingly construed as automatic termination, this may reinforce negative images of disability among the general public (already evident in the widespread perception that selective abortion is self-evidently acceptable). This effect is likely to be aggravated by the perception that selective abortion for foetal impairment is not only acceptable, but positively desirable. Under this view then, justifications of selective abortion as distinct from the perspective of foetal interests

²⁸ This need not be the case. It is quite possible that many decisions to selectively terminate a pregnancy affected by foetal impairment are not influenced by prejudice or misinformation. However, in a context where these attitudes are prevalent, the possibility of these factors playing a role must be guarded against.

become more problematic. As Gillam points out, “[a]ssessments of the expected quality of life of a disabled child-to-be are inevitably very closely connected with assessments of the quality of life of people now living with disabilities. (If prospective parents and their medical advisers do not get their information about life with a disability from looking at the lives of disabled people, then where do they get it from?)” (1999: 169). If these assessments are erroneous and prejudicial, and particularly if they assume that life with disability is not worth living, this implies that while selective abortion may not be directly discriminatory in the context of the general moral permissibility of abortion, it may indeed rely upon prejudice, and the same prejudicial attitudes towards disability which motivate selective abortion may indeed result in discrimination towards those living with disabilities in other contexts, particularly as these attitudes are normalised by the increasingly widespread perception that selective abortion is necessarily the right thing to do (and therefore that the perceptions on which these decisions are based are correct). This discrimination may take various forms, such as unfair employment practices, based, for example, on the perception that the life of a person with disabilities is “forever disrupted” by their impairment (Asch 1999:1650) or as a result of “concentrat[ion] on the truncation or loss of opportunities [imposed by disability rather than] on the nearly infinite range of remaining opportunities” (Parens *et al.* 2003: 44). Alternatively, the idea that the lives of those with disabilities are so different to the lives of those who are able-bodied may result in their social isolation or exclusion from mainstream education.

If this discrimination results in further disadvantage for those who are disabled, this may reduce the general quality of life of disabled persons, which may provide further motivation for the justification of selective abortion from foetal interests. In addition, if selective abortion is constructed as the morally desirable choice, the birth of a disabled child may increasingly be regarded as the result of an irresponsible decision, which may diminish public approval of increased support services for those who are disabled. This draws our attention to a further point – emphasising the low quality of disabled lives (particularly as this low quality of life is perceived as inherently resulting from impairment) may draw attention away from the extent to which some, and in many cases,

a great deal of the disadvantage of disability, arises from particular social structures, discrimination and prejudice rather than the innate characteristics of impairment. This in turn may militate against the transformation of society into an environment which is more accommodating to all, regardless of their particular characteristics.

Secondly, negative and prejudiced attitudes towards a particular group of people are generally experienced as offensive and hurtful by members of that group. This is the objection to selective abortion often made by disability rights advocates, who hold that prenatal screening and selective abortion “express a hurtful attitude about and send a hurtful message to people who live with [disabling] traits” (Parens *et al.* 2003: 42). In other words, decisions in favour of selective abortion for foetal impairment, and the implicit motivation for prenatal screening programmes, send “the message that [a person with the relevant disability] is automatically undesirable [and] that life with impairments is not worth living” (Fletcher 1998)²⁹. Thus selective abortion is motivated by “a quality-of-life judgement about disability that people with disabilities may well find deeply offensive and hurtful” because it leads them to believe that “others regard their lives as unhappy, unproductive and unwanted” (Gillam 1999: 164).

Where do these overly negative perceptions of life with disability come from? Firstly, it is easy to overlook that such perceptions may exaggerate the disadvantage imposed by impairment, and the extent to which this disadvantage is partially socially constructed, because impairment often *does result* in some negative consequences for those who experience it. Thus negative perceptions of disabled lives have some factual basis, which tends to mask the amplification of the hardships of disability in able-bodied perceptions, and the social construction of some of this adversity³⁰. In other words, because “disabled

²⁹ These consequences do not necessarily follow from the practice of prenatal screening. Rather, they arise primarily in situations where selective abortion is constructed as the *automatically* desirable response to a positive prenatal diagnosis of impairment, and where this response is motivated by *erroneous or prejudiced* attitudes towards disability.

³⁰ In other words, negative perceptions of disability often rely upon an exclusively medical model of disability, which assigns all (or most) of the disadvantage of disability to the innate nature of impairment. It is unsurprising, in the face of these attitudes, that disability rights advocates have placed such a great deal of emphasis on the social model of disability as a way to counter these attitudes, although, as has been shown in Chapter 2, neither model is tenable independently.

people are different, in some respects...we have overlooked the fact that...disability has been irrelevant to the different – and disadvantageous – treatment” which they have received (Singer 1993: 52). Secondly, quality-of-life judgements from the able-bodied towards the experience of disability are often constructed in terms of the loss of valued abilities, and as Asch points out, “losing capacities one has is a sad or disappointing event” (2003: 324). This can be contrasted to the actual assessments of many who live with disabilities, who experience these characteristics as the givens with which they face the world, and therefore do not perceive their disability in so negative a light³¹. Jenny Morris, for example, claims that she does not regard her disability primarily as a negative health characteristic, but as constitutive of her identity (Morris 1991: 1).

Even if the possibility of leading a worthwhile life is dependent on the ability to have certain experiences, Asch points out that “[t]hose who maintain that disability forecloses opportunity, and that any foreclosed opportunity diminishes life, focus too narrowly on the activity and do not see it as a means to an end [for example] visual instead of aesthetic pleasure; walking instead of mobilizing or exploring; talking instead of communicating” (2003: 327). Some people with disabilities may indeed be unable to enjoy specific instances of a particular experience, but this does not imply that a whole class of worthwhile experiences is closed to them. Those who underestimate the quality of life of those with disabilities ignore that there is “a diversity of views about what makes life worthwhile” (Wong 2002: 96), and that their perceptions as to the good life have been shaped by the equipment with which they face the world as able-bodied persons. Those with disabilities may indeed suffer disadvantage directly as a result of their impairment, and this may lead them, in some cases, to experience despondency and dissatisfaction. However, this fact may lead us to ignore that “[h]appiness and contentment are mainly the result of relationships between an individual and a

³¹ It is important to note at this juncture that this discussion does not imply that disability is not often experienced as negative by those who are affected by it, or that it does not imply real difficulties, suffering and frustration. This discussion is merely directed towards drawing attention to the fact that, in many cases, this disadvantage is over-emphasised, so that quality-of-life assessments are overly negative, in the sense that they are more pessimistic about life with disability than the assessments of those who are actually affected by impairment. This is especially the case in justifications for selective abortion which refer to the interests of the future person in termination, when this justification is not merited by the realities of a particular condition.

community” (Vehmas 1999: 41), rather than deriving from one’s ability to perform certain tasks. Van Niekerk points out that, for this reason, questions about quality of life may be wrongheaded: “Ek dink dat...ons verder kan kom met die vraag na die *sin van die lewe* as met die vraag na die *kwaliteit van lewe*. Die kern-vraag omtrent die lewe is of dit sin het” (2007: 6). A life with meaning is “’n lewe met ’n plan, ’n motief [en] ’n opgawe” (2007: 7). The possibility of leading such a life is not closed to those with disabilities. Asch reinforces this position by pointing out that “virtually everyone with disabilities can participate in many everyday activities, experience relationships, discover the world beyond themselves, and contribute to familial, social, political, and economic life” (2003: 320). It may be true that in cases of severe impairment, selective abortion as distinct from the perspective of foetal interests may be justified. However, in the presence of many conditions currently used to justify termination, although the quality-of-life of persons with disabilities may be lower than otherwise by able-bodied standards, this does not imply that those lives are not meaningful, not only in the perceptions of those who lead these lives, but with regard to the contribution which they might make to the lives of others. Positions which regard disability as imposing a “reduced potential for a life with the unique features which are commonly and reasonably regarded as giving special value to human lives” (Kuhse *et al.* 1985: 143) seem to misapprehend those characteristics which we generally regard as bestowing this special value.

Thus the negative assessments of the life quality of persons with disabilities expressed in arguments for selective abortion as distinct from the perspective of foetal interests may rely upon and perpetuate prejudice towards those who are disabled by “exaggerate[ing] their hardships and deprivation; obscur[ing] the injustice and discrimination they face; and dismiss[ing] or discount[ing] their own testimony of living rich and rewarding lives” (Asch 2003: 327). While these attitudes may not result in an action which is directly discriminatory in the case of selective abortion, it is possible that their perpetuation through this practice, unless carefully guarded against, may indeed have consequences which are undesirable in a society which regards non-discrimination and equality as values to be promoted.

Therefore, although some advocates of selective abortion as distinct may “argue...that to decide not to keep a [foetus] alive no more constitutes an attack on the disabled than does curing disability” (Reindal 2000: 89), this may underestimate the extent to which such decisions rest upon prejudice, in that they are often based upon “misleading and biased information about the characteristics of individuals with...disabilities and their quality of life” (Vehmas 1999: 40).

How are we to counter this trend without diminishing the autonomy of the pregnant woman? In fact, as indicated above, if societal prejudices exert pressure in favour of automatic termination of pregnancy if foetal impairment is detected, this may itself act to reduce the autonomy of the pregnant woman (as this may construct termination as a moral obligation). One possible method of countering this trend is to restructure the counselling process. If, as indicated in Chapter 2, this process is often directive, this is a major problem. Certainly parents should not be deprived of information with regard to the negative (specifically medical) implications of a particular disability, as this would indeed amount to a restriction of autonomy. However, this information should be supplemented by discussion of the social and psychological aspects of disability, and in particular, how disability influences one’s interaction with one’s concrete context. This may imply facilitating contact with a person affected by a particular condition. Currently, “[p]arents receiving prenatal counselling are rarely put in touch with people who live with the...disorder in question” (King 1999: 178). However, this may result in an approach which is itself too directive, and will only expose parents to a particular subjective view as to life with disability. Rather, it is advisable that an attempt should be made by the counsellors, and the directors of screening programmes, to expose themselves to more information about life with disability by facilitating contact with those who live with impairment, and by conducting research on how they experience their disability, not only in terms of the medical implications of their condition, but with regard to how disability impacts (or does not impact) on the various facets of their lives. As Shakespeare points out, “the best experts on life as a disabled person are disabled people themselves” (Shakespeare 1998: 673). Thus the counselling process needs to be revised in order to prevent the possibility that decisions in favour of termination could be

based upon prejudice, and particularly, overly negative assessments of the lives of those who are disabled, especially as the disadvantage of disability is regarded as wholly innate to the impairment itself. In addition, it is likely that “able-bodied people” often approach the counselling process with “negative images of people with disabilities and general misinformation about what their lives are like” as a result of existing societal prejudice (King 1999: 178). It is therefore extremely important that the counselling process should present accurate and balanced information about disability, in order to correct or counter existing prejudice.

This section has attempted to show that motivations for selective abortion as distinct from the perspective of foetal interests fail to provide a convincing account of why termination should be in the foetus’s best interests, and therefore cannot show why selective abortion should be morally preferable. In addition, this justification may often be based on erroneous information and prejudice. While this does not imply that selective abortion is morally wrong (as abortion is in itself inherently morally neutral), it does indicate that, from the perspective of foetal interests, selective abortion is in most cases not positively morally desirable. The following section will consider another justification for selective abortion which takes into account quality-of-life assessments, by making reference to the interests of the next child.

Selective abortion as distinct is in the best interests of the next child³²

The argument for selective abortion as distinct from the interests of the next child attempts to avoid the pitfalls of the justification from foetal interests, by abandoning a position which holds that selective abortion is in the best interests of the future person, but still making reference to the negative consequences arising from disability, experienced by the affected individual, in the form of suffering and limited opportunity. This alternative version of the argument holds that selective abortion proceeds in accordance with the general utilitarian principle that “it is morally good to act in a way

³² This term is actually a misnomer in the context of selective abortion as distinct, as abortion is not strictly considered to be in the best interest of the next child (who as yet has no interests), but is rather morally desirable in terms of a utilitarian obligation to maximize quality of lives.

that results in less suffering and less limited opportunity in the world” (Brock, cited in Vehmas 2002: 51). If this principle is applied in order to determine the direction of our action in choosing between the alternatives of existence and non-existence for the future person, this implies that abortion is always the morally desirable course of action in any pregnancy, as argued above, which undermines the motivations of the argument. However, the argument for selective abortion from the interests of the next child avoids this difficulty by positing the choice of alternatives posed by foetal impairment not as a choice between existence and non-existence for the future person, but as a choice between the existence of the future person who will be disabled and the existence of a future possible person who will not be disabled. In this case, a principle requiring that we act in such a way so as to produce less suffering and less limited opportunity seems to require that we choose to bring into existence the person who will not be disabled, as disability generally imposes more suffering or limited opportunity than species-typical functioning³³.

Choosing selective abortion, by taking into account the life quality of the next child, is what Parfit has termed a same number choice. Same number choices are choices where we are confronted with various alternative outcomes, and, depending on which outcome we choose to bring about, different people will come into existence (Lane 2006: 128). These types of choices will “affect the identities of future people, but [will] not affect their number” (Parfit 1984: 356). In other words, the same number of people will exist, but they will not be the same people, in the sense that they would have different identities, in each alternative³⁴.

This distinction can be illustrated with an example, which poses an imaginative thought experiment. A woman wishing to conceive is told that she is suffering from an ailment,

³³ Note that there are some conditions which are not regarded as disabling by this definition of disability, for example, achondroplasia or dwarfism (Harris 2000: 98), or physical disfigurements which do not result in divergence from species-typical functioning. As these conditions do not usually result in suffering or limited opportunity which stems necessarily from the impairment itself, these conditions would not be applicable to the utilitarian principle identified above.

³⁴ Parfit distinguishes same number choices from same people choices, in which “all and only the same people will ever live”, but we can choose whether to benefit or harm these people, and different number choices, which “affect the number and the identities of future people” (1984: 356).

which, if she conceives while affected by it, will result in her child being born with severe disabilities. However, if she takes a medication for one month, her condition will be cured and she will be able to conceive with no adverse health affects to the future child. Most of us would insist that the morally correct course of action would be to wait to conceive (Brock, cited in Vehmas 2002: 50). This is a same number choice, as the same number of people will exist in each alternative, but the future person who will result from her decision to conceive at a particular time will have a different identity, depending on whether she conceives immediately or waits to conceive, as “[i]f any particular person had not been conceived when he was in fact conceived...[or] within a month of the time when he was in fact conceived, he would in fact never have existed” (Parfit 1984: 352).

As indicated in the preceding section, were the woman to have conceived immediately, the resulting future person who would have been disabled could not complain of being wronged by such a choice, unless their disability rendered their life not worth living. The alternative to life with a disability would be non-existence, as had the woman not conceived at that particular time, this person would never have existed. Why then, would we regard the action of the woman in choosing to conceive immediately as morally wrong, if it wrongs no-one in person-affecting terms? The choice cannot logically be morally wrong unless “its outcome is worse than the outcome that some other available choice would have had” (Hanser 1990: 50). For Parfit, the choice between outcomes in same number choices should be governed by the following principle, which he calls the “Same Number Quality Claim:...If in either of two outcomes the same number of people would ever live, it would be bad if those who live are worse off, or have a lower quality of life, than those who would have lived” (1984: 360). Neither of these future persons yet exist, and we are not obligated to bring either of them into existence, as a future possible person cannot be benefited by being brought into existence, or harmed by not being brought into existence (although once the person exists they may experience their existence as a benefit). If we intend to bring a future person into existence, we are therefore at liberty to choose between future persons in a utilitarian way. In the thought experiment discussed above, we can therefore only regard the woman’s action in refusing to wait to conceive as morally reprehensible if we assume “that the value of life of an

unconceived possible child can properly be taken into consideration” (Kuhse *et al.* 1985: 159), and that the quality of life of a disabled child would be less than that of an able-bodied child (even if the life of the former child is a life worth living)³⁵.

The argument for selective abortion as distinct from the perspective of the interests of the next child considers decision making around the termination of pregnancies affected by foetal impairment to amount to a same number choice of the same type as illustrated in the example above. In other words, if giving birth to a child with disabilities is likely to prevent the birth of a future, species-typical child, one should, if guided by the Same Number Quality Claim formulated above, choose to abort the disabled foetus and instead bring into existence a future able-bodied person. This choice is similar to the above choice because, although the foetus already exists as a biological organism (as opposed to the future possible beings in the example above, who are purely potential beings), it does not exist morally. It is thus acceptable, according to this argument, “to ‘trade-off’ the life of one foetus against that of another in a utilitarian way, their status being such that killing one solely in order to generate an increase in the general good is permissible” (Sheldon *et al.* 2001). The argument from the best interests of the next child therefore avoids constructing the alternative to life with disability as non-existence, as is necessary in the foetal interests argument, and instead compares life with disability to life as “a healthy replacement” (Kuhse *et al.* 1985: 65). The action we take in selective abortion is therefore not taken “for the sake of the [foetus]...but rather for the sake of less overall suffering and loss of opportunity” (Vehmas 2002: 51), and thus avoids motivation by a person-affecting principle.

Therefore, the argument for selective abortion as distinct from the interests of the next child can be formulated as follows:

³⁵ The problematic nature of such quality-of-life judgements has been discussed in the preceding section, and will not be discussed again here. In any case, the argument from the best interests of the next child need not imply an overly negative assessment of the life quality of disabled persons. All it requires is that the life quality of those with disabilities is lower (even if not significantly lower) than the life quality of able-bodied persons. As indicated in Chapter 2, many impairments impose real disadvantage, regardless of the social context, which cannot be denied, and thus this assessment is, in most cases, not problematic.

- Premise 1: Abortion is a morally neutral action.
- Premise 2: The coming into existence of a person with disabilities will prevent the coming into existence of a future, non-disabled person.
- Premise 3: A person with disabilities will have a lower quality of life than a non-disabled person.
- Premise 4: If in either of two outcomes the same number of people would ever live, it would be bad if those who live are worse off, or have a lower quality of life, than those who would have lived.
- Conclusion: Abortion following the detection of foetal impairment is the morally desirable course of action.

This argument, if we accept its premises, is valid. However, we can subject the argument to critique in four respects. Firstly, we can examine the assumptions made in Premise 2, particularly with regard to the applicability of these assumptions to the practice of selective abortion. Secondly, we can question whether the Same Number Quality Claim which serves as Premise 4 is plausible as a moral principle. Thirdly, we can point out the undesirable implications of this claim in other contexts, particularly with regard to its consequences for reproductive autonomy. Fourthly, we must consider the offence which is likely to be experienced by persons living with disabilities as a result of the assumptions inherent in this argument.

Premise 2 of the above argument assumes that the alternative outcomes posed by the detection of foetal abnormality, and subsequent decisions around selective abortion, are the existence of a disabled person, or the existence of a non-disabled person. In other words, it assumes, and makes the moral desirability of selective abortion dependent upon, the likelihood that the foetus aborted for foetal impairment will be replaced by a future healthy foetus.

This is probably the case in many pregnancies affected by foetal impairment. (In other words, parents trying to conceive will abort a pregnancy affected by foetal impairment and ‘try again’). However, in reality, there are no assurances whatsoever that the parents

will choose to have a child later to replace a disabled foetus, or that they will regard this child as such a substitute. In other words, the argument “assumes something which cannot simply be assumed: that the women in question will at least try to become pregnant again, thereby ‘replacing’ aborted foetuses with new non-disabled ones” (Sheldon *et al.* 2001). This makes the motivation for the moral desirability of selective abortion dependent on whether the parents indeed agree to try to conceive, and go on to have another child, following the termination of a pregnancy affected by foetal impairment.

In this regard, we can compare the arguments for selective abortion from the interests of the next child with the practice of preimplantation genetic diagnosis, when we are faced with a choice as to which embryo to implant. In this case, it seems reasonable to argue (if we accept the Same Number Quality Claim) that we should choose to implant the embryo which is able-bodied over the embryo likely to be disabled, as the first embryo would be likely to result in a person with a higher quality of life than the second embryo. In this case, if both embryos are morally insignificant, we have no moral obligations to either, and our choice is unencumbered. Harris points out that “[t]he decision not to implant or to choose between embryos need not be based on any decision that life in a particular condition is not worth living” (Harris 2000: 100), as has been shown to be an implication of the argument from foetal interests. It merely implies that we judge the quality of life of one future being to be higher than that of another, regardless of whether we think this latter being may have indeed have the potential to lead a satisfying life.

In the context of selective abortion, we are also faced with two beings who are not morally significant (in one case, because it does not yet exist, and is simply a possible being, and in the other, because it has not yet acquired moral status, although it has an established genetic identity, and therefore does not exist morally). However, for the argument to succeed in a similar way to the argument for preimplantation genetic diagnosis, it must fulfil similar conditions. In the case of preimplantation genetic diagnosis, either an embryo with disabling characteristics or an embryo without these characteristics is going to be implanted. There is therefore a straightforward choice

between the future existences of two possible beings. However, as indicated above, we have no assurances that this is the case in the context of selective abortion as distinct. This means that selective abortion is only morally desirable in some cases when parents perceive the existence of their next child as the alternative which they have chosen over the existence of a disabled child. Prospective parents can therefore avoid the moral prescription to selectively abort for foetal abnormality in two ways. Firstly, parents who do not intend to replace the disabled foetus with a future child cannot be morally obligated to abort selectively. This is also true when parents are only able to conceive children with disabilities, as they do not have the alternative of producing a future, healthy child. Those who argue in support of selective abortion from the perspective of the next child have recognised this latter case. John Harris, for example, insists that “for those who can only have disabled children, having such children may be morally better than having no children at all” (2000: 100). Secondly, parents who do intend to go on to have a further child (or children) cannot be morally obligated to abort selectively if they do not regard that child as a replacement, or deny that the birth of a disabled child would have prevented the birth of their future children. In other words, unless prospective parents regard the choice posed by foetal impairment as being between the birth of a child with disabilities *or* the birth of a future, non-disabled child, this choice cannot be morally obligatory. The alternative to this position is to suggest that parents should feel obligated to abort disabled fetuses and also to produce a non-disabled child in the future as a replacement, which seems ridiculous, as it implies that future reproduction should be morally obligatory.

We can compare the assumptions underpinning the argument for selective abortion from the perspective of a possible next child with parents’ feelings when confronted with the presence of foetal impairment. Baily describes the decision making process in these circumstances as follows: “My picture is of a 'disembodied soul,' the sense of my yet-to-be-born child, waiting to be inserted into a baby-shaped container, with me standing there to make sure my child's soul gets into a well-functioning container.” (cited in Johnson 2001). From the perspective of the future parents then, the argument from the interests of the next child may be apt, although for slightly different reasons. Generally, when

parents are trying to conceive, they imagine their future child and take up a position of parental responsibility towards that child. For them, their decisions are directed towards providing the best possible life for this future child. While scientifically, the choice in selective abortion (granted that the parents will try to replace a disabled foetus) is between two individuals with particular identities; for parents, the choice is between two kinds of lives for their future, imagined child. Vehmas emphasises that “[w]hen parents wish to have a child...and when they try to have a child, they often create a vague image of their intended future child...For parents it makes no difference...whether the child has been conceived at a [particular] moment” (2002: 52). Thus for parents, choosing between when to conceive or whether to selectively abort (assuming that they regard the foetus as morally insignificant) is not a matter of choosing between two future children (although this is in fact the case scientifically) but a case of choosing between two kinds of lives for their future, imagined child³⁶. Thus, “from a parental perspective the child born is *the* intended child – the one the parents had the intention of having” (Vehmas 2002: 52-53). When some parents choose selective abortion with the intention of replacing a disabled foetus with a non-disabled foetus, their action may therefore proceed in accordance with their parental responsibility to maximise the wellbeing of their imagined, future child. Does this imply that *all* prospective parents are therefore obligated to abort for foetal impairment? It seems that this depends entirely upon parental attitudes. If parents “see the foetus as their already existing child” (Vehmas 2002: 59) and do not intend to abort selectively to choose another life for their future child, selective abortion cannot be morally obligatory, unless “it is undoubtedly in the best interest of the child to die” (Vehmas 2002: 59), as parents have now taken up a position of parental responsibility to this particular foetus, and are obligated to promote its wellbeing. As has been shown in the preceding section, it is true only in some rare cases that parents would be promoting the wellbeing of a disabled foetus by choosing

³⁶ This description of the reasoning process undertaken by parents considering selective abortion is often difficult to separate from the argument for selective abortion from the perspective of parental interests. In other words, does this justification refer to parents’ desire to ensure the best possible life for their future child, or to a desire for a future child of a particular type (and thus a parenting experience of a particular type)? It is difficult to separate these two concerns expressed by parents. Both seem to express concerns about the wellbeing of a future family. If this is the case, this justification may belong more properly in justifications for selective abortion from the perspective of parental or familial interests.

abortion. Parents who view the disabled foetus as their intended child have an obligation to promote the well-being of *this* child (by ensuring that it leads the best possible life in the context of its particular characteristics), but cannot be obligated to abort unless they do not regard the foetus as their intended child and wish to ‘try again’. Therefore, while the argument for selective abortion from the best interests of the next child provides a plausible justification for selective abortion as distinct, assuming the validity of the Same Number Quality Claim, in cases where parents intend to replace the disabled foetus with a non-disabled foetus, it does not indicate that this practice is always morally desirable, unless parents indeed have this intention.

We can secondly consider whether the Same Number Quality Claim which grounds the argument above is a plausible claim which accords with our perceptions about the nature of morality. As the Same Number Quality Claim, or any utilitarian principle which we could substitute in its place, such as a general obligation to minimise suffering and limited opportunity, is non-person-affecting, the wrong which would be done by flouting such principles would be *victimless*. Parents do not harm their future child by bringing it into the world with disability, provided that it is likely to have a life worth living, and they do not harm their possible alternative child by failing to bring it into existence as it, as yet, has no interests. If no-one is made worse off by parental action in continuing with an affected pregnancy (provided they are willing to accept any possible consequences accruing to themselves by the birth of a child with disabilities), how can it be wrong to take such action? It is unclear why we should be obliged to act in a way that results in less suffering and less limited opportunity in the world if our action in bringing a person with disabilities into the world is bad for no-one. For this reason, some critics have attempted to reformulate the wrongness of such action in person-affecting terms³⁷, by arguing that it is indeed harmful to a person with disabilities to be brought into the world even if their life is worth living, although, as indicated above, this study takes the position that these arguments are doomed to failure by their implications. We can identify a further consideration in this regard. If prospective parents do regard the disabled foetus as their future child, and experience an obligation to abort selectively as a burden,

³⁷ See Hanser (1990), Sackris (2006), and Reiman (2007).

exerting pressure in favour of such a decision would indeed be harmful to existing beings with moral status, and thus, would be person-affecting. In this case, if we must choose between harming no-one, and harming morally significant beings, reason seems to suggest that we should choose the alternative which harms no-one, regardless of whether this choice comes into conflict with the Same Number Quality Claim.

Even if we accept that we are obliged to act in accordance with a broadly utilitarian principle which holds that we are obligated to maximise quality of lives, an argument relying upon the Same Number Quality Claim faces a third difficulty, with regard to its implications if applied in other contexts. Firstly, it implies that parents are always morally obligated to choose the future child who is likely to have the best quality of life. This might imply that they should wait to conceive a child (or terminate all pregnancies) until they are in an optimal financial or social position. This assumption might seem to be self-evidently correct. However, an endless obligation to maximise quality of lives in this way has the potential to severely restrict reproductive autonomy. This can be illustrated by a second example. The Same Number Quality Claim implies that parents, in the future, could be morally obligated to choose children that have been genetically enhanced over children conceived normally (Sackris 2006: 43). Lillehammer poses this possibility as follows:

Jack and Jill are trying for a child. Their GP offers Jack a drug which, taken before and during the time of conception, will alter the genetic make-up of his sperm so as to make any child conceived from that sperm enjoy superhuman intelligence. Jack and Jill turn down the offer, conceive normally, and nine months later give birth to a normal, healthy child. Had Jack and Jill accepted the GP's offer they would have had a much more intelligent child. If so, their actual normal child would never have existed. Were Jack and Jill wrong to have a normal, healthy child (2005: 30)?

One might possibly avoid these implications by claiming that one has a duty to choose the child who will not be worse off than their peers, but does not have a duty to choose the child who will be better off than their peers (although this does not follow from the Same Number Claim). However, this does not take into account that future advances in technology may result in genetic enhancement increasingly becoming standard, which

would imply that a child with normal species-functioning would indeed be worse off than their peers. If we are uneasy about these implications, particularly with regard to their detrimental consequences for reproductive autonomy, we should carefully consider whether the Same Number Quality Claim should rightly indicate that prospective parents should feel morally obligated to abort selectively.

There is also a fourth consideration to be taken into account with regard to motivations for selective abortion as distinct from the perspective of the next child. This motivation entails a judgement about the life quality of persons with disabilities which holds that this life quality is intrinsically less than the life quality of persons who are able-bodied, which is used to ground a claim that it is less desirable to bring persons with disabilities into existence than it is to bring able-bodied persons into existence³⁸. This judgement could be experienced as offensive or hurtful by persons with disabilities, even if it is not advanced in favour of a directly discriminatory action, as it could be interpreted to imply that their lives are somehow of less value than the lives of others. As indicated in the preceding section, this expressivist argument is generally advanced by disability rights advocates. In this case, the hurtful message sent by arguments for selective abortion from the perspective of the next child is that the existence of a person with disabilities is objectively less desirable. The concern about the offensive message sent by this motivation for selective abortion does not necessarily render it invalid, as it is indeed possible that the quality of life of persons with disabilities is lower than those who are not disabled, as a result of the partially intrinsic nature of the disadvantage of impairment. However, it should at least be factored into our moral deliberations around this issue, particularly as it draws our attention to a detrimental effect of the practice of selective abortion motivated in this way, upon beings with moral status who already exist, and whose interests we are therefore obliged to consider.

³⁸ While the argument from foetal interests regards it as undesirable to bring persons with disabilities into existence, this claim is grounded on the interests of that future person. The argument from the perspective of the next child, however, entails a claim that even if it is not against the interests of a person with disabilities to bring them into existence, it is generally worse *for the world* to bring such people into existence than to bring able-bodied persons into existence, as we should try to keep suffering and limited opportunity to a minimum.

If the motivations for selective abortion as distinct from the perspective of the interests of the future person, or the interests of the next child, are problematic for the reasons given above, we should consider alternative motivations for selective abortion which do not refer to the quality of life of disabled persons. These motivations may “refer to the effect on the family of a severely disabled child; or...appeal to the need to make the most effective use of scarce medical resources...despite the fact that the child’s quality of life [is no longer in] consideration” (Kuhse *et al.* 1985: 64). We must therefore proceed with an interrogation of these alternative motivations.

Selective abortion as distinct is in the best interests of the pregnant woman, parents and family

As indicated previously, the motivation for selective abortion from the best interests of the pregnant woman, parents and family, is the only motivation which does not construct selective abortion as the morally desirable course of action. However, as indicated in Chapter 2, this motivation fails in the context of the moral significance of the foetus assumed by proponents of this justification for selective abortion as exception, as it fails to show why parental interests should count in favour of abortion in the case of foetal impairment, but not in other cases where the parent’s interests are also likely to be detrimentally affected by a continued pregnancy, but where the foetus is able-bodied.

This objection does not hold in the context of justifications of selective abortion as distinct. In fact, concerns about “the autonomy and wellbeing of the pregnant woman” could be the most successful justification of this practice (Gillam 1999:168). This is because the motivation of selective abortion from the perspective of parental interest has two advantages over other justifications discussed in this chapter. Firstly, it does not have the potential to undermine reproductive autonomy, as it does not construct selective abortion as a moral obligation, but as an option open to prospective parents who are able to independently evaluate the likely effect that the birth of a disabled child will have on their own lives, as well as their existing family. As such, abortion is “not something that is imposed on [the pregnant woman]” (Furedi 1998). Secondly, and as a result of the

above, motivations of selective abortion as distinct from the perspective of parental interests are similar in nature to general motivations for abortion, which seek to promote a woman's right to "the pursuit of a satisfactory life for [herself] and those for whom [she is] responsible" (Warren 2001: 129).

The argument for selective abortion as distinct from the perspective of parental interests could be formulated as follows:

- Premise 1: Abortion is a morally neutral action.
- Premise 2: The birth of a disabled child will impose a significant burden on others (specifically, its parents and siblings).
- Premise 3: The burden imposed on others by the birth of a disabled child (specifically on its parents and siblings) can be avoided by abortion.
- Conclusion: Abortion is a legitimate method of avoiding the burden imposed by a disabled child on others (specifically, its parents and siblings).

Note that this argument does not indicate that abortion is the morally desirable course of action, and therefore does not construct abortion as a moral obligation to the pregnant woman or parents. This is because the burden imposed by the birth of a child with disabilities, which can be legitimately avoided by abortion, is to be borne by those who are responsible for deciding whether they wish to terminate or continue the affected pregnancy. It is therefore up to these decision makers to decide whether they wish to accept this burden, or whether they wish to avoid it by abortion. This is a fundamentally similar process to decision making around abortion in other contexts. To deny that such a decision is legitimate, in the context of the general moral permissibility of abortion, is to undercut women's rights to make any decisions in favour of abortion.

Thus the argument for selective abortion as distinct from the perspective of parental interests is valid. However, in order for this motivation to avoid restricting parental autonomy, and to prevent its reliance upon prejudicial attitudes, it must also overcome certain practical difficulties which may unduly influence the decision making process.

This study will suggest that these possibilities can be avoided, on the condition that steps are taken to guard against them.

Firstly, it is likely that “many of the problems faced by parents of children with disabilities are the result of social discrimination, rather than impairment *per se*” (Sheldon *et al.* 2001). The structure of society, with regard to its lack of accessibility to persons with disabilities, and prejudicial attitudes towards disability on the part of members of society, may render the experience of parenting a child with disabilities far more difficult and burdensome than would be the case if society were more accommodating. This may pose the possibility that decisions in favour of selective abortion from the perspective of parental interests may be “colluding with social discrimination against people with difficulties” (Sheldon *et al.* 2001), or, at least, may be partially contributed towards by the presence of social discrimination. In this regard, we can draw parallels with the practice of sex-selective abortion. Wong asks us to consider this possible case:

Imagine a particular family in which the mother has several daughters and has not yet borne a son for her family. Imagine also that the family has limited financial resources, and that the basic structure of society does not provide adequate support for unmarried women or widows (2002: 97).

We could add to this postulated context: imagine that in this particular society, parents are expected to provide dowries for their daughters upon their marriage which would impose a considerable strain on their limited resources. In this context, because of social discrimination and the particular structure of society which is biased in favour of males, “parents believe that knowing the sex of a foetus can relieve them of a future burden” (Sammons 1978: 238), and it is unsurprising that many woman choose sex-selective abortion in these circumstances. While the burden of raising a child with disabilities is not a directly equivalent case, as much of this burden stems directly from the fact of impairment rather than being entirely dependent on social structure, it is still likely that the burden experienced by parents of disabled children will be aggravated by social discrimination. It is unsurprising that, in this context, many parents choose selective

abortion for foetal impairment. We should be concerned about the contribution of these factors to decisions in favour of selective abortion for similar reasons that we should be concerned about sex-selective abortion – it appears to result from inhospitable societal attitudes towards members of a particular group³⁹.

These conclusions do not imply that we should restrict decisions in favour of abortion which result from societal prejudices and discrimination. If abortion is a morally neutral act, this would be a nonsensical solution. The problem lies not in the moral status of the act of abortion, but in the structure of society which motivates individual decisions in favour of abortion⁴⁰, and limits the possibility of autonomous decision making. To restrict the right to abortion in these contexts will do nothing to improve or alter the structure of society which results in such decisions. It is in this direction that our attention should be directed, by advocating for the enactment of legislation which would expand the accessibility of society to women and persons with disabilities respectively, and by taking active measures to counter prejudice through education.

However, there is a further point to consider here. In the absence of discriminatory attitudes and social structures, female children impose no greater burden on their parents than male children. No part of the burden of caring for female children is innate to their biological identity. On the other hand, while some of the burden of caring for children with disabilities results from social discrimination, a large portion of this burden is innate to impairment itself. Even in the absence of social prejudice, raising children with many

³⁹ Note that the prejudice or social discrimination underlying sex-selective abortions may intersect, in some cases, with motivations for selective abortion for foetal impairment. The values of a patriarchal society which inform the former practice may also result in the fact that “the...strain” of raising a disabled child may fall “especially [on] the mother” (Kuhse 1985: 57), as she is often expected to fulfil the role of primary caregiver. As King points out, this may result in a positive preference for termination on the part of the pregnant woman as she may be “sharply aware that the extra burden of caring for a disabled child will fall on [her]” (1999: 178).

⁴⁰ Generally, it is likely that most of our decisions are motivated (at least partially) by the structure of society. However, this becomes a problem when the structure of society is discriminatory towards particular groups of people. For example, if it were to become possible to identify the biological basis of homosexuality, and this was used as a justification for selective abortion, the specific act of abortion would not be morally wrong. However, we would object to the presence of societal discrimination which would have been likely to have motivated such a decision.

disabling conditions will demand more time, energy, and financial resources than would be the case in the absence of these conditions.

We must therefore turn to a second concern. In many contexts, prospective parents are aware of the inherent burden imposed by caring for a child with disabilities, and these concerns may weigh heavily in favour of selective abortion. However, some critics point out that this burden could be counteracted to a large extent by the provision of support services to families affected by disability. Tom Koch, for example, regards “the ‘burden’ of caring for another [as] a function of society’s failure adequately to support those who care for a fragile other” (Koch 2004: 699). In other words, it is likely that many prospective parents feel unable to continue with a pregnancy affected by foetal impairment because of inadequate support (whether financial or otherwise) from government, which may act to limit freedom of choice in decisions around selective abortion. Sheldon *et al.* assert that “[i]f parents would feel able to care for a disabled child with greater social assistance” but choose to terminate in any case because “assistance will not be forthcoming” (2001), this has worrying implications for the exercise of autonomy. Rose confirms this position by stressing that “unless you are in a supportive society, notions of choice do not really exist” (1998). Fletcher suggests the following:

[W]here little or no financial aid is given to care for children with birth defects, the economic dimension of an expected defective child can be overwhelming. There needs to be a system of compensation for families so at-risk, especially in the case of unequal medical facilities, so that the medical and economic values in abortion decisions can be kept in reasonable balance (cited in Sammons 1978: 240).

Thus, a possible solution to this quandary is “to argue for better provision of welfare services and financial benefits to parents of disabled children” (Shakespeare 1998: 672). In other words, society should not only act to avoid prejudice and discrimination against persons with disabilities, but should also take active steps to accommodate their needs⁴¹.

⁴¹ The question as to whether it is fair to expect society to provide extra resources to those who are disabled will be discussed in the following section.

This will not only result in increased parental autonomy in considerations as to whether they are able or willing to accept the responsibility of caring for a disabled child, but will greatly improve the circumstances of many families currently living with disability.

The third factor to be considered with regard to motivations for selective abortion as distinct from the perspective of parental interests, is the possibility that the burden imposed by the birth of a disabled child may be overestimated by parents, as a result of erroneous perceptions, based upon prejudice prevalent in society, of the quality of life, capabilities, and contributions of persons with disabilities. In other words, prospective parents may have overly pessimistic perceptions of the effect which the birth of a child with disabilities will have on them and their family, and the extent to which such a child would be able to contribute to family life. These overly negative assessments are likely in the context of existing prejudice towards persons with disabilities, and may not always reflect the realities of raising a child with impairment. Asch describes these assessments as resting on a “mistaken notion” – that “[s]omeone who needs assistance with one activity...need[s] assistance in all areas and...contribute[s] nothing to the social, emotional, or instrumental aspects of family life” (1999: 1653). She refers to “[a] vast array of literature, both parental narrative and social science quantitative and qualitative research [sic]⁴² [which] powerfully attests to the rewards – typical and atypical – of raising children with many of the conditions for which prenatal testing is considered *de rigueur* and abortion is expected” (1999: 1654). The fact that prospective parents continue to assess the future possibility of raising a child with disabilities as a negative experience may indicate that they do not believe that such a child would fulfil their expectations of parenthood as “the opportunity to give ourselves to a new being who starts out with the best we can give, who will enrich us, gladden others, contribute to the world, and make us proud” (Asch 1999: 1653-1654). Asch suggests that choosing to raise children with many disabling conditions does not necessarily exclude these experiences.

⁴² Asch cites Massie *et al.* (1975), Walker *et al.* (1987), Van Riper *et al.* (1992), Turnbull *et al.* (1993), Berube (1996), Taanila *et al.* (1996) and Beck (1999).

Are the concerns expressed above as to the influence of social discrimination, lack of support services, and erroneous or prejudiced perceptions on decisions in favour of selective abortion, from the perspective of parental interests, legitimate? Some critics reject the notion that we should be uneasy about these possibilities. Jackson, for example, claims that all decisions are mediated by outside influences and cultural context, and it is thus ridiculous to regard autonomy as being undermined because similar considerations influence decision making around selective abortion (cited in Pritchard 2005: 86). This point is also made by Sharp and Earle:

It seems rather dangerous to imply that because one's beliefs, attitudes and preferences are influenced by wider social factors, one's entitlement to hold them and to have them taken seriously should be undermined. On this argument, a case could be made for denying virtually any individual the right to exercise virtually any preference (2002: 143-144).

However, this critique seems to miss the point that concerns expressed about the possible influences of societal discrimination, lack of support and prejudice on decisions in favour of selective abortion as distinct do not suggest that these choices should therefore be legally invalid or restricted. Rather, they suggest that we should do our best to ensure that choices are not unduly influenced by external pressures. In practice, we do try and ensure this in other contexts. Thus, for example, we advocate for paid maternity leave in order to allow a woman to choose to have a child while simultaneously continuing a career. The information provided during counselling following prenatal diagnosis is also explicitly directed towards increasing autonomy, by providing reliable information to prospective parents. It is therefore not unprecedented to make attempts to counter discriminatory social pressures and to provide accurate information to enable autonomous reproductive decision making. It would indeed be dangerous to suggest that choices which we do not regard as truly autonomous should be restricted or invalidated, particularly as we can recognise that autonomous decision making is an ideal to be striven towards rather than a goal that can be completely attained, taking into account that abortion is considered to be a morally neutral action in this context. However, this does not imply that we should be prevented from attempting to create the most optimal conditions for the exercise of autonomy, by advocating for the transformation of social

conditions, the expansion of support services and the provision of accurate information about the implications of disability for family life.

Taking into account all of the above, it is still likely that many parents will nevertheless feel unable to accept the burden imposed by caring for a child with a disability, and will choose selective abortion. Even if all of the recommendations above are carried out, the medical reality of impairment is still likely to imply that parental and familial interests may be detrimentally affected by continuing a pregnancy affected by foetal impairment, particularly in the case of the detection of conditions which are severe. This is a choice which is entirely acceptable within the context of justifications of selective abortion as distinct, as the moral permissibility of abortion which is assumed by these motivations is inextricably linked to the right to autonomy.

Selective abortion as distinct is in the best interests of society

The final party whose interests are considered relevant in motivations for selective abortion as distinct is society as a whole. If, as recommended in the preceding section, and as already occurring in many parts of the world, extra resources should be made available to persons living with disabilities, and those who care for them, by government, this would result in society experiencing the birth of persons with disabilities as a greater burden than would be imposed by species-typical members of society. While the motivation of selective abortion as distinct from the perspective of parental interests allows those who will be responsible for the possible burden imposed by a disabled child to decide whether to accept that burden, no such choice is offered to society. One may therefore regard the imposition of such a burden on society, without its having a choice in the matter, and when this imposition could have been avoided, as unfair. Thus, it seems that selective abortion could be motivated by making reference to the interests of society in avoiding such a burden.

The argument in this regard would have to be formulated as follows:

- Premise 1: Abortion is a morally neutral action.
- Premise 2: The birth of a disabled child will impose a significant burden on others (specifically, society as a whole).
- Premise 3: The burden imposed on others by the birth of a disabled child (specifically on society as a whole) can be avoided by abortion.
- Premise 4: It is unfair to impose a significant burden on society as a whole, when society is unable to choose whether to accept this burden, and when the imposition of this burden could be avoided.
- Conclusion: Abortion following the detection of foetal impairment is the morally desirable course of action.

Note that this argument is similar to the argument for selective abortion as distinct from the best interests of the parents. Both take into account the significant burden often imposed by disability. However, this argument leads one to conclude that abortion is once again the morally desirable course of action, as the perception exists that it is unfair to impose a significant burden on society, when society cannot choose whether to accept or reject that burden (as opposed to the argument from parental interests, where the party to shoulder the burden is also the party in a position to choose whether to accept or reject that burden).

We must consider two elements of this argument. Firstly, we can consider whether it is indeed unfair that society should experience the burden of disability, as a burden imposed by a specific reproductive choice. If this is indeed the case, this has the potential to upset the recommendations made with regard to the argument from parental interests. Secondly, we must examine the potential implications of a position which regards the moral desirability of abortion as dependent upon the interests of society, and the negative impact this might have on the promotion of reproductive autonomy.

Initially then, we can consider the position that it is unfair that society should have to accept the burden imposed by disability. In the light of limited available resources, is it not unfair that those who are disabled should demand a great deal of resources, which

would diminish the resources available to other members of society (some of whom are also in need of extra financial support)? If every pregnancy affected by foetal impairment was to result in the birth of a person with disabilities, this would “greatly increase...the burden on the limited resources available for helping people with disabilities” (Kuhse *et al.* 1985: 53). Indeed, if the recommendations made in the preceding section are to be taken seriously, this would indicate that more resources than are currently available should be dedicated to providing support services to this group. Why should society be expected to shoulder this burden, particularly when prospective parents have the option of prenatal screening and selective abortion?

The question as to whether it is unfair to provide extra resources to persons with disabilities is inextricably bound up with the perceived duty on the part of government to promote the wellbeing of all members of society and to further the equal functioning of all. As persons with disabilities are arbitrarily disadvantaged by their impairment, and as they often cannot function on the same level as others without support, it seems that if we wish to promote equality, it is acceptable to dedicate extra resources to persons with disabilities. Singer points out that this is necessary because, if we wish to promote equality, “mere equality of opportunity will not be enough in situations in which a disability makes it impossible to become an equal member of the community” (1993: 53). If we accept that persons with disabilities after birth are beings with moral status who have interests which we are obliged to consider in the same way as other persons (which we must if we are to avoid charges of discrimination), then we must recognise that the disadvantage imposed by impairment, if not countered by the provision of extra resources, prevents persons with disabilities from fulfilling their interests on an equal footing. If we are to promote equality, we must at least attempt to counter the inequality of disability by providing for some of the needs of persons with disabilities, which they would be unable to satisfy without support. Some of these needs are “very central to the lives of disabled people”, such as the need for education, healthcare, accommodation, employment and so on. This gives them “much greater weight than the more minor needs of others” (Singer 1993: 53), and explains why we are justified in dedicating more resources to those who are disabled. Wong points out that a position which regards it as

unfair to expect society to provide for the needs of persons with disabilities does not take into account “the overall basic structure of [some] societ[ies], which currently allocate...plenty of money for the military industry, agricultural subsidies, and tax breaks to wealthy corporations and well-off individuals” (2002: 95). In this context, is it not to be expected that at least the most basic needs of those with disabilities should be provided by society, particularly in societies which are committed to promoting the equal wellbeing of all its members?

However, one could critique this position by arguing that, although society does indeed have an obligation to provide for the needs of persons already living with disabilities, as these persons are existing members of society, this does not imply that we should be obligated to provide for the needs of future members of society whose birth could have reasonably been foreseen as likely to impose a burden on society. If the imposition of this burden could be avoided, without undertaking any morally wrong action, surely this would be the morally desirable thing to do? In other words, even if we claim that we should do our best to improve the lives of those with disabilities, this does not imply that we cannot also claim that, “before a life has properly begun...such a life should not be lived” (Kuhse *et al.* 1985: i), because of the burden imposed by this life on society. If prospective parents are in the position to avoid the imposition of this burden upon society by selective abortion, taking into account the moral permissibility of this practice, are they not morally obligated to do so? In this case, “a justification of public pressure for a woman to abort a defective foetus might stem from a cost-benefit analysis of [screening] and abortion versus a lifetime of sophisticated medical care or institutionalization” (Sammons 1978: 240).

Even if we do not take the above argument to imply that parents should “do the right thing” and choose abortion, one may question whether parents who reject prenatal screening, or who decide to continue with a pregnancy in the face of a positive diagnosis of foetal impairment, should still have the right to expect support from society. Some have even suggested that those who make such choices should be excluded from those who are eligible to receive support services (Green 1995: 229).

We can therefore turn to the dangerous implications which such attitudes have for the exercise of the right to reproductive autonomy. This is particularly the case as prenatal screening programmes are explicitly directed towards the promotion of reproductive autonomy. However, as indicated in Chapter 2, such programmes are also motivated by cost concerns, with selective abortion being regarded as a cost-effective solution. Ward expresses this problem as follows:

How does the state's *implicit* interest in prenatal diagnosis (particularly its economic interests in preventing the birth of children with impairments) impact upon the *explicit* aims of prenatal diagnosis, which are said to be about affording prospective parents the chance to make informed choices? The 'effectiveness' of prenatal diagnosis is determined by health economists, via cost-benefit analyses which set the resources invested in screening against the savings that result; that is the savings to the state of the costs of supporting a disabled child. Such analyses make clear (though not explicit) that the state's interest in prenatal testing is not about woman making *any* informed choice but about making a *particular* choice, namely to have an abortion (2002: 191).

If increased prenatal testing is therefore regarded as desirable for these implicit reasons, this is likely to have major implications for the level of directiveness (even if not explicit) of counselling accompanying prenatal screening.

This possibility is not as remote as it may seem. King, for example, cites the following study by Wertz and Fletcher:

An average of 20% of geneticists [in English-speaking countries and Northern Europe] feel that, given the availability of prenatal testing, it is unfair *to society* to knowingly have a child with a serious genetic disorder. In the rest of the world, majorities of geneticists support this view, rising to nearly 100% in some countries (1999: 177).

This motivation for the moral desirability of prenatal screening therefore has the potential to undercut, not only the explicit motivation for screening programmes themselves, but the general motivation for the moral permissibility of abortion. Reproductive autonomy implies that one should be able to make free choices between a variety of alternatives.

To suggest that the interests of society weigh in favour of the positive moral desirability of selective abortion thus has serious consequences for the restriction of autonomy, as it suggests that a particular choice should be taken, or that some choices are undesirable by the standards of society. If this attitude bears itself out in suggestions that those who avoid prenatal screening and selective abortion should not be eligible for societal support, this is likely to exert strong pressure in favour of selective abortion as “women [will] know [that] they have decreased opportunity to ask for help in raising and caring for a child that they chose to give birth to” (Pritchard 2005: 86). Thus the motivation for selective abortion as distinct from the best interests of society is positively dangerous, as it undermines parental autonomy in reproductive decision making, the promotion of which is the explicit aim of screening programmes as well as the motivation for the moral permissibility of abortion in general.

Concluding remarks

This chapter has shown that justifications of selective abortion as distinct cannot be regarded as directly discriminatory towards persons with disabilities. The practice of selective abortion for foetal impairment does not imply that we treat persons in a discriminatory manner on the basis of disability, as “the foetus is understood to have low moral status and can thus legitimately be killed in circumstances which would not justify the killing of a person”. Thus, “prenatal diagnosis and selective abortion are not inherently discriminatory to the disabled” (Gillam 1999: 168).

However, while motivations for selective abortion as distinct are not inherently discriminatory, these motivations, advanced in the context of existing prejudice towards the disabled, may, in some cases, rely upon discriminatory attitudes, particularly with regard to perceptions as to the quality of life of persons with disabilities. Choosing to abort selectively on the basis of these perceptions not only sends a hurtful message towards persons already living with disabling conditions, but has the potential to reinforce and perpetuate such attitudes, which “may be used to ground a moral judgement about how a [disabled] person ought to be treated or regarded by others [which] could be

discriminatory” (Gillam 1999: 169). These possible consequences of the unreflective use of selective abortion could be countered by restructuring the counselling process accompanying prenatal screening. Currently, much of “[t]he information presented to parents is...based almost exclusively on medical perspectives” (Pritchard 2005: 85), which often amount to “a narrative of tragedy” (Shakespeare, cited in Pritchard 2005: 85). Rather, counselling should also include information about the social and psychological facets of living with disability, which should take into account the experiences of persons with disabilities and their families. “The information and advice provided...is all the parents have to go on” (Kuhse *et al.* 1985: 63), and it is thus vital that this information and advice be as balanced and complete as possible, particularly in a context where prospective parents are likely to approach the counselling process with existing misapprehensions about disability.

A further problem which has been identified with regard to motivations for selective abortion as distinct, is that some of these motivations, and the assumptions on which they are based, may have the potential to undermine reproductive autonomy, which is a major motivating principle underlying both prenatal screening programmes, and general justifications for the moral permissibility of abortion. Motivations for selective abortion which construct this as the morally obligatory or morally desirable choice are particularly problematic for this reason. If these motivations underlie prenatal screening programmes, such programmes could “diminish, rather than expand, women’s choices” (Asch 1999: 1650).

Prenatal screening and selective abortion is therefore best motivated by similar concerns which support the moral permissibility of abortion in other contexts – namely, the “rights of competent women to make decisions that will affect the rest of their lives” (Pritchard 2005: 92), and the lives of those for whom they are responsible. Thus the argument for the right to selective abortion from the perspective of parental interests is the most useful justification of this practice. This motivation indeed has the potential to expand and support reproductive choice, provided that the counselling process accompanying prenatal screening offers as accurate information as possible, and emphasising that

society should be as accommodating as possible of women's choices, and of all persons already living with disability in society. Within the context of the general moral permissibility of abortion:

[e]very woman has the right to make...decisions [about abortion] in whatever way she needs, but the more information she has, the better her decision can be. Genetic counsellors, physicians, and all others involved with assisting women during [screening procedures] should gain and provide far more and very different information about life with disabilities than is customarily available. Given proper information about how disabled children and adults live, many women might choose not to abort. And many will still choose to abort. While a foetus resides within her, a woman has the right to decide about her body and her life and to terminate a pregnancy for this or any other reason (Fine *et al.* cited in Wendell 1996: 152).

Thus, justifications for selective abortion as distinct need not amount to, rely upon, or perpetuate discrimination. However, in the context of existing prejudice towards those who are disabled, we must remain vigilant against the latter possibilities, and take active measures to avoid them.

7 Conclusions and Recommendations

This study has attempted to examine the question as to whether the practice of selective abortion following the detection of foetal impairment is compatible with a commitment to equality and non-discrimination. It has found that this question has quite different answers, depending on the general position on abortion from within which this practice is justified.

Attempts to justify selective abortion, as an exception to the general moral impermissibility of abortion, cannot avoid charges of discrimination. As has been shown, these attempts cannot persuasively account for why a distinction should be made between the treatment of fetuses on the basis of disability when such a distinction is not made after birth for similar reasons, and these positions are therefore guilty of inconsistency. This is true in all but extremely severe cases of impairment where a particular condition implies that the future person's interest in continued existence would be negated by extreme suffering or a lack of minimal consciousness. In these cases, selective abortion could be considered as an instance of non-voluntary euthanasia, and acceptance of this practice necessarily implies the acceptance of this form of euthanasia. Where life with disability is worth living (a condition fulfilled by most of the conditions currently used to justify selective abortion) this distinction is untenable, cannot logically be reconciled to a commitment to equality for persons with disabilities, and thus amounts to direct discrimination. Governments should therefore adopt a common cut-off point after which abortion is restricted in all circumstances, regardless of the particular characteristics of the foetus⁴³, or should allow abortion after this point for any reason, and not only in the case of the detection of foetal impairment. Agnes Fletcher, a disabled activist, emphasises the consequences of maintaining this exception: "I cannot feel fully valued as a person, as a live person, while that inequality exists in...abortion law" (1998).

⁴³ A possible exception to this time limit could be made for pregnancies which endanger the life of the pregnant woman. However, it is not the purpose of this study to defend this exception, which would have to be argued on its own merits.

In the context of the South African Choice on Termination of Pregnancy Act, this would imply that, either the exception made for selective abortion after the 20th week of pregnancy should be abandoned, or abortion should be legal in all cases after this point. Distinctions made on the basis of disability, given the moral significance of the foetus, cannot be defended if non-discrimination is to be avoided. Making distinctions of this nature has the potential to reverse the progress made in recent decades which has resulted in decreased discrimination against persons with disabilities (Gillam 199: 165). Where distinctions are made after this point for selective abortion as exception as a form of non-voluntary euthanasia, some explicit guidelines must be given by government as to the motivations for making such an exception. These guidelines should be endorsed by a “broad public debate on the question of which conditions justify termination of pregnancy” which should avoid marginalizing the “views of people with disabilities” (King 2001: 179), and could then be applied by proxy decision makers in particular cases.

However, justifications for selective abortion as a distinct case, within the context of the general moral permissibility of abortion, are more successful, particularly when these justifications rely on similar motivations which are made for the permissibility of abortion in general (and therefore do not strictly amount to distinct justifications). In particular, such justifications are most successful when they rely upon reference to parental interests, or to the autonomy of the pregnant woman in making decisions around termination of pregnancy. In this context, it is clear that “discrimination against people with disabilities is neither an inevitable result...nor...a necessary conceptual part” of prenatal diagnosis and selective abortion (Gillam 1999: 170).

However, justifications for selective abortion as distinct are at their weakest (and at their most dangerous) when they threaten to restrict autonomy by constructing selective abortion as a moral obligation. If these attitudes persist, this “will increasingly make the bearing of disabled children seem an *irresponsible* or, more simply, a *bad* choice” (Weithman 2002: 117). In this case, justifications for selective abortion may have consequences which undermine their own foundations – that the moral permissibility of abortion is a necessary result of the pregnant woman’s right to autonomy. In fact,

consensus has been reached amongst those who make policy in this regard that “the purpose of prenatal testing is to enhance reproductive choice for women and families – not to decrease the number of children with disabilities who are born” (Parens *et al.* 2003: 40). As such, the foundation of prenatal screening is the desire to promote reproductive autonomy (Pritchard 2005: 83). This explicit aim of screening programmes therefore sits uneasily with motivations for selective abortion which regard termination in the case of foetal impairment as a morally obligatory choice. Those parents who decide to forgo prenatal testing or selective abortion should not be required to justify this decision.

Although justifications for selective abortion as distinct do not amount to discrimination in themselves, as they do not undercut the status of persons living with disability directly, or result in the differential treatment of beings with moral status on the basis of their particular characteristics, they may nonetheless rest upon erroneous or prejudiced attitudes towards disability, or result from social discrimination and the absence of supportive structures for the disabled in a given context. These are possibilities which we must take into consideration and remain vigilant against. It is a mistake to assume that selective abortion is exclusively a personal decision which “is divorced from the social realm” (King 2001: 174), and in contexts where prejudice towards and misunderstanding of the characteristic of disability continues to prevail to a greater or lesser extent, measures must be taken to protect the autonomy of pregnant women and to prevent the perpetuation of discrimination. The perception that selective abortion is self-evidently the right decision, and the fact that termination is increasingly seen as “the standard response to the detection of foetal abnormality” (Gillam 1999: 166), may act to reinforce prejudice against the disabled, and may militate against the transformation of societal conditions and the expansion of support for persons who are disabled and their families, thus “making intolerance and discrimination towards [disabled persons] more likely” (Robertson, cited in Ward 2002: 198). This possible consequence of the practice of prenatal screening and selective abortion, particularly as the former comes to be regarded as a routine element of prenatal care, must be “recognised, acknowledged and countered as far as possible” (Gillam 1999: 170). Measures taken in this regard should include, in particular, the transformation of the counselling process following prenatal screening to

include not only medical perspectives on impairment, but information about the social and psychological implications of this characteristic, which should be informed at least partially by the perspectives and experiences of persons with disabilities and their families. For many persons with disabilities, “living with disabling traits need not be detrimental to an individual’s prospects of leading a worthwhile life, or to the families in which they grow up, or to society at large” (Parens *et al.* 2003: 40). This possibility should at least be discussed with prospective parents, in order to take into account “representative disabled opinions” which are currently absent from the information presented to prospective parents during counselling (Shakespeare 1998: 673). If information is to be given about a particular condition, surely this information should include the perspectives of those who have the most relevant experience of it. In order for this to take place, counsellors themselves must be given “access to good information about what disability is really like for children with disabilities and for their families” (Parens *et al.* 2003: 45). Currently, this is not the case, as a result of counsellors’ “lack of contact with disabled adults as equals and peers” (Ward 2002: 194). Prospective parents facing a prenatal diagnosis of foetal impairment are often not knowledgeable, or indeed, are misinformed about a particular condition, and rely to a very large extent on the information provided to them during counselling. This information should therefore be as complete, balanced, and representative as possible. To fail in this duty is to “show disrespect for the intelligence and sincerity of people who rely upon [counsellors] for information and assistance”. Counsellors should therefore provide information about both the negative and positive aspects of disability, and avoid “slanting the information in the direction of a particular result” (Asch 2003: 335), whether in favour of termination or continuation of pregnancy. Non-directive counselling should thus enable, rather than influence, autonomous decision making. We must therefore persuade professionals to “change what they tell prospective parents about disability...and then endorse the choices [prospective parents] make about their reproductive and family lives” (Asch 2003: 341). This implies that, in the context of justifications of selective abortion as distinct, we should “oppose social and cultural pressures to screen and to terminate routinely while defending individual decisions to do so” (Fletcher 1998).

In addition, society should maintain and extend its commitment to transforming discriminatory social structures, countering prejudice, and creating a more accommodating society for all persons, including those who are disabled. Currently, “gaps remain between people with and without disabilities in terms of education, income, social life, and civic participation” (Asch 2003: 327). These obstacles must be tackled to enable truly autonomous decision making with regard to selective abortion.

Thus selective abortion may indeed be discriminatory in the context of the general moral impermissibility of abortion, while this is not true of selective abortion within the context of the moral neutrality of the act of abortion. However, even in this latter case, if the practice of prenatal screening and selective abortion is to avoid reliance upon and perpetuation of prejudice, and the restriction of reproductive autonomy, active steps must be taken to avoid these possibilities.

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