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Termination of Pregnancy for reason of foetal disability: Are there grounds for a special exception in Law?¹

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I INTRODUCTION

Current abortion law discriminates against the impaired foetus ... The law should not discriminate between impaired and non-impaired foetuses: a common time limit should be adopted for all pregnancies.²

At a 1998 workshop on the ethics of abortion for reason of 'foetal abnormality', a rare and interesting point of consensus emerged between the proponents of two sides of a debate normally renowned for intractable difference.³ Ann Furedi, a well-known 'pro-choice' advocate currently employed by the British Pregnancy Advisory Service, and Helen Watt of the 'pro-life' Society for the Protection of the Unborn Child and Roman Catholic Linacre Centre for Health Care Ethics were debating termination of pregnancy in the presence of a likely foetal disability. Furedi argued that any abortion should be allowed for no more reason than a woman has requested one. Watt contended that (virtually) all abortions are wrong and should be prohibited, and that

¹ We would like to thank Angus Dawson, Eve Garrard, Richard Hull and Ellie Lee for helpful comments on previous drafts.

² T. Shakespeare, 'Choice and Rights: Eugenics, Genetics and Disability Equality' (1998) 13 *Disability & Society* 665 at 671.

³ *Abortion, Ethics and the Law*, workshop held at the University of Kent at Canterbury, 20 November 1998. The papers presented at the workshop have now been published as H. Biggs and E. Lee (eds.), *Abortion, Ethics and the Law* (Law Department, occasional paper, University of Kent at Canterbury, 1999).

whether the foetus is disabled or not makes no moral difference. Accordingly, both speakers agreed that we should not regard aborting an ‘able-bodied’ foetus as morally different from aborting an ‘impaired’ foetus and that the law’s treatment of the two should be the same.⁴

This point of agreement between speakers from two sides of a notoriously polarised debate is particularly noteworthy in that the speakers find themselves joined together in taking a position which is starkly opposed to public opinion. Opinion polls have consistently found that people consider termination more acceptable in the presence of a disability.⁵ Furthermore, their view is also out of line with contemporary abortion practice: between 1,500 and 2,000 terminations per year are performed for reason of foetal disability, with several hundred of them occurring after 20 weeks gestation.⁶

Still more interesting for our purposes is the fact that both speakers find themselves in broad disagreement with the current law in England, Wales and Scotland. The 1967 Abortion Act provides that terminations are only lawful where performed by a registered medical practitioner, and where two doctors agree that one of a number of conditions is met. One of these conditions, set out in s.1(1)(d) of the Act, is that abortion may be authorised by two doctors who agree that there is a substantial risk that if the child were born it would be ‘seriously handicapped’.⁷ Since 1990, there

⁴ The point of disagreement which remained, of course, was what that treatment should be.

⁵ Although Lee and Davey have noted that whilst public opinion has become increasingly tolerant of abortion, it is increasingly less so of abortion for reason of foetal disability. They cite two MORI polls. In the first, conducted in 1980, of those questioned 84% said they supported abortion in cases of mental disability and 81% in the presence of physical disability. By 1997, these figures had dropped to 67% and 66% respectively. It was striking in the latter poll that the approval of termination for abnormality increased systematically with age, with the highest approval rating among those aged 65 and above (75% and 69% approval for mental and physical disability respectively) and the lowest rating among those aged 15-24 (50% and 40% for mental and physical disability respectively), E. Lee and J. Davey, *Attitudes to Abortion for Fetal Abnormality* (Pro-Choice Forum 1998). See also E. Lee ‘Young Peoples’ Attitudes to Abortion for Foetal Abnormality’ (2000) 10(3) *Feminism and Psychology* 396-9.

⁶ In 1997, 1,724 terminations were performed on the grounds of disability alone (612 after 20 weeks), and 129 were performed on the ground of disability combined with one of the other contraindications set out in the Abortion Act (14 after 20 weeks).

⁷ The term ‘handicapped’ has, in recent years, come to be regarded as offensive by many. Therefore, in this paper, we use the term ‘disability’ instead. For similar reasons, we avoid the contrast which is sometimes drawn between being disabled and being ‘normal’. The

have been no time limits for terminations performed on this ground.⁸ Likewise, the existence of a presumed foetal disability is also relevant in Northern Ireland, where the Abortion Act 1967 does not apply.⁹ Such terminations as are carried out there are done on the basis of *R v Bourne*,¹⁰ which holds that a doctor may lawfully perform a termination where ‘the probable consequences of the continuance of the pregnancy will be to make the woman a physical and mental wreck’. Whilst it is not obvious that this should more readily support terminations on the basis of abnormality than on other grounds, nonetheless the majority of the terminations performed in Northern Ireland each year are performed for this reason.¹¹

In this paper we scrutinise the main arguments for the special exception encapsulated in s.1(1)(d) of the Abortion Act 1967, which provides for the termination of (presumed) disabled fetuses. Nothing has happened to challenge Morgan’s view, expressed ten years ago, that this ground of the Abortion Act has remained curiously lacking in sustained critical analysis.¹² Here, we concentrate on three major

definition of ‘disability’, itself a contentious issue, is discussed in more detail later. For some guidance on what should be understood by ‘substantial risk’ and ‘serious handicap’, see Royal College of Obstetricians and Gynaecologists, *Termination of Pregnancy for Fetal Abnormality* (1996). See also I. Kennedy and A. Grubb, *Medical Law: Text with Materials* (Butterworths, 2000, 3rd ed at 1424-8) for some of the problems of interpretation raised by this section.

⁸ See J. Murphy, ‘Cosmetics, Eugenics and Ambivalence: The Revision of the Abortion Act 1967’ (1991) J.S.W.F.L. 375 for the view that the removal of the upper time limit in the presence of likely serious foetal disability was the only significant amendment to the Abortion Act introduced by s. 37 of the Human Fertilisation and Embryology Act, 1990. An attempt to reinstate the time limit of 28 weeks for abortions performed on this ground was defeated by just 14 votes, see D. Morgan and R. Lee, *Blackstone’s Guide to the Human Fertilisation and Embryology Act 1990* (Blackstone Press 1991) at 54. The statute also specifies two further exceptions to the general time limit of 24 weeks: under s.1(1)(b) that ‘the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman’; and s.1(1)(c) ‘that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated’.

⁹ A proposed amendment, aiming to the 1967 Abortion Act to Northern Ireland, was defeated by a substantial majority in 1990.

¹⁰ [1938] 3 All ER 612.

¹¹ See S. Lee, ‘Abortion in the Twilight Zone’ in A. Furedi (ed.), *The Abortion Law in Northern Ireland: Human Rights and Reproductive Choice* (Family Planning Association Northern Ireland 1995) at 16-26.

¹² The paper where Morgan makes this point provides the clearest exception to it: D. Morgan, ‘Abortion - the Unexamined Ground’ [1990] Crim. L. R. 687. See also J. K. Mason, *Medico-Legal Aspects of Reproduction and Parenthood* (Dartmouth 1990) at 105, and P. Ramsey, ‘Reference Points in Deciding About Abortion’ in J. T. Noonan (ed.), *The Morality of Abortion*

arguments which have been advanced in support of such a ground. These arguments appeal to: (1) the interests of the child-to-be, (2) a comparison with an alternative possible non-disabled child, and (3) the interests of the pregnant woman (as mother-to-be).¹³ We will not consider in any detail the arguments *against* making such a distinction, notably the claim that s.1(1)(d) encourages discrimination and ‘eugenics’.¹⁴ Whilst this claim merits further attention,¹⁵ reaching a conclusion in this regard is not necessary for our argument. For if, as we conclude, there are no entirely convincing arguments in favour of the distinction set out in s.1(1)(d), this in itself provides a *prima facie* case for at the very least questioning its place in law – since, we would argue, there should be a presumption of equal treatment of women seeking abortion, one which can only be overturned by the existence of a sound argument for differential treatment.

We should make one final preliminary point. Throughout the paper, our focus is on a law which explicitly distinguishes between the termination of (presumed) disabled fetuses and (presumed) non-disabled fetuses in the sense of providing that the former is permissible whilst the latter, in the absence of other contraindications, is not. We do not address the morality of termination decisions made by individual women. While the factors we discuss below may be relevant to such decisions, the countervailing arguments may be very different. As these countervailing arguments are not considered here, it would be wrong to attempt to read the arguments which we make with regard to the law as transferring in any straightforward way to the morality of individual abortion decisions.

(Harvard University Press 1970) at 60-100, Murphy *op. cit.* n.8.

¹³ See: L. Gillam, ‘Prenatal Diagnosis and Discrimination against the Disabled’ (1999) 25 *Journal of Medical Ethics* 163.

¹⁴ See: J. Glover, *What Sort of People Should There Be?* (Penguin 1984) at 30; J. Glover, ‘Eugenics and Human Rights’ in J. Burley, (ed.), *The Genetic Revolution and Human Rights* (Oxford University Press 1999) at 101-124; S. Reindal, ‘Disability, Gene Therapy and Eugenics – a Challenge to John Harris’ (2000) 26 *Journal of Medical Ethics* 89; T. Shakespeare, *op. cit.* n.2, at 666.

¹⁵ In particular, the idea that terminating disabled fetuses constitutes discrimination against existing people with (the same form of) disability is problematic. This claim forms the focus of a useful paper by Lynn Gillam, *op. cit.*, n.13.

II THE FOETAL INTERESTS ARGUMENT

... some kinds of life are perhaps worse than not being alive at all ... if it makes sense for people to see death as in their interests, there seems a parallel possibility of parents or doctors thinking that not being born may be in the interests of a potential child.¹⁶

[This section of the Abortion Act] may thus be understood primarily as a foetal interest ground...¹⁷

...we believe that the conceptual difficulties [associated with the action for wrongful life] would largely disappear if, first, the Abortion Act 1967, s 1 (1) (d) – the ‘eugenic clause’ – were accepted as having been drafted in the fetal, rather than the maternal, interest. The ‘right’ of the handicapped fetus to abortion is then comparable to the defective neonate’s right to refuse treatment...¹⁸

The Foetal Interests Argument attempts to justify s.1(1)(d) by claiming that termination actually benefits the disabled foetus, by saving it from a life of suffering.¹⁹

¹⁶ J. Glover, *Fertility and the Family: the Glover Report on Reproductive Technologies to the European Commission* (Fourth Estate 1989) at 129. See also: J. Harris, *Clones, Genes and Immortality: Ethics and the Genetic Revolution* (Oxford University Press 1998) at 66; J. Harris, *The Value of Life* (Routledge 1985) at 148-9.

¹⁷ D. Morgan, *op. cit.* n.12, at 692.

¹⁸ J. Mason and A. McCall Smith, *Law and Medical Ethics* (Butterworths 2000, 5th edition) at 165.

¹⁹ A number of philosophical points, none of which will be discussed in any detail in this paper, should be noted.

First, the Foetal Interests Argument relies on comparing the level of welfare that the foetus would have if it became a person with the hypothetical ‘level of welfare’ that it would ‘have’ if it didn’t exist. The (supposed) impossibility of such a calculation was asserted by the Court of Appeal in *McKay and another v. Essex Area Health Authority and another* (1982) 2 WLR 890 where Ackner LJ asked: ‘how can a court begin to evaluate non-existence, ‘The undiscover’d country from whose bourn No traveller returns’? No comparison is possible and therefore no damage can be established which a court could recognise’. For a philosophical discussion of the issue see, for example, R. Hare, ‘Survival of the Weakest’ in S. Gorovitz (ed.), *Moral Problems in Medicine* (Prentice Hall 1976) at 364-369 and D. Parfit,

It claims that termination in these circumstances can thus be thought of as a kind of foetal euthanasia.²⁰ Moral philosophers distinguish euthanasia from other types of killing on the basis that it is an *attempt to benefit* someone by killing her, the standard example being when intractable pain can only be ended by death. This, then, is why termination of seriously disabled fetuses might be thought of as euthanasia: because death (or non-existence) is the only way to avoid later suffering.²¹

Thinking along these lines some philosophers (such as Glover) have gone as far as to suggest that, when disability is very severe, abortion is not merely permissible but is morally obligatory. The idea here is that it would be wrong to subject fetuses (or the future persons that they would become) to severe preventable suffering,²² so '[i]f tests have established that the foetus is abnormal in a way that will drastically impair the quality of its life, it will normally be wrong of the mother to reject abortion'.²³ The Foetal Interests Argument necessary to justify

'Rights, Interests, and Possible People' also in S. Gorovitz (ed.), at 369-375.

Secondly, some philosophers, notably Ronald Dworkin, deny that fetuses have interests: R. Dworkin, *Life's Dominion* (Harper Collins 1995) at 97-8. See also: J. Glover, *op. cit.* n.16, at 131-2; J. Harris, 'Is There a Coherent Social Conception of Disability?' (2000) 26 *Journal of Medical Ethics* at 95; J. Harris, *Wonderwoman and Superman* (Oxford University Press 1993), chapter 4. For the present purposes, it will suffice to say that by the claim 'death is in the foetus's interests' we mean only that if the foetus were to reach personhood, the person it were to become would not have a life worth living and would be 'better off dead' or 'better off not having been born'. The question of what exactly grounds such claims is left open.

Thirdly, we should distinguish between *personal* and *impersonal* versions of this argument. The *personal* version – the one which we emphasise here – relies on the idea that the individual foetus in question is literally 'better off dead': that we *harm* it by prolonging its life, or allowing it to live. The *impersonal* version is based instead on the idea that we ought to (or, at least, may) prevent negative states of affairs (such as those involving lives filled with extreme pain) from coming into existence. The impersonal version does not require the idea that the foetus can be harmed or have interests.

²⁰ The expression 'foetal euthanasia' is used by a number of authors. See, for example: R. Hursthouse, *Beginning Lives* (Blackwell 1987) at 69; P. Ramsey, *op. cit.* n.12, at 91.

²¹ Hursthouse claims that this kind of reasoning is also what in fact motivates most prospective parents: 'no doubt some women or couples think 'I can't face how much I shall suffer' but ... [w]hat is usually dreaded is how much the child might suffer ...'. R. Hursthouse, *ibid.*, at 213.

²² Derek Parfit (*op. cit.*, n.19, at 372) makes the same sort of claim about non-conception: '[b]ut suppose that we know that any child whom we could conceive will have an abnormality so severe that it will live for only a few years, will never develop, and will suffer fairly frequent pain. It would seem to be clearly wrong to go ahead, knowingly, and conceive such a child'.

²³ See: J. Glover, *Causing Death and Saving Lives* (Penguin 1977) at 146.

s.1(1)(d), though, does not need to assert anything as strong as this. All it needs is the weaker claim that abortion in such circumstances is morally permissible or, weaker still, that it is less morally bad than abortions where the foetus is not disabled.

We turn now to objections to the Foetal Interests Argument. The first is that it only applies to a very narrow range of cases. These are cases where the likely alternative to termination is a resultant child whose quality of life is not merely low, but negative: that is, she would, quite literally, be better off dead, or better off never having been born. Whilst we are happy to grant, for the sake of argument, that there are cases in which impairment is so severe that any resultant child will have a negative quality of life (for example, a child suffering from Tay-Sachs) many actual foetal impairments are indisputably not like this. For in most cases, the resultant child will have a quality of life which, although arguably less good than it would have been without impairment, is still positive overall and therefore a 'life worth living':

... milder handicaps may make a life less worth-while without destroying its worth altogether. A blind person has a less favourable start in life than a normal person, but it would be absurd to say that his life is likely not to be worth living. And the same goes for many other severe handicaps, especially when the handicapped person has the support of other people.²⁴

As such, it appears that citing foetal interests or the welfare of resultant children will have little relevance to most terminations which fall under s.1(1)(d) since, as Harris reminds us, 'unless the child's condition and circumstances can be predicted to be so bad that it would not have a worthwhile life, a life worth living, then it will always be *in that child's interests*, to be brought into being'.²⁵

The second problem with the Foetal Interests Argument is one of maintaining law's internal coherence. Whilst there is some judicial authority for the foetal interests understanding of s.1(1)(d), this is only *obiter dicta*²⁶ and it does not seem to fit easily

²⁴ J. Glover, *ibid.*, at 147.

²⁵ J. Harris, 'The Welfare of the Child' (2000) 8 *Health Care Analysis* 27 at 29.

²⁶ Per Stephenson LJ, *McKay v. Essex AHA* [1982] QB 1168 at 1180.

with the jurisprudence which has developed to deal with issues arising from the selective treatment of impaired neonates.²⁷ In a series of such cases, the courts have held that, in order for treatment lawfully to be withdrawn from impaired neonates, the question to be asked is whether the child's future quality of life will 'demonstrably' be 'so awful that in effect [it] must be condemned to die'.²⁸ In a recent decision, the Court of Appeal expressly rejected the finding of the Family Division of the High Court that Mary, a weaker conjoined twin who was only sustained by her sister's blood flow and who would almost certainly die in a matter of months if the twins were not surgically separated, had no continued interest in living. Johnson J had reasoned that Mary's state was 'pitiable' and, although it was impossible to know whether she was in pain, the thought that her stronger sister would start to move around dragging Mary behind her was 'horrendous'. Ward LJ disagreed. He held that the weaker twin's life did have a value to her, even though she had severely limited brain function and was incapable of crying or expressing pleasure or pain.²⁹ On this issue, he concludes:

The question is whether this proposed operation is in Mary's best interests. It cannot be. It will bring her life to an end before it has run its natural span. It denies her inherent right to life. There is no countervailing advantage for her at all. It is contrary to her best interests.³⁰

In this case, then, the Court has judged even a few months of pitifully low quality life to be worth living and preferable to non-existence.

The gulf between the standards applied in these cases and in s.1(1)(d) of the Abortion Act can be clearly illustrated by taking the example of Down's Syndrome.

²⁷ See Morgan, *op. cit.* n.12.

²⁸ *Re B* [1981] 1 WLR 1241 approved, per Templeman LJ, and developed by the Court of Appeal in *Re C* [1989] 2 All ER 782 and *Re J (A Minor) (Wardship: Medical Treatment)* [1990] 3 All ER 930. These cases cast obvious doubt on the decision in *R v. Arthur* (1981) 12 B.M.L.R. 1 where a doctor was acquitted of the attempted murder of a Down's Syndrome baby after ordering treatment to be withheld.

²⁹ *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961.

³⁰ *Ibid.*

Routine pre-natal testing now predicts a large number of likely cases of Down's, and termination is then offered under s.1(1)(d). However, in the case of *Re B (A minor) (Wardship: Medical Treatment)*³¹ the courts held that it would be unlawful to withhold treatment to remove an intestinal blockage from a child suffering from Down's as there was no evidence that it was in this child's best interests to die.

Also relevant here is the English courts' treatment of the action for wrongful life. In *McKay and another v. Essex Area Health Authority and another*, Mrs McKay contracted rubella in the early months of her pregnancy.³² Her doctor took blood samples from her which were tested by the local Health Authority, but the infection was not diagnosed and her child, Mary, was born severely disabled. Mrs McKay brought an action against the doctor and the Health Authority for their negligence in failing to treat the infection and advise her of the desirability of an abortion. She claimed both in her own right (an action for wrongful birth) and on behalf of the child (wrongful life).³³ In deciding the latter action, one problem facing the courts was to determine exactly what loss Mary had suffered by virtue of her entry into a life characterised by highly debilitating injuries and resulting distress, loss and damage. The measure of damages in tort should be to put the plaintiff into the position in which she would have found herself were it not for the tortious act of the defendant. In *McKay*, the doctor's negligence was not that he exposed Mrs McKay to the rubella virus and thus caused the plaintiff's disability.³⁴ Rather, here the claim was that the

³¹ [1981] 1 WLR 1421 (CA)

³² [1982] 2 WLR 890.

³³ The child in *McKay* was born in 1975, the year before the Congenital Disabilities (Civil Liability) Act 1976 came into force. The Court of Appeal seemed confident that *McKay* was a one-off case and any subsequent actions for wrongful life would be precluded by the operation of the Act. Some academic commentators have argued for an alternative view, see I. Kennedy and A. Grubb, *op.cit.* n.7 at 1551-2; J. Fortin, 'Is the 'Wrongful Life' Action Really Dead?' [1987] J.S.W.F.L. 306. However, in the light of subsequent case law dealing with wrongful birth, it seems increasingly improbable that their arguments will prove persuasive to the Courts. In *Macfarlane v. Tayside Health Board* [1999] 4 All ER 961 (HL), the House of Lords held that it was not fair just and reasonable to impose damages for the upkeep of a child in a wrongful birth action, although expenses connected with the pain and birth could be recovered. See also: *Greenfield v Irwin and Others* (CA) 24 January 2001. Where treatment has been obtained in the private sector, more generous damages may be obtained through an action in contract: *Patricia Thompson v Sheffield Fertility Clinic* (QBD, Hooper J) 24 November 2000.

³⁴ In such a case, damages could obviously be assessed on the basis of the difference between non-impaired and impaired life.

doctor should have detected the virus and thus given Mrs McKay the possibility of terminating the pregnancy so that Mary McKay would not have existed at all. Faced with this problem, the Court of Appeal held that English law allowed no claim for wrongful life, *inter alia*, declaring itself unwilling to accept that it could ever be in someone's best interests not to exist. Again, therefore, this is inconsistent with a foetal interests understanding of s.1(1)(d) which relies precisely on the idea that it would be better for the eventual child not to come into existence.³⁵

The Foetal Interests Argument, then, is fairly hopeless as a general justification of s.1(1)(d). There are two major problems with it. The first is that it patently fails to justify most of the terminations which are generally thought to satisfy that section's criterion of 'substantial risk' of 'serious handicap', since it only really applies to one small subset of such cases: those where termination amounts to prenatal euthanasia. Hence, even if prenatal euthanasia were justified, the Foetal Interests Argument would still fail to justify the current, widely accepted scope of s.1(1)(d) because most of the terminations currently performed under that section are not cases of prenatal euthanasia.³⁶ The second problem is that the Foetal Interests Argument is not consistent with the jurisprudence which has developed in other areas, notably around the selective non-treatment of neonates and the idea of 'wrongful life'.³⁷ In particular, s.1(1)(d)'s test of 'serious risk' of 'substantial handicap' is much less restrictive than *Re B*'s test that life should be 'demonstrably awful'.

III THE REPLACEMENT ARGUMENT

³⁵ **Whether the courts' pronouncements in the selective treatment cases are compatible with *McKay* does not concern us here. See, however, the Court's treatment of this issue in *Re J (A Minor) (Wardship: Medical Treatment)* [1990] 3 All ER 930, per Lord Donaldson MR and Taylor LJ.**

³⁶ Given that this argument can be so easily and conclusively dismissed on these grounds, there is no need to engage with debates regarding the justifiability of non-voluntary euthanasia, nor the potential incompatibility between s.1(1)(d) and the case law from *Airedale NHS Trust v Bland* [1993] 1 All ER 821 onwards.

³⁷ D. Morgan *op. cit.* n.12. Morgan also deals with the argument that these issues are relevantly different because of differences between the moral status of fetuses and babies, which we address in more detail below.

*We want to stick to the axiom that that we should, given the choice, bring into the world a child without ... a handicap. But the means with which we now hope to do this, such as donor screening or therapeutic abortion, act by preventing the birth of one child, with a view to substituting the birth of another.*³⁸

*It is now routine for doctors to offer special tests to pregnant women who run an unusually high risk of having an abnormal baby ... If the test shows that the foetus does have Down's syndrome, the woman is able to have an abortion. The same happens with women who are shown to be carriers of the gene for haemophilia: the foetus can be checked to see if it has the disease. If it does, the woman can have an abortion, and then try again, so that she can have a normal baby. Why do we regard this as a reasonable thing to do, even when the handicap is one like haemophilia, which is quite compatible with a worthwhile life? ... [Because] we are offsetting the loss of one possible life against the creation of another life with better prospects.*³⁹

The second argument for s.1(1)(d) is the Replacement Argument.⁴⁰ It is not strongly evident in academic legal thinking, but versions of it are discussed within moral philosophy.⁴¹ Hursthouse describes the idea behind the argument particularly well:

The killing of the [disabled] foetus or baby is wrong insofar as its life would have contributed some happiness to the sum total; but if one kills it, and

³⁸ J. Glover, *op. cit.* n.16, at 130.

³⁹ H. Kuhse & P. Singer, *Should the Baby Live?* (Oxford University Press 1985) at 158.

⁴⁰ This, or similar, terminology is used by a number of philosophers. Glover (*op.cit.*, n.23 at 159) calls it the 'replacement view'. Hursthouse (*op.cit.*, n.20, at 149) calls it the 'replaceability argument'.

⁴¹ See, for example, L. Gillam, *op. cit.*, n.13, at 168; J. Glover, *op. cit.*, n.23, ch. 11; R. Hare, *op. cit.*, n.19; J. Harris, *Clones, Genes and Immortality: Ethics and the Genetic Revolution* (Oxford University Press 1998) ch. 3; R. Hursthouse, *op. cit.* n.20, at 149; H. Kuhse and P. Singer, *op. cit.*, n.39, at 65 and 158; D. Parfit, *op. cit.*, n.19.

conceives and produces another with no disability, then the sum total will be increased by at least the same amount, and probably more.⁴²

Similarly, Glover's *Causing Death and Saving Lives* contains a 'strong' version of the argument:

Most of us would accept that it would be wrong deliberately to conceive a handicapped child rather than a normal one, if the choice were available ... [T]his can be extended to abortion. If aborting the abnormal foetus can be followed by having another, normal one, it will be wrong not to do this. The side-effects of abortion will not in general be bad enough to outweigh the loss involved in bringing into the world someone whose life is much less worthwhile than that of a normal person who could be conceived instead.⁴³

By 'strong' here we mean that Glover's argument claims more than what is needed to justify s.1(1)(d).⁴⁴ Glover thinks that there is a *prima facie* duty to 'replace' the disabled foetus, whereas all that is needed to justify s.1(1)(d) is the more modest claim that 'replacing' the disabled foetus is morally permissible.⁴⁵

Proponents of the Replacement Argument do not normally advocate applying it to adults with disabilities, killing them so that they can be 'replaced' by others without disabilities.⁴⁶ This reveals one of the argument's premises: the view that (in comparison to competent adults) fetuses have very low moral status.⁴⁷

⁴² R. Hursthouse, *op.cit.*, n.20, at 149. Note that here she is merely reporting this argument in order to criticise it.

⁴³ J. Glover, *op. cit.*, n.23, at 146.

⁴⁴ L. Gillam, *op.cit.*, n.13, at 169.

⁴⁵ Glover does not argue that there should be laws *compelling* pregnant women to 'replace' their disabled fetuses.

⁴⁶ Extreme revisionary utilitarians may advocate 'replacing' less happy adults with more happy ones. For the present, though, we are assuming that the audience for these arguments is not full of such utilitarians.

⁴⁷ L. Gillam, *op.cit.*, n.13, at 168. Whilst by no means universally accepted, the view that fetuses have relatively low moral status is widespread in the bioethics literature. One of its most famous advocates is Peter Singer who, in *Animal Liberation*, claims that fetuses and neonates have similar moral standing only to that of 'higher' nonhuman animals, and that most people who deny this do so on 'species-ist' grounds. Biological humanity *per se*, says Singer, is not a morally relevant characteristic and 'is exactly the kind of arbitrary difference that the most crude and overt kind of racist uses in attempting to justify racial

... on any fair comparison of morally relevant characteristics, like rationality, self-consciousness, awareness, autonomy, pleasure and pain, and so on, the calf, the pig and the much derided chicken come out well ahead of the foetus at any stage of pregnancy – while if we make the comparison with a foetus of less than three months, a fish, or even a prawn would show more signs of consciousness.⁴⁸

On this view, it is acceptable to ‘trade off’ the life of one foetus against that of another in a utilitarian way,⁴⁹ their status being such that killing one solely in order to generate an increase in the general good is permissible.⁵⁰ It is worth stressing this point in order clearly to distinguish the Replacement Argument from the Foetal Interests Argument. The latter proposes killing the foetus in order to benefit it, whereas the former proposes killing the foetus in order to increase overall welfare.⁵¹ As in the euthanasia debate, these two (putative) justifications for killing are very different. For (in the case of ‘adult euthanasia’) it is one thing for you to kill someone beneficently,

discrimination’ – P. Singer, *Animal Liberation: a New Ethics for our Treatment of Animals* (Jonathan Cape, 1976) at 21. Given this, ‘even an abortion late in pregnancy for the most trivial reasons is hard to condemn in a society that slaughters far more developed forms of life for the taste of their flesh’, P. Singer, *Practical Ethics* (Cambridge University Press 1979) at 118. See also: P. Singer, H. Kuhse, S. Buckle, K. Dawson, & P. Kasimba (eds.), *Embryo Experimentation: Ethical, Legal and Social Issues* (Cambridge University Press 1990) at 65-75.

⁴⁸ P. Singer, *ibid.*, *Practical Ethics*, at 118.

⁴⁹ We are not suggesting that one needs to subscribe to the ethical theory called utilitarianism in order to accept such arguments, just that such ‘moves’ are typically made by utilitarians.

⁵⁰ Singer, controversially, extends this reasoning to neonates: ‘the newborn baby is on the same footing as the foetus, and hence fewer reasons exist against killing both babies and fetuses than exist against killing those who are capable of seeing the selves as distinct entities, existing over time’. See P. Singer, *Practical Ethics*, *op.cit.* n.47 at 124. Singer’s views here echo those expressed in Tooley’s seminal paper on this topic: M. Tooley, ‘Abortion and Infanticide’ (1971) 2 *Philosophy and Public Affairs* 37.

⁵¹ It should be noted that directly replacing A (a ‘less happy’ future person) with B (a ‘more happy’ future person) is certainly not the only, or necessarily the best, way of maximising the general good. For example, if there were over-population, it would probably be better (in utilitarian terms) to stop A from coming into existence *without* her being replaced. Conversely, it may well be better to create both A and B if practicable (see R. Hursthouse, *op.cit.* n.20, at 151). Utilitarian arguments can be used to justify a wide range of different policies; much depends on what empirical premises are accepted. Furthermore, it seems reasonable to suppose that, in this case, it is up to proponents of the Replacement Argument to provide the relevant evidence, since *they* are the ones who are proposing unequal treatment for two different groups.

to save her from intractable pain, but quite another for you to kill her for the general good of society (for example, because health resources could generate more good elsewhere).⁵² So we should remain aware of what lies behind the Replacement Argument: the view that the foetus has a very low moral status indeed - so low that it can be permissibly killed for purely utilitarian reasons.

We turn now to the objections to the Replacement Argument. The first, a practical one, is that it assumes something which cannot simply be assumed: that the women in question will at least try to become pregnant again, thereby 'replacing' aborted fetuses with new non-disabled ones. This is a problem for the Replacement Argument in two ways. First, it means that the proffered justification simply doesn't apply to many cases covered by s.(1)(1)(d) (those where there is in fact no 'replacement'). Second, and perhaps more seriously, it reduces the argument to absurdity - for what it now appears to justify is a policy under which women are only allowed to abort disabled fetuses if they agree to do their best to 'replace' the aborted foetus with a 'happier' one. For in cases where the woman decides that she doesn't want (or can't have) any further children, the idea of replacement offers no justification for termination.

This objection is clearly a huge problem for the Replacement Argument as applied to the morality of particular abortions.⁵³ It is not so clear, however, that it poses the same problem when we move up to the level of law and policy. For what can be argued at this level is the following. Admittedly, we cannot guarantee that each particular aborted foetus will be 'replaced' by another non-disabled foetus from the very same mother. However, viewing the situation holistically, it is likely that, if we allow abortion for reason of foetal disability, a *group* of mostly non-disabled fetuses will come to exist which would not otherwise exist. So, although one-to-one 'replacement' may not always occur, 'replacement' at the group level does. And,

⁵² Indeed, such a killing is not euthanasia at all because its aim is not to benefit the person killed.

⁵³ This kind of implication is recognised and accepted by Glover: 'But there are cases where the possibility of replacement may not exist. Perhaps any child of a particular mother will be abnormal to the same degree. Or perhaps she is at the very end of the childbearing age, or she no longer has a husband. In cases of this sort, unusually strong reasons are necessary for it to be wrong not to abort'. J. Glover, *op. cit.*, n.23, at 147.

provided that the ‘replacement’ group is substantially happier than and not substantially smaller than the group with disabilities would have been, this should be enough to meet the relevant utilitarian requirements. Hence, the Replacement Argument is able to survive this first objection.

However, the Replacement Argument faces a second and more serious objection: there is a clear tension between the premise on which it is based (the view that the relevant fetuses have very low moral status) and what it is trying to prove (the view that law should, at a given stage, be more permissive regarding the abortion of disabled fetuses than other fetuses). If the fetuses in question really do have very low moral status, such that they can be killed for purely utilitarian reasons, then it is not clear why *special* provisions covering disability are required. For eliminating disabled fetuses is, at most, only very indirectly related to increasing the general good and furthermore (insofar as it is a means of increasing the general good at all) it is certainly not the only relevant way of doing so. Compare, for example, parents who wish to abort their disabled fetus and then replace it with a non-disabled one with parents who wish to abort a ‘normal’ fetus and replace it with an ‘enhanced’ one.⁵⁴ In both cases, given the low moral status of the fetus, the utilitarian considerations should win out and it would be at least permissible to abort. Interestingly, Glover appears simply to accept this implication for the ethics of abortion:

If someone with a handicap is conceived instead of a normal person, things turn out less well than they might have done. It would have been better if the normal person had been conceived. But things of this sort can be said about almost any of us. If my own conception was an alternative to the conception of someone just like me except more intelligent, or more athletic or more musical, it would have been better if that person had been conceived.⁵⁵

Similar issues would arise if the parents decided on termination because of unforeseen job difficulties, or because they came to see that the world was overpopulated; again the utilitarian considerations should win out.⁵⁶ So our point is this: the Replacement Argument relies on the assumption that fetuses at the

⁵⁴ This assumes, of course, that the ‘enhanced’ one would be happier, which may or may not be true.

⁵⁵ J. Glover, *op. cit.*, n.23, at 148.

Interestingly, one of the reasons commonly given for not allowing selective termination is a fear of the ‘slippery slope’: the idea that permissive policies towards termination of the severely disabled fetus is a first step towards termination for more minor disabilities and, ultimately, for purely cosmetic reasons or enhanced characteristics of the kind suggested here by Glover. See some of the responses in the survey conducted by E. Lee and J. Davey, *op. cit.* n.5.

⁵⁶ See, for example: P. Singer, *Rethinking Life and Death* (Oxford University Press 1994) at 98.

developmental stage in question have a moral status which is so low that they can be permissibly destroyed for purely utilitarian reasons. With that assumption in place, though, we have a justification not for having a special exception for disabled fetuses - but rather for a much more permissive policy across the board. In other words, the Replacement Argument proves too much. For, if it works, what is warranted is not a special legal provision regarding disability (one like s.(1)(1)(d)) but rather a much more general relaxation of restrictions on abortion.⁵⁷

Where does this leave the argument? The Replacement Argument as applied to s.(1)(1)(d) has two principal weaknesses. As we have just seen, the main and most devastating objection is that (if it works at all) it proves far too much. If we really accept it, this should lead us not to special provisions for disabled fetuses, but instead to a more generally permissive approach to the regulation of abortion. This would involve allowing utilitarian considerations of all sorts to count as legal justifications: for example, 'replacing' a merely average fetus with an 'enhanced' one should be allowed. The second weakness is the argument's general reliance on some highly controversial ethical premises: in particular, on the view that the fetus has a very low moral status and can be permissibly killed for purely utilitarian reasons. Whether such premises are true is not something which we can hope to resolve here. But the fact that the argument depends on these contentious claims makes it vulnerable to attack, or at the very least scepticism, not only from the 'pro-life' lobby, but also from many who might consider themselves 'moderates' on abortion.

IV THE PARENTAL INTERESTS ARGUMENT⁵⁸

this mother does not know whether she will get a baby which will make her very happy or one which will make her very sad.⁵⁹

⁵⁷ One additional complication here is that there might, alternatively, be a utilitarian case for having much more restrictive abortion regulations. For, as we suggested earlier, utilitarian arguments can be used to justify a wide range of different policies, with everything depending on what empirical premises are accepted.

⁵⁸ By 'parental' interests, we remain neutral regarding whether the decision is made by just one biological parent, the pregnant woman, or by the woman acting in conjunction with a partner.

⁵⁹ Dr Winstanley, HC Deb Vol. 749, Col. 1057, 1967 (29 June).

the argument for abortion on the fetal indication relates to the welfare of the parents, whose lives may well be blighted by having to rear a grossly defective child...⁶⁰

According to the Parental Interests Argument, s.1(1)(d) can be justified by reference to the interests of the biological parents, especially the woman, since the strain of caring for a disabled child may be substantially greater than that of caring for a non-disabled one. This argument is accepted by many academic lawyers as the best rationale for s.1(1)(d).⁶¹ Furthermore, this understanding of the section fits well with the general spirit of the Abortion Act which views abortion as generally undesirable but permissible in certain exceptional circumstances where the mother will be placed at special risk or under particular strain in carrying the pregnancy to term, with due account taken of her 'actual or reasonably foreseeable environment'.⁶² There are, however, serious problems with the Parental Interests Argument, even if one accepts for the sake of argument (as we do here) its empirical premise that caring for a child with a disability is typically more difficult and costly than caring for a child without a disability.

The first problem faced by the Parental Interest Argument is a point of statutory interpretation raised by Morgan.⁶³ Morgan notes that if the 'foetal handicap' ground is to be construed in terms of parental interests, then it is superfluous, unnecessarily repeating the provision contained in s.1(1)(a) of the Abortion Act which allows termination when continuing with the pregnancy would be likely to threaten the woman's mental or physical health. This section, combined with s.1(2) which allows the doctors to take account of the woman's 'actual or reasonably foreseeable

⁶⁰ G. Williams, *Textbook of Criminal Law* (Stevens 1978), first edition at 256.

⁶¹ For example, see A. Grubb in I. Kennedy and A. Grubb, *Principles of Medical Law* (Oxford University Press 1999); and G. Williams, *ibid*.

⁶² Per s.1(2) of the Act. See generally: S. Sheldon, *Beyond Control: Medical Power and Abortion Law* (Pluto 1997) on the intention of the creators of the 1967 Act.

⁶³ D. Morgan, *op. cit.* n.12. At the time of publication of Morgan's paper, the relevant section was s.1(1)(b) of the Abortion Act which had yet to be amended by s.37 of the Human Fertilisation and Embryology Act 1990. S.1(1)(b) was preserved in the new s.1(1)(d). The only significant change was that, under the reformed law, the general time limit for abortion no longer applied to terminations performed under this section.

environment’, has generally been interpreted as authorising terminations wherever there is evidence that continuing a pregnancy would put the woman under unnecessary strain. Why would Parliament provide a separate ground for abortion in s.1(1)(d) if this is already covered by s.1(1)(a)? Morgan’s objection poses no problem from an ethical point of view, as one might just say that there is more than one justification for this provision. It does, however, provide lawyers with a salient point of statutory interpretation: given that Parliament must be presumed not to have intended these words to be superfluous, they cannot be interpreted as merely reiterating s.1(1)(a). As such, there are some grounds for questioning, with Morgan, whether this can be accepted as the intended purpose for the section.

A second, and more complex, objection to the Parental Interests Argument has been vocally made by some advocates of ‘disability rights’. We will call this the Disability Discrimination Objection. These writers argue that the Parental Interests Argument fails to take account of the fact that many of the problems faced by parents of children with disabilities are the result of social discrimination, rather than of impairment *per se*.⁶⁴

A disabled foetus represents for parents a problem that may have far more to do with society than with disability. Disabled children confront a hostile environment.⁶⁵

At this point, a parallel is sometimes drawn between disability and categories such as skin-colour, sex or sexuality.⁶⁶ Given that black and female children face social discrimination, it is asked, how would we respond to a legal provision authorising the abortion of foetuses on the basis that they are black or female and that, as such, their parents (and the children themselves) will be subjected to additional strain and

⁶⁴ Glover notes that ‘one of the worst problems handicapped people face is the attitude of many other people to them’. J. Glover, *op. cit.* n.16, at 127.

⁶⁵ M. Johnson, ‘Aborting Defective Foetuses – What Will it Do?’ (1990) *Link Disability Journal*, August/September, at 14.

⁶⁶ See C. Newell, ‘The Social Nature of Disability, Disease and Genetics: a Response to Gillam, Persson, Holtug, Draper and Chadwick’ (1999) 25 *Journal of Medical Ethics* 172 at 172.

worry? Surely we would want to say that enshrining such a provision in law would be outrageous, amounting to collusion with and (at least implicit) endorsement of discrimination or ‘eugenics’?⁶⁷ In this vein, Hubbard argues:

Most of us would be horrified if a scientist offered to develop a test to diagnose skin color prenatally so as to enable racially mixed people ... to have light-skinned children. And if the scientist explained that because it is difficult to grow up black in America, he or she wanted to spare people suffering because of the colour of their skin, we would counter that it is irresponsible to use scientific means to reinforce racial prejudices. Yet we see nothing wrong, and indeed hail as progress, tests that enable us to try to avoid having children who have disabilities ...⁶⁸

Similar arguments are made by other commentators who cite the purported existence of the ‘gay gene’ and ask whether a woman who has decided that a gay child would be destined for a life of prejudice, discrimination and suffering should have her wish to abort respected.⁶⁹ If science made such a thing feasible, what would we say about a proposed amendment to the Abortion Act, authorising termination on the grounds of ‘serious risk’ of ‘substantial homosexuality’?

These parallels with colour, with sex and with sexuality have *prima facie* plausibility as well as substantial rhetorical force. The issues raised by them, though, are far from simple. For they include conceptual questions about what disability is and in what ways, if any, it is similar to these other characteristics.⁷⁰ It seems to us that *if* traits like colour, sex, and sexuality share the same status as disability, then Hubbard’s comparison (above) is decisive and the Parental Interests Argument must

⁶⁷ Similar objections could, of course, be directed at both the Foetal Interests Argument and the Replacement Argument.

⁶⁸ R. Hubbard, ‘Abortion and Disability’ in L. Davis (ed.), *The Disability Studies Reader* (Routledge 1997) at 187-200.

⁶⁹ A. Fletcher, ‘Testing Times’ (1998/9) 16 *National Abortion Campaign Newsletter* 2 at 2.

⁷⁰ For a general consideration of this issue, see L. Waddington, *Disability, Employment and the European Community* (Metro 1995) at 38-53.

be rejected.⁷¹ However, it is not obvious that all these things do indeed share the same status. In order to explain why, we will focus specifically on the comparison with sex selection.

In what sense, then, is having a disability similar to being female? In order to answer this question, we need to address a dispute between those who advocate a 'social model' of disability and those who propound a more traditional 'individual' or 'medical' model, since disability and sex will only be relevantly similar if the social model is correct. According to the 'medical' model, at least some of the problems faced by people with disabilities are caused by their impairments, with 'impairment' being viewed as a negative health concept, along with diseases, disorders, maladies and so on. More specifically, impairment, on this view, is normally regarded as a harmful subnormal functioning of a bodily part, process, or system (including the brain, in cases of mental disability).⁷² The social model, on the other hand, claims that 'disability is a sociopolitical construction, a product of organisation and culture rather than a personal limitation due to a person's impairment'.⁷³ In other words, the social model holds that what makes people disabled is social discrimination, rather than impairment *per se*. On this view, a woman who is excluded from education or employment because of institutional sexism and a wheelchair-user who is excluded because of the inaccessible built environment are in fundamentally the same position. For both suffer disadvantage *solely* because of discrimination. If this is true, then it is also true that permitting the selective termination of disabled fetuses on the grounds of their disability is comparable with permitting the selective termination of female fetuses on the grounds of their sex. An abortion law under which the latter was explicitly singled out as an exception to a general ban would amount to colluding with sexism.⁷⁴ So

⁷¹ It should be remembered that we are discussing the appropriateness of a legal provision allowing abortion of particular fetuses in the context of a general ban on abortion. As such, we can remain agnostic on the issues raised by sex selection as a matter of individual choice. For our argument to work, we are only committed to the view that, in the context of a general ban on abortion, a provision making an exception for female fetuses would be ethically unsupportable. For a challenge to the assumption that abortion for reason of sex selection is wrong see, for example, M. Warren, 'The Ethics of Sex Preselection' in J. Humber and R. Almeder (eds.), *Biomedical Ethics Reviews – 1985* (Humana Press 1985) at 73-89. For an argument that sex selection is lawful under the Abortion Act, see D. Morgan, 'Foetal Sex Identification, Abortion and the Law' (1988) 18 *Fam. Law* 355.

⁷² Impairments need not cause actual 'all things considered' harm to the individual in every case, but they must be what Flew (at 441) calls *presumptively and in themselves* bad for people with them: '... disease must be presumptively and in itself bad for the sufferer. This ... can be satisfied by an account in terms primarily of malfunctioning. For in so far as malfunctionings either cause, or partly or wholly consist in, incapacity; then they must surely be rated as, presumptively and in themselves, bad for the people concerned ...', A. Flew, 'Disease and Mental Disease' in H. Engelhardt and J. McCartney (eds.), *Concepts of Health and Disease* (Addison-Wesley Publishing Company 1981) at 433-442.

⁷³ S. Reindal, *op. cit.*, n.14 at 92.

⁷⁴ There may be some 'therapeutic' exceptions to this (i.e. where we selectively terminate a male/female foetus in order to avoid a particular genetic disorder) but these are not our

the same could and should be said about the former: permitting and practising the selective termination of disabled fetuses amounts to colluding with (and perhaps also encouraging) discrimination against people with disabilities.

Accordingly, if we accept the social model of disability, then it looks as if the Disability Discrimination Objection to the Parental Interests Argument does hold. Even if terminating particular disabled fetuses would benefit the parents, there is good reason not to have an especially permissive regulation for such terminations, since such a regulation would amount to endorsement of serious discrimination against people with disabilities. The fundamental question with which we are left, then, is whether the social model of disability is correct. In what follows, we suggest that there are at least two reasons for thinking that it is not, that disability is not entirely 'social' and, therefore, that the Disability Discrimination Objection to the Parental Interests Argument is at best only partially successful.

The first for doubting the social model is that it offers an excessively broad definition of disability which fails to distinguish between disability and the more general concept of disadvantage, generating highly counter-intuitive results when applied to examples such as ethnicity or race. Harris, commenting on Reindal's defence of the social model,⁷⁵ sums up this problem well:

On Reindal's view a congenitally deaf individual in a supportive environment, or a paraplegic with a good wheelchair and an entirely wheelchair-friendly environment, might not be disabled, whereas for example, Blacks or Jews in a racist society would count as disabled. The danger is that Reindal equates disability with disadvantage ...⁷⁶

Defenders of the social model may, of course, say that part of the point of the model is precisely to deny that disability and disadvantage are distinct. Nonetheless, the fact that the social model would classify being black or being Jewish in racist societies as disabilities is a decisive reason for rejecting it. For, in the light of these examples, it is clear that the social model gives an incorrect account of what 'disability' means. Furthermore, because of its excessive broadness, the social model may (with potentially very damaging consequences) encourage people to 'medicalise' or 'pathologise' such things as race, sex, or sexuality – wrongly viewing them as (like) disabilities.

concern here.

⁷⁵ S. Reindal, *op. cit.*, n.14.

⁷⁶ J. Harris, 'Is there a Coherent Social Conception of Disability?' (2000) 26 *Journal of Medical Ethics* 95 at 97.

The second reason for rejecting the social model is that it ignores the obvious fact that some of the disadvantages associated with disability are not caused by society, but are intrinsic parts of the impairment itself. Harris, again, makes the point well:⁷⁷

I don't believe that it is social factors that make blindness and lameness and deafness into a disability. Social factors may exacerbate the problem of having such disabilities but they are disabilities because there are important options and experiences that are foreclosed by lameness, blindness and deafness. There are things to be seen, heard and done, which cannot be seen, heard, or done by the blind, the deaf and the lame *whatever the social conditions*.⁷⁸

Disabilities can involve pain, or reduced life-span, or important inabilities of various kinds: such as the loss of a sense modality or reduced mobility. Where present, these things are intrinsic 'evils': harms which are not caused by society and which, arguably, no amount of social intervention, short of removing the impairment, can take away. So while, clearly, many people with disabilities are the victims of harmful (and wrongful) social discrimination and exclusion, these social factors are not the whole story.⁷⁹ For impairment is necessary for disability and impairments are, by definition, intrinsically harmful to varying extents.

This observation explains why disability is *not* just like sex. Disability necessarily involves impairment, 'an inability to do something which is characteristic of the species',⁸⁰ whereas being male or female does not. Given this, it is plausible to suppose that whilst all (or virtually all⁸¹) of the special problems faced by women are caused by social discrimination, only some of the difficulties faced by disabled people are caused by such discrimination – the others being caused directly by impairment. Hence, the attempt to discredit the Parental Interests Argument by comparing selectively terminating disabled fetuses with selectively terminating female fetuses is somewhat misleading –

⁷⁷ See also: L. Purdy, 'Loving Future People' in J. Callahan, (ed.), *Reproduction, Ethics and the Law: Feminist Perspectives* (Indiana University Press 1995) 300-330 at 308.

⁷⁸ J. Harris, 'Is there a Coherent Social Conception of Disability?' (2000) 26 *Journal of Medical Ethics* 95 at 98.

⁷⁹ R. Hull, 'Defining Disability – a philosophical approach' (1998) 4 *Res Publica* 199 at 203.

⁸⁰ C. Culver & B. Gert, *Philosophy in Medicine* (Oxford University Press 1982) at 77. See also C. Boorse, 'On the Distinction Between Health and Illness' (1975) 5 *Philosophy and Public Affairs* 49; A Flew, *op. cit.*, n. 72.

⁸¹ It may be that each sex has its own 'intrinsic' disadvantages, such as susceptibility to certain sex-specific diseases, but we assume here that the two sexes are roughly equal in this respect.

failing, as it does, to take account of this important difference between disability and sex.

Making a related point, Hull usefully distinguishes between two aspects or kinds of disability: first, ‘the loss or limitation of ability or opportunities to take part in the life of the community on an equal level with others due to impairment’ (*impairment induced disability*) and second, ‘the loss or limitation of ability or opportunities for people with impairments to take part in the life of the community on an equal level with others due to ... economic, political, social, legal, environmental and inter-personal barriers’ (*socially induced disability*).⁸² On the basis of this distinction, we can argue that socially induced disability does indeed have the same status as sex discrimination. In both cases the disadvantaging is caused by the harmful actions and negative attitudes of other people. Things are different, however, for impairment-induced disability. For disadvantage here is caused not by others’ behaviour, but directly by impairment itself. And since, for sex, there is no analogue of impairment, it appears that sex and impairment induced disability are importantly different. As such, the additional cost and work involved in caring for a disabled child is not directly equivalent to the particular strain and anxiety caused by having a child which will face prejudice and discrimination because of its sex.

Where does this leave the Parental Interests Argument? The main ethical objection to it was that selectively terminating disabled foetuses is only in parents’ interests because of social discrimination against people with disabilities and their families and that, therefore, these selective terminations should not therefore be legally condoned, because they collude with and/or encourage such discrimination. However, as we have seen, this objection is not entirely successful, chiefly because the social model of disability – which posits an *exclusively* social basis for all disability - is clearly false. More specifically, the disadvantages associated with disability (unlike, say, those associated with being female) are not *entirely* a matter of social discrimination, but are at least partly caused directly by impairment.

That said, we do believe that this objection to the Parental Interests Argument still has *some* force. For *one* of the reasons why selectively terminating disabled foetuses is judged to be in parents’ interests is social discrimination, one aspect of which is a lack of support services for the parents of disabled children or prejudice against those children.⁸³ In these circumstances, we recommend caution when

⁸² R. Hull, *op. cit.*, n.79, at 209.

⁸³ For example, Andrew Grubb argues that it would be a very narrow reading of s.1(1)(d) which did not cover the termination of a HIV positive foetus, even where it is asymptomatic and not suffering any appreciable medical detriment: ‘given the social conditions, including the prejudice and the

invoking the Parental Interests Argument to justify s.(1)(1)(d), bearing in mind the danger that in so doing one may be colluding with social discrimination against people with disabilities.⁸⁴

There is an interesting parallel here with the euthanasia debate. Advocates of euthanasia often argue for it on the grounds that many terminally ill people experience severe pain. Against this, it is argued that much of this pain is avoidable given appropriate palliative care services and that therefore the ‘pain argument’ has limited force – or, more strongly, that what is in effect being proposed is ‘killing off’ the terminally ill as a ‘cheap alternative’ to the provision of proper services. Similar things can be said of disability. Thinking along these lines, Shakespeare claims that we should:

argue for better provision of welfare services and financial benefits to parents of disabled children, in order to make it easier for parents to choose to decide to continue with such a pregnancy. It could be argued that [screening with a view to the termination of affected fetuses] should not be introduced, unless such provision is extended.⁸⁵

It might, of course, equally be argued that no one should be required to carry the burdens of raising an especially needy child until such provision is in place. As Purdy puts it:

discrimination, that the baby will exist in, it is quite plausible to say that the baby will be ‘seriously handicapped’ because of its infection’. See A. Grubb, in Kennedy and Grubb, *Principles, op. cit.*, n.61 at 629.

⁸⁴ Thinking along these lines, Glover claims that if ‘the screening Programme is to be morally acceptable, it must be accompanied by a serious campaign to change attitudes towards people with disabilities, and to protect their status in society’, ‘Eugenics and Human Rights’ (n.14 above) at 109. Burley and Harris discuss a fascinating parallel case: the view that we ought not to permit human cloning on the grounds that the clones created would be subjected to social discrimination and prejudice. They conclude that ‘we should not prevent human cloning ... rather we should concentrate on combating the prejudices and attitudes that are the source of the harm done to the clone’. J. Burley and J. Harris, ‘Human Cloning and Child Welfare’ (1999) 25 *Journal of Medical Ethics* 108 at 110.

⁸⁵ T. Shakespeare *op. cit.*, n.2, at 672.

Although the solution is obvious – more social responsibility for individual needs – it's beginning to look as if none of us will see that come about in our lifetimes. It seems to me that this consideration should be, in the case of some decisions about future children, decisive.⁸⁶

V CONCLUSIONS

In this paper, we have explored three attempts to defend s.1(1)(d)'s exception to the general ban on 'late' abortions. The first two (the Foetal Interests Argument and the Replacement Argument) failed. The Foetal Interests Argument was unsuccessful because, insofar as it works at all, it only covers a small minority of those cases which fall within s.1(1)(d)'s more general test of 'seriously handicapped'. The Replacement Argument failed for a number of reasons, the main one being that it appears to justify too much: not a special exception for disability but, rather, a more generally permissive abortion policy.

The position of the Parental Interests Argument is rather more complex. Our view is that this argument would be entirely successful if it weren't for the existence of the Disability Discrimination Objection which says, roughly, that allowing certain kinds of parental interest to count in the way proposed would amount to law's colluding with (and perhaps also encouraging) discrimination against people with disabilities (and their parents). The Disability Discrimination Objection relies on the idea that disability is relevantly similar to other categories, such as race, sex and sexuality and that, therefore, selectively terminating disabled fetuses is like selectively terminating black or female fetuses (which would, in the context of a general ban on 'late' abortions, be unacceptably discriminatory). However, as we argued in the previous section, disability is not exactly like race and sex, because – in addition to the harm caused by social discrimination – disability involves harm caused directly by impairment. What we should say therefore is that insofar as the Parental Interests Argument, and the law it seeks to justify, appeal to those harms caused directly by

⁸⁶ L. Purdy, *op. cit.*, n.77, at 304.

impairment they are non-discriminatory. But insofar as they appeal to those harms caused by social discrimination, they collude with that social discrimination. In practice, this might mean making rather finer-grained distinctions between, on the one hand, disabilities which involve relatively minor impairments and where most of the 'evils' are social and, on the other, disabilities which have more substantial impairment elements and would be seriously harmful even in the absence of social discrimination.

So, in conclusion, the Parental Interest Argument does go a long way towards justifying s.1(1)(d) but (and this is an important caveat) the Disability Discrimination Objection shows us that only certain kinds of parental interest should be allowed to count for this purpose. More specifically, parental interests should not be taken to be decisive in relation to s.1(1)(d) where it is in the parents' interests to abort only or mainly because they or their child will be harmed by social discrimination (which may include lack of support services) – because this would amount to colluding with such social discrimination. While we accept, then, a limited version of the Parental Interests Argument, we would argue that the use of such arguments in practice gives cause for concern. For there is a danger that the special acceptability of terminations will be assumed not just for 'impairment induced disability', but also for 'socially induced disability' (i.e. in cases where all or most of the harm is caused by social discrimination). If parents would feel able to care for a disabled child with greater social assistance and in the absence of prejudice and discrimination, then legally to endorse termination because prejudice exists and assistance will not be forthcoming is worrying. Whilst any society will have to make a choice about where resources are to be allocated, in this instance the availability of abortion may conceal the pressure placed on potential parents by the lack of availability of financial and other support. A more honest and open evaluation of the rationale for s.1(1)(d), should at least contribute to public debate of this issue.⁸⁷

Before finishing, two more general observations should be made. First, the realisation that it is the best interests of parent(s) rather than the quality of life of

⁸⁷ Some work in this direction has been carried out by Tom Shakespeare. One particularly apposite and worrying conclusion which he draws is that parents' ability to cope with foetal disability will be heavily influenced by consideration of their social and economic means, *op. cit.*, n.2, at 92.

the eventual child which is the best way of providing a convincing argument for the exception made in s.1(1)(d) adds new weight to a rather old argument: that the fundamental basis of the current regulation of abortion in the England, Wales and Scotland is seriously flawed. How is it that two doctors can be deemed better placed to judge the strain put on parents by the birth of a (disabled) child, than are the parents themselves? What special expertise do doctors have in this regard? It is arguable that the medical profession are well placed to offer some guidance on the nature and extent of a likely disability, the child's life expectancy, and the degree of any pain and discomfort which she is likely to suffer. However, it is unreasonable to expect a doctor to have special expert insight into particular parents' ability to raise a disabled child and the positive and negative impact which such caring responsibilities will have on them. Whilst there is evidence to suggest that, in practice, women will always be allowed access to termination in the presence of serious foetal disability and indeed that it may well be unlawful to refuse such access in these circumstances,⁸⁸ the fact that technically the legal right to make this decision rests with two doctors is an indefensible anachronism in the context of a legal system which has moved firmly in the direction of according greater recognition to patient autonomy.⁸⁹

Secondly, and finally, it is important to emphasise again that our focus in this paper has been a law which posits certain reasons, and those alone, as acceptable ones for seeking abortion. Such a law seems a legitimate target for the kind of criticisms we have made and we would locate our efforts within what William Twining has recently described as the most important role of legal theory: to explore critically and to evaluate the presuppositions underlying legal discourse.⁹⁰ Our analysis has not considered the issue of the ethics of abortion decisions taken by individual women and cannot be extended to it in any straightforward way. Whilst there is no space here to develop an argument for this here, our own position is that no woman should be forced to carry to term a disabled, or any other, foetus. In other words, termination should be legally justified by the mere fact that a woman does not wish to continue with a pregnancy. So, while ultimately we agree with Shakespeare that the same

⁸⁸ Margaret Brazier has suggested that a woman refused termination in these circumstances would have a case in negligence against her doctor: M. Brazier, *Medicine, Patients and the Law* (Penguin 1992).

⁸⁹ See E. Jackson, 'Abortion, Autonomy and Prenatal Diagnosis' (2000) 9(4) S.L.S. 467.

⁹⁰ W. Twining, *Globalisation and Legal Theory* (Butterworths 2000) at 12. Critics have pursued this task with regard to abortion law with some enthusiasm, with feminists arguing that the Abortion Act says much about prevailing assumptions regarding appropriate womanhood and mothering: see S. Sheldon, *op. cit.*, n.62 and M. Boyle, *Rethinking Abortion: Psychology, Gender, Power and the Law* (Routledge 1997); and disability rights activists citing it as reflecting existing prejudices towards people with disabilities: see Fletcher, *op.cit.* n.69, Hubbard, *op.cit.* n.68. Whilst this is not the place to rehearse these claims, the failure to discover a convincing justification of s.1(1)(d) can only add weight to them.

principles should apply to all abortions regardless of any foetal disability, we believe that such principles should be very liberal.

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