

Chapter 5

Finding Common Ground in the Disability Rights Critiques of Selective Abortions

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The philosopher Alasdair MacIntyre, in an essay fittingly entitled “Intractable Moral Disagreements,” offers some interesting suggestions for advancing conversations like those presented in this book: conversations involving seemingly intractable disagreements among “intelligent, perceptive, and insightful agents” on basic moral issues.¹ MacIntyre asks “what rationality requires of us in situations in which we confront others who are in radical moral disagreement with us.”² Of course, the first step is to deliberate together, in a free, open, unthreatening, noncoercive exchange.³ But, MacIntyre concludes, even such deliberation might not result in agreement. So MacIntyre asks: “When we have reached this point, how should we proceed further? The urgent practical question will have become that of how we may most effectively find common ground with at least some of those with whom we are in continuing and irremediable disagreement.”⁴ MacIntyre quotes John Henry Newman in describing this sort of impasse: “‘Controversy, at least in this age,’ said Newman, ‘does not lie between the hosts of heaven, Michael and his Angels on the one side, and the powers of evil on the other; but it is a sort of night battle, where each fights for himself, and friend and foe stand together.’ What Newman said of his age remains true of ours.”⁵

This observation about the complexity of the battle lines is especially apt in the context of one particular argument in the frustratingly intractable abortion debates. It is the argument framed by some disability rights advocates who are generally fully committed to abortion rights, but who nevertheless assert that there is something morally problematic about abortion after prenatal diagnosis of a disability (an argument often referred to generally as the “disability rights

1 Alasdair MacIntyre, *Intractable Moral Disagreements*, in *INTRACTABLE DISPUTES ABOUT THE NATURAL LAW: ALASDAIR MACINTYRE AND CRITICS 1* (Lawrence E. Cunningham ed., 2009).

2 *Id.* at 3.

3 *Id.* at 18–24.

4 *Id.* at 4.

5 *Id.* at 328 (quoting John Henry Newman, *FIFTEEN SERMONS PREACHED BEFORE THE UNIVERSITY OF OXFORD* 201 (1997)).

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critique”).⁶ The debate on both sides of this argument is particularly intractable for a number of reasons. It involves two different foundational ethical precepts: the fundamental equality of all human beings (regardless of their disabilities), and the contested “rights” of either “life” or “choice.” In addition, it juxtaposes two common—but incompatible—intuitions about the morality of abortion.

On the one hand, there seems to be widespread consensus that a diagnosis of a disability is one of the least morally problematic justifications for abortion. Indeed, it was publicity surrounding situations in which women were likely to have disabled babies (such as the discovery that the widely prescribed sleeping aid and anti-nausea drug Thalidomide caused birth defects, and an epidemic of rubella, a disease associated with disabilities in fetuses whose mothers are infected) that catalyzed much of the public support for liberalizing abortion laws in the United States in the 1960s.⁷ Even those who oppose abortion sometimes argue for exceptions for women who learn that their child would be born with a disability.⁸

On the other hand, though, there also seems to be widespread consensus that people with disabilities have as much a claim to “human dignity” as people without disabilities, and that therefore there is something problematic about singling out fetuses with disabilities for abortion. This is the intuition that tells us that Nazi eugenic practices with respect to people with disabilities were repugnant. This is the intuition that tells us that the Supreme Court’s decision in *Buck v. Bell* was wrong, and that causes us to reject Justice Holmes’s justification for the forced sterilization of a woman identified as mentally retarded with the phrase: “Three generations of imbeciles are enough.”⁹ This is the intuition that would cause general discomfort with an effort to legislatively mandate prenatal testing and forced abortions for a disability such as Down syndrome.

In this chapter, I will explore how these conflicting fundamental premises and intuitions complicate the debate about the disability rights critique of abortion after a prenatal diagnosis of a disability. In an attempt to open up some space where “friend and foe” in the abortion debates might work together in this area, I will differentiate between two different categories of arguments in the disability rights critique: the autonomy-based argument and the expressivist argument. I will argue that while the former argument does not provide much room for common ground, the latter does. However, the expressivist arguments against selective

6 An excellent introduction to the complexities on both sides of this debate can be found in *PRENATAL TESTING AND DISABILITY RIGHTS* (Erik Parens & Adrienne Asch eds., 2000). This book publishes the results of a two-year project by The Hastings Center exploring the disability rights critique of prenatal testing for genetic disability.

7 Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 *HARV. J. L. & GENDER* 452, 437 (2006); John F. Muller, *Disability, Ambivalence, and the Law*, 37 *AM. J. L. & MED.* 469, 485 (2011).

8 Judith F. Daar, *Selective Reduction of Multiple Pregnancy: Lifeboat Ethics in the Womb*, 25 *U.C. DAVIS L. REV.* 773, 813–15 (1992).

9 274 U.S. 200, 207 (1927).

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abortion tap into a deep and uncomfortable ambivalence toward disability that is manifest in both the discourse about and the legal framework of disability law, as well as in both the discourse about and the social practices governing selective abortion. While a handful of scholars recently have begun to openly address this ambivalence, it will be difficult for many participants in the social discourse on this difficult topic to achieve the level of trust that would be necessary to openly address the consequences of this ambivalence in concrete debates about related policies. However difficult achieving such trust may be, I believe it offers the only way forward in the search for common ground on this issue.

Two Strands in the Disability Rights Critiques of Abortion After a Prenatal Diagnosis of a Disability

Two legal scholars have recently published particularly insightful observations about the participation of the disability rights community in public debates about beginning-of-life issues. In Samuel Bagenstos's 2009 book, *Law and the Contradictions of the Disability Rights Movement*,¹⁰ he addresses what he identifies as an internal inconsistency in the positions taken by the disability rights movement in two public debates: decisions of parents to withhold food, water, or medical treatment from infants born with disabilities (often referred to as "selective non-treatment"), and decisions of parents to abort fetuses after receiving a prenatal diagnosis of a disability (often referred to as "selective abortion"). John Muller's 2011 article, "Disability, Ambivalence, and the Law,"¹¹ addresses the same inconsistency. Both authors note that, in the public debate about the 1982 decision of the parents of a child born with Down syndrome and a blocked esophagus (the "Baby Doe" case), the disability rights community joined forces with the pro-life community in vocally opposing the parents' decision, and in supporting subsequent efforts of the Reagan administration to prohibit such decisions, through regulatory and statutory initiatives.¹² In contrast, both authors note, the disability rights community has not joined forces with the pro-life community in a similarly united front to support any restriction of the right to an abortion after a prenatal diagnosis of a disability.¹³

The arguments raised by the disability rights community in both of these debates fall into two different categories: autonomy-based critiques, and an expressivist critiques. Neither Bagenstos nor Muller make such a distinction, and they both tend to focus most of their analytical attention on the autonomy-based arguments of the disability rights critique, rather than the expressivist arguments. In large

10 SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* (2009).

11 Muller, *supra* note 7.

12 BAGENSTOS, *supra* note 10, at 97–100; Muller, *supra* note 7, at 473–75.

13 BAGENSTOS, *supra* note 10, at 102–104; Muller, *supra* note 7, at 476.

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part, this focus reflects the fact that the autonomy arguments fit more neatly into the existing categories of the dialogue about abortion, and are the arguments more readily presented by the disability rights community in the concrete realities of amici briefs or statements in support of specific legislation. However, I believe that appreciating this distinction helps us understand which aspects of the disability rights critique offer the possibility of common ground. Let us begin by describing the two different categories of arguments.

The Autonomy-Based Disability Rights Critique of Selective Abortions

The autonomy-based disability rights critique of selective abortion focuses on the validity of the consent of the parent choosing the abortion.¹⁴ The basic argument begins with an affirmation of one of the core principles of the disability rights movement—the right of each person to determine her own destiny, and to live, work, and participate in society with as much autonomy and self-determination as possible.¹⁵ This principle, in theory, should justify any person’s choice of a selective abortion. However, the argument goes, in practice the choice of a parent to abort a child after a prenatal diagnosis is most often not, in fact, a genuinely free choice. In reality, parents faced with a prenatal diagnosis of a disability are typically in mental states of extreme stress and vulnerability, often exacerbated by pressure from the medical professionals advising them to make decisions quickly. In these situations, parents naturally tend to rely on the specialized knowledge of the genetic counselors and physicians advising them. However, the argument continues, recent studies tend to show that “many members of the health professions view childhood disability as predominantly negative for children and their families, in contrast to what research on the life satisfaction of people with disabilities and their families has actually shown.”¹⁶ This unduly negative, prejudicial, and factually unjustified perspective of the medical profession tends to have a disproportionate influence on the choice of the parents in these situations, effectively coercing parents into making a decision that reflects biases against people with disabilities.¹⁷

Both Bagenstos and Muller point out that this same basic argument is made by disability rights activists in debates about withholding treatment for infants born with disabilities. In that context, disability rights activists have argued that

14 The following discussion of the autonomy-based critiques of selective abortion summarizes a more complete description in Elizabeth R. Schiltz, *Hauerwas and Disability Law: Exposing the Cracks in the Foundations of Disability Law*, 75 L. & CONTEMP. PROBS. 23, 44–47 (2012).

15 For a discussion and critique of some aspects of this core principle, see *id.* at 30–33.

16 BAGENSTOS, *supra* note 10, at 104 (citing Erik Parens & Adrienne Asch, *Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, in *PRENATAL TESTING AND DISABILITY RIGHTS*, *supra* note 6, at 20).

17 Schiltz, *supra* note 14, at 46 n.111 and sources cited therein.

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“societal stigmas and other social pressures, often presented by professionals without disabilities, effectively coerce people into making decisions that reflect biases against people with disabilities. Given that reality, regulation of the particular form of killing at issue is arguably not restrictive of free choice, but instead is necessary to preserve true freedom of choice.”¹⁸ However, in that context, the disability rights community has actively advocated for the legal prohibition of the decision of parents not to treat the newborn. In contrast, in the abortion context, the disability rights movement does not argue for a restriction on abortion. As Bagenstos writes, “They aim, instead, to persuade medical professionals to provide pregnant women with full information—including information about the positive aspects of living (and parenting a child) with a disability—before offering prenatal tests and suggesting selective abortions.”¹⁹

The Expressivist Disability Rights Critique of Selective Abortions

The disability rights advocate most closely associated with the expressivist arguments against selective abortion is Adrienne Asch. She is fully committed to “reproductive choice for all women.”²⁰ However, she argues that selective abortion is morally problematic in a way that other abortions are not. Two distinct arguments can be identified as part of the expressivist critique of selective abortion.

The any/particular expressivist argument

The first is the argument that there is a morally significant distinction between aborting a child for no reason and aborting a child for a specific reason—if that reason is the child’s disability.²¹ In the first instance, the act of abortion is simply a reaction to some particular circumstance in the life of the mother that makes her not want to have any child at this time. In the second instance, the act of abortion is expressive of a morally problematic judgment about the value of that particular child’s life.

Asch explains, “What differentiates abortion after prenatal diagnosis ... from ... other abortions is that the abortion is a response to characteristics of the fetus and would-be child and not to the situation of the woman.”²² Selective

18 *Id.* at 44.

19 BAGENSTOS, *supra* note 10, at 104; *see also* Muller, *supra* note 7, at 477.

20 Adrienne Asch, *Reproductive Technology and Disability*, in *REPRODUCTIVE LAWS FOR THE 1990’S* 70 (Sherrill Cohen & Nadine Taub eds., 1989).

21 Although the issue of sex-selective abortions involves many of the same concerns as disability-selective abortions, my focus in this chapter is on disability-selective abortions. As Muller points out, “The threat to disability rights from disability-selective abortion ... is arguably greater than the threat to women’s rights from sex-selective abortion; the rate of disability-selective abortion is in a different league.” Muller, *supra* note 7, n.79 and accompanying text.

22 Asch, *supra* note 20, at 82.

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abortion, she argues, “expresses negative or discriminatory attitudes not merely about a disabling trait, but about those who carry it.”²³ This message, she explains, is that “a single trait stands in for the whole, the trait obliterates the whole ... The tests send the message that there’s no need to find out about the rest.”²⁴ Asch describes this distinction as the “any/particular” distinction. She argues that it is *not* morally problematic for a woman to abort because she does not want *any* child at this time; however, it *is* morally problematic for a woman to abort because she does not want *this particular* child, based on a trait identified in a prenatal test.²⁵

The social message expressivist argument

The second argument is that the act of screening to prevent the birth of disabled children concretely affects the lives of living, existing people with disabilities, because it not only expresses, but also reinforces and socially validates, the view that people with disabilities are less valued than people without disabilities. Furthermore, the consequence of this screening is a smaller number of people with disabilities being born, resulting in fewer advocates for the rights of people with disabilities, and a decrease in social support for those with disabilities and those who care for them.

Asch argues that screening for preventing the birth of disabled babies ultimately “disparages the lives of existing and future disabled people.”²⁶ This disparagement hinders the wider social acceptance of people with disabilities, and it concretely affects society’s willingness to support the lives of those with disabilities. She explains:

If the majority continues to see disability as a form of human difference that is worse than other types of difference, it is no wonder that the majority will resist social changes that would incorporate people who have these negatively valued characteristics. The goal of the disability rights movement is to persuade the majority to recognize that people with those disabilities are not lesser than others because of those variations; they are not lesser in what they have to offer and what they can contribute to family and social life. If we truly believed that it was acceptable to have a disability, we would subsidize more disability-related expenses than we do as a society.²⁷

23 Parens & Asch, *supra* note 16, at 13.

24 *Id.*

25 Adrienne Asch, *Why I Haven’t Changed my Mind about Prenatal Diagnosis*, in *PRENATAL TESTING AND DISABILITY RIGHTS*, *supra* note 6, at 236.

26 Asch, *supra* note 20, at 81.

27 Asch, *supra* note 25, at 253.

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Assessing the Possibility of Common Ground in the Disability Rights Critiques of Selective Abortions

Bagenstos and Muller offer different explanations of and prescriptions for resolving the inconsistencies between the positions of the disability rights community in the context of selective treatment of disabled infants and selective abortions. A careful look at their contrasting explanations and prescriptions illustrates both why the autonomy-based disability rights critique does not afford much common ground for abortion opponents and advocates, and why the expressivist disability rights critique might be more promising.

Autonomy-Based Critiques of Selective Abortion Afford Little Room for Common Ground

Bagenstos points out:

Current constitutional doctrine relating to abortion is rooted in a principle of autonomy. The Supreme Court has held, most notably in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, that a choice of such profound moral and practical significance for a woman must be made by her, freely. But the Court also has recognized—in the mode of the disability rights critique—that private as well as public pressures can inhibit free choice. Accordingly, it has upheld regulations of abortion that are justified as removing obstacles to women’s authentic choice.²⁸

If it were accepted that most abortions occur under conditions of effective duress, but that this duress is so subtle that it cannot be reliably detected in any individual case, then women’s choices in these situations are never truly free, and an absolute prohibition on abortion might be justified. Both in his book and in an earlier article on the same topic, Bagenstos argues against this conclusion, searching instead for some way to “endorse the disability rights critique while at the same time adhering to support for broad abortion rights.”²⁹ He suggests “gender equality” as a possible curb, a brake on the “kinds of (publicly or privately imposed) constraints that we are going to treat as rendering a choice unfree.”³⁰ One could accept the theory that “many abortions that result from prenatal testing are effectively coerced by social stigmas filtered through powerful professional cultures,” but also believe that

any prohibition of a particular class of abortion will be abused to harass women who seek abortions more generally. Such a prohibition might also chill doctors from performing abortions, particularly if its terms are vague. If those

28 BAGENSTOS, *supra* note 10, at 104–105.

29 Bagenstos, *supra* note 7, at 457.

30 *Id.* at 451–2.

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risks outweigh the risk that disability-selective abortions will occur and harm disability equality—or if nonregulatory means such as public education can effectively address the harms caused by such abortions—then abortion should not be regulated, even if one accepts the critique.³¹

Bagenstos goes on to argue: “Indeed, I would wager that most disability rights activists who support abortion rights—including those who support assisted suicide—would favor informed consent requirements for disability-selective abortions, if they believed those requirements would not be used simply as part of a campaign to deny women the right to choose abortion.”³²

This would be, I think, the strongest autonomy-based argument against selective abortion that one could accept, while still preserving the right to abortion generally. Let us examine the premises underlying this argument. The starting premise for this argument is that the right to abortion is essential to women’s equality. The argument is that when the risk that some people with disabilities will be aborted because of prejudicial social stigma is weighed against the risk that some women or physicians might be dissuaded from getting or performing abortions, the latter risk is greater than the former. Since (according to the starting premise) women’s equality depends on unhindered access to abortion, in this situation, gender equality must trump the disabled fetus’s right to be born (often based on a conviction that the taking of a potential life cannot be equated with the taking of an actual life). But most abortion opponents reject the starting premise of this argument: that women’s equality depends on access to abortion. Instead, they start from the premise that at some point after conception, the right of the developing fetus to be born trumps all other considerations, including any potentially negative effect on women’s equality or autonomy (often based on a conviction that society should be reformed to ensure that giving birth to a child does *not* necessarily precipitate such a negative effect).

Clearly, the autonomy-based disability rights critique offers a very slender plot of common ground for parties approaching the issue from such incommensurable starting points. As Bagenstos suggests, perhaps there is some room for agreement on initiatives to ensure more informed decision-making in connection with a prenatal diagnosis of a disability, such as the Prenatally and Postnatally Diagnosed Conditions Awareness Act of 2008³³ (commonly referred to as the “Kennedy-Brownback Act”, after its bipartisan sponsors). However, if the “common goal” of more informed decision-making actually starts to significantly influence women’s decisions to abort fetuses with disabilities, those convinced that women’s equality depends on unfettered access to abortions are likely to perceive these measures as posing an obstacle to that goal. The “friend and foe” in any particular skirmish on

³¹ *Id.* at 457.

³² BAGENSTOS, *supra* note 10, at 113.

³³ Prenatally and Postnatally Diagnosed Conditions Awareness Act of 2008, Pub. L. No. 100-374, 122 Stat. 4051 (codified as amended at 42 U.S.C. § 280g-8 (2008)).

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abortion that is being waged on these terms, who might find themselves standing together in some night battles about a specific measure to related to consent, are likely to turn on each other as soon as the measure begins to have an appreciable effect on parents' decisions.³⁴

Muller's Argument for Acknowledging and Embracing Ambivalence about Disability Suggests that the Expressivist Critiques May Offer More Common Ground

Muller's analysis of what he characterizes as the disability community's "opposition to selective non-treatment but acquiescence in selective abortion"³⁵ provides additional insight into the limits of the autonomy argument. Muller suggests that the many contradictions and inconsistencies in matters related to disability law—including this one—stem from a largely unacknowledged ambivalence about disability that "hinders our capacity to confront disability honestly and forthrightly in the law."³⁶ He argues that "the law should express this ambivalence rather than strive for abstract conceptual clarity."³⁷ Although Muller does not make this argument, for the reasons discussed below, I believe that the autonomy-based disability rights critique of selective abortion tends to be shaped by notions of "abstract conceptual clarity" that in fact do not reflect the more honest ambiguity that underlies the discourse. The expressivist disability rights critiques, on the other hand, provide a more natural platform for acknowledging the ambiguity shared by all the participants in the debate, thus offering a more promising possibility for forging common ground.

What is the ambivalence that Muller identifies? He introduces it with reference to what he characterizes as "a pair of tired descriptive models" used by scholars speaking about disabilities:

The medical model casts disability as a biological impairment synonymous with illness. By this view, disability is an undesirable deviation from normal human functioning. The social model, by contrast, casts disability as a social construction like race. By this view, cultural practices transform differences into disabilities. Neither of these descriptive models necessarily incorporates into a particular norm of justice or a particular notion of the value of disability. It has long been clear, however, that adherents of the social model tend to cast

34 See, e.g., Deborah Pergament, *What Does Choice Really Mean?: Prenatal Testing, Disability, and Special Education without Illusions*, 23 HEALTH MATRIX: J. OF LAW-MED 55, 80–83 (expressing concerns about the potentially chilling effect of the Kennedy-Brownback Act's measures on "women's access to choices").

35 Muller, *supra* note 7, at 479.

36 *Id.* at 470.

37 *Id.*

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disability as a difference we should celebrate, and that adherents of the medical model tend to cast disability as a difference we should eliminate.³⁸

The core dilemma ignored by both of these two dichotomous models is that human disabilities are neither solely biological impairments, nor solely social constructs. They are a complex blend of both. In fact, disabilities present neither solely valued differences, nor solely devalued differences. As Martha Saxton writes, “the experience of disability does not neatly reflect the experiences of [other socially stigmatized groups such as women, people of color and gay people] for whom negative judgments about their personal characteristics have been exposed as resulting solely from oppression.”³⁹ Adrienne Asch adds, “The inability to move without mechanical aid, to see, to hear, or to learn is not inherently neutral. Disability itself limits some options.”⁴⁰

Muller argues that the legal regimes resulting from impoverished discourse based on the two common descriptive models are flawed. He uses the contradiction in the disability community’s approach to selective non-treatment and selective abortion as a case study for his argument. He writes:

Selective non-treatment and selective abortion raise variants of the same basic question: is it acceptable for prospective parents to choose death for their nascent offspring rather than life with a disability? The disability community has responded quite differently in these two contexts. With respect to selective non-treatment, it has answered no, advancing a vision of disability as a valued difference. With respect to selective abortion, it has answered yes, accepting a vision of disability as a devalued difference.⁴¹

Muller acknowledges that there may be many reasons for the disability community’s different positions in these two situations, such as the distinction between a newborn and a fetus, or differences in the legal and political contexts in which the two different issues have arisen.⁴² However, these reasons do not explain “the different visions of disability endorsed by disability advocates in discussions about these two issues.”⁴³ Muller examines in detail how these conflicting sentiments about disability have been reflected in the public discourse on both of these issues.⁴⁴

38 *Id.* at 470 (emphasis added).

39 Marsha Saxton, *Why Members of the Disability Community Oppose Prenatal Diagnosis and Selective Abortion*, in *PRENATAL TESTING AND DISABILITY RIGHTS*, *supra* note 6, at 147, 150.

40 Asch, *supra* note 20, at 73.

41 Muller, *supra* note 7, at 472.

42 *Id.* at 479–80.

43 *Id.* at 479.

44 *Id.* at 481–89.

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Without express acknowledgment of this ambiguity, Muller argues that the resulting legal outcomes in both situations only obliquely accommodate it. The Baby Doe controversy ultimately resulted in the enactment of the Child Abuse Amendments of 1984,⁴⁵ which require all infants (including those with disabilities) to be given medically indicated treatment unless such treatment would be futile. Muller points out, however, that the explicit legal prohibition of selective non-treatment has little practical impact. The sanction for noncompliance is limited to “withdrawal of a miniscule set of federal funds.”⁴⁶ Enforcement is virtually non-existent; in practice, “physicians tend to deliberate about difficult treatment decisions amongst themselves and present a unified front to acquiescent parents.”⁴⁷ In other words, the ambivalence expresses itself in a legal prohibition of selective non-treatment, but an unspoken social consensus that permits lack of enforcement of the prohibition.

The legal outcome with respect to selective abortion reflects the same ambivalence, oriented in the opposite direction: no legal prohibition, but significant moral sanction. Despite the absence of any legal prohibition of selective abortion, Muller notes, “The social ritual around prenatal testing ... reflects a powerful ambivalence about testing and selective abortion.”⁴⁸ Prenatal testing is routinely offered as a means of ensuring the health of the child, without any advance discussion of the real dilemma posed by the results of such testing—the choice between abortion or a child with a disability.⁴⁹ What little legal regulation of the area there is comes from cases considering the torts of wrongful birth and wrongful life, a troubled area of the law in which courts continue to “express[] profound unease with both forms of action,” with even states recognizing the causes of action “proceed[ing] with trepidation.”⁵⁰ The only relevant statutory enactment is the Kennedy-Brownback Act, which “expresses social concerns about selective abortion in general terms, yet ... skirts the ethical questions at the issue’s core.”⁵¹ Indeed, Muller contends, “Like the delicate dance conducted by physicians and expectant women, the Act limits its concern to testing and makes no mention of abortion ... More than anything else, the Act provides a public statement of moral uncertainty that we may privately ignore.”⁵²

Muller argues that legal regimes resting on an unacknowledged ambivalence such as this can be dangerous for two reasons. The first is what he calls the “problem of conscious embrace”: “denials of ambivalence lead to the embrace of a conscious view of disability that distorts our genuine concern ... To deny the

45 42 U.S.C. § 5106g (2006).

46 Muller, *supra* note 7, at 485.

47 *Id.*

48 *Id.* at 487.

49 See *infra* notes 77–85 and accompanying text.

50 Muller, *supra* note 7, at 487.

51 *Id.* at 489.

52 *Id.*

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mixed sentiments that inform our reactions to disability obscures the substance of the decisions before us.⁵³ Indeed, this is arguably precisely the dynamic exposed in the dialogue about the autonomy-based disability rights critique. If we deny the ambivalence in our reactions to disability, we must embrace either one or the other view of disability—either disability as a valued trait (leading to the view that the disabled fetus’s right to life must trump the woman’s right to abort) or disability as a devalued trait (leading to the view that the woman’s right to abort must trump the right of the disabled fetus to survive).

The second danger that Muller sees in a legal regime resting on an unacknowledged ambivalence is what he calls “the problem of expressed suppression.” He explains: “Suppression of one or both of two competing sentiments is rarely stable; the suppressed sentiment may either emerge, amplified, in behaviors we neither expect nor understand, or it may give rise to behaviors, once again amplified and neither expected nor understood, that reinforce the conscious view.”⁵⁴ In the specific context of selective non-treatment and selective abortion, Muller suggests the following possible dangers:

Under the regime espousing a view of disability as a valued difference, the law would encourage parents and prospective parents to choose life in situations where life is against the best interests of the parties involved. Suppressed negative valuations of disability could give rise to guilty uncertainty about this choice; they could also provoke eruptions of anger and resentment directed toward the child, the medical profession, or society more broadly. Under the regime espousing a view of disability as a devalued difference, the law would encourage parents and prospective parents to choose death in situations where death is against the best interests of the parties involved. Suppressed positive valuations of disability could give rise to uncertainty about these choices and similar eruptions of anger and resentment, albeit toward different targets. For example, parents and prospective parents might direct these eruptions toward living individuals with disabilities or children without disabilities.⁵⁵

Muller proposes that the law should attempt to minimize the dangers identified above in two ways. It should not embrace unequivocally either a view of disability as wholly positive, or wholly negative. Moreover, it should consciously expose and accentuate this ambivalence, to ensure that policy prescriptions adopted through such legislation do not have unintended adverse consequences for people with disabilities.⁵⁶ Muller ultimately concludes that the current regimes governing both selective non-treatment and selective abortion do serve these two goals to a large extent. With respect to selective non-treatment, “The law’s

53 *Id.* at 497.

54 *Id.*

55 *Id.* at 499–500.

56 *Id.* at 500.

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formal condemnation preserves social mores [against infanticide], yet non-enforcement allows decisions against treatment. Moreover, the threat of social or legal sanction focuses responsibility for individual decisions.”⁵⁷ With respect to selective abortion, “the law should allow selective abortion yet raise moral doubts about the practice.”⁵⁸ The inconsistency in the positions with respect to the two different situations is explained (and justified), Muller argues, by the difference in our existing background legal presumptions regarding infanticide (generally prohibited) and abortion (generally permitted).⁵⁹ Although the existing legal schemes thus structurally accommodate the expression of our ambivalence toward disability, Muller argues that being more explicit about the fact that the legal scheme is structured to express this ambivalence might permit us to *actually* express it more directly. We will return to some of his specific suggestions for how this might be done later in this chapter.

Muller’s proposal clearly acknowledges the expressive function of laws. His proposal also clearly rejects the primacy of the two incommensurable starting premises underlying the autonomy-based disability rights critiques. He is suggesting, instead, that both pro-life and pro-choice participants in the debate actually share the same set of fundamental starting premises: that the situation faced by parents who have received a prenatal diagnosis of a disability is fraught with ambiguity; that the actors in such a scenario most likely view the disabled fetus as both *valued* and as *devalued*; and that these conflicting views should all be taken into account in deliberations about the ultimate decision. I believe that a careful look at the expressivist disability rights critique suggests that Muller’s insights might be applied to offer some possibility for forging the common ground that eluded us in considering the debate about the autonomy-based disability rights critique.

Do the Expressivist Critiques of Selective Abortion Offer Some Possibility of Common Ground?

Recall the two different dangers that Muller identifies in suppressing the ambivalence we feel about disabilities: the problem of conscious embrace, and the problem of expressed suppression. I have argued above that the problem of conscious embrace helps explain the lack of common ground among people on differing sides of the abortion debate in discussions framed by the autonomy-based arguments of the disability rights critique of selective abortion.⁶⁰ The problem of expressed suppression is directly related to the core concern underlying the expressivist disability rights critique. In both its forms, the expressivist disability rights critique is concerned about the effects of suppressed valuations of disability

57 *Id.* at 502.

58 *Id.* at 507.

59 *Id.* at 503, 506.

60 pp. 127–128, *supra*.

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(both positive or negative) that might lead to negative consequences for people with disabilities. If both sides of the debate about this critique could more directly confront the dangers of suppressing expressions of ambivalence in their valuation of disability, perhaps the debate could proceed on a more productive path. Let us examine two common exchanges in debates about this critique, to consider how this might play itself out.

The slippery slope objection to the any/particular expressivist argument

The most common criticism of Asch's first expressivist argument, the any/particular argument, is a "slippery slope" argument: the any/particular distinction "calls into question the morality of virtually all abortions."⁶¹ The decision to abort any fetus can be easily recast into a decision to abort this particular fetus, for some reason. For example, the decision of the mother of three children to abort her fourth child could be characterized as a decision to abort any child who happened to come along after she already had three children; or, it could be seen as a decision to abort that particular child because of her "trait of being fourth-born." Critics of Asch's argument fail to see why traits such as "fourth-bornness" can be distinguished from other disabling traits.⁶² Anthropologist Nancy Press argues that such arguments fail to acknowledge the "important nuance" of Asch's argument, one that is based on women's experience of pregnancy.⁶³ Press explains:

For Asch there is, virtually from its inception, a perceived difference between a wanted pregnancy and one that is not wanted at that time. In the first case there is an immediate, imaginative sense of carrying a baby; in the latter, the pregnancy remains a fetus. For Asch, the negative message of selective abortion for disability is that it is a decision to terminate a pregnancy, which was previously experienced as wanted, on the basis of knowing only one new fact about that baby—that it will have some sort of disability. To Asch this is fundamentally different from the termination of a pregnancy that was always unwanted based on characteristics of the woman's life at the time.⁶⁴

61 PRENATAL TESTING AND DISABILITY RIGHTS, *supra* note 6, at 15.

62 *Id.* at 15–16; James Lindemann Nelson, *The Meaning of the Act: Reflections on the Expressive Force of Reproductive Decision Making and Policies*, in PRENATAL TESTING AND DISABILITY RIGHTS, *supra* note 6, at 201–05.

63 Nancy Press, *Assessing the Expressive Character of Prenatal Testing: The Choices Made or the Choices Made Available?*, in PRENATAL TESTING AND DISABILITY RIGHTS, *supra* note 6, at 215. Press also argues that "fourth-bornness" "is not an intrinsic attribute of that child, but rather of that pregnancy. Put up for adoption and raised in another family, the fourth-born, biological child may become the first-born, adopted child. But a disability is intrinsic to the child. A fetus definitively diagnosed with a disability will have that disability, whatever family raises it." *Id.*

64 *Id.*

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Press's observation emphasizes that the *particular* reason for the change in the parent's attitude toward the fetus is the concern of this critique. It is *precisely* the fact that the parent's decision is based on the category of disability that makes it problematic. The proponents of this argument would not embark on the slippery slope suggested by the fourth-born argument, because they are not entrenched in the all-or-nothing debate of the autonomy-based argument, where women's equality is pitted and balanced against the right to life. Instead, they are attempting to open a discussion that acknowledges a more nuanced, delicate balance of the ambiguities of the situation, and permits some discussion of both the valued and the devalued nature of the difference about this fetus revealed by the prenatal diagnosis.

In such a nuanced discussion, the disability rights critique proponents would be free to counter the parents' concerns about the negative value of the disabled fetus's life with arguments about the positive value. They might, for example, offer a civil-rights analogy that could serve as a response to this "slippery slope" critique of the any/particular distinction. Bagenstos discusses this argument in another section of his book, dealing with critics of the Americans with Disabilities Act (the "ADA")⁶⁵ who attempt to distinguish it from other civil rights laws on account of its accommodation requirements. The ADA does not simply forbid discrimination because of disability; it requires employers and providers of public services to make positive (and sometimes costly) accommodations to a person's disability. Bagenstos argues, however, that these accommodations are justified under the same rationale that justifies all of the antidiscrimination provisions in our civil-rights laws. He argues that antidiscrimination laws "seek to dismantle a system of group-based subordination and patterns of occupational segregation that support that system."⁶⁶ This is supported by the fact that our traditional civil-rights laws do not prohibit all irrational discrimination, but instead prohibit *only* discrimination against people in particular groups identified as having been the subject of group-based subordination. We are free to discriminate against our fellow human beings for all sorts of irrational reasons. We could arbitrarily refuse to hire people who have red hair, because we were jilted by a red-haired person when we were 16 years old. We could arbitrarily refuse to rent apartments to people who are exactly 5'6" tall, because we are locked in an extreme case of sibling rivalry with our 5'6" tall sister. But our civil-rights laws forbid irrational discrimination against people who belong to certain protected classes, classes defined by race, sex, religion, and disability. Indeed, even when such discrimination might be entirely rational, the laws still prohibit it. Even if an employer could empirically prove that employees of a certain racial group are less productive than employees of another, our laws would still prohibit discrimination on such grounds.⁶⁷ We have enacted these laws because we, as a society, have identified that particular protected class

65 The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990); see BAGENSTOS, *supra* note 10, at 55–75.

66 *Id.* at 57.

67 *Id.* at 63.

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as having been systemically subordinated. We think that discrimination based on membership in one of these historically subordinated groups is much more dangerous, resulting in much more serious social harm, than discrimination based on personal idiosyncracies like resentment of a red-haired object of our unrequited love, or the trait of “fourth-bornness.”

The ADA not only adds people with disabilities to the category of protected persons, but it goes even further than many civil-rights laws. It not only forbids discrimination against people with disabilities, but it sometimes mandates accommodation of people with such disabilities to enable them to access public facilities or to perform certain jobs. And that additional requirement of accommodation, with all its attendant costs and obligations, is justified for the same reason as the antidiscrimination provisions. People with disabilities are recognized as a group of people who have been systemically subordinated, and some accommodation, no matter how costly or inconvenient, can be mandated, because it “serves the goal of equal access to societal opportunities by helping to dismantle a structure of subordination.”⁶⁸ That is the same rationale behind the Supreme Court’s decision in *Olmstead v. L.C.*,⁶⁹ which required the state of Georgia to house people with mental disabilities in community settings, rather than in institutions, regardless of the greater cost this might entail. That is also the rationale behind the Individuals with Disabilities Education Act,⁷⁰ giving children with disabilities the right to be educated in our schools, despite the cost.

This argument potentially offers a response to the “slippery slope” criticism of Asch’s first expressivist argument against abortion after a prenatal diagnosis of a disability. The civil-rights laws as characterized by Bagenstos provide a venerable model for the view that an act that might not be morally problematic if done for no particular reason might be morally problematic if done for some particular reason. In light of the overwhelming evidence of the systemic structure of subordination to which people with disabilities have been subjected in the history of the United States, and the overwhelming evidence of the effect of a prenatal diagnosis of a disability on the number of people with disabilities being born,⁷¹ it is arguably legitimate to consider abortions after a prenatal diagnosis to be particularly morally problematic, even if one supports a woman’s right to an abortion generally. It is this “systemic structure of subordination” that the disability rights critique considers to be suppressing the positive evaluation of disability in this situation; this is a subtle, but powerful systemic force, recognized as such in a significant body of civil-rights laws that most of us support—such as the ADA and IDEA.

Of course, in such a debate, the proponent of the disability rights critique would have to be equally appreciative of arguments that could only be raised by

68 *Id.* at 64.

69 527 U.S. 581 (1999).

70 20 U.S.C. §§ 1400–82 (2006) (originally enacted as the Education for all Handicapped Children act of 1975).

71 Schiltz, *supra* note 17, at 49 n.120 and sources cited therein.

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interlocutors who trust the sincerity of the shared starting premise that accepts the ambiguities inherent in decisions about selective abortion. Even if the civil-rights analogy effectively addresses slippery slope concerns, it does not address counter-arguments based on the dangers of suppression of the negative valuation of a disability. In such debates, then, the proponent of the disability rights critique would have to productively engage counter-arguments such as the distinctions between race and disability identified by disability rights scholars such as Asch,⁷² and distinctions between granting people with disabilities access to our workplaces, neighborhoods, and schools, and granting people with disabilities access to our wombs and our homes. But a debate about the correct balance between the more concrete dangers of suppressed expression of particular aspects of the negative and positive valuation of people with disabilities is at least directly focused on the concerns of the disability rights critique. This would be a more difficult, but more productive, dialogue than one focused on the conversation-stopping contention that the any/particular distinction places us on a “slippery slope” to questioning the morality of all abortions.

Objections to the social message disability rights critique

Critics of Asch’s social message argument (that selective abortion to prevent the birth of disabled children disparages the lives of existing and future children, by diminishing the numbers of such people and hindering their wider social acceptance) commonly argue that individual acts by the parents choosing selective abortions cannot be attributed with any such message. Some argue that actions can only convey the conscious meaning intended by the actor. Selective abortions are typically *not* intended by the parents choosing them as intentional disparagements of people with disabilities, and thus cannot be attributed with such an expressive effect.⁷³ Others concede that actors might send messages without being fully conscious of the expressive effect, but argue that the circumstances “in which broad cultural agreement about the symbolic meaning of an act means that the act can send a specific message” are rare, limited to instances such as “flying the Confederate flag over a public building in the southern United States.”⁷⁴

Press points out, though, that these critics might be misinterpreting the expressivist argument by implicitly assuming that

the “message” is having an abortion and the “sender” is the woman/couple who terminate the pregnancy. But this is only one possible way to construct the message to which those with disability may be reacting, and, I would contend, it is not the most useful way. Another way of thinking about it is that the offer

⁷² See *supra* notes 38–39 and accompanying text.

⁷³ Press, *supra* note 63, at 214 (citing bioethicist Allen Buchanan).

⁷⁴ *Id.* at 214–15 (citing James Lindemann Nelsons).

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of prenatal testing itself is the message and the institutional structures through which the offer is made constitute the senders of the message.⁷⁵

Press's suggestion emphasizes that the concern of the social message disability rights critique is *not* the intent of any particular parent making a selective abortion decision. Adopting Muller's suggestion, this critique is best understood as coming from a perspective in which the honest ambivalence of the actors is accepted as a shared common presumption. The critique is not an argument that parents choosing a selective abortion are expressing a simplistically negative message about the perceived value of the life of the fetus with a disability.⁷⁶ Instead, it is an argument about a social structure that has developed around the process of prenatal testing that raises the specter of expressed suppression—that is, suppression of positive valuations of disability in discussion of the practices of selective abortion.

Press has conducted extensive research on the routinization of noninvasive prenatal screening for birth defects.⁷⁷ This research has led her to conclude that the more routine such testing has become, the more obscure the actual meaning and purpose of such testing has become, both in conversations with women about such testing as “under the rubric of routine postnatal care,”⁷⁸ as well as in scientific literature about such testing.⁷⁹

Press surveyed pregnant women and test providers in California, which in 1986 mandated that all healthcare providers offer such testing to all their pregnant patients.⁸⁰ In particular, she focused on the maternal serum alpha fetoprotein (MSAFP) screen, a test involving analysis of the amount of a particular substance produced by the developing fetus that is found in the mother's blood. The MSAFP involves analysis of blood drawn from the mother, rather than the more invasive procedures such as amniocentesis, which involve drawing amniotic fluid from the mother's womb. The women Press interviewed had come to consider the MSAFP screening as part of “routine prenatal care,” to the extent that it was sometimes “described in terms of helping to protect the fetus. The actual purpose of the MSAFP screening—to find cases of untreatable birth defects in order to allow women and couples the opportunity to terminate a pregnancy—appeared to be obscured from view.”⁸¹ Indeed, obscuring the connection between the test and

75 *Id.* at 217.

76 Indeed, Press's research has also revealed striking evidence of this ambivalence in the pregnant women surveyed in the MSAFP study. While they tended to express extremely positive attitudes about the lives of people with disabilities in general, when questioned about a possibility of disability in a child of their own, they expressed extremely negative attitudes toward the potential life of such a child. *Id.* at 225–29.

77 *Id.* at 218–30.

78 *Id.* at 219.

79 *Id.* at 221–22.

80 *Id.* at 218.

81 *Id.* at 219.

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the most common outcome of tests that show fetal anomalies—abortion—was an intentional goal of the test providers. Press reports that:

Health care providers in our study, and state officials who had created informed consent materials for the California MSAFP program, were often quite open about the fact that the link between abortion and prenatal screening was intentionally avoided. They cited as reasons behind this omission both political conflict over abortion and the observed discomfort of pregnant parties when abortion was mentioned in this context.⁸²

Press notes the same approach in the scientific literature on this subject. She observed that the only literature that openly confronts the centrality of abortion to prenatal screening are cost-benefit analyses of selective abortion, comprising “up-front calculations of the minimum number of pregnancy terminations that can be done before screening ceases to be cost effective.”⁸³ In more general articles, the goals of MSAFP screening are rarely discussed openly. In the brief statements of goals often contained in the introductions to such articles, Press identifies two types: “societally approved goals” and “controversial goals.” The “societally approved goals” include reassuring the pregnant woman, providing information to doctors about the state of the pregnancy and possibilities for special preparations for the birth or *in-utero* treatment, and providing information to parents to prepare psychologically if the screening reveals an anomaly. Press notes that these goals focus on benefits to the people involved, on the joint interests of the mother and the fetus, and, generally, on “life.” She also notes, however, that they are ancillary goals,

in that they apply to statistically rare situations, involve information that could be found out in other ways, or describe either future situations or ones for which no guidelines for action currently exist. Fundamentally, they are ancillary because it is so unlikely that the MSAFP test would have become routinized if they were the only, or even the major, goals.⁸⁴

In fact, the “controversial goals” are the ones that are “central to the public health purposes that make population-based prenatal screening viable”: the ability to terminate the pregnancy when the testing reveals an anomaly, and the resulting cost savings to society. Yet, Press notes, these goals are so controversial that even when they are addressed, the obliqueness of the language used verges on “newspeak.”

82 *Id.* at 221.

83 *Id.* at 221 n.18 (citing sources).

84 *Id.* at 222.

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For example, one article contends that “MSAFP screening has proved to be a ... cost-effective way of improving pregnancy outcome.”⁸⁵

Press describes the danger of obscuring the true stakes in dialogue about prenatal testing in language that invokes the social message disability rights critique:

Such encoded language is explicable by the fact that, in opposition to the societally acceptable goals, these controversial goals imply things that are not comfortable for most Americans. They logically imply that not all life is worthwhile, and that the interests of society may be in conflict with those of the fetus ... This encoded language also poses challenges to those who believe that the expressive character of prenatal diagnosis is hurtful, and even potentially dangerous, to those with disability: if the goals of prenatal testing are obscured and denied, it is difficult to demonstrate harm coming from those goals.⁸⁶

This language also invokes Muller’s concerns about the problem of expressed suppression. The social message disability rights critique should be understood as being based on fears about an institutional suppression of positive valuations of disability. Rather than a criticism of what any particular set of parents might be expressing with respect to any specific decision they make, the concern is about a social practice that is developing around these individual decisions that suppresses the possibility of introducing arguments that might “demonstrate harm” resulting from those unexpressed goals.

Arguments about the dangers of collective social messages of institutions, rather than individuals, are accepted in a number of contexts outside of selective abortion. For example, some scholars have suggested that the routine practice of sperm banks in assisting aspiring parents to choose sperm donors based on their race might be subject to some regulation, as a result of the social meaning and potential expressivist harm of such practices in light of our commitment to racial equality.⁸⁷ Expressivist arguments have been lodged against unjust legal schemes. Legal scholars over the past few decades have articulated various versions of legal expressivism, asserting that “laws and legal actions can express normative commitments and that laws may be evaluated according to whether their expressive content comports with constitutional or legal norms.”⁸⁸ For example, scholars have asserted that:

85 *Id.* (citing G.C. Cunningham & K.W. Kizer, *Maternal Serum Alpha-Fetoprotein Screening Activities of State Health Agencies: A Survey*, 47 AM.J. OF HUMAN GENETICS 899 (1990)).

86 *Id.* at 222–23.

87 Dov Fox, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844 (2009).

88 Matthew A. Edwards, *Legal Expressivism, a Primer*, at 8, available at <http://ssrn.com/abstract=1361101> (generally referencing the contributions of scholars such as Elizabeth Anderson & Richard Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Matthew A. Adler, *Expressive Theories of Law: A Skeptical*

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Contemporary Equal Protection doctrine incorporates expressive concerns [by making] unconstitutional all laws that rest on certain impermissible purposes: those which express contempt, hostility, or inappropriate paternalism toward racial, ethnic, gender, and certain other groups, or that constitute them as social inferiors or as a stigmatized or pariah class.⁸⁹

Another scholar recently has argued, “Granting patents on genes related to sexual orientation, and potentially other conditions such as deafness, high-functioning autism, or dwarfism, communicates government approval that these groups are pathological and should be cured. Such a communication expressively harms these groups.”⁹⁰ These are all contexts in which arguments are made that some regulation of private practices might be justified, based not on what the individual actor intended to say about her specific action, but rather on the dangers stemming from the collective social message sent by some social practice or law.

Of course, opening up space in the debate for considering the social message disability rights critique does not determine the final outcome of the debate. Those asserting the social message disability rights critique have to accept that acknowledging a negative social message resulting from current practices does not provide an irrebuttable argument for ending the practice. Proponents of this critique must be equally open to honest engagement with the aspects of the practice of prenatal testing that suppress negative evaluation of a disability. For example, Press describes the anger expressed by a woman who chose abortion after a prenatal diagnosis of Down syndrome. Though prenatal testing and the abortion were presented to her and her husband as morally legitimate and legal choices, she describes a “punitive” feel to the way she was treated in undergoing the abortion: being placed in a ward in the maternity floor to recover, being treated rudely by the nursing staff, and not being given appropriate pain medication.⁹¹ Scholars have raised concerns about the danger of prenatal testing becoming culturally or even legally mandatory, and the potential for totalitarian or social coercion in the use of reproductive technology.⁹²

Another difficult issue that must be addressed by both sides debating the social message disability rights critique is the lack of congruence between the social

Overview, 148 U. PA. L. REV. 1363 (2000); Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506 (2001); Cass R. Sunstein, *On the Expressive Function of the Law*, 144 U. PA. L. REV. 2012 (1996)).

⁸⁹ Edwards, *supra* note 88, at 12 (referencing Anderson & Pildes, *supra* note 87, at 1533, and citing Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 MD. L. REV. 777 (2001), for the proposition that “laws that denote inferior legal status constitute an intrinsic harm because they deny the human need for ‘recognition’”).

⁹⁰ Edwards, *supra* note 88, at 13 (quoting Timothy R. Holbrook, *The Expressivist Impact of Patents*, 84 WASH. U. L. REV. 573, 581 (2006)).

⁹¹ Press, *supra* note 63, at 224.

⁹² Pergament, *supra* note 34, 74–75.

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message of support for choosing not to abort based on a diagnosis of a disability, and the social message of support for actually raising a child with a disability. On the one hand, Nancy Mahowald argues:

While individuals are unable to care adequately for a child in some instances, the same is hardly true for society as a whole, at least in the developed world. Collectively, society has all the resources necessary to care adequately for all of its people: healthy newborns, those with disabilities, or anyone who needs care that is not available through parents or other family members. Accordingly, society in general does not have the justification that some pregnant women may have for testing and abortion of fetuses whose subsequent care may be impossible for them to provide.⁹³

On the other hand, Deborah Pergament laments “the paradox created when there is concerted effort to encourage women and their partners to choose to have a child with a prenatally diagnosed disability while government policies emphasize private responsibility for the care and education of children with disabilities and mandate restrictions on public expenditures for them.”⁹⁴

These broader questions about the wide panoply of collective social messages we send with respect to our brothers and sisters living with disabilities are, in the end, the crux of both versions of the expressivist critique of selective abortion addressed in this chapter, as well as the myriad versions of it that are beyond the scope of this work. Accepting as a shared common premise the ambiguity about disability that all participants in debate share will not be an easy step. However, it offers the possibility for a more honest conversation about the issues at stake, and perhaps a way forward in shaping social practices around selective abortion that are more satisfactory to both sides of the debate.

Opportunities for Finding Common Ground

Press makes clear that the conclusions from her research “are not intended as direct support for the expressivist argument.” Rather, she hopes

that this exploration of the silences, discomforts, multiple discourses, and structural tensions underlying the arena of prenatal testing will demonstrate the need to think in a broader way about what constitute the “messages” of prenatal testing, and who are the senders and receivers. This is important not primarily because of the putative negative effects of an offer of prenatal testing on those with disability. More crucial are the effects of our silences and evasions about

93 Nancy Mahowald, *Aren't We All Eugenicists? Commentary on Paul Lombardo's "Taking Eugenics Seriously"*, 30 FLA. ST. U. L. REV. 219, 232 (2003).

94 Pergament, *supra* note 34, at 115.

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our attitudes, desires, and intentions as regard the main driving forces of prenatal testing—selective abortion and attitudes toward disability. As we continue with increasing speed down an ever-widening path of prenatal testing, we need to ask: *What message are we sending to ourselves by being willing to do something which we cannot truly discuss?*⁹⁵

Press has offered her explanations for the unwillingness of parents and the medical community to discuss selective abortion in the prenatal testing context: abortion is politically volatile and discussing it with prospective parents is difficult and uncomfortable. Bagenstos and Muller have offered their explanations for the unwillingness of the disability rights community to engage the selective abortion debate in the same forthright way in which they engaged the selective non-treatment debate: Bagenstos sees it as an inconsistency best resolved by choosing a side; Muller sees it largely as a consequence of our inability to acknowledge the ambivalent feelings about disability that all sides share. Lisa Blumberg, a frequent contributor to the disability rights journal *Disability Rag*, suggests some additional, pragmatic reasons:

[T]he movement for quite legitimate reasons is unwilling to take a stand that could be seen as taking sides in the abortion controversy. The disability rights movement is for the most part a progressive movement and is increasingly cognizant of the need to forge alliances with other progressive movements. People with disabilities, like any other diverse group of people, have varying views on pregnancy termination. However, numerous people with disabilities are pro-choice, and indeed disabled women tend to perceive the same need to have access to abortion as nondisabled women.⁹⁶

Muller expands: “The disability rights movement has traditionally aligned itself with the political left, including on the issue of abortion. It is at least plausible that restrictions on selective abortion could yield more costs in eroded political alliances and abortion rights than benefits for traditional notions of disability rights.”⁹⁷

But Blumberg, writing in 1994, makes a suggestion that is equally applicable today. She argues, “Now that we have an administration in Washington that is more receptive to reproductive choice than previous ones, the movement should not hesitate to speak out about eugenics.” In other words, a political environment in which the disability rights community can feel more secure that its critique

95 Press, *supra* note 63, at 230–31 (emphasis added).

96 Lisa Blumberg, *Eugenics and Reproductive Choice*, in *THE RAGGED EDGE: THE DISABILITY EXPERIENCE FROM THE PAGES OF THE FIRST FIFTEEN YEARS OF THE DISABILITY RAG* 229, 232 (Barrett Shaw ed., 1994).

97 Muller, *supra* note 7, at 479. *But see* Pergament, *supra* note 34, at n.72 (taking issue with Muller’s “presentation of the disability rights movement as somewhat monolithic in its alignment with the political left, particularly on the issue of abortion”).

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of selective abortion will not be misinterpreted as a general assault on women's reproductive rights might open up space for some more difficult, nuanced conversations. This position is supported by Muller's suggestion that a legal regime that consciously exposes and accentuates ambivalence about disability might allow for more forceful expressions of both poles of this ambivalence.⁹⁸ Blumberg suggests that

the movement ... carefully define the issues that should concern us as disability rights activists. As a movement, we should not take any position on the rights of a fetus versus the rights of a pregnant woman. However, what we can and must do is take a position against any medical, legal or social policy that is based on the attitude that people who have disabilities are categorically inferior to others and therefore would be better off if they did not exist and everyone else would benefit by their absence.⁹⁹

Blumberg offers the following list of "concrete positions which disability rights groups along with other progressive groups should take to combat eugenics ... which should in no way involve the movement in the debate over whether a woman should have a legal right to abortion":

- The decision whether to have prenatal tests must be solely that of the pregnant woman regardless of the woman's age, reproductive history, or disability status.
- All expectant couples should be informed as to the purpose of the different available prenatal tests as well as given information on the risks, limitations, and expense of the tests, the manner in which these tests will be performed, and when during the gestation period the results will be available. Consent and refusal forms must state that a woman's decision to forgo prenatal tests will not subject either her or her future child to loss of any medical care, insurance, legal benefits or community services that they would otherwise be entitled to. Legislation should be drafted as appropriate.
- The results of all prenatal tests must be strictly confidential and may only be released to a third party with the woman's consent.
- All women regardless of age, reproductive history, or disability status must be given the absolute right to continue a pregnancy after prenatal diagnosis. Legislation should be drafted as appropriate.
- Laws regulating abortion should be disability neutral.
- Disability groups should prepare packets of information to be offered to all couples who learn that their fetus has a disabling condition. These packets should contain (1) information that seeks to dispel common misconceptions about disability and to present disability from a disabled

⁹⁸ See *supra* notes 56–59 and accompanying text.

⁹⁹ Blumberg, *supra* note 96, at 233.

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person's perspective, (2) information on community-based services for disabled children and their families as well as on financial assistance programs, (3) material on special needs adoption, and (4) a summary of major laws protecting the civil rights of persons with disabilities. People with disabilities and parents of people with disabilities should be available to talk with future parents.

- All medical students should be required to take at least one course in political and social issues of disability and all practicing physicians should be required to take such a course as part of their continuing education requirements. All genetic counselors as part of their specialized training must participate in an activity that will give them contact with disabled persons in nonmedical settings.
- Non-perjorative language must be used when describing persons with disabilities and potential persons with disabilities. The term “defective fetus” should be seen to be in the same category as “kike fetus” and “nigger fetus.”
- Wrongful life suits are inherently discriminatory against persons with disabilities and should be prohibited. Wrongful birth suits should only be permitted with disabled children if they are permitted with nondisabled children.
- Family strengthening initiatives such as parental leave, part-time and flextime work, expanded childcare alternatives, comprehensive health care programs and programs assisting low-income families must be supported. Parenting a disabled child will become a more viable option for more people if society provides more support to parents in general.¹⁰⁰

Some of these suggestions are similar to those offered by Muller to redress what he perceives as a current imbalance in the competing views of disability in the legal regime governing selective abortion. He suggests that the current background legal regime, with its sanction of selective abortion, offers a “quite meager” voice to the pole of ambiguity representing disability as a valued difference. He suggests that the emphasis on information expressed in the 2008 Kennedy-Brownback law could be made more robust “to encourage exchange between disability groups, prospective parents considering abortion, and the physicians and genetic counselors working with prospective parents. It could also do more to regulate how physicians and genetic counselors discuss diagnosis.”¹⁰¹ However, Muller also suggests that “it is not unforeseeable that more genuine restrictions on abortion could prove necessary to maintain a balance between expressions valuing and devaluing disability in this context,” such as restrictions on government funding to selective abortion, heightened waiting periods on selective abortions, restrictions

100 *Id.* at 238–39.

101 Muller, *supra* note 7, at 507.

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on testing, extension of the Child Abuse Amendments to cover viable fetuses, or limitations on wrongful birth or life tort claims.¹⁰²

If friend and foe are to stand together in any place in the night battle of abortion, the most promising place to start might be in our shared common convictions about our brothers and sisters with disabilities—both the positive valuations shared in progressive legislation such as the ADA and IDEA, and the negative valuations that shape the silences that currently shroud the practice of selective abortion.

102 *Id.*

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