JUDGING IN THE PUBLIC REALM

A Kantian Approach to the Deliberative Concept of Ethico-Political Judgment and an Inquiry into Public Discourse on Prenatal Diagnosis

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A

AQE

CJ/KrU

CPR

CPrR

EP

FI

Gr

LE

LL

MM

OBS

OT

PP

Prol
Prolegomena zur einer jeden künftigen Metaphysik, die als Wissenschaft wird auftreten können (1783). Prolegomena to any future metaphysics that will be able to present itself as a science, trans. by Peter G. Lucas. Manchester: Manchester University Press (1953).

TP
There is something to be said, my lord, for his point of view,  
And for yours as well, there is much to be said on both sides.  
Sophocles, Antigone

Judging is one, if not the most, important activity in which  
the sharing-the-world-with-others comes to pass  
Hannah Arendt

Everything valuable is vulnerable  
Lucebert
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CHAPTER 1

Public deliberation and ethico-political judgment

The point of this inquiry is that we should enhance discussions about moral and political questions. We should, in other words, deliberate. I shall speak of deliberation in two senses: as a public discussion in the various arenas of the public sphere, in the sense of giving and asking for reasons, and as the weighing up of matters in the mind by thinking on the basis of the standpoints of others. As a matter of fact, we do deliberate. We wish to voice our concerns and to exert influence. Still, we may aim to enhance the way we deliberate. In this inquiry, a deliberative concept of ethico-political judgment will, to this end, be elaborated on.

An argument for public deliberation is that it may ensure the legitimacy of democratic decisions. From this perspective, deliberation is closely connected with our understanding of democracy. Understandings of democracy can differ. Representative democracy can take different shapes. Many argue that we should enhance our representative democracy by conversing more at different levels. John Dewey captured the essence of what is now called ‘deliberative democracy’, a democracy whereby citizens are increasingly involved in discussions concerning a public course of action. If we are dissatisfied with democratic institutions, the remedy is not simply to extend or refine aggregating individual interests or preferences but to have more and better democratic deliberation:

The essential need, in other words, is the improvement of methods and conditions of debate, discussion, and persuasion. That is the problem of the public.¹

What if we are not dissatisfied with our institutions? Perhaps we do not have a problem with legitimacy? Given the plurality of viewpoints in society, for instance with regard to prenatal diagnosis, my hypothesis is that we need and can also enhance the legitimacy of decisions. There are proponents and opponents, and even those who lie in between; and choices have to be made. Not everybody will accept the outcome of the process of political decision-making. We can, at least, demand that the various viewpoints are given due respect.

Conversation, in this respect, is a great good. One of the outcomes may be mutual respect. We understand the viewpoint of the other better and - if consensus or compromise are unlikely - we can start to live with dissensus. This not merely by tolerating the actions of the other but by developing a sense of tolerance and coming to an understanding.

¹ John Dewey (1927: 207).
1.1 An inquiry into public deliberation

The aim of the thesis is to suggest how public deliberation on moral and political questions may be enhanced. I believe that such deliberation, given the plurality of viewpoints in society, should be enhanced in order to ensure the legitimacy of decisions, in order to give citizens an opportunity to voice their concerns and enable them to come to an understanding. Public deliberation presupposes giving and asking for reasons in the public sphere. It could be asked why deliberation in, and in between, the public political sphere - e.g. on ethical committees, in parliament, on advisory councils - and the informal public sphere should be enhanced.

This is because moral questions related to, for instance, prenatal diagnosis are often controversial and there exists a profound plurality of viewpoints in society with regard to these questions. It is not, in my view, likely that this plurality can be represented in the public political sphere without the input of public deliberation in the informal public sphere. The relation between informal public deliberation and formal public deliberation is, thus, important.

But how can the legitimacy of decisions be ensured by public deliberation? In order to form judgments that can be justified in the public sphere, citizens can legitimately demand that their viewpoints be given due respect. This is a matter of procedural legitimacy. When diverging viewpoints are given due respect, citizens may accept the ‘force’ of the better reason that has been propounded in public deliberation in order to justify a judgment of right.

To examine how public deliberation may be enhanced, a philosophical and an empirical inquiry are carried out concerning the questions of how we should deliberate and how we in fact do deliberate. The philosophical inquiry into ethico-political judgment has the aim of developing a theoretical approach in order to suggest how we should deliberate as far as moral and political questions are concerned.

The philosophical inquiry thus consists of elaborating a deliberative concept of ethico-political judgment. By this, I mean the deliberative formation of a justifiable judgment with regard to a public course of action with moral implications. In public deliberation, we aim at a judgment that can be defended with good reasons in the public sphere.

But is not the mere concept of ethico-political judgment an oxymoron? Ethics is often assumed to be about right and wrong, or good and bad; and politics about power and interest. In my view, it is sometimes warranted to speak of an interrelation between ethics and politics. This interrelation is pointed at using the concept of ethico-political judgment. Ethics matters to politics since we need to reflect upon the question of what it is that makes the reason for a judgment a good one. Politics matters to ethics since judgments of right - what we ought to do - have to be made in a pluralist society concerning a public course of action. My contention is that, in the discussion about prenatal diagnosis for instance, we need to be able to justify our judgments in the public sphere. That is the point of ethico-political judgment.
I develop two Kantian conditions of ethico-political judgment as the regulative ideal of public deliberation on moral and political questions. In an ‘external-collective’ sense, the first condition is giving and asking for normative reasons. In an ‘internal-reflective’ sense, the second condition is aiming at impartiality of the faculty of judgment. I concretize these conditions in order to see how - on the basis of the empirical inquiry - they can have a place in public deliberation. Unlike public discourse, a descriptive concept, public deliberation is a concept that tells us how to discuss: it is something to be aimed at.

If we are convinced that we should aim at public deliberation, we should also aim at ethico-political judgment. We should judge and deliberate. In relation to my inquiry, I discern four relevant aspects of the concept of judgment. In the first sense, as a faculty, judgment means the capacity to judge. Judgment is concerned with the appropriate application of general rules, or principles, to particular situations. In the second sense, a judgment is an inference from reasons and it can be more or less authoritative: if a formal body propounds a judgment, it will carry more weight than if I as a citizen propound that judgment in public. In the third sense, judgment is equivalent to assessment.

In the fourth sense, we can speak of the formation of judgment. It is the formation of a judgment that is pointed to in ethico-political judgment. Judgment can, in this respect, be regarded as a process during which judgments are formed by a variety of individuals. Judging can, in a Kantian sense, also mean that we reflect upon our initial judgment from a universal standpoint which we can only determine by thinking from the standpoint of others (this is the ‘enlarged thought’). This entails that we communicate with others, during public deliberation.

The empirical inquiry into the public discourse on prenatal diagnosis and screening in the Netherlands and Sweden has the aim of examining how we deliberate. I have chosen prenatal diagnosis and screening as an example of such questions although the inquiry is relevant to many other questions; i.e. euthanasia, stem cell research, or human genetic engineering.

Public discourse can be defined as the ‘utterances and texts (spoken, written, images) which circulate in society and which, through their communicative forms, are accessible to a larger number of people in the public sphere’. In our inquiry,

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2 The distinction between external-collective and internal-reflective deliberation is made by Robert Goodin (2000), see also chapter 4: 4.2.

3 This definition is defended by Charles Larmore: ‘Judgment itself is not restricted to the moral domain, but is a general faculty concerned with the appropriate application of general rules (which may be more or less schematic) to particular situations. Moral judgment […] aims at the appropriate application of moral rules to particular circumstances insofar as their application requires choosing among morally different alternatives’ (1987: 7).

4 Urteilsbildung (German), oordeelsvorming (Dutch), ’omdömesbildning’ (Swedish).

5 My translation: de ‘uttalanden och texter (talade, skrivena, bilder) som cirkulerar i samhället och som genom sina kommunikativa former är tillgängliga för ett större antal människor’ (Ann-Sofi Bakshi 2000: 13), I added ‘in the public sphere’. My conception of discourse differs from the account given by Michel Foucault (2006). According to him, discourse consists of statements made over a long period of time. He considers a group of relations between statements, for example, from the 19th century when medical science was characterized not so much by its objects of concepts as by a certain style, a certain constant manner of
public discourse is considered in the Netherlands and Sweden. The inquiry into public discourse in the Netherlands and Sweden entails public discourse being investigated in the context of different public spheres.

By means of an inquiry into public discourse in the Netherlands and Sweden, it will be possible to examine possible interpretive differences with regard to interpretive frameworks and principles, as well as representations of ‘the other’ who is affected: [A]ttention to history and to context is essential because both yield insight into the presumptions, images, and customs that determine how we frame questions and conflicts, and into the resources available for resolving them.’6

The inquiry is not, however, comparative in the sense of examining the influence of political cultures on public discourse, although this could be worthwhile in itself. Still, I believe that, given features of the political cultures, an inquiry into Dutch and Swedish public discourse is worthwhile as far as different kinds of judging are concerned, by citizens in public discourse.

*Philosophical and empirical inquiry*

Given that it is still not very usual to carry out an empirical inquiry in relation to a philosophical inquiry, I shall clarify how I see the relationship.7 Philosophical inquiry consists of asking questions, in order to come to an understanding, at a general and abstract level. It entails, among other things, conceptual analysis. The characteristics of philosophy are argument and justification.8 Empirical inquiry consists of asking concrete questions concerning to an empirical material which in turn may lead to more general considerations.

The theoretical part 1 - The ideal of ethico-political judgment - addresses the issue of how we should deliberate: I suggest that we give and ask for normative reasons and aim at impartiality of the faculty of judgment. These are, I shall suggest, the conditions of the deliberative formation of a justifiable judgment. The empirical part 2 - Judging in public discourse - is an empirical inquiry into how we actually do deliberate by examining public discourse on prenatal diagnosis and screening in the Netherlands and Sweden during the period 1989-2006. The concluding part 3 -

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statement. There is a corpus of knowledge that presupposes the same way of looking at things, the same division of the perceptual field, the same vocabulary, the same play of metaphor. The unity of discourses on madness would not, for Foucault, be based upon the existence of the object ‘madness’, or the constitution of a single horizon of objectivity; it would be the play of the rule that enables the appearance of objects during a given period of time. In our inquiry into public discourse, it is not possible to identify a similar way of looking at things or a similar vocabulary: therefore, public discourse is too heterogeneous. Furthermore, in order to, for instance, regard medical discourse concerning prenatal diagnosis in terms of a similar way of looking at things and a similar vocabulary, we would have to consider a longer period.

7 According to Sven Ove Hansson (2008), in philosophy, there is much less interest in a new subject matter. A possible explanation may be that many philosophers prefer to see their discipline as concerned with eternal truths, and therefore in some sense independent of empirical facts.
8 Dagfinn Føllesdal (1996).
Judging in the public realm - asks how we, on the basis of the normative account in part 1 and the empirical inquiry in part 2 can enhance public deliberation.

What can we learn from public discourse in order to develop ideas about how to enhance public deliberation? We can suggest which role normative reasons and impartiality of judgment may fulfill in public deliberation. I shall, on the basis of the empirical inquiry, suggest how these concepts may have a role to play in public deliberation. We may wish to have adequate interpretations of moral principles and adequate representation of ‘the other’. The theoretical and empirical inquiry may, furthermore, to lead to insights about how we should shape deliberative practices that are meant to involve citizens.

What kind of knowledge can a combined philosophical and empirical inquiry gain? Before answering this question, let me first consider the concept of knowledge in terms of understanding. Catherine Elgin argues that, for our epistemological purposes, we would do better to speak of understanding than of knowledge: ‘Not being restricted to facts, understanding is more comprehensive than knowledge ever hoped to be.’9 While knowledge is traditionally concerned with facts, we understand, for instance, rules and reasons, actions and passions, objectives and obstacles, and facts. According to Elgin, these kinds of understanding are not isolated accomplishments. They coalesce into an understanding of a subject, discipline, or field of study. The growth of understanding is, for Elgin, a matter of building on what we have already established.

We are concerned with a better understanding of how to enhance public deliberation. To this end, we need a theoretical account - how to deliberate - and an empirical account - how we deliberate. It is my contention that it not only makes sense to make a theoretical case for public deliberation; we need also to reflect upon the question of how we can deliberate in existing or shaped deliberative practices - whether we mean, for instance, public discourse or a consensus conference. These two aspects - the theoretical case for public deliberation and the case for deliberate practices - are often dealt with separately. I believe that a combined theoretical and empirical inquiry is highly relevant in this respect. Let us start, nevertheless, with the theoretical case for public deliberation.

Legitimacy and public justifiability: the case for public deliberation

I have suggested that we consider ethico-political judgment as a regulative ideal of public deliberation on moral and political questions. But why should we aim at public deliberation? There are at least three reasons to take public deliberation seriously: it gives citizens an opportunity to raise their concerns and exert an influence, we may come to an understanding, and it may ensure legitimacy.

The most likely reason that we, as citizens, may want to deliberate is related to the first aim. We want to articulate our voice and our concerns in public and we want to

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convince others and influence a public course of action. As a citizen, I need not primarily be interested in coming to an understanding, or enhancing the legitimacy of decisions. I believe that my point of view, my judgment and its justification, are of importance to discussion in the public sphere and I want to convince others.

Coming to an understanding - in terms of agreement, compromise or a way of accommodating our differences in a tolerant way - and enhanced legitimacy may, however, be desirable outcomes of extended public deliberation. In this sense, public deliberation matters to politics to the extent that there is a need to come to an understanding and ensure legitimacy. We should broaden and deepen our representative democracy by enhancing deliberation. In this section, I am primarily concerned with legitimacy. How to come to an understanding is a question that is dealt with in part 1.

An argument for enhancing deliberation, by those who defend the idea of ‘deliberative democracy’, is that this may ensure the legitimacy of decisions. I find this a plausible argument. In order to enhance legitimacy, we need deliberation. The extent to which judgments are justifiable in the public sphere in public deliberation ensures the legitimacy of decisions based upon these judgments. I shall, in this respect, speak of public justifiability. Public justifiability is a concept emphasizing that the legitimacy of decisions depends on them being justifiable in public which can only become known when we engage in public deliberation.

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10 According to Michael Rabiner James (2004, 51 ff.), reaching legitimate collective decisions in a plural polity will require members of diverse groups to participate in democratic processes of deliberation and decision-making that all can accept as fair. Collective decisions are legitimate to the extent that they are secured through processes that adequately connect deliberation with actual democratic decision-making. This raises the question, however, of how deliberation can be connected with decision-making. Jack Knight and James Johnson (1994) thus ask, in my view appropriately, how deliberation might be institutionalized and how can it be reconciled with the pluralism that characterizes modern polities. According to them, a political outcome is legitimate because it survives the deliberative process; because it is produced by the sort of reasoned argumentation that defines deliberation as a critical ideal. Deliberation is an idealized process consisting of fair procedures within which political actors engage in reasoned argument for the purpose of resolving political conflict.

11 The point of public deliberation as a way of ensuring legitimacy is also stressed by James Bohman (1996) who sees public deliberation as a normative ideal and a test of democratic legitimacy. Decisions should be justified using reasons. Public deliberation is more likely to improve the epistemic quality of the justifications of political decisions. According to Thomas Nagel (1987), defenses of political legitimacy are of two kinds: those which discover a possible convergence of rational support for certain institutions and form the separate motivational standpoints of distinct individuals; and those which seek a common standpoint that everyone can occupy, guaranteeing agreement on what is acceptable. I believe that we, in the context of public deliberation on moral and political questions, do best when speaking of such deliberation in terms of arriving at a common standpoint, given the plurality of points of view. Convergence, in this respect, does not seem very likely. This is the question we will concern ourselves with in chapter 4: ‘A free consensus is a consensus arrived at under conditions that ensure the possibility of individual reflection and public deliberation’ (Joshua Cohen 1993, 275). Loren King argues that legitimacy is ultimately assessed in terms of the judgments of those being governed: ‘Legitimate collective decisions emerge from procedures supported by reasons that would, upon informed reflection, be acceptable to those affected by these decisions’ (2003: 42).
Public justifiability is related to, but different from, the concept of public justification.¹² Public justification lies at the core of theories about liberalism and is regarded as a way of ensuring legitimacy. Public justification is often related to the political domain.¹³ I understand public justifiability as a concept which is also associated with the informal public sphere and not merely with the public political sphere.

One argument for public justification is that, when the state has to choose or enforce a particular policy, it is morally relevant how much justification that policy enjoys.¹⁴ However, how much justification a decision enjoys, in my view, is better expressed by the notion of public justifiability - the extent to which judgments are justifiable in the public sphere - than by the notion of public justification which primarily concerns the process of justifying a decision made by representatives. The notion of public justifiability can be related to the case for deliberative democracy where the emphasis is on the public accountability of reasons given to citizens.¹⁵

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¹² An argument for the public justifiability of judgments is provided by Cillian McBride who speaks of public reasons: ‘When public policy is not backed by public reasons, then those affected are […] exposed to domination: the risk of arbitrary interference with their lives’ (2007: 177). McBride argues that when collective decisions are made on the basis of public reasons, the equality of citizens is respected: ‘we are ruled, not by persons, but by reasons’ (2007: 178). McBride claims that channels of communication between ordinary citizens and the formal public sphere need to be expanded. To expand the circulation of reasons between citizens and parliament, a formal space for public reasoning is required. What could this formal space be? It is, in my view, a question best addressed in the context of the political culture of each polity. It is a question which I shall occupy myself with in the last chapter.

¹³ Graham Long (2003). Public justification entails, for Fred D’Agostino, the fact that citizens are provided with reasons for decisions: ‘I say that a proposal that social relations be arranged in a particular way is justified for or with respect to a given community of individuals when each member of that community has been given a reason for such an arrangement.’ (1992: 145). Public justification is a quest for a rational consensus which, for Gerald Gaus, means that ‘Principle/policy P is publicly justified if and only if […] everyone would accept P’ (2003: 135). According to John Rawls, public justification, of his conception of ‘justice as fairness’, is, for instance, a way to ensure the legitimacy of political authority: ‘Rather, justice as fairness is not reasonable in the first place unless in a suitable way it can win its support by addressing each citizen’s reason, as explained within its own framework. Only so it is an account of the legitimacy of political authority as opposed to an account of how those that hold political power can satisfy themselves, and not citizens generally, that they are acting properly. A conception of political legitimacy aims for a public basis of justification and appeals to public reason, and hence to free and equal citizens viewed as reasonable and rational’ (1996: 145). It should be noted that, for Rawls, justification is limited to a public sphere in an exclusive sense; it is a restricted sphere of, primarily, the political and legal sphere and its institutions (Evan Charney 1998). The public sphere, for Rawls, is not located within associational life in civil society. I suggest that we, in the sense of Rawls, can speak of a public political sphere.


¹⁵ Let me consider the proposal for deliberative democracy by Amy Gutmann and Dennis Thompson, for whom deliberation is about justification: ‘Most fundamentally, deliberative democracy affirms the need to justify decisions made by citizens and their representatives’ (2004: 3). The aim of deliberative democracy is to provide the most justifiable conception for dealing with moral disagreement in politics. According to Gutmann and Thompson, deliberative democracy serves four purposes. It promotes the legitimacy of collective decisions; it encourages public-spirited perspectives on public questions; it promotes mutually-respectful processes of decision-making; it helps to correct mistakes made during decision-making. Gutmann and Thompson see deliberative democracy as a way to broaden representative democracy: ‘We accept that most decisions are made by representatives, but would encourage more of those forms of popular participation that increase the quality of deliberation or the fairness of representation. We also believe that some of the institutions of civil society as well as those of government should be more...
Public deliberation, the giving of and asking for reasons in the public sphere, as I shall argue, is important to legitimizing decisions to citizens. According to Jürgen Habermas, legitimacy means that there are good arguments for a political order’s claim to be recognized as right and just: a legitimate order deserves recognition. Whether legitimizations are convincing, whether they are believed, will depend on empirical motives, but these motives are not formed independently of the formally analyzable justificatory force of the legitimizations themselves. What are accepted as reasons and have the power to bring about consensus will depend on the level of justification required in a given situation.

If we consider decisions to be right and just, following Habermas’ view of legitimacy of a political order, what kind of legitimacy do we mean: procedural or substantive? Joshua Cohen formulates the idea of legitimacy as follows:

deliberative’ (2004: 29). They do not discuss, however, which institutions should be more deliberative. Joshua Cohen, too, sees deliberation and justification as closely connected: ‘The deliberative conception of democracy is organized around an ideal of political justification. According to this idea, justification of the exercise of collective political power is to proceed on the basis of a free public reasoning among equals’ (1996, 95)

16 According to Bernard Manin (1987), rules can be legitimate only if they arise from the will of all and represent the will of all. As political decisions are characteristically imposed on all, it seems reasonable to seek, as an essential condition for legitimacy, the deliberation of all, or the right of all to participate in deliberation. Manin’s emphasis on the will of all could make us believe that he endorses the social contract of Jean-Jacques Rousseau. This is not the case. Rather, he speaks of the deliberation of all. I believe that the social contract is still relevant, but it has to be complemented by deliberation in order to know the general will (in contrast to the will of all). According to Rousseau, the convention of the body with each of its members is legitimate because it has the social contract as a basis. It is common to all with the public force and the supreme power as a guarantee. The social contract is reducible to the following terms: ‘Each of us places his person and all his power in common under the supreme direction of the general will; and as one we receive each member as an indivisible part of the whole.’ (1987: 148) According to Joshua Cohen, who also emphasizes the role of deliberation in ensuring legitimacy, since the members of a democratic association regard deliberative procedures as the source of legitimacy, it is important to them that the terms of their association are not merely the results of their deliberation, but also manifested to them as such (1997: 73). They prefer institutions where the connections between deliberations and outcomes are evident to ones where the connections are less clear.

17 Jürgen Habermas (1979, 179). Seyla Benhabib argues that democratic legitimacy is the belief that the major institutions of a society and the decisions reached by these on behalf on the public are worthy of being obeyed and granted normative recognition: ‘The basis of legitimacy in democratic institutions is to be traced back to the presumption that the instances which claim obligatory power for themselves do so because their decisions represent an impartial standpoint said to be equally in the interests of all. This presumption can only be fulfilled if such decisions are in principle open to appropriate public processes of deliberation’ (1996: 69). I shall defend the fact that we should adopt an impartial standpoint when judging in chapter 3. I shall be skeptical of the Habermasian idea that we should consider merely interests.

18 The procedural question is how an authority is to decide; the substantive question is; what has this authority to decide. According to José Luis Martí Mármol (2005), the relationship between procedure and substance is one of the most striking questions in political philosophy. Radical proceduralism entails that the legitimacy of political decisions depends purely on the procedure by which they have been made. Radical substantivism entails that we have independent substantive standards of rightness. An intermediate position stresses the co-originality of basic rights and democracy. I suggest that such an intermediate position is plausible.
The fundamental idea of democratic legitimacy is that the authorization to exercise state power must arise from the collective decisions of the members of a society who are governed by that power.¹⁹

The test of democratic legitimacy will in part be substantive - dependent on the content of the outcome, not simply on the processes through which it is reached. According to Cohen, the procedural test entails that legitimacy can be settled by looking exclusively to the processes through which collective decisions are made and to values associated with fair processes. Cohen mentions, for example, values of openness, equal chances of presenting alternatives, and full and impartial consideration of those alternatives. The deliberative conception of democracy is organized around an ideal of political justification. According to this ideal, justification of the exercising of collective political power is to proceed on the basis of free public reasoning among equals.

In my view, the test of the legitimacy of decisions, in the context of our inquiry, is both substantive and procedural. Without an adequate procedure - in which public deliberation plays an important role - we cannot test the content of the outcome of the process of political decision-making. Whether or not citizens regard a judgment on which the decision is based as justifiable, and hence as legitimate, will not merely depend on the procedure. The reasons justifying judgments have to be good and convincing ones that can be recognized by citizens accordingly.²⁰ Public deliberation is important for assessing whether or not a reason is justifiable, and hence for determining the legitimacy of decisions. The point of ethico-political judgment is the deliberative formation of a justifiable judgment in the public sphere. Therefore, the concept of public justifiability, in this respect, is of relevance.

### 1.2 The deliberative concept of ethico-political judgment

In chapters 2 and 3, I shall be concerned with developing the two Kantian conditions of ethico-political judgment: giving and asking for normative reasons and aiming at impartiality of judgment. Here, the concept of ethico-political judgment will be explored in general terms. Let us first consider the concept of morality.

*Morality and judgments of right*

We engage, among other things, in moral reflection when we wish to examine whether or not our beliefs and judgments can be justified to others, on the basis of our fundamental principles. We are interested in what a justifiable course of action

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²⁰ According to Constantin Stamatis (2001), whether or not reasons for decisions are good is a substantive question dependent on principles of justice. This is, in my opinion, a plausible view, but to determine whether or not a reason is a reason, we need a procedural account of legitimacy as well.
is, or a good life. Ethics is not merely an academic discipline, but also a kind of reflection and inquiry which engages many people.  

21 I take ethics to mean reflection upon how to live - related to views on the good - and how to act - which actions are right and wrong, or justifiable or non-justifiable. The object of ethical inquiry is morality.

I suggest that we can speak of a relation between critical morality and lifeworld morality.  

22 Critical morality is to be understood as the reflective consciousness of the right and the good, broadly in a Kantian sense.  

23 There is a close relation between ethics and critical morality, but critical morality is not the same as reflection upon how to live and act. Ethical inquiry, which is an activity conducted by some, is not the same as our reflective consciousness - which is shared by reflective agents.

It is our reflective consciousness that makes ethical inquiry possible and ethical inquiry may in turn shape our reflective consciousness, on which basis we act. It should be noted that we may also internalize our views on what is right and good in order to be able to act accordingly. We may have internalized a principle such as responsibility in relation to others. On the basis of our reflective consciousness, our lifeworld morality and our values may be shaped.

I shall understand ‘right’ in relation to principles, e.g. the principles of justice or responsibility. On the basis of principles, we may agree on rights and liberties.  

24 Using principles, we can hope to assess what a correct action would be. It is commonplace that principles may guide correct action. However, principles and rules are unable to guide action fully; they must be complemented by judgments. Judgments are not supplements, but can supplant principles.

25 My understanding of critical morality encompasses more than general principles on which basis we may determine what is right. We may reflect upon the good and our fundamental commitments: ‘To understand our moral world we have to see not
only which ideas and pictures underlie our sense of respect for others, but also those which underpin our notions of a full life.\textsuperscript{26}

I have thus far defended the proposition that critical morality concerns the consciousness of the right and the good. How then to transcend from critical morality to lifeworld morality? Lifeworld morality, in my understanding, entails morality consisting of moral, lived, experience.\textsuperscript{27} It is thus a concept to be explored, not only by normative-reflective ethics, but also by interpretive ethics. Lifeworld morality can be said to consist of valuations (conceptions or deeply rooted opinions on what is right or good), values (as stable concerns\textsuperscript{28}), and norms (rules for actions).\textsuperscript{29}

There is an interaction between critical and lifeworld morality. Values and norms are reflected upon in the critical morality; critical morality can inform lifeworld morality in the sense of, for instance, questioning norms.\textsuperscript{30} In ethics, we do not merely reflect upon our principles, and valuations of the right, but also on our valuations of the good, or our ‘strong evaluations’.\textsuperscript{31} We become, in critical morality, aware of our values as stable concerns and the rules we follow regarding our actions in everyday life.

Lifeworld morality is both subjective and intersubjective. The lifeworld is subjective, since every experience has some kind of meaning for us and is valued, and intersubjective, since our experiences take place in a community rooted in

\textsuperscript{26} Charles Taylor (1989:14).
\textsuperscript{27} According to medical ethicist Heleen Dupuis (1998), cumulative experience regarding the question of how to live can be considered to be the most general description of morality's content. Experiences change and may be more or less reliable as indications of the ‘good life.’ Dupuis stresses the need for interpretation and translation of experiences into a general level of ‘general rules and guides to conduct.’
\textsuperscript{28} See Simon Blackburn (2000).
\textsuperscript{29} By Tristram Engelhardt (1986), morality is described as the taken-for-granted webs of moral values that constitute the character of everyday lifeworlds. William Frankena (1973) demarcates deontic judgments - related to norms - strictly from arctic judgments - related to values. Paul Kurtz (1998), on the other hand - defending an ‘objective relativism’ - claims that principles or norms may function as values treasured for their own sake: they have an intrinsic worth. Principles and values differ, however, since values do not have the level of generality of principles, nor do they lay down prima facie rules of conduct.
\textsuperscript{30} Using the distinction between critical and lifeworld morality, we can accommodate criticisms of morality as highly abstract, as a concept which is merely philosophical. Margaret Walker (1998), for instance, criticizes a so-called ‘theoretical-juridical’ model of morality and moral theory. According to Walker, in this model, morality is represented as compact, propositionally codifiable, and impersonally action-guiding. This would be a distorting view of the kinds of understanding that exist in morality. Morality consists of practices of responsibility that implement shared understandings. Dwight Furrow (1995) also levels critique against what Walker calls a theoretical-juridical model by taking an antitheory position. The antitheory position is motivated by the perception that when moral agents think about moral questions, they do not do so in terms of abstract principles, with the aim of systematizing some large chunk of moral experience, but in terms of concrete relationships with other people within the context of their understanding of those relationships, histories, and the institutions in which they are embedded. In my view, the definition of morality as critical and lifeworld morality can make things clearer. A critical morality is necessarily codifiable since it concerns a collective course of action: we do not wish, and are not able, to justify such actions in terms of non-propositional justifications. It lies at the heart of the justification of actions that we are in need of codifiable propositions. At the same time, we need to interpret what I call lifeworld morality as the various understandings that exist in morality.
\textsuperscript{31} Charles Taylor (1989).
It is in the social context that the responsibility of one human being toward another is developed. In our reflection upon the right and the good, we start out from our lifeworld morality. It is quite inconceivable that we reflect from nowhere, so to speak. This does not mean that we could not reflect upon our own valuations, values and norms - we can, on the other hand, distance ourselves from them when thinking of principles concerning the right and our deepest beliefs about the good.

In engaging in moral reflection, we are urged to justify our judgments of the right and the good. John Skorupski offers a challenging account of normative, or what he calls evaluative, judgments. Essential to an evaluative judgment is, namely, their presupposition of rational acceptance by others. Evaluative judgments are accountable to spontaneous feeling, but the spontaneity in question is that which survives experience, reflection and intersubjective comparison and agreement:

The commitment one incurs in making an evaluation, to the claim that other judges who suffer from no disqualifying defect or limitation would confirm one’s judgment, arises because evaluation is judgment. It is not a feature of evaluative judgment alone; it is a feature of judgment as such.

When I judge, I enter a commitment that inquirers who scrutinize the relevant evidence and argument available to them would converge on my judgment - unless I could fault their judgment or their evidence. According to Skorupski, if I judge that p, I am rationally committed to holding that there is sufficient reason to judge that p. Whenever we accept a judgment - however good our evidence and reasoning for it are - the possibility always remains that we are wrong in doing so and hence wrong in also thinking that impeccable inquirers would converge to stable agreement on. Evaluative judgments are similarly grounded on a disposition to acknowledge reasons to act.

We can conclude that, for Skorupski, judging means making a claim which others - when scrutinizing the evidence and argument - would have reason to accept. It is merely the nature of judging - making a judgment - that implies this rational acceptability of judgments. The position of Skorupski is of relevance to our inquiry, given what can be called the orientation towards others in making a judgment. We make a claim on others. As such, we can wish to make judgments that can be

32 Edmund Pellegrino and David Thomasma (1981).
33 John Skorupski (1999).
34 According to Skorupski, moral propositions are evaluative propositions. They are propositions regarding what there is reason to feel, specifically to disapprove, and to respond to with blame or guilt. If judgments are evaluations, then what is their relationship with practical reasons? For Skorupski, this is a question of the relationship between reasons to act and reasons to feel.
36 Allan Gibbard expresses this 'convergence' in terms of standpoint-independence. A normative judgment is fully objective if the judgment is accepted by any conceivable ideal normative judge: 'he treats it as fully objective if he accords it a validity that is standpoint-independent, among all conceivable rational beings' (1992: 200).
justified accordingly with good reasons.\textsuperscript{37} This is how I shall understand making judgments of right.

\textit{Judgment and politics}

To the extent that we have considered the concept of morality and judgment, we can now ask what the relation between judgment and politics is. Political judgment, in the case of moral and political questions, is complementary to normative judgment. Benjamin Barber argues that, in politics, we address the ‘necessity for public action’. Politics is concerned with reasonable public choice, in the presence of conflict and in the absence of private or independent grounds for judgment.\textsuperscript{38}

Politics arises out of conflict and takes place in a sphere defined by power and interest. Barber regards the sphere of politics primarily as a sphere of human action. However, not all action is political, of course. Politics is restricted to public action, both when undertaken by a public and when intended to have public consequences. For Barber, politics encompasses the sphere, not simply of action, but of necessary action.

But what is meant by necessary action? Barber argues that public actors always necessarily weigh the benefits of short-term non-interference against the long-term costs. Even the choice not to make a political decision will thus have public consequences. We could consider public action, in the case of prenatal diagnosis and screening, e.g. in terms of possible regulation and legislation. In the political arena, again following Barber, to speak about doing is to speak about choosing - about deliberating, determining, and deciding. Citizens construed as free choosers are by definition reasonable - non-impulsive, thoughtful, and fair. Regarding the absence of an independent ground, this absence of judgment is, for Barber, novel and central.

Judgment has an important role in politics. In this sense, Aristotle’s understanding of \textit{phronesis} - practical wisdom or prudence - that is described as the faculty of judgment embodied in action may be of relevance.\textsuperscript{39} Political action can be

\textsuperscript{37} Christopher McMahon argues that we understand the benefit produced by collective reasoning to be the attainment of better justified judgment by the members of a group (2001, 111 ff.). Each party is able to form a judgment that is better justified than it would have been otherwise. The judgment of each is better justified when he or she participates in a collective judgment. By participating in a collective judgment, one can obtain a better grasp of the force of a body of reasons than by making an individual judgment.

\textsuperscript{38} Benjamin Barber (2003: 120 ff.).

\textsuperscript{39} Ronald Beiner (1983: 74) relates practical wisdom and judgment. I shall consider Aristotle’s concept of \textit{phronesis}, which can be translated as practical wisdom. \textit{Phronesis} is a much-discussed concept in relation to political judgment. The concept of \textit{phronesis} is also employed by neo-Aristotelians in ethics. For instance, Alasdair MacIntyre (1984) regards \textit{phronesis} as the exercising of judgment in particular cases. MacIntyre highlights the fact that, for Aristotle, \textit{phronesis} is a central virtue. \textit{Phronesis} would be essential to politics because ‘it is flexible, practical, and the product of shared understandings concerned with particular, concrete human beings’ (Richard S. Ruderman 1997: 410). Practical wisdom entails, then, considering what sort of people are called prudent. The man who is capable of deliberation is prudent (Aristotle 1953: NE 1140a24-b12). \textit{Phronesis} is a virtue. It is not possible to deliberate about things that are necessarily so. Therefore, practical wisdom cannot be science or art. Practical wisdom is not science because what can be done is a variable; it may be done in different ways or not done at all. It is not an art since action, which
considered in relation to judgment in this respect. According to R.L. Nichols and D.M. White, it entails deliberation over action in the light of the human good: action with ‘discretion, discernment, and foresight’. According to them, all these notions are bound up with good judgment.

Prudence conditions namely action, but never without judgment. Furthermore, prudence is, in the view of Nichols and White, a matter of learning and acting from experience, a matter of practical understanding and practical enterprise. The prudential actor makes a judgment. Following Nichols and White, making is significant, since the prudential actor must engage in a constructive enterprise. Political problems, in the light of the complexity and uncertainty of politics, are not simply given and immediately solved in a straightforward way.

According to Nichols and White, the core of politics is the doing of deeds; action is needed, often urgently. The account of Nichols and White on prudence is, arguably, related to Aristotle’s account of phronesis if we see this concept in terms of judgment embodied in action. The relevance of the concept of phronesis to our inquiry is that we do not merely encounter reflection upon, for instance, new technologies in moral terms: not all questions are of a moral nature and the virtue of prudence may sometimes be appropriate.

The relation between morality and politics

What is the relation between morality and politics? Many would regard ethics and politics as immiscible and even antithetical. To mix them is to compromise both.

practical wisdom is about, is different from production, which art is about: ‘What remains, then, is that it is a true state, reasoned, and capable of action with regard to things that are good or bad.’ (Ibid. 1953 NE 1140a24-b12). Wise are those men who can envisage what is good for them and for people in general; it can be considered that this quality belongs to those who understand the management of households or states. Practical wisdom is concerned with human good, things about which deliberation is possible: ‘For we hold that it is the function of the prudential man to deliberate well and nobody deliberates about things that cannot be otherwise or that are not means to an end and that end is a practical good.’ (Ibid. 1953 NE 1141b8-27). Practical wisdom is not only concerned with universals, it must also be aware of particulars because it is concerned with conduct and conduct has its sphere in particular circumstances. Political science and practical wisdom are the same state of mind but their essence is not the same. Practical wisdom concerning the state has two aspects: one, which is controlling and directive, is legislative science; the other, which deals with particular circumstances, bears the name that properly belongs to both, namely political science. Political science is practical and deliberative. Practical wisdom involves knowledge of particular facts which become known from experience (Ibid. 1953 NE 1142a12-29). Practical wisdom does not exercise authority over (theoretical) wisdom since it does not use wisdom, but provides for its realization (Ibid. 1953 NE 1144b33-1145a11). We can think of Aristotelian practical wisdom as presupposing deliberation concerning conduct, or human action. We have to be aware of the fact that deliberation, in the Aristotelian sense, is a broader concept than it is, for instance, in the neo-Kantian approach of Habermas. Habermas excludes rhetorics, as well as an appeal to testimony and emotion, from deliberation. See John O’Neill (2002).

Politics would lose its practical effectiveness if restrained by ethical principles; ethics would lose its moral ground if required to justify political necessity.42

Norberto Bobbio defends a position entailing that neither a ‘morality first’ nor a ‘politics first’ option is to be chosen.43 He regards morality and politics as two distinct ‘spheres’ with interrelations. According to Bobbio, when one refers to the relation between morals and politics, one is not referring to individual morality, but to social morality - morality that concerns the activities of an individual which interfere with the spheres of other individuals. Bobbio argues that, often, politics is either reduced to morality, thus ‘morality first’, or morality is reduced to politics, thus ‘politics first’. Bobbio offers a solution: ‘Concerning the problem of the relation between morals and politics, one of the possible solutions is to conceive of morals and politics as two distinct normative systems that are not completely independent of another.’44

However, the relation between the distinctive systems of morality and politics is not uncomplicated. It can be argued that there is an opposition between postulates of an absolute morality and the realities of political purposiveness due to the struggle of political interests. In practical democratic politics, perspectives of purposiveness will often prevail over moral impulses.45

What is the relation between critical morality and politics in ethico-political judgment? This is a relevant question since the interrelations between the moral and the political sphere would make it impossible to separate both areas, as well as determine their relation in general terms.46 If we regard morality and politics, however, as two distinct spheres, it will be clear that there are sometimes interrelations. The fact that there should be, in the case of prenatal diagnosis and

42 According to Dorothy Emmet (1979), the fact that politics is ‘beyond good and evil’, or a sphere in which moral considerations are not applicable, is a notion with a long history. Politics uses power in order to promote policies directed at ends, thus political morality will, on the whole, be utilitarian and concerned with consequences rather than principles. According to Emmet, there is a relationship between morality and politics, but it will be utilitarian ethics that prevails in the political sphere.
43 Joan C. Tronto (1994) distinguishes between a ‘morality first’ and ‘politics first’ position when thinking about the relation between morality and politics. In the first case, thinkers begin by asserting the primacy of moral values. After moral views are fixed, right-thinking individuals should suggest to the state how political life should conform to these moral principles. Thus, for Ian Shapiro (2003), a democratic approach involves recognition of the importance of truth as an ideal in public debate and institutionalizing means of bringing the truth to bear on contending political positions. An example of the ‘morality first’ position is also provided by Richard J. Regan (1986); key to the vitality of a public philosophy, according to him, is public consensus, that is, widespread civic agreement on basic rational principles of moral good to govern the activities of organized society and public policies. According to Otfrid Höffe (1987), a legitimate role in politics have concerns about social and political justice: political justice entails that people live together and that the disadvantages of their co-existence and co-operation are outweighed by the advantages. Justice is, for Paul Ricoeur (1993), the specific moral value in relation to the level of politics as an institution. Ricoeur relates ethics, in terms of the good life, to just institutions. Moral values should only be introduced to politics in accordance with the requirements of these political concerns. Tronto clarifies that ‘politics first’ view political thinkers assert the primacy of political values, e.g. gaining power and preserving it through force and strength.
45 Ludwig Freund (1961).
screening, a relation between morality and politics can be defended, given the plurality of points of view in society.

This does not mean that moral values should prevail in politics. In view of moral disagreement, however, moral reflection is called for. Although not all technologies are as controversial as prenatal diagnosis and screening, the new reproductive and genetic technologies generally offer clear examples of questions where a relation between morality and politics is called for. Indeed, what is technologically possible would not be an option for public action when it contradicts prevailing morality.47

But how can we understand moral reflection in relation to political decision-making? Moral reflection can result in sound judgments with regard to legislation and regulation. It could be defended that decision-making concerning prenatal diagnosis and screening is simply a question of majority rule. What the majority considers to be right will be decisive in political decision-making. Politics, the necessity of public action in a sphere that can be characterized in terms of power and interest, would entail justification essentially being a matter of that which the majority find justifiable.

Still, I have argued that the judgments on which decisions are based should be justifiable in the public sphere, in order to ensure the legitimacy of such decisions. This entails judgments being given which can be justified with good reasons. Moral reflection can entail reflection upon what would constitute good reasons for judgments concerning morally controversial technologies. In this sense, public deliberation in the sense of giving and asking for justifying reasons is a plausible alternative for majority rule given the plurality of viewpoints in society.

The deliberative practice of ethico-political judgment

We need to judge and deliberate.48 This is the point of ethico-political judgment. But what does deliberating entail? A minimum condition for deliberation, in my view, is what Robert Brandom calls giving and asking for reasons.

I regard public deliberation as the giving of and asking for reasons in the public sphere. To this end, we have to distinguish between what Brandom calls a discursive, linguistic, practice and a deliberative practice. In a deliberative practice, we not only have linguistic norms - how to understand something - but also

47 Wolfgang van den Daele (1989).
48 The relation between judging and deliberating is emphasized by Cillian McBride. She argues that what is needed, in the view of deliberative democrats who place the exercising of citizens' deliberative capacities at the centre, is better judgment and not the construction of institutions that seek to eliminate the judgments of ordinary citizens from democratic politics. According to McBride, deliberation and judgments should be impartial: ‘This is because deliberation should be impartial and not altruistic. Because public deliberation is concerned with the employment of our common coercive power, judgments about how this power is to be used must pass the test of impartiality’ (2003: 113) For McBride, impartiality imposes, a constraint upon our judgments, a constraint which, according to her, requires the assessment of our judgments as if they were those of a third person. Implicitly, McBride presupposes what I shall call, in chapter 3, impartiality of judgment.
proposals for political norms. Brandom himself also sees linguistic norms and social and political norms as related. According to Brandom, linguistic normative statuses, such as authority, responsibility, commitment and entitlement, are products of our own activity. They are features of our own practices which were brought into existence by our coming to take or treat each other as authoritative, responsible, committed or entitled. In this sense, Brandom claims that there is an analogy between linguistic commitments and social or political commitments. We give and ask for reasons because we want our judgments and the judgments of others to be justifiable.

I base my account of deliberative practice on the inferentialism of Brandom. Let me examine this account in more detail. According to Brandom, giving and asking for reasons for actions is possible only in practices of making and defending claims or judgments. Judgments cannot only be supported by reasons, but they can also serve as reasons. According to Brandom, judging or claiming is undertaking a commitment. The conceptual articulation of these commitments consists of the way they are liable to conditions for justification. The context within which concern regarding what is thought and talked about arises is the assessment of how the judgments of one individual can serve as reasons for another. The representational content of claims and the beliefs they express reflect the social dimension of the game of giving and asking for reasons. Brandom argues that the giving of and asking for reasons is required by the members of a community in order for them to be able to talk. Brandom speaks, in this context, of discursive practices. Discursivity for Brandom is related to concept-using:

What distinguishes specifically discursive practices from the doings of non-concept-using creatures is their inferential articulation: to infer conclusions or deductions from premises. To talk about concepts is to talk about roles in reasoning.

The capacity for judgment, for applying rules to particular instances, subsuming intuitions under concepts, is something that we must, in the end, just accept that we have, without understanding just what we have. According to Brandom, saying or thinking that things are thus-and-so is putting forward a fit premise for further inferences, authorizing its use as such a premise, and undertaking the responsibility to entitle oneself to that commitment. Concepts play an important role in inferential reasoning. Characteristic of discursive beings is the fact that they apply concepts and

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54 Brandom argues that contemporary thought regarding the use of concepts owes a great debt to Kant. According to Brandom, one of Kant’s cardinal innovations is the claim that the fundamental unit of awareness or cognition, the minimum graspable, is the judgment: as all acts of the understanding can be reduced to judgments, the understanding may be defined as the faculty of judging. Judgments and action are to be understood in terms of the special way in which we are responsible for them. Concepts take the form of rules; they say how something ought to be done according to the rule.
give and ask for reasons. According to Brandom, being rational is being bound or constrained by norms, being subject to the authority of reason. Saying 'we' in this sense is placing ourselves and each other in the space of reasons, by giving and asking for reasons for our attitudes and performances. What we can offer as a reason, what we can take of make true, has a propositional content.

We are the ones upon whom reasons are binding, who are subject to the peculiar force of the better reason. The understanding, the conceptual faculty, is the faculty of grasping rules - of appreciating the distinction between the correct and incorrect application they determine. The 'force of the better reason', then, is a normative force. It concerns what further beliefs one is committed to acknowledging, what one ought to conclude, what one is committed or entitled to say.

I find the theory of inferentialism helpful when reflecting upon the concept of a public deliberation as a deliberative practice. I have already indicated that I regard public deliberation as a deliberative practice in the public sphere characterized by the giving of and asking for reasons. Giving a reason means expressing a judgment and making a claim. To form judgments is to infer from reasons. We could speak of a discursive rationality as regards the giving of and asking for reasons. In a discursive practice, we infer conclusions - or judgments - from reasons. As rational creatures, we are committed to accepting what Brandom, following Habermas, calls the 'force of the better reason'.

Discursivity means that we owe each other justifications for our claims, or judgments. Discursivity is essentially related to the giving of and asking for reasons, as potential justifications for our claims. A deliberative practice is a discursive practice in the public sphere. What is the relation between public discourse, as utterances in the public sphere, and a deliberative practice in terms of giving and asking for reasons? As I have already suggested, public discourse is a descriptive concept. With the concept of public deliberation in deliberative practices, it is suggested how we ought to deliberate. In the sense of giving and asking for reasons,

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56 Propositional content is whatever that-clauses contribute to what is ascribed in utterances of sentences such as: Ralph believes that Tony Curtis is alive, Ralph said that Tony Curtis is alive, Ralph hopes that Tony Curtis is alive, Ralph desires that Tony Curtis is alive, and 'Tony Curtis is alive' means that Tony Curtis is alive (see Stephen Schiffer 2006).
57 Ralph Wedgwood (2006) speaks of this inferential relation between reasons and inferences in terms of causality. Reasoning is a causal process in which one mental event (say, one’s acceptance of the conclusion of a certain argument) is caused by an antecedent mental event (say, one’s consideration of the premises of the argument). Reasoning is the process of revising one’s beliefs or intentions, for a reason. Both practical and theoretical reasoning involves forming a belief or intention that is both caused and rationalized by some antecedent mental states that one is in, representing one’s own reason for forming that belief or intention. Accepting an argument is accepting the conclusion of an argument conditionally, on the condition that the arguments’ premises are true.
58 The concept of discursive rationality could be developed on the basis of Robert Audi’s account of practical reasoning. This entails that the rationality of deliberation is conceived of in terms of reasonableness. Audi (2006) regards reasoning in terms of a major and minor premise, as well as a practical judgment. According to Audi, good practical reasoning expresses a valid underlying argument with premises that are true and justifiably believed, and with a conclusion which is both justifiably inferred from them and justifiably held on the basis of them.
and aiming to make common judgments, public discourse can embody features of public deliberation. This need not, however, always be the case.  

The public sphere and publicity

If we are interested in public deliberation, we have to ask where deliberation takes place. Let us consider the concept of the public sphere, the realm of public deliberation, in this respect. We can ask what is meant by ‘public’. That which is public is open and accessible to everyone. Open access is one of the central meanings of the norm of publicity. ‘Public’ is the common affair of an all-inclusive number of people. ‘Private’ is what is intimate and closed to the unwarranted. What is private concerns only a strictly limited number of people. The public sphere can be understood in terms of a communication network, or more specifically public discourse. The arena of public discourse is the public sphere. The outcome of public discourse can, arguably, be the shared judgments of citizens.

The term ‘public’ contrasts with the term ‘private’ but, as Peter Steinberger notes, the task of formulating clear boundaries has proven enormously complex. He thinks of public and private not as separate spheres of endeavor, but as different ways of being in the world, or ‘manners of acting’. One way to act is to judge: according to Steinberger, judging is an inherently public activity. Furthermore, the objectivity that we associate with systematic argumentation is a public matter. It can thus be argued that judgment in the public sphere is public in the sense that judgment is a common affair. Judgment is inherent in politics and gathers citizens in the public sphere.

Thus, according to Doug Walton, ‘rather than providing an arena for informed deliberation, the growing expertise of the media, lobbyists, and politicians has sub-optimized the current system of discourse to focus on emotional manipulation and the creation of polarized interests, each competing with each other for dominance. Consequently, public discourse in Western democracies […] bears little resemblance to Habermas’s portrayal of citizens engaging in a rational discussion of public affairs’ (2007: 370).

Nancy Fraser (1992).

Jürgen Habermas regards the public sphere as a ‘network for communicating information and points of view (i.e. opinions expressing affirmative or negative attitudes); the streams of communication are, during the process, filtered and synthesized in such a way that they coalesce into bundles of topically-specified public opinions’ (1996: 360). Habermas argues that the public sphere is reproduced through communication: ‘it is tailored to the general comprehensibility of everyday communicative practice’. While a system like morality takes up the validity aspects of everyday communicative action - rightness - the public sphere does not refer to the content but to the social space generated in communicative action. This linguistically-constituted space is open to potential dialogue partners; when larger numbers of persons are present, we speak of forums, stages, arenas. I would like to stress, in addition to the conception of Habermas, that judgment is important in the public sphere.

Martha Cooper (1989). It is also possible in this respect to speak of public judgments: ‘To say that public judgment has been reached [implies] that people have struggled with the issue, thought about it in their own terms, and formed a judgment they are willing to stand by’ (Daniel Yankelovich 1991: 42).

This gathering is emphasized, in my view aptly, by Hannah Arendt who distinguishes between two meanings of the term ‘public’.\(^65\) Firstly, everything that appears in public can be seen and heard by everybody and has the widest possible publicity. Appearance, something that is seen and heard by others as well as ourselves, constitutes reality. Secondly, the term ‘public’ signifies the world itself, insofar as it is common to all of us and distinguished by our privately-owned place in it. Living together in the world means, to Arendt, that a world of things is shared between those who have it in common.\(^66\) The public sphere gathers us together.

It is the second meaning of the term public which Arendt discerns that is, in my view, related to judgment as a public activity. Public is the world insofar as it is common to all. To act is to judge for Steinberger. This can be related to Arendt’s view that action corresponds to the human condition of plurality, to the fact that humankind lives on the earth and inhabits the world. Judging, for Arendt, is a way for a citizen to orient him- or herself in the public sphere, in the common world. Characterized by the fact of pluralism, the public sphere becomes an arena for judgment. Engaging in ethico-political judgment is a way of dealing with pluralism in the public sphere.

How can we think of the public sphere as an arena for judgment? There is no longer a single (exclusive) Greek polis where citizens can gather to judge common affairs. Rather, we have to understand the public sphere in terms of several arenas which constitute the public sphere.\(^67\) How the public sphere is to be conceived of, which arenas are relevant, should be determined from case to case. In our inquiry into the public discourse on prenatal diagnosis and screening, the relevant arenas have to be identified. The fact that there is no single arena where citizens can gather to judge questions of common interest merely reveals the challenge facing judgment in the public sphere. Judgment will have to be exercised in various arenas.

In principle, a condition for meaningful communication in the public sphere is, in my view, publicity. Judgments meet a publicity condition when there is openness in the methods used to persuade an audience of their rightness.\(^68\) This requires the

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\(^{65}\) Hannah Arendt (1958).

\(^{66}\) Charles Taylor (1997) takes over Arendt’s idea that the public sphere is a space that is common to all. In this space, members of society are deemed to meet through a variety of media and to discuss matters of common interest. In this way, they are able to be of a common mind regarding these matters. The public sphere plays a crucial role in the self-justification of a free self-governing society. In such a society, according to Taylor, people form their opinions freely in arriving at a common mind. Such common minds matter; they may influence government.

\(^{67}\) Should one speak about one arena of the public sphere, or about various sub-public spheres? A plurality of competing publics may better promote the ideal of participatory parity than a single, comprehensive, overarching public, which is the implication of one public sphere (Nancy Fraser 1992). This is because deliberative processes in public spheres will operate to the advantage of dominant groups and to the disadvantage of subordinates. I do not see a reason for choosing between one arena of the public sphere or between various sub-public spheres. I regard the public sphere to be constituted by various sub-public spheres, which I shall call arenas.

\(^{68}\) Cindy Holder (2004). According to Iris Young (2000), publicity refers to the constitution of a site for communicative engagement and contest. In the second place, it refers to a relationship between citizens within this site. Finally, publicity refers to the form that speech and other forms of expression take.
information, principles, and rules via which the judgments are advocated being generally and easily available to others:

Insisting that judgments must be public in the sense of being generally available makes permission to impose judgments conditional on legislators demonstrating proper respect for the reasoning abilities of the individuals upon whom their judgments are imposed.69

Using a general understanding of publicity, a claim is publicly justifiable ‘insofar as it employs information, principles, and rules that are generally accepted as adequate’. According to Kant, publicity entails people having to be allowed the freedom to judge publicly the proposed laws of the state. Publicity is also regarded as a test of right and wrong.70

Kant states in *Perpetual Peace* that ‘All actions relating to the rights of other men are wrong, if the maxims from which they follow are inconsistent with publicity.’71 For Kant, publicity provides an ‘easily applied criterion which is to be found *a priori* in reason’, so that in each particular case, we can at once recognize the falsity or illegality of a proposed claim. Kant’s conception of publicity articulates a relation between the judgment of the individual, a judgment that originates within oneself, and the context of this judgment, which accords others an equal right to judge for themselves.72

Kant’s urging of citizens to be allowed to judge publicly is similar to the suggestion that judgments be made public. Judgments concerning a public course of action with moral implications should be public: that is the implication of the condition of publicity. I distinguish between publicness, the characteristic of a public sphere which is, in principle, accessible and open to all citizens, and publicity, which entails judgments concerning a public course of action being made public in the sense that citizens can judge these judgments.73

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69 Cindy Holder (2004: 512). Cillian McBr ide argues that publicity may prevent arbitrariness: ‘Knowledge that one may be called upon publicly to justify one’s course of action also provides a vital incentive for those in public office to act on public rather than private reasons and institutionalizing the exchange of reasons therefore serves to justify public confidence that the democratic process is not prey to arbitrariness’ (2007: 179).
71 P 185.
72 Katerina Deligiorgi (2002).
73 According to James Bohman, publicity creates the social space for deliberation, it governs processes of deliberation and the reasons produced in them, and it provides a standard by which agreements are judged. Rather than the content of the questions determining their public character, it is the ‘public character of the reasons addressed to others in deliberation. That is, reasons offered to convince others must be formulated in such a way that all deliberators can understand and potentially accept them’ (1996: 38). Weak publicity entails the rules governing political life and the justification of these rules being publicly known. When I speak of publicity, I point to what Bohman calls weak publicity: for Bohman, publicness is strong publicity, it includes weak publicity.
1.3 Outline

Part 1 concerns the two conditions of ethico-political judgment which have already been mentioned and asks how we should deliberate. In chapter 2, a Kantian account of normative reasons is developed on the basis of Kant’s ethics. Since we not only deliberate alone in an internal-reflective sense, but also in an external-collective sense whereby we justify our beliefs to others, the question of whether or not we have come to the right philosopher is legitimate, given the critique of Jürgen Habermas concerning the presumed monological character of the categorical imperative. I show, however, that Habermas’ concept of communicative reasons has strong Kantian underpinnings. The concept of normative reasons has three aspects - these are prescriptive, universal, and internal - and I suggest that it may complement Habermas’ understanding of a practical discourse with the quest for the better reason.

Chapter 3 is about the impartiality of the faculty of judgment. This concept is developed on the basis of Kant’s erweiterte Denkungsart or ‘enlarged thought’; imagining oneself into the standpoint of others. Hannah Arendt was the first to emphasize the importance of ‘enlarged thought’ beyond the context of Kantian aesthetics. She suggests an autonomous faculty of judgment in the sphere of morality. This cannot be defended from a Kantian perspective, however. Still, ‘enlarged thought’ has an important role and the role of the faculty of judgment is not as subordinate in Kant’s ethics as is sometimes suggested. Arendt’s interpretation of ‘enlarged thought’ is important but has to be related to Kant’s practical philosophy.

Chapter 4 is a critical discussion of Tristram Engelhardt who does not believe that public deliberation is likely since we have moral premises that differ too much. I argue that public deliberation not only concerns consensus or compromise, but also mutual respect. Engelhardt seems to believe that public deliberation will only be successful if we can have a fundamental normative consensus. I relate the concept of ethico-political judgment to the prospect of public deliberation. The function of chapter 4 is also to make the case for an empirical inquiry in order to investigate Engelhardt’s claim. Do we have too many different premises and, if this is the case, will we not be able to deliberate at all?

In part 2, the question of how we actually deliberate is addressed. In chapter 5, an analytical approach to the analysis of texts belonging to public discourse in the Netherlands and Sweden is developed. I consider judgments, interpretive frameworks, and reasons. Four thematic foci are considered in the empirical inquiry in chapters 6 and 7: the unborn life, attitudes toward the disabled, the implications of new choices, and the limits of medicine.

In chapter 8, I interpret the findings of the empirical inquiry. We can ask whether public deliberation is, in principle, likely. By considering interpretive frameworks, we can examine how principles which are important in normative reasons are given various interpretations and whether or not we share our principles at all. By examining ways of how the ‘the other’ is brought before the mind, we can consider
how ‘the other’ is represented and highlight the importance of impartiality of judgment which urges us to consider the standpoints of others who have other representations.

Part 3 consists of chapter 9 and, in this chapter, I ask how we can enhance public deliberation. I discuss several attempts to shape deliberative practices and whether such practices may be worthwhile. It should be possible, for instance, to address interpretive differences and representations of ‘the other’. Ethicists, in my view, have a role to play in enhancing public deliberation and I shall clarify how I see the role of ethical expertise. I conclude by discussing five critical comments, as far as public deliberation is concerned, and suggest that we have no other alternative if we wish to justify our judgments in the public sphere in order to influence the course of public action.
PART 1

THE IDEAL OF ETHICO-POLITICAL JUDGMENT:
HOW TO DELIBERATE

Φ

CHAPTER 2

Justifying judgings

I have argued that public deliberation may ensure the legitimacy of democratic decisions. Furthermore, I have elaborated on a deliberative concept of ethico-political judgment as the regulative ideal of public deliberation on moral and political questions. We have to ask which reasons can justify judgments with regard to a public course of action. In this chapter, I am concerned, in this respect, with Kantian normative reasons.

Giving and asking for normative reasons - in the remainder, I shall speak of Kantian normative reasons as normative reasons - is developed as one of the two conditions of ethico-political judgment. I will develop the second condition, aiming at impartiality of judgment, in the next chapter. It is my contention that normative reasons are strong candidates for reasons that can be justified in the public sphere. A normative reason is, by implication, a good reason. 74 Here, I shall elaborate on the concept of normative reasons based on Kant’s ethics.

A normative reason tells us what we ought to do. If we are concerned with articulating a normative reason, we test whether there is a law from which such a reason can be derived. We can find such a law by carrying out the procedure of the categorical imperative. It might seem far-fetched in the context of public deliberation to turn to the categorical imperative. Still, I believe that this imperative, which urges us to ‘universalize’ our principles for action, is of relevance when thinking of normative reasons. Kant’s ethics require, furthermore, that we justify ourselves. However, is Kant the right philosopher to turn to when we are interested in justifying our judgments to others?

Jürgen Habermas, for instance, regards the categorical imperative as monological (carried out in the ‘loneliness of the soul’) and hence inappropriate in the context of public deliberation. I discuss Habermas’ defence of a communicative reason which he regards as an alternative to Kant’s practical reason. I see, however, Habermas’

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74 Thus, good reasons are normative, or justifying, reasons for action. According to Julian Savulescu, ‘a reason for action is good if it meets a standard, that is, it conforms to a set of norms governing that behaviour. When, in ethics, we ask whether there is a reason to save someone’s life, we mean whether there is a good or normative reason to save their life’ (1999, 406).
project as the powerful elaboration of the idea of intersubjectivity which is already, to a certain extent, present in Kant.

In the context of Habermas’ suggestion that Kant’s ethics are monological, I suggest that there are Kantian underpinnings of the concept of communicative reason which are of import to our inquiry wherein we are interested in how we can justify our judgments to others. This enables us to speak of an ‘ethics of dialogue’ that has its origins in Kant’s ethics. I conclude with a discussion of what Habermas calls a practical discourse, a communicative practice aimed at Verständigung: mutual understanding. In such a discourse, we could test the force of normative reasons. We may accept the ‘unforced force’ of the better, normative, reason.

2.1 Kantian normative reasons

Why should we aim at articulating Kantian normative reasons? In my view, many reasons are inarticulate. Let me discuss this using an example. The Council of Europe has agreed that any intervention seeking to create a human being that is genetically identical to another human being, whether living or dead, is prohibited.75 As justification for the prohibition of human reproductive cloning, which is referred to here, the Council argues that the instrumentalization of human beings through the deliberate creation of genetically identical human beings is contrary to human dignity and thus constitutes a misuse of biology and medicine.

The stance of the Council is in line with the moral intuition of many but not uncontroversial. Indeed, the appeal to Kantian human dignity has been criticized.76 The reason I chose this example is that there is much support for a ban on reproductive cloning, but the reasons for such a ban are not without dispute.

In this chapter, I intend to show how this kind of reason can be developed in terms of normative reasons. My aim will not be, in the end, to defend or criticize cloning but to emphasize the necessity of elaborating the argument: we can ask what instrumentalization entails, why it is contrary to human dignity, and what we mean by dignity in this respect; whether or not the reason is universal and applies to all agents. I shall return to the example after having elaborated the Kantian account of normative reason. What I mean by inarticulate reason is that its formal aspects are not yet clear. It is with such formal aspects of normative reasons that we will concern ourselves here.

75 Council of Europe (1998).
76 John Harris (1997) argues that Kant’s principle of respect for human dignity - never use an individual exclusively as a means - is vague and open to selective interpretation. Furthermore, its scope for application is so limited that its utility as one of the ‘fundamental principles of bioethical thought’ is virtually zero. I conclude that if the argument of the Council of Europe is to have any normative force, it will have to be specified.
We have to ask what we mean by normative reasons. It has been claimed that normative reasons are the ones agents appeal to when making claims on each other. In addition, it has been argued that there is a connection between normative reasons and public justifiability. This connection is of relevance to our inquiry. If we can arrive at normative reasons, they may well be justifiable in the public sphere due to the aspects that normative reasons possess.

It has been suggested by Hallvard Lillehammer that there are three aspects to normative reasons. Firstly, normative reasons are rational prescriptions regarding the recognition of which agents can be motivated insofar as they grasp them, subject to weights and balances between reasons. Secondly, the scope of normative reasons is universal. The class of agents to whom normative reasons apply is the class of all agents sharing a given capacity for practical reasoning. All successful rational agency depends on successful practical reasoning. Lillehammer suggests, then, that normative reasons are rationally inescapable for the agents who fall within their scope. The claim of one’s normative reasons cannot be rationally evaded by claiming a lack of interest in such claims.

I endorse this attempt to grasp the nature of normative reasons. It seems to me, however, that the aspects are all of a different nature. We can firstly regard normative reasons simply as rationally prescriptive reasons. These reasons prescribe to us how we ought to act: normative reasons can be defined in terms of rationally prescriptive reasons.

However, normative reasons may encompass more actions than those that concern all agents sharing a given capacity for practical reasoning. We can be motivated by recognizing reasons, and see them as rational prescriptions for our actions, even though these reasons do not necessarily have the same universal scope that moral reasons have. They may be particularistic reasons. In order to be able to speak of Kantian normative reasons, we thus need the universal aspect in addition to the aspect of rational prescriptivity.

As far as the third aspect is concerned, there is, according to Lillehammer, a rational link between motivation and sound practical reasoning. I suggest that it

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77 According to Robert Audi, they are reasons, in the sense of objective grounds, which urge us to do something (Audi 2004).
78 Hallvard Lillehammer (2003).
79 Marc Slors et al. (2004, 5).
80 Hallvard Lillehammer (2002, 50 ff.).
81 We concern ourselves, in this inquiry, with normative reasons, one aspect of which is prescriptivity. In this respect, I shall discuss normativity and view the concepts as related. Richard Hare distinguishes between the normative ‘ought’ and the prescriptive ‘must’. ‘We say something prescriptive if and only if, for some act A, some situation S and some persons P, if P were to assent (orally) to what we say, and not, in S, do A, he logically must be assenting insincerely’ (1981: 21). It is, according to Hare, much plainer that ‘must’ is prescriptive and universalizable than ‘ought’ is. What can we say about the relation between prescriptivity and normativity, which are regarded by many to be (nearly) identical? Prescriptive statements constitute a subclass of normative statements. The prescriptive statement ‘A must do X’, following an imperative in the Kantian sense, can obviously be related to the normative statement ‘A ought to [soll] do X’.

would be better if we spoke of *internal* reasons rather than rationally inescapable reasons, although the concepts are intimately related.\(^{82}\) The theory of internalism claims that, if an agent judges it to be right for her to \(\Phi\) (for instance treat others with respect) in circumstances \(C\), then she will be motivated to \(\Phi\) in \(C\).\(^{83}\) With the concept of an internal reason, a theory of internalism is presupposed which, I shall argue, is well reconcilable with Kant’s ethics.

It has been argued that normative reasons are, by definition, internal reasons.\(^{84}\) Michael Smith illustrates the case of internal reasons in the following way:

> Suppose we debate the pros and cons of giving to famine relief and you convince me that I should give. However when the occasion arises for me to hand over my money I say ‘But wait! I know I should give to famine relief. But you haven’t convinced me that I have any reason to do so!’\(^{85}\)

Believing I should give to famine relief seems to bring with it my being motivated to do so, hence, if you convince me that I should give, then you give me an internal reason. If I am convinced that I should give, I have, by implication, a reason to give. This is what internalism amounts to.

If we can elaborate on the concept of normative reasons, based on Kant’s ethics, how can we then relate this concept to Kant’s ethics?\(^{86}\) There are several suggestions for such a relation. For instance, it is suggested, a Kantian maxim - a subjective practical principle - is a premise in practical reasoning.\(^{87}\) Another suggestion is that the law - an objective practical principle - or a principle are, in themselves, a reason.\(^{88}\) I shall discuss these suggestions after having elaborated the Kantian concept of normative reasons. My own idea is based on the suggestion of Christine Korsgaard that reasons are *derived* from principles, or laws:

\(^{82}\) This is in order to avoid confusion entailing that those who do not subscribe to what Lillehammer calls rational inescapable reasons could be ‘accused’ of not having rational beliefs (which is not, however, in accordance with the account of Lillehammer who speaks of the individual agent herself). Internal reasons are those linking practical reasoning and motivation for action, of which the rational link is characteristic of rational inescapability.

\(^{83}\) Philip Stratton-Lake (2000, 43 ff.). Internalism locates the morality’s authority inside the agent in holding that she has a reason or motive that necessarily accompanies duty (David Wong 2006, 179 ff.). According to an internalist, in the view of Wong, a reason must be based on a motive and such a reason to do an action must be present whenever an agent has a duty to do it. A moral reason to do \(X\), and in general any kind of reason to do \(X\), is a feature of the situation which calls for the agent to do \(X\), for example, the fact that she did not do \(X\) would be an injustice or an instance of cruelty. The internal interpretation, in the account of Bernard Williams (1988, 101 ff.), is that \(A\) has a reason to \(\Phi\) and \(A\) has some desire of which the satisfaction is served by his \(\Phi\)-ing. An external reason statement could not, by itself, offer an explanation of anyone’s action.

\(^{84}\) See Jonny Anomaly: ‘Since internalism is a thesis about normative reasons, rather than explanatory reasons, one of the first questions it raises is what constitutes a ‘sound’ deliberative route from beliefs and desires to reasons for action’ (2008: 471). Anomaly argues that internalism can be related to the ‘ought-implies-can principle’ and this principle is a conceptual constraint on normative reasons.


\(^{86}\) Kant writes that the will is determined by ‘principles of reasons’ or grounds [Gründen] (Gr 413).

\(^{87}\) Robert Audi (2006).

\(^{88}\) Theo van Willigenburg (2004); Andrews Reath (2006).
Since the will is practical reason, it cannot be conceived as acting and choosing for no reason. Since reasons are derived from principles, the free will must have a principle. But because the will is free, no law or principle can be imposed on it from outside. Kant concludes that the will must be autonomous: that is, it must have its own law or principle.89

A maxim expresses what you take to be a reason for action and since reasons are derived from principles, or laws, it expresses as Korsgaard puts it 'your conception of a law'.90 Ideally, reasons should, in my view, be derived from principles: that is, if we attempt to justify our judgments, we are interested in finding a law from which the reason can be derived; this in the sense of obtaining them from principles. Principles capture the notion of acting for general reasons: to act or think rationally, one must do so in accordance with principles.91 On a Kantian account of practical reasoning, I suggest, we should offer reasons that can be derived from the law.

If we are conscious of the practical law - for instance if, in the example of Kant, the matter of my subjective law is my happiness, then this law can only become an objective practical law if I include the happiness of others92 - we can derive a normative reason from this law: ‘we ought to promote the happiness of others’. This derivation is a logical one.93 We articulate a reason to support a judgment or to justify an action and are concerned with whether or not there is a law from which the reason can be derived. If, as I intend to do, we can show that the law or principle is prescriptive, universal, and internal, we will also be able to show that reasons which are derived from the law also have these aspects.94

Why are Kant’s ethics appropriate when elaborating on the concept of normative reasons? Since the three aspects of normative reasons mentioned above are formal, Kant’s formal ethics provide a good point of departure, in my view, for an account of normative reasons. If we can establish that the moral law contains the three formal aspects, then the reason that can be derived from the law will contain these aspects by implication. We can assess the normativity of normative reasons on the basis of Kant’s ethics, which is a powerful account of how we ought to act, namely in accordance with the moral law we give ourselves.

92 CPrR Chapter 1 § 8 (Theorem IV, Remark).
93 Starting with a law ‘p’, ‘if a law p than a normative reason q’, we have derived the normative reason ‘q’ (modus ponens). If there is a law whose matter is the happiness of others (and a universal form), we can logically derive the reason that we ought to promote the happiness of others from this law. A normative reason tells us that we ought to X which justifies the judgment that Y is right (“giving in order to relieve famine is right since it contributes to happiness”, or, in a different formulation, “since we ought to act from the duty of beneficence”. Often, factual premises are of relevance, for instance: “giving in order to relieve famine is effective”).
94 It should be noted that the Kantian principles with which we are concerned are formal ones. The formal principles in question are objective practical principles, or laws. A content-rich principle, such as respect for autonomy, is not pointed to here, although such a principle could be derived from Kant’s ethics.
Critical morality is the reflective consciousness of the right and the good. We concern ourselves, reflectively, with the normative question of what we ought to do and how we should live. Where does normativity originate? Kant writes at the beginning of the *Groundwork* that we become conscious of the law as soon we trace ‘maxims of the will’ for ourselves. The moral law presents itself to us, in our consciousness, and leads directly to the concept of freedom. In this case, ‘we become conscious of the law guiding our action’.

Normative reasons are prescriptive: but why is the law prescriptive? According to Kant, only the will is unconditionally good. A concept closely related to the good will is duty. This is, namely, a concept of the will. Duty is defined by Kant as the necessitation of free choice through the law, the action to which someone is bound. A deed is right or wrong, in general, insofar as it conforms with duty or is

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95 The law proceeds from the will (Wille) which provides laws for the maxims of actions; maxims proceed from choice (Willkür). Kantian legislation entails prescribing actions.

96 CPR § VI, 44. Kant also speaks of the consciousness of obligation in accordance with a law (MM 6: 232). We can become conscious of purely practical laws just as we are conscious of purely theoretical principles, namely by attending to the necessity with which reason prescribes them (CPR Chapter 1 § VI, 45). 677. He ‘who is pleased with the consciousness of right conduct must be conceived as already virtuous’ (CPR Chapter 1 § VIII Remark 2: 56). Furthermore, in respect to the mere perception and receptivity of sensations, an agent must ‘reckon himself as belonging to the world of sense; but in respect of whatever there may be of pure activity in him (that which reaches consciousness immediately and not through affecting the senses), he must reckon himself as belonging to the intellectual world, of which, however, he has no further cognizance’ (Gr 451). We are conscious of the immediate determination of the will by the law and this determination is called respect. This is an effect of the law on the subject and not the cause (Gr 401, n. 2). We are conscious of ourselves as objects affected via the senses but also as intelligence, independent of sensible impressions in the use of reasons and as belonging to the world of understanding (Gr 457). The moral law is given as a fact of pure reason of which we are a priori conscious (CPR Ch I).

97 According to Joseph Raz, it is normativity itself that presupposes reasons: ‘Aspects of the world are normative in as much as they or their existence constitute reasons for persons, that is, grounds which make certain beliefs, moods, emotions, intentions, or action appropriate or inappropriate’ (1999: 67). According to Henry Allison (1995, 89), every objective practical principle expresses a ‘necessitation of the will’, that is, an ought that applies universally.

98 Kant speaks of maxims of the will. It is well known that only the good will can be qualified as, unconditionally, good: ‘Nothing can possibly be conceived of in the world, or even out of it, which can be called good without qualification, except a good will. Gr 393: ‘Es ist überall nichts in der Welst, ja überhaupt auch außer derselben zu denken möglich, was ohne Einschränkung für gut könne gehalten werden, als allein ein guter Wille’ (GMS 393). A talent of the mind, such as the faculty of judgment, is undoubtedly desirable but may also be used badly if the will is to make use of it. When Kant speaks of maxims of the will, we can understand this in terms of giving ourselves a principle through the will. We can will ourselves to ‘obey’ the moral law and hence we must do so. According to Allen Wood, however, the will has a more subordinated role in Kant’s ethics than is often thought to be the case (1999, 20). Concepts such as ‘categorical imperative’, ‘end in itself’, ‘autonomy of the will’, and ‘duty of virtue’ are all far more important.

99 MM 6: 379; 6:222. I find David Ross’ account of duties illuminating. According to Ross, duties are encoded in general principles. He speaks of principles of duty. Each principle imposes a prima facie duty, a duty that would be obligatory, all other things being equal, that is, if no other principles were to apply. Ross contrasts judgment about our actual duties with the certainty that is provided by general principles of duty: ‘Our judgments about our particular duties are not logical conclusions from self-evident premises. The only possible premises would be the general principles stating their prima facie rightness or wrongness’ (1930: 31).
contrary to it. Duty is the necessity to act out of respect for the law. An action done out of duty derives its moral worth from the maxim, the subjective principle of which we ask whether or not it can become a law, by which it is determined. A principle that makes certain actions duties is a practical law. We can thus see why the law is prescriptive: it makes certain actions duties and duties determine whether an action is right or wrong.

Kant argues that a maxim, which for him is a subjective practical principle, has moral content if an action is performed out of duty, not through inclination. An action performed out of duty derives its moral worth, not from the purpose which it is to attain, but from the maxim by which it is determined. We can conclude that the law is prescriptive only if the maxim of which we ask whether or not it can become a universal law has any moral content. And whether or not a maxim has any moral content will depend on whether or not the action we are considering in this respect is performed out of duty.

For our inquiry into normative reasons, the relation between duty and the moral law is of interest. If normative reasons are derived from the moral law, and if the law makes certain actions duties, then normative reasons that are to be derived from a law can be assumed to prescribe actions performed out of duty. In the *Metaphysics of Morals*, we find an elaborate account of Kant’s view of duties. Here, Kant is concerned with ends that are also duties. In ethics, unlike the doctrine of right concerned with the duties of right, the concept of duty of virtue will lead to ends, and will have to establish maxims with respect to ends that we ought to set.

100 MM 6: 223.
101 Gr 400, 61.
102 Consider the following maxim ‘everyone may make a deceitful promise when he finds himself in a difficulty from which he cannot otherwise extricate himself’. I can will the lie but not that the maxim becomes a universal law: given such a law, there would be no promises at all. Kant distinguishes between acts out of duty and acts in conformity with duty. Only the former have moral worth, see Allen Wood (1999, 27 ff.). A maxim is a subject’s practical principle, and hence subjective: a law applies to all and is an objective practical principle. A principle is a universal proposition which has other propositions under it of which it is the ground: it is also called a ‘ground proposition’ (*Grundsatz*) (See H.J. Paton 1971, 59 ff.).
103 MM 6: 225. With regard to the same law, agents can, however, have very different maxims. This is because a maxim is a rule that the agent himself makes his principle on subjective grounds. Hence, we can also speak of a subjective practical principle in opposition to the law as an objective practical principle.
104 Johan Brännmark (2002) asks at what level maxims should be located: are they to be identified with principled counterparts to highly specific intentions or with general underlying principles by which the agent orchestrates his numerous and more specific intentions? A third alternative is that they can be said to have different degrees of generality and be situated in a hierarchy of maxims, ranging from the specific intentions underlying concrete actions to the fundamental disposition of one’s character. Brännmark defends the third alternative.
105 The pre-eminent good which can be called moral consists, for Kant, of nothing else than the representation of the law itself, the objective practical principle, insofar as this representation, and not its effect, determines the will. Rational beings alone have the capacity to act in accordance with the representation of law, that is, according to principles, having a will.
106 Philip Stratton-Lake argues that to act out of duty is to act out of an unconditional commitment to morality and to do what is required from the normative reasons regarding why it is required (2000, 63).
ourselves. The capacity to set oneself an end is what characterizes humanity; we have a duty to make ourselves worthy of humanity:

Hence there is also bound up with the end of humanity in our own person the rational will, and so the duty, to make ourselves worthy of humanity by culture in general, by procuring or promoting the capacity to realize all sorts of possible ends, so far as this is to be found in a human being himself.

Happiness is an end that is also a duty. This is the happiness of other human beings, whose end I make my own end as well. But what is an end? As we will see, Kant speaks of humanity as an end in itself and also of the kingdom of ends. I find the distinction made by Frederich Rauscher between the subjective value of voluntarily chosen ends and the objective value of objectively required ends helpful in this context. We can have ends such as taking up the hobby of playing a musical instrument or devoting ourselves to learning about a particular subject which are not forced upon a moral agent. Objective ends are the value of rational beings, the respect of their power of choice, the value of humanity itself or the happiness of other beings. These ends are ends that also are duties.

Kant identifies four cardinal duties toward others: these are beneficence, gratitude, sympathy, and respect. Benevolence is taking satisfaction in the happiness, defined by Kant as the well-being, of others, beneficence is the maxim of making others’ happiness one’s end, and the duty to perform it consists of the subject’s being constrained by his reason to adopt this maxim as a universal law. Gratitude consists of honoring a person because of a benefit he has rendered us. Sympathic joy and sadness are sensible feelings of pleasure or displeasure at another’s state of joy or displeasure. The respect that I have for others, or that another can require from me, is recognition of the dignity of other human beings.

As we have seen, an action that is performed out of duty, not out of inclination, has moral worth. Christine Korsgaard suggests that we submit our inclinations, desires, and impulses to the test of reflection. When an impulse presents itself to us, as a kind of candidate for being a reason, we look to see whether it really is a reason, whether or not its claim to normativity is true. The Kantian test for determining whether or not an impulse is a reason consists of whether we can will acting on that impulse as a law:

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107 MM 6: 383. See MM 6: 368 on one’s own perfection as a duty and Gr 399 on one’s own happiness as a duty.
108 MM 6: 392.
109 Frederick Rauscher (2002).
110 MM
111 In the precritical *Enquiry*, desire has a different standing. Kant writes that the faculty of representing what is true is knowledge; the faculty of perceiving what is good is feeling. There is an unanalyzable feeling of the good: ‘The judgment, this is good, is completely unprovable and an immediate effect of the consciousness of the feeling of desire, combined with the representation of the object’ (EP II 299).
112 Korsgaard (2005, 113).
When you deliberate, it is as if there were something over and above all of your desires, something which is *you*, and which *chooses* which desire to act on. This means that the principle or law by which you determine your actions is one that you regard as being expressive of *yourself*.113

According to Korsgaard, we thus have impulses that present ourselves to us and that ‘tell’ us what we ought to do. This is because the reflective structure of human consciousness sets us a problem. Reflective distance from our impulses makes it, however, both possible and necessary to decide which ones we will act on: it forces us to act on reasons.114 Korsgaard argues that the reflective structure requires that you identify yourself with some law or principle which will govern your choices. It requires you, furthermore, to be a law unto yourself: this is the source of normativity.115

I conclude that, by giving ourselves a law, we may also give ourselves a normative reason, at least as far as the aspect of prescriptivity is concerned. Since the law tells us what we ought to do, the derived reason is prescriptive. Our critical morality originates from the reflective structure of our consciousness and it is with this structure that we address the question of what we ought to do: which are the maxims of our will. We have already concerned ourselves with the question of whether or not a maxim can become a universal law. This leads us to the procedure of the categorical imperative and the aspect of universality of normative reasons.

**Universality and the moral law**

*Act only on that maxim whereby you can at the same time will that it become a universal law.*116 This is Kant’s Formula of Universal Law, considered one of the three main formulations of the categorical imperative.117 The conception of an objective principle, a law, is called a command and the formulation of the command is called an imperative. We have already seen that a maxim is a subjective practical principle. Kant makes the distinction between subjective and objective in order to distinguish the maxim which is set in accordance with the condition of the subject, often its ignorance or its inclinations, and the law that is the objective principle which is valid for every rational being.118 The law is the principle on which we ought to act.

Kant exemplifies the procedure of the categorical imperative using the maxim for the act of borrowing money. When I feel myself in need of money, I shall borrow some and promise to repay it, although I know that I will never be able to do so.

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113 Ibid. (2005: 100).
114 Ibid. (2005, 113).
115 Ibid. (2005, 103 ff.).
116 Gr 421.
117 There are categorical and hypothetical imperatives. The latter represent the practical necessity of a possible action as means of achieving something else that is willed; the former represent an action as being necessary of itself (Gr 414).
118 Gr 420 n.3.
But how would it be if my maxim were a universal law? Now, this maxim would, according to Kant, contradict itself. No one would consider that anything had been promised to him, instead ridiculing all such statements as vain pretences.

The categorical imperative has widely been regarded as a universalizability test.\textsuperscript{119} This is also, as we will see, the interpretation that is endorsed by Habermas. He suggests a dialogical reformulation of the categorical imperative in terms of a principle of universalization that urges us to generalize interests.

I have already indicated that Kant’s ethics are formal. To obtain an understanding of his ethics, the distinction between formal and material principles is important. What is meant by a formal principle? According to Kant, when an action is performed out of duty, it must be determined by the formal principle of volition; in which case, every material principle has been withdrawn from it.\textsuperscript{120} The universality of the law springs from its formal features. Form consists, namely, of universality: the formula of the moral imperative states that the maxim must be chosen as if it were to serve as a universal law of nature.\textsuperscript{121} The complete determination of maxims means that all maxims, by their own legislation, ought to harmonize with a possible kingdom of ends - ends that are also duties - as with a kingdom of nature.\textsuperscript{122}

According to Kant, material practical rules place the determining principle of the will in the \textit{lower desires}, and ‘if there were no purely formal laws of the will adequate to determine it, then we could not admit \textit{any higher desire} at all’.\textsuperscript{123} Paul Guyer argues that this inference - all material practical rules put the determining ground of the will in the lower faculty of desire - is invalid because it fails to admit the possibility that there might be an object of the will which is suggested by contingent inclination but which is necessary in some sense.\textsuperscript{124} There might be, namely, such an object that is not suggested by contingent inclination but by a higher faculty of desire.

What can we conclude regarding our inquiry into normative reasons? As we have seen, for Korsgaard, ‘matter’, e.g. impulses and desires, has a role to play in ethics but we should submit it to rational reflection. Normative reasons should be assessed, notwithstanding this, on the basis of Kant’s ethics, in terms of their formal aspects - prescriptivity, universality and internalism. According to Kant, a rational being cannot regard his maxims as practical universal laws, unless he conceives them as principles which determine the will, not by their matter, but by their form only.\textsuperscript{125}

\textsuperscript{119} Onora O’Neill (1989) regards, for instance, the categorical imperative as a universalizability test. According to Kant, universalization entails that the subjective practical principle, the maxim, can become a universal law: this is the point of the categorical imperative. The categorical imperative contains no reference to what everybody wants, or to what somebody wants, done either by or to everybody (1989, 86).

\textsuperscript{120} Gr 400.

\textsuperscript{121} Gr 436.

\textsuperscript{122} If pure reason applies to choice, it does not have within the matter of the law: as a faculty of practical principles, there is nothing it can make the supreme law and determining ground of choice except the form, the fitness of maxims of choice to be universal law (MM 6: 213).

\textsuperscript{123} CPRR Chapter 1 § III. For Kant, matter is the determinable and forms its determination: ‘All thinking is an activity of determining (giving form to) a determinable (matter)’ (Longuenesse 2000: 148).

\textsuperscript{124} Guyer (2005, 152).

\textsuperscript{125} CPRR Chapter § IV.
The second, main, formulation of the categorical imperative is the Formula of the End-in-itself: *So act to treat humanity, whether in your own person or in that of any other, in every case at the same time as an end, never as a means only.* According to Kant, one violation of this formulation of the categorical imperative is lying, and would entail using another human being merely as a means.

Henry Allison interprets this formulation of the categorical imperative in terms of justifiability. According to him, rational agents must regard their maxims in some sense as rationally justifiable or, equivalently, their reasons for acting in a certain way as ‘good ones’. In claiming that one’s reason for acting in a certain way is a ‘good’ one in the sense of a justifying reason, one is assuming its appropriateness for all rational beings. If reason R justifies my Φ-ing in circumstances C, then it must also justify the Φ-ing of any other agent in similar circumstances. This is, we can conclude, the implication of the universalizability test of the categorical imperative.

According to Allison, rational agents cannot simply refuse to play the justification game, that is, refuse to concern themselves with the question of whether the reasons for their actions are ‘good’ ones. Rational agents cannot reject the universalizability test without, at the same time, denying their rationality. But how can we justify a particular judgment? This is, in my view, a matter of universalizability, of taking an impartial stance toward the own person and the other: ‘When the moral subject considers the person of the other [a] feeling of respect awakens in it - since the other is also, by virtue of his or her reason, a possible source of the moral law.’

For Kant, legislating entails that a person ‘must always take his maxims from the point of view which regards himself, and likewise every other rational being, as lawgiving being’. We have to justify ourselves, thus, to others as rational beings and as persons. For Kant, it is, as we have seen, the will which, in its maxims, provides universal laws:

Thus, the principle of every human will as a will which in all its maxims provides universal laws would be very well suited to being the categorical imperative in this respect, namely that, just because of the idea of universal legislation, it is *not based upon any interest*, and thus it alone, among all possible imperatives, can be *unconditional*.

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126 Gr 429.
127 Henry Allison (1995, 204 ff.).
128 John Rawls (2000, 192) has suggested that humanity in us is simply our powers of reason and thought and moral judgment and sensibility. To treat persons as ends in matters of justice - to treat humanity in them as an end - and never as means only is to conduct ourselves in ways that are publicly justifiable to their and our common human reason, and of offering such justifications as the occasion demands. The key to this question, for Nicholas Rescher (1958), lies in the concept of an evaluative test. According to Rescher, an example of this is Kant’s test of universalization. According to Rescher, this test entails that an action will be right only if the ‘principles’ or standards of action which it embodies can reasonably be conceived of as universal and binding upon all men. As regards the process of reasoned justification, the most common and familiar means of justifying a particular evaluation is with regard to moral rules, familiar and acknowledged criteria of right action, the Kantian ‘maxims’.
130 Gr 438.
131 Gr 432: ‘Also würde das Prinzip eines jeden menschlichen Willens als eines durch alle seine Maximen allgemein gesetzgebenden Willen, wenn es sonst mit ihm nur sein Richtigkeit hätte, sich zum kategorischen
Providing universal laws in its maxims is a procedure of judging actions. Every rational being must consider itself as providing, in all the maxims of its will, universal laws. This means judging itself and its actions. This leads Kant to a concept that is dependent on this legislation, namely, that of the *kingdom of ends*. For Kant, this kingdom is the systematic union of different rational beings through common law. It is through laws that the universal validity of ends is determined. The combination of ends in a systematic whole is a kingdom of ends. This kingdom includes both rational beings as ends in themselves and the special ends which each may propose to himself.

What can we conclude with regard to the universality aspect of normative reasons? If my maxim is justifiable, in terms of being universalizable through the procedure of the categorical imperative, I hold that my maxim can become a universal law. This law applies to others as well as it applies to me. Kant writes that an agent must be able to regard himself as a legislating being; he has a dignity and must always take his maxims from the point of view which regards himself, and likewise every other rational being as a lawgiving being by which account they are persons.

**Internalism of normative reasons and the moral law**

Let us now consider the internal aspect of normative reasons. This entails that we have a reason, or a motive, that necessarily accompanies duty. I have suggested that the first two formulations of the categorical imperative can elucidate the universal aspect of normative reason. The third formulation, the Formula of the Kingdom of Ends, which we already encountered, may shed light on the internal aspect.

This formula is as follows: *A rational being belongs as a member to the kingdom of ends when, although giving universal laws in it, he is also himself subject to these laws.* Kant writes that morality is the condition under which alone a rational being can be an end in himself. This is because he can be a legislating member of the kingdom of ends. Kant speaks of the autonomy of the will as the property by which it is a law unto itself. The principle of autonomy is: to always choose so that the maxims of the choice are contained in the same volition as a universal law.

I believe that we can consider this formulation of the categorical imperative in terms of internalism: if we give ourselves a universal law that applies to me as well as
others, I am subject to this law. If we give ourselves an objective practical principle for an action, we will, as subjects, be motivated accordingly.

We have seen that Kant speaks of ends that are also duties. Allen Wood suggests that we relate this concept of duties to the Formula of the Kingdom of Ends:

Rational beings constitute a realm to the extent that their ends form a system. This happens when these ends are not only mutually consistent, but also harmonious and reciprocally supportive. Thus regards as laws as a realm of ends, moral laws ‘have as their ends the relation of [rational] beings to another as ends and means’.135

Kant writes that moral laws ought to hold good for every rational being, and they must be derived from the universal concept of a rational being.136 For Kant, a rational being is a universal legislator: the will is not merely subject to the law but must regard itself as giving the law. As legislators, we are authors of the law.137 We are autonomous: we give ourselves the law which is universal.138 Autonomy is the basis of the dignity of human nature and of every rational nature.139 Kant holds that, in virtue of being autonomous, we are self-legislators: we give ourselves the moral law.140

Autonomy is considered by Kant to be freedom of the will: autonomy is the property of the will to be a law unto itself. Freedom is an ideal. The subject must regard itself as the author of its principles independently of foreign influences. Freedom is the only one of the ideas of the speculative reason of which we know the possibility a priori because it is the condition of the moral law which we know.141

We have, as we have seen, a duty to promote the happiness of others. This is because a maxim which excludes it cannot be included as a universal law in one and the same volition; this would be contrary to autonomy.142 My own happiness, as a rule, can only become an objective practical law if I include the happiness of others.143 Kant suggests how the moral law is internal. He asks why I should subject myself to a universal principle and do so as a rational being, thus also subjecting all other beings endowed with reason to it:

I shall allow that no interest impels me to do this, for that would not give a categorical imperative, but I must take an interest in it and discern how it comes to pass; for this ‘ought’ is

136 Therefore, morality needs anthropology for its application (Gr 412).
137 Gr 431.
138 Autonomy of the will is contrasted with heteronomy, which entails that we are only subject to the law, a law that requires some interest by way of attraction or constraint and does not originate from one’s own will (Gr 433).
139 Gr 436. Wood argues that autonomy is an unattainable idea, which is the same for every rational being (1999, 157). We regard ourselves as categorically bound by norms only to the extent that we see them as proceeding from reason.
140 Gr 440. The principle of autonomy is this: Always to choose so that the maxims of the choice (Wahl) are contained in the same volition (Wollen) as universal law
141 CPrR Preface.
142 Gr 442.
143 CPrR § VIII.
properly a ‘will’, which is valid for every rational beings, provided only that reasons determined
his actions without any hindrance.\footnote{Gr 449.}

The law is internal, and hence the reason derived from it, since ‘ought’ is to ‘will’. We are conscious of the law that prescribes that we ought to act accordingly and this ought is a will: we are motivated accordingly. To return to the example of famine, I am willing to relieve famine due to my consciousness of the law that urges me to act out of duty: we ought to relieve famine.\footnote{According to Joshua Gert (2003), there are two ways of being a Kantian internalist. The first is to hold that there are certain rational processes that would produce specific motivations in any agent, completely independently of that agent’s motivation. The second entails that there are simply some motivations that one is rationally required to have even though there are no rational processes that would necessarily bring one to have them. Desires to avoid death and pain are simply rationally required, in virtue of death and pain being bad things. In my view, the first way is most plausible: Kant’s ethics urge us to rational reflection which is contrary to the second way.}

According to Philip Stratton-Lake, who defends Kantian internalism, I can become conscious of the moral law only insofar as I recognize that some act falls under some morally normative concept, such as ‘ought’, ‘duty’, ‘obligation’.\footnote{Philip Stratton-Lake (2000, 43 ff.).} The feeling of reverence is to be understood, not as the moral motive, but as the state of being morally motivated.

Kant’s claim that we cannot be aware of the moral law without reverence of the will amounts to internalism in the view of Stratton-Lake. This is the view - a view that has already been discussed - that if an agent judges that it is right for her to $\Phi$ in circumstances C, then she is motivated to $\Phi$ in C or she is practically irrational. According to Stratton-Lake, it is plausible to believe that there is a conceptual connection between believing that I should $\Phi$ and being motivated to $\Phi$: there is a conceptual connection between consciousness of the moral law and the feeling of reverence.\footnote{According to Thomas Nagel, Kant insists that the imperatives of morality are categorical and that their application is not dependent on the presence of a motivational factor prior to ethics, from which they are extracted as consequences. Ethical principles themselves are put at the absolute source of our moral conduct (1978, 7 ff.).}

There is, I conclude, a link between prescriptivity, universality, and internalism of the law. As we have seen, prescriptivity stems from reflective consciousness of the law. This consciousness explains why we are motivated since we become aware of the ‘ought’ in relation to our actions. As soon as we ask whether our maxim is universalizable, whether it can apply to me as well as others, and can thus result in a universal law, the consciousness of this law explains what we ought to do and are consequently motivated to do.
Normative reasons can be derived from the law. We have been concerned with the prescriptive, universal, and internal aspects of the law, and hence of normative reasons. Michael Smith has suggested that there is a relation between the categorical imperative and normative reasons, a suggestion that I find convincing. Smith suggests that we can speak of a normative reason in categorical imperative terms. According to Smith, we can analyze the concept of a normative reason in categorical imperative terms: to say that we have a normative reason to \( \Phi \) in certain circumstances \( C \) is to say that we would want ourselves to \( \Phi \) in \( C \) if we were fully rational.\(^{148}\)

Smith argues that if there is a normative reason for some agent to do \( \Phi \) in certain circumstances \( C \), then there is a like normative reason for all those who find themselves in circumstances \( C \) to \( \Phi \). We see that this accords with the various formulations of the categorical imperative: the moral point of view applies to me and others. We respect humanity in ourselves and others. Normative reasons, in the sense Smith defends them, may well be derived from the moral law.\(^{149}\)

In my view, the law is not a reason. This is argued by Theo van Willigenburg for whom a reason is a law or principle.\(^{150}\) He argues that Kant’s project is a search for the ultimate source of the normativity of practical reasons.\(^{151}\) Van Willigenburg understands self-legislation in terms of reason-giving considerations. A reason-giving consideration will only be normative to us, because we have gained insight into its force. We have made it ‘ours’ by grasping its depth. It is my taking a consideration as a normative reason, by giving it a particular role in my practical thinking, that gives it the authority of a law.

I find Van Willigenburg’s emphasis on self-legislation in terms of reason-giving considerations plausible. However, I find the idea that the law or objective practical principle is a reason less plausible than the suggestion of Korsgaard that a reason is derived from the law.\(^{152}\) A reason is not, contrary to the law, a command. It is a

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\(^{148}\) Michael Smith (1995, 182 ff.).

\(^{149}\) Allan W. Wood (1999, 78) suggests that a categorical imperative tells us to act - to adopt maxims - in conformity with objective principles or ‘practical law’. Laws are based on objective grounds - reasons are valid equally for every rational being per se. Hence they are universally and unconditionally valid for every rational being per se.

\(^{150}\) Andrews Reath argues that reflection on the attitude of respect shows that we take moral principles and reasons to have the status of a law. He argues that, on a Kantian account, we justify our actions with reasons: ‘When moved by respect for the law, one is concerned with the ‘conformity of [one’s] actions to universal law as such’ (Gr 402). That is, ‘one wants one’s actions to be supported by reasons that are necessary and universally valid (unconditionally valid), and thus sufficient to justify the action fully to anyone.’ (Andrews Reath 2006: 73).

\(^{151}\) Theo van Willigenburg (2004, 39 ff.).

\(^{152}\) I find the suggestion of Robert Audi that a maxim is a reason, and that the categorical imperative can have a role to play as a major premise in an inference, also problematic. He argues that Kantian practical reasoning consists of a major premise, a maxim, and a minor, instrumental, premise (Audi 2006, p. 61 ff.). The categorical imperative is, however, a procedure; it cannot be part of a major premise in an inference as Audi suggests. If we speak of a procedure of categorical imperative, it is obvious that a procedure cannot be part of an inference. I find the idea of Barbara Herman (1993, 77), that we speak of the categorical imperative as a procedure, also problematic.
ground used in an inference. Reasons may justify our judgments concerning actions, or our actions immediately.\footnote{Rüdiger Bittner (2001) speaks of reasons for maxims and finds this implausible. There would be no recognizable sense of ‘inferring’ whereby ordinary cases of following a maxim can be described as cases of inferring (except, say, that one is practicing logic). The person who has the principle of enriching himself by every safe means and recognizes that the deposit in his hands is a safe means is not, in an intelligible sense, inferring embezzling it. Whether that person’s maxim is formulated as an ‘ought’ statement (I ought to do everything safe to enrich myself) or as an imperative directed at himself (I do whatever is safe to enrich myself), what can be inferred from one of these is at most ‘I ought to embezzle the deposit or embezzle it’. In my view, if reasons can be derived from the law, we can infer from these reasons. The law is inescapable, as soon as we recognize its normative force, we are bound by it, and hence the derived normative reason. This reason is a reason for action.}

Let us consider the law that we should promote the happiness of others.\footnote{CPrR Chapter I § VII (Theorem IV, Remark).} This law is an objective practical principle and the related maxim - of which we want to know whether or not it can become a universal law - is a subjective practical principle. We can, certainly, ask whether our reason which is supposed to justify a judgment - X is right since it contributes to the happiness of others - can be derived from a law. Normative reasons are reasons for action, much as maxims, when they can be universalized, are maxims that urge us to act.

So far, there seems to be a striking similarity between the law and a normative reason. The difference is that, for Kant, the law determines the will: ‘a will which can have its law in nothing but the mere legislative form of the maxim is a free will’.\footnote{CPrR. § IV (Remark).} We cannot give ourselves a normative reason like we give us the Kantian law. According to Kant, we become, namely, conscious of practical laws just as we are conscious of purely theoretical principles, ‘namely by attending to the necessity with which reason prescribes them’.\footnote{CPrR Chapter VI.} Reasons are not, however, necessarily prescribed by reason, unlike the law.

imperative as a principle of judgment in this respect, plausible. According to Herman, the procedure is a principle of judgment. The idea of Audi, that maxims are premises or reasons, is also defended by Noell Birondo. Kantian maxims are reasons for an agent’s being motivated by whatever reasons, by facts of his or her situation. A fact is, for instance, someone making a promise: ‘What I have urged is that Kantian maxims serve as general practical principles which, when held by a particular agent, shape or influence the deliberative judgments he or she makes in particular situations; judgments about whether or not certain facts are also reasons for acting in certain ways.’ (2007: 274). I find the concept of a fact problematic, and do not see a reason to introduce the concept at all. We can speak of reasons for actions in a Kantian sense, but they are not maxims. I also find Thomas Hill’s suggestion that taking a maxim as reason for action is subscribing to a principle or law less plausible. Still, I subscribe to his argument that ‘ought’ is related to ‘compelling reasons: The word ‘ought’ (‘Sollen’), like ‘must’ and other ways of expressing Kant’s imperatives, is supposed to express the sense that something is ‘necessary’, whether to achieve an end or to satisfy morality; but the necessity is a practical one created by ‘compelling’ reason’ (1992, 124 ff.).

\begin{itemize}
  \item \footnote{Rüdiger Bittner (2001) speaks of reasons for maxims and finds this implausible. There would be no recognizable sense of ‘inferring’ whereby ordinary cases of following a maxim can be described as cases of inferring (except, say, that one is practicing logic). The person who has the principle of enriching himself by every safe means and recognizes that the deposit in his hands is a safe means is not, in an intelligible sense, inferring embezzling it. Whether that person’s maxim is formulated as an ‘ought’ statement (I ought to do everything safe to enrich myself) or as an imperative directed at himself (I do whatever is safe to enrich myself), what can be inferred from one of these is at most ‘I ought to embezzle the deposit or embezzle it’. In my view, if reasons can be derived from the law, we can infer from these reasons. The law is inescapable, as soon as we recognize its normative force, we are bound by it, and hence the derived normative reason. This reason is a reason for action.}
  \item \footnote{CPrR Chapter I § VII (Theorem IV, Remark).}
  \item \footnote{CPrR. § IV (Remark).}
  \item \footnote{CPrR Chapter VI.}
\end{itemize}
Can we share our normative reasons? In my view, inherent in normative reasons is the fact that ‘we’, in principle, can indeed subscribe to them since they are not only prescriptive and internal, but even universal. They are good reasons and apply both to you and to me. The Kantian moral point of view urges us to consider not only how our actions affect others. Intersubjectivity applies to Kant’s philosophy, as I shall argue in the next section. In this respect, an ‘ethics of dialogue’ can be based upon Kant’s ethics, an ethics that urges us to think from the standpoint of others. I shall, in the next section, contend that Kant is indeed the right philosopher to turn to when we are interested in obtaining an account of how to justify our judgments to others, even though this idea is more explicitly developed in Habermas’ discourse ethics.

2.2 Intersubjectivity from Kant to Habermas

Jürgen Habermas has proposed what has been called a dialogical reformulation of the categorical imperative given its presumed monological nature. According to Habermas, the Kantian procedure of the categorical imperative would take place, namely, in the loneliness of the soul. For our inquiry, Habermas’ discourse ethics, with their emphasis on justification in a practical, undistorted, discourse, are of relevance.

Before discussing the relation between Kant’s ethics and Habermas’ discourse ethics, I shall, therefore, look at the main ideas of discourse ethics. I am going to present discourse ethics as an urge to justify ourselves and to imagine a situation - a practical discourse - where we justify our judgments to those who are affected by the proposed ‘way of acting’ or norm. This is also, I have argued, what Kant’s ethics demand. What I can will to be a valid norm is what we can as a valid norm. Seen in this light, Kant’s ethics are closer to discourse ethics than some commentators on Habermas think.

With a practical discourse, Habermas means an exacting form of argumentative decision making. It is a warrant of the rightness of any conceivable normative

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157 Can we share our normative reasons? I find Christine Korsgaard’s suggestion, that the reasons which we can share can be called intersubjective reasons, plausible (2000, 275-310). Korsgaard departs from Thomas Nagel’s distinction between objective and subjective reasons (1978, 90 ff). According to him, all reasons must be derivable from objective principles. Even if one operates successfully with a subjective principle, one must be able to back it up with an objective principle. According to Nagel, all universal reasons and principles are expressible in terms of the basic formula - every reason can be expressed by a predicate R, such that, for all persons p and events A, if R is true of A, then p has prima facie reason to promote A. According to Korsgaard (2005), we are obliged to see the ends of others as providing reasons for action.

158 The discourse principle, one of the two principles of discourse ethics, could thus be reasonably construed as something like a dialogical version of Kant’s categorical imperative (Jon Mahoney 2002). According to Alessandro Ferrara (1999, 38), the central intuition of ‘Habermas’s project of discursive reformulation of moral theory’ rests on a post-metaphysical and dialogical revisitation of Kant’s view of moral validity as generalizability. Habermas is a critic of what he, according to Janna Thompson (1998, 36 ff), calls monology: the idea that an individual can alone determine the truth or falsity of an ethical proposition. Habermas would believe that ethical inquiry is essential ‘dialogic’.

159 Jürgen Habermas (1996b, 198).
agreement that is reached under certain conditions. Argumentation ensures that all concerned, in principle, take part, freely and equally, in a cooperative search for truth, where nothing coerces anyone except the force of the better argument.

I believe, thus, that the roots of discourse ethics are more Kantian than is often assumed. Despite differences, Kant’s ethics and Habermas’ discourse ethics could, in principle, be developed via fruitful interaction toward an ‘ethics of dialogue’. The Kantian account of normative reasons can, furthermore, be a valuable complement to Habermas’ account of good reasons. The concept of normative reasons is, in my view, important for the quest to find the better reason that characterizes Habermas’ theory. This is what I defend in the last part of this chapter.

Discourse ethics: beyond the loneliness of the soul

Discourse ethics constitute a program of justification wanting to derive a kind of rule of argumentation for discourse in which moral norms can be justified. According to Habermas, all studies of the logic of moral argumentation end up by introducing a principle of universalization as a rule of argumentation.¹⁶⁰ Philosophers would come up with principles whose basic ideas are similar:¹⁶¹ Some variants of cognitivist ethics take their bearings, namely, from the basic intuition contained in Kant’s categorical imperative. The underlying idea is to take the impersonal or general character of valid universal commands into account. So far, Habermas remains close to Kant’s ethics. He defends its cognitive content: if moral statements or utterances can be justified, then they have a cognitive content.¹⁶²

Normative claims to validity have cognitive meaning, namely, and can be treated like claims to truth. Kant’s ethics are concerned with judgments of right and wrong and assume that we can speak of right actions. According to Habermas, the meaning of ‘rightness’ consists entirely of ideal warranted acceptability.¹⁶³ We have seen that Kant’s ethics urge us to justify ourselves and, in my view, this is consistent with Habermas’ idea of rightness. According to Habermas, judgments are ‘right’ when they can be dialogically justified. According to him, the internal connection between norms and justifying grounds constitutes the rational foundation of normative validity. Discourse ethics are, thus, a program of normative justification.¹⁶⁴

I believe, as I will set out below, that the concept of normative reasons is a valuable addition to discourse ethics. This also applies to Habermas’ concept of rightness. Dialogical justifiability is necessary but insufficient when speaking of ‘rightness’. It is not merely the better reason that can justify a judgment of right; this reason should be a normative one. Kantian normative reasons are one example of possible normative reasons that can dialogically justify a judgment of right. This is

¹⁶⁰ Ibid. (1996a).
¹⁶¹ Ibid. (1996b).
¹⁶² Ibid. (1998, 3 ff.).
¹⁶³ Ibid. (2005c).
¹⁶⁴ Ibid. (1998, 43).
because such normative reasons are derived from the law that tells us what we ought to do. We become conscious of the law as soon as we become aware of the universalizable maxim for our action.

For Habermas, the meaning of rightness also lies in ideal warranted acceptability. This concept is related to dialogical justifiability. The outcome of the practical discourse - what participants can justify, or warrant, to each other in dialogical terms on the basis of reasons - is ultimately the rightness of a judgment that can be endorsed by all. However, I believe that reasons in general do not have the normative force to justify a judgment of right. Speaking of moral rightness requires more: the reasons have to be normative ones that relate in one way or another to general principles.

Normativity is not merely a question of what the participants in a practical discourse can agree on; it is also, as I have argued, a question of our reflective consciousness of the right and the good. It could be argued that all of the participants in a practical discourse have their reflective consciousness which thus does not have to be thematized. Habermas presumes such a consciousness as belonging to our everyday lifeworlds: it is the task of the philosopher to interpret on behalf of the lifeworld.165

However, Habermas does not elucidate our morality in terms of what I call critical and lifeworld morality: he takes the sources of normativity for granted. Still, if we see discourse ethics as an urge to imagine a situation where we justify our judgments - and hence as starting with the moral agent who needs to think from the standpoints of others when taking a hypothetical argumentative stance - we need an account of where normativity originates. This is in the reflective consciousness of the right and the good.

We have considered dialogical justifiability. However, what can dialogical mean? A dialogue is a conversation or discourse between two or more persons. We can, therefore, relate the concept to the idea of a practical discourse that is implied by the principle of discourse. For Habermas, intersubjectivity is constituted, namely, under the communicative presuppositions of a universal, practical, discourse in which all those possibly affected can take part in and adopt a hypothetical argumentative stance. Together with the principle of universalization, the principle of discourse constitutes discourse ethics. This principle is formulated as follows:

(D) Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse.166

The discourse principle makes reference to a procedure, namely the discursive redemption of normative claims to validity. Introducing a discourse principle already presupposes that practical questions can be judged impartially and decided rationally.167

165 Ibid. (1996b, 18).
166 Ibid. (1996b, 66).
167 Ibid. (1996b)
For Habermas, practical discourses are, open communicative practices in which the participants seek to reach Verständigung, mutual understanding, regarding the truth of a proposition or the validity of an action norm\textsuperscript{168}. How, then, do we interpret the urge to participate in a practical discourse that is mentioned with the principle of discourse (D)?

In my view, what Habermas demands is that we imagine that we are participants in a practical discourse in which we consider all concerned by a proposal for a norm or a judgment. For Habermas, impartiality of judgment constrains all affected to adopt the perspectives of all others in the balancing of interests. In order to be able to adopt the perspectives of all others, we need communication. Otherwise, we would not know whether or not everyone’s interests are being satisfied and, what is more, we would not be able to scrutinize our own reasons from an impartial point of view.

We are to justify our judgments to others: the question is not whether I can want a norm to be valid but whether we can will that. Still, I believe that Habermas’ discourse ethics assign an important role to reflecting the single moral agent.\textsuperscript{169} We are urged to judge impartially and justify our judgments to others using what Kant calls, as we will see, ‘thinking from their standpoints’.

We take what Habermas calls a hypothetical argumentative stance. This is also how I see the giving of and asking for normative reasons, a condition I have developed on the basis of Kant’s ethics. We imagine that we defend our normative reasons in order to justify our judgments. Habermas sees discourse ethics as a call for a joint process of ‘ideal role taking’: everyone is required to take the perspective of everyone else and to project him- or herself into the understandings of self and the world of all others.\textsuperscript{170}

I suggest that this means that each one holding judgments, for instance in public discourse, is required to take the perspective of the other. I simply cannot claim validity for the norm I am proposing if I do not imagine myself into the standpoints of the others who are affected. This procedure of imagining oneself has, however, already been captured by the Kantian idea of ‘enlarged thought’, which has been interpreted by Hannah Arendt in the context of ethics and politics, an interpretation that Habermas, as a matter of fact, takes as the starting point of an ‘ethics of communication’\textsuperscript{171}.

How, then, does Habermas arrive at his dialogical reformulation of the categorical imperative? According to him, the categorical imperative is to be understood as a principle that requires the universalizability of modes of action and maxims. Furthermore, Habermas argues, it requires the universalizibility of the interests furthered by them. In this sense, by introducing the concept of generalizable

\textsuperscript{168} Ibid. (1996a).
\textsuperscript{169} Thus, according to Janna Thompson (1998, 39 ff.), Habermas’ discourse ethics are still monological since discourse is necessary to ‘enlarge’ each individual’s interpretive perspective, as well as to criticize biases and prejudices.
\textsuperscript{170} Jürgen Habermas (1998, 58).
\textsuperscript{171} Ibid. (1980). See chapter 3 for a discussion on ‘enlarged thought’ from Kant to Arendt.
interests, Habermas departs from Kant who speaks of the universalizability of maxims.

Thus, for Habermas, the impartiality of judgment is expressed in a principle that constrains all affected to adopt the perspectives of all others in the balancing of interests. This principle is Habermas’ principle of universalization. It entails that every valid norm requires that:

\[(U) \text{ All affected can accept the consequences and the side effects its general observance can be} \]
\[\text{anticipated to have for the satisfaction of everyone’s interests (and these consequences are} \]
\[\text{preferred to those of known alternative possibilities for regulation).}\]

The principle of universalization is Habermas’ proposal for the moral principle, and it acts in his view like a knife that makes razor-sharp cuts between evaluative statements of the good and strictly normative ones of the just. The principle is formulated in a way that precludes a monological application of the principle. In the view of Habermas, it thus precludes the Kantian categorical imperative.

We have to ask at this point what can be meant by monological in opposition to dialogical. A monologue denotes a situation in which one person is speaking for a long time while his or her audience is listening. A monological form is, for instance, a teaching situation whereby the teacher communicates his or her thoughts and the students just listen. Habermas subscribes to the view that, in Kant’s ethics, one ascribes one’s maxim as valid to others. This would indeed be monological in the sense of communicating our thoughts to others without considering their points of view. In order to know whether or not a maxim is valid, we can test it in the loneliness of our soul and then simply communicate it to others.

Why, then, does Habermas suggest a reformulation - using both the principle of universalization and the principle of discourse - of the categorical imperative? This is because he rejects the presumed monological approach of Kant. According to Habermas, Kant would assume that the individual tests his maxims of action foro

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172 Ibid. (1996b, 65). In The Inclusion of the Other, a different formulation of (U) is given: ‘A norm is valid when the foreseeable consequences and side effects of its general observance for the interests and value-orientations of each individual could be jointly accepted by all concerned without coercion’ (Habermas 1998: 42).

173 Seyla Benhabib argues that the principle of universalization is actually redundant in Habermas’ discourse ethics and that it adds little but consequentialist confusion to the discourse principle; the basic premise of discourse ethics. A communicative ethics version of the principle of universalization must deliver criteria among morally permissible and morally impermissible actions, like the categorical imperative: ‘Without some stronger constraints on how we are to interpret U, we run the risk of regressing behind the achievements of Kant’s moral philosophy, and behind his distinction between positive and negative duties (Benhabib 1992: 35).


175 According to Habermas, Kant bases his justification of the categorical imperative on the substantive normative concepts of autonomy and free will (Habermas 1996b) This would make Kant’s account vulnerable to the objection that he has committed a petitio principii (Begging the question or assuming the thing that was to be argued for. The justification of the categorical imperative is so closely intertwined with the overall design of Kant’s system that it would not be easy to defend it if the premises were changed.
*interno* or, as Husserl puts it, in the loneliness of his soul. Habermas speaks of Kant’s philosophy of reflection as the experience of ego-identity in self-reflection: ‘Thus all the experience of the self of the knowing subject, which abstracts from all possible objects in the world, and refers back to itself as the sole object. In it the unity of the subject as self-consciousness constitutes itself.’ Habermas argues that recognition of the moral laws, accounted for *a priori* by practical reasons, permits the reduction of moral action to the monological domain.

We have seen that the observation of interests is crucial in discourse ethics. Discourse ethics thus prefer to view shared understandings of the generalizability of interests as the result of an intersubjectively mounted public discourse. Habermas

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176 *Foro interno*: this affects only the personal conscience. Grace Clement (1989) speaks of the monological versus the dialogical moral point of view. Kant would make the individual consciousness central: it is the individual and the society that discern and enforce the moral law. In moving from monological to dialogical deliberation, Habermas makes the role of the social explicit. Eva Erman also invokes the distinction monological-dialogical; in my view, in an unfortunate way: ‘Within the Cartesian paradigm of the solitary thinker, the Golden Rule does not allow for any other procedure than a monological one since it starts out from how you yourself wish to be treated and views others from the standpoint of your preferences and interest’ (2006: 381). Kant denies that the categorical imperative is the golden rule (Gr 430 n.1). This is because the golden rule cannot be a universal law as it does not contain the duties of benevolence to others. Furthermore, the Kantian moral subject is, in my view, no solitary thinker but needs to take others into account and to think from their standpoints. Anders Bordum (2005) sees discourse ethics as the dialogical continuation of Kant’s ethics. In Habermas, justification is always anchored in a social process oriented toward justification to other persons: to Habermas, truth and validity are not merely a private but a public matter. Habermas would improve the monological perspective within the dialogical approach. This may be right as far as discourse ethics are concerned, but is not in conflict with Kant’s ethics or his account of the subject and reason. Like Bordum, Hans Klaus Keul (2002) understands Habermas’ ‘universal pragmatic transformation of morality’ as the continuation and concretization of Kant’s critical ethics. According to Keul, reason is situated by Habermas within the social sphere of language. The weight shifts from an *a priori* standard of impartiality that must be internally viewed to an intersubjective process of arriving at a shared understanding. There is a transformation of the self-relation within the will into the communicative relation between different subjects. James Gordon Finlayson (2000) points out that, for Habermas, Kant mistakenly assumes that the procedure by which moral norms are selected somehow takes place inside each solitary individual; he would be blind to the intersubjective or social nature of reason. Habermas’ principle of universalization as the criterion of morality would be his post-metaphysical rendition of Kant’s categorical imperative (Farid Abdel-Nour 2004).

177 Jurgen Habermas (1988: 144). According to Habermas, Kant has a problematic assumption of a complete, fixed knowing subject: a normative concept of the ego. Nothing seemed more certain to Kant than the self-consciousness in which I am given to myself as the ‘I think’ that accompanies all of my representations (1971, 15 ff.).

178 Jurgen Habermas (1988, 151). According to Seyla Benhabib, Kantian ethics are monological as they proceed from the standpoint of the rational person, defined in such a way that differences among concrete selves become quite irrelevant. Communicative ethics defend a dialogical model of moral reasoning, according to which real actors engage in actual processes of deliberation on moral questions. (Benhabib 1986, 300).

179 Thus, instead of asking what an individual moral agent could or would will, one rather asks; what norms or institutions would the members of an ideal or real communication community agree to as representing their common interests after engaging in a special kind of argumentation or conversation (Benhabib 1990, 331).

180 When one considers how a proposed norm will satisfy the interests and needs, it must ultimately be the case that this consideration is something dialogical, not just monological - these interests must be capable of being discussed with others. One cannot merely assert, without providing reasons to others, that one has an interest or a need with which a proposed norm conflicts (Douglas B. Rasmussen 1992: 25).
wishes to replace the Kantian categorical imperative with a procedure of moral argumentation.  

For Habermas, a narrow individualistic conception of morality rests on a negative reading of the categorical imperative understood as being applied in a monological fashion. In Kant, however, the moral principle would be designed to explicate the meaning of the validity of norms. It expresses, with specific reference to normative propositions, the general intuition that true or correct statements are not valid for you or me alone. The meaning of the question ‘What should I do’ undergoes a further transformation as soon as my actions affect the interests of others and lead

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181 This emphasis on the role of language in normative discourse can already be found in the work of Paul Taylor (1976) who argues that using normative language is being disposed toward carrying on our reasoning within the framework of a particular universe of normative discourse. The rule which governs our use of verification sentences (in which we state right-making or wrong-making) defines the language games in which we give reasons for or against a value judgment or prescription by appealing to a standard or rule of evaluation.

182 Jürgen Habermas (2001). Habermas argues that, in Kant, each individual could undertake the required test of norms for himself in foro interno. Kant would ascribe the free will to an intelligible Ego situated in the realms of ends. Self-legislation would be the sole competence of the individual. Rather, the ‘idea of a discursively produced understanding also imposes a greater burden of justification on the isolated judging subject than would a monologically applied universalization test’ (1998: 33). Christopher McMahon (2000) distinguishes between weak and strong dialogicity, arguing that Habermas’ discourse ethics are only tenable in the weak sense. Monological theory allows for the possibility that a single individual reasoning could carefully arrive at a correct understanding of the requirements of morality; dialogical theory concerns the identification of the correct principles of morality as a project that must be carried out collectively by all those potentially affected by their adoption. Strong dialogicity provides that judgments identifying the correct principles of morality must be made collectively by all those potentially affected; weak dialogicity, for McMahon, involves a simple requirement to consult everyone who might have evidence germane to the identification of the correct principles of morality. In my view, it is not correct to say that the correct principles of morality must be made collectively: the emphasis in discourse ethics is on the justification of judgments: to this end, we need a practical discourse wherein we give and ask for reasons.

183 Pablo Gilabert (2006) puts forward a severe criticism of Kant’s ethics in the light of Habermas’ discourse ethics. The most serious problem with Kant’s account of moral validity would be that there is a gap between objectivity and justification. A norm will be objectively valid if, and only if, it were to be accepted by all rational beings as such. Any individual would reach the same conclusion when reasoning carefully enough. Gilabert discusses the example of helping the needy in *Groundwork*. A person who strongly values self-sufficiency would be prepared to universalize his maxim of not helping someone in need when he can. Another person who values cooperation more than self-sufficiency would conclude the opposite. Neither justifies his actions in terms of egocentric self-interest; both are concerned with the integrity of all human beings as such. But exactly what that concern means will be different to each of them. Gilabert thus supports Habermas’ reformulation of Kant’s account of the justification of moral norms. In my view, Gilabert is mistakenly suggesting that there is a gap between objectivity and justification in Kant’s ethics. Let us look at the example discussed by Gilabert. Kant asks, concerning a person who lives in prosperity while he sees others in need, whether or not the maxim that the person does not wish to contribute can become a universal law. However: ‘Although it is possible that a universal law of nature might exist in accordance with that maxim, it is impossible to will that such a principle should have the universal validity of a law of nature.’ (Gr 423). As justification, Kant contends that cases are conceivable whereby he would need the love and sympathy of others and whereby he would deprive himself of all hope of the aid he desires. Now, irrespective of whether or not one values self-sufficiency or cooperation, for Kant, each rational being would follow the maxim of helping the needy since it can be universalized with the ‘principle of judgment’ of the categorical imperative. Objectivity entails moral agents, through the procedure of the categorical imperative, being able to determine whether or not an action is in line with a moral law or not.
to conflicts that should be regulated in an impartial manner, from the moral point of view. This is, in my view, in line with Kant’s ethics. Kantian ethics presuppose that I give myself the law that applies to me as well as others.

Notwithstanding this, and despite the fact that Habermas mentions here the possibility of testing norms in terms of their validity on the basis of Kant’s’ ethics - ethics do not concern you or me alone - he still endorses the view that Kant’s ethics are monological, a view that, given the many references to Kant in this sense, seems to be the one that Habermas defends. Thus, in a monological application of the universalization test, each of us still privately considers what all could will from individually isolated perspectives. This can no longer be assumed under conditions of social and ideological pluralism.

According to Habermas, the justification of norms and commands thus requires that a practical discourse be carried out. Justification cannot occur in a strictly monological form, like Kant’s categorical imperative. Communicative ethics, on the other hand, guarantee the generality of admissible norms and the autonomy of acting subjects solely through the ‘discursive redeemability of the validity claims with which norms appeal’.

This is what is meant by what Habermas calls discursive will-formation. By carrying out a practical discourse, the legitimacy of decisions can be secured. According to Habermas, only communicative ethics are universal and not - like formalistic Kantian morality that is sanctioned through the inner authority of conscience - restricted to the domain of private morality separate from legal norms. Only communicative ethics can, therefore, guarantee autonomy.

According to Habermas, Kant had carried out his critique of reason from reason’s own perspective, in the form of a rigorously argued self-limitation of reasons. Habermas contends that reason, on the other hand, by its very nature, is incarnated in contexts of communicative action and in structures of the lifeworld. ‘Communicative reason’ makes itself felt in the binding force of intersubjective understanding and reciprocal recognition:

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184 Jürgen Habermas (2001, 5).
185 Ibid. (2008, 57 ff.).
186 Habermas refers elsewhere (2005b, 92 ff.) to George Herbert Mead in articulating his own critique of the presumed monological character of the procedure of the categorical imperative. Mead (1967, 381 ff.) argues that Kant’s categorical imperative assumes that there is just one way of acting. What Kant’s principle does is tell you that an act is immoral under certain conditions, but it does not tell you what the moral act is. Discourse ethics do not, however, tell us what the moral act is. Furthermore, they presume, like Kant’s ethics, that there is one way to act: one normative judgment which can guide our actions where we can have an agreement (Verständigung).
187 Jürgen Habermas (1973b, 89).
188 Ibid. (1996a, 312 ff.).
189 According to Jari I. Niemi (2005), Habermas’ transition to social theory implies the contextualization of Kantian reason.
As a resource from which interaction participants support utterances capable of reaching consensus, the lifeworld constitutes an equivalent for what the philosophy of the subject had ascribed to consciousness in general as synthetic accomplishments.  

Habermas traces this philosophy from consciousness, the philosophy of the subject, from Descartes to Kant. But are Kant’s ethics really as monological and is the concept of practical reason really as subject-centered as Habermas believes? In my view, this would be a reading of Kant’s ethics that is not entirely plausible.

Kant and communicative reason

I have suggested that we see discourse ethics as an urge to imagine a situation whereby we participate in a practical discourse wherein we justify our judgment to all concerned. Justification is a matter of accepting the force of the better reason. Discourse ethics are to be regarded in terms of ‘ideal role taking’: we are urged to take the standpoints of others. All this, in my view, is consistent with Kant’s ethics and his view of the common human understanding.

In order to investigate Habermas’ claim that Kant’s ethics are monological, and that discourse ethics, by implication, are dialogical, let us consider an interpretation by Thomas McCarthy of discourse ethics, an interpretation that Habermas has endorsed. McCarthy sees the transition from Kant’s ethics to discourse ethics as the shift away from a solitary, reflecting moral consciousness toward the community of subjects in dialogue. The rationality and universality of action cannot be decided monologically. Habermas’ discourse model represents a procedural reinterpretation of Kant’s categorical imperative:

Rather than ascribing as valid to all others any maxim that I can will to be a universal law, I must submit my maxim to all others for purposes of discursively testing its claim to

190 Jürgen Habermas (1996c: 326). According to Habermas, ‘communicative reason treats almost everything as contingent, even the conditions for the emergence of its own linguistic medium. But for everything that claims validity within linguistically structured forms of life, the structures of possible mutual understanding in language constitute something that cannot be gotten around’ (1992, 139). According to George Snedeker, ‘rejecting postmodernism’s critique of rationality, Habermas argues for a conception of politics and society that reflects both the Enlightenment’s emphasis on reason and the post-modernist critique of the failure of rationalists of power and ideology. Although Habermas has moved closer to Kant’s conception of epistemology and ethics, his aim has been to reformulate the idea of reason in terms of a theory of communicative reason and discourse ethics. Kant’s conception of abstract reason has been replaced by intersubjectivity and rational consensus’ (George Snedeker 2000: 246). In my view, there is a prospect of rational consensus even on basis of Kant’s conception of reason: what I can will to be a universal law is what we can will.

191 Jane Kneller nuances the Habermasian critique of Kant’s ethics. What is needed is an account of autonomy that is not predicated on an isolationist individualism and recognizes the importance of the individual’s being situated within a community of others as an essential part of his or her autonomy. There is, in this respect, some resemblance to Kant’s account of moral subjectivity. Kant would have come to believe that there is more to say about human subjectivity than can be accounted for simply by an individualistic account of ‘pure practical reason’ (1997, 174 ff.)

192 Jürgen Habermas (1996b, 67).
universality. The emphasis shifts from what each can will without contradiction to be a general law, to what all can will in agreement to be a universal norm.\textsuperscript{193}

We have seen, however, that legislating for Kant entails that a person ‘must always take his maxims from the point of view which regards himself, and likewise every other rational being, as a lawgiving being’.\textsuperscript{194} We are not only concerned with what I ought to do but what we ought to do. The relation between what each can will, and ought to do, and what all can will is stressed in Kant’s ethics.

According to Kant, a maxim is a subjective principle of action and contains that practical rule set by reason according to the conditions of the subject; the law in objective principle valid for every rational being and is the principle on which it ought to act.\textsuperscript{195} Calling Kant’s ethics monological would, in my view, be neglecting the fact that the Kantian moral point of view regards ourselves as well as others.

Seen in this light, Kant’s ethics are not merely about what each can will. If, in discourse ethics, the emphasis is on what we can will in agreement to be a universal norm, there are, in my view, stronger Kantian underpinnings of discourse ethics than Habermas and McCarthy admit. Kantian autonomy is not solipsistic: we are autonomous by virtue of the consciousness of the law that applies to every rational being. We are legislators, not of laws merely for ourselves, but of laws for all.

There is, in my view, more evidence that Kant’s practical philosophy is not monological. We have seen that, in the view of Habermas, Kant’s ethics are not only monological but even based upon a subject-centered reason. Let us, in addressing this point, briefly consider the place of practical reason. We have, during the discussion in the former section, seen that reason makes the supreme law the determining ground of choice. Reason is, furthermore, the governor of the will.\textsuperscript{196}

Kant also speaks of the common human reason that goes out of its sphere and takes a step into the field of practical philosophy on practical grounds: this being in order to attain in it information and clear instructions respecting the source of its principle. Practical reason cultivates itself and, in this case, it will find rest nowhere

\textsuperscript{193} Thomas McCarthy (1984: 326).
\textsuperscript{194} Gr 438. Burkhard Tuschling argues that to call Kant’s ethics monological or even solipsistic is a fundamental misunderstanding: to be the author and subject of the categorical imperative is to be sovereign as well as the subject of legislation by and for all rational beings. Kant’s moral philosophy does not lack a ‘social dimension’ nor does it accidently just have certain social implications: it is intrinsically intertwined with a basically social conception of the human being as a member of the totality of rational and free agents, of humankind: ‘The Fürsichsein (beings-for-oneself) of the moral agent is, for all its apparent absoluteness, nothing but a particular mode of being-for-others.’ (1991: 182). According to Kenneth Baynes, discourse ethics abandon Kant’s monological version of the categorical imperative in favor of an intersubjective or communicative version of the principle of universalizability. He admits, nevertheless, that Kant’s categorical imperative - especially the Kingdom-of-ends formulation - has an intersubjective dimension to it already. Kant is only, however, able to equate what one person consistently can will, a rationally will with what everyone could consistently and rationally agree to (1992, 108 ff.). In my view, also the first, main, formulation of the categorical imperative has an intersubjective dimension even though this dimension is more focal in particularly the end-in-themselves formulation (see also note 129).
\textsuperscript{195} Gr 420, n. 3.
\textsuperscript{196} Gr 394.
but in a thorough critical examination of our reason.\textsuperscript{197} Reason represents the commands of duty to the human being as so deserving of respect.

Is practical reason merely subject-centered? In my view, this is not the case. Practical reason does not entail that I, in the loneliness of my soul, test my maxims and ascribe them as valid to others. The procedure of the universalizability of the categorical imperative entails that we adopt the point of view that concerns me as well as others. A maxim is merely subjective, a law concerns all. I do not want to undervalue the role of the Habermasian practical discourse, but I believe that, even in Kant, we are urged to justify ourselves to others in testing whether or not a maxim can become a universal law.

Intersubjectivity is certainly not always explicit in Kant.\textsuperscript{198} It is, in my view, quite salient, in the idea of thinking from the standpoint of others to be found in, among others, the Anthropology. As the second cognitive maxim of thinking, Kant identifies: “To think for oneself (in communication with human beings) into the place of everyone other person.”\textsuperscript{199} This maxim is related to wisdom: the idea of a practical use of reason that conforms perfectly with the law. It is the principle of liberals who adapt to the principles of others.\textsuperscript{200} It seems to me that, in this light, the charge that Kant’s ethics are monological is less plausible, given the emphasis on the maxim in relation to the practical use of reason. Giving oneself the law is not solipsistic but occurs - as I shall argue in the next chapter - in orientation to others.

Kant also writes that we restrain our understanding by the understanding of others, instead of isolating ourselves with our own understanding and judging publicly with our private representations. This is necessary for the correctness of our judgments and the soundness of our understanding.\textsuperscript{201} We are thus no isolated subjects who judge and think from a solitary perspective in the loneliness of our souls. Kant wonders how much and how accurately we would think if we did not think, so to speak, in community with others to whom we communicate our

\textsuperscript{197} Gr 405.

\textsuperscript{198} Thus, Karin Flikschuh (2008, 36 ff.). argues that, in the case of Kant, it is misleading to speak of mere intersubjective validity. The claim that a categorical framework is valid for everyone must be made from outside the framework. It presupposes some additional vantage point from which its general validity is affirmed. A metaphysical interpretation entails ‘valid for all irrespective of the actual assent of each’. I believe, nevertheless, that it makes sense to speak of intersubjectivity in a Kantian manner even though this intersubjectivity presupposes the categorical imperative. It is an intersubjectivity in terms of the giving of and asking for normative reasons.

\textsuperscript{199} A § 59, 228. The maxim can also, in different formulations, be found in the Critique of Judgment, as well as the Jäsche Logic, see chapter 3.

\textsuperscript{200} Kant turns away from the maxims of thinking toward his famous formulation of enlightenment: The most important revolution from within the human being is ‘his exit from his self-incurred immaturity’. Before this revolution, he let others think for him and he merely imitated others. In his essay on enlightenment, Kant argues that for enlightenment - famously defined as having the courage to use one’s own understanding (sapere aude) - all that is needed is freedom: ‘And the freedom in question is the most innocuous form of all - freedom to make public use of one’s reason in all matters’ (AQE, 55). The public use of man’s reason must always be free, and it alone can bring about enlightenment among men. When we use or reason in public, we argue. Kant writes, and defends in view of this, his concept of the public use of reason: ‘I hear on all sides the cry: Don’t argue!’. Elsewhere, he writes that you ought to let your opponent speak only reason, and fight him solely with the weapons of reason (CPR A744/B772).

\textsuperscript{201} A § 53, 219.
thoughts and who communicate their thoughts to us.\textsuperscript{202} We compare our judgments concerning our knowledge with the opinions of others.

According to Kant, the touchstone is that we subject our knowledge to many heads: 'Universal reason, the judgment of all, is the tribunal before which our knowledge has to stand.'\textsuperscript{203} In a passage in the \textit{Critique of Pure Reason}, intersubjectivity is also implicated:

Truth rests upon agreement with the object, with regard to which, consequently, the judgments of every understanding must agree. The touchstone of whether taking something to be true is conviction or mere persuasion is therefore, externally, the possibility of communicating it (\textit{mitzuteilen}) and finding it to be valid for the reason of every human being to take it true; for in that case there is at least a presumption that the ground of agreement of all judgments, regardless of the difference among the subjects, rests on the common ground, namely the object, with which they therefore all agree and through which the truth of the judgment is proved.\textsuperscript{204}

Here, \textit{mitzuteilen} is translated as communicating. Mitteilbarkeit is usually translated as communicability.\textsuperscript{205} In the \textit{Anthropology}, 'In der Mitteilung mit Menschen' is translated as Communication with human beings. We can communicate our thoughts, and let others know our them. In this sense, we have a Kantian germ of a communicative ethics defended by Habermas. Habermas himself, however, reads the quoted passage in relation to his theory of Öffentlichkeit, and not in relation to Kant’s practical philosophy.\textsuperscript{206}

Kant then writes that the very existence of reason depends upon the freedom of critique whose claim is never anything more than the agreement of free citizens.\textsuperscript{207}

Kant’s name for autonomy in the extreme sense is theoretical solipsism, which he

\begin{footnotes}
\footnotetext{202}{OT 247.}
\footnotetext{203}{LE 27:411.}
\footnotetext{204}{CPR A820/B848. Jeff Malpas (2000) interprets this passage such that truth and objectivity are notions that stand in essential relation to intersubjectivity. It is only when we are able to compare our own beliefs and attitudes with those of others that we are able to begin to judge what is true and what is false; for only then, will we have access to any basis on which such judgments can be made.}
\footnotetext{205}{William Klubeck sees this notion as the basis of meaningful political and moral action and thought. The public sense of \textit{sensus communis} (see chapter 3) creates a common community of communicability, it is the discourse of the reasonable: ‘Moral and political thinking requires the commonality of judgment as the basis for the meaningful and reasonable discussion of those legislative and judicial procedures that are vital for the development of the common good….We can speak of a morality of communicability. This is the universal discourse of reason which transcends dialogue, subject, and object and seeks that communicability and universality which negate the particularity of both subject and object and realize each as expressions of universality’ (1986, 266). As we will see, there are problems with an interpretation of communicability in Kant’s aesthetics (from which Klubeck starts out). Communicability implies that you can let others know your thoughts, but Kant denies that this is the case as far as feelings regarding the beautiful are concerned: they are identical.}
\footnotetext{206}{Jürgen Habermas (2008, 108).}
\footnotetext{207}{CPR A738/B766. Allen W. Wood argues that any interpretation of Kant that takes account of his conception of reason as grounded on public communication must display Kantian autonomy as intersubjectively already (1999, 374, n.3).}
\end{footnotes}
regards as the opposite of rational autonomy. It should be noted that, for Kant, the ultimate aim of engaging in an operation of ‘enlarged thought’ is to overcome the subjectivity of the own judgment: ‘An external mark or an external touchstone of truth is the comparison of our own judgments with those of others, because the subjective will not be present in all others in the same way.’

At the same time, this does not imply solipsism as if only my own judgment were to count. In the *Anthropology*, Kant argues that the opposite of moral egoism is pluralism: ‘The way of thinking in which one is not concerned with oneself as the whole world, but rather regards and conducts oneself as a mere citizen of the world.’ This is how we can have a touchstone of the concept of duty, a universally valid principle:

> For it is a subjectively necessary touchstone of the correctness of our judgments generally, and consequently also of the soundness of our understanding, that we also restrain our understanding by the *understanding of others*, instead of isolating ourselves with our own understanding and judging *publicly* with our private representations, so to speak.

If Kant’s ethics are not monological in the sense of Habermas’ criticism, then what is a potential relation between Kant’s ethics and discourse ethics? Albrecht Wellmer has discussed this question. He aims to mediate between Kant’s ethics and discourse ethics. Wellmer points to what he finds to be a problematic substitution of the Kantian categorical imperative with the Habermasian principle of universalization.

Wellmer distinguishes between a ‘dialogic ethics’ and an ‘ethics of dialogue’. By ‘dialogic ethics’ is meant an ethics in which the dialogue principle is substituted for the moral principle. In an ‘ethics of dialogue’, the dialogue principle is one of the derived moral principles. Wellmer argues that it is not possible to move to a dialogic ethics while remaining true to Kant’s thinking. I endorse this argument of Wellmer.

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208 See Allan W. Wood (1999). Wood argues that any interpretation of Kant that takes account of his conception of reason as grounded on public communication must display Kantian autonomy as intersubjectively already (1999, 374, n.3). Onora O’Neill (1989), in light of the Formula of the Kingdoms of Ends, speaks of a possible community of separate, free, and rational beings. Furthermore, she also speaks, in relation to the first formulation of the categorical imperative, of a plurality of agents: the idea of acting on maxims fit to be universal law, which is the core of the Formula of Universal Law, invokes the notion of a plurality of free and rational agents who act only in ways that do not preclude others’ doing likewise.

209 *LL (Jäsche Logic* 57).

210 *A § 2, 130*.

211 *A § 53, 219*.

212 According to Joseph Heath (2001), there is a tendency to draw too close an analogy between the principle of universalization and the categorical imperative. Unlike the categorical imperative, the principle of universalization is never applied to action but only to norms. The principle of universalization is a rule of inference, not a norm. In Kant’s framework, the categorical imperative can serve as a premise from which particular moral obligations can be deduced, contrary to the case of the principle of universalization. According to Habermas, the only permissible premises are statements that indicate how a particular norm affects the interests of the particular persons affected. We can understand Heath’s suggestion that an analogy is perceived between the categorical imperative and the principle of universalization as a criticism of Habermas who discusses the principle of universalization as the continuation of Kant’s categorical imperative.

213 Allbrecht Weller (1991, 142 ff.).
I believe that, if we give up the procedure of the categorical imperative in order to try to universalize our maxims, and go beyond the several formulations of the categorical imperative and the account of duties, then we will have given up Kant’s ethics altogether. I agree with Wellmer that, on the other hand, an ‘ethics of dialogue’ could be based on Kant’s ethics:

In so far as it is possible for individuals to resolve difference in the way they understand themselves and the situations they find themselves in by means of dialogue, and in so far as it is possible for them to achieve a mutual understanding about their respective needs and values, then the Kantian ethic also demands that this should be done.\(^{214}\)

Wellmer speaks of a ‘communicative substructure’ of Kant’s ethics, even though Kant would have trivialized this, nevertheless. Wellmer argues, however, that the presumed monological character of the categorical imperative is not such a serious problem as Apel and Habermas suggest. Since, as we have already seen, if I am unable to will that a way of acting should become a universal rule, then we cannot will it. We have seen that in Kant’s ethics, the singular is simultaneously the plural.

Still, in my view, discourse ethics matter to an ‘ethics of dialogue’. The categorical imperative and Habermas’ principle of discourse - at least if we do not regard it as the reformulation of the categorical imperative - could be a fruitful combination. In my view, it is particularly the principle of universalization which, in Habermas’ discourse, takes the place of the categorical imperative and is, consequently, problematic.

In the context of our inquiry, the question is how we can justify ourselves for our judgments. The concept of normative reasons is relevant in this sense. Both Kant’s ethics and Habermas’ discourse urge us to justify ourselves for what Wellmer calls our ‘ways of action’. We justify ourselves towards others. If we have reflected upon normative reasons in a formal sense, on the basis of Kant’s ethics, then we may well be able to imagine ourselves in the situation where we are participants in a practical discourse wherein we have to justify our judgment to all those concerned.

### 2.3 The unforced force of normative reasons

In the last part of this chapter, I address the question of how normative reasons can play a role in an ‘ethics of dialogue’. I shall discuss Habermas’ own concept of ‘good reasons’ and argue that the concept of normative reasons can play a role in relation to the idea of a practical discourse.

Habermas endorses the ideal of a cooperative competition for the better argument, an ideal that I defend. He argues that there is a need for reason: universally and publicly cogent reasons.\(^{215}\) Normative content has to be acquired

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215 Jürgen Habermas (2005c, 238).
and justified from the rational potential that is inherent in everyday practice.\textsuperscript{216} A communicatively achieved agreement must be based, in the end, on reasons.\textsuperscript{217} In practical discourse, reasons or grounds are meant to show that a norm recommended for acceptance expresses a generalizable interest.

But what is it that makes a reason a good one which can, in the end, be accepted as the better reason? Habermas asks how problematic validity claims can be supported by good reasons.\textsuperscript{218} How can reasons be criticized in turn? What makes some arguments, and thus some reasons which are related to validity claims in a certain way, stronger or weaker than other arguments?

Habermas distinguishes, to this end, three properties of argumentative speech.\textsuperscript{219} Firstly, participants have to presuppose that the structure of their communication excludes all force except the force of the better argument. Secondly, the discursive process of reaching understanding is normatively regulated in such a way that participants: 1) thematize a problematic validity claim and 2), relieved of the pressure of action and experience, in a hypothetical attitude, 3) test using reasons, and only reasons, whether or not the claim defended by the proponents rightfully stands or not. Thirdly, argumentation has to produce cogent arguments that are convincing by means of their intrinsic properties.

In my view, Habermas’ account of good reasons is not, however, sufficiently based upon an articulation of what aspects a reason must have in order to be a good reason. It elucidates the basic intuitions of discourse ethics with its emphasis on the force of the better reason. But what are the intrinsic properties of cogent reasons that Habermas speaks of? In this respect, Habermas begs the question, in my view.

It is in this sense that the Kantian account of normative reasons endorsed in this chapter can contribute towards discourse ethics that cherish the unforced force of the better argument. We can test whether or not a reason is a good one on the basis of the three aspects of prescriptivity, universality, and internalism. In my view, the idea of a practical discourse is, in turn, relevant to the discussion on normative reasons. I have already indicated that, as far as a practical discourse is concerned, we imagine ourselves in a situation where we have to justify ourselves to all affected. In articulating normative reasons, we justify our judgings to others.

I suggest that we think of our normative reasons in terms of whether or not they could be endorsed by others. We have seen that, in the view of Habermas, ‘only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as \textit{participants in a practical discourse}.’\textsuperscript{220}

Habermas has given a cogent formulation of the ambition of a practical discourse enabling communicative rationalization:

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\textsuperscript{216} Ibid. (1996\textsuperscript{a}, 341.
\textsuperscript{217} Ibid. (2005\textsuperscript{a}, 17 ff.).
\textsuperscript{218} Ibid. (2005\textsuperscript{a}, 24 ff.).
\textsuperscript{219} Ibid. (2005\textsuperscript{a}, 24 ff.).
\textsuperscript{220} Ibid. (1996\textsuperscript{a}, 66.)
Public, unrestricted discussion, free from domination (*herrschaftsfrei*), of the suitability and desirability of action-orienting principles and norms in the light of the socio-cultural repercussions of developing subsystems of political and repoliticized decision-making processes is the only medium in which anything like ‘rationalization’ is possible.\(^{221}\)

Practical discourse is related to impartiality of judgment. According to Habermas, when engaging in moral reflection, we adopt a moral point of view which permits the impartial treatment of questions of justice. Habermas understands the moral point of view as the standpoint from which moral questions can be judged impartially. It is practical discourse that is the form of communication securing the impartiality of moral judgment.\(^{222}\) While the first condition of ethico-political judgment, the giving of and asking for normative reasons, is, in my view, a valuable addition to discourse ethics, we see that the second condition, aiming at impartiality of judgment, which I shall develop in the next chapter, is implicitly endorsed here by Habermas.

What is the point of a practical discourse? According to Habermas, when we engage in practical discourse, consensus is implied by the mere presuppositions of language. Habermas distinguishes a communicatively achieved agreement from a *de facto* accord (Übereinstimmung). Processes of reaching understanding (*Verständigung*) entail an agreement that meets the conditions of rationally motivated assent (*Zustimmung*) to the content of an utterance.\(^{223}\) A communicatively achieved agreement has a rational basis – here, the force of the better reason applies. Insofar as norms express generalizable interests, they are based on a rational consensus. I shall defend the view that not only does consensus matter to public deliberation but also compromise or mutual respect, living with dissensus. Still, *Verständigung* is desirable and, in this sense, I agree with Habermas.

According to Habermas, moral disputes can be resolved on the basis of reasons. In his earlier work, Habermas has highlighted the role of a ‘communicative rationality’, related to what he later calls communicative reason. Communicative rationality, and practical discourse, entail discursively justified norms bringing to expression what is equally in the interests of all and a general will that has absorbed the will of all.\(^{224}\) There would be a prospect of consensus if practical discourse could take place:\(^{225}\)

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\(^{221}\) Ibid. (1971b: 118)

\(^{222}\) Ibid. (2001, 50). According to Habermas (1973\(^{a}\)), discourse is a form of communication that is characterized by argumentation in which problematic claims to validity can be thematized and their justification can be examined. Action is a sphere of communication in which we presuppose and recognize implicit claims of validity in utterances in order to exchange information. According to Martin Matustik (1989), communicative ethics is an ideal that is operative in all uses of language. The recovery of ethical life under the figure of undistorted communication points toward an anamnetic practice of the self-corrective process of learning. The learning process makes explicit the normative criteria which are discovered and justified within the same context of discursive rationality.

\(^{223}\) Jürgen Habermas (2005\(^{a}\), 287).

\(^{224}\) Ibid. (2001, 13).

\(^{225}\) Ibid. (1973\(^{b}\), 111).
The concept of communicative rationality carries with it connotations based ultimately on the central experience of the unconstrained, unifying, consensus-bringing force of argumentative speech, in which different participants overcome their merely subjective views and owing to the mutuality ofrationally motivated conviction, assure themselves of both the unity of the objective world and the intersubjectivity of their lifeworld.226

According to Habermas, valid statements must admit to justification by appealing to reasons that could convince anyone irrespective of time or place. In rational discourse, the speaker seeks to convince his audience through the force of the better argument; this is what Habermas calls a dialogical situation. Anyone who seriously engages in argumentation must indeed presuppose that the conditions of the ‘ideal speech situation’ being alluded to are sufficiently realized. For Habermas, practical discourses are open, communicative practices in which the participants seek to reach Verständigung, mutual understanding, regarding the truth of a proposition or the validity of an action norm227.

The better argument, in my view, is, by implication, a normative reason. Only when a reason applies to all, when it is prescriptive and motivates us to act if we judge it to be right, can it be said to justify judgments of right that can be dialogically justified. For Habermas, this means that we try to support a claim with good grounds or reasons; the quality of the reasons and their relevance can be called into question by the other side; we encounter objections and are, in some cases, forced to modify our original position. 228 Given the important role of reasons in discourse ethics, my account of normative reasons is indispensable, in my view, when it comes to thinking about practical discourse.

Thus, according to Habermas, we can understand reasons only to the extent that they are sound or not - an interpreter has to take a position on them while applying his own standards of judgment, as well as standards he has made his own.229 To say

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226 Ibid. (2005a, 10).
227 Ibid. (1996a). Is Verständigung a realistic ideal? Let me in this respect discuss Habermas’ principle of discourse ethics in relation to the abortion question. Habermas himself asks whether there is a single correct answer to the abortion question. Both sides of the dispute appear, following Habermas, to have good arguments. Whereas in the long-run, we should aim to decide this question, since it is a moral one, on the basis of good reasons, Habermas admits that the abortion question may not be resolved at all. However, in the view of Habermas, the abortion question must be formulated differently in ethical terms. It then follows that ‘the moral question arises at the more general level of the legitimate ordering of coexisting forms of life. Then, the question would be how the integrity and coexistence of the ways of life and worldviews that generate different ethical conceptions of abortion can be secured under conditions of equal rights.’ (1991: 60). We see that Habermas suggests a solution for the abortion controversy in terms of his principle of universalization which, in his view, acts like a knife that cuts sharply between the good and the right. Whereas diverging opinions on abortion stem from ways of life, we could understand the contrast between the good and the right in terms of the principle of the sanctity of life - clearly a religious principle - on the one hand, and an appeal to autonomy in terms of equal rights on the other. We can conclude that the principle of discourse ethics demands a lot from those who oppose abortion on the basis of religious views - it requires that they accept the force of the better argument in a practical discourse where participants are to agree on the right. The question is thus whether the opponents, and proponents, are willing to engage in a practical discourse. Still, there may be questions that are less notorious than the abortion question characterized by irreconcilable disagreement.
228 Jürgen Habermas (2005a, 31).
229 Ibid. (2005a, 116).
that I ought to do something means that I have good reasons for doing it.230 The social currency of a norm depends on its being accepted as valid in the group to which it is addressed and as long as this recognition is based on the expectation that the corresponding claim to validity can be redeemed with reasons.231

Moral utterances are, furthermore, made against a background of potential reasons from which we can draw in moral disputes: ‘To the moral language game belong disagreements that can be resolved convincingly from the perspective of participants on the basis of potential justifications that are equally accessible to all.’232

Habermas argues, in my view convincingly, that members of post-traditional societies must appeal to reasons to justify problematic norms: in the Kantian tradition, it is emphasized that a moral point of view is justified from which norms themselves can be judged in an impartial fashion. Only reasons that give equal weight to the interests and evaluative orientation of everybody can influence the outcome of practical discourses: nothing but reason can tip the balance in favor of the acceptance of a controversial norm.233

But how should we distinguish between evaluative and normative statements? According to Habermas, we ought to perceive the lived world of the communicative practice of everyday life from an artificial, retrospective point of view. At this ‘post-conventional’ stage of moral consciousness, moral judgment becomes dissociated from local conventions and the historical coloration of a particular form of life. Moral judgment can no longer appeal to the naïve validity of the context of the lifeworld:

Arguments by their very nature point beyond particular individual lifeworlds, in their pragmatic presuppositions, the normative content of presuppositions of communicative action is generalized, abstracted and enlarged.234

To become effective in practice, every universalistic morality has to make up for this loss of concrete ethical substance. Post-conventional morality provides no more than a procedure for impartially judging disputed questions: it cannot pick out a catalog of duties, as is the case with Kant, but expects subjects to form their own judgments.235 Communicatively acting subjects find themselves within the context of a lifeworld that makes their communicative actions possible.236

Habermas’ distinction between evaluative and normative statements is in line with what I call critical morality as the reflective consciousness of the right and the good and lifeworld morality as valuations, values, and norms. We cannot simply take moral commands for granted when they originate in the lifeworld: we have to reflect

230 Ibid. (1996b, 49).
231 Ibid. (1996b, 62).
235 Ibid. (1996a, 114).
236 Ibid. (2001, 142).
critically upon them. It is only at the level of the critical morality that we can become conscious of the moral law. However, without the moral experience of the lifeworld, we are unable to reflect upon right conduct, and the good. We do not start from scratch but reflect upon our own moral experience and the experience of others. We have to generalize, however, our experiences when developing normative reasons with which we can justify our judgments.

Justifying judgments, in terms of normative reasons, has been the topic of this chapter. I have argued that a Kantian account of normative reasons is indispensable with regard to the idea of a practical discourse. Practical discourse entails that we imagine an open communicative practice aimed at Verständigung and take a hypothetical argumentative stance. In this sense, Kant's ethics can be defended against the charge that the categorical imperative is monological. In a practical discourse, we adopt a point of view from which we legislate the law that applies to me as well as others. While Habermas’ principle of discourse is well reconcilable with Kant’ ethics, this is not the case with the principle of universalization. We do not need to throw out the baby with the bathwater, however, if we are interested in a Kantian ‘ethics of dialogue’ on the basis of Kant’s ethics and Habermas’ discourse ethics.

Epilogue

I started this chapter with the argument against cloning. How can we assess whether or not the argument that human reproductive cloning entails instrumentalization is a good reason? I shall suggest some relevant questions in order to determine whether or not the argument is a normative reason. The main question is whether or not cloning entails treating someone - the future child - merely as a means for our aspirations. Given their emphasis on instrumentalization in relation to human dignity, we can assume that those who defend the argument implicitly refer to Kant.237

Kant is not, however, a Geist der stets verneint. The Kantian credo of sapere aude - dare to know - does not thus, in the view of opponents of cloning, always apply to moral questions raised by biomedicine.238 Let me suggest in which direction an assessment of the argument of cloning could be developed. If cloning is against human dignity, this would entail that we ought to ban it (the prescriptive aspect). Furthermore, the argument may apply to all rational beings as treating someone

237 The argument of instrumentalization is used by Habermas in the context of the embryo debate: ‘In the perspective of the self-instrumentalization and self-optimization to which humanity is about to subject the biological foundations of its existence, both PGD and stem cell research become part of the same context’ (2003: 20). Society seems to accept the instrumentalization of humanity’s inner nature, which can be justified medically by the prospect of better health and a prolonged lifespan. According to Erik Malmqvist, instrumentalization lies neither in the failure to respect the decision-making of another rational agent nor in the destruction of an autonomous capacity, but in the absence of responsiveness to the claims of another end in itself (Malmqvist 2007: 413).

238 Thus, Martin Gunderson (2007) discusses a Kantian argument for human genetic engineering.
merely as a means, and not additionally as an end in itself, and could, in this respect, be said to be universal. We have a duty to treat others not merely as means and we are accordingly motivated - this gives us an internal reason.

I suggested that we - due to their aspects - can share our normative reasons in a practical discourse. Is this realistic in the context of societies divided by bioethical questions? This will be the topic of chapter 4, where I discuss the prospect of the Kantian, deliberative, concept of ethico-political judgment. In this chapter, the first condition, giving and asking for normative reasons, has been elaborated upon. In the next chapter, the second condition, aimed at impartiality of judgment, will be considered.
CHAPTER 3

The capacity to judge

Hannah Arendt has made a highly original interpretation of the first part of Kant’s *Critique of Judgment*. She argues that there are moral and political implications in this *Critique*. I shall discuss this interpretation in this chapter but relate it, against the spirit of Arendt’s interpretation, to Kant’s practical philosophy.

For our inquiry, the idea of ‘enlarged thought’ in § 40 of the *Critique* is particularly relevant. I suggest that, besides giving and asking for normative reasons, aiming at impartiality of judgment, as the second condition of ethico-political judgment, can be related to this idea. Impartiality of judgment entails that we reflect upon our own judgment from a universal standpoint. In adopting this standpoint, we aim to be impartial with regard to the judgments of others and our own judgment. We encounter the other as an other and try to think from his or her standpoint.

In the first part of the chapter, I shall concern myself with Arendt’s interpretation of Kant’s account of aesthetic judgment. In her account, not only is the idea of ‘enlarged thought’ important, but also the idea of *sensus communis*. I endorse Arendt’s emphasis on the moral and political relevance of these ideas. I suggest, however, that we disentangle these ideas - at least as far as *sensus communis logicus* is concerned - from the Kantian account of aesthetic judgment, given the difficulties that beset an interpretation of the judgment of taste, this being in regard to the so-called communicability of judgments of taste, the realm of judging subjects, and the indeterminacy of the judgment of taste beyond aesthetics. I shall discuss, notwithstanding this, Arendt’s interpretation of Kantian aesthetics in order to discuss the context of her interpretation of the above-mentioned ideas (which are sometimes related to the account of the judgment of taste).

I shall suggest, in the second part of this chapter, an interpretation of *sensus communis* as a common ground of judgment. Furthermore, I shall also discuss ‘enlarged thought’ in relation to Kant’s practical philosophy. While many have observed the fact that Arendt departs from Kant, not much effort has been undertaken to interpret *sensus communis* and ‘enlarged thought’ in relation to the practical philosophy. That may very well, in my view, be possible. It entails, however, that the faculty of judgment is important but that it does not have the role of solely discriminating between right and wrong, as Arendt suggests.

3.1 Arendt on the power of judgment

Not only has Hannah Arendt suggested that we may turn to the third *Critique* in order to obtain an account of political judgment - this account can be found in *Lectures on Kant’s Political Philosophy* and *Between Past and Future* - but also of moral
judgment. I shall discuss Arendt’s, rudimentary suggestions with regard to the role of judgment in ethics. These can be found, among others, in the ‘Some questions on moral philosophy’ lectures.

**Telling right from wrong**

In these lectures, Arendt argues that moral issues concern individual conduct and behavior, the few rules and standards according to which men used to tell right from wrong, and which were invoked to judge or justify both others and themselves. Their validity was supposed to be self-evident to every sane person, either as a part of divine or natural law. In this respect, she refers to Kant:

> Whatever the source of moral knowledge might - divine commandments of human reason - every sane man, it was assumed, carried with himself a voice that tells him what is right and what wrong, and this regardless of the law of the land and regardless of the voices of his fellowmen [...] Kant believed that he had articulated the formula which the human mind applies whenever it has to tell right from wrong.

Contrary to Kant, however, the faculty of judgment for Arendt is the true arbiter between right and wrong, beautiful and ugly, true and untrue. In her lectures, Arendt is interested in the question of how we tell right from wrong but she finds it curious that Kant approached this problem using the question of how do I tell beautiful from ugly. Arendt contends that Kant expounds two political philosophies, the *Critique of Practical Reason* and the *Critique of Judgment*. According to Kant, in the view of Arendt, the theme of judgment carried more weight than did that of practical reason.

But did Kant really approach the question of judgment in this way? This can, I contend, be questioned. In my view, what Arendt does in this respect is a *Hineininterpretierung* of Kant. Arendt departs, namely, in her account of judgment as an arbiter, from Kant since he believed that no problem of judgment existed from truth and right. Arendt herself admits this. Human reason, in its theoretical capacity, knows truth by itself; the same reason knows, in its practical capacity, ‘the moral law within me’.

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241 Ibid. (2003, 137 ff.). According to Arendt, the faculty of judging particulars, the ability to say ‘this is wrong’, ‘this is beautiful’ is not the same as the faculty of thinking. Thinking deals with invisibles, with representations of things that are absent; judging always concerns particulars and things close at hand. (1981, 193).
243 According to Elisabeth Young-Bruehl (1994), in Kant’s view, the faculty of judgment was not the faculty that considers right and wrong, this was the province of practical reason or the will. What Arendt did in her lectures, and presumably would have done at length in ‘Judging’, was to consider how we experience the solidarity of mankind through the activity of judging.
Indeed, it has been argued that a normative foundation for Arendt’s political theory, one of the main concerns of Arendt, rather than moral philosophy, is lacking.\textsuperscript{244} I shall, in the next section, relate the faculty of judgment to Kant’s practical philosophy. Arendt was, in my view, right in ‘discovering’ the faculty of judgment in Kant, but this faculty does not have the pivotal place in ethics that Arendt suggests.

In her lectures, Arendt concerned herself with a theme that she also discusses, to a greater extent, in her work on political judgment, namely common sense. Common sense is closely related to the crisis of judgment. Arendt’s point of departure in all her work is the crisis of the modern world.\textsuperscript{245} Arendt believes that we are confronted with a total collapse of moral and religious standards in people who had always firmly believed in these in the catastrophic 20\textsuperscript{th} century.

Arendt thus claims, theoretically speaking, that we find ourselves today in the same situation which the eighteenth century found itself in with respect to mere judgments or taste. According to Arendt, Kant was outraged that the question of beauty should be decided arbitrarily, without any possibility of dispute and mutual agreement (\textit{de gustus non disputandum est}). The concept offering a solution to this situation is common sense, which Arendt interprets as the very ground from which judgment springs.

This interpretation of common sense, the Kantian \textit{sensus communis}, seems to me to be adequate and I shall develop it. I believe, however, that we would do better to speak of the \textit{sensus communis logicus} in the case of morality than the \textit{sensus communis aesthetics} to which Arendt is referring here. In what follows, I shall doubt whether questions of aesthetic judgment can be treated in the same manner as questions of moral and political judgment. Together with the \textit{sensus communis}, the notion of ‘enlarged thought’ - thinking from the standpoint of others - plays a crucial role in Arendt’s interpretation of the third \textit{Critique} and in the reception of her interpretation.

It can be argued that these ideas play a rather detached role in the ‘Critique of Aesthetic Judgment’, the first part of the \textit{Critique of Judgment}. This prevents them, in my view, from being prone to the difficulties that beset an interpretation of the \textit{Critique} beyond aesthetic judgment.

\textsuperscript{244} Seyla Benhabib (1996) discusses Arendt’s skepticism, that moral beliefs and principles would ever be able to restrain or control politics in the twentieth century, and gives it direction compatible with human rights and dignity. This would lead to a normative lacune in her thought.

\textsuperscript{245} Frank Hermenau (1999, 15 ff.). Arendt (1953) often speaks of a crisis of judgment. She asks whether or not the task of understanding has become hopeless if it is true that we are confronted by something which has destroyed our categories of thought and standards of judgment. Is not understanding so closely related to and interrelated with judging that one has to describe both as the subsumption which, according to Kant, is the very definition of judgment?
In her Lectures on Kant’s political philosophy, Arendt has set out her interpretation of the third Critique as Kant’s hidden political philosophy. We have already encountered Arendt’s suggestion that judging entails telling right from wrong, beautiful from ugly. She does, indeed, depart from Kant, for whom the faculty of judgment has a less prominent place in his practical philosophy. Kant would have discovered, in his third Critique, an entirely new human faculty, namely judgment; but according to Arendt, he withdrew moral propositions from the competence of this new faculty.

We have already seen that the question of right and wrong for Kant is to be decided neither by taste nor judgment, but by reason alone. It is, in the view of Arendt, surprising that common sense and the faculty of judgment - of discriminating between right and wrong - should be based on the sense of taste. Let us briefly turn to Kant’s account of taste.

Kant considers taste to be the faculty of estimating an object by means of delight, apart from any interest. The object of such delight is called beautiful. Where anyone is conscious that his delight in an object is, for him, independent of interest, it is inevitable that he should look upon the object as one containing a ground of delight for all men. It is this passage that is able to illuminate Arendt’s appropriation of disinterestedness: delight is independent of interest. Indeed,

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246 Hannah Arendt (1982, 10).

247 ‘Taste is the faculty of estimating [Beurteilungsvermögen] an object or a mode of representation by means of a delight [Wohlgefallen] or aversion apart from any interest. The object of such delight is called beautiful.’ (CJ § 5).

In § 8, Kant distinguishes between the taste of sense and the taste of reflection. The first lays down merely private judgments, the second lays down judgments of general validity. General validity means the validity of the reference of a representation, not to the cognitive faculties, but to the feeling of pleasure or displeasure for every subject. The judgment of taste itself does not postulate the agreement of everyone - this is only possible in the case of a logically universal judgment - but attributes this agreement to everyone: ‘We are suitors for agreement from everyone else, because we are fortified with a ground common to all.’ (§ 19). In his pre-critical Observations of the Beautiful and the Sublime, the beautiful is connected to a feeling which we are conscious of: ‘True virtue can be grafted only upon principles such that the more general they are, the more sublime and noble it becomes. These principles are not speculative rules, but the consciousness of a feeling that lives in every human breast and extends itself much further than over the particular grounds of compassion and complaisance. I believe that I sum it all up when I say that it is the feeling of the beauty and the dignity of human nature (OBS 60).

248 Kant speaks of a delight for all men (CJ § 6). Where anyone is conscious that his delight in an object is, for him, independent of interest, it is inevitable that he should look on the object as one containing a ground of delight for all men. The person who judges cannot find personal conditions as a reason for his delight. According to Kant, he must regard it as resting on what he may also presuppose in every other person; and thus he must believe that he has reason for demanding a similar delight from everyone. Accordingly, he will speak of the beautiful as if beauty were a quality of the object and of the judgment as logical (forming a cognition of the object by concepts of it); although it is only aesthetic, and contains merely a reference of the representation of the object to the subject; because it still bears this resemblance to the logical judgment, that is it may be presupposed to be valid for all men. However, this universality cannot spring from concepts, for, from concepts, there is no transition to the feeling of pleasure or displeasure. The universality of the judgment of taste, which has no concepts, is, for Kant, the ‘finality in the representation of an object, exclusive of any end (objective or subjective) - consequently the bare form of finality in the representation whereby an object is given to us, so far as we are conscious of it - as that which is alone capable of constituting the delight which, apart from any concept, we judge as universally communicable, and so of forming the determining ground of the judgment of taste.’ (CJ § 11).
disinterestedness and impartiality are related in the account of Arendt, a relation that is not wholly unproblematic.

How, then, is mutual agreement possible, and can we confront mere subjectivity in the realm of taste? Kant contends that the person who judges cannot find personal conditions as a reason for his delight. Rather, he must regard it as resting on that which he may also presuppose in every other person; and thus he must believe that he has reason for demanding a similar delight from everyone. Accordingly, he will speak of the beautiful as if beauty were a quality of the object.249

As far as the judgment of taste is concerned, de gustus non disputandum est does not apply. Although it is only aesthetic, the judgment of taste bears, namely, some resemblance to the logical judgment: it may be presupposed to be valid for all men. The universality of the judgment of taste is capable of constituting the delight which, apart from any concept, we judge as universally communicable. It is this concept that Arendt appropriates for her account of political judgment. We have to be aware, however, that communicability does not mean for Kant that we can communicate our feelings.

Communicability in German is Mittteilbarkeit, which would wrongly suggest that one individual would be capable of letting another know precisely what his or her state of mind is.250 Rather, Kant would be of the opinion that the feelings of the two people are identical in character. We cannot describe them accurately since, in this case, objective concepts would then be required.251 According to Kant, the specific quality of sensation may be communicable to others provided that everyone has a similar sense to our own.252

According to Arendt, then, communicability is the condition sine qua non of the existence of the beautiful. The judgment of the spectator who can ‘communicate’, rather than the actor, creates the space without which no such objects could appear. The spectator operates in the public realm. Arendt is aware, nevertheless, of the problem of interpreting communicability in a political sense. She departs from Kant from whom judgments of taste are communicable in the special sense we have seen.253

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249 What does it mean to assert beauty rather than express liking, asks Jennifer Nedelsky (2001). I find her account illuminating. To assert beauty is to make a claim of agreement upon other judging subjects. We claim that a picture is beautiful, instead of just saying ‘I like it’, we make a subjective judgment. We are saying that others who bring their judgment to bear on the picture will also find it beautiful, if they are truly, autonomously judging. According to Kant, a person who describes something as beautiful insists that everyone ought to give the object in question his approval and describes it as beautiful.


251 Paul Ricoeur (2000) argues that the condition of plurality offers an evident kinship with the requirement of communicability implied by the judgment of taste. According to Ricoeur, not only does this concept stemming from the third Critique receive a decisive clarification from its use within the framework of political judgment, it also offers, in return, the means of politically reinterpreting the judgment of taste. This is puzzling in view of the fact that communicability presupposes two identical feelings. If I say ‘This rose is beautiful’, I demand a similar delight from all the judging subjects. I already presuppose a similar feeling.

252 CJ § 39.

253 Pablo Gilabert criticizes Arendt for her interpretation of communicability. Gilabert argues that, for Kant, the sensus communis, as the basis of pure judgments of taste, is the transcendental structure of human beings’ cognitive powers. ‘Putting oneself in the place of everyone else’ does not mean engaging in an
According to Arendt, the disturbing thing about matters of taste is, namely, that they are not communicable.\textsuperscript{254} She seems to mean communicability in the sense of communicability of thoughts: she makes this observation in relation to critical thinking. In any case, the solution which Arendt sees is imagination and, as we already have seen, common sense.\textsuperscript{255} Here, however, Arendt regards common sense not as the ground from which judgment springs but as community sense.

Given the observation that matters of taste are not communicable, Arendt turns to the notion of genius. According to Kant, the task of the genius is, namely, to make a state of mind ‘generally communicable’. Without the help of genius, we would not be able to communicate with one another since in taste representations arise in all of us but for which we have nor words.\textsuperscript{256} We could, in my view, regard the genius as Arendt’s judging ‘spectator’ even though the spectator does not have the originality of the genius but still has the faculty of judgment in common. The spectator, not the actor, holds the clue to the meaning of human affairs.

Spectators exist in the plural:\textsuperscript{257} ‘Life…is like a festival; just as some come to the festival to compete, some to ply their trade, but the best people come as spectators, so in life the slavish men go hunting for fame or gain, the philosophers for truth.’\textsuperscript{258} The spectator’s verdict, while impartial and freed from the interests of gain or fame, is not independent of the views of others - on the contrary, an ‘enlarged mentality’ has to take them into account.\textsuperscript{259} According to Arendt, the public realm is even constituted by the critics and the spectators.\textsuperscript{260}

Notwithstanding the emphasis on the role of the spectator in constituting the public sphere, Arendt has highlighted the role of the actor in orienting him- or herself to such a realm in judging. Arendt speaks, in this respect, of a ‘company of operation of linguistically exchanging authentic role-taking, for there can be no difference to discover: ‘The ‘universal communicability’ of valid judgments of taste has nothing to do with actual communication, but rather with transcendental (always already presupposed) agreement’ Gilabert (2006: 218). In my view, Gilabert is right when he rejects a non-aesthetic reading of communicability. We already presuppose similar delight in others. In my view, he is wrong when suggesting that the ‘enlarged mentality’, thinking from the standpoint of others, presupposes the communicability of feelings. The enlarged mentality presupposes an anticipated agreement rather than an always already-presupposed agreement, as is the case with judgments of taste. \textit{Sensus communis} is not merely \textit{sensus communis aestheticas}, rather we should speak of a common sense for exercising the reflective judgment of taste. This means that Arendt’s emphasis on ‘putting oneself in the place of everyone else’, in a non-aesthetic sense, may be warranted. I defend this.

\textsuperscript{254} Hannah Arendt (1982, 66).
\textsuperscript{255} According to Kant, imagination is the faculty for representing an object even without its presence in intuition. Since all of our intuitions are sensible, the imagination, on account of the subjective condition under which it alone can give a corresponding intuition to the concepts of understanding, belongs to sensibility (CPR: B151). Arendt appropriates Kant’s concept of imagination as the sense of thinking about what is absent. She also speaks, in this respect, about judgment as ‘the imagination going visiting’. Judgment and judgments of taste always reflect upon others and their taste, taking their possible judgments into account: this is necessary because I am human and cannot live outside the company of men: without a sense of community, we could add, following Arendt’s interpretation of \textit{sensus communis}.

\textsuperscript{256} Hannah Arendt (1982, 63).
\textsuperscript{257} Ibid. (1981, 96).
\textsuperscript{258} Ibid. (1982, 56).
\textsuperscript{259} Ibid. (1981, 94).
\textsuperscript{260} Ibid. (1982).
men. According to her, judgment always reflects upon others and their taste, taking their possible judgments into account: 'This is necessary because I am human and cannot live outside the company of men.' In the view of Arendt, judgment may be one of the fundamental abilities of man as a political being since it enables him to orient himself in the public realm, in the common world: 'Judging is one, if not the most, important activity in which [the] sharing-the-world-with-others comes to pass.' I shall discuss the account of the judge as a spectator and actor later on. Here, I shall concentrate on the relation of the judge of the beautiful with the public realm.

According to Arendt, namely, the exercising of judgment may be one way for a man to orient himself in the common world or the public realm. It is not uncontroversial to interpret Kant’s judgment of taste in this way. In § 8, Kant speaks of the extension of the predicate of beauty over the whole sphere of judging Subjects. In this respect, we also have to consider § 31 in which Kant explicitly emphasizes the autonomy of the judging subject: ‘universal validity is not to be based on a collection of votes and interrogation of others as to what sort of sensations they experience, but is to rest, as it were, upon an autonomy of the Subject passing judgment on the feeling of pleasure (in the given representation), i.e. upon his own taste’.

According to Jean-François Lyotard, § 31 should be enough to discourage all sociologizing and anthropologizing of aesthetic common sense. This is because,
Judgment and knowledge

Judgments of taste have, namely, no determinate concept. This means that they are not cognitive, contrary to moral judgments. The distinction between judgments with determinate and indeterminate concepts is of importance to gain an understanding of Arendt’s account of political judgment. Here too, she departs from Kant by modeling her account on the judgment of taste. I shall discuss Kant’s distinction between judgment with and without a concept after having discussed Arendt’s defense of indeterminate judgments for her account.

According to Arendt, judgments of taste have in common with political opinions the fact that they are persuasive: the judging person can only ‘woo the consent of everyone else’, or exact the agreement of everyone else, in the hope of coming to an agreement with him eventually. Arendt refers here to § 19 of the Critique: ‘The judgment of taste exacts agreement from everyone; and a person who describes something as beautiful insists that everyone ought to give the object in question his approval and follow suit in describing it as beautiful.’

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268 Jean-François Lyotard (1994).
269 Kant repeatedly claims that judgments of taste have no concept. In the antinomy in the third Critique (see note 280), it becomes clear, however, that these judgments have a concept but are not determinate. Therefore, I speak of judgments of taste having no determinate concept.
270 Miles Rind argues that any judgment that is ‘public’ in its claim, or made ‘for everyone’, be it a judgment of taste or a properly objective judgment of cognition, is made with an implicit demand for universal agreement (Rind 2000). In my view, we should distinguish, in this respect, the judgment of taste from a judgment of cognition. Communicability has, as we have seen, a role to play in aesthetic judgment, but universal agreement, in this respect, means something different than in the case of the judgment of cognition where there is a determinate concept.
271 CJ § 19: ‘Das Geschecksurteil sinnet jederman Beistummung an; und, wer etwas für schön erklärt, will, daß jedermann dem vorliegenden Gegenstande Beifall geben und ihn gleichfalls für schön erklären sollte’ (Kru § 19).
speech corresponds to the kind of speech that was regarded by the Greeks as a typical political form of people talking with one another.

For Arendt, persuasion is the opposite of the philosophical way of speaking which is concerned with knowledge and finding truth.272 Culture and politics belong together since knowledge and truth are not at stake, but judgment and decision: “The judicious exchange of opinion about the sphere of public life and the common world, and the decision what manner of action is to be taken in it.”273 Doxa not only means opinion but also splendor and fame. As such, it is related to the political realm, which is the public sphere in which everybody can appear and show who he is. To assert one’s own opinion belonged to being able to show oneself, to be seen and heard by others.

Arendt’s separation of opinion and knowledge has been criticized. She would have an antiquated concept of knowledge in distinguishing between knowledge and truth, on the one hand, and judgment and decision, on the other.274 It could be argued that politics is the domain of mere opinion. For Kant, however, the law, and hence knowledge since we can speak of right and wrong, has a place in politics.275

If the interpretation of normative reasons derived from this law is plausible, then Kant’s practical philosophy matters to politics in the sense of the urge to justify judgments.276 This is particularly the case when we are confronted with moral

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272 Arendt (1990) distinguishes between persuasion and dialectic: the former always addresses a multitude whereas dialectic is possible only as a dialogue between two persons.
274 According to Jürgen Habermas, ‘Arendt sees a yawning abyss between knowledge and opinion that cannot be closed with argument. She holds fast to the classical distinction between theory and practice; practice rests on opinions and convictions that cannot be true or false in the strict sense. An antiquated concept of theoretical knowledge that is based upon ultimate insights and certainties keeps Arendt from comprehending the process of reaching agreement about practical questions as rational discourse’ (1977: 22). According to Margaret Canovan (1983), Habermas regards the questions of opinion and judgment not merely as philosophical questions but as practical problems, concerned not just with how political debates are carried on, but also with how to settle them. Arendt, on the other hand, saw no reason to suppose that we can settle practical political disputes through purely rational means. There is a difference between Habermas and Arendt and thus Canovan speaks of creative misreading. Peter Steinberger (1990) also finds Arendt’s exclusion from knowledge and truth, in her account of judgment, problematic. We have no criterion in order to distinguish good from bad judgment; we have no account of what it might mean to have knowledge in the political, action-relevant non-rationalist sense. Albrecht Wellmer (2001), like Habermas and Steinberger, also points to the problem of Arendt’s antiquated concept of knowledge or rationality; the role of judgment could be redefined with a broader conception of rationality. Yet, with regard to Habermas’ ‘discursive rationality’, Wellmer argues that an autonomous faculty of judging is not highlighted in his work.
275 If one wants to be faithful to Kant’s philosophy, however, one should be aware of the fact that his practical philosophy is related to politics: Kant speaks, in this respect, of the moral politician, in contrast to the political moralist (PP Appendix, 116 ff.). According to Howard Williams (1983), Kant’s political philosophy grows out of his moral theory: Kant believes that practical reason ought to set the standards for political life. If the politician is to carry out his duties, as prescribed by the theory of right (the first part of the Metaphysics of Morals), he must strive to abstract from his natural inclinations and desires. Since politics deals with the well-being of entire societies, politicians need a conception of the well-being of mankind.
276 Richard Bernstein (1986) argues that Arendt’s claim that Kant, behind taste, discovered the mental ability of judgment is problematic. This is problematic when we realize that Kant not only sought to sharply distinguish the reflective judgment of aesthetics from cognition but also from the legislation of practical
questions in relation to politics. The giving of and asking for normative reasons, in this respect, is of relevance to politics. Opinions, or judgments, need to be supported by intersubjectively disclosable, good, reasons: we need a ‘discursive rationality’ of giving and asking for normative reasons.277

Let us now look at the distinction between judgments and taste and judgments of cognition. Kant is quite clear that judgments of taste differ from moral or logical judgments. In the judgment of taste, there is a subjective universal communicability.278 Communicability entails, as we have seen, that two feelings of judging subjects are identical. Let us compare the communicability of judgments of taste with how Kant perceives the communicability of moral judgments. Kant speaks of a moral feeling as the satisfaction with an action because of its moral character:

But this feeling, which is called the moral feeling, requires concepts and is the presentation of finality, not free, but according to law. It therefore admits of communication only through the instrumentality of reason and, if the pleasure is to be of the same kind for everyone, by means of very determinate practical concepts of reason.279

As we have seen, the judgment of taste is distinguished, by Kant, from logical judgment since the latter subsumes a representation under a concept of the object, whereas a judgment of taste cannot be subsumed under a determinate concept at all.280 However, in common with a logical judgment, the judgment of taste asserts a universality and necessity that are merely subjective.

277 Linda Zerilli (2005) asks whether Arendt severs the link between argument and judgment? Her point, according to Zerilli, is not to exclude arguments from the practice of aesthetic or political judgment - as if something or someone could stop us from making arguments in public contexts - but to press us to think about what we are doing when we reduce the practice of politics to the contest of the better argument. I lend more weight to the contest of the better argument than Zerilli, but the point is that Arendt is skeptical of a discursive rationality in her account of persuasive speech which encompasses more than reasoning.

278 CJ § 9.

279 CJ § 39: ‘Dieses Gefühl, welches das sittliche heißt, erfordert aber Begriffe; und stellt keine freie, sondern gesetzliche Zweckmäβigkeit dar, läβt sich also auch nicht anders, als vermittelst der Vernunft, und, soll die Lust bei jedermann gleichartig sein, durch sehr bestimmte praktische Vernunftbegriffe, allgemein mitteilen’ (KrU 387). It has been argued that, despite the opposition between judgments of taste and moral judgments apparent from this passage, it is indicated in § 59 that Kantian aesthetics are the continuation of his moral philosophy in the domain of aesthetics (Welsch 1996, 471 ff.). In this paragraph, beauty is considered to be the symbol of morality (Sittlichkeit): ‘The beautiful is the symbol of the morally good, and only in this light (a point of view natural to everyone, and one which every one exacts from others as a duty) does it give us pleasure with an attendant claim to the agreement of every one else, whereupon the mind becomes conscious of a certain ennoblement and elevation above mere sensibility to pleasure from impressions of sense, and also appraises the worth of others on the score of a like maxim of their judgment’. Despite this passage, Kant writes, in the same paragraph, that the moral judgment not only admits of definite constitutive principles, but is only possible by adopting these principles and their universality as the grounds of their maxims. It seems obvious to me that we, on the basis of the ‘Critique of Aesthetic Judgment’, should not conflate judgments of taste with moral judgments.

280 CJ § 35. In § 56 and § 57, Kant sets out, however, that the judgment of taste has some concept but that this concept is an indeterminate one. The antimony of taste is as follows: 1. Thesis. The judgment of taste is not based upon concepts; for if it were, it would be open to dispute (decision by means of proof). 2. Antithesis. The judgment of taste is based on concepts; for otherwise, despite diversity of judgment, there
Let us, briefly, consider Kant’s ‘concept of concept’. Kant writes that, as far as the form of cognition is concerned, the concept is always something general, and something that serves as a rule. The concept is the one consciousness that unifies the manifold (‘of many kinds’) that has been successively intuited, and then also reproduced into one representation (Vorstellung). All actions of the understanding, which is the faculty of concepts, can be traced back to judgments, so that the understanding can in general be represented as a faculty for judging. Concepts, as predicates of possible judgments, are related to some representation of a still undetermined object. Objects are given by sensibility, and it alone affords us intuitions, but they are thought through the understanding, and from it concepts arise. Kant defines all concepts using the notion of a rule. The concept is a rule for sensible synthesis and, as a discursive rule, a rule in thinking an object under a concept.

Since there is no determinate concept, we can conclude that there is, thus, no rule for the judgment of taste. Although it has an indeterminate concept, it is aesthetic. This means that it is a judgment whose determining ground cannot be other than subjective. For Kant, the judgment of taste is not grounded on determinate concepts and not intentionally directed toward them. We can contrast this with the moral judgment: in order to find something good, I must always know what sort of thing the object ought to be, which means that I must have a determinate concept of it. While there is no determinate concept for the judgment of taste, it is, according to Guyer, still reflective in the sense that it subsumes the particular under something universal.

Even though no determinate concept is given for reflective judgment, and hence we are unable to speak of knowledge, we subsume in reflective judgment the particular under the idea of ‘subjective universal validity’. We claim, for our judgment, the universal assent of others, although clearly it has neither the objective

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281 CPR: A106.
282 Ibid.: A103.
283 CPR: A69/B94. In the Prolegomena, Kant claims that judgments are rules (Prol § 23) Empirical judgments, insofar as they have objective validity, are judgments of experience. Judgments that are only subjectively valid are merely judgments of perception (Prol § 18). The latter do not need a pure concept of the understanding; only the logical connection of perception in a thinking subject. In addition to the representations of sensible intuition, the former need special concepts originally generated in the understanding, and it is these that make the judgment of experience objectively valid. Objective validity and necessary universal validity are identical concepts.
284 CPR: A19/B33.
286 CJ § 5.
287 CJ § 5.
289 Henry Allison (2001) suggests that subjective universal validity can be understood as the validity of a feeling with respect to the entire sphere of judging subjects.
warrant of theoretical judgments nor the binding force of moral judgments. This is what is meant by subjective universality of taste.290

My point has been to show how Kant distinguishes the judgment of taste from the judgment of cognition, and the moral judgment. If we wish to highlight the importance of the faculty of judgment for morality and politics, we cannot ignore the fact that, for Kant, calling something good presupposes a determinate concept.

It has been argued that Arendt has ‘rescued’ the faculty of judgment from domination by theoretical wisdom, scientific knowledge, or ideology.291 Arendt did not regard the maxims of common human understanding as matters of cognition. In the view of Arendt, truth compels: one does not need any ‘maxims’. Maxims apply and are only needed for matters of opinion and judgments.292 This is, in my view, questionable. Kant explicitly discusses the maxims as cognitive powers. If we regard the faculty of judgment as rescued from domination by cognition, this is essentially contrary to Kant’s account of judgment.

In the third Critique, § 40 has a special place and I shall consider it here in relation to Arendt’s interpretation before relating it, in the next section, to the practical philosophy. It is not, in my view, prone to the same difficulties of interpretation beyond the aesthetic judgment. I have subsequently stressed the importance of relating the faculty of judgment to Kant’s practical philosophy, the difficulty of the notion of communicability in a sense that goes beyond aesthetics, the publicness of the judgment of taste and the absence of a determinate concept for it.

§ 40: Arendt on ‘enlarged thought’

We have seen that Arendt speaks of a common sense as a ground from which judgment springs and as a community sense. Here, she refers to Kant’s sensus communis in § 40. Furthermore, she speaks of an ‘enlarged mentality’ as far as the spectator’s verdict, which is not independent of the views of others, is concerned. I discuss the ideas of sensus communis and ‘enlarged thought’ in order to make clear how Arendt, partly, departs from them in her own interpretation and why I believe that there is a reason to relate them to Kant’s practical philosophy.

In § 40, Kant argues that the common human understanding, as mere sound understanding, has the dubious honor of having the name of common sense. However:

By sensus communis is to be understood the idea of a public sense, i.e. a critical faculty [Beurteilungsvermögen] which in its reflective act takes account (a priori) of the mode of representation of everyone else, in order, as it were, to weigh its judgment with the collective reason of mankind, and thereby avoid the illusion arising from subjective and personal

291 Dana Villa (1999b, 11).
conditions which could readily be taken for objective, an illusion that would exert a prejudicial influence upon its judgment.

How can this capacity for judgment, the sensus communis, be exerted when taking account of the mode of representation of all other men in thought? This is possible by weighing the judgment, not so much against the actual, but against the merely possible, judgments of others. We need to put ourselves in the position of everyone else, as the result of a mere abstraction from the limitations which contingently affect our own judgment. We compare our judgment with the possible, rather than the actual, judgments of others.

Arendt interprets sensus communis, as we have seen, as community sense. Men are earthbound creatures, living in communities, endowed with common sense. Sensus communis is, therefore, a community sense: men are not autonomous; they need each other’s company even for thinking. The sensus communis is a specifically human sense because communication, i.e. speech, depends on it.

We have seen earlier that sensus communis is also, for Arendt, a ground of judgment. We encounter sensus communis, thus, as a community sense and a ground of judgment. In my own interpretation, sensus communis is the ground from which judgment springs. This is partly in accordance with the first interpretation of Arendt. This is, furthermore, in line with the fact that sensus communis is Beurteilungsvermögen.

Kant speaks of three maxims of common human understanding. Are they related to the sensus communis? Despite Kant’s cryptic formulation - ‘common human understanding has the dubious honor of having the name of common sense’ - we indeed find evidence in the Logic that sensus communis is essentially common human understanding. There are three maxims of this common human understanding: to think for oneself; to think from the standpoint of everyone else; to always think consistently. The first is the maxim of unprejudiced thought; the second maxim is of enlarged thought (erweiterte Denkungsart); the third is the maxim of consistent thought.

293 CJ § 40: ‘Unter dem sensus communis aber muß man die Idee eines gemeinschaftlichen Sinnes, d.i. eines Beurteilungsvermögen verstehen, welches in seiner Reflexion auf die Vorstellungsart jedes andern in Gedanken (a priori) Rücksicht nimmt, um gleichsam an die gesamte Menschenvernunft sein Urteil zu halten, und dadurch der Illusion zu entgehen, die aus subjektiven Privatbedingungen welche leicht für objektiv gehalten werden könnten, auf das Urteil nachteiligen Einfluß haben würde’ (KrU § 40).


295 With Kant’s second maxim of the common human understanding, the maxim of judgment, the cognitive power is put to a purposive use, as Edward Kleist (2000) clarifies. This purposive use to which the power of cognition is put is the reflection upon one’s own judgment from a universal standpoint. Kleist clarifies that reflection, for Kant, means comparing given representations with other representations or with one’s cognitive power itself, in reference to some concept that such comparison provides. This understanding is not put to cognitive use but placed in the service of a reflective judgment. Such judgment provides a concept (although not a determinate one, ingredient of cognition) by reference to which one compares one’s own way of thinking with that of all the others. This is what is at stake in the enlarged thought.
The third maxim, according to Kant, is the most difficult to attain. The ‘enlarged thought’, the maxim of judgment, is indicated thus:

If a man detaches himself from the subjective personal conditions of his judgment, which cramp the minds of so many others, and reflects upon his own judgment from a universal standpoint (which he can only determine by shifting his ground to the standpoint of others). 298

Let us, after having considered Arendt’s interpretations of sensus communis, turn to her appropriation of ‘enlarged thought’, translated by her as ‘enlarged mentality’. According to Arendt, the capacity to judge is political in that I aim toward a potential agreement with others:

The power of judgment rests on a potential agreement with others, and the thinking process which is active in judging something is not, like the thought process of pure reasoning, a dialogue between me and myself, but finds itself always and primarily in an anticipated communication with others with whom I know I finally come to some agreement. From this potential agreement judgment derives its specific validity. 299

The enlarged way of thinking which, as judgment, knows how to transcend its own individual limitations, needs the presence of others ‘in whose place’ it must think. According to Arendt, the capacity to judge is a specifically political ability which is expressed in the idea of ‘enlarged thought’. 300 Truly political activities, acting and speaking, cannot be performed at all without the presence of others, without the public, without a space constituted by the many. 301

Arendt’s general account of political action can illuminate how she relates ‘enlarged thought’ to politics. 302 In The Human Condition we find an account of action that may elucidate Arendt’s concept of political judgment. To act means to take an initiative, to begin, to set something in motion. 303 Speechless action is no longer action because there is, in that case, no longer an actor. In acting and speaking, men

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298 CJ § 40: ‘wenn er sich über die subjektiven Privatbedingungen des Urteils, wo zwischen so viele andere wie eingeklammert sind, wegsetzen, und aus einem allgemeinen Standpunkte (den er dadurch nur bestimmen kann, daß er sich in den Standpunkt andere versetzt) über sein eigenen Urteil reflektiert’ (KrU § 40).
300 According to Leonard Feldman (1999), there is a tension between the ethical-political responsibility to think from the standpoint of others and the ethical-political responsibility to make a decision. What Arendt does not address is the possibility that enlarged thought also threatens our capacity to judge, and that no decision can be made. According to Gueorguieva (2003), on the other hand, common sense or sensus communis is both a way of thinking and a way of acting. Enlarged thought is a capacity which allows one, among other things, to orient one’s action while anticipating the judgment of others.
301 Hannah Arendt (1993, 217).
302 Arne Johan Vetlesen holds that Arendt conceives of politics as ‘worldly’, as a phenomenon of the ‘common world’ and the public sphere (Vetlesen 1994, 119). In politics we are concerned with the judgment of appearances (Erscheinungen), of what appears and is displayed for all to see and comment on in the public world (Öffentlichkeit). And this very feature - appearing in a public world - is what Arendt holds politics and aesthetics to have in common.
303 Hannah Arendt (1958).
show who they are, actively revealing their unique personal identities and thus making their appearance in the human world.

According to Arendt, most action and speech is concerned with this in-between, which varies with each group of people, so that most words and deeds are about some worldly objective reality, in addition to being a disclosure of the acting and speaking agent. Deeds and words owe their origin exclusively to men acting and speaking directly to one another. This subjective in-between is not tangible, but for all its intangibility, this in-between is no less real than the world we visibly have in common. We call this reality the ‘web’ of human relationships.

If we relate this account of action to the account of political judgment, it will be apparent that the subjective in-between that exists between actors is constituted in judgment (a concept which Arendt, however, does not employ in The Human Condition). To act, and perhaps we could add to judge, means to appear in the human world. According to Arendt, judging is namely an important activity, perhaps the most important one, in which sharing-the-world-with-others comes to pass. In aesthetic judgment and political judgments, a decision is made, and although this decision is always determined by a certain subjectivity, by the simple fact that each person occupies a place of his own from which he looks upon and judges the world, it also derives from the fact that the world is something common to all its inhabitants.

Let us return to Arendt’s discussion of the ‘enlarged thought’. In the view of Arendt, political thought is representative. I form an opinion by considering a given issue from different viewpoints, by making present in my mind the standpoints of those who are absent; that is, I represent them. The capacity for an ‘enlarged mentality’ enables men to judge. According to Arendt, this capacity was discovered by Kant, although he did not recognize the political and moral implications of his discovery. According to Arendt, the greater the reach in ‘enlarged thought’ - the larger the realm in which the enlightened individual is able to move from standpoint to standpoint - the more general will be his thinking.

The general standpoint - usually translated as universal standpoint, a translation which, I shall argue, is more in line with Kant’s thought - is related to impartiality by Arendt. It is a viewpoint from which to look upon, to watch, to form judgments or to reflect upon human affairs. Is the general standpoint merely the standpoint of the spectator? Arendt seems to think so. She doubts whether Kant’s focus on the world citizen, in this respect, is appropriate: only the spectator but never the actor knows what it is all about. It has, indeed, been argued that Arendt has two accounts of judgment: one of the actor and one of the spectator. These accounts of judges seem to conflict.

304 ‘Judging, then, doesn’t only express a judgment on a socio-historical phenomenon, but it always brings forward the uniqueness of the judge’s perspective. If this wasn’t the case, all the judgments would consequently be all the same’ (Joke Hermsen 1999: 76).
305 Hannah Arendt (1993, 221 ff.).
306 Ibid. (1982).
308 Ronald Beiner (1982).
Yet, the fact that there is no real problem here is indicated by Arendt herself: the critic and spectator sit, namely, in every actor and fabricator. Without the critical judging faculty, the doer or maker would be so isolated from the spectator that he or she would not even be perceived. The actor and spectator become united: 'the maxim of the actor and the maxim, the ‘standard’, according to which the spectator judges the spectacle of the world, become one'. I find Arendt’s claim that the spectator ‘sits in the actor’, who has the critical judging faculty, illuminating. This makes the fact of the seemingly conflicting accounts of judges - the actor and the spectator - less of a problem. We are urged, when entering into the public realm, and in this way acting when making a judgment, to reflect upon our own judgment from a universal standpoint that we can only determine by becoming a spectator.

According to Arendt, we can become impartial spectators very much in the same way as we are disinterested judges in matters of beauty. According to Arendt, the very process of opinion formation is determined by the imaginative thinking from the places of others. The only condition for the exertion of the imagination is disinterestedness, liberation from one’s own private interests. I endorse Arendt’s emphasis on impartiality in relation to ‘enlarged thought’ but doubt whether aesthetic disinterestedness is the right source of this impartiality. Let us first look at Arendt’s account of impartiality. She quotes two letters by Kant on the basis of which she concludes that representative thought is impartial. These letters could well be related to the notion of ‘enlarged thought’ in the third Critique:

You know that I do not approach reasonable objections with the intention merely of refuting them, but that in thinking them over, I always weave them into my judgments, and afford them the opportunity of overturning all my most cherished beliefs. I entertain the hope that by thus viewing my judgment impartially from the standpoint of others, some third view that will improve upon my previous insight may be obtainable.

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311 Majid Yar (2000) still speaks of Arendt’s ‘two theories’ of judgment. The practice of political judgment by actors comprises the formation, clarification and testing of opinions through free and open communication and persuasion between individuals. The disinterested standpoint of Kant and Arendt is the standpoint of the spectator. The spectator comes to have a privileged view of the actor. The fact that the spectator, however, cannot have a privileged view is argued for by Richard Bernstein (1986), who argues that Arendt’s emphasis on the spectator as judge does contradict the claim that judging itself is not only the political ability par excellence but also a form of action-debate - which Arendt takes to be the essence of politics. The spectator and the actor cannot be considered to be fundamentally opposed archetypes; rather, to use the hermeneutic metaphor, living and acting in the world require us to tack back and forth from another (Lawrence Biskowski 1993: 874). According to Max Deutscher, both the spectator and the actor are equally important: the judgment of the spectator creates the space without which no such objects could appear at all. Arendt sees the judge both as a spectator who observe life’s arena and makes valid judgments and the involved participant who must judge, since ‘to remain in retreat on the spectator’s bench is to evade the world’s demands - to refuse the very being of the world’ (2007: 125).
312 The letters were written to Hertz who was a physician giving public lectures on the philosophy of Kant.
In this letter, Kant speaks of a third view; in the description of enlarged thought there is reference to a universal standpoint. In the following letter, Kant refers to a general outlook:

[The mind needs a reasonable amount of relaxations and diversions to maintain its mobility] that is, may be enabled to view the objects afresh from every side, and so to enlarge its point of view from a microscope to a general outlook that it adopts in turn every conceivable standpoint, verifying the observations of each by means of all the others.\(^{314}\)

Arendt quotes the letters in a passage on critical thinking which, for her, implies the application of critical standards. One cannot learn to apply such standards without what Arendt calls publicity or the testing that arises from contact with other people’s thinking. Although Arendt is not quite clear about the relation between judgment and impartiality, she interprets disinterestedness - the disinterested delight in the beautiful - in terms of impartiality.\(^{315}\) In the view of Arendt, the very quality of an opinion or a judgment depends upon the degree of its impartiality and hence disinterestedness.

The notion of disinterestedness is, however, highly controversial.\(^{316}\) According to Kant, pleasure is disinterested when its existence is in no way bound up with desire. In my view, there are good reasons to distinguish between disinterestedness - of the delight in the beautiful and thus of the judgment of taste - and impartiality, reflecting upon my own judgment from a point of view that can be determined by shifting my ground to the standpoint of others.\(^{317}\)

Disinterestedness is related to the judgment of taste. Impartiality, on the other hand, is related to the faculty of judgment in its political and moral use. Arendt also speaks of impartial generality. In matters of opinion, but not in matters of truth, our thinking is discursive; ‘running, as it were, from place to place, from one part of the world to another, through all kinds of conflicting views, until it finally ascends from these particularities to some impartial generality.’\(^{318}\) According to Arendt, Kant, using his legal terminology in general, could have said: ‘I have reached a general

\(^{314}\) Ibid. (1982: 42).

\(^{315}\) Ibid. (1983, 73).

\(^{316}\) Nick Zangwill (2003). The notion of disinterestedness in Kant’s account of judgments of taste is highly controversial, see Allison (2001).

\(^{317}\) Andrew Norris (1996) follows Arendt in her emphasis on impartiality as disinterestedness. Kant attributes the experience of impartiality to aesthetic judgment, which he argues is inherently public. It is this theoretical model of public judgment that, according to Norris, Arendt seeks to appropriate for politics. Disinterested aesthetic judgment is related to impartial political judgment. Also Judith Shklar (1977), who argues that politics ought to be an expression of the faculty of judgment, sees politics as the appeal of the disinterested spectator to all others who strive to be impartial. Their enlightened common sense must be assumed to yield universally acceptable standards, and it is in terms of these that we judge and try to persuade each other. Alessandro Ferrara (1998) also sees a relation between impartiality, in the sense of Arendt, and disinterestedness. One can be disinterested about another’s opinion which means, in terms of impartiality of judgment, extricating oneself from a concern for one’s own standing in the other actor’s eyes.

standpoint, the impartiality the Judge is supposed to exercise when he lays down his verdict’.\footnote{Ibid. (1982, 56).}

Given the emphasis on disinterestedness, in relation to ‘enlarged thought’, it is not unsurprising that it has been assumed that § 40, containing the ideas of \textit{sensus communis} and ‘enlarged thought’, is to be understood from the perspective of aesthetic judgment.\footnote{Thus, George Kateb (2001) argues that for the judge in a worldly society, two components of aesthetic judgment are important: the first is taste while the second is enlarged mentality from which taste emerges. Patrick Riley (1987) speaks of ‘enlarged’ and ‘generalized’ aesthetic judgment.} This can be explained by the emphasis of Arendt on \textit{sensus communis aestheticae} and the fact that she develops her account of judgment on the basis of the first part of the third \textit{Critique}, the ‘Critique of Aesthetic Judgment’. In my account, § 40 has a more freestanding function in the \textit{Critique}. Paul Guyer sees § 40 as a more general account of judgment than an account of aesthetic judgment. According to Guyer, the maxims of common human understanding are not peculiar to aesthetic judgment but are applicable to this special case. These maxims suggest guidelines for the process of reflection, by means of which we can hope to make sound judgments, including sound judgments of taste.\footnote{Paul Guyer (2003).}

Kant writes in § 40 that the maxims of common human understanding do not indeed properly apply here as constituent parts of the \textit{Critique of Taste}. However, they may still serve to elucidate its fundamental propositions. Given the fact that the maxims of the common human understanding are also mentioned in the Jäsche Logic and in the \textit{Anthropology}, where they are maxims of cognitive thought, it is warranted to see \textit{sensus communis} and the ‘enlarged thought’ in relation to a general capacity for judgment, as Guyer suggests.

The ideas of \textit{sensus communis} and ‘enlarged thought’ have undoubtedly been endorsed in the Arendt reception as crucial elements of her account of a ‘politics of enlarged mentality’.\footnote{Patricia Moynagh (1997). The most elaborate attempt to develop the ideas in § 40, following Arendt, has been undertaken by Ernst Vollrath who wants to reconstruct the concept of political judgment, which means that the power of judgment can ground and rescue the free, public and common action of human beings in the world (Vollrath 1977, 140 ff). Vollrath distinguishes morality and politics differently to Kant. To the extent that the action of the individual contributes toward constituting the \textit{Gemeinschaftlichkeit} of the action of all, it is morally binding. The political question is, however, a different one: how can the actions of many, or even all, in the world coincide, and in such a way, that no objective concept is presupposed? Vollrath argues that the maxim of ‘enlarged thought’ is intrinsically political. The ‘enlarged thought’ is the thought related to judgment, or \textit{Gemeinsinn} (\textit{sensus communis}). The ‘enlarged thought’ is nothing other than the reconstructed political judgment as \textit{Gemeinsinn}. Genuine political action entails action following the maxim of judgment or being able to be judged according to this maxim. The three characteristics of the political - \textit{Gemeinschaftlichkeit}, publicity and freedom - apply to the ‘enlarged thought’: thinking has to be related to the thinking of others, it needs a common denominator. Thinking needs this orientation.}

Given that § 40 offers a general account of the faculty of judgment, we can elaborate on Arendt’s appropriation of this paragraph without experiencing the difficulties of interpreting the judgment of taste. There is, after all, a crucial distinction between discriminating between the beautiful and the ugly, on the one hand, and discriminating between right and wrong, on the other.
In this section, I have discussed Arendt’s appropriation of Kant’s ideas on judgment. I endorse her emphasis on the role of ‘enlarged thought’ and sensus communis in political and ethical thought. I believe, however, that the role of the faculty of judgment in ethics and politics is less pivotal than she presupposes. We should disentangle the ideas of ‘enlarged thought’ and sensus communis (logicus) from the Kantian theory of taste. Only then will they be relatable to Kant’s thoughts on ethics.

In the next section, I shall proceed as follows. First, I suggest an interpretation of sensus communis as a ground for judgment common to all. Then, I suggest that we relate ‘enlarged thought’ and the universal standpoint to Kant’s practical philosophy. Before relating judging to legislating, I shall consider Kant’s account of the faculty of judgment. Finally, I elaborate on the idea of impartiality of judgment focusing on the relation to the other.

3.2 ‘Enlarged thought’ and the law

Sensus communis as a ground for judgment

I suggest that sensus communis can be related to the idea of a ground for judgment common to all which enables us to make common judgments.323 Sensus communis, in § 40, is a critical faculty. We weigh our judgment using the collective reason of mankind and adopt an impartial stance. Sensus communis enables us to judge. There is a sense of universality in sensus communis.324

What is the relation between sensus communis and ‘enlarged thought’, the maxim of judgment? Kant argues that common human understanding has the dubious honor of having the name common sense. Rather, sensus communis is to be understood as a public sense (gemeinschaftlichen Sinn) or a capacity for judgment (Beurteilungsvermögen). A straightforward explanation is that sensus communis is common human understanding, this is what Kant, in any case, claims in Logic, and that the three maxims, including ‘enlarged thought’ as the maxim of judgment, are maxims of sensus communis.325

323 The view that sensus communis is a common ground for judgment is also defended by Gundula Felten, who specifies sensus communis as the faculty of judgment (Beurteilungsvermögen), as the capacity to regard one’s own judgment in connection to other - possible and factual - judgments and in comparison with these other judgments to neglect the subjective conditions (2004, 188).
324 According to Dagmar Barnouw (1990, 21), sensus communis is a potential expansion of common sense into universality. Common sense develops interdependently with communal standards and expectations.
325 LL (The Jäsche Logic, 563). This interpretation is not uncontroversial, however. According to Michael Japaridze (2000, 80 ff.), sensus communis is not common human understanding, the ordinary faculty of reasoning that is attributed to every thinking being. Hence, we are able to authorize the universal exemplarity of taste and the necessity felt singularly in taste: the validity that ensues is a subjective universality validity, a validity for all. Gemein implies commonality, Gemeinsinn a common sense. Sensus communis would essentially be sensus communis aestheticus, according to Antoon van den Braembussche (2000); Kantian sensus communis is an a priori principle of every judgment of taste. It is a principle we have to presuppose if we are to make sense of our judgments of taste. Sensus communis is not community spirit, not general will, not common sense, not intellectio communis, not gemeine Menschenverstand, not common human understanding, and not sensus communis logicus, rather, it is sensus communis aestheticus. It could be claimed,
I regard *sensus communis*, in accordance with what is suggested in § 40, as a ground for judgment. Sensus communis is a ground for judgment common to all which enables us to make common judgments in accordance with the three maxims of common human understanding: to think for oneself, to think from the standpoint of others, and to think consistently.

According to Stuart Dalton, the ‘sense’ in common sense refers not to empirical opinions, but to an *a priori* capacity to judge. Sensus communis is a sense of the common that is common to everyone; an individual capacity which is also the capacity to overcome some of the limits of one’s individualism. Kant’s account of *sensus communis* allows us to reconceptualize subjectivity as an interchange between the self and others.

I interpret Dalton’s suggestion that we can reconceptualize subjectivity in Kant in terms of a critique of the charge that Kant’s reason would be subject-centred, a charge I have criticized in the previous chapter. Sensus communis can overcome mere subjectivity and is oriented toward others. We have seen that Arendt has already suggested such an interpretation in terms of a community sense. If we consider sensus communis as a ground for judgment, this ground will be oriented toward others.

I believe that the concept of sensus communis gives us the conceptual tools to argue that there is a ground for judgment that is common to all and can play a role in politics and ethics. We are endowed with the ability to make reasonable judgments about human affairs and there is a common ground that matters when making however, that the latter sensus communis should instead be identified with the common sense in § 21. Sensus communis logicus, on the other hand, would be relevant in politics, history, religion, and ethics, argues Heinz Kimerle (2000). This is, in my view, an adequate interpretation. Henry Allison (2001) suggests that the common sense in § 21, where Kant argues that the universal communicability of a feeling presupposes common sense, should rather be considered Gemeinsinn [gemeinschaftlichen Sinn] than the sensus communis logicus of § 40. By common sense, we must understand not taste *per se*, but the faculty for immediately seeing whether or not a given intuited manifold accords with a particular concept. The universal communicability of a feeling in § 21 presupposes common sense. According to Allison, this is not to be identified with the *sensus communis logicus*, which is equivalent to common human understanding.

*In the translation of J.H. Bernard, Beurteilungsvormögden is given as ‘faculty of judgment’.*

**326** What kind of judgments are pointed to using *sensus communis*? According to Monika Tiffany, *sensus communis* proceeds as reflective judgment: ‘Das Vermögen des sensus communis verführt als reflektierende Urteilskraft: es wird eine allgemeine Regel vorausgesetzt, worunter das besonderen Urteil subsumiert werden kann.’ (2002, 207). According to David Rasmussen (2003), *sensus communis* is a sense shared by everyone and defined simply as a universal power to judge which exists in everyone.

**328** According to Stuart Dalton (1999, 440). “The *sensus communis* is, for both Kant and Arendt, something we share with every other human being, it is ‘what judgment appeals to in everyone’” (Hermsen 1999: 76).

**329** Stuart Dalton (1999, 441).

**330** According to Kyriaki Goudeli (2003), common sense is (1) identical with all men (2) pure and formal (3) possesses a cognitive status which conditions aesthetic judgment and allows it communicability - common sense acquires the features of a mental structure shared by all human beings as judging subjects.

**331** That does not mean that the *sensus communis*, as such, has historical, ethical, or cultural substance (Ferrara 2008): for Kant, the notion is bound to universalism. It is this that Gadamer (1999, 30 ff.) laments: there is no longer any basic moral sense of *sensus communis* which is basically related to judgment.

**332** See Ronald Beiner (1983). Beiner suggests that reflection on the nature of politics, and on what it means to be a political being, discloses a faculty of judgment that is intrinsic to political life *per se*, and intrinsic to man as a political being. Political judgment is like aesthetic judgment, reflective, but in reflective judgment,
political judgments. The ground for judgment is a common capacity. It is oriented toward others; it does not merely reflect on our own judgment. We make judgments while reflecting upon the judgments of others.

Reflecting from a universal standpoint

We have already seen that the concept of ‘enlarged thought’, as a maxim of the common human understanding and, as such, related to the sensus communis, figures in more of Kant’s works than the Critique of Judgment. I will compare the formulations of the three maxims in the Critique, in the Logic and in the Anthropology. Recall the three maxims of this common human understanding in the Critique: 1) To think for oneself, 2) To think from the standpoint of everyone else, 3) To always think consistently.

In the Logic, we are urged to compare our judgments with those of others. The common human understanding - sensus communis - is meant for orienting oneself in thought or in the speculative use of reason by means of the common human understanding which is a test for passing judgment on the correctness of the speculative use. Universal rules and conditions for avoiding error in general are: 1) To think for oneself (enlightened mode of thought), 2) To think of oneself in the position of someone else (the extended mode of thought), and 3) To always think in it is not only our ‘pleasures and displeasures’, but also our cognitive efforts that should be at stake. Political judgment is the estimation of particulars with which we are confronted, like the aesthetic judgment of particular objects to be appreciated: a rose, a painting, a piece of music. Not being able to exercise political judgment is like not being able to judge the beauty of a rose. According to Beiner, political judgment is similar to reflective aesthetic judgment in the sense that we judge particulars. In my view, however, rational inquiry and discursive rationality play a role in moral and political judgment. It is important to scrutinize judging in terms of analyzing the reasons from which judgments are inferred.

333 See Peter Steinberger (1993). According to Steinberger, the radically-isolated thinker cannot exist and the faculty of judgment is explicitly bound up with the idea of a ‘common sense’, a set of socially generated norms, intuitions, and premises without which judgment would be impossible. Judgment does not aim at absolute truth but at ‘agreement’ and this is explicitly and necessarily understood to be an interactive and political endeavor. The sense of political judgment is a common sense. Common sense establishes indispensable criteria with which we can evaluate the coherence and legitimacy of particular thoughts and actions. Steinberger relates his account of political judgment to what I call a discursive rationality. According to Steinberger, judgment should be authorized and constrained by inferential rules and procedures. Anyone who cares to justify a judgment must do so, therefore, by showing, in terms of a rational argument, how it is faithful to them.

334 With Kant’s second maxim of the common human understanding, the maxim of judgment, the cognitive power is put to a purposive use as Edward Kleist (2000) clarifies. This purposive use, to which the power of cognition is put, is the reflection upon one’s own judgment from a universal standpoint. Kleist clarifies the fact that, for Kant, reflection means comparing given representations with other representations or with one’s cognitive power itself, in reference to some concept which such comparison provides. This understanding is not put to cognitive use but placed in the service of a reflective judgment. Such judgment provides a concept (although not a determinate one, ingredient of cognition) by reference to which one compares one’s own way of thinking with that of all the others. This is what is at stake in the enlarged thought.

335 LL (The Jäsche Logic) 57.
agreement with oneself (the consequence of thought). The second maxim, in the Critique called the ‘enlarged thought’, is ‘the extended mode of thought’ here.

In Anthropology, the maxims are related to a discussion of wisdom: the idea of a practical use of reason that conforms perfectly with the law. I have already mentioned the second maxim in the previous chapter. The precept for reaching wisdom contains the following maxims: 1) Think for oneself, 2) Think in the place of the other (in communication with other beings), 3) Always think consistently with oneself.336

We see that there are different but closely related formulations of the maxim of judgment: to think from the standpoint of everyone else, to think in the position of someone else, and to think in the place of the other, in communication with other beings. In the Critique, the maxim of judgment is related to the common human understanding - in the Logic, this is sensus communis - and explicitly to the power of judgment. In the Logic, the maxim, as a universal rule or condition, is intended to avoid error and used in order to pass judgment on the speculative use of reason. In the Anthropology, finally, the maxim is related to wisdom, a concept related to the law.

‘Enlarged thought’ thus not only plays an important role in the third Critique. ‘Thinking from the standpoint of everyone else’ can, despite the different formulations, be regarded as a central maxim in Kant’s thought, as is also indicated by the quoted letters. Let us now consider the notion of a universal standpoint. Recall the passage on ‘enlarged thought’, which is indicated thus:

If a man detaches himself from the subjective personal conditions of his judgment, which cramp the minds of so many others, and reflects upon his own judgment from a universal standpoint (which he can only determine by shifting his ground to the standpoint of others).337

A standpoint is an angle from which to judge a particular situation and to form points of view. I shall suggest that we think of shifting our ground to the standpoint of the other in terms of imagining ourselves in the place of the other as other. This does not mean that the other is transparent to us, and that by imagining ourselves we can know how the other thinks and feels.338 In order to judge a situation and form a point of view, communication with others is additionally required. In

336 A § 43.
337 CJ § 40: ‘wenn er sich über die subjektiven Privatbedingungen des Urteils, wozwischen so viele andere wie eingeklammert sind, wegesetzen, und aus einem allgemeinen Standpunkte (den er dadurch nur bestimmen kann, daß er sich in den Standpunkt andere versetzt) über sein eigenen Urteil reflektirt’ (KrU § 40).
338 ‘To imagine the judgment of another person, I must imagine how I would judge if I were in that other person’s place’ (George Kateb 2001: 132). I disagree with Iris Marion Young (2001) that we cannot think from the standpoint of the other. We need moral humility when approaching the other. Young argues that taking the other’s standpoint is supposed to aid communication, but in fact may impede it: ‘if you think that you already know how other people feel and judge because you have imaginatively represented their perspective to yourself, then you may not listen to their expression of their perspective very openly’ (2001: 215). Below, I suggest that we think of the other as other who we meet in language. We cannot discover how the other feels but we can imagine how he or she judges and makes the judgments that he or she actually makes.
Anthropology, the maxim of 'enlarged thought' is related explicitly to communication.339

But what is meant by a universal standpoint (einem allgemeinem Standpunkte), translated by Arendt as general standpoint?340 Arendt argues that the greater the reach of our ‘enlarged thought’, the more general will be our thinking. A general standpoint is not the same, however, as a universal standpoint, at least as far as Kant’s use of the concept of universal is concerned. Kant’s allgemein, in his practical philosophy, is translated as universal. We find the distinction of general versus universal in the Critique of Practical Reason, where universal applies to the law.341 Allgemeine Gesetzgebung des Willens is to be translated as the will itself being universal legislator.342

The notion of sensus communis invokes the distinction between matter and form.343 Kant writes in § 40 that the sensus communis is possible by letting go of the element of matter and confining our attention to the formal peculiarities of our general state of representative activity. According to Wellmer, the formal element represents that which is not merely subjective and thus belongs to a universal standpoint. Wellmer argues that, in the case of empirical cognition and moral judgment, conformity to the universal form of thinking - to the form of lawfulness - is brought about essentially by the categories of pure understanding and by the categorical imperative, respectively. I endorse this interpretation of Wellmer and believe that there is indeed a relation between sensus communis and the categorical imperative.

Let us first recall the distinction between matter and form which we have concerned ourselves with in the former chapter. As we have seen, in the Groundwork, Kant clarifies that all maxims have a form and a matter.344 A form consists of universality, and, in this view, the formula of the moral imperative is expressed thus; that the maxims must be chosen as if they were to serve as universal laws of nature. A matter is an end and here the formula says that the rational being, as it is an end by its own nature and therefore an end in itself, must serve in every maxim as the condition limiting all merely relative and arbitrary ends.

339 This is also how Josef Früchtl (1996) understands the demands of enlarged thought: imagination and the preparedness to enter into dialogue.
340 According to Jennifer Nedelsky (2000), there is no universal standpoint of humanity that one arrives at, rather one’s own general standpoint developed through attention to the particulars of the different standpoints one considers. The generality of the enlarged mentality does not yield a general concept under which one can subsume the particulars of a situation requiring judgment and it is not a universal perspective but one generated by each individual’s encounter with multiple particular standpoints. In my view, we should yet see ‘enlarged thought’ in relation to Kant’s idea that moral judgments have a concept (we can speak of right or wrong). A universal standpoint has to be adopted if we search for a law. It is not always appropriate to speak of a law in politics; sometimes, however, there is a necessity of finding out what course of action is right or wrong as in the case of prenatal diagnosis considered in part 2.
341 With regard to the principle of happiness, Kant writes that every man’s judgment depends very much on his particular view. The judgment can therefore supply ‘only general rules, not universal; that is, can give rules which on the average will most frequently fit, but not rules which must hold good always and necessarily; hence, no practical laws can be founded on it’. (CPrR § VIII Theorem IV, Remark II).
342 Gr § 431.
344 Gr § 436.
I believe that the adjective *universal* gives us a reason to consider the notion ‘universal standpoint’ in relation to Kant’s practical philosophy, this being due to the maxim of judgment in the *Anthropology* being related to an ‘idea of a practical use of reason that conforms with the law’. It thus seems to be warranted to conclude that thinking from the standpoint of others, and determining a universal standpoint, should be understood from the perspective of Kant’s practical philosophy. In *Anthropology*, the maxim of thinking in the place of the other is dealt with under the cognitive faculty. I have already suggested, in the previous chapter, that this maxim, related to the practical use of reason that conforms with the law, sheds a different light on the discussion of the presumed monological character of the categorical imperative. Whereas ‘enlarged thought’, for Kant, is thus related to practical reason, Arendt departs from Kant in this respect.

Dianna Taylor has argued that the general standpoint which Arendt describes in important ways diverges from Kantian universality. Kant’s notion of impartiality, while not universal in a traditional sense, nonetheless verges on universality in a way that is incompatible with Arendt’s notion of plurality. We can, indeed, see Arendt’s reluctance, as far as universality in Kant is concerned, in relation to her translation ‘general standpoint’: the more standpoints we consider, the more general our thinking. This can be contrasted with the Kantian emphasis on a universal standpoint - we give ourselves a law by thinking from the standpoints of others - on the basis of which we reflect upon our judgment.

Arendt seems to suggest that giving ourselves a law does suppress plurality. However, is there no Kantian account of plurality? It has been argued that Kant does not offer a model for dealing with a ‘cacophony of voices’. However, he does offer a model for transcending the private conditions of judgment by different people. As I will argue below, Kant considers the ‘generalized other’ in contrast to the ‘concrete other’ in ‘enlarged thought’. The emphasis is on what we have in common. The law applies to me as well as to others. Still, plurality matters since we cannot know how the law affects others without having considered their standpoints. In this sense, Kant respects plurality.

The difference between Kant and Arendt is that the maxim of ‘enlarged thought’ presupposes, for Kant, that we need to adopt a universal standpoint in terms of lawfulness in order to escape mere subjectivity. On the other hand, Arendt does not relate an ‘enlarged mentality’ to Kant’s ethics, but starts with plurality and asks how we can come to an agreement by means of judging. This agreement is not to be understood in terms of a law. It is merely what we can agree on after having carried out the operation of the ‘enlarged mentality’.

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345 According to Onora O’Neill, the *universal* standpoint is no pre-established Archimedean standpoint of reason (1989, 26).

346 Since legislation is universal, it seems plausible to call the point of view that is adopted when legislating a universal point of view which regards the self, and likewise every other rational being, as a lawgiving being (Gr 438).


348 May Thorseth (2008).
Given the fact that the law, for Kant, has a place in politics, we are confronted with difficulties when appropriating the idea of ‘enlarged thought’ in politics if we see, in the sense of Arendt, politics as acting and judging in the public realm.\(^{349}\) Still, as I have argued, normative reasons may matter to politics. If we see normative reasons as deriving from the law, then Kant’s account of ‘enlarged thought’ will matter to politics when we concern ourselves with moral questions in relation to politics (rather than politics in general). On the other hand, Kantian ‘enlarged thought’ has a more evident role in the context of ethics. When we ask whether or not our maxim can become a universal law which others can act on, we need to think from the standpoints of others. This is an interpretation defended below after having discussed Kant’s thought on the faculty of judgment.

\section*{Kant’s concept of judgment in brief}

I shall concentrate on the faculty of judgment both in general and in relation to ethics. This, together with the discussion of Kant’s ethics in the previous chapter, should give us the opportunity to relate ‘enlarged thought’ to the practical philosophy.

According to Kant, the higher cognitive faculty consists of understanding, the power of judgment, and reason.\(^{350}\) The understanding is the faculty of the cognition of rules, cognition through concepts.\(^{351}\) Correct understanding, practiced judgment, and thorough reason constitute the entire range of the intellectual cognitive faculty. In the \textit{Critique of Judgment}, Kant speaks of two kinds of judgment:

Judgment in general is the faculty of thinking the particular as contained under the universal. If the universal (the rule, principle, or law) is given, then the judgment which subsumes the particular under it is determinant [...]. If however, only the particular is given and the universal has to be found for it, then the judgment is simply reflective.\(^{352}\)

\(^{349}\) John Llewelyn (2000, 141n ff.) argues, thus, that political judgment is neither a matter of action nor of cognitive science. It is a matter of opinion. The moral feeling is respect for a law of reason, for rationality per se. With this rationality per se, judgment can have nothing to do except promote the susceptibility of the mind to the moral law’s appalling awesomeness. According to Dana Villa, ‘a pattern is set in which judgment is utterly marginalized by the syllogistic deduction of action (the machinery of Kant’s categorical imperative is an example). Political thinking is characterized not by the rigorous logical unfolding of an argument, but rather by imaginative mobility and the capacity to represent the perspectives of others’ (1999: 94).

\(^{350}\) A § 40.

\(^{351}\) A § 42.

\(^{352}\) CJ Introduction, IV: ‘Urteilskraft überhaupt ist das Vermögen, das Besondere als enthalten unter dem Allgemeinen zu denken. Ist das Allgemeine (die Regel, das Prinzip, das Gesetz) gegeben, so ist die Urteilskraft, welche das Besondere darunter subsumiert [...] bestimmend. Ist aber nur das Besondere gegeben, wozu sie das Allgemeine finden soll, so ist die Urteilskraft bloß reflektierend’ (KrU, Einleitung, IV).
We can think of subsumption as the inclusion, or placement, of a particular within something larger or more comprehensive, the universal. Reflective judgment is also defined as *Beurteilungsvermögen* (*facultas dijudicandi*).\(^{353}\)

In the *Critique of Pure Reason*, only determinant judgment is mentioned: ‘If the understanding in general is explained as the faculty of rules [*Vermögen der Regeln*], then the power of judgment is the faculty of subsuming under rules, i.e. of determining whether something stands under a given rule or not.’\(^{354}\) Kant holds that general logic contains no precepts at all for the power of judgment, and cannot contain them. Since it abstracts from all content of cognition, nothing remains to it but the business of analytically dividing the mere forum of cognition into concepts, judgments and inferences, and thereby achieving formal rules for all the use of the understanding.

Although the understanding is capable of being instructed, the power of judgment is a special talent that cannot be taught but only practiced (hence we can speak of practiced judgment as we saw above). The intellectual faculty of judgment, that of discerning whether or not something is an instance of the rule - the power of judgment - cannot be instructed, but only exercised.\(^{355}\) If there were to be doctrines of the power of judgment, then there would have to be general rules according to which one could decide whether or not something was an instance of the rule, which would generate further inquiry into infinity. Understanding is the faculty of rules, and the power of judgment of discovering the particular insofar as it is an instance of these rules.\(^{356}\)

So far, we have concerned ourselves with a general account of the faculty of judgment. The definition of determinant and reflective judgment in the introduction of the third Critique is crucial for understanding Kant’s view of judgment. Judgment, furthermore, discovers whether or not something is an instance of a rule - whether something is right or wrong. I shall now continue my resume of Kant’s view of judgment by considering the faculty of judgment in ethics.

In the *Lectures of Ethics*, the account of judgment is implicitly related to the idea of ‘enlarged thought’ with which we concern ourselves. Providence has implanted that drive in us, so that our actions and practices might conform with the general judgment of others.\(^{357}\) If we were lacking it, we would not make our actions so acceptable to the community. Our opinions are often mistaken if they rely solely on our own judgment. Hence, this drive leads us to compare our judgments regarding our knowledge with the opinions of others. This is the touchstone, that we subject our knowledge to the judgment of many heads: ‘Universal reason, the judgment of all, is the tribunal before which our knowledge has to stand’. Understanding is not enough to motivate us for an action: when I judge by understanding that the action is morally good, I am still very far from doing this action of which I so have judged.

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\(^{353}\) FI V.

\(^{354}\) CPR: A132/B171.

\(^{355}\) A § 42.

\(^{356}\) A § 43. See also § 53.

\(^{357}\) LE (*Collins*) 27: 411.
But, if this judgment moves me to perform the action, that will be the moral feeling.\textsuperscript{358}

Kant writes that, in judging our actions, we consider whether or not our maxims - rules or subjective principles - can become a universal law. This may be the case if our maxims follow from duty. The moral judgment of an action entails that we must be able to will that a maxim of our action should be a universal law. Rational beings should always judge their actions by maxims, of which they themselves can will that they should serve as universal laws. In the \textit{Critique of Practical Reason}, Kant argues that it is the notions of good and evil that first determine an object of the will. For Kant, they themselves are subjected to a practical rule of reason, which, if a pure reason, determines the will \textit{a priori} relative to its objects. Kant assigns an explicit role to judgment as regards determining whether or not action comes under a rule\textsuperscript{359}:

Now, whether an action which is possible to us in the world of sense comes under the rule or not, is a question to be decided by the practical judgment, by which what is said in the rule universally (\textit{in abstracto}) is applied to an action \textit{in concreto}.\textsuperscript{360}

According to Kant, the rule of the judgment, according to laws of pure practical reason, is this: ask yourself whether or not, if the action you propose were to take place by means of a law of the system of nature, of which you yourself were a part, you could regard it as possible by means of your own will. In fact, everyone does decide by means of this rule whether actions are morally good or evil. According to Kant, what befits the use of the moral concepts is only the rationalism of the judgment, which takes from the sensible system of nature only what pure reason itself can also conceive of; that is, conformity to law.

We have seen that, for Kant, rational beings should judge their actions by means of maxims of which they should will that they can become universal laws: this is, for Kant, moral judgment. Whether or not an action comes under a rule - or maxim - is decided by judgment. Kant speaks of a ‘rule of judgment’. In \textit{Theory and Practice}, Kant also emphasizes the role of judgment in ethics.\textsuperscript{361} A concept of the understanding which contains a general rule must be supplemented by an act of judgment whereby instances are distinguished as regards where the rule applies and where it does not. Rules cannot in turn be provided on every occasion to direct the judgment when subsuming each instance under the previous rule. This would, namely, involve an infinite regress.

\textsuperscript{358} LE (\textit{Collins}) 27: 1428.

\textsuperscript{359} For Kant, a rule for making other rules is a maxim.

\textsuperscript{360} CPrR 87.

\textsuperscript{361} TP 61.
We have seen that judgment is the subsumption of the particular under the universal. In the third Critique, the emphasis is on reflective judgments. In the practical philosophy, the emphasis is on determinant judgments. Is there a possible relation between determinant and reflective judgment in ethics? \(^{362}\) It is not self-evident that there is such a relation. \(^{363}\) According to Kant, determinant judgment enables moral as well as scientific judgments, whereas reflective judgment enables, among others, aesthetic and teleological judgments; the judgments examined in the third Critique. Kant also speaks of the determinant as the pure form of universal lawfulness embodied in a maxim. \(^{364}\)

In my view, in relation to the ‘enlarged thought’, we can speak of an interaction between determinant and reflective judgment. If there were merely determinant judgment, whereby the universal principle, rule, or law is given, there would be no reason to think from the standpoint of others. If there were merely reflective judgment, we would not be able to ‘test’ our maxims (and hence our normative reasons) using the universalization procedure of the categorical imperative. \(^{365}\) We

\(^{362}\) It has been argued that they should be regarded as complementary. In the view of Samuel Fleischacker (1999), reflective judgment not only consists of a play between concepts and intuitions, it also participates in a play with determining judgment as well. Concepts have a definite meaning insofar as we have a definite set or system of scientific and moral determining judgments, but such systems must be constantly scrutinized regarding their responsibility to evidence, to the facts. Mats Hansson regards determinant and reflective judgment as two kinds of operation which are brought into play in ethical judgment. One starts with the moral law, the other begins with the moral problem: ‘Starting with the moral law we develop the criteria of universalizability, moral autonomy, coherence, compatibility as the only end which will not destroy the apodicticity of the moral imperative. With the help of reflective judgment, human needs and desires, the human context and purposiveness in nature will have a place in the investigation of morality.’ (1991: 124).

\(^{363}\) Ricardo Blaug (2000) claims that all moral judgment is determinant since it involves the application of a pre-given universal, the categorical imperative, to a real situation. Also, according to Blaug, moral judgment is determinant for Habermas: the pre-given universal under which the particular is subsumed is the idea of domination-free communication, the account of judgments remains determinant.

\(^{364}\) TP.

\(^{365}\) Let me consider Rainers Forst’s proposal for the role of reflective judgment in ethics. Forst claims that reflective judgment, and it seems that he does not mean aesthetic judgment, is of significance for determinant judgment in ethics: ‘To judge morally means regarding, as a human being, other human beings as members of the comprehensive community of all human beings and behaving toward each one here and now in a way that can be justified with general reasons. That is the meaning of ‘reflective’ judgment, which does not subsume the particular under general but equips the particular with the authority to demand generally justified reasons for mode of action’ (2002: 271). Forst refers implicitly to the third main formula of the categorical imperative, namely the Formula of the Kingdom of Ends. As we have seen, a kingdom is, for Kant, the systematic union of different rational beings through common law. The universal validity of ends is determined by laws. When Forst contends that moral judgment entails human beings being members of a comprehensive community, he presupposes the union in the second Formula. For him, moral judgment is essentially reflective judgment to the extent that reflective judgment would entail universalizable justifications for actions being given. This is, in my view, problematic. Certainly, Kant talks about universality and the necessity of reflective judgments, but it is very clear that reflective judgments have no determinate concept, as is the case with moral judgments. While, as we have seen, normative reasons can play a role in Kant’s ethics, they do not in Kant’s account of reflective judgment. According to Josef Früchtl, reflective judgment entails all others being considered: ‘The aesthetic judgment can claim
need, thus, both kinds of judgment when adopting a universal standpoint from which we judge.

Jürgen Habermas has argued, commenting upon Arendt, that elaborating on moral and political implications of ‘enlargement of mind’ is a first approach to a concept of communicative rationality which is built into speech and action itself.\textsuperscript{366} He speaks of an ethics of communication connecting practical reason to the idea of a universal discourse. It is in this way that I understand the relation between a universal standpoint and judging in relation to Kant’s practical philosophy. Communication is not merely important when the law has been given and has to be applied. Quite the contrary, we legislate by thinking from the standpoints of others.\textsuperscript{367} The role of judgment in Kant’s ethics is not marginal, even though judgment alone cannot discriminate, without practical reason, between right and wrong, as Arendt suggests.\textsuperscript{368}

We have seen that, for Kant, the faculty of judgment discerns whether something is an instance of a rule or not. Judgment is closely related to the understanding, the faculty of rules, and discovers the particular insofar as it is an instance of the rule (for instance, a maxim as a subjective practical principle). The account of judgment in the Lectures on Ethics is illuminating insofar as we are urged to subject our judgment to the judgment of all, the universal reason. This is in accordance with the sensus communis where we weigh our judgment against the collective reason of mankind. The passages in Lectures indicate that the sensus communis, and hence the maxim of ‘enlarged thought’, should indeed be given a role in ethics.

The fact that the role of judgment in ethics is not marginal has also been emphasized by Onora O’Neill. O’Neill discusses § 40 in relation to moral philosophy, the maxims of the sensus communis constrain understandings, and

universal validity since, in its formation, it satisfies a moral requirement, namely to ‘consider’ all others. For the aesthetic judgment, as for the moral judgment, universalizability is constitutive.’ (my translation: ‘Das ästhetische Urteil kann auch deshalb allgemeine Geltung beanspruchen, weil es in seinem Zustandekommen einer moralischen Forderung genügt oder genügen soll, nämlich auf alle anderen ‘Rücksicht’ zu nehmen. Für das ästhetische ist wie für das moralische Urteil Verallgemeinerbarkeit konstitutiv.’) (1996: 454). That we have to consider others is implied by the maxim of enlarged thought but universalizability does not have the same meaning in Kant’s ethics and the third Critique. In Kant’s ethics, universalizability entails that we employ the procedure of the categorical imperative and ask ourselves whether our maxim can become a universal law. In the third Critique, we claim universal validity for our reflective judgments without a concept. Kant explicitly distinguishes the communicability of judgments of taste from the communicability of moral judgments in § 9 and § 39.

\textsuperscript{366} Jürgen Habermas (1980).

\textsuperscript{367} According to Katerina Deligiorgi, by encouraging us to adopt a critical stance toward our judgments, communication can play an important role in intellectual self-determination by ‘triggering the process in which we submit our judgment to the test of independent reasoning’ (2002: 151). Reflection upon one’s judgment from a universal standpoint contains within it an irreducible communicative aspect: communication helps us discover what might count as universalizable.

\textsuperscript{368} Manfred Riedel speaks, in this respect, of Weltweisheit as the ‘Critique of morally judging reason’ (1989, 67). Paul Ricoeur (2004) has also related the concept of judgment to Kantian deontologism: the deontological judgment is to be contrasted with the prudential judgment and the reflexive judgment - all applicable to the medical context. The role of the deontological is to universalize precepts. Kant himself allows considerable room for judgment and exceptions in the application of duties (Allen Wood 2008, 62 ff.). The exceptions we make to rules should always be made for good reasons.
practices of communication, which can be shared in any possible community: ‘They articulate the self-discipline of thinking that will be required if there is to be communication among a plurality whose members are not antecedently coordinated, who form a merely possible community.’ According to O’Neill, sensus communis articulates some ways in which the categorical imperative bears on practices of interpretation. It is the possible rather than the actual judgments of others that form the coordinates for the sensus communis. The categorical imperative, applied to reasoning itself, demands that we only reason on principles that others can act on. To do so is to adopt the three maxims of common human understanding.

O’Neill thus stresses, additionally, the role of judgment in relation to Kant’s practical philosophy, and more specifically in relation to the categorical imperative. We can conclude that, whereas judgment cannot solely discriminate between right and wrong, the faculty of judgment is indispensable in assessing whether others can act on the principles that we discern through practical reason, like judgment, a higher cognitive faculty. If the categorical imperative demands that we reason on principles that others can act on, and that we hence think from the standpoint of others and communicate, we will have, in my view, a good starting point for the Kantian ‘ethics of dialogue’.

We need to judge while we legislate. This means adopting a universal standpoint in order to take a reflective stance toward the own judgment. Such a stance presupposes that we consider the other and, indeed, do not carry out the procedure of the categorical imperative in the loneliness of the soul. This would be against the spirit of Kant’s ethics.

3.3 Impartiality of judgment and the other

Let us now consider how we can meet the other that is pointed to in ‘enlarged thought’. I shall speak of ‘enlarged thought’ in terms of impartiality of judgment. By judgment, the faculty of judgment is meant here. This is in line with the view of sensus communis as a common ground of judgment. ‘Enlarged thought’ is the maxim

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370 The second part of the sensus communis is the maxim of thinking from the standpoint of everyone else and is called, as we have seen, the ‘enlarged thought’. Onora O’Neill understands this maxim in terms of the interpretation of others. Elsewhere, O’Neill relates ‘enlarged thought’ to reflective judgment. According to O’Neill, the situation of agents is primarily one which requires reflective judgment. The most significant single element of moral deliberation may well be coming to appreciate the actual case in a specific way, as falling under one rather than another set of descriptions and hence judgable in the light of some, rather than other, principles.) (O’Neill 1986: 24). When we would judge whether or not a given case falls under any of a set list of concepts, this would be determinant judgment. If we search for concepts under which the case might be positioned by locating it in a larger coherent and systematic whole, we will be able to speak of reflective judgment. Like O’Neill, J.R. Silber relates the maxim of ‘enlarged thought’ to the categorical imperative: ‘In order to respect the humanity of all rational beings the moral agent must put himself into the place and point of view of other beings, and by moving out beyond himself will limit his tendency to concentrate upon the fulfilment of his own needs to the neglect of the needs and legitimate desires of others.’ (1974: 216). According to Silber, judgment is a procedure used to reflect upon one’s own judgment from the standpoint of others. This judgment is what I call the impartiality of judgment.
of judgment and, as we have seen, we can speak, following Hannah Arendt, of an impartial stance in relation to the universal standpoint.

I have already suggested that we distinguish the disinterestedness of the judgment of taste from the impartiality of adopting a universal standpoint. We can contrast impartiality of judgment with the concept of moral impartiality: treating like cases alike. Impartiality of judgment is different from moral impartiality, even though both kinds of impartiality require us consider the standpoints of others. The method of universalization presupposes that impartiality results from the incorporation of all perspectives into one standpoint. The universalizing reasoner must somehow consider the views of all standpoints when reaching his or her normative conclusions.

I have suggested that thinking from the standpoint of others entails imagining ourselves in the standpoint of others and being prepared to enter into dialogue. It has been suggested that the sensus communis urges us to shift our ground in thought and feeling to the standpoint of the other. According to Arendt, critical thinking is possible only where the standpoints of all others are open to inspection. According to Arendt, however, the trick of critical thinking does not consist of enormously enlarged empathy by which we can know what actually goes on in the minds of all others.

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371 Idil Boran (2004) speaks of impartial judgment within a focal group, e.g. a two-person situation, a society, all human beings, or all sentient beings. Impartiality of judgment not only has a place in ethics but also in politics. In politics, we are confronted with a plurality of points of view. In order for our judgments to become sound, we have to take the standpoints of others. Brian Barry associates impartiality with equality. Justice as impartiality "rests upon a fundament commitment to the equality of all human beings. Only on this basis can we defend the claim that the interests and viewpoints of everybody concerned must be accommodated" (1995: 8). According to Susan Mendus (2002), impartial political philosophy is more than a merely practical response to pluralism. It must somehow secure the priority of justice without undermining the permanence of reasonable pluralism. We can conclude that impartiality of judgment is quintessential in a public sphere characterized by pluralism. In a political context, where there is a plurality of points of view, enlarged mentality may enable the critical scrutiny of one’s own judgment vis-à-vis the points of view of others.

372 Marilyn Friedman (1989: 649).

373 See Richard Hare on the role of imagination in moral argumentation: ‘In most normal cases a certain power of imagination and readiness to use it is a [...] necessary ingredient in moral arguments’ (1987: 94). In asking whether another person is happy, we have to imagine ourselves in his shoes.

374 'Der so verstandene Gemeinsinn is immer weniger ein ‘Herumfragen bei anderen’, er wird zunehmend ein ‘In-sich-selber-Horchen’ das jedoch den Standpunkt der anderen in die Reflexion gedanklich und gefühlsmäßig einbezieht. In der Selbstbesinnung erfährt das Subjekt seine ursprüngliche und natürliche Ausrichtung auf die Gemeinschaft’ (Monika Tiffany 2002, 180).

375 Hannah Arendt (1982, 43). I want to consider empathy in relation to ‘enlarged thought’, however. Arne Johan Vetlesen holds, in contrast to Arendt, that empathy entails a Sichmitbringen, not a Sichaufgeben (1994, 118). The emotional ‘projection’ of myself into the place of the other leaves intact the space between myself as one and the other as other. Thus, empathy does not mean that we can know what goes on in the minds of others. According to Philip Hansen (1993), Arendt presupposed the existence of an ‘enlarged mentality’ as the ground upon which judgment could be exercised. Unlike thought or cognitions, judgments are always public. Benhabib (1996) argues that judging becomes an activity of ‘enlarged mentality’ and that this capacity is not empathy, in that it does not mean ‘feeling with others’, but signifies instead a cognitive ability to ‘think with others’.
In my view, empathy plays a role in imagining oneself in the standpoints of others. How can we, for instance, consider the experience of the other as other and respect her? We can, in my view, consider experiences, even though we are not wholly able to know and feel how it is to have the experience of the other who really is an other and who we therefore need to meet in conversation.

How can we relate the otherness of the other, the relation of the one to the other in terms of alterity, to the view of Kant that if we can will to act on a principle, I can will it? How can we recognize the other as other and at the same time think from the other’s standpoint? We could, in this respect, speak of a ‘generalized other’ and a ‘concrete other’. This distinction is made by Seyla Benhabib. According to her, the ‘enlarged mentality’ can be described as exercising the reversibility of perspectives which discourse ethics enjoins. We could say that in thinking from the standpoints of others, we imagine ourselves in the place of the ‘generalized other’.

According to Benhabib, we exercise reversibility of perspectives either by actually listening to all involved or by imaginatively representing to ourselves the many perspectives of those involved. This procedure is an aspect of the skills of moral imagination and the moral narrative which good judgment involves. Only judgment guided by the principles of universal moral respect and reciprocity is ‘good’ moral judgment, in the sense of being ethically right. The standpoint of the generalized other requires us to view each and every individual as a rational being entitled to the same rights and duties we would want to ascribe ourselves with.

Benhabib argues that, in approaching the other as a ‘generalized other’, we abstract from the individuality and concrete identity of the others. We assume that the other, like ourselves, is a being who has concrete needs, desires and affects but that what constitutes his or her moral dignity is not what differentiates us from each other, rather what we, as speaking and acting rational agents, have in common.

According to Benhabib, the standpoint of the concrete other requires us, on the other hand, to view each and every rational being as an individual with a concrete history, identity and affective-emotional constitution. We abstract from what constitutes our commonality, and focus on individuality. Neither the concreteness

376 ‘To be able to ‘visit’ - to be at home in the world - requires the ability to move outside of the singularity of one’s own conscious experience and develop empathy with others’ (Philip Hansen 1993, 210)
377 According to Stephen Darwall, recognition respect is ‘a way of valuing someone intrinsically, in and of himself. In respecting someone’s dignity, we respect and value him (Darwall 2006, 126). Charles Larmore (1997) argues that the norm of equal respect can be detached from Kant’s ideal of autonomy. The idea of a person to whom the formulation of the norm of equal respect appeals involves the capacity for thinking and acting on the basis of reasons. That which demands that we go on talking, that which requires political principles to be the object of reasonable agreement, is the additional norm of equal respect for persons. According to Drucilla Cornell (1999), through reflective judgment, we do not simply seek to negate the fear of the other but instead seek to respect the dignity of the other through the enlarged mentality of reflective judgment. Axel Honneth (2003) relates the Kantian concept of ‘Achtung’ (respect) to the moral chernel of ‘Anerkennung’, recognition. Anerkennung entails that we respect the moral authority of others.
379 Ibid. (1992, 158 ff.).
nor the otherness of the ‘concrete other’ can be known in the absence of the voice of the other.  

The fact that we cannot meet the ‘concrete other’ in other ways than language does not, in my view, mean that communication is not important when approaching the other as ‘generalized other’. To view the other as ‘concrete’ and ‘generalized’ is to complement these two ways of meeting the other. In the meeting with the other, we seek to understand what we have in common but also the respects in which we differ.

Why should we adopt a universal standpoint and engage in an operation of ‘enlarged thought’ whereby we recognize the other as other, by imagination and preparedness to dialog? Why not deliberate simply from the point of view from here? If we want to give normative reasons, and in my view we should, to justify our judgments, we cannot merely deliberate from here but need to determine a universal standpoint from where to judge. We are concerned with how our judgments, with which we suggest a public course of action, affect others. Only then can we claim that our reasons are universal in the sense intended in the previous chapter. By judging and legislating, we may be able to share our reasons. Is the prospect of sharing our normative reasons in a practical discourse realistic; a practical discourse in which we could argue, on the basis of the discussion in this chapter, think from the standpoint of others? This is the topic of the next chapter.

381 Emmanuel Levinas’s view on the recognition of the other as other is, in my view, important for an understanding of impartiality of judgment whereby we relate to the other. Levinas argues that the absolutely other is the other. The relation between the same and the other is enacted as conversion (discours) whereby the same leaves itself: ‘Conversation, from the very fact that it maintains the distance between me and the Other […] cannot renounce the egoism of its existence; but the very fact of being in a conversation consists in recognizing the Other a right over this egoism, and hence in justifying oneself’ (1998: 40). The manifestation of the face is already discourse. To present oneself by signifying is to speak. In Levinas’ account, the role of language is important. The claim to know and to reach the other is namely realized in the relationship with the other that is cast in the relation of language. Language institutes a relation irreducible to the subject-object relation: the revelation of the other. The presence of the others is not contemplated as an intelligible essence but is heard as language.
382 Susan Wolf argues that a moral point of view, often associated with impartiality, is not at all required for deliberation. The moral point of view is reached by abstracting from a point of view that one more naturally holds. However: ‘Once we recognize that our reasons come from a variety of sources that no single point of view can capture, however, we seem forced to admit that we can and often do deliberate among reasons without the help of any overarching point of view at all.’ (1999: 219). Wolf argues that, when I deliberate, I simply deliberate from here. The point of view from here is nothing more or less than one’s own point of view.
Deliberating in a pluralist world

In this chapter, I shall concern myself with the prospect of public deliberation. I shall examine this prospect in relation to the skepticism of Tristram Engelhardt, as far as public deliberation is concerned. His skepticism provides a good starting point for an account of public deliberation. Furthermore, Engelhardt has formulated a cogent account of the bioethical condition. According to Engelhardt, we do not share enough moral premises to be able to communicate rationally. I argue that we at least need an account of how we should deliberate.

In the previous chapters, I have concerned myself with the two conditions of ethico-political judgment. I regard ethico-political judgment, the deliberative formation of a judgment in the public sphere, as the regulative ideal of public deliberation. In this chapter, the two ethico-political conditions will be applied to the question of how we can judge and deliberate: aiming at impartiality of judgment in the deliberative practice of giving and asking for normative reasons. Whether or not we can deliberate, in fact, is an empirical question that we will examine in the subsequent chapters in part 2. This is a question that Engelhardt does not address.

In the first part of the chapter, I shall deal with Engelhardt’s skepticism about public deliberation which is informed by an account of moral diversity in a postmodern society. First, I provide Engelhardt’s foundations of bioethics, explaining how they suggest a public course of action. Then, I discuss the prospect of deliberation with what Engelhardt calls ‘moral strangers’. It is this discussion that forms the point of departure for the second part, in which I shall criticize Engelhardt for not providing us with the appropriate conceptual tools for dealing with plurality. We should instead ask how ought we to deliberate.

I suggest such an account in terms of ethico-political judgment. Moreover, the concept of public justifiability - with which we have concerned ourselves in the first chapter - is a concept that is relevant; this, in view of Engelhardt’s skepticism, as far as the normative guidance of a public course of action is concerned. In the last part, I shall defend the point that public deliberation is about furthering mutual respect, irrespective of whether we arrive at consensus, compromise, or dissensus.

Engelhardt’s *Foundations*, with its emphasis on plurality, provides a good starting point for such a discussion. Engelhardt’s cogent account of the bioethical condition cannot be ignored in an inquiry into the opportunity to justify judgments in a public sphere characterized by a plurality of viewpoints.
4.1 Too different to deliberate?

The bioethical condition

Engelhardt is skeptical with regard to the Enlightenment project’s aim of justifying morality in rational terms and discovering a common morality by reason. The project of securing as much universality as possible for the claims of bioethics has its roots in this project which establishes universal, content-full ethics. Furthermore, it emphasizes a moral community of all persons, outside of any particular religious or cultural assumptions.\(^{383}\) By content-full, Engelhardt means giving normative guidance in terms of right or wrong.

But what Enlightenment project are we aiming at? Kant’s project of establishing practical reason as the governor of the will; Habermas’ attempt to secure the validity of norms by communicative reason; or Rawls’ emphasis on public reason as the reason for free and equal citizens, with all their apparent differences? I want to make, in addition to the common view of the Enlightenment as the age of reason, the case for a view on the Enlightenment in terms of the will.\(^{384}\) Albrecht Wellmer describes the ‘discovery’ of the Enlightenment as follows:

> Enlightenment means the discovery that seemingly guaranteed norms of correct living, the ‘justification’ for which lay in the order of things, the will of God, or the authority of tradition, have no conceivable foundation other than in the will of men. I imagine that this discovery must have induced a sense of vertigo in those who first made it.\(^{385}\)

It is skepticism, with regard to what the will can accomplish, which characterizes the project of Engelhardt. We have nothing but that which Engelhardt himself points to as the ‘will to morality’.\(^{386}\) Engelhardt’s morality is, however, scarce.\(^{387}\) If we will more morality, how realistic will this be in a society characterized by diversity?\(^{388}\)

Engelhardt believes, in any case, that we do not have a content-full ethic that can give guidance in such a society.\(^{389}\) For that reason, we cannot have rational

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\(^{383}\) Tristram Engelhardt (1996, viii).

\(^{384}\) Nathan Rotenstreich (1985) argues that the will, in Kant, is to be presupposed as a capacity of the human subject. It connotes the capacity to choose, to set goals or to take a stand motivating the agent to perform a certain action. Will is not only an affirmation inherent in reason or understanding; it is elevated to the level of morality. In chapter 2, we have encountered the importance of the will in relation to Kantian autonomy: Kant speaks, in this respect, of autonomy of the will (Gr § 439).


\(^{386}\) Tristram Engelhardt (1996, 103 ff.).

\(^{387}\) ‘For a will to a moral viewpoint to be more than an inclination toward a particular moral viewpoint, it will need to be a will to a moral fabric as general as the very concept of morality itself’ (Engelhardt 1996: 104).

\(^{388}\) Barbara Herman (2008) has argued that it is a reasonable expectation of morality’s authority over other normative claims that it can be consistent with the recognition and respect regarding differences in culture and ways of life that are morally substantial and group-defining. This applies, even on a Kantian account: ‘Traditional interpretive misgivings notwithstanding, I believe that Kantian framework provides the reasoned balance between objectivity of judgment and sensitivity to the particular that is necessary to acknowledge pluralism without succumbing to across-the-board relativism’ (2007: 32).

\(^{389}\) Tristram Engelhardt (1996, 8 ff.).
communication. The failure of the Enlightenment project lies in the inability to recognize the depth of the moral diversity that characterizes our context; diversity regarding, for instance, abortion, commercial surgery, euthanasia, germline genetic engineering, inequalities in access to health care, infanticide and organ sales. Thus, for Engelhardt, the Enlightenment project cannot deal adequately with what can be called the bioethical condition.

In what sense does Engelhardt’s concept of moral diversity differ from the liberal concept of moral pluralism, such as Habermas’ lifeworlds with their ethical orientations? In my view, the difference is that Habermas still regards a minimal consensus - *Verständigung* - in view of moral pluralism, as conceivable while Engelhardt believes that a consensus is neither likely nor desirable.

Given his skepticism regarding a binding morality, utilitarianism and Kant’s ethics are dismissed by Engelhardt in view of their content. This would entail, namely, begging the question. We presuppose controversial claims, such as the fact that actions can be judged solely on the basis of their consequences of their moral worth. These claims cannot be endorsed by all persons given the diversity that Engelhardt discerns. A moral theoretical account must either beg the question, with regard to moral content, or give no substantive guidance.

However, if we cannot have a content-full morality; what about formal ethics such as the discourse ethics of Habermas? According to Engelhardt, discourse ethics still suffer from having content. In the case of Habermas, either secular norms do not exist or they cannot be tested without presupposing what is at issue: a particular moral sense or a notion of moral rationality. The target of Engelhardt is Habermas’ principle of universalization. In the view of Engelhardt, the principle of universalization is untenable since, given different understandings of the significance of consequences and the proper ordering of interests, there can be no rationally principled acceptance. Habermas would smuggle considerable content into his notion of discourse.

However, is there an alternative ethic that is freed from begging the question that can still have guidance? In Engelhardt’s alternative, the concept of agreement plays a pivotal role. Engelhardt’s alternative is that the only source of general secular authority, for moral content and moral direction, is agreement. Only on the basis of agreement can there thus be an authority of ethics that can bind all persons. Authority is the authority of the agreement of those who decide to collaborate. Consent establishes a ‘secularly acknowledgeable authority’ for its conclusions: agreement.

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390 Ibid. (1996, 3).
391 Engelhardt (2007) ascribes Kant with a rationally discoverable vision of morality, justice, and proper conduct, which authorizes state or international governmental authority to constrain and direct citizens, groups, and communities. This is the normative perspective of the universal legislator of the categorical imperative, or of the privileged utilitarian calculator of benefits and harms, who assumes that, out of an already available account of moral rationality, rational volition, or human preference satisfactions, a concrete understanding of responsible human choice, can be imposed on citizens.
392 Tristram Engelhardt (1996, 40 ff.).
What is meant by agreement? An example that Engelhardt provides is the relation between patient and doctor. Only on the basis of consent can such a relation be characterized in terms of agreement (or what is called ‘informed consent’ in the contemporary medical ethics discourse). We should not, however, see Engelhardt’s agreement in terms of Habermas’ *Verständigung* or consensus at the societal level. According to Engelhardt, agreement with regard to, for instance, human genetic engineering is unlikely, given moral diversity.

Engelhardt goes on to develop two principles of his project of founding bioethics. These are permission and beneficence. The maxim of the principle of permission entails that we do not do to others that which they would not have done unto themselves, and do for them that which one has contracted to do. We see that this principle applies, without doubt, to the clinical encounter between patient and doctor. The principle applies less, however, at the societal level of, for instance, the public discourse on prenatal diagnosis.

Beneficence, Engelhardt’s second principle, albeit less focal than permission, urges us to do unto others their good. For Engelhardt, permission and beneficence are principles in two senses. They function as chapter heading or indexes, directing one to clusters of issues, and they are rules of thumb. However, they are also sources of particular areas of moral rights and obligations. As principia, they indicate the source, beginnings, commencements, or origins of particular areas of moral life. Contrary to permission, the principle of beneficence is not required for the very coherence of the moral world: this principle is not as basic as the principle of permission.

We should not understand Engelhardt’s principles as mid-level principles, such as the four well-known principles of biomedical ethics: principles between ethical theories and judgments regarded as expressions of a common morality. The principles should instead be recognized as a disclosure of a ‘transcendental

394 Ibid. (1996, 103).
395 According to Mark Aulisio (1998) Engelhardt does not contend, nor should he, that one *ought* to play the permission game, but rather that the permission game is the only alternative to force in the moral wasteland of postmodernity. If one wants an alternative to force (i.e., if moral strangers want to enter the practice of intersubjective moral collaboration, as Engelhardt himself puts it, one must play the permission game.
396 It should come as no surprise that Engelhardt sees no opportunity for agreeing on the ‘common good’: rather, the common good is related to communities in which the common good of the community can be negotiated. In my view, the idea of the common good plays a role in bioethics. Let me consider the account of the good by Charles Taylor (1997). According to Taylor, the common good is constituted out of individual goods. Things have value to me and you, and some things essentially have value to us. The good is what we share. Daniel Callahan (1994) asks what new technologies will mean for all of us together. The question is whether or not the technology will be sufficiently compatible with the common good to permit its use. The possibility of enhancing human nature raises the question of what the proper goals and uses of medicine are. What kinds of medical advances and progress will be most conducive to a morally and culturally good society? What uses of medical knowledge and technology are most constitutive of the good of the human community and of those institutions in society that are necessary in order to sustain that community? These questions are, in my view, important ones to address.
397 See Tom Beauchamp and James Childress (2009). I shall discuss their concept of common morality - constituted by the principles of respect for autonomy, beneficence, non-maleficence and justice - in chapter 5.
condition’, by which Engelhardt means a necessary condition for the possibility of a
general domain of human life and of the life of persons generally.\textsuperscript{398} According to
Engelhardt, the transcendental principles provide a minimum grammar, or a neutral
language, involved in speaking of moral commitments with an authority other than
through force.\textsuperscript{399} The neutral language is not dependent on particular moral visions.
This language is a moral or logical possibility; it would not depend on socio-cultural
conditions.\textsuperscript{400}

\textit{Public courses of action in postmodern society}

Given the diversity of questions related to biomedicine in contemporary societies,
we could expect Engelhardt’s foundations of bioethics to have implications when
deliberating on a public course of action. According to Engelhardt, at stake are deep
and fundamentally different understandings of the sanctity of life, equality, and
fairness. These differences show no promise, in fact, of disappearing. We should
therefore prepare to meet a future where moral diversity can peaceably persist. We

\begin{footnotes}
\item Tristram Engelhardt (1996, 70). Thomas Bole (2000) criticizes Engelhardt’s claim that successful
transcendental argument in morality yields valid procedure, but not valid content. He contends that Kant’s
argument is more fundamental to the concept of morality and that if we distinguish the categorical
imperative in its function as defining the moral law from its function as a criterion for the morality of its
maxims, we have no problem seeing how it is content-filled.
\item I suggest that, for any transcendental founding of bioethics, in the spirit of Kant, the principles of
permission and beneficence are insufficient. I suggest that autonomy and human dignity should also be
elaborated on as principles in the sense of Engelhardt in order to provide the ‘minimal grammar’ to live
peaceably together. Engelhardt, who renamed the principle of autonomy from the first edition of
\textit{Foundations to permission in the second edition, admits elsewhere (Engelhardt 2001)} that autonomy is at the
root of morality. In the view of Engelhardt, autonomy as the freedom of the individual to consent or give
permission is indeed sparse, unKantian, and unavoidable. According to Kant, autonomy is the basis of the
dignity of human nature and of every rational nature (Gr § 436). Morality is the relation of actions to
autonomy of the will, that is, to the potential universal legislation by its maxims (Gr § 439). According to
Jacob Rendtorff (2002), autonomy should be considered as a principle of self-legislation of rational human
beings taking part in the same human lifeworld. Autonomy, in the sense of self-legislation, is depicted by
Onora O’Neill (2002) as Kantian, principled, autonomy. Engelhardt also mentions human dignity when
arguing that human dignity is no longer grounded in a status conveyed by God to humans, through creation
in his image and through incarnation (Engelhardt 2004). Human dignity can, however, also be defined both
as an intrinsic value and as a matter for constructive morality in human relationships (Rendtorff 2002).
Dignity includes respect for the moral agency of the human subject. It means that every human being must
be considered as being without a price and unable to be commercialized. According to Wolfgang Vitzthum
(2004), dignity - that worth which is not subject to balancing tests, which is irreplaceable, and which
distinguishes the human being as such - owes its uniquely primary position to the necessary recognition of
all those involved.
\item Hub Zwart (1998) has criticized the idea of a neutral moral language. By endorsing a neutral common
language for moral deliberation, we indicate that we prefer peaceful negotiation, tolerance and resolution by
means of agreement to moral warfare. To others, i.e. those who are not involved in this particular
community, the neutral common language might seem to be as parochial and arbitrary as other moral
idioms in society. Zwart argues that, from the point of view of other moral communities, bioethics does
not coin a neutral moral language but merely adds one particular moral language to those already available.
Why should the so-called neutral common language overrule the vocabularies of other communities, asks
Zwart.
\end{footnotes}
have to acquiesce as regards differences without suppressing them by force.\textsuperscript{401} There is, namely, no authoritative Ariadne’s thread of sound rational argument to lead us to the morally canonical, authoritative, policy to which all should accede.

Engelhardt believes that the hope of the modern age - to be able, based on reason, to establish a canonical and content-full moral account that can authorize a content-full public policy - is vain.\textsuperscript{402} Rather,

pluralism so prevails that we even may doubt whether we can in principle share a common, concrete, sense of rationality, not to mention a common sense of grace. The fashioning of a common moral discourse is one of the most serious challenges of the post-modern era. How can public policy be developed with moral authority when there is often little consensus on the meaning of life and death, or the final purposes and significance of human endeavours.\textsuperscript{403}

In order to deal with diversity, a libertarian understanding with regard to public policy must be accepted because of the failure of the Enlightenment project.\textsuperscript{404} The accent is unavoidably on free and informed consent, the right to privacy, private property, and limited democratic decision-making. A libertarian framework can, nevertheless, unite persons and communities who are associated through the market and protected by the state against unconsented-to force. The procedural framework ensures that citizens are protected against fraud and other varieties of unconsented-to harm and coercion.\textsuperscript{405}

Using the example of prenatal diagnosis, in the first edition of \textit{Foundations}, the implications for public discourse are clarified.\textsuperscript{406} Engelhardt distinguishes between a number of moral questions: What rights and obligations do parents have to avoid the birth of defective children? What is the basis for holding certain children to be ‘defective’ and therefore less valuable? Would it be good to help a woman to secure amniocentesis and abortion, should she want them? In addition, an ontological question is a content-full question raised by prenatal diagnosis; are fetuses persons? The only relevant question in a neutral framework, however, is the general question of whether or not a woman should be allowed to abort a fetus.\textsuperscript{407}

However, how do we decide whether or not a woman should be able to make this choice? I have already indicated that Engelhardt’s understanding of agreement entails the agreement of persons, for instance during the clinical encounter. Given the emphasis on a libertarian understanding and diversity, we can assume that Engelhardt does not see a rationale for a public discourse on prenatal diagnosis:

\begin{itemize}
\item Tristram Engelhardt (2000\textsuperscript{b}).
\item Ibid. (1994\textsuperscript{a}: 31).
\item Ibid. (1991: 13).
\item Ibid. (1994\textsuperscript{b}).
\item Ibid. (1994\textsuperscript{a}).
\item Ibid. (1986).
\item Michael Merry (2004) criticizes Engelhardt in this respect: is it possible that responsible informed consent, for instance, carried out between physician and patient irrespective of ideological adherence, could ever be empty of moral content? Is it likely for honest discussion of the rights of the mother or the rights of the unborn child to be devoid of content? Is it even thinkable that strenuous efforts to palliate when someone is dying a slow, agonising death could be absent of moral content?
\end{itemize}
rather, the choice is merely left to the woman. There are, thus, important normative assumptions in Engelhardt’s libertarianism. The question of whether or not prenatal diagnosis should be allowed is not addressed, however. It is assumed that, given moral diversity, we cannot arrive at a consensus in this respect. As is the case with euthanasia, abortion, and human genetic engineering, there are, in the case of prenatal diagnosis in the view of Engelhardt, no rational arguments other than to let persons decide for themselves and give their consent.\footnote{408}

Engelhardt himself seems to be aware of the limitations of his approach, as far as public discourse is concerned. He is, namely, afraid that religious understandings will not be heard in public discourse structured by the liberal condition of reciprocity - I give you a reason that you can accept as your own.\footnote{409} Religious discourse, in this sense, is neutralized so that it will no longer pose a sectarian threat to the universalistic aspirations of the new secular liberal agnostic morality.\footnote{410} Rawls, with his emphasis on public reasoning,\footnote{411} and Habermas, with his emphasis on the

\footnote{408} There is no consensus in a liberal society that human nature is special. Therefore, there is no rational argument against human germline genetic engineering (Engelhardt 1990). Bioethical decisions are now framed not only without an ultimate orientation, but without any regret concerning the absence of orientation (Engelhardt 2002\textsuperscript{b}). This state of affairs is underscored in secular reflections regarding germ-line engineering and the proper goal for a humanly directed human evolution.

\footnote{409} Since reciprocity is important to public deliberation, the account of Amy Gutmann and Dennis Thompson (1996) is valuable. Public deliberation by citizens entails that they seek agreement on substantive moral principles that can be justified on the basis of mutually acceptable reasons. Reciprocity holds that citizens owe one another justifications for the mutually binding laws and public policies they collectively enact. The aim of a theory that takes reciprocity seriously, for Gutmann and Thompson, is to help people seek political agreement on the basis of principles that can be justified to others who share the aim of reaching such an agreement: ‘When citizens deliberate, they seek agreement on substantive moral principles that can be justified to others who share the aim of reasoning in politics succeeds in finding such principles, the conclusions of deliberation become mutually justifiable. According to Gutmann and Thompson, whether or not there are such principles, and how they should be interpreted, can often only be discovered during the process of deliberation itself. An appeal to divine authority per se is not what creates a problem, the problem lies in appealing to any authority whose conclusions are impervious, in principle as well as in practice, to the standards of logical consistency or to reliable methods of inquiry which themselves should be mutually acceptable. Also in discourse ethics, we can speak of reciprocity in terms of giving and asking for reasons. William Rehg relates impartiality and reciprocity in discourse ethics: ‘(U) arrives at […] impartiality only by way of a reciprocity defined in terms of the perspective taking given with the need to find arguments convincing in the language of the other participant’ (1994: 76).

\footnote{410} Ibid. (2006).

\footnote{411} According to John Rawls, only a political conception of justice, that all citizens might reasonably be expected to endorse, can serve as a basis for public reason and justification. Reasonable pluralism entails that there is a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral (Rawls 2002, 131 ff). Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines. In view of this, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake. Reason is public, as the reason of free and equal citizens it is the reason of the public. Unlike Habermas, for whom a coming to agreement (Verständigung) entails that we agree on the better reason; for Rawls, an overlapping consensus can be endorsed by each from his own point of view. For our inquiry, the Habermasian concept of consensus seems to be the most relevant. In case we have fixed viewpoints, and a consensus is unlikely, it is compromise that matters. It can be called into question that we always have fixed
impartiality of communicative rationality, require that claims made in the public forum be fully grounded in a public secular rationality, in reasons comprehensible to all. According to Engelhardt, these claims are suppressing religious discourse. A notion of the reasonable incorporates particular social democratic ideals.

According to Engelhardt, these content-full claims cannot, however, be justified by sound rational argument. What is more, the affirmation of the right of the religious to give public voice to their insights, and to act on their special knowledge, radically limits the aspiration to establish a public discourse that excludes claims about God, sin, and eternal life. In the view of Engelhardt, Christian appeals to grace and noetic knowledge (‘inner knowledge’) are no more arbitrary than invoking particular moral intuitions. Thus, Engelhardt is not only skeptical as far as content-full ethics are concerned but also regarding the prospect of rational communication. Indeed, to be able to have rational argument, we need, in the view of Engelhardt, content-full ethics. It is this claim which I consider below. First, let us have a closer look at Engelhardt’s claim that we can’t deliberate, or communicate rationally.

Conversation with moral strangers

We have seen that, in the view of Engelhardt, the Enlightenment project fails to recognize the diversity that is apparent in discussions on moral questions related to biomedicine. For Engelhardt, diversity is not merely pluralism of values and worldviews, as it is conceptualized in liberal theories. Rather, we should think of a radical postmodern plurality in terms of irreconcilable disagreement. Engelhardt takes the postmodern condition as his point of departure for his analysis of the bioethical condition. However, what does Engelhardt mean by postmodernity, as the successor of the Enlightenment project?

For Engelhardt, postmodernity entails the incredibility of an epistemological moral narrative as well as a radical moral diversity. According to Engelhardt, the viewpoints, however, and in this case, it may be logical to engage in the giving of and asking for reasons in search of the better, normative reason.

412 Tristram Engelhardt (1996, n. 7). Engelhardt departs, to a considerable extent, from the observation of Jean-François Lyotard that the grand narrative has lost its credibility (in Engelhardt 1996, 2000a, 1991). Engelhardt takes Lyotard’s observation of the ‘fracturing of the universal moral narrative’ as heuristic. In my view, Engelhardt’s analysis of postmodernity would gain from Lyotard’s later work, particularly The Differend, a work which explicitly deals with difference. A differend is a case of conflict, between at least two parties, which cannot be equitably resolved for the lack of a rule of judgment applicable to both arguments (Lyotard 1998). A universal rule of judgment between heterogeneous genres is generally lacking. The only one that is indubitable is the phrase because it is immediately presupposed. A phrase is constituted according to a set of rules (its regimen). There are a number of phrase regimens: reasoning, knowing, describing, recounting, questioning, showing, ordering, etc. Phrases from heterogeneous regimens cannot be translated one into the other. Genres of discourse, however, supply rules for linking together heterogeneous phrases. Each of the families of phrases, essential components of language, is as an island: the faculty of judging has to be like an admiral, or a judge, moving from one island to another. Deliberation is a concatenation of genres. Engelhardt stresses that we should respect the difference in a postmodern society between communities, but sees no reason, or opportunity, for a judge to travel in between the various communities.
failure of the Enlightenment project is a consequence of the fact that we have entered the era of postmodernity. This is, according to Engelhardt, a sociological phenomenon. Engelhardt does not address this sociological question in detail, however.

In any case, we now have to come to terms with the chaos and diversity of postmodernity using secular means:

The attempt to sustain a secular equivalent of Western Christian monotheism through the disclosure of a unique moral and metaphysical account of reality has fragmented into polytheism of perspectives with its chaos of moral diversity and it cacophony of numerous competing moral narratives. This circumstance as a sociological condition, reflecting our epistemological limitations defines postmodernity. Secular rationality appears triumphant. But it has become many rationalities.

The postmodern age is the age of moral strangers. Moral strangers have no common moral vision and, what is more, rational communication among them is deemed to fail, given their diverging moral premises. Moral strangers constitute society; community identifies, on the other hand, a body of men and women bound together by common moral traditions and practices around a shared vision of the good life. This vision allows them to collaborate as moral friends. Moral friends, on the other hand, are those who share enough of a content-full morality to be able to resolve moral controversies by sound moral argument or by appeal to a moral authority. Such an authority is absent in the case of moral strangers.

When the premises held in common are insufficient to frame a concrete understanding of the moral life, and if rational arguments alone cannot definitely establish such premises, then reasonable men and women can establish a common fabric of morality only through mutual agreement. There is, thus, a possibility of intersubjective moral coherence and collaboration without presupposing the

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\[\text{413} \] Tristram Engelhardt (1996: 5).
\[\text{414} \] Ibid. (1996, 7).
\[\text{415} \] The distinction between moral strangers and friends has been questioned by Kevin Wildes (2000). According to him, secular society can be understood as many communities that have overlapping as well as different ideas, commitments and members. Members of a secular society may be regarded, in many circumstances, as moral acquaintances. There are instances where we appear neither as friends nor strangers, but as moral acquaintances. There are contexts where we share some common points and are able to articulate a common morality. The procedure of informed consent is one example. People who hold different foundational views can look at cases involving abortion and agree that there are moral losses in choices that are often tragic. People who hold very different views about the law or public policy can agree that members of society ought to find ways to build a society that seeks to reshape the circumstances leading to such tragic choices and provides options for women in crisis. This is the common ground of moral acquaintanceship.

\[\text{416} \] Brendan Minogue (1997) argues that, because of his formal or procedural nature of minimal secular ethics, Engelhardt thinks of agreement and permission as ethical rules that are outside the realm of normative ethics. They are meta-ethical and because of their meta-ethical character, they transcend the typical restraints imposed by normative ethics.
objectivity of secular morality. Because sound rational argument fails, in principle, to establish a canonical content-full moral understanding, one is left with agreement.\textsuperscript{417}

According to Engelhardt, moral strangers do not only have diverging moral premises, they also lack rules of inference and evidence. Does the concept of the moral stranger apply to citizens who are deliberating on moral and political questions, e.g., prenatal diagnosis? This is, ultimately, an empirical question, just as the sociological account of postmodernity is a question of inquiring into our social reality.

Are citizens able to give and ask for reasons in deliberative practices? Engelhardt seems to deny this. Deliberation would be pointless, given the radical diversity. I have already mentioned the concept of irreconcilable disagreement. We could assume, given Engelhardt’s claim that a fundamental normative consensus is unattainable, that the success of deliberation is dependent on the outcome in terms of such a consensus.

In the view of Engelhardt, as we have seen, in order to resolve moral controversies by sound rational argument, one must share fundamental moral premises. However, outside of any particular tradition of discernment or \textit{phronesis}, how would one be able to determine who is discerning and who is imprudent?\textsuperscript{418} According to Engelhardt, this criticism invokes a moral epistemological skepticism, not a metaphysical skepticism. It does not require us to hold that there is no moral truth or moral sense to discern. However, no general secular account can determine which moral sense has discerned rightly or wrongly without begging the question.

Moral friends gather in communities. For instance, communities of Orthodox Christians - Engelhardt makes no attempt to disguise that he belongs to this

\textsuperscript{417} According to James Lindemann Nelson (1997), Engelhardt relegates morality to a matter of coordinating various kinds of permission-giving and agreement-keeping, among those able to give permission and make agreements, devoid of any resources for explaining what it is about the ability of persons to permit and agree which ought to command our respect. This is because any such account would draw on some content-full, and therefore unjustifiable, conception of the value of persons and their deeds. It seems impossible, however, to understand how permissions and agreements count as moral reasons for action. Rather, we can approach the task of making sense of, refining, and even justifying the moral understandings by which we live immanently, rather than transcendentally. We must start out from where we are, elucidating what we value, relating our various commitments, striving for greater coherence among our moral, philosophical, and empirical beliefs, regarding disagreements with others, insofar as we can, as chances to increase the power and scope of our understandings. This is, of course, an impressionistic sketch of a wide reflective equilibrium approach to moral justification (see also chapter 5, note 470, regarding this approach).

\textsuperscript{418} Tristram Engelhardt (1996). Engelhardt’s emphasis on the role of communities of moral friends in resolving moral controversies - and the implication that each community has its own rationality can be compared with Alasdair MacIntyre’s (1988, 350 ff.) account of traditions. According to MacIntyre, traditions can only, at each stage of their development, provide rational justification for their central theses in their own terms, employing the concepts and standards by which they define themselves, but there is no set of independent standards of rational justification by appeal via which the issues between contending traditions can be decided. It is through debates, conflicts, and enquiry into socially-embodied historically-contingent traditions (including liberalism) that contentions relating to practical rationality and justice are advanced. There is a striking similarity, in this respect, between the thinking of Engelhardt and MacIntyre. Both seem to suggest that we cannot justify a certain action on the basis of moral premises, since such premises are inextricably interwoven with communities or traditions.
community, with its aversion to most practices in the wake of biomedicine - and Liberal Protestants. Indeed, moral friends belonging to these communities will differ as far as moral premises are concerned; but can’t they converse?

Why are communities important? In the view of Engelhardt, this is because moral truth is to be discovered in communities of moral friends. There remains a sense that a final and enduring truth must exist in morality. There are moral truths, but only some know them. To the discomfiture of a post-metaphysical, liberal culture, sectarians or fundamentalists have a cult of full commitment to a transcendent truth. Thus, moral truth does exist, but only in certain communities.

If moral truth is only to be discovered in certain communities, does not Engelhardt's project end in relativism? This question is appropriate given that we cannot have a binding ethic for moral strangers - content-full or formal - which gives us the conceptual tools for determining what is right and wrong. Neither do we have the opportunity to deliberate on a justifiable course of action, given that we are moral strangers. The charge of relativism has, indeed, been made by several commentators. According to Engelhardt, there is, namely, no standing ground, no place for enquiry, no way to engage in the practices of advancing, evaluating, accepting, and rejecting reasoned argument, apart from that which is provided by some or other tradition.

Before addressing the question of relativism, in relation to Engelhardt’s project, let us first consider what we mean by relativism. According to Tännö, it is true that the meanings of words such as ‘right’ and ‘wrong’ tend to vary between different moral universes. Within each moral universe, there are true and false moral judgments. Relativism is the doctrine that there is more than one truth about some moral cases. Moral relativism, however, comes in many varieties. One is a substantial moral doctrine, according to which we ought to respect other cultures, and allow them to solve moral problems as they fit it. Other kinds of relativism

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419 According to Joseph Seifert (2004), Engelhardt’s position is not only relativist but also deprives the human intellect of any immune system against ethical skepticism, relativism, agnosticism, ontological value nihilism and the most radical value subjectivism and nihilism. His position should be designated as an exclusively philosophical epistemological skepticism and as an ’epistemology of an ethical knowledge through private religious experience and contact with divine energies alone rather than an all-out skepticism of any knowledge of objective truth’. According to Seifert, for Engelhardt, true moral knowledge presupposes the personal transformation of the knower, which is unlikely on the part of persons generally. Another charge of relativism comes from Michael Wreen (1998) who claims that Engelhardt moves in the direction of relativism and nihilism. Substantive bioethics lack an intersubjectively verifiable and binding foundation. As Seifert observes, grace and revelation are routes to the single true morality. According to Wreen, Engelhardt’s secular neutral framework is an attempt to avoid the ravages of nihilism and relativism in the wake of the purported failure of the Enlightenment project that does not hold. The concept of a content-less morality is an attempt to have it both ways: to have and not have genuine prescriptions. Content-less morality is, however, an oxymoron. According to Wreen, nihilism is less of a worry than relativism: the problem is that there are too many true moralities, being true and binding in only a limited territory or for only a limited number of people.

420 Torbjörn Tännö (2007).
include meta-ethical doctrines. According to these doctrines - semantic, epistemic, and ontological - there is more than one correct way to answer a moral question.\footnote{Semantic relativism entails that, according to some adequate moral framework or system S, to which I adhere, e.g. the one prevailing in my culture, an action is permitted. Ontological relativism implies that when two persons pass conflicting moral verdicts on a certain action, they may both be right. The explanation of why they are both, in an absolute sense, ‘right’ in their judgments is that they inhabit different moral socially constructed universes, common sense moralities.}

*Epistemic relativism* entails that when one person belonging to one culture makes a certain moral judgment, e.g. this action is right, and another person belonging to another culture makes the judgment that the very same action is wrong, they may have equally good reasons for their respective judgments. They are each fully justified in their belief in the conflicting judgments.

In my view, Engelhardt is an epistemic relativist if we consider, at least, a culture in terms of a community. In communities of, for instance, to mention that example again, Orthodox Christians and Liberal Protestants, members may have good reasons to hold judgments that are different. In these communities, members share different premises. Epistemic relativism may entail that one community considers an action to be right while another community may regard it as wrong. As we have seen, we could say that Engelhardt is an epistemological skepticist, who does not believe that we can have knowledge in morality.

According to Tännsjö, a moral realist who believes that there are moral facts, which are independent of our conceptualisations or actions, should be expected to want to add that once different moral universes have been described, there will be a way of transcending them all: which one, if any, of competing moral claims, is the uniquely correct one? If we conceive of ourselves as inhabiting a moral universe, there will, namely, be a drive toward completeness. We want answers to all moral questions, also those arising in alien cultures. Engelhardt, in this sense, is certainly no realist. He sees no way of transcending the various communities. To this end, we would need a content-full ethic, which is not to be had.

### 4.2 The deliberative justification of judgments

I have discussed Engelhardt’s claim that rational communication between moral strangers is not likely, given their diverging premises concerning what is right or wrong. Only moral friends would be able to agree on judgments of right. However, can we speak of judgments of right in the public sphere contrary to what Engelhardt, who in this sense, in my view, is a relativist, defends? In principle, this is possible, in my view, at least if we see rightness in terms of being dialogically justified by normative reasons. Habermas argues that judgments are right if they can be dialogically justified. Being dialogically justified is, as I argued chapter 2, in my view, a necessary but insufficient condition of rightness. In addition, the better reason that Habermas speaks of has to be a normative one - given that it applies to every rational being in the Kantian sense.
We should aim at dialogical justification in terms of normative principles. However, what is justifiable in one public sphere, with good reasons, need not be justifiable in another public sphere. In Europe, for instance, there are different judgments of right and wrong with regard to pre-implantation genetic diagnosis, for example.422 How do we find out, in this light, whether a course of action is right or wrong? The answer is that we cannot know whether a course of action is right or wrong if we do not transcend ‘moral universes’ and ask, in view of the judgments that we accept as justifiable in our own polity, whether a judgment is right if we consider points of view in other polities.

What we do when we deliberate is try to give each other good reasons. While Engelhardt believes that, in this respect, we need an ethic that tells us what is right or wrong - and we cannot have such an ethic beyond communities - I believe that we need an ethic that can help us to articulate our reasons in terms of good, normative reasons.423 We should aim at justifying judgments of right using reasons that cannot reasonably be rejected.424 It is a matter of public deliberation whether such judgments can be dialogically justified using normative reasons.

Are we speaking, in the context of ethico-political judgment, the formation of a justifiable judgment in the public sphere, of judgments of right? Indeed, I believe that many citizens defend their judgments as judgments of right. Furthermore, we want a public course of action that has moral implications to be justifiable using normative reasons. I have defended the fact that, in the case of moral and political questions concerning, for instance, prenatal diagnosis, there should be interrelations between morality and politics. Ethics matters as regards articulating reasons that can justify judgments of right, reasons that are normative.

422 See S. Soini: ‘PGD is shadowed by conflicting ethical views in Europe, often also tainted with religious concepts. It is not possible to achieve a Europe-wide consensus on acceptable indications for PGD, not to mention harmonised regulation’ (2007, 323).
423 My point relates to Will Kymlicka’s (1993) comment regarding the need for moral philosophy in order to analyze public policy issues. The question is whether or not taking morality seriously requires taking moral philosophy seriously. People do not need to subscribe to a particular moral theory in order to evaluate what counts as a good reason - the fact that a policy will promote the child’s interests, for instance, is clearly a good reason for endorsing that policy, for instance with regard to new reproductive technologies. Even though Kymlicka is, in my view, somewhat optimistic in his judgment, i.e. that we can apply a common morality to these technologies since the guiding principles are widely shared, I still share his belief that we can discern good reasons irrespective of whether or not we appeal to a moral theory. I shall return to this point in the analysis of public discourse.
424 Thomas Scanlon (1998) offers, together with Habermas, a way out of relativism. According to him, judgments of right and wrong are claims about reasons - about the adequacy of reasons to accept or reject principles under certain conditions. According to Scanlon, a reason is a good one if it counts in favor of the thing in question. Judgments of right and wrong are judgments about what would be permitted by principles that could not reasonably be rejected. According to Scanlon, thinking about right and wrong is thinking about what could be justified to others on grounds that they, if appropriately motivated, could not reasonably reject. When we find ourselves in disagreement with someone, the first question to ask is the extent to which the reasons on which their conception of morality is based are good reasons. I have suggested that normative reasons are candidates for good reasons; the kinds of reasons of which Scanlon and Habermas speak. I find Scanlon’s suggestion that we think of right and wrong in terms of justification to others, on the basis of reasons, plausible. Scanlon’s contractualism is, in this sense, related to discourse ethics.
The objection could be raised that normative reasons are precisely the premises that divide us. Members of different communities - moral strangers - have different premises. This is what Engelhardt stresses. He seems to think that our viewpoints are fixed and that we are only prepared to enter into public deliberation in order to defend our viewpoints, not to reflect upon our judgment or assess our reasons. Public deliberation becomes a mere mirror of the plurality of viewpoints in society. Engelhardt starts with the empirical claim a radical postmodern diversity - and we can examine this claim and he believes that, given this diversity, deliberation is unlikely. We should aim higher.

Since we have different beliefs regarding what it is that constitutes normative reasons - for instance when a reason is universal - we may start to deliberate using different normative reasons. We start with plurality. Plurality is the condition sine qua non of public deliberation: Hannah Arendt has observed that ‘men, not Man, live on the earth and inhabit the world’. Since our critical morality, our reflective consciousness of the right and the good, may result in different initial normative reasons, we should deliberate. If there is to be any meaningful public deliberation, we wish this deliberation to result in judgments that can be justified using good, normative reasons. In order for reasons to be normative ones, ‘enlarged thought’ is relevant.

To assess whether or not a reason from which a judgment is inferred is universal - whether or not it applies, in the sense of Habermas, to all affected - we need to consider the standpoints of others to whom the judgment applies. I hope that my reason is not solely endorsed by ‘moral friends’ but by all those affected by my judgment. In this sense, Habermas’ observation is relevant that arguments, by their very nature, point beyond particular individual lifeworlds. If I provide a reason for my judgment, that a course of action is justifiable or not, I address the entire community that is affected.

However, is it conceivable that there are judgments of right that are justifiable in the public sphere? We have seen that Engelhardt believes that there is no common viewpoint that can give guidance as far as such judgments are concerned. Do we need such a viewpoint? Is there no alternative way? In this sense, Forst’s principle of a right to justification is relevant. According to Forst, human beings not only have the gift of justifying themselves with reasons for their actions and convictions, they also have the obligation to do so in particular contexts and assume that others do so as well. There is a basic right to justification. Forst discusses the bindingness of norms in relation to the principle of justification:

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425 Hannah Arendt (1958, 7).
426 Steven DeLue speaks, in this sense, of an ‘enlarged culture’. If citizens were to remain mire in their own private understandings, they would not be able to test their views against those provided by others. ‘Citizens form their judgments by comparing and contrasting their views to those held by others. In consequence, people are open to carefully consider the objections of others to their views, and from this activity it is possible for them to search for a consensus’ (1989, 39.)
427 Rainer Forst (2007, 9 ff.).
428 That we justify ourselves regarding our judgments and that we demand of others that they justify themselves is in line with Habermas. Forst also speaks, in this respect, of the ‘force of the better reason’. 

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Our normative world is a created world according to the principle of reciprocal-universal justification: an intersubjective constructed world of norms, which claim thus binding validity, that no good reasons [...] can be put forward against them.429

Forst develops this idea of a normative world in a critical discussion of Kant’s account of normativity. The main point of his critique is that Kant has reduced the moral respect for the other to the relation to oneself. However, it is the dignity of the other person that counts in morality in the first place.430 I believe, on the other hand, that we need Kant’s account of normativity in order to be able to speak of a normative world at all. Forst does not explain, namely, where norms originate. He discusses, like Habermas, their validity and argues that intersubjectivity is required to this end.

I agree with this but I have argued, in chapter 2, that Habermas’ dialogical reformulation of Kant’s categorical imperative is not as alien to Kant’s ethics as Habermas, and in the wake of Habermas also Forst, seems to think. Both Kant’s ethics and Habermas’ discourse ethics urge us to justify ourselves regarding our maxims, our ways of acting. An extension of Kant’s ethics to an ethics of dialogue is in line with a number of passages on the intersubjective dimensions of reason and ‘enlarged thought’, which I have related to Kant’s practical philosophy.

I find Forst’s starting point for a normative world promising; however, we should not merely stress the external-collective aspect of deliberation but also the internal-reflective aspect. In this respect, Kant’s ethics matter more to the normative world than Forst admits. Normative reasons are derived from the law. We become conscious of the moral law insofar as this law is normative. Kant urges us to think from the standpoints of others when legislating the law.

We create a normative world in which judgments are supported by normative reasons. This is how judgments of right can be authoritative, pace Engelhardt: there are no good reasons that can be put forward against them. The reason from which the judgment is inferred is the better reason that is justifiable in the public sphere. In order to find the better reason, we should look for normative reasons. However, is this enough when there is a veritable Tower of Babel? If there is such a tower, we cannot merely resign ourselves to this situation. Judgments need to be made. Even if the only question relevant to public discourse is whether or not a woman should be allowed to choose a technology, good reasons will still have to be put forward.

emphasized by Habermas. Forst argues that the demand for human rights arises where people ask for reasons, for the justification of certain rules, laws, and institutions. The most universal and basic claim of every human being is the right to justification, ‘the right to be respected as a moral person who is autonomous at least in the sense that he or she must not be treated in any manner for which adequate reasons cannot be provided’ (1999: 40).


430 Rainer Forst (2007, 90).
Whether or not a reason is good can only be ascertained by judging (in the sense of the maxim of judgment, 'enlarged thought'), and deliberating.

Judging and deliberating are features of a public sphere characterized by plurality. Public deliberation needs to do justice to plurality. While for Engelhardt, the postmodern recognition of diversity entails a minimal stance characterized in terms of permission, in my view, removing many concerns from the agenda is not reconcilable with a recognition of plurality. We have seen that Engelhardt, in the case of prenatal diagnosis, sees no opportunity to deliberate on many of the concerns of citizens. Removing questions that divide us from the agenda seems to be the liberal stance.\textsuperscript{431} It is at this point that we see the lack of an account of the justification of judgments in the public sphere in Engelhardt. According to Engelhardt, it will often be appropriate to say; 'The patient has a right to do that, but it is wrong.'\textsuperscript{432} Some may understand the moral impropriety of genetic engineering, but there are no secular grounds to forbid it.\textsuperscript{433}

Engelhardt presupposes that we make judgments of right and wrong at the level of a community of moral friends, and at the level of the polity; given the libertarian doctrine, the rights of the patient will prevail. However, why should the rights of the patient always prevail? This is essentially a matter of public justifiability. Guaranteeing the rights of the patient is essentially a matter of deliberation, regardless of whether the question concerns, for instance, euthanasia or prenatal diagnosis.

In my view, public deliberation matters when engaging with each other's content-full viewpoints originating from the lifeworld. It could be argued that only when due respect is given to the viewpoints of citizens can a public course of action become legitimate. This is a matter of procedural legitimacy. If my viewpoint is taken seriously, in genuine public deliberation, I may see that a judgments of right is justifiable in the public sphere, even though it is a different judgment than mine. It is the procedure that enables me to accept the force of the better reason, even though I do not agree with the outcome in terms of substantial legitimacy.

How can we deliberate on a justifiable course of action? The concept of ethico-political judgment can give us the tools. The deliberative concept of ethico-political judgment has been outlined in chapter 1, while its conditions of giving and asking for normative reasons and impartiality of judgment have been elaborated upon in chapters 2 and 3. Can the opportunity of public deliberation be shown using this concept?

The conditions tell us how we should deliberate. We can make judgments and justify these to others using normative reasons. In order to deliberate on the reasons with which we want to justify our judgments, we need to judge. We need to think

\textsuperscript{431} See Bruce Ackerman (1989). Ackerman argues that when you and I learn that we disagree about some dimension of the moral truth, we should not search for some common value but simply say nothing at all about this disagreement and put the moral ideals that divide us of the conversational agenda of the liberal state.

\textsuperscript{432} Tristram Engelhardt (1996, 78).

\textsuperscript{433} Ibid. (1996, 417).
from the standpoints of others in order to reflect upon our own judgment. We need to judge while deliberating in order for there to be a prospect of deliberation.

I want to illustrate this idea of judging - in terms of impartiality of judgment - and deliberating - in terms of the giving of and asking for normative reasons - using the distinction, already mentioned, made by Robert Goodin. He speaks of an external-collective aspect and an internal-reflective aspect of deliberation. The external-collective aspect concerns public deliberation in the sense we concern ourselves with here. Internal-reflective deliberation, on the other hand, consists of the weighing up of reasons for and against a course of action. This can and must take place within the head of each individual.

According to Goodin, deliberation in this second sense is less a matter of making people conversationally present and more a matter of making others ‘imaginatively present’ in the minds of deliberators. This is to understand what they are saying to us. Making sense of others entails mentally ‘putting ourselves in the other’s place’. This is necessary since society is not small enough to allow genuine conversational exchanges among all the relevant members of the public. Therefore, internal-reflective dialogues are useful for informing external-collective ones.

Internal-reflective deliberation thus urges us to judge in the specific sense defended by Arendt. It requires us to think from the standpoints of others when engaging in public deliberation. We can deliberate better if we judge: by reflecting upon our own judgment, by putting ourselves in the other’s place, and by adopting a universal standpoint. In the previous chapter, I have already indicated that this universal standpoint is connected with Kant’s practical philosophy.

The Kantian approach entails, when assessing a reason, that we ask whether or not there is a moral law from which the reason can be derived. Since the law is universal, tells us how to act, and motivates us accordingly, the reason derived from the law is normative. The three aspects of normative reasons - prescriptive, universal, internal - are formal. We can assess a reason on the basis of these three formal aspects, but they do not concern the content of a reason. Hence, assessing reasons on the basis of Kant’s ethics is not prone to the skepticism of Engelhardt, as far as Enlightenment ethics are concerned. However, there has, to be a will to morality if the concept of ethico-political judgment is to have import as regards thinking about public deliberation.

4.3 From sensus communis to consensus?

I have argued that there is a ground of judgment, the Kantian sensus communis, that is common to all and that all have in common. Can we make common judgments based on sensus communis with regard to what is dialogically justifiable or not? What should we aim at: consensus, compromise, or even living with dissensus? Given our different moral premises, Engelhardt does not believe that a fundamental normative
consensus is possible. A consensus may even be oppressive, Engelhardt contends, if it is the majority that imposes a consensus on the minority. We have to consider - in order to ask what the public justifiability of a judgment can mean - the concept of consensus and compromise.

Consensus in the Latin means both unanimity and agreement. According to Engelhardt, authority cannot be derived from a consensus which is agreed upon by the majority. In our fallen moral state, we are best advised to pursue means of living peaceably in the presence of substantive moral diversity rather than seek a first-order consensus. Engelhardt believes that, insofar as one holds that disagreement regarding, for instance, the proper ending of life is real and not likely to abate, one has good grounds not to pursue consensus. Instead, we should pursue the articulation of political structures that allow a polity to peaceably encompass real moral and religious pluralism. Moral difference is, namely, real.

Engelhardt believes that we do not need general agreement about what to do in medicine in order to act together with common authority. It is enough for particular physicians and patients to agree to act in concert on, as we have seen, the principles of permission and beneficence. There are, thus, institutions that bind moral strangers simply in terms of the agreement of those who participate.

In my view, consensus may be worthwhile to aim for, but it is not always likely. It is most likely when points of view are not fixed beforehand, e.g. the discussion about human reproductive cloning. Consensus suggests openness to unanticipated possibilities and points of view. At a deeper level, it holds the prospect that individuals will themselves change as a result of the process: that they will achieve perspectives that were not available to them before.

We could, in this respect, stress the concept of ‘enlarged thought’, which allows the modification of our initial judgments. We can form considered judgments by

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435 According to Engelhardt (1999), a ‘consensus’ derives from the view of public reason and moral rationality of the participants. People with different philosophical, moral, or cultural understandings can be brought to consensus about controversial issues only if they share a common view of public reason that limits and subordinates those differences. In such circumstances, their implicit view can be given an explicit articulation. The result may be accompanied by a shared experience of moral discovery. The necessary condition for the possibility of this discovery lies, however, in the prior selection of participants and the determination of the character of their discourse, all leading to a shared background moral and/or political understanding. The experience of rational concurrence and the disclosure of consensus therefore depends on a prior commitment to a particular understanding of moral rationality, fairness, justice, and/or public reason. It does not involve the discovery of a consensus that was not already guaranteed from the start. One gets out at the end what one puts in at the beginning.

436 Tristram Engelhardt (1996, 60 ff). Consensus is no precondition but something to be aimed at: ‘Consensus is not a condition but a problem citizens have to work on’ (Gunsteren 1998: 56). It is a desired outcome of citizen activities.


439 Ibid. (1994).

440 I do indeed believe that public deliberation may aim at consensus, contrary to Griffin Trotter (2006) who argues that moral consensus is not a desirable pursuit since citizens are deceived to believe that the opinions of statesmen or moral experts are morally authoritative for the whole group. The point of public deliberation is that citizens, with politicians and ‘moral experts’ deliberate together.

reflecting upon our judgments on the basis of the plurality of viewpoints. Do we mean consensus when we say that a judgment can be justified in the public sphere via deliberation? This is what Habermas seems to think when he speaks of the dialogical justification of a judgment in a practical discourse. A consensus entails that there is agreement, not only on the judgment, but also on the reason from which the judgment is inferred.442

However, if we, as moral strangers, have different moral premises, how can we even suggest that there could be any consensus at all? Let us consider a situation in which you and I disagree. We have different moral premises. You believe that allowing cloning is right and I believe that it is wrong. In that case, we should deliberate. I consider, in order to be able to give you a good reason, the standpoints of others. I may, in the end, accept the force of your better argument that we should allow cloning even though I remain skeptical. Still, there can be good reasons on both sides, and I hope you will agree that there is something to say for my judgment, but we have to, in fact, make a common judgment.443

Allowing cloning is justifiable for both you and for me since I accept your reason (whatever that may be). We share the reasons for allowing cloning, which does not necessarily mean that we share the same moral premises when all is said and done; (I can still hold that cloning is wrong, even though I have been convinced that each individual should be able to decide whether or not to have a genetically identical child). Consensus suggests that it is precisely the sharing of moral premises that is the final aim of deliberation. We could argue that consensus does not need to entail accepting the force of the better argument, just that we hold the same opinion in the end, but for different reasons. Yet, if we have different moral premises, and can still agree on a judgment, the difference between consensus and compromise will seem blurred.

Let us look at the concept of compromise. Compromise is relevant when each party enters the scene with a more or less fixed agenda; this is the case in, for instance, the abortion controversy.444 We can see that, in this controversy, fixed

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442 Rawls has developed the concept of an overlapping consensus (1996, 133 ff.). Can this concept play a role in public deliberation? An overlapping consensus regarding a political conception of justice entails reasonable doctrines endorsing the political conception, each from its own point of view. The public conception of justice should, as far as possible, be independent of comprehensive religious, philosophical, and moral doctrines, or what Engelhardt calls communities. An overlapping consensus is different from a modus vivendi: the object of consensus is itself a moral conception. Rawls’ view that a consensus need not be based on the reasons - each doctrine can endorse the ‘overlapping consensus’ raises the question whether we in this regard can speak of Verständigung. According to John Dryzek, consensus is unanimous agreement not just on a course of action but also on the reasons for it. In a pluralistic world, however, consensus is unattainable, unnecessary, and undesirable. More feasible and attractive are workable agreement in which participants agree on a course of action, but for different reasons (Dryzek 2002, 166 ff.). The Habermasian account of consensus or Verständigung seems to me most plausible and neither undesirable nor unattainable (at least if viewpoints are not yet fixed).

443 The point of moral inquiry, according to Cheryl Misak (2000, 104) is that we take our beliefs to be responsive to new arguments and sensibilities regarding what is good, cruel, kind, oppressive, worthwhile, or just. Those who neglect the experiences of others are adopting a very bad means of arriving at true and rational beliefs.

views are only amenable to modification at the margins, and the moral questions have become politicized. They consider the agreement as the most acceptable to all concerned, while each retains his or her own view of what is best.

A compromise is not a synthesis that all regard to be superior to their previous position: although they consider the agreement to be the most acceptable to all concerned, each retains his or her own view of what is best. Compromise would essentially be a question of judgment.\textsuperscript{445} Citizens deciding to seek, devise, or accept a compromise on a matter of rationally irreconcilable moral conflict is more a matter of practical than of technical reasoning, and more the outcome of reflective judgment than of a rationalistic decision-making procedure.\textsuperscript{446}

Thus, the difference between the preconditions for consensus or compromise is viewpoints being fixed or not (as yet). When public deliberation addresses, for instance, a new technology that demands a public course of action whereby citizens do not have fixed viewpoints but jointly explore the moral questions concerning the new technology, the Habermasian concept of \textit{Verständigung} may apply. Still, we can argue that, even in the case of fixed viewpoints in the abortion debate - the fetus as a human life versus the woman who should be at liberty to decide for herself - we may want to examine what a justifiable course of action is. We could adopt a policy that only allows the woman to abort during the first trimester. Abortion opponents may accept the limitations while abortion proponents may welcome the (albeit limited) opportunities given to women.

Thus, we may both aim at consensus and, in cases when consensus cannot be reached since we have not been able to convince each other as far as the better reason is concerned, compromise. Or, should we cherish dissensus in view of the plurality of viewpoints in society?\textsuperscript{447} The relevant question is, rather, whether or not a quest for consensus or compromise will entail pluralism being compromised by the dictates of the majority.

Dissensus in itself cannot be the aim of public deliberation, even though the dissensus in society would be articulated.\textsuperscript{448} Making dissensus visible is important.

\textsuperscript{445} Martin Benjamin (1990, 121 ff.).
\textsuperscript{446} Ibid. (1990).
\textsuperscript{447} Habermas’ emphasis on the role of the better reason has been criticized by Nicolas Rescher (1996) who argues that, in matters of inquiry, rational argumentation need not lead people to consensus - or to truth - since argument alone, however cogent, can only lead us where our premises direct, so that we cannot take the line that truth lies on the side of the best arguments. What is Rescher’s alternative? Acquiescing in a diversity of opinions - tolerating dissensus - means accepting pluralism. Pluralism holds that it is rationally intelligible and acceptable that others hold positions at variance with one’s own. Communication requires some understanding of meanings, but not agreement on them. Its roots lie in interpretation. Often, dissensus and diversity can also play a highly constructive role in human affairs. Rescher’s critique of Habermas’ emphasis on the unforced force of the better argument resembles Engelhardt’s skepticism vis-à-vis rational communication. Neither Rescher nor Engelhardt find it likely that, in view of our initial premises, we will come to understand the force of the better reason: that there may be good reasons to pursue a public course of action, even though we would prefer another public course of action.

\textsuperscript{448} The ideal of consensus is not cherished by all. Ewa Ziarek proposes a feminist ethics of dissensus: ‘At stake in the feminist ethics of dissensus is a decisive formulation of the politics of difference, so that it not only strives to create alternative hegemonic formations in order to contest the interlocking patterns of domination based upon the racial, gender and class inequalities but also bears an obligation to redress the
Not all viewpoints are likely to be heard in public discourse. Dissensus can be constructive when stimulating public deliberation. If opponents and proponents both claim that their judgment is right - and if they are prepared to justify their judgments - then there will be a reason to engage in public deliberation.

In the first instance, we may try to convince the other. We hope that others will accept the force of our normative reasons. We hope that there is a consensus we can agree upon in light of the force of the better reason. If we realize that there appears to be irreconcilable disagreement, and consensus is not achievable, we may wish to deliberate on a compromise. However, why should we aim at a consensus or compromise in public deliberation, as citizens? Is not the quest for consensus or compromise merely a strictly political affair; for instance, when political parties discover that they disagree on a public course of action? Why would compromise or consensus be an issue for public deliberation in the informal public sphere, too?

A public course of action that is justifiable in the public sphere is more likely to be legitimate than a course of action that is the result of bargaining, especially when the result is not justifiable, given the plurality of viewpoints concerning an issue. Therefore, enhancing public deliberation in order to discuss a justifiable course of action - regardless of whether there is a consensus or a compromise - is in the interest of politicians. But why would other citizens be interested in this quest for compromise or consensus? If politicians are interested in genuine public deliberation using the giving of and asking for reasons as its point of departure, and hence the preparedness to reflect upon one’s own judgment, then citizens will be given a chance to exert an influence. They want the compromise to be in line, as much as possible, with their own judgments.

If there is irreconcilable disagreement - if we do not accept one reason as the better reason - we should continue to converse with each other. The question is whether or not there are any justifiable reasons on which basis a compromise can be formulated. If we are interested in 'deliberative politics', we cannot leave the question of formulating a compromise to, for instance, political parties. There should be open debate since the compromise should be justifiable in the public sphere. Only then, given the plurality of viewpoints in society, will the course of action being proposed via the compromise be legitimate.

While we are tempted, in the context of public deliberation, to think in terms of aiming at a consensus or a compromise, there are other values connected with public deliberation. A cardinal value is mutual respect. Furthering mutual respect is a reason for entering into dialogue. Mutual respect entails, among other things, discerning the difference between respectable and merely tolerable differences and differend - the erased conflicts in which victims cannot signify their damages’ (2001, 116). I disagree that dissensus should be the aim of moral reflection. Reflection should, however, start with a profound understanding of the plurality of opinions.

449 An example of a compromise that should be deliberated on in the public sphere is the compromise concerning pre-implantation genetic diagnosis for hereditary breast cancer in the Netherlands (Editorial Trouw 2008). The discussion concerned the question of whether or not we are on a slippery slope when allowing diagnosis of potential disease when there is no 100 % certainty. The compromise entailed diagnosis being allowed but following assessment by a national commission.
opinions as well as an openness to the possibility of changing one’s mind if confronted with unanswerable objections to one’s own point of view.450 Thus, mutual respect not only demands that we depart from the principle of permission, as Engelhardt believes.451

Toleration merely entails allowing others to act in accordance with their view of the good. Rather than having recourse to toleration, tolerance is, in my view, a virtue to be aimed at by mutually respecting each other.452 Tolerance demands more than toleration. Tolerance entails being prepared to change one’s judgment in view of the better reason. I respect the viewpoint of the other and can in turn demand that my viewpoint be given due respect. We can recognize the other as other in public deliberation.

In this way, we can see plurality as a challenge, rather than a problem. Liberal Protestants and Orthodox Christians, for instance, can converse with each other and try to develop, at the very minimum, tolerant attitudes toward each other by aiming for mutual respect. In the next part, we can see how ‘moral strangers’ converse with each other. I have already indicated that I find that Engelhardt’s claim about rational communication being unlikely should be supported by empirical evidence. I shall examine this claim on the basis of the empirical inquiry. This is not the only aim of the empirical inquiry. The inquiry is concerned, namely, with the question of how the concept of ethico-political judgment, with its conditions, can be applied to public deliberation. This question can be addressed in the context of an inquiry into how we deliberate during the deliberative practice of public discourse.

450 According to Amy Gutman and Dennis Thompson (1990), mutual respect, like the liberal concept of toleration, is a form of agreeing to disagree. Mutual respect demands more than toleration. It requires a favourable attitude toward, and constructive interaction with, the persons with whom one disagrees. It consists of the reciprocally positive regarding of citizens who manifest the excellence of character permitting a democracy to flourish in the face of irresolvable moral conflict. According to Gutman and Thompson, mutual respect seems to be necessary to keep open the possibility of resolving, on a moral basis, any significant dispute about public policy that involves fundamental moral conflict. According to James Boettcher (2007), liberal accounts of respect for persons emphasize the capacity for thinking and acting on the basis of reasons Respecting the other politically is acknowledging the other as a free and equal citizen, with an interest in exercising the two powers and adjusting one’s own choices and actions accordingly. Stephen Darwall (1977) speaks in this respect of recognition respect. Saying that persons as such are entitled to respect is saying that they are entitled to have other persons take seriously and weigh up appropriately the fact that they are persons when deliberating about what to do.


452 Toleration is a phenomenon central to the liberal tradition and a virtue tied to respect for individuals and moral personhood (Andrew Murphy 1997). Toleration refers to social or political practices while tolerance refers to attitudes. Toleration denotes forbearance from imposing punitive sanctions for dissent regarding prevailing norms. Tolerance is the willingness to admit the possible validity of seemingly contradictory viewpoints, a hesitancy to pass value or ‘truth’ judgments on individual or group beliefs. Barry Barnes regards tolerance as a virtue, as I have it in mind. Tolerance requires the acceptance of conflicting beliefs: ‘Individual A believes action X to be unethical or immoral, and hence something that she should oppose. And yet, being tolerant, A believes it right not to oppose X enacted by B’ (2001: 231). According to Carmen Kaminsky (2002, 57), tolerance is a Klageheitsverweigerung, a strategy with which norms can become and can stay valid. Bioethics is opposed to a Diskursverbot but appeals to academic and personal freedom of speech.
PART 2

JUDGING IN PUBLIC DISCOURSE:
HOW WE DO DELIBERATE

CHAPTER 5

The inquiry of judging in the public sphere

Given the question of whether public deliberation is likely, I have suggested that we consider public deliberation in the context of public discourse. In the first part, I shall consider some inquiries into public discourse which suggest that public discourse has aspects of public deliberation. The second part concerns the analytical approach with which public discourse will be examined in chapters 6 and 7. This approach concerns interpretive frameworks, reasoning, and judgments. I am interested, during the analysis of public discourse, in how principles - in terms of interpretive frameworks - are interpreted and how representations of ‘the other’ who is affected have a role to play in reasoning. By examining the plurality of judgments, we can ask ourselves whether disagreement is irreconcilable and whether an internal development in public deliberation can be expected. The last part of this chapter provides the empirical inquiry with a background.

5.1 Public discourses considered

*Public discourses on reproductive and gene technologies: deliberative practices?*

There are a number of inquiries into public discourse regarding reproductive and genetic technologies. I shall, on the basis of the concept of dialogicity, discuss the extent to which these public discourses can be called deliberative practices. Dialogicity is a concept associated with Mikhail Bakhtin and, for him, dialogical is in opposition to monological, which does not necessarily mean that there is an abyss between monological and dialogical utterances:

However monological the utterance may be (for example, a scientific or philosophical treatise), however much it may concentrate on its own object, it cannot but be, in some measure, a response to what has already been said about the given topic, on the given issue, even though
this responsiveness may not have assumed a clear-cut external expression … the utterance is filled with dialogical overtone.453

I regard dialogicity as a precondition for public deliberation. Not only do we give reasons in public deliberation, but also demand that others provide reasons for their judgments. According to Mikhail Bakhtin, dialogical relations are relations between any utterances during speech communication.454

Dialogicity can be regarded as a criterion for a process whereby one provides fully developed arguments for one’s own position and takes seriously and responds to the arguments of others.455 Dialogical structure in public discourse measures the presence of speakers with opposing views in the same article, which is, in principle, a measure of potential dialogue. The extent to which it is realized will depend on whether the participants are likely to engage with each other’s arguments or not.

Margo Trappenburg has studied medical ethics discussions in the Netherlands by inquiring into how these have evolved.456 She regards a debate as having rules of discussion and a logic of its own. According to Trappenburg, the result of a debate which takes place with the best of intentions is norms. Participants in the public debate try to find a kind of truth. The structure of a discussion and the kind of arguments used are significant for the outcome of the debate. One of the discussions Trappenburg examines is the one on genetics: we can conclude that we can speak of a deliberative practice in this respect.

Also in the case of the public discourse on animal gene technology, we can speak of a deliberative practice since participants use arguments and points of view to convince.457 Elmar Theune, inquiring into the Dutch public debate on animal gene technology, regards public debates as being associated with informal, spontaneous, non-organized debates which potentially every citizen is involved in.458 One of Theune’s conclusions is that the debating rules were respected and that the public debate featured many characteristics of deliberation; citizens have, among other things, reasoned and responded to reasons.

Tsjalling Swierstra has studied the public discourse on cloning, including the debates organized by the Dutch Rathenau Institute.459 Swierstra dwells on the question of whether debates on cloning should be organized at all (as we will see in the concluding chapter). Swierstra concludes that no internal development of the public debate has taken place: the main arguments for and against cloning recurred in the public debate. In this respect, we can hardly conclude, thus, that the debate is

454 Zali Guruvitch (2000) relates dialogicity to pluralism: monologism comes from dialogue, i.e. from plurality, but reduces that plurality to a single voice of the master. Plurality requires a passage or shift from monolog to dialogue since any moment in dialogue is a threshold - not only between utterances or speakers, but also between plurality and non-plurality.
455 Myra Ferree et al. (2002).
457 Frans Brom (1997).
459 Tsjalling Swierstra (2000).
a deliberative practice. The conclusions of these meetings do not add any essential insights when compared with the debate taking place in the media.

Ann-Sofi Bakshi studies the public discourse on gene technology and prenatal diagnosis in Sweden.460 On the basis of her conclusion, that this discourse is partly monological, we could doubt whether public discourse is a deliberative practice. One of Bakshi’s conclusions is that participation in public discourse is not evenly balanced. It is mostly the utterances of physicians, politicians, and people with academic degrees that are published. Many of the analyzed texts would be monological rather than dialogical. Even in the case of the public discourse on genetically modified food, it cannot be concluded that we can speak of a discursive practice.

Karin Hugo studies moral disagreement in the Swedish public debate by using a variety of texts on genetically modified food.461 Hugo focuses on three main arguments: human beings should act according to their nature; risk and utility; and democracy, freedom of choice and labeling. Hugo concludes that there is hardly any interaction between the participants in the debate. If the debate is to become a dialogue, concrete meetings will have to take place. In many debates, publicness would be restrained in such a way that it excludes groups.

In her inquiry concerning articles on gene technology in Swedish daily Dagens Nyheter, Anna Olofsson finds that the overall theme of public debate follows a specific sequence whereby the focus is firstly on the risks, then on the ethics, followed by regulation and, when the debate matures, on the application of the technology.462 Olofsson indicates that public debate, which she defines as spoken or written messages in a public sphere, entails more arenas than just the mass media. Olofsson has not explicitly examined whether or not there is a dialogue in the specific daily she studied.

According to Myra Marx Ferree et al., in a study of the abortion discourse in Germany and the USA, public discourse is public communication about topics and actors related either to some particular policy domain or to the broader interests and values involved.463 Ferree et al. evaluate the quality of public discourse in Germany and the USA, using, among others, the criterion of deliberativeness, which includes dialogue. Newspaper articles in the USA, to a much greater extent than German articles, have a so-called dialogical structure, the reference to other stances and a measure of dialogue. We can conclude that, in this case, we can to a certain extent speak of a deliberative practice.

José Van Dyck, in a study of the public debate on in vitro fertilization in the USA and the UK, regards a public debate as a process of signification in which meanings, definitions, and concepts are discussed and wagered by doctors, researchers, feminists, investors, and others.464 She argues that the need for technology is not

461 Karin Hugo (2005).
462 Anna Olofsson (2002).
463 Myra Ferree et al. (2002).
simple there, but is created during an ideological process. According to Van Dyck, the issue is not whether technologies are good or bad but how they have changed images of procreation, motherhood, and the female body.

We can conclude that public discourse, according to a number of studies, can be characterized in terms of a deliberative practice in the public sphere, namely as public deliberation characterized by the giving of and asking for reasons. In such cases, the condition of dialogicity is met, which is a requirement for meaningful public discourse. The public discourse has rules of discussion; using arguments, participants try to articulate that which others have not seen; debating rules have been respected; and public discourse has many characteristics of deliberation.

The fact that the ideal of public discourse as a deliberative practice, with the giving of and asking for reasons, may be difficult to realize is also shown by some studies. Public discourse would be monological in the sense that there is no ‘dialogical structure’ in texts that do not refer to other texts. Furthermore, interaction would hardly have taken place and public discourse would be about the negotiation of meaning rather than the giving of and asking for reasons concerning the rightness of a technology. Dialogicity is not, thus, self-evident.

5.2 Inquiring into judging

Judging in public discourse is, as I already indicated, understood in terms of interpretive frameworks, reasoning and judgments. I shall discuss these three concepts with which public discourse is to be analyzed. The relation between these three concepts will also be discussed. We start with interpretive frameworks, on which basis we justify judgments by means of reasoning. Let us first consider a way of analyzing judgments in public discourse.

A spectrum of judgments

As we saw in the first chapter, John Skorupski argues that; when I judge, I enter into a commitment whereby inquirers who scrutinize the relevant evidence and arguments available to them would converge on my judgment. A judgment is an inference from reasons. The ambition of ethico-political judgment is to find a judgment that is justifiable in the public sphere. Any account of normative judgment has to deal with the difference between theoretical and practical judgments.\(^{465}\)

\(^{465}\) Kurt Baier (1965) provides an account of this difference. According to him, judgment involves providing correct answers under difficult conditions. There is a distinction between theoretical and value judgments. Theoretical judgments are a type of fact-stating claim requiring special talents or skills. Value judgments are judgments with a direct logical bearing on what should be done. Value judgments involve something being legal or illegal, just or unjust, good or bad, right or wrong. For Baier, judgments and factual claims serve different purposes. In factual comparisons, our purpose is to characterize something, to establish to what degree it has certain properties. Value judgments, on the other hand, involve rational guidance. Value judgments give rise to the question of correct criteria. Value judgments not only have to be
In my view, we can discern theoretical and practical judgments in terms of their epistemic characteristics. With regard to a factual, theoretical judgment, we can say that it is true or false on the basis of an investigation. The truth of this judgment can be determined objectively. A practical, normative, judgment can be characterized in terms of right or wrong. Can such judgments be true or false? I shall not deal with this question here. In my view, suffice it to say that they may pass the test of rational acceptability. We need standards of rational acceptability in order to have a world at all, either a world of 'empirical facts' or a world of 'value facts'.

Let us now consider the concept of judgment in relation to this inquiry into public discourse. I distinguish four kinds of possible judgments concerning prenatal diagnosis. A permissive judgment entails that the use of prenatal diagnosis or screening is considered justifiable. A moderate-permissive judgment entails that the use of prenatal diagnosis and screening is, in principle, considered justifiable, with exceptions. A moderate-restrictive judgment entails that the use of prenatal diagnosis or screening is not, in principle, considered justifiable, with exceptions. A restrictive judgment entails that the use of prenatal diagnosis or screening is not considered justifiable.

The classification of judgments in public discourse, in terms of the four possible judgments that I discern, is a matter of interpretation. For instance, whether a judgment is moderate restrictive or moderate permissive is a matter of coming to an understanding of the text. The question of whether a judgment is moderate permissive or permissive, and moderate restrictive or restrictive, is easier to deal with.

By classifying judgments in terms of (moderate) permissive and restrictive judgments, it will be possible, in principle, to see the extent to which public deliberation is likely: the extent to which this is more than a repetition of irreconcilable judgments. I shall ask whether, given the broad spectrum of judgments in public discourse, an internal development in public deliberation is likely. As we have seen, Tristram Engelhardt believes that such an internal development is not likely, given that we have moral premises that are too different and no content-full ethic in common. Let me illustrate how he sees irreconcilability in relation to public deliberation.

Engelhardt believes that we seek, more than a de facto consensus, a normative consensus that will have moral force. When it comes to assisted reproduction, ‘cosmopolitans’ do not, however, share a consensus with those who live their lives within the embrace of the traditional beliefs of the Catholic Church, or most other religious groups. The cosmopolitan is interested in safety, efficacy and costs and does not consider assisted reproduction to be wrong since it domesticates nature. Therefore, the debate, the controversy, and the dispute between the religious believers and the cosmopolitan do not appear amenable to resolution.

verified, they also have to be validated: It is not enough to show that, if certain criteria are employed, then a thing must be said to have a certain degree of ‘goodness’; we must also show that these criteria ought to be employed (1965:22).

467 Tristram Engelhardt (1994).
Is it possible to examine Engelhardt’s claim that rational communication is unlikely since consensus is beyond reach empirically? I believe that we, on the basis of the empirical inquiry, can, in principle, draw conclusions as far as this question is concerned. In the case that Engelhardt discusses, there are clearly different premises: an appeal to human nature on the one hand and an emphasis of risk and costs on the other. In this case, it seems that cosmopolitans and believers are, indeed, moral strangers who do not have much in common (and religious believers are likely to dismiss the permission game that Engelhardt suggests as being merely cosmopolitan).

However, while the premises Engelhardt discusses may figure in the discussion regarding assisted reproduction, it is an empirical question whether or not other premises also have a role to play in debates. Is, for instance, prenatal diagnosis discussed merely in terms of the debate on abortion in general, with seemingly irreconcilable disagreement, or is it conceivable that we can come to an understanding in the case of prenatal diagnosis, and are there other questions regarding prenatal diagnosis where we can, at least, deliberate in a meaningful way? Is there a prospect of an ‘anticipated communication with others whom I know I can finally come to some agreement with’, an agreement from which judgment derives its specific validity? I will address these questions in relation to the thematic foci following the empirical inquiry.

Interpretative frameworks

In chapter 2, I have elaborated on a Kantian account of normative reasons. Like impartiality of judgment, this condition has to be concretized in order to analyze it. I suggest a concretization of the concept of normative reasons in terms of the principles contained by them, or relevant to them. Reasons are intended to justify judgments. Principles are important in normative reasons. We are tempted to think that principles apply to all human beings and, hence, that they are universal. Their interpretation, may, however differ.

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469 In this sense, there is a clear relation between principles and judgments. This relation is emphasized by those who defend the coherentist doctrine of reflective equilibrium. Reflective equilibrium entails that, in a process of mutual adjustment, we seek coherence among the widest possible set of beliefs which are arguably relevant in establishing a moral theory, in selecting moral principles, or in deciding a specific moral problem (Norman Daniels 1996). Daniels claims that all of us are familiar with the process of working back and forth between our moral judgments about particular situations and our effort to provide general reasons and principles that link those judgments to ones that are relevantly similar. The fundamental idea underlying the method of reflective equilibrium is that we ‘test’ various parts of our system of moral beliefs against other beliefs we hold, seeking coherence among the widest set of moral and normal beliefs by revising and refining them at all levels. Seeking wide reflective equilibrium is the process of bringing to bear the broadest evidence and critical scrutiny that we can, drawing on all the different moral and non-moral beliefs and theories which are arguably relevant to our selection of principles or adherence to our moral judgments.
Often, we start with principles in order to justify our judgments. But do we share our principles? In other words, do we have a common morality on the basis of which we can form common judgments? According to Tom Beauchamp and James Childress, there does indeed exist a common morality which refers to norms, concerning right and wrong human conduct, which are so widely shared that they form a stable social agreement. The common morality - e.g. do not kill, do not cause pain or suffering to others, tell the truth - is applicable to all persons in all places, and we rightly judge all human conduct by this standard. We can, certainly, assume, with Beauchamp and Childress, that there are common standards of action and moral character traits. However, applied to the field of biomedicine, for which these authors defend the principles of respect for autonomy, beneficence, non-maleficence, and justice, there is likely to be discussion regarding their interpretation.

In my analysis of the results of the inquiry into public discourse, I shall focus on how principles are interpreted. This is important for an understanding of normative reasons in justifying judgments. How can principles have a role to play if

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470 Tom Beauchamp and James Childress (2009, 2 ff.). As we encounter principles of biomedical ethics in public discourse, let me clarify how Tom Beauchamp and James Childress (2009) understand the four principles of what Birnbacher calls their reconstructive model of bioethics. For Beauchamp and Childress, autonomy is self-rule. To achieve autonomy, liberty (independence from controlling influences) and agency (capacity for intentional action) are essential. Beauchamp and Childress have often been criticized since they would privilege autonomy over the other principles. In their view, this criticism is not warranted. They speak of the balancing of principles. The principle of nonmaleficence is crucial to many ethical theories. For Beauchamp and Childress, this principle asserts the obligation not to inflict harm on others. Beneficence includes all the actions intended to benefit other people. Formal justice entails equals having to be treated equally, and unequals having to be treated unequally. Whatever respects are relevant, people equal in those respects should be treated equally. According to Beauchamp and Childress, the specification of their four principles enables us to reach practical judgments. Specification provides an action-guiding context by the filling in and development of the abstract content of principles. According to Beauchamp and Childress, however, balancing and judgment are as necessary as specification.

471 According to Tom Beauchamp (2003), the common morality is not merely a morality that differs from other moralities: it is applicable to all persons in all places, and all human conduct is rightly judged by its standards.

472 Interpretation of principles is something different than specification, which is considered in terms of adding content by Beauchamp and Childress (2009, 16 ff.). Specification of the respect for autonomy clarifies its meaning in using the norm - e.g. allowing competent persons to exercise their liberty rights. Specification reduces the indeterminate character of abstract norms and generates more specific action-guiding content. While interpretation and specification both reveal the meaning of a principle, there are interpretive differences, but not differences as far as specification in the account of Beauchamp and Childress is concerned. According to Henry Richardson (2000), specification is a mode of interpretation. An interpretation modifies the content of a norm. I would like to stress that there are more possible interpretations than just adding content to a norm; this can be done in several ways. Indeed, I agree with Leigh Turner that ‘even if various participants in moral debates agree about the importance of particular principles, maxims, or common moral norms, deliberations concerning these norms should be interpreted at the level of practice and policy can proceed along many pathways’ (2003: 195). For principles to have meaning and weight, they require interpretation. Indeed, an objection against common-morality accounts is that if a common morality exists at all, its norms will not be sufficiently determinate to be able to solve concrete bioethical problems (Oliver Rauprich 2008). According to Evans, the problem of the common morality defended by Beauchamp and Childress is that it has been suggested that it can be universally applied to all ethical problems: ‘This flows from the idea that you can identify four baseline principles underneath all morality’ (2006: 226). It is, however, unlikely that even the defenders of principlism believe that principles are applicable to all biomedical problems.
we, in the first place, do not always agree about them - they may, for instance, be related to a religious doctrine that I may not accept or a libertarian doctrine that I do not endorse either - and, in the second place, if we do not agree on their interpretation?

That the interpretation of principles has an important role to play in public discourse has been defended by Georgia Warnke, and I think that her account of, for instance, the public discourse on abortion is relevant to our inquiry. Warnke thinks that an openness to different interpretations of common principles may further public discourse. She argues that conflicts regarding abortion, for instance, are rooted in differences in the meaning that we take our principles and practices to have and that they hence reflect interpretive differences. We do not disagree on the validity of fundamental principles of life, liberty, and equality. What is at stake is not the moral principles themselves but our understanding of their meaning and our orientation toward particular cases. Our differences over concrete questions are interpretive ones that are not resolved through dogmatic appeals to principles, rather they lend themselves to reinterpretation and hermeneutic discussion (we interpret principles just as we interpret texts). We need a willingness to see different interpretations in their ‘best light’ and use them to illuminate the questions at stake:

Suppose we no longer conceive of the debate over abortion as a clash between different absolute principles, between principles of life and procreative responsibility, on the one hand, and liberty and ‘amative sex’ on the other… Suppose we construe our differences over abortion as differences over literary texts, as the consequence of different contexts of assumptions and values duly and legitimately constrained by considerations of fit.

In that case, debate over interpretive differences may help us to accommodate our differences. In my inquiry into public discourse, I am interested in the role of principles insofar as they have a place in what can be called interpretive moral frameworks. In this sense, I endorse Warnke’s emphasis on interpretation, as far as our principles are concerned. I regard moral interpretive frameworks as understandings by citizens of moral questions. These questions may be framed in

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473 Georgia Warnke’s account of interpretive differences is related to Dworkin’s. According to Ronald Dworkin (1993, 68 ff.), the majority of liberals as well as conservatives with regard to abortion believe, at least intuitively, that the life of a human organism has intrinsic value in any form it takes. It is intrinsically regrettable when human life ends prematurely. However, the abstract idea of life’s intrinsic value is open to different interpretations. Abortion is worse on some occasions than on others. Both parties would suppose that there are degrees of badness in what Dworkin calls the waste of human life.

474 Georgia Warnke (1999, 8 ff.).

475 Ibid. (1999, 22 ff.).


477 If we were to make these suppositions, Warnke believes, both the pro-choice positions and pro-life positions would learn that there is more than woman’s life and liberty, on the one hand, and the sanctity of life and liberty, on the other. The pro-choice position could appreciate the value and even potential of different sorts of life. The pro-life position could find dimensions in the meaning of liberty that center on the particularity of different family circumstances. We might see that there are interpretations of ideas of which other interpretations are possible as well. Warnke believes that, in this way, we can accommodate our differences.
terms of moral principles. For instance, the question of prenatal diagnosis may be framed in terms of human dignity. The interpretive framework of human dignity underlies the reasoning concerning prenatal diagnosis from which judgments are inferred. Framing, on the basis of an interpretive framework, may entail prenatal diagnosis, for instance, being considered a violation of human dignity: the moral question is understood in terms of human dignity. Frameworks can be said to be schemata of interpretation. As is suggested by the adjective, the framework is based upon an interpretation, e.g. of what human dignity means when applied to the discussion on prenatal diagnosis. Likewise, we could ask what autonomy means in the context of ultrasonography: our understandings of principles are not independent of technological developments.

I understand an interpretive framework as part of what Hans-Georg Gadamer calls a horizon. Gadamer has introduced this concept to clarify that, in understanding a text, the horizon is the range of vision that includes everything that can be seen from a particular vantage point. Gadamer speaks of narrowness of horizon, of the possible expansion of horizon, of the opening up of new horizons. The concept has been used in philosophy to characterize the way in which thought is tied to its finite determinacy and the way one’s range of vision is gradually expanded: ‘To have a horizon means not being limited to what is nearby but being able to see beyond it.’

According to Gadamer, a person who has a horizon knows the relative significance of everything within his horizon, whether it is near or far, great or small. A horizon is something in which we move and which moves with us. Horizons change for a person who moves. Acquiring a horizon means learning to look beyond what is close at hand - not in order to look away from it but to see it better, within a larger whole and in true proportion. In my view, we could speak of an

478 When speaking of interpretive frameworks, I presuppose that these are interpretive moral frameworks.
479 Erving Goffman argues that ‘When the individual in our Western society recognizes a particular event, he tends, whatever else he does, to imply in this response (and in effect employ) one or more frameworks or schemata of interpretation of a kind that can be called primary’ (1986: 21). We can speak of a connection of frameworks and interpreting, regarding framing as ‘a particular way of representing knowledge, and as the reliance on (and development of) interpretive schemata that bound and order a chaotic situation, facilitate interpretation and provide a guide for doing and acting’ (David Laws and Martin Rein 2003: 173). We see that, in this definition, Goffman’s concept of interpretive schemata is presupposed. Framing provides a guide for doing and acting and is essentially interpretive. Adam Simon and Michael Xenos (2000) relate the framing paradigm to deliberation. Deliberative processes, entailing the formation of associations between concepts within discourse, are, according to Simon and Xenos, intimately linked to framing effects. During the phases of deliberation, frames compete with each other; each of the frames represents a contention or validity claim. This allows the exploration of ‘public discourse in a way that is sensitive to the detection of deliberation by envisioning competing frames as the principal means by which interlocutors interact with one another (2000: 367)
480 This point is, at least, made by Peter-Paul Verbeek (2008) and I agree with him in this respect. Technology mediates our relation to the fetus and frames pregnancy in medical terms and the relation to this mediating role ‘embodies a form of freedom that is an interesting alternative to autonomy. Recognizing that our experiences and actions are inevitably mediated by technology, the choice is here to explicitly ‘shape’ and ‘stylize’ these mediations, in order to help shape one’s own subjectivity’ (2008: 22).
interpretive horizon as the range of vision with which a citizen understands something that is seen. An interpretive horizon is broader than an interpretive framework, as I understand these concepts.

An interpretive framework entails a principle, for instance, being applied to the concrete situation. Gadamer understands application in terms of understanding and interpretation. In early hermeneutics, a distinction was made between understanding, interpretation, and application: a distinction which is still relevant to Gadamer. According to Gadamer, interpretation is not an occasional, post facto supplement to understanding; rather, it is always interpretation and hence interpretation is the explicit form of understanding. This fusion between understanding and interpretation has led to the third element, i.e. application, being excluded from hermeneutics. According to Gadamer, however, understanding always involves applying the text to be understood to the interpreter’s present situation.

I suggest that the application of moral principles, understood in relation to interpretive frameworks, can be conceived of in a way analogous to Gadamer’s treatment of early hermeneutics. Principles have to be understood by interpreting them in their application to the problems of prenatal diagnosis and screening. The principle of human dignity is to be interpreted in its application. I shall consider an interpretive framework to contain the three elements of hermeneutics; i.e. understanding, interpretation, application. From a particular horizon, and the narrower concept of the interpretive framework, citizens contributing to public discourse understand and interpret the moral dimensions of prenatal diagnosis and screening. Application is a kind of understanding.

Understanding is always application since a text such as a law must be understood at every given point, in every concrete situation, in new and different ways. According to Frans Jacobs, in ethics, it is the application that gives knowledge its full import. It would therefore be better to model applied ethics on hermeneutics rather than on technics. Application is not something that occurs when all work is done, not something that is superfluous, but that during the process of understanding an application occurs out of the text that is to be interpreted to the situation of the interpreter. In this respect, Jacobs speaks of philosophical ethics as a hermeneutics of moral experience.

484 Ibid. (1999).
486 Edmund Pellegrino notes that hermeneutics is extremely popular today in European bioethical circles: its focus is the interpretation of the meanings of the moral experience. Pellegrino continues to show that this kind of bioethics, in accordance with the classical meaning of hermeneutics, reads moral experience as a text. However, since there can be many interpretations of a text, Pellegrino questions the ‘hermeneutics of moral experience’ in view of its lack of normativity: ‘The question remains of how to make the judgment about right and wrong, which is essential if hermeneutics is to have normative force. A hermeneutical interpretation of our own moral experiences or that of another may be illuminating and conducive to intersubjectivity and communication. It also may be useful procedurally but it is not per se normative.’ (2000: 664). In my view, hermeneutics, ‘reading principles’, matters when we want to make judgments of right on the basis of principles. This is since we need adequate understandings of these principles (such as respect for autonomy, beneficence, or human dignity),
We have seen that, for Gadamer, a horizon is a ‘range of vision that includes everything that can be seen from a particular vantage point’. As I have already argued, the concept of the interpretive framework is included in the concept of the horizon. An understanding of moral questions is part of a range of vision. An example of the use of the concept of the interpretive horizon is ‘background interpretive horizons’ within which judgments concerning euthanasia are formulated. Distinctive understandings of illness and suffering serve as interpretive horizons in public deliberation over euthanasia. For instance, within a new interpretive horizon, suffering was understood as a largely unnecessary evil that could and should be countered through human intervention.

How can we understand an interpretive framework in relation to judgment? All judgment has an ineluctable hermeneutical dimension, which means that all human judgment crucially rests on interpretation. We can understand the concept of the interpretive framework in relation to judgment in the sense that judgment presupposes interpretation. This means that we come to an understanding of the principle when applying it to prenatal diagnosis and screening. Interpretive frameworks are understandings of moral questions. Judgments are inferred from reasons that are related to interpretive frameworks. Exercising judgment is, therefore, based on interpretation.

Representations of ‘the other’

In chapter 3, I developed the concept of impartiality of judgment. Like normative reasons, we have to concretize the concept in order to be able to suggest its relevance to public deliberation. I shall analyze how ‘other’ is represented. By ‘the other’, I mean, for instance, the fetus, the pregnant woman, future parents, and the disabled who are affected by decisions concerning prenatal diagnosis and screening. How these ‘others’ are represented is, ultimately, a question of judgment and, in this respect, the condition of impartiality of judgment is of import.

In my account, to represent ‘the other’ means: to make present or to bring ‘the other’ before the mind by means of describing. Since there are various ways of describing ‘the other’, representation is, in my view, a question of aiming at ‘enlarged thought’. We have to think from the standpoint of others, or to imagine ourselves into the places of others who hold different representations, in order to have adequate ways of bringing ‘the other’ before the mind.

‘The other’ often has an important place in the reasons put forward in public discourse. An opponent of abortion may argue that abortion is wrong since the fetus is a human being. A proponent of prenatal diagnosis may argue that offering

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488 Peter Steinberger (1993).
489 Since we do not have automatic knowledge of ‘the other’, we need openness to him or her. In view of the persistence of [the distance of the Other], we discover that the will to gain knowledge will not yield intersubjectivity and will make an object out of the Other (Claret Vargas 2008).

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Reasoning and the relation between judgments and interpretive frameworks

I shall present the reasons which participants in public discourse use to justify their judgments. This is, for instance, in order to able to discuss representations of ‘the other’. I shall not, however, only discuss reasoning in relation to the representation of ‘the other’ but also with regard to judgments and interpretive frameworks. In the inquiry into public discourse, I shall pursue a descriptive analysis of reasoning using texts. This entails examining which reasons are given and which judgments are inferred from these reasons. An evaluative analysis would, on the other hand, also consider the evidence for the reasons, their tenability, and their relevance to the conclusion.

An argument consists of premises, or reasons, and conclusions, or judgments. A premise or reason is a statement that is used when arguing to establish a conclusion. An example of an argument is a syllogism, consisting of premises and a conclusion. In a syllogism, an argument is valid when the conclusion, by necessity, follows from the premises. The argument is deductive which entails that it is rationally inescapable for anyone who accepts the premises not to accept the conclusion. If we accept the truth of the reasons, we have to accept the conclusions.

The relation between interpretive frameworks, reasoning and judgments is straightforward. Judgments may be justifiable in terms of reasons, reasons which in turn can often be understood in terms of the interpretive frameworks I discern in texts. Let us consider the example of the death penalty. If our reasoning is based on the principle of human dignity, we can say that our interpretive framework contains this principle. The moral question of the death penalty is understood in terms of human dignity. We may reason that the death penalty is a violation of human dignity and that a violation of human dignity is wrong. This principle of human dignity is present in one of the reasons from which we infer the judgment that the death penalty is wrong.

490 An example of a (valid) syllogism:
Premise 1 (reason): All humans are mortal.
Premise 2 (reason): Socrates is human.
Conclusion (we infer from the premises or reasons): Socrates is mortal.
5.3 On the inquiry into public discourse

The interpretation of texts

In my inquiry into public discourse, I analyze texts such as articles, political documents, and monographs. But what are texts? And how can we analyze them? According to Paul Ricoeur, a text is any discourse fixed by writing.\textsuperscript{491} Fixed by writing is a discourse which can be said but is written precisely because it is not said. According to Ricoeur, the reading of a text is possible provided that it does not close itself but remains open to something else. To read is namely to relate the discourse of the text to a new discourse. All discourse is related to the world. A text is waiting and calls for a reading. There are two ways of reading. We can prolong and reinforce the ‘suspense’ of the reference of the text to a surrounding world. This means that we are open to the fact that the text is not complete. This is the explanatory attitude. We can also read a text by lifting the suspense and fulfilling the text in present speech. It is this second way of reading, relating the discourse of the text to present speech, which makes it possible, according to Ricoeur, to relate the discourse of the text to another discourse.

To interpret a text is to come to an understanding of it. In public discourse, we cannot understand a particular text without having recourse to others texts which stand in relation to it.\textsuperscript{492} I understand Ricoeur’s claim that it is possible to read since a text, as a discourse, does not close itself but remains open to something else in the sense that it can be related to another discourse. This relation is evident when citizens respond to other citizens in texts, when there is a ‘dialogical structure’ in texts. Whether or not a text is a relevant contribution to public discourse is a matter of interpretation. Interpretations may differ with the horizon of understanding of the reader interpreting the text. My interpretation of texts in public discourse presupposes that we are able to speak of a text in terms of an interpretive framework, reasoning, and judgments.

Thematic foci

The inquiry into the public discourse on prenatal diagnosis and screening will be structured according to four thematic foci. These foci have been discerned in a reading of the texts belonging to public discourse. The first, second, and fourth foci

\textsuperscript{491} Paul Ricoeur (1991).
\textsuperscript{492} Staffan Carlshamre (1994) discusses various maxims for the interpretation of texts. The maxim of quality reads as follows: Try to interpret the text in such a way that it becomes true. One formulation of this maxim entails that the text is interpreted in such a way that it expresses something that the sender believes and considers to have good reasons to believe. The other formulation focuses on what the reader believes; for instance, Gadamer suggests that a text be interpreted in such a way that the text becomes a unity and true. Other maxims that Carlshamre mentions are ‘Try to consider the text as a relevant contribution to the ‘conversation’ it is part of’ and ‘Interpret the text in such a way that it adds something new to the conversation.’
are notably related to the discourse on prenatal diagnosis; the third focus is notably related to the discussion on prenatal screening:

- *The unborn life.* Should moral worth be attributed to the unborn life and should this influence a public course of action? Even though under Dutch and Swedish law selective abortions are treated like any other abortions, in general terms, there has been intense discussion as to whether the termination of a pregnancy, due to an afflicted fetus, is justifiable. The status of the fetus and the question of the extent to which it deserves protection, or is entitled to human dignity, are discussed in public discourse. The discussion differs, however, from the abortion discourse in general: the specific reason that a woman may have for terminating the pregnancy, namely an afflicted fetus, is also questioned;

- *Attitudes toward the disabled.* How do prenatal diagnosis and screening influence attitudes toward the disabled and should this influence a public course of action? Some disability organizations have criticized prenatal diagnosis since it would entail a value judgment of the disabled. The question of whether or not this is the case, and whether it should lead to regulatory changes, is thoroughly discussed in public discourse;

- *Implications of new choices.* Which implications do new choices of prenatal diagnosis and screening entail for women and their partners and should this influence public discourse? Screening tests are becoming increasingly available and offered to pregnant women in estimate the risk for having a child with a chromosomal aberration leading to Down Syndrome. The justifiability of prenatal screening is, however, a topic of public discourse;

- *Limits to medicine.* In public discourse, this focus addresses the question of what the indications of prenatal diagnosis and screening should be. Public discourse addresses the question of whether there should be limits to medicine as far as prenatal diagnosis is concerned in view of, for example, new genetic diagnoses. Examples of indications for prenatal diagnosis that have been discussed are gender selection and the prenatal diagnosis of so-called late onset diseases. Some argue that there should be a distinction between ‘severe’ and ‘less severe or mild’ afflictions while others claim that it is impossible or undesirable to make such a distinction at all.

**Material and selection criteria**

I consider written texts belonging to public discourse in five arenas of the public sphere: the political, academic, medical, civic, and mass media arenas. This means that, for instance, newspaper articles, journal articles, political documents, and monographs are considered. As far as newspaper articles are concerned, I limit myself to national newspaper articles. From a rather comprehensive body of material, I have selected 125 texts for further inquiry. The selection criterion used here was that they had an argumentative structure. 59 texts belong to the Swedish
public discourse and 61 belong to the Dutch discourse. From the selected 125 texts, 51 are considered in detail in terms of interpretive frameworks, reasoning, and judgments. The other texts are considered using footnotes, in order to provide a more comprehensive overview of public discourse. Of the 51 texts that have been considered to a greater extent, 25 belong to the Swedish public discourse and 26 to the Dutch public discourse.

There are three, qualitative, selection criteria for the texts considered in detail that have been weighed into the selection:

(1) A structure that makes it possible to analyze judging. This entails interpretive frameworks, reasoning, and judgments being present, in principle, in the text.

(2) Dialogicity. I do not merely consider public discourse as utterances in the public sphere but in terms of deliberation. This entails texts being considered with a dialogic structure containing references to other texts.

(3) Relation to politics. I am interested in public deliberation using ethico-political judgment as an ideal. Since ethico-political judgment concerns a public course of action, I am interested in texts that consider such a course of action.

Public discourse is considered during the period 1989-2006. I have chosen to consider public discourse commencing in 1989 due to a Swedish Government Official Report being published that year and due to the impetus of an intense discussion in the Netherlands during almost the same period. During the period 1989-2006, opportunities for prenatal diagnosis and screening have been developed further; the debate on prenatal diagnosis has been intensified by the ongoing Human Genome Project, and it has been possible to diagnose more and more hereditary afflictions. Furthermore, new techniques of prenatal screening have entered into clinical practice.

*Developments in prenatal diagnosis and screening*

Prenatal diagnosis, in the sense of amniocentesis, an invasive procedure that withdraws fluid surrounding the fetus in the uterus, has been in use since the mid-1960s. Another invasive procedure is chorionic villus sampling, which entails a sample of the placental tissue being taken. The advantage of this invasive procedure, compared with amniocentesis, is that it can be carried out 10-12 weeks after the last period, thus being earlier than amniocentesis, which is carried out at 15-18 weeks. When the results of amniocentesis or chorionic villus sampling are positive, for instance when the fetus has a chromosomal aberration, the choice will be whether or not to opt for selective abortion. Selective abortion means terminating a pregnancy on the grounds of some distinctive condition of the fetus that would most probably result in an undesirable state of functioning or being in the unborn life. Usually, selective abortion refers to terminating a pregnancy due to some illness or impairment in the fetus.493
The objectives of prenatal diagnosis are:

1. to offer the widest possible range of choices to women at risk of having children with a genetic abnormality;
2. to provide reassurance and reduce the anxiety associated with reproduction, especially among high-risk women;
3. to enable high-risk women to continue a pregnancy by confirming the absence of a certain genetic disease;
4. to facilitate optimal treatment of affected infants through early diagnosis.\(^{494}\)

The discovery of the presence of fetal cells in maternal blood during pregnancy, and their isolation for genetic analysis, brought about a major revolution in prospective prenatal diagnosis. Genetic testing in general is growing rapidly by 200-300 % per annum. Tests for genetic diagnosis in general exist for over 1,000 conditions. Prenatal diagnosis of a ‘minor’ genetic affliction such as hemophilia has also been defended. While there is a political will to restrict the indications for prenatal diagnosis, there would be little justification for a restrictive stance in the light of the reasons offered for such a stance.\(^{495}\)

In a study of health practitioners’ discussions regarding the issue of drawing the line, it was concluded that the notion of professional behavior serves to act against the drawing of lines: many practitioners felt strongly that their job was about supporting the individual woman, whatever her choice, despite any conflicting personal beliefs.\(^{496}\) In the future, one possible development in prenatal diagnosis, perhaps using the isolation of fetal cells from maternal blood, may be DNA chip technology based upon ‘multiplex gene expression analysis’\(^{497}\). This may cause a dramatic decrease in inherited diseases. Another development that can rapidly detect fetal abnormalities is a molecular technique called fluorescent PCR (polymerase chain reaction).\(^{498}\) PCR can be used to detect an extra chromosome, as well as genetic abnormalities, by removing a small amount of amniotic fluid. The technique takes only a few hours.

Prenatal screening is the offer to carry out, for instance, the maternal serum test, and, more recently, a nuchal translucency measurement in order to search for fetal abnormalities such as congenital malformations, chromosomal disorders, neural tube defects, and even genetic conditions regarding the asymptomatic population of pregnant women.\(^{499}\) These tests differ from prenatal diagnosis in the sense that they pose a risk to a fetus with an aberration, particularly Down Syndrome, and a neural tube defect. When there is an increased level of risk, prenatal diagnosis is offered to pregnant women.

At the end of the 1980s, a new biochemical approach to screening, without any risk of miscarriage such as there is with amniocentesis, known as the triple test and

\(^{494}\) Vered Eisenberg et al. (1997).
\(^{495}\) Robert Boyle and Julian Savulescu (2003).
\(^{496}\) Clare Williams et al. (2002).
\(^{497}\) Wolfram Henn (2000).
\(^{498}\) Ian Findlay et al. (1998).
\(^{499}\) Elizabeth Ettorre (2001).
based upon maternal blood samples, became available. Women with Down Syndrome pregnancies have a reduced level of AFP concentrations. Using a blood sample, it is possible to calculate the risk, which entails, in some cases, that the woman is referred to amniocentesis. In the 1990s, the screening method fetal nuchal translucency measurement, using ultrasonography, was introduced; this method estimates the risk of having a child with Down Syndrome. A combined nuchal translucency and biochemical test can detect 87% of cases of Down Syndrome.

Screening trials for other afflictions are also being carried out. While it is recommended that prenatal screening for Fragile X syndrome, a cause of inherited mental impairment, be limited to individuals that are at increased risk in the light of their specific family history, in a trial in the USA, Fragile X syndrome screening has been offered to a wide population and pregnant women were strongly in favor of being tested.

**Legislation and regulation**

In the Netherlands and Sweden, selective abortions are statutorily treated similarly to other abortions. In the Netherlands, under the Termination of Pregnancy Act (Wet abbreking zwangerschap, 1981), abortion is still punishable, but the doctor is allowed to make an exception when the woman is suffering from ‘distress’ (if there is a so-called *noodsituatie*) The decision is strictly for the woman.

In Sweden, it is the Abortion Act (Abortlagen, 1974) that applies. In Sweden, women may request an abortion up until the 18th week. Regarding indications for prenatal diagnosis, no specific legislation exists in the Netherlands or in Sweden. In the Netherlands, prenatal diagnosis, using invasive methods such as amniocentesis, is offered to pregnant woman over 36, to risk groups, to women at greater risk, for instance when an affliction is found using ultrasonography or screening, and to those with diseased or disabled children.

In Sweden, prenatal diagnosis is offered to pregnant women over 35, to women belonging to risk groups, and to those who have previously given birth to a diseased or disabled child. In the Netherlands, the Population Screening Act (Wet Bevolkingsonderzoek) governs prenatal screening. A permit must be requested from the Minister of Health when population screening for serious diseases which are either untreatable or unpreventable.

Prenatal screening in Sweden is judged on a case-by-case basis by the National Board of Health and Welfare, following a Government Official Report published in 1989. This means that new techniques, such as nuchal translucency screening, are assessed by the Board. In Sweden, trials are taking place using a combined blood

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and ultrasonography test. Also in the Netherlands, new methods of prenatal screening are being introduced. In the Netherlands, around 550 selective abortions were carried out in 2006. In Sweden, in 2004, around 350 fetuses with an aberration were aborted (4 per 1,000 births). Of these fetuses, the majority had a chromosomal aberration.

**In sum**

In this chapter, I have concerned myself with an analytical approach that I shall apply to public discourse in the Netherlands and Sweden. In the texts that I have considered, interpretive frameworks, reasons, and judgment will be elucidated. Citizens frame their concerns concerning technologies such as prenatal diagnosis and screening using what I call interpretive frameworks. I shall ask, in the chapter where I analyze the results of the empirical inquiry, whether or not there are any interpretive differences regarding such frameworks, including moral principles.

Furthermore, I shall also ask how ‘the other’, e.g. the fetus, the pregnant woman, and the disabled person, are represented. Interpretive differences and representations of ‘the other’ have a legitimate place in public deliberation. The question is, however, whether or not public deliberation is likely, given potentially divergent moral premises. I shall address this question after the following chapters on Dutch and Swedish public discourse.
CHAPTER 6

Judging in Dutch public discourse

I have been interested in a theoretical account of how to deliberate in part 1. I shall now analyze public discourse in the Netherlands in order to examine how we actually deliberate. Let me first sketch some features of Dutch political culture.

The Netherlands is characterized by its age-old history of pluralism: the co-existence of different religious and secular communities. This co-existence can explain the relative tolerance to diverging opinions in public discourse, as well as the rather liberal attitude toward, for instance, euthanasia. Pragmatic tolerance is said to be a feature of political culture. A discussion is currently taking place, however, as to whether the tolerance associated with Dutch culture has transformed into indifference and mere toleration. The political parties are, nevertheless, expected to concern themselves with moral issues and questions concerning ‘the good life’.

I shall analyze texts on prenatal diagnosis and screening belonging to Dutch public discourse by considering judgments, interpretive frameworks, and reasoning (where appropriate). I shall characterize Dutch discourse on the unborn life in terms of protection and quality of life; discourse on attitudes toward the disabled in terms of valuation of them; discourse on the implications of new choices in terms of autonomy and medicalization; discourse on the limits of medicine in terms of the question of whether ‘severe’ and ‘less severe’ afflictions can be distinguished.

6.1 ‘The unborn life’: the protection and quality of life

A report by the Lindeboom Institute, a Christian institute for medical ethics, has been the impetus for a debate in the Netherlands concerning the justifiability of selective abortion. The institute defends a limitation of prenatal diagnosis to severe afflictions, while at the same time rejecting abortion. The institute rejects selective abortion despite a discussion on the reduction of indications for prenatal diagnosis, which would suggest that the Institute regards selective abortion for some indications as justifiable. The Institute wants to restrict prenatal diagnosis to severe afflictions, arguing that, in the future, it will also be possible to carry out prenatal diagnosis for less severe afflictions. The Institute’s view on the status of the fetus, however, is a reason for it to reject of all kinds of abortions, including the selective abortion of afflicted fetuses:

507 Wibren van der Burg and Frans Brom (1999).
On the basis of our conviction, with regard to the status of the human fetus, we reject abortion provocatus, even of an impaired fetus, categorically, as well as euthanasia of a disabled newly born.\textsuperscript{508}

The Institute thus rejects abortion categorically, which may lead to a conflict in view of the practice of prenatal diagnosis. The judgment is that selective abortion, as such, has to be rejected, even though the situation exists whereby selective abortion is carried out within society. In the judgment of the Institute, selective abortion has to be restricted to severe cases. It can thus be concluded that the Institute has a principled judgment - while reasoning that selective abortion has to be rejected with the status of the fetus in its interpretive framework - and a pragmatic judgment - reasoning that selective abortion has to be restricted to severe afflictions with limits to its interpretive framework. We see that the institute defends a restrictive judgment - selective abortion cannot be justified in view of the status of the fetus - and a moderate-restrictive judgment - exceptions are justifiable in cases of severe affliction. The reason for the restrictive judgment is that the status of the fetus does not justify selective abortion.

In a reaction to the report of the Lindeboom Institute in a newspaper article, ethicist Heleen Dupuis and geneticist Hans Galjaard argue that the view that the unborn fetus is, in any respect, a human being, a view which they ascribe to the Institute, is not the only defendable view on human being-in-becoming. They speak of \textit{not yet human beings}.\textsuperscript{509} Potential beings are, in the view of Dupuis and Galjaard, equal to not yet human beings:

Potential human beings are not yet human beings, one could argue, much like children are potential adults, but are not yet adults and do not have the same rights and obligations as adults.\textsuperscript{510}


\textsuperscript{509} Geneticist Leo Ten Kate also endorses the doctrine of ‘not yet human beings’. The pre-embryo is not as protectable as a newborn child, according to him. The embryo is not yet a human being. He uses an analogy between an acorn and an oak to clarify the relation between the embryo and a newborn child (Kate, Leo P. ten’ De vraag is: wie mogen wij het leven aandoen’ [The question is: who will live?], \textit{Trouw} April 3, 1992). Such an analogy is also used by a committee of the Protestant Churches in speaking of the relation between a seed and a tree. A tree starts as a seed but we treat a tree differently than a seed. According to the committee, there is thus a difference between a developed and an undeveloped fetus. The analogy is used to clarify the doctrine of the growing protectability (Commissie ‘Biomedische ethiek’ (1991). \textit{Mensen in wording [Human beings in the becoming]. Utrecht: Deputaatschap en de Raad voor de Zaken van Kerk en Theologie van de Nederlandse Hervormde Kerk en de Gereformeerde Kerken in Nederland}).

\textsuperscript{510} My translation: ‘Potentiële mensen zijn nog geen mensen, zou men kunnen argumenteren, zoals kinderen potentiële volwassenen zijn, en evenmin dezelfde rechten en plichten als volwassenen hebben’. Dupuis, H.M. en Galjaard, H. ‘Ongeborene heeft recht op een goede start’ [Unborn has the right to a good start], NRC \textit{Handelsblad} July 28, 1989.
The authors thus see an analogy between the difference between potential human beings, the unborn life, and human beings, on the one hand, and the difference between children and adults, on the other. The authors argue, therefore, that it is not unreasonable and not immoral to consider the unborn life differently than the born child: there is a development of the fetus. They endorse implicitly the doctrine of the growing protectability of the fetus; in the beginning, the fetus is entitled to less protection than at the end. According to the authors, selective abortion can be justified since it can be defended that the aim is the optimal development of the unborn life and a start to life that is as good as possible:

Is this possibility lacking, then can, in the decision-making process, the termination of a pregnancy be chosen as the lesser of two evils.

Implicitly in their reasoning, Dupuis and Galjaard appeal to the principle of respect for autonomy, interpreted as freedom of choice. In their permissive judgment, selective abortion may be justified by having recourse to the future parent. As reasons are firstly given that a moral consensus is impossible, with regard to selective abortion, and secondly that it should be the choice of the prospective parents. Thus, for Dupuis and Galjaard, the fetus, although a potential human being, does not have the same rights as the born child. Selective abortion can be justified since the fetus is, in their view, a ‘not-yet-human-being’, the concept of their interpretive framework. The judgment that selective abortion can be justified is inferred from the reasons that autonomy, understood as freedom of choice, should be a guiding principle, but implicitly also that suffering has to be prevented. Suffering is reduced when the child is given as good a start as possible.

511 According to ethicists Dupuis and De Beaufort, the fetus has a protectability that grows with the fetus. The more the fetus approaches the status of being a person, the greater its rights. The fetus has a right to live but the woman has a right regarding integrity of her body (Dupuis, H.M. en De Beaufort, I.D. (1988). ‘De morele positie van de ongeborene’ [The moral position of the unborn], in I.D. de Beaufort en H.M. Dupuis (eds.), Handboek gezondheidsethiek. Assen/Maastricht: Van Gorcum). Also ethicist Van Steendam endorses, implicitly, the doctrine of growing protectability. Until a certain level of development is attained, there is no human individual that implies that abortion, until this level, does not violate the rights of the fetus as a human being (Steendam, G. van (1988). ‘Abortus in het kader van erfelijkheidsadvisering’ [Abortion in relation to hereditary counselling], in I.D. de Beaufort en H.M. Dupuis (eds.), Handboek gezondheidsethiek. Assen/Maastricht: Van Gorcum). Ethicist De Wert also endorses, implicitly, the doctrine of growing protectability. According to him, potential persons do not have the same moral standing as persons. The fetus is, according to him, a potential person until it obtains a capacity for consciousness in the third trimester (Wert, G.M.W.R. de (1990). ‘Prenatale diagnostiek en selectieve abortus. Enkele ethische overwegingen’ [Prenatal diagnosis and selective abortion. Some moral considerations], in H.A.M.J. ten Have (ed.), Ethiek en recht in de gezondheidszorg. Deventer: Kluwer). He describes the dominant opinion of growing, progressive, protectability: the fetus is protectable against conception, but the protectability increases as the fetus grows (Wert, Guido de (1999). Met het oog op de toekomst. Voortplantingstechnologie, erfelijkheidsonderzoek en ethiek [Vision of the future. Reproductive technologies, hereditary research and ethics]. Amsterdam: Thela thesis).

512 My translation: ‘Ontbreekt die mogelijkheid dan kan in het afwegingsproces gekozen worden voor de afbreking van de zwangerschap als de minste van twee kwaden’. Dupuis, H.M. en Galjaard, H. ‘Ongeborene heeft recht op een goede start’ [The unborn has the right to a good start], NRC Handelsblad July 28, 1989.
Ethicists Th. Beemer and M. Christiaans, framing the question of the unborn life in terms of the protection of human life, criticize, in a newspaper article, the suggestion of Dupuis and Galjaard that parents should have the freedom to opt for selective abortion when the quality of the fetus is insufficient for its future existence. Protection for them encompasses all human life, which is considered to be protectable. According to Beemer and Christiaans, the law on abortion does not at all provide parents with the freedom which Dupuis and Galjaard presuppose. This is because the principle of the protection of human life, both born and unborn, is fundamental to the law:

[The abortion law] departs from the principle of protectability with regard to human life; born and unborn [...] The law wants to protect the unborn human life as much as possible against being killed. It does not protect the unborn against a future of suffering [It’s] preference is not restricted to lives with a certain quality.

The protection of human life thus entails, for the authors, that a ban on the killing of the unborn life exists. This protection is legal since it is the point of departure in the abortion law. The authors note that abortion is only allowed when there is a situation of distress for the woman. According to them, there is no principled difference between selective abortion and infanticide. Selective abortion poses a specific moral problem since, contrary to most cases of abortion, parents have planned not to give birth to children with certain afflictions.

Beemer and Christiaans thus reason that the unborn life should have the same protection as the newly born child in equaling selective abortion and infanticide. They reject the principle of so-called growing protectability, implicitly referred to by Dupuis and Galjaard, which entails that a principled difference exists between the early and late fetus. The judgment of Beemer and Christiaans regarding abortion is restrictive and based upon the principle of the protection of human life, the concept of their interpretive framework, which only allows abortion in cases of distress to

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513 Health lawyer Ten Braake propounds a different interpretation of the law on abortion. The human fetus does not have the same rights and obligation as newly born human beings, but it has a certain protection under the law depending on the potency of becoming a human being. This protection grows when approaching the boundary of viability. Abortion until the fetus is viable can be justified, according to the law (Braake Th.A.M. ten (1990). ‘Prenatale diagnostiek’ [Prenatal diagnosis], in H.A.M.J. Ten Have (ed), *Ethiek en recht in de gezondheidszorg*. Deel XVI. Deventer: Kluwer).

514 My translation: ‘[De abortuswetgeving] gaat uit van het beginsel van bescherming ten opzichte van het menselijk leven, geboren en ongeboren [...] Hiermee wil de wet het ongeboren menselijk leven zoveel mogelijk beschermen tegen doden. Zij bescherm niet tegen een leedvolle toekomst [De voorkeur van de wet] is niet beperkt tot levens van een bepaalde kwaliteit’. Beemer, Th. en Christiaans, M. ‘Elke ongeboorene heeft recht op een zo goed mogelijke start’ [Each unborn has the right to a start that is as good as possible], *Trouw* August 24, 1989.

515 The Christian Democratic Party also endorses the doctrine of the protection of human life. Reverence and the protection of human life, regardless of the developmental stage, should be the foundation of the legal order. Life is, according to the party, a right. When reverence and protection are considered foundations of society, this means that the strong and the healthy take responsibility for the vulnerable, including the unborn life (CDA (1992). *Genen en grenzen*. Een christen-democratische bijdrage aan de discussie over gentechologie [Genes and limits. A Christian Democratic contribution to the discussion about gene technology]. Den Haag: Rapport van het wetenschappelijk instituut).
the woman. This leads to the judgment that selective abortion cannot be justified. The reasons provided for the inference that selective abortion cannot be justified are that human life, in terms of both born and unborn life, is to be protected and that the fetus is an unborn human life.

Ethicist Marlies van de Meent-Nutma also criticizes, in a newspaper article, the liberal stance of Dupuis and Galjaard. Like Beemer and Christiaans, she frames the question of the unborn life in terms of protectability, but also in terms of quality of life, implicitly in the newspaper article and explicitly in a monograph. We have seen that protectability entails that the unborn and born life deserve protection. Quality of life, as we will see, entails that exceptions may be justified. Van de Meent-Nutma proposes, implicitly, a compromise between Dupuis and Galjaard and Beemer and Christiaans:

On the one hand, the fetus, as a potential human being, but particularly as an already existing human life, has the right to protection on the basis of the moral principle of respect for human dignity. On the other hand, there could sometimes be reasons which outweigh the protection of the unborn life. Severe afflictions resulting in a life of suffering constitute one example.516

Suffering can thus, for the author, outweigh the right of protection of the fetus, and protection is, for her, not an absolute criterion as it is for Beemer and Christiaans. According to Van de Meent-Nutma, for many afflictions, it applies, however, that they are less severe, entailing that they do not outweigh the protectability of the unborn life. This gives Van de Meent-Nutma a criterion of protectability, with reference to the principle of human dignity, which entails that a distinction between severe and less severe afflictions can be made. In a monograph, Van de Meent-Nutma introduces the term ‘quality of life’ to discuss whether or not it is morally justified to terminate a pregnancy after a positive diagnosis resulting from prenatal diagnosis.517 In such cases, the future child may have a lower quality of life. Quality of life is used in health care to indicate that quantity of life should not be the only guideline for medical treatment.

One of the most difficult questions is which afflictions make life too great a burden? Van de Meent-Nutma mentions diseases and disabilities leading to a miserable life, severe neurological afflictions, and severe hereditary diseases. The judgment of De Meent-Nutma is, thus, that the fetus deserves protection, but that in the case of severe suffering, selective abortion may be justified: the judgment is

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516 My translation: ‘Enerzijds heeft de fetus als potentieel menselijk persoon, maar vooral als reeds bestaand menselijk leven recht op bescherming op grond van het moreel principe van respect voor de menselijke waardigheid. Anderzijds kunnen er soms redenen zijn die zwaarder wegen dan de beschermwaardigheid van het ongeboren leven. Ernstige afwijkingen die resulteren in een leven vol pijn en leed zijn daarvan een voorbeeld’. Meent-Nutma, E.M. van de ‘Controle bij prenatale diagnostiek. Er zijn grenzen aan de autonomie van de ouders’ [Control using prenatal diagnosis. There are limitations to the autonomy of parents], Trouw August 18, 1989.

therefore moderate-restrictive. The judgment is based upon the concepts of her interpretive framework, protectability and quality of life. Protectability implies a restrictive stance toward selective abortion, while quality of life entails the justifiability of some selective abortions. Van de Meent-Nutma infers her moderate-restrictive judgment, from the reasons that, on the one hand, the fetus deserves protection while, on the other hand, this protection, in certain cases of severe affliction, may be outweighed.

In a report, a committee from the Dutch Society for Obstetrics and Gynaecology frames the question of selective abortion in terms of quality of life, protection, and suffering. With regard to quality of life, the committee refers to the position of Van de Meent-Nutma. The committee asks whether afflictions exist that are so severe that, with regard to the possibility of the child suffering from them, abortion may be justified. Can suffering outweigh the protectability of human life? The committee argues that this can be the case:

Sometimes a fetus can have such severe afflictions that it can be asked whether or not it is in the ‘interests of’ the fetus to be born.

The committee relates this question to the notion of the quality of life. According to the committee, selective abortion can be justified in the case of afflictions which can affect the child. The notion of the protectability of human life is not, for the committee, absolute and does not lead to an unqualified ‘no’ with regard to selective abortion:

If there is a life that will never be able to develop into a human life with a certain level of quality, the notion of protectability carries less weight.

Thus, quality of life is, for the committee, a criterion to determine whether or not the protection of human life can be compromised. According to the committee, it is impossible, however, to indicate in the case of which afflictions the termination of a pregnancy can be justified. The committee mentions, nevertheless, some criteria: communication, dependence on health care, the ability to live, suffering, and the

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518 A working group on bioethics from the Dutch Humanist Association also propounds the judgment that prenatal diagnosis should be restricted to severe cases. The question of what is severe or not severe can be interpreted differently by different parents, according to the group (Jacobs, Emmy (ed.) (1990). De biomaatsschappij: een humanistische visie op de ethiek van het biomedisch handelen [The biosociety: a humanist view on the ethics of biomedical acting]. Amersfoort: Aeco).


expected lifespan. The committee not only mentions the expected suffering of the child but also the capacity of the parents, their personal and family situation, their moral and religious convictions. In the moderate-permissive judgment of the committee, selective abortion can thus be justified if the quality of life of the child suffering from an affliction is poor. In this case, the notion of protectability is outweighed. Quality of life and suffering, concepts with which the committee frames the question of prenatal diagnosis, are related; suffering entails that the quality of life is poor. Besides the quality of life of the child, the question of whether the parents can cope with the child is also relevant to the committee. Like Van de Meent-Nutma, the committee reasons in support of its judgment that protectability may be outweighed and that this can be justified using the criterion of quality of life, or suffering.

6.2 ‘Attitudes toward the disabled’: the valuation of the disabled

Theologian and ethicist Harry Kuitert discusses, in an article in a journal, why the idea of a slippery slope and a eugenetic population policy persist. According to Kuitert, the reason for the persistence of a eugenetic population policy is the prospect of a society without suffering. If we could ‘cleanse’ the human gene pool, this would be a huge step toward the reduction of suffering. However, a society without suffering does not exist and will never exist. The number of disabled due to reasons other than hereditary is growing. Disabilities will always exist to a large extent. According to Kuitert, the belief in a society without suffering is particularly offensive to the disabled. It is the reason for a social tendency toward eugenics. The neighbors may argue that the disabled child would not have to exist if prevention had been chosen:

The belief in a society without sorrow and suffering is, above all, offensive to existing disabled fellow humans. It is the breeding ground (not of coercion but) of social pressure toward a eugenic future.

Kuitert’s interpretive framework with which he judges prenatal diagnosis thus consists of two kinds of eugenics. In its strongest meaning, eugenics means a eugenetic population policy in which the perspective of a society without suffering lies at the centre. In the other, much weaker meaning, there can already be a

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521 Eugenics is defined by Philip Kitcher (1996) as the attempt to minimize congenital disorders and enhance abilities; traditional eugenics goals. However, contrary to traditional eugenics, liberal eugenics entails the state not interfering with the reproductive choices of individuals.


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tendency toward eugenics when the birth of a child with a disability is questioned. In Kuitert’s judgment, attitudes toward the birth of disabled children may change due to prenatal diagnosis. He also expresses doubts with regard to prenatal diagnosis preventing a child with Down syndrome. The reasons that Kuitert provides for his judgment are that, in the strongest sense, eugenics is impossible since suffering will always exist. For the argument that eugenics, in the weak sense, may be possible, Kuitert refers to social pressure, which entails parents being blamed due to their refusal to carry out prenatal diagnosis.

Is the decision to prevent the birth of a child with a disability, such as blindness, a value judgment with regard to the lives of people who have such a disability? Politicians reacted furiously when prenatal diagnosis for this indication occurred. Member of Parliament Rob Oudkerk argued, for instance, that he knew many blind people who had a decent life. In a newspaper article, ethicist Govert den Hartogh claims, in response to these political reactions, that the decision to terminate a pregnancy after a positive test for blindness does not imply that people with the disability would not have a decent life. According to Den Hartogh, contrary to Kuitert, attitudes toward the disabled do not change due to prenatal diagnosis. Den Hartog asks how the disabled value their own lives: how do the disabled themselves judge the meaning of their disability as regards the meaning and value of their lives? The error that is often made is that the disabled are considered to value the same things as the non-disabled, but are only able to realize those shared values to a lesser extent:

The life of a disabled person is, to a certain extent, a different one, which is measured by different standards.

The value of a life for Den Hartogh is, thus, the value of the life for the person who lives it. If we decide to prevent children with a disability such as cystic fibrosis from being born, this does not mean that we do not attach value to the existence of such people even though we do everything to protect our children from the fate of being disabled. There is no reason to respect the life of a disabled person less but there is, on the other hand, a legitimate reason for not beginning the life of a disabled person. In the first case, someone exists for whom life is of great value. In the second case, that person does not yet exist and we do not harm anyone by deciding

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523 Ethicist Hilhorst implicitly claims that there is, in fact, a reason for Kuitert’s ‘neighbors’ to question the choice of giving birth to a child with an affliction without using prenatal diagnosis. If parents deliberately refrain from prenatal diagnosis, the suffering which results cannot be put down to ignorance; from a moral point of view, parents can be asked to justify their choice. (Hilhorst, M.T. (1993). Aangeboren en aangedane handicaps: maakt het moreel verschil? [Congenital and caused disabilities: is there a moral difference?], in Beaufort, I.D. de, en M.T. Hilhorst (eds.), Kind, ziekte en ethiek. Baarn: Ambo).

524 Köhler, Wim. ‘Ongefundeerde kritiek van politici op abortussen’ [Unwarranted criticism of politicians over abortions], NRC Handelsblad October 13, 1995.

525 My translation: ‘Het leven van een gehandicapte is echter tot op zekere hoogte een ander leven, waarin gemeten wordt met andere maatstaven’. Hartogh, Govert den. ‘Het was beter als u er niet geweest’ [It would have been better if you had never existed], Trouw March 2, 1996.
that he will not exist. That decision does not mean that such a life is not worth living, only that it will have to overcome more barriers.

Den Hartogh thus claims that, while existing disabled people attach great value to their lives, there is a legitimate reason to prevent a disabled life. Since that person does not yet exist, we will not be harming anyone. According to Den Hartogh, prenatal diagnosis thus does not entail that the lives of existing disabled people are valued less. Following Den Hartogh, attitudes toward the disabled do not change, but the reason that potential parents choose prenatal diagnosis is that they wish to avoid the birth of a disabled child with all the burdens forming part of such a child’s life. Den Hartogh thus propounds the permissive judgment that prenatal diagnosis can be justified as far as attitudes toward the disabled are concerned. The reason he gives is that the burden of a disability may justify prenatal diagnosis.

Ethicist Hans Reinders discusses, in a newspaper article, in reaction to Den Hartogh, the question of attitudes toward the disabled in terms of the valuation, not of the disabled of their own lives, but of those who do not want a child with a disability. Reinders criticizes Den Hartogh’s argument that the value of a disabled life only can be judged from within. Then, the statement ‘I do not want to live like that’ would have no meaning. Those who do not want a child that will be blind base their decision upon a judgment about what living with blindness would mean to a blind person:

If they would not do that, what reason would they have to spare their child such a fate? Possibly, they have an incorrect understanding of the value of life, but that does not mean that an incorrect value judgment is still a value judgment.526

According to Reinders, there thus exists a connection between the choice not to give birth to a child with a disability, due to the fate of the child, and the valuation of existing disabled people. In the view of Reinders, Den Hartogh wants people who choose prenatal diagnosis not to be confronted with doubts about the choices they make. However, the moral ambivalence regarding prenatal diagnosis is not disappearing. In a monograph, Reinders asks whether the interests of disabled who are now alive are affected by the choice of prenatal diagnosis. Here too, the framework valuation of people with a disability is used, as in the newspaper article. Parents who are facing the choice form an image of the life of disabled people, which can be nothing other than a valuation of the existence of those others. The reason for their possible choice of prenatal diagnosis has its basis in a judgment regarding people with disabilities:

‘[I] would not want to live like that’ where ‘like that’ either refers to their image of the lives of people with that disability or to the lives of people with children who are disabled.527

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526 My translation: ‘Zouden ze dat niet doen, wat voor reden zouden ze dan kunnen hebben om hun kind dat lot te willen besparen? Mogelijk bedienen ze zich daarbij van een verkeerd begrip van de waarde van het leven, maar dat neemt natuurlijk niet weg dat een verkeerd waardeoordeel nog steeds wel een waardeoordeel is’. Reinders, J.S. ‘Gehandicapten en de twee boodschappen van de samenleving’ [The disabled and the double messages of society], Trouw March 9, 1996.
The disabled thus have reason to take offence from prenatal diagnosis. According to Reinders, negative valuations of the existences of disabled people do matter. If a woman with spina bifida watches a program about prenatal diagnosis where a couple explain that they have prevented the birth of a child with that severe disability, will she then have reason to take offence? According to Reinders, both yes and no. The judgment does not need to apply to people with this affliction who can live an independent life and who are satisfied with that.

However, it is also a judgment about people, of whom she is one. In the judgment about ‘future people’, images of ‘actual people’ act as evidence. A judgment about the affliction which causes a disability implies no judgment of people with the disability. However, when there is a difference between a person and his or her affliction, in the sense that the struggle against the latter does not exclude respect for the former, it would be difficult to see how decisions to prevent the birth of a disabled child do justice to that difference. The ‘actual people’ do have reason to feel violated in their societal standing. Thus, the (implicit restrictive) judgment of Reinders is that the choice of prenatal diagnosis entails a value judgment with regard to the lives of the disabled. According to Reinders, however, this is no reason to condemn prenatal diagnosis.


528 Geneticist Geraedts denies that prenatal diagnosis would imply a value judgment regarding the disabled. He addresses the question of whether genetics could have a negative influence on the attitude of society toward those who are born with a disability. Is this a question of ‘failed prevention’? Is it true that is aimed at the perfect child and that there is less acceptance of disabilities? Geraedts argues that, using an analogous argumentation, one could wonder whether the aim of diminishing disease and suffering in health care would have consequences for those who cannot be cured in terms of less care. The contrary is true; in our society, the chronically sick and disabled are very well taken care of. However, sometimes, social pressures can bear on, for instance, elderly mothers-to-be to have a prenatal diagnosis. (Geraedts, Joep (1998). Erfelijkheid en voortplanting [Heredity and reproduction]. Amsterdam: Uitgeverij Nieuwzijds). Ethicist Ten Have argues that the attitude of society toward the disabled may change due to prenatal diagnosis. It is no coincidence, he argues, that discussions on prenatal diagnosis and pre-implantation genetic diagnosis take place when the Government wants to cut expenditure in disability care (in Braams, Renée. 'Kind van de berekening. Selectieve abortus en de kwaliteit van het bestaan' [Child of calculation. Selective abortion and the quality of existence], NRC Handelsblad April 15, 1994). Ethicist Musschenga is critical, in a newspaper article, of the notion that there is a relation between prenatal diagnosis and cuts in disability care; care of the mentally ill has been reduced in recent cuts. Whether the expectation that prenatal diagnosis will make care of the disabled progressively superfluous or not is the most important motive of prenatal diagnosis, this is morally reprehensible. But this is not the case in the Netherlands, according to Musschenga (Musschenga, Albert. ‘Selectieve abortus is niet a priori immoreel’ [Selective abortion is not a priori immoral], NRC Handelsblad August 5, 1994).

529 What is the possible role of the Government in this respect since prenatal diagnosis entails a valuation of the lives of the disabled? According to Reinders, not much can be done. Liberal democracy cannot protect people with a disability against the societal side effects of reproductive genetics. If the Government would like to regulate prenatal diagnosis, it cannot do so without presuming a judgment regarding the quality of life of the disabled. The Government would dictate what citizens ought and ought not to do on the basis of a conception of the good life which is not shared by all citizens. The citizens of a liberal society decide for themselves, however, about what constitutes a good life (Reinders, J.S. (2001). ‘Het Human Genome
that prenatal diagnosis entails a value judgment by reasoning that, in the judgment about future people, actual people act as evidence: parents argue, after all, that they do not want to live the way a disabled person does.

In a newspaper article, ethicist Marian Verkerk addresses, also in reaction to Den Hartogh, the question of attitudes toward the disabled in terms of emancipation. Analogous to the struggle of women for equal rights and opportunities, the disabled are also struggling for emancipation. She uses a thought experiment with a society in which it is much more difficult for women to live a worthwhile life than men; it is, for instance, difficult to find the means to live and start relationships. Is this a legitimate reason to prevent the birth of women? According to Verkerk, to the contrary; the struggle for the emancipation of women is aimed at equal rights and opportunities for women. The same struggle for emancipation can be expected from the disabled. Being-disabled would be a social construction:

Whether or not one experiences a disadvantage in one’s life is related to the situation in which one finds oneself. 530

This implies, thus, that, for Verkerk, disadvantages are relative to the situation. Whether or not a person experiences a disadvantage in his or her life is related to the situation; deafness is not a problem when communication tools are not solely adapted to hearing human beings. The disabled do the right thing if they criticize the tacit normative portrayal of human beings. The implicit restrictive judgment of Verkerk is, thus, that prenatal diagnosis would not be necessary in the case of the successful emancipation of the disabled: equal rights and opportunities for the disabled would make prenatal diagnosis superfluous. The reasons she provides for her judgment are based upon an analogy between the emancipation of women and the emancipation of the disabled.

How do Dutch disability organizations consider prenatal diagnosis? According to Cees Smit, representing an organization for hemophilia, two tendencies in reactions to the disability and patient organizations can be observed. Firstly, the emphasis is on acceptance and a positive valuation of the being-other of disabled. Progress in genetics is mostly not experienced positively. Secondly, patient organizations are interested in the opportunities for genetics to cure disease. 531 Thus, the disabled are predominantly reluctant while patient organizations embrace new opportunities to cure disease. These tendencies can, as a matter of fact, be found in a statement by the Dutch Genetic Alliance which represents patient and parent organizations. The interpretive framework of the alliance consists of the basic principle of equal human value. Furthermore, the protection of life and freedom of choice are basic principles. As a
basic principle, the alliance has articulated that each human being, growing or adult, disabled or not, is valuable, a carrier of many human values; the protection of life should be the basis of Government policy, which implies that this policy should be directed at informing prior to conception. With regard to pre-implantation genetic diagnosis, it has been observed that information that is too optimistic may lead to a social norm: ‘the perfect child.’ In its moral manifest, the alliance interprets the idea of equal human value as follows:

People with hereditary or congenital afflictions are primarily human beings like all human beings. They deserve equal treatment. In everyday practice, they experience that this is not always self-evident. An accurate image regarding these people requires that is given due to the experience of those with the affliction.

Like Reinders, the alliance thus observes negative attitudes toward those with a disease or disability. With regard to new technologies, the alliance opposes the idea that, partly due to pre-implantation genetic diagnosis, severe hereditary disease would not exist in the future. The alliance warns that financial means of, among other things, pre-implantation genetic diagnosis will be at the expense of treatment and therapy. Yet the alliance is in favor of the use of pre-implantation genetic diagnosis to cure hereditary disease, however, without a normative list of indications for such diagnosis. The alliance is also in favor of prenatal diagnosis and the screening test called the triple test to detect Down Syndrome and neural tube defects. Parents should have freedom of choice as regards using this test. Skepticism, the risk of a social norm concerning the perfect child, is thus represented in the judgment regarding pre-implantation genetic diagnosis of the alliance.

Yet, the alliance supports this kind of diagnosis like prenatal diagnosis and prenatal screening. The balance is tipped toward embracing technologies, which can be explained by the fact that the alliance mainly consists of parent and patient organizations. The reasoning of the alliance in favor of the moderate-permissive stance seems to be influenced by the argument that people should have the freedom

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532 Geneticist Van de Kamp discusses this fear of a tendency toward the perfect child. Many are, according to Van de Kamp, afraid that, with the large groups that have a disability, between an almost normal life and sometimes a life with quite a burden, a slippery slope will be embarked upon due to the value judgments underlying prenatal diagnosis. In the future, there would only be space for the most perfect. Van de Kamp argues that there is a certain rationale for such a fear, but that in practice, little can be noticed with regard to such a tendency (Kamp, J.J.P. van de (1990). ‘Prenatale diagnostiek’ [Prenatal diagnosis], in Ethiek en recht in de gezondheidszorg).


534 Reinders notes in Moeten wij gehandicapt leven voorkomen? (1996) that Dutch disability organizations have been surprisingly silent on prenatal diagnosis, which can be contrasted with the protests made by the Swedish disability organizations.
to choose whether or not to use new technologies, whereas the notion of protectability is outweighed by the judgment in favor of prenatal diagnosis.

6.3 ‘Implications of new choices’: medicalization and autonomy

In advice given to the Minister regarding prenatal screening relating to Down Syndrome and neural tube defects, the Health Council of the Netherlands approaches the question of screening in terms of advantages and disadvantages for those concerned. Since screening entails an offer that is not asked for, it is only acceptable for the council when the balance tips toward the advantages. As advantages, the council mentions that couples expecting a child with a possible severe affliction will have opportunities to act, while screening entails relief for the great majority of pregnant women tested. Screening may, furthermore, prevent suffering:

The moral justification for such screening is the principle of ‘the prevention of suffering’: participation enables those concerned to influence the outcome of pregnancy on the basis of - according to their own judgment - what it would mean to have a (severely) disabled child, not only for the child, but also for themselves and their families, in view of their current responsibilities, their life plans and their capacity.535

Thus, the council refers to different kinds of suffering: the possible suffering of the child from a disability, as well as the suffering of the parents and family of the child. As disadvantages of screening, the council mentions, among other things, false tests results. Two general objections against screening are discussed: pregnant women would be confronted with a choice that does not always fit in with the way they experience pregnancy; furthermore, the possible coercion of those offering screening or the social environment are mentioned. The council argues that, although the test may lead to a more complicated experience of pregnancy, it has transpired that the majority of pregnant women would support screening.536

535 My translation: ‘De morele rechtvaardiging van dergelijke screening is gelegen in het principe van ‘leed voorkomen’: deelname stelt de betrokkennen in staat de uitkomst van de zwangerschap mee te bepalen op grond van wat - volgens hun eigen beoordeling - het krijgen van een (ernstig) gehandicapte kind zou betekenen, niet alleen voor het kind, maar ook voor henzelf en hun gezin, mede gelet op hun bestaande verantwoordelijkheden, hun levensplannen en hun (gezamenlijke) draagkracht’. Gezondheidsraad (2001: 120).

536 Gynaecologists Kleiverda and Vervest argue that the majority of surveys regarding attitudes toward testing, referred to by the Health Council, were directed at women over 36. They ask whether it is morally responsible to offer pregnant women under 36 a test whereby the chances of them losing a child without Down syndrome are as large as the chances that the test will demonstrate the presence of a child with Down syndrome. Like other countries, the Netherlands’ next step will be in the direction of the medicalization of pregnancy in the judgment of Kleiverda and Vervest (Kleiverda, Guinalla en Vervest, Harry (2001). ‘Zorgen over screeningsbeleid’ [Concerns about screening policy], Medisch Contact 24). Reacting to the criticism of Kleiverda and Vervest, Van der Maas and Dondorp from the Health Council
Regarding the question of possible social coercion, the council notes that the opposite is also conceivable, namely that there may be coercion not to use the offer of screening. In order to safeguard the free choice of pregnant women, between terminating or continuing a pregnancy, the council mentions the importance of care for the disabled and their integration into society. The introduction of screening for all pregnant women could lead to a climate in which the acceptance of the disabled is further endangered.

The permissive judgment that the council propounds is thus that screening is justified in view of the opportunities it provides for pregnant women and the prevention of suffering that is possible. The council infers that suffering can be prevented, both that of the child and that of the parents and family. Furthermore, the council refers, implicitly, to the principle of respect for autonomy when arguing that prospective parents should have the opportunities to act. Despite the disadvantages that are mentioned by the council, false tests, the changing experience of pregnancy, and possible coercion, for the council, the advantages outweigh the disadvantages.

As far as possible coercion is concerned, as referred to by the Health Council, psychologist Dymphie van Berk is of the opinion that autonomy consists of such coercion. She speaks, in a popular science publication, of the question of screening in terms of reduced autonomy. Autonomy may, in her view, be compromised. She asks whether a certain coercion of technology exists to actually use the technology, a coercion which she elsewhere calls a ‘technological imperative.’ As a remedy, ask what might be meant by pointing to the medicalization of pregnancy. If this means that more pregnancies come under medical supervision, then this is not right. Pregnant women who are supervised by midwives will get the offer of screening, counseling, and results. Critics may also point to the fact that younger women are also confronted with a choice and the knowledge that something might be wrong with the fetus. Without good reason, the pregnancy becomes subject to the omen of that possible result. While it is true that the offer of screening may lead to additional anxiety, Van der Maas and Dondorp argue that there are good reasons for the offer since ‘which mother-to-be does not want to know that her child is healthy?’ (Maas, P.J. van der, en Dondorp, W.J. (2001). ‘Tripeltest voor alle zwangeren’ [Triple test for all mothers-to-be], Medisch Contact 27/28).

537 In the judgment of ethicists Van den Boer-Van den Bergh and Dupuis, the question of whether the test does more harm than good is justified, and whether autonomy is compromised. While serum screening can detect more fetuses with Down syndrome or neural tube defect, a falsely positive result leads to needless concern and unnecessary invasive diagnostics, as well as the risk of a spontaneous abortion. Furthermore, falsely negative results are harmful since women are erroneously reassured that they will not give birth to a disabled child. Furthermore, the offer of screening is value-laden and women seldom refuse an offered test. The question is whether the information is sufficiently comprehensive so that the moral duty of not doing harm does not compromise the principle of respect for autonomy (Van den Boer-Van den Berg, J.M.A. en Dupuis, H.M. (1993). ‘De triple-serumtest voor detectie van Down-syndroom en neurale-buisdefecten: het probleem van een risicoschattende test.’ [The triple serum test for detection of Down Syndrome and neural tube defects: the problem of a test that estimates a risk], Nederlands Tijdschrift voor Geneeskunde 26).

538 Berkel, Dymphie van (1997). ‘Zwangerschap als risico?’ [Pregnancy as a risk?], in Frank van Balen, Dymphie van Berkel en Jacqueline Verdurmen (eds). *Het kind van morgen*, Consequenties van voortplantingstechnologie, Groningen: Van Brug. According to Jochemsen from the Lindeboom Institute, the offer of screening leads to a coerced choice being made by pregnant women due to the offer of prenatal diagnosis to all pregnant women proposed by the Health Council. Prenatal diagnosis may possibly becoming gradually more ‘normal’ as a result of which a new norm may be created leading to societal coercion. The so-called free choice is often a ‘coerced’ choice. Another disadvantage is that children with
objective information is mentioned, but there may be implicit recommendations since information is limited. More explicit coercion is exerted by insurance companies who exclude people with genetic diseases from insurance cover. Furthermore, autonomy is threatened by a subtle coercion of the social environment:

Should one not feel guilty and justify oneself as an elderly mother, who could have used prenatal diagnosis, who has a child with Down Syndrome in any case? […] In our society, it is quite self-evident to take action in case of problems or when desires are not fulfilled.539

This feeling of guilt is due to coercion of the social environment and, for Van Berkel, the feeling infringes on the autonomy of the woman. In sum, it can, in the view of Van Berkel, be questioned whether the opportunities for prenatal diagnosis will lead to more autonomy for women. What conception of autonomy does Van Berkel endorse? The principle of respect for autonomy entails, for Beauchamp and Childress, a ‘person’s right to hold views, to make choices, and to take actions based upon personal values and beliefs.’540 It seems that Van Berkel does not discuss autonomy as a right but as a freedom from external coercion, either from the technological imperative, the social environment, or insurance companies in order to make a free choice. As reasons for her restrictive judgment that screening compromises autonomy, she mentions implicit coercion due to counseling, explicit coercion by insurance companies, and coercion by her social environment.

The Secretary of State for Health, Welfare, and Sport, Clémence Ross-van Dorp, of the Christian Democratic Party, defends, in reaction to the advice of the Health Council, a reluctant policy toward prenatal screening with the medicalization of pregnancy in her interpretive framework.541 She defends the fact that prenatal Down syndrome are no longer accepted (Jochemsen, Henk. 'Straks mág je niet eens een mongooltje hebben' [Soon one will not be allowed to have a mongol], Trouw May 17, 2001). Ethicist van Dijk points out that the result of the triple test is different from traditional unequivocal tests, as is the case in preventive medicine: for a woman of 20 and upward who, considering her age, has a risk of 1 in 1,500 of having a child with Down syndrome and learns that she has an actual chance of 1 in 400, interprets this result in the same way, while, for her physician, this is a good result since invasive research is done with a risk of 1 in 250 (Dijk, Gert van. Tripeltest schept ook problemen [Triple test also creates problems], Trouw May 22, 2001.


540 Beauchamp and Childress (2001: 60).

541 In a letter to the Secretary of State, three parental, disability, and disease organizations support Government policy. All people are equal, and those with disabilities should feel welcome in society. The message of respect for life and equality should be implemented on a large scale. In offering information, a realistic picture of living with a disability should be given. Are prospective parents only told that Down syndrome is a severe disability or are they also told that many children with Down syndrome go to school? ask the organizations. (Chronisch zieken en Gehandicapten Raad Nederland CG-raad, Landelijke Federatie
screening should only be offered to women over 36 and women at risk, while pregnant women who explicitly ask for screening tests are allowed to undergo the tests but have to pay for the test themselves. Ross-van Dorp defends her reluctant stance, contrary to the advice of the Health Council, by arguing that, if prenatal screening were to take place on a large scale, then women would be confronted with possible medicalization:

If prenatal testing becomes common for all mothers-to-be - which is defended by the Health Council - each mother-to-be who has a very low chance of her child suffering, particularly from Down Syndrome will be confronted at the beginning of her pregnancy with possible medicalization and a problematization of her pregnancy.

By offering screening, health care confronts the pregnant woman with difficult choices. Should we place a natural process, which is experienced by the majority of young women as something very positive, in a medical framework? Are we not creating a misleading ideal picture, the makeability of man, the prevention beforehand of all possible defects in the unborn life? In Parliament, the Secretary of State promised that all pregnant women would be informed about prenatal tests,


542 The Christian Democratic Party has four basic principles regarding population screening, which includes prenatal screening, of which one is medicalization. The fourth is the undesirability of medicalization. However, medicalization can also be acceptable as a side-effect if there are important interests at stake. Screening methods for Down syndrome and neural tube defect have to be rejected. Even though medicalization may be acceptable if important interests are at stake; this is, in the judgment of the party, not the case with prenatal screening where prevention or treatment is not possible (CDA (1992). Genen en Grenzen. Een christen-democratische bijdrage aan de discussie over de gentechnologie [Genes and Limits. A Christian-democratic contribution to the discussion on genetic technology], Den Haag). As far as medicalization as a result of prenatal diagnosis is concerned, the Society for Obstetrics and Gynaecology speaks in a report of suffering which can be prevented, which outweighs the risk of medicalization. Medicalization does not need to be negative in itself; when under medical supervision, suffering can be prevented. With regard to the question of whether the autonomous choice of the woman is endangered or not, the society stresses non-directive counselling. Concerning possible anxiety due to screening, information is also essential, according to the society (Nederlandse vereniging voor obstetrie en gynaecologie (1993). Prenatale diagnostiek: de grenzen verkend [Prenatal diagnosis: the boundaries explored], Utrecht).


544 In an editorial, it is argued that Secretary of State Ross departs from a Christian ethic entailing that a human being cannot decide over life and death him- or herself. In the prevailing liberal spirit of the times, however, people feel more for a utilitarian ethic that aims to bring as much happiness as possible to so many people as possible: a disabled child means less happiness, both for the parents and for the child itself. However, one side effect is that prenatal screening contributes to the idea that life is makeable; this may endanger the acceptance of the disabled. The editorial argues, however, that the argument that screening leads to medicalization is untenable as a ‘cultural criticism’ argument. Fear of medicalization is, in particular, a product of the 70s when there was a movement to keep pregnant women out of the hands of the gynaecologists (Editorial. ‘Prenatal diagnostiek’ [Prenatal diagnosis], Volkskrant April 20, 2004).
but that the distinction between informing them about tests and offering them tests would remain intact.\textsuperscript{545} Ross-Van Dorp mentions, thus, two meanings of medicalization as reasons for her restrictive judgment that screening would not be offered to all pregnant women. She infers that, in the first place, they would be confronted with difficult choices; while in the second place, pregnancy loses its natural character and may become a less positive experience.

Medical sociologist Tjeerd Tijmstra, in a report for the Council for Social Development, frames, just like the Secretary of State, the question of prenatal screening in terms of \textit{medicalization}. He sees, referring to opponents of screening, medicalization as a disadvantage of prenatal screening, which entails that pregnant women are increasingly coming under medical supervision. This is a development that is contrary to the traditional support given in the Netherlands to a ‘natural approach’ to pregnancy and delivery. Another disadvantage is that the spontaneity of pregnancy can disappear. Screening may contribute to the ‘tentative pregnancy’, which entails that women will only feel really pregnant when they get a reassuring result from screening:

If a woman uses prenatal diagnosis, she will have to wait for the (favorable) result of the test before she can feel really pregnant and can tell others about it.\textsuperscript{546}

According to Tijmstra, the experience of being pregnant would thus change due to the offer of prenatal screening.\textsuperscript{547} Furthermore, technology gives pregnant women

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\textsuperscript{545} Kammer, Claudia. ”Meeste zwangeren willen testen.’ Grens test bij 36 jaar is ‘arbitrair’” [‘Most mothers-to-be want a test.’ Limit at 36 years of age is ‘arbitrary’], NRC Handelsblad November 27, 2003.


\textsuperscript{547} Philosopher Jet Isarin, in a philosophy journal, also points to the changing experience of pregnancy due to prenatal screening. A controllable life is also a medicalized life in which disease, suffering, and death are in the hands of experts. If we say yes, then we say yes to an investigation that fosters anxiety in order to obtain certainty in the end. If we say no, then we are afraid of deliberately giving birth to a disabled child. Isarin argues that it is not the burden of freedom of choice that makes decisions concerning screening so troublesome: those decisions are troublesome due to the negation of the tragic, the boundary between the who and the what, and the relatedness of uncontrollability and controllability. According to Isarin, both options have disadvantages (Isarin, Jet (2002). ‘Als het maar gezond is. Over ongelukkige kinderen, ongelukkige ouders en ongelukkige beslissingen’ [If it is healthy. On unhappy children, unhappy parents and unhappy decisions], \textit{Filosofie en Praktijk} 2). Policy official Mol and lecturer in philosophy Kanne, in a medical journal, point to ambivalence in order to describe the changed experience of pregnancy. Prenatal screening is, in their view, based upon the assumption that prospective parents may and can decide about the continuation of the life which is developing in the mothers-to-be. The necessity to make decisions about the life or death of the child-in-becoming was suddenly raised during the pregnancy, which brought a new perspective on motherhood: Is one allowed to decide over issues of life and death? Mol and Kanne both wrestled intensively with the question of whether or not to undergo the triple test, while Kanne reflected for months upon the question of whether she had made the right decision in not undergoing the test (Mol, Lidwien en Kanne, Mariël (1996). ‘Prenatale diagnostiek. Valkuil voor arts en patiënt?’ [Prenatal diagnosis. Pitfall for doctor and patient?], \textit{Medisch Contact} 16).
certainty but not after making them uncertain at the beginning.\textsuperscript{548} Elsewhere, Tijmstra discusses another disadvantage of screening.\textsuperscript{549} The decision whether or not to accept the test is a difficult one. However, it is a decision that cannot be avoided. When women know of the existence of the screening test, they will have to make a decision. A decision not to carry out the screening test is also a decision. Knowledge and responsibility are related. Tijmstra’s reasoning, as far as medicalization is concerned, thus resembles the reasoning of the Secretary of State: medicalization entails pregnant women coming under medical supervision. Furthermore, this medicalization effect may influence a natural process of pregnancy. Implicitly, Tijmstra defends a reluctant judgment concerning prenatal screening by reasoning that pregnancy will be brought under medical supervision, which is contrary to the natural approach to pregnancy used in the Netherlands.

Ethicists Guido De Wert and Ron Berghmans, reacting in a newspaper article directed at the Secretary of State, find her stance on prenatal screening patronizing.\textsuperscript{550} They frame the discussion on screening by appealing to freedom of choice.\textsuperscript{551} If the Government wants to inform but does not want to make tests

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\item \textsuperscript{548} According to Tijmstra, the offer of prenatal diagnosis can be experienced as a burden due to the responsibility that is the effect of this offer. He speaks in this respect of ‘anticipated decision regret’. Pregnant women are anticipating the negative emotions that can arise if it later becomes clear that they made the wrong decision (Tijmstra, Tj. (1987). ‘Het imperatieve karakter van medische technologie en de betekenis van ‘geanticipeerde beslissingsspijt’ [The imperative character of medical technology and the meaning of ‘anticipated decision regret’], Nederlands Tijdschrift voor Geneeskunde 26). Tijmstra also speaks of the so-called prevention paradox which entails that in order to prevent the birth of a child with an affliction, many are experiencing anxiety (Tijmstra, Tj. en Bajema, C. (1990). ”Je zult die ene maar zijn; risicobeleving en keuzegedrag rond medische technologie’ [‘If you were the one’: risk perception and choice regarding medical technology], Nederlands Tijdschrift voor Geneeskunde 39).
\item \textsuperscript{549} Tijmstra, Tjeerd (1999). ‘Leed voorkomen heeft een prijs’ [The prevention of suffering has a price], in Myra van Zwieten and André Kalden. Ons gescreende lichaam. Kansen en risico’s van de genetica. Amsterdam: Balans.
\item \textsuperscript{550} Prospective parents Kooijman and Dobbelaar also argue that the stance of the Government implies patronization. All parents should be offered screening tests since they are very well able to make decisions about their lives. Facing the choice of terminating the pregnancy is very difficult, but the other alternative, living with a severely disabled child, is just as difficult. Parents are not ignorant: they understand that a guarantee of a healthy child is impossible. (Kooijman, Hellen en Dobbelaar, Tanny. ‘Luister eindelijk eens naar aanstaande ouders’ [Listen, finally, to prospective parents], Trouw March 26, 2005).
\item \textsuperscript{551} Ethicist Den Hartogh also speaks, in a medical journal, about freedom. Does the freedom of those who undergo prenatal screening outweigh the anxiety and uncertainty over a period of a couple of weeks for the 8 % of women who have a falsely positive test result? The answer for Den Hartogh is affirmative. Nobody is forced to use the screening opportunities offered to them; not offering screening would entail that the 90 % of pregnant women who undergo the test and receive a negative result, thus without an increased risk for a child with the affliction being tested for, will be deprived of the test. The fact that half of pregnant women over 36 refuse prenatal diagnosis points, in his view, to the absence of coercion (Hartogh, Govert den (1997). ‘Prenatale diagnostiek. De morele bezwaren gewogen’ [Prenatal diagnosis. The moral concerns weighed up], Medisch Contact 50). Ethicist De Beaufort argues that the aim of offering the triple test is not to have as many women as possible undergoing the test but to allow women to make well-informed decisions that can be defended on the basis of the principle of respect for autonomy. The anxiety that may be caused due to the information about the test is, in the judgment of De Beaufort, no reason to refrain from offering the test to women who prefer the test over the anxiety of not having it (Beaufort, I.D. de (1996). ‘Van blijde naar bezorgde verwachting? Enkele ethische vragen naar aanleiding van de tripletest’ [From happy to worried pregnancy? Some moral questions regarding the triple test], Nederlands Tijdschrift voor Geneeskunde 140). Referring to Dutch social scientific studies, physicians Wiersma and Flikweert doubt whether freedom
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accessible to all, then there is no freedom of choice. The ethicists defend the advice of the Health Council:

[...]

Freedom of choice is thus guaranteed when pregnant women are offered screening and on the basis of this offer are able to make an informed choice. The ethicists argue that all pregnant women abroad get tests such as blood tests or nuchal translucency measurements using ultrasonography. Without too many risks, a larger number of fetuses with Down Syndrome can be found. The majority of pregnant women are positively-inclined toward screening tests and there would be no empirical findings that indicate that the disadvantages outweigh the advantages. Concerning the Government’s argument that screening leads to medicalization, De Wert and Berghmans ask whether or not all forms of medical supervision, in that case, should be rejected. De Wert and Berghmans thus regard medicalization as coming under medical supervision. As we have seen, the Secretary of State, like Tijmstra, also argues that pregnancy as a natural process will be compromised as a consequence of medicalization. In the permissive judgment of De Wert and Berghmans, screening should be allowed since it provides pregnant women with a choice. Furthermore, it would prevent the birth of a larger number of children with Down syndrome.

Ethicists Mariëtte Van der Hoven and Marcel Verweij, in a newspaper article, frame the discussion on screening in terms of *medicalization*. In their view, the argument of De Wert and Berghmans against medicalization is a fallacy. Taking a stance against medicalization does not mean that all medical prevention activities will beforehand be good or bad, however:

There is a certain obligation to prevent people from being subjected to medical supervision more than is necessary. [This obligation entails] the prevention of people regarding their lives merely in terms of disease and health.\(^{553}\)

Thus, the risk of medicalization for the ethicists is that life will merely be regarded in terms of disease and health. Even though pregnancy is strongly medicalized, this is,
for the authors, no justification for allowing an unlimited number of medical investigations. It is impossible for a mother-to-be to escape the offer. Prenatal screening may have a medicalizing effect since proper information entails that midwives have to let their clients consider the possibility of a serious disability or disease and termination of the pregnancy. Furthermore, Van der Hoven and Verweij claim that De Wert and Berghmans have a simplified conception of autonomy, namely as freedom of choice.

The offer of screening may, however, create a need, which does not mean that people are unable to decide autonomously, but means that the offer of screening tests is not neutral. Thus, we see that, for Van der Hoven and Verweij, the problem of medicalization is not primarily that pregnant women come under medical supervision, but the consequences of this, in regarding life merely in terms of disease and health. Furthermore, pregnant women are confronted with difficult choices in their contact with midwives. In support of the implicit restrictive judgment, the authors reason that the offer of prenatal screening entails medicalization and, furthermore, that this offer is not neutral.

Philosopher Paul Cobben is not against the offer of prenatal screening per se but, having a son with Down syndrome, he asks what is meant by the phrase ‘the prevention of suffering’ as used by the Health Council. Cobben frames, in a newspaper article, the discussion on screening in terms of autonomy and suffering. He argues that the council relates suffering to autonomy. Suffering is present when the autonomy of our will is infringed and suffering exists when a human being does not have autonomous capacities. Does not having Down Syndrome mean that an individual is unable to develop autonomous freedom? The Health Council suggests that there are different kinds of human beings; those who are more autonomous and those who are less autonomous.

According to Cobben, an asymmetric relation between human beings is indicated by the Health Council, which conflicts with the meaning of autonomy in our culture. Human beings are autonomous since they live in a society in which individuals respect each other as free and equal people. Society should provide people with opportunities to give content to their own life. But does not Down Syndrome entail suffering? According to Cobben, only when there is, for instance, a norm to find a normal job:

When someone with Down Syndrome has no chance on the labor market does this not imply suffering? Yes, that implies suffering when such a person is subjected to the norm that he should have success to the labor market. But if there is no such norm and society offers alternatives for work and income, I don’t see why there would be suffering.

554 Lawyer Sarah Nouwen who has a sister with Down syndrome also asks who is suffering. Society may, on the other hand, learn a lot from people with Down syndrome; they are not aware of their disabilities and let not restrain themselves in their lives. Like Cobben, Nouwen argues that suffering may be dependent on society formulating norms for success (Nouwen, Sarah. 'Down-kind is tenminste zichzelf' [The Down child is himself at least], Trouw May 29, 2004).

555 My translation: ‘Betekent het geen leed dat iemand met Down-syndroom vrijwel geen kans heeft op de arbeidsmarkt? Ja, dat betekent leed, als zo iemand de norm krijgt opgelegd dat hij eigenlijk zou moeten
When the Health Council speaks of suffering, it points to the suffering of prospective parents. Cobben sees no reason to reject screening tests if someone asks for them, but points to the fact that suffering may be a consequence of screening when the social acceptance of people with Down Syndrome may diminish. We see that, for Cobben, as for ethicist Marian Verkerk, regarding attitudes toward the disabled, disability is in fact a social construction. If we expect children with Down Syndrome to find a normal job, their disability will entail suffering. Autonomy is, for Cobben, relational; rather than speaking of people with more or less autonomy, Cobben relates autonomy to a society in which individuals respect each other. Rather than propounding the judgment that screening ought to be banned, he points to the possible side effects of screening such as a reduced acceptance of the disabled. Implicitly, Cobben calls for opportunities such as work and income for the disabled.

### 6.4 ‘The limits to medicine’: distinguishing ‘severe’ and ‘less severe’ afflictions?

In the Netherlands, a discussion has taken place as to the desirability and possibility of a list of indications for which prenatal diagnosis would be allowed. Geneticist Hans Galjaard, in a companion, argues that there is an undecidability of what is severe. He rejects the idea of formulating such a list containing guidelines for which afflictions prenatal diagnosis should be carried out. It would be impossible to make a list of very severe, severe, less severe and not severe afflictions. A large clinical heterogeneity exists, furthermore, and it can never be wholly predicted how the disease or disability will develop. Galjaard also argues that norms regarding what is severe and not severe change with time:

slagen op de arbeidsmarkt. Maar als deze norm niet wordt opgelegd en de samenleving alternatieve faciliteiten biedt om werk en inkomen te verwerven, dan zie ik niet in welk leed hier geleden wordt'.

Cobben, Paul. ‘Er wordt geen leed voorkomen door embryo’s met een Down syndroom te aborteren’ [There is no prevention of suffering by aborting embryos with Down syndrome’], NRC Handelsblad May 8, 2004.

556 As we saw in the discussion on the unborn life, The Lindeboom Institute is opposed to a development which entails that, for any undesired hereditary affliction for which an investigation is possible, the investigation will actually take place. The Institute wants to limit the use of prenatal diagnosis, and it should be determined for which afflictions prenatal diagnosis may be carried out (Lindeboom Institute (1989). *Prenatale diagnostiek*. Ontwikkelingen van het indicatiebeleid en opname in het ziekenfondspakket [Prenatal diagnosis. Development of the indication policy and inclusion in health insurance]. Rapport van het Prof. Dr. G.A. Lindeboominstituut, no 4. Ede). Physician Post also frames the question in terms of limits. He requires criteria for prenatal diagnosis since many afflictions can be detected before birth. He mentions haemophilia, hereditary afflictions with an onset from birth, hereditary afflictions entailing a late-onset disease such as Huntington, schizophrenia, or cancer. According to Post, terminating a pregnancy - ‘killing the unborn life’ - is only justified when the child, after being born, has no future at all, or when the life of the mother or family is ruined. (Post, Doeke. ‘Medische ontwikkeling leidt tot vraag: wie mag blijven leven? [Medical development leads to the question: who will be allowed to live?], Trouw March 19, 1992).
Over the course of time, norms regarding what can be considered severe and not severe change. That applies to the patient himself, the concerned, and the experts who are involved in the diagnosis, prevention, and treatment.557

In a society where the emphasis is on knowledge and information, mental disabilities will be perceived as very severe. For instance, in a community enjoying a large degree of leisure time, physical disabilities will be perceived as severe. Implicitly, Galjaard thus argues that the extent to which a disability is perceived as severe is in part a social construction and dependent on society, where certain traits are valued to varying degrees. His judgment that a list of indications should not and cannot be formulated is thus based upon the reasoning that there is great clinical heterogeneity, as well as changes in what counts as severe over the course of time.

However, developments in prenatal diagnosis have continued to stimulate the discussion about guidelines for prenatal diagnosis. In 1995, two women in the Netherlands chose to abort following prenatal diagnosis since the fetuses they were carrying had an affliction that could have resulted in hereditary blindness, *retinitis pigmentosa*. A discussion has taken place regarding whether or not blindness should be an indication for prenatal diagnosis, as well as whether or not, as we have seen in the discourse on attitudes toward the disabled, this case implies a value judgment of blind people.

Ethicists Babs van den Bergh, Frans Brom, and Ghislaine van Thiel, in a newspaper article, frame the question of indications in terms of *autonomy* and *information*. They raise, in the light of the increase in opportunities for prenatal diagnosis, the question of to what extent one should have freedom of choice.558 What is the difference between general abortion for social reasons or for emotional reasons? According to the authors, the termination of a pregnancy following prenatal diagnosis essentially differs from a general abortion on the basis of psychosocial indications. This is due to freedom of choice following prenatal diagnosis being necessarily limited; prenatal diagnosis is no guarantee of making an informed choice:


558 In an article in a medical journal, clinical geneticists Cobben, Leschot, and Bröcker-Vriends argue, in this respect, that prenatal diagnosis of BRCA - a diagnosis of the genes involved in breast cancer - is not beforehand morally unacceptable. The ultimate choice is made by the parents. The difference with current indications for prenatal diagnosis is that breast cancer is a late-onset disease. (Cobben J.M. et al. (2002). ‘Prenatal diagnosis for hereditary predisposition to mammalian and ovarian carcinoma-defining a position’, *Nederlands Tijdschrift voor Geneeskunde* 31). Lawyer Sanders, in a medical journal, is opposed to this form of prenatal diagnosis. He interprets the article of Cobben et al. in the sense that it is a recommendation to abort the unborn, and healthy, child in the light of an increased risk from 30 years old and upward.558 The termination of a pregnancy is, in his opinion, medically irresponsible and morally reprehensible. For the legal protection of the unborn life, it is, according to Sanders, necessary to adjust the criteria in the abortion law (Sanders, H.W.A. (2002). ‘Ongeboren leven beschermen’ [Protect the unborn life], *Medisch Contact* 49).
Making an informed decision following prenatal diagnosis is, in many cases, hardly possible. After all, genetic screening offers information regarding the genetic composition of the fetus. The ‘result’ of many genetic afflictions in terms of disabilities is not given.559

Prenatal diagnosis does not give information about the severity of the afflictions caused by a genetic defect; afflictions such as blindness or Down Syndrome do not say anything about quality of life of the child. This disadvantage entails that an informed decision is difficult to make. The defense of freedom of choice is based upon an appeal to autonomy. Autonomous choices are informed choices; while information due to prenatal diagnosis, however, is limited and thus also freedom of choice.

According to Van den Bergh, Brom, and Van Thiel, prenatal diagnosis should only be carried out in the case of very severe afflictions; blindness does not fit into this category.560 Those, in the judgment on abortion following prenatal diagnosis, who do not consider these decisions to be based upon very limited information would be blind to the facts. According to the authors, autonomy thus needs to be based upon adequate information. An autonomous choice is only possible on the basis of comprehensive information. They suggest that a real choice regarding prenatal diagnosis is not possible and are, for that reason, reluctant vis-à-vis prenatal diagnosis. In their moderate-restrictive judgment, prenatal diagnosis should not be carried out in the case of ‘less severe’ afflictions such as blindness, a judgment based upon the reasoning that, on the basis of the diagnosis of blindness, an informed choice would be impossible. The diagnosis of blindness gives no information with regard to the severity of the affliction.

Ethicist Guido De Wert also discusses the case of prenatal diagnosis for retinitis pigmentosa. He opposes, in a newspaper article, the framing of the discussion in terms of a decent or indecent life. De Wert addresses the question of limits in terms of coping. The life of a blind person is not unlivable but the capacity of the parents to have such a child is essential; do they cope with having such a child?561 The answer to that question is the moral justification of a possible termination of the pregnancy. Thus, the burden of a child with a disability on the parents and the extent to which they are able to cope with that child is, for De Wert, the justification for selective

559 My translation: 'Het nemen van een geïnformeerde beslissing na prenatale diagnostiek is in veel gevallen nauwelijks mogelijk. Immers, genetische screening biedt informatie over de genetische compositie van de fetus. Het ‘resultaat’ van veel van de genetische afwijkingen in termen van handicaps is daarmee echter niet gegeven'. Bergh, Babs van den, Brom, Frans W.A., Thiel, Ghislaine van. ‘Blind voor de feiten?’ [Blind to the facts?], Trouw October 21, 1995.

560 Molecular biologist Van ’t Hoog, in a newspaper, asks who will decide what is severe and not severe. He points to the fact that, due to growing knowledge about the human genome, questions about what is normal and abnormal will be raised. While red hair is considered a part of normal variation, it has transpired that red hair is associated with a ten-fold increase in skin cancer. If gender selection is debated, then why not also the colour of the child’s hair? Who decides what is severe or not severe, as in the case of hereditary blindness? Normal variation and divergence cannot, however, be deduced from human DNA (Hoog, Arno van ’t. ‘Rood haar reden voor abortus? [Red hair the reason for abortion?], Volkskrant October 14, 1995).

561 Feenstra, Gerbrand. ‘Fetus met oogziekte aborteren al jaren praktijk’ [Aborting fetuses with eye diseases has already been practice for years], Volkskrant October 13, 1995.
abortion. It is the parents who can justify such an abortion since they would be able to decide whether or not they could cope with a disabled child.

In a companion, De Wert discusses limits of prenatal diagnosis. He refers to practice abroad where prenatal diagnosis is used for gender selection or to test if a child can become a tissue donor. Since the aim of prenatal diagnosis is to inform about the health of the future child, these applications have to be rejected. According to De Wert, rather, a further limitation to indications of prenatal diagnosis is required; selective abortion is only morally justifiable when the severe suffering of the future child or family can be prevented:

A practice whereby each affliction that can be diagnosed prenatally - severe or not - at the request of the client is also detected may not be reconcilable with the conviction that selective abortion is only morally acceptable when important reasons exist, e.g. the prevention of (probable) severe suffering for the future child and/or the family concerned.562

The implication of De Wert’s stance could be that prenatal diagnosis is only carried out in the case of severe afflictions, but De Wert chooses instead a different opportunity. He shares, implicitly, the conviction of Galjaard that a list of allowed indications would continuously be out of date, but he proposes a list of afflictions where prenatal diagnosis should not be carried out: treatable afflictions; especially non-severe afflictions such as color-blindness or sex-related ichtiosis and mutations that only lead, in combination with environmental factors, to a certain increased risk of health problems.

De Wert expects that the criteria for a last will be much discussed. When, for instance, is an affliction treatable? According to De Wert, without a list of indications, prenatal diagnosis may become an instrument for giving birth to the perfect child. An interdisciplinary discussion is required, rather than merely leaving the question to physicians. Thus, even De Wert does not want to leave the question of indications to the medical profession, even though he does not want a list of indications for which prenatal diagnosis is allowed, rather a list of afflictions for which prenatal diagnosis is not allowed. Nevertheless, discussion about which afflictions are severe or non-severe can be expected under his proposal. The reasoning for his moderate-permissive judgment that there should be a list of indications for which prenatal diagnosis is not allowed is that, in fact, prenatal diagnosis could be used in a eugenic way, to create the ‘perfect child’.563


563 Member of Parliament Oudkerk also warns of a tendency toward the ‘perfect child’. He proposes an institution for public debate about the moral aspects of science and technology. Within a couple of decades, it will be possible to screen for less severe hereditary afflictions, which implies that we are going to create a child that is as perfect as possible. According to Oudkerk, we will have a society in which, as regards
Ethicist Hans Reinders distinguishes, in a newspaper article, the question of indications, in relation to the prenatal diagnosis of blindness, a legal and a moral perspective on prenatal diagnosis. A woman who does not want a child with an eye affliction needs only to clarify that the prospect of such a child is as awful to her as accepting an unwanted child. Since physicians do not judge the severity of the suffering of the woman concerned, it is up to the woman to decide how important her own reasons for an abortion are. However, a moral responsibility also exists for physicians with regard to what they are doing. The law on abortion is the result of a compromise between, on the one hand, the protectability of the unborn life and, on the other, the right to self-determination of the woman. In the recent, much discussed case of prenatal diagnosis of blindness, the protection of the unborn life is outweighed by the moral interest of preventing a child that is blind from being born. With the development of the practice of prenatal diagnosis, a new moral problem is created:

Those who do not want a trivialization of the practice of abortion cannot pretend that, with the development of prenatal diagnosis, no new moral problem has been created. The justification for abortion provocatus upon the indication of an affliction such as blindness or being partially sighted has little to do with the right of self-determination of the woman. It is the responsibility of physicians to decide whether or not they want to carry out prenatal diagnosis. In the view of Reinders, physicians cannot ignore the distinction between severe and less severe afflictions. Either physicians decide about the limits, or this will be the task of the Government; Reinders believes himself that it will be the Government’s task. We see that Reinders distinguishes between self-determination regarding abortion in general, justified by the existence of severe distress to the woman, and self-determination regarding prenatal diagnosis which, in his view, is not, or not always, based upon distress to the woman. While selective abortion is legally allowed with a reference to the self-determination of the woman, Reinders has doubts about the moral justifiability of selective abortion in the case of less severe afflictions. His reasoning for this judgment is based upon the conviction that, in this case, it is not sufficient to speak of self-determination.

The Minister of Health, Welfare, and Sport, Els Borst-Eilers of the Social Liberal Party, reacts to the discussion concerning the prenatal diagnosis of blindness. In a letter to Parliament, she sets out Government policy regarding the indications for abortion. Divergences from the almost perfect, there will be no place any more. Should Parliament then make a list that indicates for which afflictions abortion is allowed, and for which it is not, and should this list be updated each month? According to Oudkerk, this should not, however, be done (Oudkerk, Rob. ‘Een debat over de “consequenties van het weten” [A debate about the “consequences of knowledge”], Trouw October 17, 1995).

564 My translation: ‘Want wie geen trivialiseren van de abortus-praktijk wil, kan niet doen alsof er met de uitbreiding van de prenatale diagnostiek geen nieuw moreel probleem is ontstaan. De rechtvaardiging van een abortus provocatus op indicatie van een aandoening als blindheid of slechtziendheid heeft wel heel weinig met het recht op zelfbeschikking van de vrouw te maken’. Reinders, J.S. ‘Met abortuwet zijn morele problemen niet verdwenen’ [Under the abortion law, moral problems have not disappeared], Trouw October 14, 1995.
prenatal diagnosis. She frames the question in terms of self-determination by parents. The Minister observes that different opinions regarding the issue of indications exist, as well as what afflictions should be regarded as severe. An increased risk is a condition for prenatal diagnosis and such a risk exists when a hereditary affliction is present, when the age of the woman indicates that an increased risk for a chromosomal abnormality exists, or when a risk-estimating test, such as maternal serum screening, indicates an increased risk. The Minister is opposed to a list of indications for prenatal diagnosis:

A principled objection is that the Government would decide what extent of suffering is severe. The Government would judge which afflictions can be coped with and which are not reconcilable with the individual's capacity. That judgment is purely a question for the future parents.\footnote{My translation: ‘Een meer principieel bezwaar ligt mijns inziens in het feit dat met het opstellen van een lijst door de overheid zou worden bepaald welke mate van leed ernstig is. De overheid zou daarmee een oordeel hebben over de vraag welke aandoening te dragen is en welke de individuele draagkracht te beven zou kunnen gaan. Dat oordeel komt alleen de toekomstige ouders toe’. Borst-Eilers, E. *Prenatale diagnostiek. Brief van de Minister van Volksgezondheid, Welzijn en Sport* [Prenatal diagnosis. A letter from the Minister of Health, Welfare, and Sport]. Tweede Kamer der Staten-Generaal, Vergaderjaar 1995-1996, 24624. Ethicist Van den Boer-Van den Berg mentions, in a journal, additional reasons against a list of severe afflictions. Prior to birth, it cannot be predicted to which extent a child with Down syndrome will develop mental retardation. Besides the fact that the severity cannot be determined by other people than the parents, a list would suggest that fetuses with an affliction mentioned on the list should be aborted. She suggests that it is the parents who decide what is severe to them, since it is impossible to decide objectively which afflictions are severe and which are not. She believes that it is possible to draw a line between afflictions which belong to medicine and which do not (Boer-Van den Berg, J.M.A van den (1996). *Prenatale diagnostiek en de keuzemogelijkheden* [Prenatal diagnosis and the choices], *Bijblijven* 12/7).}

The Government would, in this case, judge in place of the parents: rather than the Government deciding which afflictions can be coped with, this decision is by the future parents.\footnote{This point is also made by a committee from the Dutch Health Council: a restrictive list of indications would not be a solution since how the concerned woman and her partner judge the severity of the affliction is dependent on personal reasons, such as religion and family situation. Furthermore, a list would continuously be out of date due to developments in diagnostic opportunities (Gezondheidsraad (1989). *Erfelijkheid en maatschappij* [Heredity and society]. Den Haag). Reacting in a newspaper to Member of Parliament Oudkerk, who commented on the case of prenatal diagnosis for hereditary blindness retinitis pigmentosa by saying that he knows many blind people who live a decent life, gynaecologist Bleker denies, in a newspaper article, that the aim of prenatal diagnosis is to prevent all hereditary forms of blindness. Rather, prenatal diagnosis is for individuals, who in this case, have experienced the disease as severe suffering and have reflected for a long time on prenatal diagnosis. They would have considered the alternative of not having children if they were unable to get support for prenatal diagnosis (Köhler, Wim. *Ongefundierde kritiek van politici op abortussen* [Unwarranted criticism of politicians regarding abortions], *NRC Handelsblad* October 13, 1995).}

However, the Minister argues, prenatal diagnosis should not be carried out in the case of clearly mild afflictions such as color-blindness or recessive diseases such as cystic fibrosis.\footnote{A recessive hereditary affliction means that if the prospective mother and father both carry a recessive allele, the form of genetic material at a locus, the chances of that child having the genetic affliction will be 25%. In the case of a dominant genetic affliction in either the mother or the father, the chances will be 50%. In a TV program, Minister Borst argued that the termination of a pregnancy following gender selection should be allowed: the law speaks from a situation of distress to the woman, which may be a reality in the
severity of an affliction cannot be formulated. Concerning afflictions that have their onset later on in life, such as Huntington or Alzheimer, it would not be the task of the Government to judge in such cases; parents who know from their own experience what a disease entails are the only ones to have an opinion in this respect. The Minister thus propounds the judgment that a list of indications for prenatal diagnosis is undesirable. She is opposed to guidelines regarding which afflictions should be classified as severe and which should not, and, in support of her permissive judgment, she argues that it is the parents who are to decide on the basis of what they can cope with. Parental experience should guide the discussion about indications and the Minister thus implicitly refers to the right of self-determination.

case of immigrants. Geneticist Oosterwijk argues that the opinion of the Minister implies that girls are regarded as less valuable, which is against predominant norms and values. Prenatal diagnosis for gender selection has always been referred to as the example of a reprehensible application of this technology, and society should avoid the slippery slope of gender selection (Oosterwijk, Jan C. 'Minister Borst overschrijdt met haar uitspraak reeks grenzen' [Minister Borst’s opinions cross various boundaries], Trouw Januar 21, 1997).
CHAPTER 7

Judging in Swedish public discourse

In this chapter, I shall analyze public discourse on prenatal diagnosis and screening in Sweden. Let me first comment briefly on the political culture of Sweden.

For a long time, the prevailing opinion in Sweden was that politics should be based upon facts and rational analysis.\(^{568}\) In the spirit of positivism, moral questions received little attention. However, a re-moralization of politics has taken place and developments in reproductive technologies have been widely discussed. The political parties are jointly involved with experts in the process of preparing Swedish Government Official Reports. This can be understood against the backdrop of the Swedish tradition of \textit{samförstånd}, i.e. consensus.\(^{569}\) Yet, contrary to the thesis of re-moralization, moral dimensions have come into political decision-making, it has been argued, in a depoliticized way. Furthermore, a large number of citizens would not read Government Official Reports.\(^{570}\) As we will see, however, these reports play an important role in public discourse. Public discourse on prenatal diagnosis and screening can be regarded in terms of the re-moralization of politics observed.

As in the Dutch public discourse, I shall, where appropriate, analyze interpretive frameworks, judgments concerning a public course of action, and the way are inferred from reasons. I shall characterize Swedish public discourse in terms of human dignity and suffering; the discourse on attitudes toward the disabled in terms of the question of whether human dignity is ‘graded’; the discourse on implications of new choices in terms of the question of whether autonomy can be realized; the discourse on the limits of medicine in terms of the question of whether we are heading toward ‘liberal eugenics’.

A comment on the translation of the Swedish \textit{människovärde}, it should be noted that human dignity is not a literal translation of the Swedish term \textit{människovärde}, which can be taken to mean equal human value. In German, the equivalent of \textit{människovärde} is \textit{Menschenwürde}. \textit{Menschenwürde} refers to a kind of dignity that we all have as humans just because we are human. We all have this value to the same degree: we are equal with respect to this kind of dignity.\(^{571}\)

7.1 ‘The unborn life’: human dignity and suffering

In a White Paper on prenatal diagnosis, a Parliamentary committee frames the question of prenatal diagnosis in terms of the \textit{inviolability of human life} and \textit{human
dignity. The concept of human dignity entails, for the committee, the sanctity of life and the integrity of people. Human dignity entitles people to universal human rights, irrespective of race, sex, disability, or education. While general abortions may always entail decreased respect for the ‘inviolability of human life’, selective abortion may be even more controversial in the view of the committee, due to the risk that an elitist and cynical view of human beings would develop. In this case, the notion that human dignity cannot be graded is compromised.

Yet, when reflecting on moral consequences of the view that human life, from conception, is assigned ‘inviolable human dignity’, it concludes that these would be serious since the termination of a pregnancy would not be justifiable at all, not even if the pregnancy were the result of rape.\(^{572}\) The committee defends another doctrine which entails that human life is a possibility, and is developing\(^ {573}\):

Considering its inherent possibilities, the germinating life should be attributed a lot of value from conception and should normally be protected as long as possible. However, the principle of the inviolability of life cannot apply in the same uncompromised way as to developed human life.\(^ {574}\)

\(^{572}\) The Christian Democratic Party argues, on the other hand, that human dignity should apply to all human life, life that starts with conception. The party mentions the existence of moral dilemmas; no matter what we choose, the result is something we do not desire. All public power should therefore be exerted with respect for the inviolability of human life, the same value of all human beings and the freedom and dignity of individuals (Kristdemokraterna (1997). På livets sida [On the side of life]. Medicinsk-etsiskt handlingsprogram). Like the Christian Democratic Party, the Centre Party frames the question of the unborn life in terms of a dilemma. The fetus represents a miracle of creation and, if the feeling of a moral dilemma disappears, rational decisions would certainly be possible but everyone would, according to the Centre Party, lose with such a development. According to the Centre Party, an unequivocal moral judgment regarding the unborn life is thus impossible; whatever judgment is made, there will be a dilemma (Tillander, Ulla m.fl. (c). ‘Fosterdiagnostik m.m’. Motion till riksdagen 1991/92:So423 [Prenatal diagnosis. Parliamentary Bill]).

\(^{573}\) With regard to the notion that human life is developing, philosopher Egonsson defends the doctrine of potentiality. Potentiality entails that the fetus can potentially or possibly develop human capacities such as feeling pain or having consciousness. With the development of the fetus, there is a development in degrees of potentiality: it ‘costs’ less to let the developed fetus become a person. Egonsson uses an idea by the philosopher Persson; ‘… the value of a human being is equal to the value of the life he has the potential for, minus the value of the circumstances necessary for the life in question to be realized.’ While choosing the argument of potentiality, Egonsson claims that the selective abortion of a fetus with a chromosomal abnormality can be more justifiable than abortion in general. Having a child with Down syndrome can entail more suffering than having a child at an undesirable time (Egonsson, Dan (1994). ‘Fosterdiagnostik och selektiv abort. De etiska problemen’ [Prenatal diagnosis and selective abortion. The ethical problems], Tvärnitt 2). Philosopher Munte discusses the status of the embryo from a utilitarian perspective. The potential for development into an individual with a life worth living gives the fetus a moral status: ‘What makes abortion and the destruction of embryos troublesome is not the mere fact that there is killing involved, but rather that these acts prevent the future occurrence of additional individuals who would have had lives worth living’ (Munthe, Christian (1999). Pure selection. The Ethics of Preimplantation Genetic Diagnosis and Choosing Children without Abortion. Göteborg: Acta Universitatis Gothoburgensis).

Thus, while human life, from conception, ought to be attributed dignity, undeveloped human life and developed human life are inviolable in different ways. The committee does not suggest how the undeveloped life is inviolable compared with the developed life. We see that the committee implicitly endorses the doctrine of growing protectability: there is a distinction between developed and undeveloped life. In the judgment of the committee, prenatal diagnosis in combination with selective abortion should not be carried out except when there are humanitarian reasons to do so. The unborn life is attributed human dignity, a concept from the interpretive framework, but this dignity is not, for the committee, inviolable as is the case with developed life. The committee also considers that the fetus has interests, interests that may conflict, however, with the interests of the mother.\footnote{According to the committee, selective abortion cannot be justified by considering the interests of the future child. The committee refers to the unequivocal and strong reactions of Swedish disability organizations in this respect.}

The moral judgment of the committee, however, is not consequential as far as the political judgment is concerned. The committee defends clinical practice, and no changes of the law are proposed. It can be concluded that the committee defends a moderate-restrictive judgment as far as selective abortion is concerned, and abortion in general, but selective abortion is not rejected categorically. The committee distinguishes the inviolability of the life of the fetus from the inviolability of developed life, a distinction with which the committee implicitly endorses a doctrine of growing protectability. However, the concept of the inviolability of human life, from its interpretive framework, leads to a restrictive stance toward selective abortion: the suggestion is that abortion violates human life. The reasoning of the committee regarding the restrictive inference is supported with a reference to the concepts of human dignity and inviolability which influence the reasoning of the committee as to what the justifiable course of action is.

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The Swedish National Council on Medical Ethics supports, in a so-called ‘comment’, the recommendations made in the White paper, but presents its own moral framework in order to judge prenatal diagnosis.\footnote{Swedish organizations are invited to write comments regarding White Papers, see also Chapter 9 on the system of making comments, note 649.} The interpretive framework that underlies the judgment of the committee consists of five concepts: a humanist view of human beings, autonomy based upon knowledge, beneficence, nonmaleficence, and justice. Of these five concepts, nonmaleficence is a focal concept for the council. The council lists several pros and cons of selective abortion on the basis of these principles, but concludes that the arguments that are in favor dominate. The council argues that moral discussions always take place at a level of principles which reflect the ideal way of dealing with things, while reality requires compromises. Different moral principles may conflict with each other which requires various important values and interests having to be balanced with each other. While selective abortion, regarded from the point of view of the fetus, can be taken as compromising human
dignity, the council is attracted to the principle of nonmaleficence; to reduce suffering is an important aim of prenatal diagnosis:

One can argue that the affliction with which the fetus will be born can lead to suffering that reduces the value of being born. Here, the principle of nonmaleficence and the principle of reducing suffering are relevant.577

Thus, the principle of nonmaleficence, which implies that suffering should be reduced, may justify, for the council, selective abortion following prenatal diagnosis. The pregnant woman would also have the right of self-determination; it is her life that is being affected. Here, too, the principle of nonmaleficence may apply since the woman wants to prevent the future suffering of her child. The permissive judgment that the council propounds is, thus, that prenatal diagnosis can be defended from a moral point of view, and, of the principles in the interpretive framework, it is nonmaleficence that, for the council, may justify prenatal diagnosis. It is argued that nonmaleficence, or the reduction of suffering, may justify selective abortion. Implicitly is pointed to the responsibility of the prospective mother, in terms of reducing the suffering of the future child.

The Swedish Churches frame the question of the unborn life in terms of human dignity in a comment on the White Paper. They share the committee’s view of human beings, entailing that human dignity ought not to be graded. The question is, however, whether or not the law should include the rights of the fetus as an independent individual. A tendency to individualize the moral conflict is observed. However, the extent to which an individual is able to take care of a disabled child is dependent on the resources of society, as well as dominant opinions on the good life. Implicitly, the Churches criticize the stance of the Swedish National Council on Medical Ethics with its focus on the mother and the possible suffering of the future child. The Churches argue that the mother and the fetus are two individuals. Each individual must have human dignity; a viewpoint that is in accordance with a Christian view of creation and a long tradition of Christianity. Human rights and intrinsic value, or dignity, are related to mere existence, and not dependent on the degree of development or autonomy:

[H]uman rights and the dignity of every human being are rooted in mere existence. These are not dependent on the degree of development or autonomy [...] the unborn life is a specific human life and, as such, an individual with human interests and with the right to life and development.578

For the churches, the fetus is, thus, a human being or at least a specific human life and an individual. In the White Paper, there would be tension. On the one hand, it is argued that the need for protection is already present during early pregnancy; on the other hand, the abortion law exists, giving protection only later on when the fetus is viable. It can be concluded that the restrictive judgment of the Churches on prenatal diagnosis is based upon the conviction that prenatal diagnosis entails human dignity being graded since the fetus is entitled to human dignity, the concept with which the Churches frame the discussion on prenatal diagnosis. According to the churches, there is a relation between the fetus as an individual, with rights, and the fetus having human dignity. 

Philosopher Torbjörn Tännsjö critically discusses the judgments in the White Paper in a medical journal. He frames the question of the unborn life in terms of suffering, criticizing the belief that selective abortion always entails a conflict between the woman and the fetus. This implies that abortion following prenatal diagnosis can only be justified for humanitarian reasons. Tännsjö himself introduces the concept of suffering in order to justify selective abortion. According to him, many who choose selective abortion reason that severe genetic disease may involve an incomplete or shorter life, and thus suffering. Giving instead birth to a child that can be supposed to live a whole and good life prevents suffering, on the other hand:

Either I give birth to this fetus, of which I know that, due to a disposition toward a severe hereditary disease, it will be an individual who can only live a limited life (and perhaps even half a life) or I choose selective abortion, 'try again' and give birth to a child that can be assumed to have normal chances of living a good (and a whole) life.\(^{579}\)

Tännsjö thus supposes that parents who consider selective abortion compare the happiness, or suffering, of a child with an affliction and a child without an affliction. Tännsjö critically discusses the concept of the sanctity of life, and the assumption that the fetus has rights and interests. Tännsjö argues that the concept of the sanctity of life cannot sustain critical scrutiny. Traditionally, the concept has not excluded the death penalty or led to radical pacifism. Christian ethics have not, furthermore, been able to answer what it is in human life that deserves protection, and the concept has been abandoned in the abortion debate.\(^{580}\)

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\(^{580}\) Physician Seidal, discussing Tännsjö’s article, argues that the concept of the sanctity of life is reflected in medical ethics, and points to the fact that the Judeo-Christian view of human beings is reflected in legislation and praxis in health care. Tännsjö’s attempt to disqualify Christian values therefore cannot achieve a serious dialogue (Seidal, Tomas (1989). 'Läkaretidningen 41."

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\(^{579}\) Remissvar’ [The pregnant woman and the fetus - two individuals. Comment], in Rolf Ahlzén (ed.) Abort, fosterdiagnostik, människowärde. Uppsala: Tro and Tanke.

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Tännsjö observes, then, a paradox with regard to the assumption that the fetus has rights; in using the rights concept, the doctrine of natural law is invoked. However, since this doctrine entails that moral subjects have the capacity for free choice, with desires and intentions, it is unclear how it should be applied to fetuses. Tännsjö thus rejects the deontological concepts of the sanctity of life and the rights of the fetus. In his permissive judgment, there is no conflict between the rights of the fetus, a concept he rejects, and the rights of the mother. According to him, the fetus is merely the object of the parent’s personal relations and selective abortion can be justified in view of the reduction of suffering by preventing a child with a severe disease from being born. The reduction of suffering, the concept with which Tännsjö frames the discussion on prenatal diagnosis, is in line with the utilitarian principle. The prevention of suffering in terms of an incomplete or shorter life is justification for prenatal diagnosis and selective abortion. Thus, prenatal diagnosis is judged in terms of its consequences.

Ethicist Per Sundström develops, in a monograph, the question of the unborn life in terms of an existential perspective which entails responsibility for the appeal from ‘the other’. Commenting on the White Paper, Sundström is critical of the use of the term human dignity. In the White Paper, two interpretations of human dignity are discussed; on the one hand, it is argued that all fetuses should be assigned an ungraded and equal human dignity, even though abortions can be justifiable from a moral point of view, while on the other, the fetus does not have full human dignity since it is not a human being. Sundström does not want to use the concept of dignity in his discussion of selective abortion. Sundström’s moral point of view is a phenomenological-moral perspective inspired by Levinas. This perspective is about confronting a human being; a requirement to ‘answer’ to the ‘appeal’ that already exists there through the existence of the other. From this perspective, Sundström suggests an existential argument against abortion. He argues that abortion is a morally problematic act since it stops another human being, or at least a human

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581 In reaction to Tännsjö, Catholic theologian and ethicist Bischofberger defends the White Paper’s opinion that the fetus, like the woman, has rights. Bischofberger argues that the fetus is a person with an intrinsic right to life, rather than a ‘function of his mother, father, medicine, or society.’ The fetus is, in the view of Bischofberger, vulnerable and his integrity therefore deserves more protection than does the integrity of the mother who has autonomy (Bischofberger, Erwin (1989). ‘Fostret är en person med inneboende rätt till existens’ [The fetus is a person with the inherent right to exist], Läkartidningen 52).

582 Tännsjö sets out, in a medical journal, his own view of the fetus; he believes that people have personal relations with each other. Crucial to the question of whether or not early abortion is morally justified is the personal relation of the parents with the fetus (Tännsjö, Torbjörn (1989). ‘Nyttomoralen bör vara grunden för ställningstagande till selektiv abort’ [Utility morality ought to be the basis for stances taken on selective abortion], Läkartidningen 1-2). In a monograph, Tännsjö argues that, whereas the fetus does not have any personal relations, the parents can have personal relations with the fetus. These relations can develop during pregnancy. Ultrasonography can paradoxically reinforce the relation of parents to the fetus. That relation becomes wholly developed when there is a mutual and clear boundary for it when, between the stages of the fetus and those of a child with a developed consciousness, birth takes place (Tännsjö, Torbjörn (1991). Välfya barn. Om fosterdiagnostik och selektiv abort [Choosing children. On prenatal diagnosis and selective abortion]. Stockholm: Sesam).
being in the becoming, from developing his or her inherent capacities. This means that the requirement to answer to the appeal of the other is compromised:

[In the fact of a pregnancy, ‘the other’ is manifested with an ‘appeal’ that requires an ‘answer’.]

Thus, implicitly, Sundström rejects the doctrine of growing protectability, which entails the early fetus deserving less protection than the later fetus. From conception, the fetus is, for Sundström, a human being or an individual. An individual’s continued development would be interrupted in the case of an abortion; a unique genome, a unique organism, and a unique person in the becoming. Sundström argues that it does not matter what the fetus is called; the term he uses is individual, an individual of the human species. When applied to the question of selective abortion, Sundström finds such abortion justifiable in the case of severe afflictions causing a short life of suffering.

To the current practice of selective abortion, with many abortions in the case of Down syndrome, Sundström is very skeptical. He argues that, of the current indications for prenatal diagnosis - the age of the woman, a known hereditary disease in the family, having a child with an affliction, anxiety regarding the mere possibility of having a child with an affliction - only the second and third are morally justifiable. Sundström thus rejects the view that the fetus is entitled to human dignity, while considering it as an individual. The individual exists, and abortion means that the individual cannot develop. We see that, on the basis of the existential perspective, the interpretive framework of Sundström, his judgment is moderate-restrictive with regard to the permissiveness of selective abortion. Sundström’s reasons, on the basis of the existential perspective, are that the development of an individual ought not to be stopped. However, Sundström also reasons that selective abortion can be justified in the case of severe afflictions. Still, he regards certain, justifiable, selective abortions as exceptions to the rule that abortion has to be condemned in view of the existential perspective.

7.2 ‘Attitudes toward the disabled’: grading human dignity?

The Swedish Federation for Disabled Persons argues that all human beings have equal value, a value that is inviolable. In addition, the interpretive framework of the Federation also consists of the principle of human dignity. Human dignity should not be graded, which would be the case when it is decided that a fetus with a particular affliction will live while another is aborted. Moreover, human dignity should not be graded according to dominant attitudes and views on the good life.


584 In Swedish ‘graderad’.
Human dignity is, for the Federation, connected with existence, not capacities. Children have a right to their own life even when they are born with an affliction or a disease; in this case, it is society’s responsibility to provide its members with the preconditions to be able to live a meaningful and good life. Therefore, the Federation is opposed to those kinds of prenatal diagnoses which entail fetuses being chosen that are to be aborted\(^\text{585}\), as well as selective abortion and screening. On abortion in general, the Federation does not take a stance since this is not a disability issue. Disease, crisis, and sorrow would be part of life. This is denied in the case of prenatal diagnosis:

*The mere existence of the grading of prenatal diagnosis compromises the dignity of, and tolerance for, physically and mentally different human beings.*\(^\text{586}\)

Thus, for the Federation, prenatal diagnosis affects tolerance toward the disabled. It would not, however, be possible to prevent functional disabilities since such disabilities can occur even after birth. There is no inherent suffering in having a functional disability; the suffering is caused by a society that does not offer sufficient care to people with disabilities. The solution for such suffering is not abortion but political prioritization. It is not abortion, in itself, which is problematic but the abortion of a fetus with a certain affliction. Implicitly, it is claimed that there would not be a demand for prenatal diagnosis if dominant attitudes and the view of the good life were to change, and if society were to take better care of the disabled:

*Disability is a relation between individuals and society. Disability is not a characteristic of the individual. Through changes in society, disability can be prevented and its effects can be compensated for.*\(^\text{587}\)

The Federation is of the opinion that society must accept its responsibility and be much more active in following up and regulating the development of prenatal diagnosis. The Federation asks which kind of society we want. Is it a society for A-people?; for perfect people?; is it about prejudices regarding functional disability?; do people believe that our lives are merely about suffering?; is it cheaper for society to develop prenatal diagnosis and, in this way, save money?\(^\text{588}\) The Federation requires

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\(^{585}\) In Swedish, the organization talks about ‘utsorterande’ prenatal diagnosis.


\(^{588}\) In the journal of the Swedish Federation of Disabled Persons, Johansson, herself disabled, contends that prenatal diagnosis leads to a situation whereby politicians do not have the incentives to bring about reforms for people with a disability. A situation is conceivable whereby parents with a disabled child are confronted with the question of why they gave birth to a child with a disability. This is because prevention using prenatal diagnosis was, after all, possible (Johansson, Christina (1990). ‘Den fullständige kontrollen’
the development of prenatal diagnosis to be regulated. Here, too, those kinds of prenatal diagnosis which entail fetuses being chosen are regarded as contrary to human dignity.

Thus, we see that the Federation implicitly claims that disability is a social construction, an opinion that we also found in the Dutch discourse on attitudes toward the disabled. In the judgment of the Federation, prenatal diagnosis is both to be rejected by an appeal to human dignity, but also to be regulated. Obviously, as with the Lindeboom Institute in the Netherlands, but for different reasons, there is a principled ‘no’ from the national organization regarding prenatal diagnosis, but also a pragmatic call for regulation. The Federation seems aware of the fact that prenatal diagnosis is a reality and has to be regulated, while a ban would have little support. Rather than referring to the status of the fetus, the Federation is not opposed, in principle, to abortion; rather, it claims that the principle of human dignity is compromised by prenatal diagnosis. Implicitly, in its restrictive judgment, it claims that prenatal diagnosis implies a value judgment of the disabled; it would lead to a situation whereby people with disabilities are valued less than so-called ‘A-people’.

Physician Sam Brodsky, in a medical journal, is not convinced by the opposition of disability organizations to prenatal diagnosis. He frames the question in terms of autonomy. Brodsky does not understand why there is so much discussion about 100 abortions following prenatal diagnosis, compared with 35,000 ordinary abortions.

[Complete control], Svensk HandikappTidskrift SHT 1). In a Bill put before Parliament by the Christian Democratic Party, the opinions of the disability organizations are referred to in formulating a similar critical position: who should decide which children are to be born; do parents with a disabled child need to pay themselves for their care; where will the boundary be drawn between disease, disability, or merely undesirable traits? The Christian Democratic Party thus desires morally-supported legislation (Kristdemokraterna. ’Fosterdiagnostik och människovärdet’, Motion till riksdagen 1992/93, Sö486 [Prenatal diagnosis and human dignity. Parliamentary Bill]).

589 For instance, in a comment on the White Paper made by the Swedish Association of Persons with Neurological Disabilities, the same stance on prenatal diagnosis is defended. The Association is in favor of prenatal diagnosis in order to prevent or relieve disease. On the basis of the principles of human dignity and the same right to live - those with functional disabilities are as worthy as those without such disabilities - the Association is against prenatal diagnosis with the aim of grading and aborting fetuses (In a comment made by the youth organization, the fear of an elitist view is mentioned. If society accepts grading prenatal diagnosis, this entails that it will undermine the raison d’être of the entire group of disabled people since it is this group that should not be in existence. The organization argues, furthermore, that society does not desire a broad public discourse; attempts to express opinions in the media by the organization were without result, namely [De Unga med Neurologiska funktionshinder i Sverige DUNS (1990). Remiss beträffande SOU 1989:51]. [Comment on White Paper 1989:51]). Gregorson, representing the Swedish Federation of Disabled Persons, argues that one has to be vigilant in order to ensure that moral limits are not exceeded when searching for the ‘perfect’ human being. She contends that the Federation cannot accept human dignity being compromised or the negative view of people with a disability being reinforced. Those who themselves have a disability know that their lives are valuable and good. A disability does not entail suffering per se. The solution to the ‘suffering’ of the disabled is not abortion but political priorities ensuring that those with a disability and the parents of the child get all the support that is necessary to live a good life. Medical developments are rapid and, unlike some years ago, a child with cystic fibrosis can live until adulthood (Gregorson, Barbro (2003). DHR:s syn på fosterdiagnostik och den nya genetiken [The view of the DHR on prenatal diagnosis and the new genetics] in: The Swedish Council on Medical Ethics, conference on ethics).
abortions. The moral discussion that was absent from the discussion about the latter kind of abortion (in a 1965 report, the moral question is not even mentioned), is now taking place with regard to these 100 abortions in the view of Brodsky. The disability organizations talk about grading human dignity on the basis of functions. In the moral conflict between mother and fetus, a third actor would also be introduced, namely the collective of the disabled.

According to Brodsky, the argumentation of the disabled organizations follows a political ideology. The disabled child risking a lack of care is not in line with the factual situation, following Brodsky. Talk of the ‘quality control of fetuses’, the ‘prioritization of strong healthy A-people’ etc. belongs to political jargon and is not affected by ethics. Brodsky argues that it would be of great concern if major interest organizations were able to introduce a perspective whereby a small number of afflicted fetuses are given legal protection, compared with thousands of fetuses that are aborted anyway. It is an absurd thought that ethics is formulated by collective or political organizations:

Individual consciousness, ultimate responsibility, and good will cannot be collectivized. Kant's categorical imperative enforces an individual stance. The moral conflict as regards free or selective abortion is between the mother and the child.

According to Brodsky, ethics is, thus, implicitly a question of autonomy - prenatal diagnosis is a question of an individual stance and the individual consciousness - and he is opposed to politics compromising ethics. According to Brodsky, prenatal diagnosis does not affect attitudes toward the disabled while society takes good care of the disabled. According to Brodsky, as we have seen, there is no difference between abortion on general grounds and abortion due to an afflicted fetus. His permissive judgment that prenatal diagnosis can be justified is based upon the conviction that it should be the mother who has to decide.

Physician Karl Grunewald responds to Brodsky's article in the same medical journal, by discussing what can be called the disability critique. He argues that opposition to prenatal diagnosis comes from those who know best, namely the disabled themselves and parents of children with a disability:

As we have seen, in 2004, approximately 350 selective abortions were carried out in Sweden.


The Christian Democratic Party also argues that the rejection of prenatal diagnosis by disability organizations should be taken seriously; prenatal diagnosis can entail disabled persons having a lower value than others. (KDS. ‘Med anledning av prop. 1994/95:142 Fosterdagnostik och abort’, Motion till riksdagen 1994/95:3028 [With regard to Government Bill 1994/95:142 prenatal diagnosis and abortion. Parliamentary Bill]). Like Grunewald, the Christian Democratic Party thus claims that disability organizations should play a special role in the discussion.
It is not extreme politicians who talk of selection and the risk of an elitist society. It is the lifelong disabled and the parents of children with a disability who speak in this way. Those who, as a matter of fact, live in the situation attempting to be prevented know best.\(^{593}\)

The disabled and parents talk of selection and the risk of an elitist society. With regard to the protests of major disability organizations, Grunewald argues that it is democratic organizations that should formulate the moral rules in order to minimize conflicts within society. Good care of the disabled can reduce the anxiety of parents as regards giving birth to a child with a disability and, consequently, prenatal diagnosis. Brodsky wonders, in turn, why Grunewald has such an uncompromising attitude. The fear that a generous attitude toward prenatal diagnosis would lead to the disabled being brought into discredit would be unfounded.\(^{594}\) If such a fear were to be warranted, however, society should take effective measures. Brodsky wants to restrict prenatal diagnosis to severe cases. According to Grunewald, replying again to Brodsky, research has shown that prenatal diagnosis brings the disabled into discredit; one third of the women in a research object are of the opinion that prenatal diagnosis can lead to a negative attitude toward the disabled.\(^{595}\)

In an editorial in a medical journal, criticism of Grunewald is discussed. Prenatal diagnosis should have a medical-humanitarian aim for individuals, without aiming at achieving effects at the societal level. Resources for the disabled should not be made dependent on the development of prenatal diagnosis. The diagnostic work, however, has had hardly any effect on the number of disabled people; we will have to take care of those who are impaired due to, for instance, pregnancy, birth, or traffic accidents. The disabled should not be brought into discredit, which can be realized with resources that support and care for the disabled. It is unlikely that parents, during pregnancy, are led by thoughts about elitist people:

> Every human being has an intrinsic worth that is independent of his or her other traits, good or bad. It is improbable that parents, in connection with pregnancy, would be guided by thoughts about elite human beings.\(^{596}\)

We see that, in the editorial, the risk of societal effects of prenatal diagnosis is considered low. If the choice is left to the individual, societal effects will not occur. According to Grunewald, in a reaction, the diverging opinions regarding prenatal diagnosis have to do, however, with the fact that prenatal diagnosis is not about

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\(^{593}\) My translation: 'Och för övrigt är det verkliga inte extrempolitiker som i detta sammanhang talar om urval och risken för ett elitismhälle. Det är de livslångt handikappade och föräldrar till barn med handikapp som gör det. De som de facto lever i den livssituation som man vill förebygga, de som faktiskt vet bäst'.


\(^{594}\) Brodsky, Sam (1989). 'Den moderna fosterdiagnostiken förebygger svårt mänskligt lidande' [Modern prenatal diagnosis prevents severe human suffering], Läkartidningen 35.

\(^{595}\) Grunewald, Karl (1989b). 'Fosterdiagnostik som trend och hot' [Prenatal diagnosis as trend and threat], Läkartidningen 41.

improving and prolonging life but about extinguishing it. A discussion about which disabilities are reconcilable with a good life is thus necessary. Society should formulate norms for prenatal diagnosis.

Elsewhere, too, Grunewald speaks of the extinguishing of life by prenatal diagnosis. The most important task for a democratic state is to protect its weak members, and in our society, the fetus is a legal subject. We thus see that Grunewald, implicitly, takes a stance against abortion by speaking of extinguishing life. According to Grunewald, furthermore, the disability organizations play a special role in the discussion about prenatal diagnosis. The disabled have experience of disability and regard prenatal diagnosis as a threat. On the basis of their experience of disability, they should be given a prominent role in formulating moral rules. Grunewald bases his restrictive judgment concerning prenatal diagnosis on the disability critique, but also on the viewpoint that prenatal diagnosis implies the extinction of life, thereby going further than the national organization, which takes no stance against abortion per se.

Philosopher Torbjörn Tännösjö formulates three possible arguments belonging to what is called the disability critique, which he then criticizes. The first argument discerned by Tännösjö is that selective abortion may lead to elitist opinions and confirms prejudices against the disabled. Another argument is that tolerance for parents who give birth to a child with a disability is possibly diminishing: parents have to take care of their disabled children themselves. A third possible argument is that when few individuals are born with a disability, our knowledge of disability will be affected. This could lead to more prejudice with regard to the disabled since such prejudice has to do with knowledge. These arguments have a certain weight, argues Tännösjö. With regard to the first argument, however, Tännösjö argues that such a fear is unwarranted since there is a system of free selective abortion. The disabled do not need to be afraid that there is a list indicating the disabilities for which prenatal diagnosis is allowed. However:

Is it not an expression of elitism when a fetus is aborted, therefore, because it would result in a life that is not worthwhile living [...] Does not society (indirectly) express the opinion that those who live with disease and disability should not exist; that they should have been aborted?

Yet, if certain abortions of certain fetuses with an affliction causing deafness are accepted, this will say nothing about the value of a life of a deaf person in general.

597 Grunewald, Karl (1989c). 'Fosterdiagnostiken behövs - men kan bantas' [Prenatal diagnosis is needed - but can be slimmed down], Läkartidningen 36.
With regard to the second argument, the social climate is important. This argument could apply to people who are becoming sick due to their lifestyle. The child has not chosen the disability himself and he cannot be blamed for the decision of the parents. According to Tännsjö, the third argument has least weight. Disabled people will exist in any case due to accidents or diseases, and disability is not becoming an exclusive or special phenomenon.

We see that Tännsjö discusses possible, rather than actual, arguments regarding the position of the disabled in society. In fact, there may be different arguments but the first argument discussed by Tännsjö is particularly defended by the Swedish disability organizations. Tännsjö discusses prenatal diagnosis also on the basis of other kinds of arguments, but on the basis of his refutation of the three possible arguments, which could be called the possible disability critique, his permissive judgment is that prenatal diagnosis can be defended.

7.3 ‘Implications of new choices’: can autonomy be realized?

Prenatal screening, the offer of prenatal tests made to all pregnant women, entails facing new choices. In the White Paper from 1989, which has been discussed in relation to the unborn life, the permissiveness of prenatal screening is discussed in a paragraph on voluntariness and prenatal diagnosis. The question of screening is characterized by reluctance. Screening is defined as the offer of an examination of the fetus, more or less as routine, to large groups of women. It is observed that screening is already being carried out in the form of ultrasonography examinations, as well as blood tests to measure a possibly enhanced level of AFP (alpha-fetoprotein) related to a possible neural tube defect. The White Paper recommends, however, that screening should not be allowed on a general basis; rather, it should be decided from case to case whether or not screening should be allowed. The responsibility for such decisions should be delegated to the National Board of Health and Welfare. Which justification does the paper provide for its reluctant judgment? In the first place, there is a general objection in the White Paper:

We believe that there could be a risk of routine ‘hunting’ for divergences from normality possibly contributing to a weakened view of human dignity.600

Furthermore, it is argued that the woman’s freedom of choice may be compromised. It could be difficult, the White Paper states, to resist an offer to examine the fetus. If the pregnant woman were to resist the offer, and give birth to a child with a disability, then she may feel responsible for the burden she is placing on herself, her family, and society. The reluctance to screening in the White Paper is, furthermore,

related to the belief that the woman is not free to make an autonomous decision; free from coercion by her family or society. We can conclude that the White Paper suggests that the autonomy of the mother-to-be cannot be safeguarded. She cannot freely decide since she is influenced by her family or society and she may also feel responsible for not taking up the offer of prenatal screening. Despite the moderate-restrictive judgment that screening ought not to be allowed on a general basis, the White Paper does not argue for a ban on screening but proposes to delegate the question to the National Board of Health and Welfare.\textsuperscript{601}

Ethicist Göran Collste also discusses the question of screening in terms of reluctance. He contends that prenatal diagnosis, in the sense of screening, entails important decisions having to be made by individuals. Is it possible to decide in a rational way whether or not to opt for prenatal diagnosis, asks Collste? When prospective parents are confronted by questions such as whether or not to do a so-called AFP test, the relation with the future child is at stake:

> When the prospective parents are confronted by these questions, something happens with their relation with their future child: it changes into a thing. On the continued existence of this thing, the parents have to take a stance.\textsuperscript{602}

Personal experiences are contrasted with a technical rationality. According to Collste, it is not possible for prospective parents to choose whether a possible affliction is reconcilable with a decent life, whether it is possible to take care of a child with an affliction, or whether abortion is a possibility. This question has political implications: a) prenatal diagnosis is offered to all, which would violate the autonomy of individuals; b) prenatal diagnosis is banned; c) pregnant women over a certain age are offered prenatal diagnosis, which is the current practice; d) prenatal diagnosis is offered when the woman asks for it; in this case, anxiety over the current practice is prevented, but only women who are informed can ask for the test; e) only real risk groups are offered prenatal diagnosis. Collste argues that the arguments for the latter two alternatives are the most convincing.

According to Collste, screening thus changes the experience of pregnancy: something changes in the relationship with the fetus. Implicitly, he suggests that autonomy has to be based upon comprehensive information regarding the question of whether or not an affliction can be compatible with a decent life. His moderate-restrictive judgment entails that screening can be justified in some cases, but not in all. The justification for this stance is that a real choice is not possible since it is

\textsuperscript{601} In a critical comment, the central committee of the Swedish Disability Federation argues that the delegation of the decision of screening to the National Board of Health and Welfare is a warrant for a permissive stance; even in the current situation, the board takes a liberal stance, namely (Handikappförbundets centralkommitté (1991). Remiss beträffande SOU 1989:51 [Comment on White Paper 1989:51]).

impossible to know whether or not a certain affliction can lead to a decent life. This argument is similar to that of Van den Bergh, Brom, and Van Thiel in the Dutch discussion about the limits of medicine, when they argue that prenatal diagnosis does not give any information about the severity of the afflictions caused by genetic defects.

Geneticist Jan Wahlström also discusses, like Collste, different scenarios for prenatal screening. In a medical journal, he discusses the moral dimensions of the so-called serum test for detecting Down Syndrome while framing the question in terms of the principles of justice and autonomy. Wahlström discusses the application of the test at three levels: a) the test is offered to all women; b) it is offered to all women who ask for a prenatal diagnosis, or to women over 35; c) the serum test is offered to women who ask for this particular technique. Without defending a particular scenario himself, Wahlström identifies the pros and cons of the different scenarios. Wahlström argues that, from the perspective of justice, it seems reasonable to offer a serum test to all pregnant women. However, as long as a blood test based upon the level of alpha-fetoprotein is used, women may have to consider not only the possibility of a chromosomal aberration, but also of a neural tube defect. Screening requires major investment in order to ensure the right to autonomy. The blood test is simple and could be carried out on a routine basis; some women may, however, experience indirect coercion regarding their choice:

Pregnant women may experience […] coercion since the examination is easy to carry out and health care carries these out on a routine basis without giving women the opportunity to choose for themselves. Opportunities for choice can also be experienced as limited since economic cuts lead to poorer care of the disabled.603

According to Wahlström, the second and third scenarios have the advantage that only women who have already shown interest will undergo prenatal diagnosis. This entails that they have more incentive to struggle with complicated choices. Since the number of women requiring the test is smaller, it will be easier to ensure autonomy. However, from the perspective of justice, these scenarios have disadvantages.

Wahlström argues that a consequence of the second and third scenarios may be an ‘effect of dispersion’ due to the fragmentary knowledge that spreads within society, more and more women may be aware of the existence of a non-invasive test. Wahlström thus argues that, even though the intention is to offer a test only to women who are asking for prenatal diagnosis, the consequence may be that, in the end, screening has been introduced de facto. While for Wahlström, from a perspective of justice, it seems reasonable to offer the serum test to all pregnant women, this may violate their autonomy since it is easier to ensure autonomy when the test is being offered to a smaller group of women. Thus, the implicit moderate-permissive

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judgment of Wahlström is that, while screening should be offered on the basis of the principle of justice, autonomy may be compromised when more women are offered screening tests.

In the Government Bill in the wake of the White Paper, there is a proposal to provide all pregnant women with information concerning prenatal diagnosis - including ultrasonography, which is included in the definition of prenatal diagnosis in the Government Bill - rather than offering them prenatal diagnosis.604 Lisa Öberg, in a newspaper article, is critical, nevertheless, of the proposal since no women’s or parental organizations would have asked for this change, a change which, in her view, should have been discussed more carefully. Öberg, herself a member of the Swedish Haemophilia Society and the National Association for Disabled Children and Adolescents, addresses the question in terms of limits to freedom of choice. There would be a risk that the information is interpreted as coercive, since it comes from a physician or a midwife. The idea that there is real freedom of choice would be naive, this being due to the professional interest in expanding new genetic practices. Furthermore, Öberg argues, prenatal diagnosis raises complicated moral questions on both a principled moral and a personal level:

From a psychological point of view, a deliberate choice is difficult during early pregnancy when both the woman and the man are getting used to their new situation. Anxiety and uncertainty are normal […] For an unprepared person, it will presumably be impossible to make a well-considered decision within a couple of weeks. Making the wrong decision and then regretting it may have tragic consequences.605

604 In the Government Bill on prenatal diagnosis and abortion, the recommendation of the White Paper to delegate decisions regarding screening to the Board of Health and Welfare is defended, as is the underlying argumentation. This is despite the reluctance to prenatal screening. Screening examinations may violate the autonomy of the women. It could be difficult to abstain from an examination when it is offered. There is also a risk that prenatal diagnosis, on a large scale, would inflict more harm than good since the prospective parents are exposed to unnecessary anxiety. Screening should therefore, in principle, be avoided, according to the Government Bill (Regeringen. Fosterdiagnostik och abort. Regeringens Proposition 1994/1995: 142 [Prenatal diagnosis and abortion]. Government Bill 1994/95:142). The Government Bill also proposes that general information regarding prenatal diagnosis be provided to all pregnant women. Pregnant women under 35 and not belonging to a risk group have not received any information regarding prenatal diagnosis until now, and it is proposed to offer general information to them, for instance, regarding the opportunity to discover an affliction when carrying out ultrasonography. This is defended using the claim that knowledge is a requirement for autonomy. Jönsson and Ljungquist, representing a disability organization, react in a journal to the proposal to inform all pregnant women about prenatal diagnosis. They argue that the proposal may disturb the pregnancy of many women due to the fact that they are being confronted with the fact that their fetus may be damaged (Jönsson, Ann, and Ljungquist, Mari-Louise (1995). 'Informera inte alla om fosterdiagnostik' [Do not inform everyone about prenatal diagnosis], LandstingsVärlden 27).
Finally, Öberg claims that, in a democratic country, a basic principle is that citizens only seek contact with health care with problems they are experiencing themselves. Öberg’s restrictive judgment regarding information on prenatal diagnosis to all pregnant women is thus based upon the conviction that real freedom of choice is difficult to realize, a conviction she shares with Collste, although for different reasons. In the first place, the fact that information about prenatal diagnosis is provided by medical personnel would compromise freedom of choice since it might be experienced as coercive. Secondly, Öberg argues that pregnant couples are not really autonomous in the sense that they can make a conscious decision. Their freedom of choice is compromised due to the offer made by medical personnel, but even more fundamentally, prospective parents cannot make autonomous decisions because they would be anxious and uncertain.

Physician Boris von Uexküll frames, in reaction to Öberg, in a newspaper article, the question of screening in terms of freedom of choice and information. He strongly objects to Öberg’s view that it would be wrong to offer information about prenatal diagnosis to all women. A consequence of this view would namely be that only the well-informed members of society would be provided with the opportunity to choose. According to Von Uexküll, it is right to inform about prenatal diagnosis if the individual is provided with real freedom of choice, and if adequate information about the pros and cons is provided:

> It is right to inform about the opportunities for prenatal diagnosis in its different forms, provided that knowledge of the advantages and disadvantages of the diagnosis is given and that the individual is given a real opportunity to choose. Information should not be coercive. It should be given in a spirit of tact and respect for the individual.

A disadvantage, or ambiguity, with regard to prenatal diagnosis would be that, using a particular technique, the majority of fetuses with an affliction can be found, but that no absolute guarantee can be given that a fetus is not afflicted. Furthermore, new techniques may predict the increased chance of an affliction, without being able to reduce anxiety completely.

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606 This point is also made by Conner et al. who argue that all pregnant women throughout Sweden should be offered the combined ultrasonography and biochemical test that is available in Stockholm. Women from other regions come to Stockholm for the test and, according to Conner et al., it is not satisfactory that socio-economic factors and residence influence the use of prenatal diagnosis; they require national guidelines and a national database to safeguard the quality of nuchal translucency screening and biochemical analysis (Conner, Peter et al. (2006). 'Upptäckt av kromosomrubbningar hos foster - hög tid att ändra strategi' [Detection of fetal chromosomal aberrations - high time to change strategy], Läkartidningen 41).


608 In view of this estimation of chances and uncertain outcomes regarding the serum test, Kjöller, in an editorial, argues that serum screening should be evaluated carefully before a possible introduction. All women undergoing a prenatal test do so, according to Kjöller, in order to receive a comforting result. But
According to Von Uexküll, freedom of choice is thus guaranteed when prospective parents are provided with the pros and cons of prenatal diagnosis. His judgment that information about prenatal diagnosis should be given is based upon the conviction that real freedom of choice can be guaranteed. While for Wahlström, the so-called ‘dispersion effect’, i.e. that more and more pregnant women hear of the opportunities for prenatal diagnosis, provides a reason for a more reluctant stance, the opposite is true for Von Uexküll. According to him, the dispersion effect entails that only well-informed women know about prenatal diagnosis. His permissive judgment is supported by the conviction that to avoid only well-informed women having a choice, information should be offered to all pregnant women.

Philosopher Christian Munthe goes one step further than the provision of information and defends prenatal diagnosis being offered to all pregnant women. In a so-called expert contribution to a medical consensus conference on early prenatal diagnosis, Munthe's framework consists of the principle of respect for autonomy. According to Munthe, prenatal diagnosis has benefits for the woman and therefore the offer of prenatal diagnosis, on an individual basis, can be defended. With such an individual variant, Munthe contrasts screening, which for him entails the health care system informing about the opportunity for prenatal diagnosis and, for instance, booking a date for the examination in advance.

The latter variant is difficult to combine with respect to autonomy, argues Munthe, and in his view, prenatal diagnosis should be organized as a general offer. This entails that the woman first being informed and then asking for prenatal diagnosis if she is interested. Munthe contends that prenatal diagnosis may benefit the autonomy of the woman by providing her with opportunities to make decisions concerning her life on the basis of underlying plans and aspirations; by improving her well-being; and by reducing anxiety regarding the prospect that she may give birth to an afflicted child. This is in line with Munthe's conception of autonomy, which for him means self-determination and people’s capacity to control their own lives:

what if a risk of 1 in 80 exists, compared with 1 in 250 for a certain age? Following such a result, a choice would be impossible to make, argues Kjöller. Kjöller thus points to the discrepancy between objective and perceived risk, as was the case in the Dutch discourse, as a reason against screening (Kjöller, Hanne. 'Gravida oros i onödan' [Pregnant women are unnecessarily anxious], Dagens Nyheter March 26, 2001).

609 The Swedish National Council on Medical Ethics also proposes that prenatal diagnosis be offered to all pregnant women. Every woman should have the right to decide about her own life in accordance with her view on the good life. Autonomy can be a capacity, a right, and a value. Prenatal diagnosis should realize autonomy as an aim; prenatal diagnosis should be of help to the woman in order to realize a plan for her life (Statens Medicinsk-Etiska Råd (2006). Yttrande. Etiska frågor kring fosterdiagnostik [Opinion. Ethical questions concerning prenatal diagnosis], Stockholm).

610 The consensus conference report states that prenatal diagnosis should be regarded as an offer to women or couples who want an examination. Prenatal diagnosis should not be carried out as general screening; and before offering so-called nuchal translucency tests, trials in Sweden and Denmark should be evaluated (Vetenskapsrådet (2001). Tidig fosterdiagnostik [Early prenatal diagnosis]. Konsensusuttalande i samverkan mellan Landstingsförbundet, Socialstyrelsen och Vetenskapsrådet. Stockholm).
In the context of medical ethics, this is specified as the degree to which individuals make decisions and live their lives in accordance with their own ideals, aims, and plans.\textsuperscript{611}

Munthe argues that a fundamental requirement for a person to be able to exert autonomy is that he or she is not subject to coercion or manipulation. However, autonomy would not exclude others influencing the ideals and aims on the basis of which decisions are made. Munthe thus supports his judgment that prenatal diagnosis ought to be offered to all pregnant women by a reference to the principle of respect for autonomy. His reasons for the priority of the principle of respect for autonomy are that autonomy can generally be assumed to be the most important fundamental value and that, in the particular case of prenatal diagnosis, it is reasonable to prioritize the principle of autonomy.

In Munthe's view, no one is better equipped than the pregnant woman to make her reproductive choices, and there is political value in ensuring the reproductive choice of individuals. Autonomy thus entails, for Munthe, the freedom of reproductive choice, and one might speak of reproductive autonomy in this respect. We see that, for Munthe, the reluctance of the White Paper, based upon the fear that the woman may be influenced by her family or society, is not warranted. Autonomy for Munthe is not compromised when the ideals and aims of the woman are influenced by others. His permissive judgment that prenatal diagnosis ought to be offered is based upon the implicit assumption that coercion or manipulation are excluded, hence his preference for offers on an individual basis.

A White Paper from 2004 refers to trials in Sweden using a combination of serum screening and nuchal translucency screening.\textsuperscript{612} As with Munthe, autonomy is a focal concept in the interpretive framework of the White Paper, but there is no discussion about whether or not the combined test ought to be offered to all pregnant women. Using the combination test, reports the White Paper, 90\% of all fetuses with Down Syndrome can be detected.\textsuperscript{613} In the White Paper, it is recommended that routine


\textsuperscript{612} Kommittén om genetisk integritet (2004). Genetik, integritet och etik [Genetics, integrity and ethics]. Swedish Government Reports 2004:20. In the Government Bill following the White Paper, it is argued that trials concerning the combination test are important since the criterion age has disadvantages while invasive procedures carry the risk of spontaneous abortion. The National Board of Health and Welfare is given an important responsibility in regulating prenatal diagnosis. In the White Paper, it is argued that the Board should monitor the development of alternative methods of predicting the risk of Down syndrome. (Regeringen. Genetisk integritet m.m. Regeringens Proposition 2005/06:64 [Genetic integrity. Government Bill 2005/06:64]).

\textsuperscript{613} Also physicians Kristoffersson and Nørgaard-Pedersen argue that prenatal tests such as serum screening can detect more afflicted fetuses. A benefit of such tests, in their view, is that women younger than 35 can undergo a non-invasive test: 70\% of all children with Down syndrome come from mothers younger than 35. Using the non-invasive test, the number of miscarriages due to invasive prenatal diagnosis may be reduced. Also, the number of children with Down syndrome will decrease, which implies reduced costs for society in the long-term. Screening may also have its disadvantages. For instance, a number of women may experience unnecessary anxiety due to falsely positive tests, if the invasive chromosomal analysis shows no
prenatal diagnosis should be voluntary. However, the offer of prenatal diagnosis could be perceived as a recommendation that the woman undergo prenatal diagnosis. While some women demand prenatal diagnosis, others may feel uncertainty regarding the offer.\textsuperscript{614} Autonomy can, in this context, be regarded as an abstract concept, the White Paper claims:

Autonomy can be regarded, not least in this context, as an abstract concept, something which is desirable but difficult to realize. Today, no easy method exists of guaranteeing that decisions concerning prenatal diagnosis become autonomous.\textsuperscript{615}

Decisions are, for the White Paper, a process during which advantages are weighed against disadvantages and during which self-determination is an important condition. Autonomy presupposes that the individual is able to obtain information; for an independent decision, she must know which alternatives exist.\textsuperscript{616} The White Paper recommends, in line with clinical practice, that all pregnant women be offered ultrasonography to examine the anatomy of the fetus and for obstetric purposes (for instance, in relation to delivery), while pregnant women who belong to risk groups will be offered prenatal diagnosis. This should not be carried out as screening since it may compromise the woman’s self-determination. We can conclude that the moderate-restrictive judgment of the White Paper, i.e. that there is no

affliction. Due to new techniques for serum screening, Kristoffersson and Nørgaard claim that some of these disadvantages may disappear, however (Kristoffersson, Ulf och Bent Nørgaard-Pedersen (1995). 'Serumanalys av gravida: allmän screening effektivt sätt upptäcka kromosomavvikelser - argument för och emot' [Serum analysis of pregnant women: general screening is an effective way of discovering chromosomal abnormalities - arguments for and against], Läkartidningen 12). Concerning the argument of the authors that society’s costs may diminish due to less children being born with Down syndrome, see Munthe who shows that the argument is hardly used any more (Munthe 1996).

\textsuperscript{614} With regard to this uncertainty, philosopher Tännsjö asks whether or not the routine offer of information on prenatal diagnosis and screening creates anxiety. If several hundred cases of severe suffering can be avoided each year using selective abortion, could that then justify a certain amount of anxiety being created for hundreds of thousands women each year? Tännsjö, admitting that it is difficult to weigh ‘costs and benefits’ against each other in his calculation, believes that the advantages outweigh any possible anxiety. This because prenatal diagnosis may not only cause anxiety, but may also prevent it by providing those who are afraid of giving birth to an afflicted child with a chance. Furthermore, prenatal diagnosis not only prevents severely afflicted children from being born, it also results in individuals being born for ‘whole lives’ rather than lives that end prematurely due to hereditary disease (Tännsjö, Torbjörn (1991). Välja barn. Om fosterdiagnostik och selektiv abort [Choosing children. On prenatal diagnosis and selective abortion]. Stockholm: Sesam).


\textsuperscript{616} Physicians Saltvedt and Bui discuss, in a medical journal, nuchal translucency measurement in terms of autonomy depending on adequate information. They contend that an important precondition for prenatal diagnosis for the early detection of Down syndrome is that the autonomy of the affected individuals is not violated. Prenatal diagnosis is only an offer, not a demand, made by society. The opportunities and limitations of nuchal translucency measurement have to be explicated via adequate information. According to Saltvedt and Bui, it is difficult for parents to take in the whole picture before the first test is carried out (Saltvedt, Sissel och Bui, The-Hung (2001). 'Mätning av nackuppkärning för tidig upptäckt av Down syndrom' [Nuchal translucency screening for the early detection of Down syndrome], Läkartidningen 50).
recommendation to extend the trials using the combination test and no changes in clinical practice are proposed, is based upon skepticism regarding whether or not the autonomy of pregnant women can be ensured. She may feel that the test is recommended and hence she may not be in a position to make a free decision. Furthermore, it would be difficult to provide information about the different alternatives.

7. 4 ‘Limits of medicine’: heading toward liberal eugenics?

In the Swedish discussion regarding the question of which indications should apply to prenatal diagnosis, philosopher Torbjörn Tännö plays a prominent role. Some have accused him of defending what can be called liberal eugenics; others welcome his defense of the woman’s freedom to choose prenatal diagnosis according to her plans. According to Tännö, in a newspaper article, prospective parents should be able to get all the information possible concerning afflictions leading to disability and disease. Parents should then decide whether or not to give birth to the child. Tännö’s interpretive framework consists, in the article and in a monograph, of the notions of happiness and suffering. Limits regarding which information parents get should only be economical and practical. The reason that Tännö provides to support his liberal judgment is that the happiness of the child and the parents can be safeguarded by free selective abortion:

Most importantly, as with free abortion in general, selective abortion makes it possible for the children who are born to be wanted as much as possible. This guarantees the happiness of the child and the parents.

Tännö argues that a pregnant woman who chooses selective abortion does not need to consider that the life she does not choose is less valuable than no life at all. What she must suppose is that the life that is not chosen is worse than a life in general. A pregnant woman who decides not to give birth to a deaf child must consider that a life as a deaf child is worse than a life as a hearing child.

In a monograph, Tännö argues that, in some cases, it may be in the interests of the fetus not to be born. This is the case when the child has a severe, untreatable, disease that entails severe suffering. According to Tännö, we ought to use the opportunity for prenatal diagnosis in such cases. He supports his judgment using an appeal to the hedonistic utilitarianism of Bentham. It is important that we experience happiness and do not suffer or experience pain. From a hedonistic point of view, it can be argued that the life of an individual with Krabbe’s disease is derived from meaning:


618 Krabbe’s disease is a progressive brain disease with a life expectancy of 2-3 years.
What I mean when I argue that it can be in the interest of the fetus to be aborted is that the life of the fetus, were it to be born, would be such that, for the individual who had to live, it would have been better not to have lived at all.\textsuperscript{619}

This hedonistic position entails, for Tännö, however, that it is not in the interest of the fetus with Down Syndrome not to be born. This is due to the mentally disabled having the same opportunities to realize happiness and satisfaction. Still, Tännö does not want to infringe on the rights of the woman to choose prenatal diagnosis, for whatever reason. As in the newspaper article, Tännö argues for free selective abortion. The alternative would, in the view of Tännö, be a list of indications for prenatal diagnosis.\textsuperscript{620} However, if society formulates a list, it will have to take a stance regarding difficult moral questions. Society has to take a stance regarding the question of whether selective abortion, from the point of view of the interests of the fetus, is justified. Furthermore, society has to decide whether or not it is reasonable to abort a fetus that has a disease that limits life. Society must also take a stance regarding the question of whether or not the will of the woman not to give birth to a child with a disability or disease constitutes a sufficient reason for abortion.

In another newspaper article, Tännö gives an example of his liberal view of prenatal diagnosis in arguing that society should allow women to choose abortion when the fetus does not have the desired sex.\textsuperscript{621} Tännö argues that the reason


\textsuperscript{620} In the White Paper on prenatal diagnosis, it is argued that a dilemma arises when one seeks to formulate such a list. Should one choose afflictions that cause severe physical suffering for the individual? The questions are difficult to answer since Down syndrome would not be included. It is argued that prenatal diagnosis should only be used in case of severe disability or disease, not in order to determine, for instance, the sex of the child (Utređenjem om det ofödda barnet (1989). Den gravida kvinnan och fostret - två individer. Om fosterdiagnostik. Om sena aborter [The pregnant woman and the fetus - two individuals. On prenatal diagnosis. On late abortions], SOU 1989:1).

\textsuperscript{621} Geneticist Wahlström is of the opinion that there are limits to self-determination as far as, for instance, gender selection is concerned. He argues, contrary to Tännö, that the risk exists that prenatal diagnosis will lead to race hygiene if the diagnosis of traits is allowed. The boundary between traits and disease is not, however, self-evident and has to be discussed in particular cases (Wahlström, Jan. ‘Avstå från genetisk diagnostik av egenskaper ’ [Refrain from the genetic diagnosis of traits], Göteborgs Posten July 14, 1996). Physician Moldin and curator Broo-Johansson are also opposed to gender selection, of which they have personal experience. These abortions evoke strong emotions in the personnel involved, and they consider them to be a moral provocation of our basic values. In the experience of Moldin and Broo-Johansson, no one wants to perform these abortions; a moral boundary seems to have been overstepped (Moldin, Per och Broo-Johansson, Lotta. ’Oönskat kön ofta orsak till abort’ [Unwanted sex often the reason for abortion], Dagens Nyheter June 24, 1998). In a Social Democratic Bill put before Parliament, there are arguments for changes to the law in view of the determination of sex using prenatal diagnosis. The woman is thus able to decide to have an abortion on other than strictly medical grounds. A ban should be introduced to prevent information about the sexe of the fetus being given before the 25th week of pregnancy (Israelson, Margareta et al. (s) ‘Fosterdiagnostik’. Motion till riksdagen 1993/94: So488 [Prenatal diagnosis. Parliamentary Bill]). Like the Social Democratic Party, the Liberal-Conservative Alliance wants a ban on gender selection, in a Parliamentary Bill. According to the Alliance, in case legislation is lacking, Parliament and the Government show that gender selection is acceptable to society. There is thus a political consensus, at least as far as the Social Democratic Party and the Liberal-Conservative Alliance are concerned, that prenatal diagnosis for
society should offer women the opportunity to determine sex is that there is a demand from individuals for such a determination, and that such a determination is possible without risk. An example of such a demand for sex determination is when a woman is at risk of sustaining an injury when she does not give birth to a son:

It is not a societal question to decide whether, in an individual case, there are sufficient grounds for abortion. That decision should be the woman’s.\(^{622}\)

Tännsjö notes that there are proposals to allow prenatal diagnosis for certain indications but to ban others.\(^{623}\) He opposes such proposals since society would, using such a list, take a stance on the question of what makes a human life valuable (this is what the Nazis would have done).

We see that Tännsjö supports his liberal, permissive judgment that the woman should be free to use prenatal diagnosis for whatever reason by means of utilitarian reasoning. According to Tännsjö, a liberal position would result in an enhancement of happiness: a healthy child that is born is more wanted than a child with an affliction. Furthermore, a liberal position would have the consequence of a reduction in suffering, which, for Tännsjö, can be defended from a moral point of view. There would even be a duty to prevent a life of suffering. Society should not decide the indications for which prenatal diagnosis should be allowed or not, since this would entail a decision regarding which lives are valuable.

Tännsjö’s position is criticized by journalist Yrsa Stenius since it would unburden us from our consciences. One need not be a utilitarian philosopher to ask questions about what the meaning of giving birth to a child with a severe disease or disability is. Stenius is critical of Tännsjö’s assumption that it is possible to value human life objectively, and to measure the amount of happiness:

Torbjörn Tännsjö’s ethics is about unburdening us from our consciences and making us believe that we are doing the right thing when we are doing the wrong thing. […] Life is such a tragic place that we are forced to do the wrong thing sometimes. Choosing to do the wrong thing.\(^{624}\)

gender selection should not be allowed (Fridén, Lennart (m). ‘Könsaborter’. Motion till riksdagen 200/01: S0260 [Sex-selective abortions. Parliamentary Bill]).


\(^{623}\) According to Tännsjö, the same argument as for gender selection applies to the determination of homosexuality. If research were to make it possible to determine whether or not the fetus had a predisposition toward homosexuality, Tännsjö argues that it should be possible for individuals to choose sexual predisposition. If there is a ban on gender selection or on the selection of sexual predisposition and not regarding mental disability, then the message is that the problem is having a mental disability (Tännsjö, Torbjörn. ‘Välj om barnet ska bli homosexuellt!’ [Choose whether the child will be homosexual], Dagens Nyheter March 22, 1998).

Philosopher Eduardo Pérez-Bercoff defends, in a journal, the position of Tännö while criticizing the criticism of Stenius. He rhetorically asks whether or not Stenius believes that we are unburdened from responsibility for our actions when we deliberately choose to ignore the risks we expose someone to:

In criticizing Tännö, Yrsa Stenius’ problem is that she does not want to accept his argument: i.e. that our responsibility requires of us that we try to get to know, beforehand, as much as possible about the consequences of our actions.\footnote{My translation: ‘Då Yrsa Stenius angriper Tännö är hennes problem att hon inte vill acceptera hans grundtes: att vårt ansvar kräver av oss att vi på förhand försöker ta reda på så mycket som möjligt om våra handlingars konsekvenser’. Pérez-Bercoff, Eduardo (1991: 114). ‘Fosterdiagnostik och aborter. Till Tännöfs försvar’ [Prenatal diagnosis and abortions. In defense of Tännö], Clarté 1/2.}

According to Pérez-Bercoff, Tännö clarifies the fact that abortion is not only a question concerning the mother or father, but also the future child. Rather than unburdening us from our consciences, Tännö wants to make us conscious of the duty to respect the suffering of the future child. Pérez-Bercoff thus implicitly refers to the suffering of the future child which can be prevented using prenatal diagnosis. Editor Hans Isaksson to a certain extent agrees, in the same journal, with Pérez-Bercoff:

Ignorance is not an argument […] I agree in general that she who considers abortion rationally cannot be without knowledge about an aberration of the fetus.\footnote{My translation: ‘Okunskap är inget argument […] Jag är allmänt införståd med att den som skall överväga abort rationellt inte kan undvika kunskapen om fostrets sjukdomsanlag’. Isaksson, Hans (1991: 120). ‘Fosterdiagnostik och aborter. Jag håller på Alf Svensson’ [Prenatal diagnosis. I agree with Alf Svensson], Clarté 1/2.}

However, contrary to Tännö, Isaksson believes that prenatal diagnosis cannot be judged without taking the society in which the knowledge will be used into consideration. Pérez-Bercoff does not, in his view, deal with the problem of formulating clear limits for prenatal diagnosis. Isaksson points to the social context in which decisions about prenatal diagnosis are made.

Stenius’ criticism of Tännö’s position is not based upon an argument with Tännö regarding the justifiability of prenatal diagnosis, she supports prenatal diagnosis, but about the moral justification of Tännö of prenatal diagnosis. According to her, prenatal diagnosis entails a moral dilemma that affects our conscience: even if we choose prenatal diagnosis, this does not unequivocally entail that we are doing the right thing. According to Pérez-Bercoff, there is an unequivocal justification of prenatal diagnosis, particularly of prenatal diagnosis for severe afflictions, and he agrees with Tännö that we have a responsibility to avoid suffering in the future child. Isaksson does not, in principle, disagree with Pérez-Bercoff, he claims that a rational stance entails that using knowledge of affliction rather than being ignorant. He is more reluctant than Pérez-Bercoff, however, when considering the context in which decisions about prenatal diagnosis are made and stresses the need for limits to prenatal diagnosis, contrary to Tännö.


In a newspaper article, the leader of the Christian Democratic Party, Alf Svensson, condemns the liberal position taken by Tännsjö regarding prenatal diagnosis, which he interprets in terms of race hygiene. According to Svensson, it should not be possible that universities teach race hygiene:

Does it not matter if it were the case that, from Swedish platforms, opinions were defended which could be characterized as elitism? In that case, democracy in Sweden would be in jeopardy.627

Svensson defends a democratic view of human beings which entails that all human beings regardless of race, sex, age, intellect, and disability are entitled to human dignity and have a right to life. Democracy requires a view of human beings which entails that the weak have the same right to life as the strong, that anti-Semitism, racism, and race hygiene which grade human dignity are condemned. While race hygiene is traditionally connected with state intervention, Svensson thus argues that Tännsjö’s plea for a liberal stance on prenatal diagnosis may also lead to another kind of race hygiene, or what is called liberal eugenics. In a later Bill put before Parliament, the Christian Democratic Party provides proof of the restrictive stance defended by Svensson. The party wants to restrict prenatal diagnosis to serious hereditary diseases leading to early death. The development of prenatal diagnosis should be guided by moral considerations using the principle of human dignity as a ground:

In this development, the utilization of prenatal diagnosis should not be governed by technological opportunities but by moral considerations using the principle of human dignity as a foundation.628

According to the party, however, prenatal diagnosis is used to diagnose diseases and disabilities that are reconcilable with a good life. Abortions are allowed by the National Board of Health and Welfare in the case of Down Syndrome or if a hand is missing. The same restrictions that apply to pre-implantation genetic diagnosis should also apply to prenatal diagnosis.

Like the disability federation, as we have seen in the discussion on attitudes to the disabled, Svensson is opposed to what is called the grading of human dignity through the use of prenatal diagnosis. Prenatal diagnosis is, for him, on a par with elitism and race hygiene. The party wants to restrict the use of prenatal diagnosis but takes a very restrictive stance: prenatal diagnosis is only justifiable in case of severe disease leading to early death. The restrictive judgment of the Christian Democratic

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Party is based upon the conviction that the use of prenatal diagnosis is contrary to human dignity.

The Swedish Society of Medicine has formulated guidelines regarding indications for which prenatal diagnosis should be allowed. According to the Society, the rapid development of DNA diagnosis entails that it is not only possible to diagnose severe afflictions, but also less severe or treatable ones. The Society discusses regulation. It is argued that the HUGO project enables the identification of afflictions and traits that are not related to disease. 629 The new problems should be discussed in order to allow medical and ethical considerations to govern development, rather than technological and economic opportunities. Society should, via its responsible bodies, formulate guidelines for the use of prenatal diagnosis. Such guidelines entail limits to the self-determination of women:

The right of the woman to decide when and if she will give birth to a child does not entail an unlimited right to decide what kind of child she will give birth to. In such cases, the prenatal diagnosis, not only of life-threatening diseases and aberrations of the fetus but also of mild disabilities and treatable diseases, or traits within normal variation, would be legitimized. 630

The guidelines of the Society entail that prenatal diagnosis may be offered if treatment is possible; if untreatable afflictions can be detected which lead to severe suffering and early death; if diseases or disabilities can be detected which manifest themselves early and entail severe chronic disability; and, finally, when caring for the child demands too much of the parents. Pre-implantation genetic diagnosis should only be used in cases of severe, progressive, genetic diseases leading to early death, and when no cure exists. According to the Society, it is, in many cases, difficult to predict whether the child will suffer more than other individuals. In the case of ultrasonography, a change in the indications can be relevant since it is possible to screen for abnormalities.

Even more difficult is the situation in which prenatal diagnosis is carried out using a blood test. The Society thus has, in some cases, restrictive guidelines; afflictions leading to severe suffering and early death, or severe chronic disabilities. 631 However, prenatal diagnosis may also be offered to parents who

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629 Whereas HUGO as an organization still exists, the mapping of the human genome - the main aim of the Human Genome Project - has been completed by 2003.


631 The Society does not discuss prenatal diagnosis regarding late onset diseases. Geneticist Wahlström et al. formulate moral guidelines for Huntington disease with a late onset in life. The prenatal diagnosis of Huntington is possible, namely. Two questions are raised: is it an advantage or a disadvantage to know early on in life that one at the age of 25-40 will contract a severe disease; is it justifiable to carry out prenatal diagnosis regarding the disease? (Wahlström, Jan et al. (1992). 'Prediktiv och prenatal diagnostik av
expect that their child may be too huge a burden. The judgment of the Society is thus ambiguous: on the one hand, society’s responsible bodies should govern the use of prenatal diagnosis and limit the use to afflictions that entail severe suffering and severe chronic disabilities; on the other hand, it is the parents who decide what the indications of prenatal diagnosis are on the basis of what they can cope with. It is the parents, and not society, who decide what a severe affliction is and what it is not. Prenatal diagnosis should not be utilized for any indication whatsoever, and, in this respect, the guidelines of the Society are contrary to the reasoning of Tännström. We see that the moderate-permissive judgment of the Society is predominantly based upon the argument that suffering should be prevented; the indications which apply are those which may prevent suffering.

Huntingtons sjukdom - etiska riktlinjer’ [Predictive and prenatal diagnosis of Huntington disease - ethical guidelines], Läkartidningen 25).
CHAPTER 8

Judging considered

We have considered public discourse in the Netherlands and Sweden. In this chapter, I shall address the question, on the basis of the empirical inquiry, of whether there is, at least, a prospect of internal development in public deliberation or whether public discourse will merely reflect irreconcilable disagreement.

This is an examination of the claim by Engelhardt that rational communication is not likely since we have moral premises that are too different and are unable to arrive at a fundamental normative consensus. If such a consensus is unlikely - and initial judgments are unchanged following deliberation and fixed - we can, at least, examine whether or not public deliberation can lead to a compromise. In my view, when there is a political necessity to agree on a compromise, public deliberation is indispensable when it comes to ensuring the democratic legitimacy of decisions. Public deliberation is not only a matter of the public political sphere but also of the informal public sphere: in order to know whether a judgment is justifiable in the public sphere, a question which is relevant to all concerned, we need to deliberate.

I have argued that giving and asking for normative reasons and aiming at impartiality of judgment are appropriate conditions of public deliberation. If we want to give and ask for normative reasons for our judgments, the question is how we can start on the basis of different interpretive frameworks. These not only include different principles, there are also different interpretations of principles. We have interpretive differences and we need to deal with them. I shall examine which interpretive differences exist.

In addition, I discuss the possible role of impartiality of judgment in public deliberation. We judge in order to have adequate representations of ‘the other’ who is affected. I shall consider the various representations of the fetus, the pregnant woman, future parents, and the disabled. In judging, we represent the other and we should, in my view, address the situation that there may be various potential representations.

I shall start by discussing the four thematic foci, whereby I consider both Dutch and Swedish public discourse in terms of the prospect of internal development in public deliberation, interpretive differences over principles, and the representation of ‘the other’. In the remainder of the chapter, discussion of the four thematic foci will be related to the question of which questions lend themselves to public deliberation.

The point of the chapter is to suggest what direction public deliberation could take: aiming at consensus or, if this is unlikely, compromise, as well as, at least, mutual respect. Addressing our interpretive differences - in order to have common understandings of them - and diverging representations of ‘the other’ - in order to have adequate representations - may contribute to these aims regarding public
deliberation. While I discuss these questions in relation to the public discourse on prenatal diagnosis and screening, I believe that the analysis is also of relevance to thinking about deliberation on other moral and political questions that are characterized by discussion about principles and where an ‘other’ is concerned.

8.1 ‘The unborn life’: irreconcilable disagreement?

Making judgments

At first glance, we could expect irreconcilable disagreement with regard to the first thematic focus in the prenatal diagnosis discourse, the unborn life. This is the disagreement Engelhardt speaks of in terms of postmodern moral diversity which lies in the way of reaching fundamental normative consensus. Given the disagreement regarding abortion in general, selective abortion is likely to arouse conflicting viewpoints. As we have seen, there is clearly a plurality of viewpoints concerning this issue. However, do we merely have conflicting, irreconcilable, premises that stand in the way of consensus or compromise?

We have seen that there are not only restrictive but also even moderate-restrictive, and not just permissive but even moderate-permissive judgments in Dutch and Swedish public discourse. It is, in my view, this plurality of judgments - not merely permissive and restrictive - that gives us reason to examine the claim that we cannot deliberate in a rational way critically. If there were merely fixed permissive or restrictive judgments, the prospect of public deliberation could be compromised. Moderate judgments can also be fixed. However, with the presence of moderate judgments, deliberation is not merely framed in terms of viewpoints of the mere opponents and proponents who, following Engelhardt, have moral premises that are too diverging to be able to deliberate.

Let us consider the different judgments in some detail. We have seen that a principled restrictive judgment - selective abortion is to be rejected with regard to the status of the fetus - and a pragmatic moderate-restrictive judgment - selective abortion has to be restricted to severe afflictions - are defended. This can be compared with the view that the inviolability of human life and human dignity entail abortion having to be rejected categorically - thus a restrictive judgment is defended - on the one hand, while at the same time there is a moderate-restrictive judgment that is defended by making a distinction between developed and undeveloped life. In both cases, both a principled stance and a more pragmatic one are defended.

It seems that the tough consequences of a merely restrictive stance are eschewed, given the existing practice of abortion in the Netherlands and Sweden. Protection of the fetus is endorsed, but it is argued that, in some cases, it can be outweighed by considerations concerning quality of life. However, there are even purely restrictive, principled, judgments based on the principle of the protection of life in Dutch discourse, the principle of the human dignity of the fetus in Swedish discourse, the intrinsic right to life, or the sanctity of life. Another judgment that is defended is
that abortion is intrinsically wrong but that selective abortion can, in some cases, be defended.

Many who defend permissive or moderate-permissive judgments refer either implicitly or explicitly to a doctrine of growing protectability. Even though it is not always made explicit which value is assigned to the early fetus, a distinction is made between ‘not yet human beings’ and human beings who are entitled to full protection in order to justify selective abortion. A concept that is connected with growing protectability is potentiality - often related to a permissive judgment with regard to abortion in general and selective abortions in general - or potency. We see that even considerations of the quality of life, protection of the fetus and suffering are weighed in moderate-permissive judgments. Considerations regarding the prevention of suffering and enhancing happiness are related to permissive judgments.

We can ask, at this point, whether we have premises that are too different to deliberate. This would particularly be the case with merely restrictive judgments related, say, to the doctrine of absolute protection of the fetus or human dignity, and permissive judgments concerning, say, the suffering of the future child. However, not only are permissive and restrictive judgments to be found in Dutch and Swedish public discourse, but also moderate judgments.

Given the plurality of judgments that we have encountered, public deliberation seems, in principle, to be a possibility. This would not merely be a mirroring of irreconcilable disagreement. There have been at least several attempts to overcome such disagreement, for instance by suggesting that the fetus is (to a certain) extent protectable while the quality of life should be considered, on the other hand, or by invoking the distinction between undeveloped and developed life. In this sense, the discussion about selective abortion differs from the irreconcilable disagreement concerning abortion in general between mere opponents and proponents.

We have seen, for instance, that compromise positions are defended in both Dutch and Swedish public discourse - entailing that prenatal diagnosis is allowed, with exceptions, even though such positions may still be controversial for those who make restrictive and permissive judgments. Those adopting a permissive stance may ask whether one should say anything at all about the fetus in a pluralist society containing different ‘comprehensive doctrines’. Furthermore, the question of whether there should be exceptions where prenatal diagnosis should not be allowed is in itself controversial, as we have seen in the discussion on the limits of medicine.

**Interpreting principles**

We have encountered a number of different principles and frameworks, not only in, but even in between the two countries whose public discourse is under study. If we want to give normative reasons for our judgments, and this is the point of ethico-political judgment, we should be clear about the meaning of principles in these reasons. Since normative reasons are prescriptive, universal and internal, principles
should at least apply to all. Principles can, in this sense, be related to the Kantian moral law from which normative reasons, reasons including moral principles, are derived.

We have seen that interpretative frameworks often indicate the judgment being made. Thus, if the notion of the protection of human life is endorsed, we can expect a restrictive judgment. This also applies to the principle of nonmaleficence or quality of life related to a permissive judgment. There are also frameworks with several principles. Are there, as far as the principles we encountered are concerned, interpretive differences, or is the meaning of these principles pretty clear? There are indeed, I suggest, interpretive differences which should be discussed further.

Starting with the notion of protectability, we can ask whether we mean absolute or relative protection of the fetus. When we think of the notion of the protection of human life, regardless of the stage of development, absolute protection is meant. The fetus, as a potential human being, but particularly as an already-existing human life, has a right to protection. Prenatal diagnosis is opposed on principled grounds. However, even those subscribing to the notion of growing protectability, the view that there is a potency, or an analogy, between seed and tree, seem to suggest that the fetus is in some sense protectable, although not as protectable as a newborn child. There is a development of the fetus. Yet, what it is that makes the fetus protectable to a certain extent is not often expressed; also, it is not always clear whether we speak of moral or legal protectability.

Thus, the discussion is sometimes framed in terms of absolute protectability and growing protectability. Per se, these notions are not moral principles, although in the Netherlands, in one case, they are related to human dignity. We also find the principle of human dignity in Swedish discourse where opponents of selective abortion speak of human dignity. In accordance with this principle, human beings have universal human rights. It is assumed that also the fetus is entitled to such rights. Selective abortion may also entail human dignity being graded. The fact that human dignity might not, as a matter of fact, be the guiding principle is observed in view of the serious consequences. If human dignity were to apply to the fetus, abortion could never be justified at all. The role of human dignity in the debate can be compared with the absolute protectability of the fetus: the fetus is the bearer of rights that are inviolable.

Quality of life and the prevention of suffering are notions referred to by those defending moderate or permissive judgments. It is assumed that quality of life is poor in the case of suffering. Quality of life is a criterion used to determine whether or not the protection of life can be compromised. Poor quality of life is closely related to the expected suffering of the future child. Unlike in Swedish discourse, where preventing suffering or acting in accordance with the principle of nonmaleficence leads to permissive judgments, the notion of quality of life in Dutch discourse has led to moderate judgments.

With regard to the criterion of suffering, we can ask who decides what quality of life is. As we have seen in the discussion on the limits of medicine, some suggest that we should distinguish between ‘severe’ and ‘less severe’. Given the emphasis on
the self-determination of the woman, and the expectation that future parents themselves want to prevent suffering, there seems to be agreement among those who make permissive or moderate-permissive judgments that this is a question where individuals should decide: the suffering of the future child cannot be defined objectively.

I conclude by observing that the notions and principles of (growing) protectability, human dignity, suffering and quality of life do not have an unequivocal meaning and role in public discourse. For instance, can human dignity be related to a judgment that allows at least some selective abortions? If yes, what do we mean by human dignity in this case? What do we mean when we say that the fetus is growingly protectable? Do we only have a duty towards a fully protectable fetus or also towards a less developed fetus in such cases? These questions remain to be discussed in public deliberation, if, at least, we wish to improve on the justifications for our judgment.

Representing ‘the other’

In public discourse, we encounter various representations of the fetus as ‘an other’. In Dutch discourse, we encountered the view that the fetus is protectable from conception. The fetus has the status of a human being who has to be protected and is also, in the Swedish case, an individual, like the mother, who has human dignity. Just why this is the case is often implicit. We can sometimes assume that the metaphysical understanding of the fetus is related to a religious worldview. This is, of course, plausible when representatives of churches participate in the discussion. The assumption that the fetus is a human being is not, of course, uncontroversial. Indeed, much discussion concerning the status of the fetus concerns the question of whether or not we can speak of human life and whether there is a morally significant distinction between the unborn and born life.

It is called into question whether the view that the fetus is a human being is the only defendable view of the fetus. Contrary to those who hold that the fetus is a human being, or a human life, some speak of the fetus as a potential human being, having certain rights which grow as the fetus approaches the status of becoming a person or acquires a capacity for consciousness in the third trimester. In the latter respect, we indeed see that a scientific view is defended. The fetus may possibly develop human capacities such as feeling pain or having consciousness. Here too, a scientific view informs the discussion about what a fetus is.

We also find the view that the fetus is germinating life with inherent possibilities. Here, there is no talk of the status of the fetus, but of being ascribed with value from conception. We can speak of the fetus in terms of the inviolability of life in a different way than the inviolability of developed life. The fetus is, however, vulnerable and in need of more protection than the autonomous mother. This view can be contrasted with the view that the value of the fetus is only dependent on the
relationships one has with the fetus. The relation, which can be reinforced by ultrasonography, depends on the fetus developing.

The fetus is represented in several ways but, not often, the underlying assumptions behind the representation are made explicit. Do we invoke scientific understandings of the fetus or metaphysical worldviews? And what role can such understandings have in a pluralist society? Does the fetus have value even before developing consciousness and before we acquire a personal relationship with the fetus reinforced by ultrasonography? What are the grounds for considering the fetus in terms of human dignity? These questions are related to the ones raised in regard to the role of principles in interpretative frameworks. Much as we have interpretive differences - and a need to clarify what a principle means when applied to the discussion about prenatal diagnosis - we need an understanding of the different ways the fetus is represented.

8.2 ‘Attitudes toward the disabled’: a role for experience?

Making judgments

Do attitudes toward disabled people change due to the clinical introduction of new techniques for prenatal diagnosis? It could be argued that this is an empirical question, although difficult to examine. It is argued that the disabled have reason to feel offended by prenatal diagnosis. This is, in fact, a question that can be answered by disabled people themselves. If there are implications for disabled people, the question will be, in that case, how we can formulate a public course of action that deals with their concerns.

As with the discussion about unborn life, there are several judgments in public discourse: judgments with regard to whether prenatal diagnosis should be allowed or not, this with regard to potentially changing attitudes towards the disabled and disability. There is a moderate judgment which states that a eugenics policy - taking the perspective of a society without disabled people - is offensive to the disabled. There is a permissive judgment entailing that prenatal diagnosis involves no value judgment regarding the disabled since the value of a life is the value to the person who lives it. This is questioned in a moderate judgment: the disabled may feel offended.

As we have seen, many disability organizations in Sweden defend restrictive judgments concerning prenatal diagnosis which in turn elicited permissive judgments: the disability organizations should not be privileged with determining society’s stance concerning prenatal diagnosis. The discussion about attitudes toward the disabled shows that irreconcilable disagreement exists, even though some disability organizations do not deny the right of the woman to choose prenatal diagnosis if she experiences distress.

Seen in this light, the question of the extent to which the practice of prenatal diagnosis entails value judgments is raised. A relevant question to be addressed in
public deliberation could be how to accommodate the critique of disability organizations by shaping a public course of action. There is a persisting critique of ‘grading prenatal diagnosis’ that affects equal human value and the question that is raised is how to cope with value judgments, at least if these exist.

Interpreting principles

We have seen that disability organizations argue that prenatal diagnosis is contrary to human dignity, or equal human value. All human beings have a value that is inviolable. A distinction is made between abortion in general and selective abortion - abortion due to diagnosing a fetus with an aberration. The equality of people with and without a disability would be compromised in the case of selective abortion.

As with discussion about the unborn life, the principle of human dignity needs to be interpreted, in my view, to a greater extent when applied to prenatal diagnosis. It is an important principle but its relevance is not wholly clear. What is meant is that society, by allowing prenatal diagnosis, is sending a message to currently disabled people that they are not welcome anymore. There is a fear of an elitist society: a fear that is relativized by some. Even though the discussion in Sweden is not framed in terms of value judgments, we can assume that disability organizations feel offended by the practice of prenatal diagnosis. Still, the role of the principle of human dignity per se is questioned by the debate on prenatal diagnosis.

We have seen that some argue that disability is a social construction and that suffering is not inherent in having a disability. Political prioritization would be a solution. The effect of disability could be compensated for. This discussion is also taking place in the case of the limits of medicine: the indications for which prenatal diagnosis should be allowed. Suffering would not be such a problem when emancipation of the disabled occurs, much like women have improved their chances. Given that the prevention of suffering is an important principle for those who defend prenatal diagnosis, and given that some question whether or not disability inherently entails suffering, we need to address this interpretive difference.

Are prospective parents who choose to abort a fetus with an aberration sending a message to disabled people that they would not have been welcome had prenatal diagnosis been possible in their case? The question of value judgments reveals that there are also interpretive differences over what we mean by whether or not disabled people are offended by such a judgment. Interpretation is needed.

Prospective parents may, in fact, declare their sympathy for people with a disability while at the same time believing that they cannot cope with a disabled child, or that the quality of life of such a child would be poor. Still, and this is a matter of interpreting the choice made by the parents, disabled people may feel offended by their choice. This is, ultimately, a question of conversation regarding individual experiences of having a disability. Since we cannot know the experience of the other, as other, by merely thinking from his or her standpoint, there is an argument for public deliberation in which experiences have a role to play. Indeed,
several assumptions are made about what it means to have a disability which stress the importance of deliberation.

Representing 'the other'

There will always be disabled people: that is the point made in Dutch discourse. Disability, e.g. blindness, would not make a decent life impossible. This is, in fact, an interpretation of what it means to have a disability. Being disabled would be a fate: here, a representation of what it means to have a disability is apparent. People with a disability measure their lives by different standards than do people without a disability. People with a disability have to overcome more barriers. Actual disabled people have reason, it has been argued, to feel offended.

I have already discussed the fact that some believe that being disabled is a social construction - this representation of having a disability has been discussed in both Dutch and Swedish discourse. If there were equal rights and opportunities for disabled people, then disability would be less of a problem. Disability is only a disadvantage in an unfortunate situation. This situation could, however, be adapted. Swedish disability organizations argue that suffering is caused by society not offering sufficient care to people with disabilities. Furthermore, disability is a problem because of dominant attitudes and views of the good. Implicitly, it has been suggested that dominant attitudes may change due to the introduction of prenatal diagnosis.

In my view, there are good reasons to deliberate on these representations of what it means to have a disability. Do all the disabled subscribe to the view that having a disability is a social construction? It has been argued that only those with a disability know their lives are valuable and good. The ‘disabled other’ can be represented in several ways, and the possible representations could be a topic for public deliberation.

In deliberation, we may attempt to enhance our understanding of what it means to have a disability and why (some) disabled people feel offended and regard the choice of prenatal diagnosis as a value judgment regarding their lives. At the same time, our understanding of why prospective parents choose selective abortion may also be enhanced. If there are good arguments on both sides, public deliberation is relevant. I have argued that tolerance is a virtue connected with public deliberation. We do not merely tolerate the viewpoints and acts of the other but aim toward an understanding of ‘the other’, by adopting a tolerant attitude.
8.3 ‘Implications of new choices’: agreement about autonomy?

Making judgments

The development of more efficient techniques for prenatal screening is largely international. This development raises the question of whether prenatal screening should become an option for women and their partners. What is technically possible is not always regarded as justifiable. We thus find different kinds of judgments in Dutch and Swedish discourse.

Permissive judgments are based upon the claim that many women desire screening, even though the experience of pregnancy may change. Both in Dutch and Swedish discourse, those who hold permissive and restrictive judgments address, among others, the question of whether or not autonomy can be secured. Proponents argue that respect for autonomy is a justification of a permissive stance while opponents claim that women are not, in fact, autonomous. There are not just permissive and restrictive stances but also moderate ones. For instance, it is argued, that prenatal screening should not be offered to pregnant women and their partners and that only information should be provided. This is the official stance, in the political arena, in both the Netherlands and Sweden. There is a certain reluctance as far as prenatal screening is concerned.

The reluctant stance, it has been argued, is patronizing. There should be an offer. At the same time, the issue of the difference between offering and providing information could be examined. This is an important distinction at the level of discussing a public course of action, given the reluctance surrounding screening; but in practice, it could be argued, the distinction is less significant.

It is important which reasons are given for moderate or restrictive judgments: it is not only the judgment that matters. If is argued that respect for autonomy cannot be secured, the principle is presupposed. If we could create a situation in which women and their partners can take an informed decision, a situation wherein respect for autonomy is guaranteed, then opponents would, by implication, accept that prenatal screening is being offered, or that information is being provided. When, on the other hand, it is argued that prenatal screening may entail a medicalization of pregnancy, reluctance will be more principled. The assumption can, of course, be discussed, but the discussion is not merely framed in terms of respect for autonomy.

Is public deliberation conceivable in the sense of an internal development of the discussion? The question concerning a public course of action is whether to offer or provide information on prenatal screening. Although prenatal screening has been introduced in a large number of countries, the question of whether or not autonomy can be ensured, it could be argued on the basis of public discourse, is still relevant. This is a relevant question for public deliberation. Other questions may concern the issue of when prenatal screening should be offered: screening is possible for more aberrations than Down Syndrome and neural tube defects. In my view, public deliberation is highly relevant as far as prenatal screening is concerned. Given that prenatal screening affects so many, there is a raison d’être for public deliberation.
Interpreting principles

Proponents defend prenatal screening on the basis of respect for autonomy: opponents claim that autonomy cannot be ensured. But how is the principle of respect for autonomy to be interpreted? Are there interpretive differences? This is indeed, in my view, the case. Screening would give couples the opportunity to act and make decisions concerning their lives and would reduce anxiety - they are being offered a choice. Implicitly, respect for autonomy is presupposed. Autonomy, on the other hand, would be compromised by external coercion from society, or the family. Furthermore, it has been argued that, if the offer is resisted then giving birth to a child with a disability would cause guilt.

The question is whether information will be comprehensive enough to ensure an autonomous decision. It is argued that prospective parents cannot take an informed decision since they do not know whether or not a possible affliction will be reconcilable with a decent life. It has, therefore, been argued that autonomy is easier to ensure when screening is offered to a smaller group (but this would conflict with the principle of justice). Also in this case, freedom of choice would be compromised since information given by doctors or midwives is coercive. Real freedom of choice, it has been argued, entails adequate, non-coercive, information about the pros and the cons being provided. In an official report, however, it has been argued that no easy method exist of guaranteeing that decisions are autonomous.

We encounter the principle of respect for autonomy as freedom of choice. This freedom is guaranteed when pregnant woman are offered screening and are able to make an informed choice. Autonomy would be compromised if screening were to be offered, rather than information being provided. It has been argued that autonomy is inherently relational: human beings are autonomous because they live in a society in which individuals respect each other as free and equal people. One cannot, on the other hand, have more or less autonomy.

In the discussion about prenatal screening, autonomy is predominantly interpreted in terms of freedom of choice and the opportunity to act and make decisions. Many argue that information is crucial for making autonomous choices. Whether or not giving such information is possible, and whether or not it is coercive, will determine the extent to which decisions can be autonomous. It could be asked whether or not the medicalization of pregnancy, if that were to be a consequence of offering prenatal screening, affects autonomy. This is implicitly suggested in Dutch discourse since life is merely regarded in terms of disease and health. Offering screening tests is not neutral. The argument that offering prenatal screening entails the medicalization of pregnancy frequently recurs in Dutch discourse. I shall consider the argument when discussing how the pregnant woman is represented. I conclude that there is reason to discuss our interpretive differences over autonomy - what do we mean by respect for autonomy and what does the principle mean when applied to prenatal screening - and medicalization?
Representing ‘the other’

There are several assumptions in public discourse concerning the experience of being pregnant. The pregnant woman is represented in various ways. She is regarded as autonomous in the sense of being able to make decisions, but also as experiencing a medicalized pregnancy. We have to ask what is meant by the expression the medicalization of pregnancy. It is argued by proponents that screening may lead to a more complicated experience of pregnancy. But, it is claimed, the majority of women would still prefer a test. On the other hand, others point to more ambivalence. Two Dutch women describe how the necessity to take decisions about the life or death of the child-in-becoming was suddenly raised during the pregnancy, giving them a new perspective on motherhood; is one allowed to decide upon questions of life and death? They wrestled intensively with the question of whether or not to undergo a prenatal test. Furthermore, a controllable life with help of screening would also be a medicalized life in which disease is in the hands of the experts. Decisions would be troublesome due to the negation of the tragic.

Medicalization is also, in an official context, referred to. Screening would entail a problematization of pregnancy. The natural process of being pregnant is placed within a medical framework. Furthermore, a natural approach to pregnancy is abandoned: women come under medical supervision. Lives are merely regarded in terms of disease and health. Pregnant women, and their partners, are confronted with the possibility of having a child with a serious disability or disease. They have to face the possible choice of terminating a pregnancy.

Even though the concept of medicalization is not referred to explicitly in Swedish discourse, similar concerns have been raised. It is argued that personal experiences are contrasted with a technical rationality. Women may feel uncertainty regarding the offer of prenatal diagnosis. Contrary to such concerns, it is argued that the anxiety of the great majority of pregnant women, because of the offer, would be outweighed by the fact that several hundred cases of severe suffering could be avoided due to the offer of prenatal screening.

What this means, in my view, is that there is a rationale for involving ‘the other’, the pregnant woman or the woman who considers a pregnancy in public deliberation. Is the claim that offering prenatal screening leads to a medicalization of pregnancy warranted, and how much of a problem is it? Is it true that the majority of women would prefer prenatal screening, even if their experience of pregnancy were to change? We need reasoned argument, also in this case. It can be asked, on the one hand, to which extent truly autonomous decisions are possible and, on the other, to which extent the argument regarding medicalization can play a role in public deliberation.
8.4 ‘The limits of medicine’: justifying limits?

Making judgments

Judgments concerning the question of ‘limits to medicine’ involve the question of whether or not there should be any restrictions concerning prenatal diagnosis. Should prenatal diagnosis be allowed, for whatever reason the woman has for choosing prenatal diagnosis, or should we distinguish between ‘severe’ and ‘less severe’ diseases and disabilities, if that were possible? The latter position could be regarded as a possible compromise between the opponents and proponents of prenatal diagnosis. We have seen, in the discussion about the unborn life, that several citizens, in Dutch and Swedish discourse, who are critical of selective abortion, given their view of the fetus, still support a policy allowing prenatal diagnosis for certain indications: i.e. severe disability and disease.

Public deliberation seems, therefore, to be possible in the case of ‘limits to medicine’ even though some people defend merely restrictive judgments which entail that prenatal diagnosis is not justified in any case. The question is whether or not it is desirable and possible to determine in which cases prenatal diagnosis can be justified. Or should it be the prospective parents who have the ultimate choice as regards whether or not they can cope, on basis of their experiences, with a child who has a disability or a disease?

In this respect, however, it has been suggested that we should have a list of the allowed indications. It has been argued that such a list is an impossibility, given the great clinical heterogeneity. Such a list would continuously be out-of-date. Or should we determine the cases where prenatal diagnosis is not allowed? It has been argued that it is not merely the parents who should decide whether or not to choose prenatal diagnosis. In some cases, they may even have a duty to prevent the suffering of the future child. This view has been criticized in Swedish discourse.

There seem to be ample questions for public deliberation, given the view that it may be a duty to choose prenatal diagnosis, in some cases. Furthermore, there could be an examination of how autonomous decisions are made based on individual experiences of having a child with a disability or disease. Some critics argue that we are going to create ‘the perfect child’. Is this concern warranted? Is it wrong to create ‘the perfect child’? If yes, how can we prevent such a tendency?

Interpreting principles

As with prenatal screening, the extent to which autonomous decisions are possible has been questioned. Prenatal diagnosis would not provide information about the severity of the afflictions caused by a genetic defect. A child being blind or having Down Syndrome would not say anything about the quality of that child’s life. This is, in fact, admitted by the proponents in the case for preventing the suffering of the future child: Down Syndrome would be reconcilable with a decent life. Still, the
choice should be made by the prospective parents who have to decide whether or not they can cope with a child who has a disease or a disability. There are several assumptions concerning respect for autonomy. On the one hand, it has been argued that information by means of prenatal diagnosis does not guarantee autonomous decisions. On the other hand, it has been argued that allowing couples to make a choice will result in the best consequences.

It has also been argued that we should distinguish between self-determination regarding abortion in general, due to the distress of the woman, and self-determination in the case of prenatal diagnosis. However, one could ask if this distinction is relevant given that the woman may suffer from distress if giving birth to a child with a disability or a disease. Contrary to this view, it is argued that it is only the prospective parents who can decide what they can or cannot cope with. Still, some people defend the stance that there should be limits to self-determination: society should determine guidelines.

Do we have a duty to prevent suffering? The question, in this case, is not merely whether the parents can cope with a child who has a disability or a disease, but whether or not they are obliged to choose selective abortion. The question is, of course, who can determine whether a disability or a disease entails suffering. While some people, as we have seen, argue for a list of indications regarding what is ‘severe’ and ‘less severe’, others argue that such is list is neither desirable nor possible. Few would deny, I assume, that there are cases where a disability or disease will lead to suffering and a poor quality of life. Prenatal diagnosis would be justified, at least in these cases. One could, however, ask to which extent a discussion about what is ‘severe’ and ‘less severe’ makes sense, given the emphasis on what the parents can cope with.

As with the discussion about attitudes toward the disabled, there seems to be a rationale for addressing interpretive differences over autonomy and preventing suffering in public deliberation. What will be required to enable autonomous decisions if we offer the opportunity for prenatal diagnosis to couples on the basis of the principle of respect for autonomy? When can we speak of the suffering of the disabled child, or should this question merely be left to the future parents?

Representing ‘the other’

As with prenatal screening, the question of whether the prospective parents can be represented as autonomous has been discussed in public discourse. They are autonomous when able to decide whether or not they can cope with a child who has a disability or disease. However, autonomy, it has been suggested, is only possible if parents are sufficiently informed regarding the question of what it means to have a child with a disability or a disease and whether this is reconcilable with a decent life. There are, thus, several representations of the prospective parents in terms of being more or less autonomous.
The extent to which prospective parents should be conscious of a possible duty to prevent suffering is also discussed. Ambivalence is sometimes stressed. It is argued that decisions concerning prenatal diagnosis are tragic: life is such a tragic place that we are forced to do the wrong thing sometimes.

I conclude that, also in the case of ‘limits to medicine’, several representations regarding the prospective parents have a role to play in public discourse. The development of prenatal diagnosis may even give them a responsibility to prevent suffering. Thus, technologies confront us with difficult choices. As with prenatal screening, information is required to ensure that autonomous decisions can be made, given that ‘severe’ and ‘less severe’ disabilities and diseases can be detected.

As with the discussion about implications of new choices, representations of future parents, in terms of being more or less autonomous, require public deliberation. I have suggested that we deliberate on our interpretive differences regarding autonomy and, in this sense, deliberation on various representations of future parents will also be relevant.

8.5 Judging and deliberation

I have suggested that there are ample questions to be discussed in public deliberation. The empirical inquiry shows that there is a plurality of judgments in public discourse. Plurality, however, does not merely mean that there are restrictive and permissive judgments. Plurality also entails that there are judgments that lie in between: moderate judgments that contain elements of both restrictive and permissive viewpoints. To say that the only relevant question is whether or not to allow a woman and her partner to choose prenatal diagnosis, as Engelhardt suggests, merely reinforces, in my view, the dichotomy between proponents and opponents. We need, in my view, a more nuanced view of plurality as a starting point for public deliberation in order to accommodate our differences. Only then will we be able to frame the discussion about prenatal diagnosis in terms other than irreconcilable disagreement.

We should, in my view, aim at consensus or compromise in public deliberation. Other merits of public deliberation include furthering mutual respect and tolerance in view of dissensus, if consensus or compromise are not to be had. The quest for consensus or compromise should not suppress the plurality of viewpoints - this plurality should be made visible during public deliberation. Plurality may stimulate public deliberation, at least when those who make conflicting judgments start to converse with each other. Starting out from an account of plurality, we can ask, while deliberating, whether or not we can accept the force of the better reason, and I have suggested that a normative reason is a good candidate for such a reason. This entails agreeing on a judgment. It may also be conceivable that, on the basis of our own judgment, we can accept a compromise that reconciles diverging judgments.

I have outlined the fact that internal development in the direction of agreement or compromise is well conceivable. Compromise positions include both permissive
and restrictive judgments. The outcome of public deliberation could, of course, also be a merely permissive or restrictive judgment being considered justifiable in the public sphere. Given the irreconcilability of restrictive and permissive judgments, it would seem, however, more likely that a moderate judgment, whether permissive or restrictive, turns out to be justifiable in the end.

But why would I, convinced that a merely permissive or restrictive judgment concerning prenatal diagnosis is right, concern myself with an attempt to design a compromise that is justifiable in the public sphere? This is because I might realize that a public course of action that is merely based upon a restrictive or permissive judgment is not justifiable given the disagreement existing in society. We need a public course of action that can be justified in the public sphere whereby citizens defend a spectrum of judgments.

Only then, when we can speak of public justifiability, can the course of action be said to be legitimate. I may, for instance, have an interest in influencing a moderate public course of action even though I suggest a merely permissive or restrictive course based upon my judgment of what is right. This is in the sense of defending this judgment in the public sphere where we have to come to an understanding concerning a public course of action, but where phronesis is also relevant (for instance, if the possibility of taking autonomous decisions has to be ensured or stigmatization of those with a disability has to be opposed). I may still believe that my permissive or restrictive judgment is right, but, as second best, I contribute toward forming a moderate public course of action.

I have suggested that we address our interpretive differences over principles and varying representations of ‘the other’. Why is this important in public deliberation? Many judgments are based upon moral principles. Moral principles that are referred to include respect for autonomy, protectability, the reduction of suffering, happiness, human dignity, equal human value, harm, the sanctity of life, beneficence, justice, and respect. These principles are related, in public discourse, to a public course of action.

It is in this context that various meanings of the principles are discussed. Autonomy can, as we have seen, have different meanings in the discussion: e.g. freedom of choice or the opportunity to take deliberate decisions based on comprehensive information. Whether or not disability entails suffering is also discussed, for instance. The mere meaning of suffering is called into question.

Addressing interpretive differences is not only a question of problematization: we may have a better understanding of the meaning of a principle when it is applied to moral and political questions. We can articulate what we mean using a principle with regard to questions such as prenatal diagnosis, in order to obtain a richer understanding of the principle in question. If we wish to give and ask for normative reasons, we will need adequate understandings of the principles at stake.

Giving and asking for normative reasons entails us reflecting upon our reasons and asking whether or not there is a law from which they can be derived. Given that a normative reason is prescriptive, universal and internal, such a reason is inconceivable without a moral principle. One reason may be, for instance, that
prenatal diagnosis is contrary to human dignity or that prenatal diagnosis is justifiable in view of respect for autonomy. In such cases, we have to be aware of the various meanings of principles. Only when we accommodate interpretive differences will we be able to claim universality for our reasons.

Not only do we have interpretive differences but also varying representations of ‘the other’. Also these should, in my view, be discussed in public deliberation. Like principles, representations of ‘the other’ play a role in reasoning. For instance, is the fetus a human being or a ‘not yet human being’? How should we proceed, given the various representations of the fetus, the disabled, the pregnant woman, future parents?

We should deliberate on the various representations at the extent to which this is possible with an important role for ‘the other’ in public deliberation. Public deliberation could contribute toward adequate representations. I have argued that representing ‘the other’ is a matter of impartiality of judgment. There are several possible representations: making ‘the other’ present is a matter of judgment. Impartiality entails us reflecting upon our own representation - and the judgment based upon it - by thinking on the basis of the standpoints of others.

Impartiality of judgment, however, involves more than aiming at adequate representations. We wish to legislate from a universal standpoint and, hence, to form normative reasons. Reasons from which a judgment is inferred include moral principles as well as representations of ‘the other’. Considering the reasons of others entails, among other things, considering various meanings of principles and various representations of ‘the other’. Shifting my ground to the standpoints of others entails me reflecting upon my own judgment and on the underlying reasons, including my own understanding of a principle and my own representation.

The point of this chapter has been to argue that we can aim at ethico-political judgment by addressing our interpretive differences and our varying representations of ‘the other’. I have examined how this is possible on the basis of the inquiry into public discourse. Another question I addressed was the prospect of internal development in public deliberation. My conclusion was that, in the case of prenatal diagnosis, such a development may well be possible. Public deliberation, rational communication, is not pointless, contrary to what Engelhardt believes. We can aim at Verständigung. If that is not to be had, we can deliberate on a justification of a compromise, a compromise which, in this way, can be defended in the public sphere. Rational communication matters, in the sense of developing an attitude of mutual respect and fostering tolerance, too.
Enhancing public deliberation

A vital public sphere is essential for the continued health of democracy because a flourishing civil society provides both a resource for future democratization of the state and a check against reversal of the state’s democratic commitments.632

I have suggested that we deliberate by giving and asking for normative reasons - external-collective deliberation - and by aiming at impartiality of judgment - internal-reflective deliberation. We need internal-reflective deliberation - which entails judging - as well as external-collective deliberation. This is, briefly, the point of part 1 of our inquiry. The concept of ethico-political judgment might give us an understanding of how we should deliberate. In part 2, we have been concerned with the question of how we actually do deliberate. The analysis of the inquiry into public discourse has focused on the prospect of deliberation, interpretive differences, and representations of ‘the other’. I have suggested that public deliberation on moral and political questions should address these differences and representations. In this chapter, the question of how we can enhance public deliberation is discussed.

A theoretical account of how to enhance public deliberation is not enough. We need to think of the deliberative practices through which we can share our reasons. In the first part of the chapter, the case for deliberative practices is considered and we will have a closer look at some of these practices. Then, I focus on the relation between ethics and public deliberation, given that ethicists frequently voice their concerns in public discourse and are, in my view, indispensable for public deliberation. I shall distinguish between ethical expertise and moral expertise. There is an important role for ethicists to play in public deliberation; however, in relation to political decision-making, it is important to involve several ethicists, given that ethicists themselves do not always agree on what a justifiable course of action is.

In conclusion, I develop the argument for deliberation in reaction to some of the criticisms of the idea that we should aim at more public deliberation in a democracy. I shall defend the ideal of ethico-political judgment in the face of these criticisms and discuss the relevance of a Kantian approach to public deliberation.

9.1 Shaping deliberative practices

As we have seen in the first chapter, the case for public deliberation is made by several defenders of what is called ‘deliberative democracy’. In my view, more deliberation is desirable but this has to be related to ongoing deliberations in parliament, in relation to ethical committees and advisory councils. The conclusion of the inquiry into public discourse is that we do deliberate in the public sphere, we give and ask for reasons in most cases, and there is discussion about what judgments are justifiable. The point of this chapter is to argue for enhanced public deliberation. Where should such deliberation take place?

One way of enlarging the public spheres, it has been suggested, is organized deliberative practices. The focus is often on deliberative practices concerning new technologies, which have received the most attention by far. There has been much interest in many countries in organizing consensus conferences or lay panels, entailing that citizens gather in order to deliberate on a question, often by consulting expertise. The formal goals of the consensus conference are twofold: to provide members of parliament and other decision-makers with the information resulting from the consensus conference; and to stimulate public discussion through media coverage of both the conference and the follow-up debates.633

Bernice Bovenkerk and Lonneke Poort discern three goals of (organized) public debate: reaching consensus, broadening and deepening. They defend the latter goals in a situation where norms are involved which are subject to varying interpretation and have not yet been crystallized. Inclusiveness (a way to realize broadening) can, however, stand in the way of the quality of public debate (deepening) as larger and more diverse groups of participants are more likely to experience miscommunication and constant repetition of the same arguments.634

In my view, broadening and deepening are important but they are not ends in themselves. In order to enhance the legitimacy of decisions, there has to be a relation with deliberation in the public political sphere whereby a consensus or compromise is sought, and not merely a way to live with dissensus.

The main argument for deliberative practices such as consensus conferences is, namely, similar to the argument for public deliberation in general that I defended in chapter 1, i.e. that they may ensure the legitimacy of decisions. Thus, according to Edna Einsiedel, the increasing domination of expert or technical knowledge over what are essentially political questions has led to questions about the democratic base of technology-based decisions and their consequent legitimacy.635

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633 Frank Fischer (2003, 211).
635 ‘Only by assigning decision-making to public processes before the development of technologies, as well as sustaining deliberation through the development processes, can we make good on the democratic commitment’ (Frank Fischer 1999: 297). I endorse this emphasis on deliberative practices before the development of technologies. In the Netherlands, there has been a tension between practice and the political discourse concerning prenatal screening. Dirk Stemerding and Dymphie Van Berkel (2001) note a
The consensus conference represents a ways of coping with accommodating broader social values and concerns. Directly involving citizens has become common, for reasons of effectiveness and legitimacy. Consensus conferences can, according to Einsiedel, be seen as an attempt to bridge the incommensurability of participation and expertise.

That the consensus conference would guarantee legitimacy can, of course be questioned. Deliberative decisions appear, namely, illegitimate to those left outside the forum, while bringing more than a few people in would quickly turn the event into speech-making, not deliberation. Deliberative arrangements depend on an active public sphere in order to function properly, in order not to deteriorate into forms of ‘deliberative technocracy’ and ‘ethical paternalism’. The legitimacy of decisions made within such arrangements depends upon them being seen as rational and just, also in a larger public context.

I shall discuss the question of legitimacy after considering the deliberative practices in the Netherlands and Sweden which, unlike practices in other countries, did not have the aim of reaching agreement.

**Deliberating on genetic testing**

In 2000, a Swedish so-called Lay Panel consisting of 14 citizens discussed genetic testing. This Lay Panel was supposed to intensify the democratic debate between the public, experts and politicians since it would not be self-evident that experts,

difference due to the promotion of screening by the medical community, on the one hand, and control and regulation by political decision-makers, on the other. A report by the Dutch Health Council from 1987 leads to political judgments in which articulation of the acceptability was connected to a process of societal, political, and cultural articulation. This resulted in the rejection of serum screening as a form of population screening. However, the medical community interpreted the report as support for broadening the practice of screening; the position that political forums took was unable to hinder that development. According to Ulrich Beck (1992), scientific and technological development is no longer to be understood in terms of the traditional dichotomy of politics/non-politics; instead, this development has taken on a sub-political character. Sub-politics is the area where the range of societal changes, as a result of certain decisions, is inversely proportional to the democratic legitimization of these decisions.

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636 Edna Einsiedel et al. (2001). They argue for a relation between consensus conferences and political decision-making. In Denmark, consensus conferences have been institutionalized by the Board of Technology and funded by parliament. This ensures close connections with politicians and political attention to the outcome of the conferences. The Dutch Rathenau Institute, with a similar responsibility for technology assessment, has a more arm’s length relationship with government. Also, Mairi Levitt argues that public involvement can raise wider questions: ‘Public consultation is one way of raising wider questions by asking different kinds of questions but will not be taken seriously if ethicists separate science off from its applications or divorce ethics from the world in which people are living and making ethical choices’ (2003: 24).


638 Ole Brekke and Erik Eriksen (1999: 113).

639 Mark Button and Kevin Mattson (1999) discern four orientations as far as deliberative practices are concerned: educative (deliberation as a means of political learning about an issue or problem); consensual (an emphasis on procedures by which participants can come to an agreement on an issue); activist/instrumental (direct political or legislative results); conflictual (giving the widest possible space to the expression and development of individual points of view).

agencies and lay people have the same opinion regarding important questions. Furthermore, it is not easy to follow the rapid developments and increases in knowledge taking place in genetic technology. Organization of the panel was motivated as follows:

From a democratic point of view, it is important that questions concerning the development of technology are not merely left to experts. An established dialogue between scientists, politicians and the public also strengthens the legitimacy of decisions concerning the introduction of new technology into society [...] It is not very judicious to invest large sums of money in the research and development of technologies which large sections of the public are skeptical about using.641

The Panel chose a number of experts in, for instance, law, genetics, and ethics, as well as representatives of civil society to reflect upon the question of genetic testing. The Lay Panel chose four questions - legal and insurance questions, control of samples in biobanks, clinical use and general socio-ethical questions. The main comment made by the Panel was that Sweden should have clear legislation (which at that time was not yet in existence) which protects the integrity of individuals and that the work of introducing such legislation had not been prioritized. The Panel was sponsored by several organizations, including the committee that prepared a Government Official Report on biotechnology but which withdraw, however, since the results of the Lay Panel would not have been delivered in time.

Lisa Modée and Mona Backhans evaluated the Swedish Lay Panel.642 They observed that genetic testing was chosen by the organizers rather than controversial questions such as prenatal diagnosis or patents on biotech discoveries since these questions would require a longer period of deliberation. It was difficult to find funding for the Lay Panel, which would have to do with the very nature of a Lay Panel: there is neither a genuine appreciation nor a tradition in Sweden whereby lay people have a say in important questions.

Whereas in the Netherlands, disagreement is accepted to a greater extent than in, for instance, Denmark where the panel has to agree on a shared conclusion, in Sweden, it was decided that disagreement on the panel would be accepted.643 This gave the members of the panel individual autonomy and freedom to express their opinions. Despite this, the panel was unanimous in its conclusions regarding genetic testing. Modée and Backhans conclude that the Lay Panel did not have an impact on the political debate in Sweden. Furthermore, media coverage was poor.

643 Ibid. (2002).
Deliberating on cloning

In the autumn of 1997, the political debate in the Netherlands resulted in an official request being made by the Minister of Public Health, Welfare, and Sport for the Rathenau Institute to organize a societal debate.\(^644\) Parliament later accepted a motion stating that experiments on animals regarding cell nucleus transplantation would be forbidden as long as the results of the societal debate were not known.

Simultaneously with the commencement of several debating activities with a variety of participants - debates on the cloning of human embryos, cloning in the cattle breeding sector, cloning and medicine, cloning and religion, and cloning and political traditions - the Dutch Rathenau Institute formed a Citizen’s Panel of twenty people. The objective of the Panel was to arrive at a standpoint with a group of interested citizens.\(^645\) In order to achieve this objective, the panel attended a number of the debating activities as well as own organized activities. Finally, following lengthy deliberations, standpoints were formulated.

Whilst the integrity of animals ought to be respected, violation of this principle must not be completely unacceptable. According to the panel, alternatives should, however, be identified. Emotional arguments are not merely the gut feelings of the members. They are important counselors of people and that is why they should be taken seriously. With the exception of one person, all were against reproductive human cloning. The members advised politicians that the cloning of animals and human beings ought to be made unattractive. Existing legislation can only partly be used to achieve this.

The panel did not receive the task of formulating a consensus.\(^646\) The expectation was that a Citizen’s Panel could broaden the public debate, perhaps on the basis of assumptions that well-informed citizens will propound different questions and sensibilities to the experts. The panel was free to determine its own agenda for a year, and to invite people.

According to Tsjalling Swierstra, who evaluated the debates of the Rathenau Institute, a moral discussion that may contribute to societal and political decision-making presupposes that we have certain options and can make a choice.\(^647\) Swierstra observed that some members of the Citizen’s Panel were not satisfied with rational arguments, but also emphasized the role of emotions in decision-making.\(^648\) However, the argument that cloning is unnatural, or entails instrumentalization, is only, in the view of Swierstra, defendable within a specific conception of the good life. The fact that certain members speak of non-rational arguments can be understood in the context of a modern, pluralistic, liberal society in which hardly any meaningful communication concerning these questions is possible.

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\(^{644}\) Rathenau Institute (1999: 10).
\(^{645}\) Ibid. (1999, 6 ff.).
\(^{646}\) Burgerpanel (1999).
\(^{647}\) Tsjalling Swierstra (2000, 29).
\(^{648}\) Ibid. (2000: 103 ff.).
Swierstra concludes that there has not been any internal development of the debate in the media: many concerns, as well as all pros and cons, were already articulated in the beginning. The declaration of the Citizen’s Panel did not add anything to the discussions in the written media. The value of the declaration, however, is that several conflicting opinions are included which gives an adequate picture of the overall discussion.

**Considering deliberative practices**

Deliberative practices, such as public discourse or institutionalized channels of communication, may differ with the political culture.\(^\text{649}\) Still, how can deliberative practices concerning the questions we have been concerned with in this inquiry be enhanced? Should we aim at new deliberative practices such as the ones considered above?

According to Annika Nielsen, attention needs to be paid to the complex ways in which the consensus conference model is interpreted, applied, and received: and to show that these interpretive processes depend on the characteristics of national political cultures into which the model is introduced.\(^\text{650}\) Within different conceptions of democracy, democratic legitimacy is attained in different ways and through various procedures. This shapes ideas about when and how decisions are legitimate, which again leads to different perceptions of public participation and deliberation.

This emphasis on the role of political culture is warranted in my view. As we have seen, according to one organizer, there is no climate of direct citizen involvement in Sweden. Furthermore, there was no clear connection with the political decision-making process. Whereas such a connection existed in the Dutch case, and where there was much media coverage, there was no agreement among the members of the Citizens’ Panel and there was no ‘qualitatively new voice’.\(^\text{651}\)

In my view, it is worthwhile establishing new deliberative practices, but there should be a prospect of the internal development of deliberation in such practices. There are, in the case of prenatal diagnosis, enough chances to enhance deliberation.

\(^{649}\) Swedish committees normally include experts and, in the reports referred to in this inquiry, politicians. This offers politicians and specialists an excellent opportunity for fruitful cooperation. Furthermore, the parliamentary opposition and different advocacy groups are given an opportunity to follow reform work from an early stage. After a committee has submitted its report to the minister responsible, its contents are referred to the relevant authorities, advocacy groups and the public for consideration before the government writes its proposals for new legislation in government bills which it then submits to parliament. The system of making comments has different functions (Anders Sannerstedt 1989). With the comments, it is possible to check whether or not the proposals are reasonable. The system is democratic in the sense that many organizations - whether large or small - are provided with the opportunity to make comments. The government wants to hear the opinions of those likely to be affected by future legislation in order to find out whether or not there is any support for its proposals.

\(^{650}\) Annika Nielsen et al. (2007).

\(^{651}\) ‘The point of deliberative practice is not only to interject new or previously excluded, present preferences into the bargaining mix but to introduce a qualitatively different voice’ (Patrick Hamlett 2003: 121).
by addressing our interpretive differences and diverging representations of ‘the other’. It is important to include ‘the other’ in public deliberation in order to hear his or her voice. This applies equally to pregnant women and their partners and to people with a disability.

The question is, first and foremost, what we want to achieve using deliberative practices. In the case of prenatal diagnosis and screening, an organized deliberative practice may be difficult to realize given the moral disagreement and often sensitive questions involved, even though the *raison d’être* for deliberative practices may be significant given a possible lack of legitimacy in the ordinary process of shaping a public course of action. It is not, on the other hand, easy for anyone to get access to the mass media, which is the most focal arena for public discourse. 652 We have to address the question of how the public sphere can be enlarged by giving more citizens the opportunity to raise their voices in public discourse. One way of enlarging the public sphere could be by using the Internet as a possible, reliable arena. 653

According to Jürgen Habermas, the success of deliberative politics does not depend on a collectively acting citizenry, but on the institutionalization of the corresponding procedures and conditions of communication, as well as on the interplay of institutionalized deliberative processes with informally developed public opinions. 654 We can view this idea as an implicit criticism of Hannah Arendt’s emphasis, in her early work, on the importance of citizens judging and acting using speech and deeds in the public realm. I believe that we need both an acting citizenry in a vibrant public sphere and adequate channels between the informal public sphere and the political public sphere. Allowing ‘the other’ to raise his or her voice is important in this respect. It is, primarily, this other who is affected by public courses of action concerning, for instance, prenatal diagnosis.

652 In a comment, the youth organization of the Swedish Association of Persons with Neurological Disabilities argues that society does not desire a broad public discourse; attempts to express opinions in the media by the organization were without result, in fact (De Unga med Neurologiska funktionshinder i Sverige DUNS (1990). Remiss beträffande SOU 1989:51. [Comment on White Paper 1989:51].

653 Antje Gimmler (2001) argues that, contrary to the view of some critics, the Internet can actually strengthen deliberative democracy. This is possible because the model places such emphasis on raising questions of a social and political sort within a sphere composed of deliberating citizens. On the local, regional and national levels, moderated discourses, public forums, and the round-table style of discussion can be established, all of which give citizens the opportunity to be active participants in the process of decision-making. According to James Bohman, however, ‘the Internet “decentres” the public sphere; it is a public of publics rather than a distinctively unified and encompassing public sphere in which all communicators participate. Rather than simply entering into an existing public sphere, the Internet becomes a public sphere only through agents who engage in reflective and democratic activity’ (2004: 139-140). I believe that, in the context of our inquiry, opinion sites on relevant moral and political questions backed up by, for instance, organizations for technology assessment can still be regarded as part of a public sphere. The advantage is that it is possible for citizens to ‘enlarge’ their minds by having access to what others say. Furthermore, it is possible to react directly to what others write, ensuring dialogicity. There is no evidence, however, that the Internet constitutes, in the case of human genome research, an egalitarian, democratic space of communication. Communication via the Internet is possibly even more one-sided, with a focus on scientific actors and being even less pluralistic than the printed media (Jürgen Gerhards and Mike Schäfer 2007). This stresses the importance of publicity and equal access on possible debating sites.

654 Jürgen Habermas (1996a, 298).
9.2 The contribution of ethics to public deliberation

We have seen that deliberative practices such as consensus conferences are regarded as ways of establishing a dialogue between citizens and experts. Given the disagreement among ethicists themselves, which we observed in public discourse, it is a legitimate question who counts, when deliberating over moral and political questions, as an expert. This question is relevant since, in relation to political decision-making, ethicists are sometimes asked to function as an expert.

If we wish to address our interpretive differences over, for instance, autonomy or human dignity, or our different representations of ‘the other’, ethicists will, in my view, be indispensable. But what is an ethical expert; and, is an ethical expert also a moral expert? Given the differences between ethicists themselves, we should, in my view, speak of ethical expertise in the plural. It is also tempting to think of the ethicist as an authoritative expert who gives his or her verdict on what is right or wrong. However, in my view, this does no justice to the disagreement among ethicists themselves.

The distinction between ethical and moral expertise which I have in mind has been made by Theo van Willigenburg. Ethical expertise entails applying a method of reasoning that reflects standards of ‘rigor in argument’ I believe that rigor in argument is desirable. Ethicists can stimulate internal development in public deliberation which prevents arguments from merely recurring.

If we believe that we should endorse the force of the better argument, which I call normative, we will need ethical expertise. Van Willigenburg mentions four

655 ‘In most European countries, deliberation and public engagement are presented as a democratic route to consensus formation. To some degree, this assumption takes its inspiration from the old deficit model: once the public understands the ‘real’ questions, then it will trust institutions, a ‘reasonable’ consensus will arise, and policy-making can proceed’ (Rob Hagendijk and Alan Irwin 2006: 175). Claims to expertise and the importance of lay perspectives are dynamic and context-dependent. They can be linked to a range of discourses about balancing public and professional input into decision-making (Anne Kerr et al. 2007: 405).

656 Tristram Engelhardt describes, and is critical of, how bioethicists have become politically ‘useful’, and have become experts in ‘gaining control over a powerful, socially-established domain of human intervention’: ‘Despite the existence of fundamental moral disagreements, there was a desire on the part of those who held that society should be a single moral community to find persons who could disclose the morality that should inform society conceived of as a singular moral community’ (2002: 79). According to Engelhardt (2003), what bioethical consultation should be about is far from uncontroversial. Morality has become, in the view of Engelhardt (2002), politics since bioethicists provide moral instruction and have become a sociopolitical authority in guiding policy choices. Still, Daniel Callahan (1999) provides a clear description of the task of ethical experts: to determine what is right and wrong, good and bad, regarding the scientific development and technological deployment of biomedicine. Gary Belkin (2004), however, argues that bioethics needs reflection in terms self-understanding: ‘How is it that I am in a position to address particular kinds of questions?’ Answers to a question like this form part of humanistic understanding itself, of explaining how, in a context of time and place, certain questions become more relevant than others.


658 Richard Hare (1977) argues that the philosopher studies words whose meaning and logical properties are not at all clear (words without moral problems cannot be discussed) in order to establish canons of valid argument or reasoning and so to avoid errors in reasoning.
characteristics of ethical expertise: (1) Clarification and diagnosis (2) Analysis of concepts and arguments (3) Balancing of duties and responsibilities (4) Implementation of moral decision-making and norms.\textsuperscript{659} I thus agree with Van Willigenburg that ethical experts are indispensable, but I suggest that we do not speak of the ethical expert but of ethical expertise.

In order to understand the application of principles to questions concerning prenatal diagnosis, we need to interpret them. Interpretive differences exist and we will need to deal with them if we want to have any meaningful deliberation. The ethicist is equipped like no one else to interpret moral principles - to understand principles in their application to concrete questions. Furthermore, we could expect the ethicist to be able to think from the standpoint of the other, to imagine him- or herself in the standpoint of ‘the other’ who is.\textsuperscript{660}

But what about moral expertise? How substantial should the recommendations of what Van Willigenburg calls the ethical expert be in public deliberation? Is, in his words …

… the task of the ethical expert limited to the production of enlightenment upon people’s reflection of moral questions, or does it also involve the making of moral choice itself. Is moral expertise, i.e. knowledge and ability in the field of right and wrong, good and bad, part of ethical expertise, or not?\textsuperscript{661}

Van Willigenburg goes on to argue that ethical expertise does not automatically include moral maturity. The judgment of the ethicist, in a moral case, has no more moral authority than the judgment of anyone else. Yet, the ethicist is better equipped to reach a satisfactory decision concerning what is right and wrong in a certain case since he or she can think about moral questions full-time. In practice, the ethicist may gain some special authority to comment on the morally ‘right’ course of action. Moral expertise is a likely, but not a necessary, element of ethical expertise.

However, as we have seen in the inquiry into public discourse, several judgments of right are made. In my view, it is only in deliberation that we are able to discern a

\textsuperscript{659} It is in this way Hallvard Lillehammer sees the role of bioethicists. They are not barred from expressing their opinions about what is morally right, but have expert knowledge of theoretical assumptions and priorities embedded in moral judgments, expert mastery of theoretical distinctions between ethical positions, and detailed knowledge of the difficulties which all ethical positions face: ‘Although bioethicists do not have special access to a distinct realm of philosophical fact from which other participants in the debate are excluded, bioethics is an area of inquiry in which the standard tools of the philosophers find illuminating applications’ (2004: 132.

\textsuperscript{660} I do not agree with Christopher Cowley (2005) that a moral philosopher has no special role to play on a research or clinical ethics committee. There is, according to him, a case for having a lay member, but this post could be filled by anybody who is interested in the subject matter and who is articulate and imaginative, with some skills in critical thinking. I believe that ethicists, by virtue of their expertise and training, can play a valuable role. According to Norbert Steinkamp et al. (2008), within a complementary and interactive concept of clinical ethics, ethical expertise can focus on the knowledge and ability of ethical deliberation in a narrow sense (no substantial advice is given on what to do in order to utilize its inherent potential for critical distancing and detached reflection. Both ethicists and non-ethicists should be encouraged to employ a style of thinking and argumentation that brings out the strongest traits of everyone’s training, experience, expertise, and role-related responsibility.

\textsuperscript{661} Theo van Willigenburg (1991: 22).
judgment that is justifiable. It has been argued that merely making the right judgments is sufficient for moral expertise. What the right judgment is, however, a matter of dialogical justifiability on the basis of normative reasons, and therefore of deliberation.

If we ask citizens, including ethicists, to justify themselves, it will be the force of the better reason that counts. Whether or not the ethicist is also a moral expert who can give his or her verdict on what is right or wrong will solely depend, in my view, on the quality of his or her reasons. Whether or not his or her judgment is justifiable, however, can only be assessed during public deliberation. The fact that the ethicist is an ethical expert does not bestow him or her with any moral authority over and above the quality of the argumentation. Indeed, individuals who are capable of providing strongly justified moral claims may be considered experts, even if they disagree with one another.

To further examine the claim that the ethicist is a moral expert, let me consider the account of Peter Singer. The ethicist gathers information, selects the information that is relevant, combines it with a basic moral position (for example, which course of action produces greater happiness and less suffering), and eliminates bias. This procedure is not easy. The problem is not so much knowing ‘the difference between right and wrong’ as deciding what is right and what is wrong:

Given a readiness to tackle normative questions, and to look at the relevant facts, it would be surprising if moral philosophers were not, in general, better suited to arrive at the right, or soundly based, moral conclusions than non-philosophers.

The problem with Singer’s argumentation for the moral expert, however, is that there are several basic moral positions. In the case of euthanasia, for instance, a utilitarian ethicist may give a different verdict to a deontological ethicist, or a virtue ethicist. Of course, it is also possible that they might agree. However, given that basic moral positions differ, there is reason, in my view, to be reluctant as far as the possibility of the moral expert is concerned.

While we can speak of the ethical expert in the plural, this seems odd in the case of the moral expert who is supposed to defend a judgment of right. Moral experts, as the inquiry into public discourse shows, where ethicists defend different judgments, are likely to defend several judgments of right. Let me illustrate this with some ways of moral reasoning that can also be found in public discourse.

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663 According to Carmen Kaminsky (2005, 65 ff.), what is to be considered ‘right’ in normative ethics is not yet adequate in the context of ethische Politikberatung. In the context of applied ethics, only that which is realizable in the light of the factual conditions surrounding a concrete situation can be adequate. This is, in my view, to demand too little from ethics. We can, at least, want to examine whether our reasons are good, normative reasons and in this sense we need normative ethics. I have in this respect defended a view on Kantian normative ethics.
664 Bruce Weinstein (1994).
665 Peter Singer (1972: 117).
There are consequentialist and deontological ways of reasoning.\(^{666}\) There are, certainly, other traditions in ethics than those related to these ways of reasoning, e.g. virtue ethics.\(^{667}\) There is also a way of reasoning whereby the reconstruction of moral convictions is essential.

A consequentialist way of reasoning entails actions being judged in terms of their consequences, e.g. the good. One example is the theory of utilitarianism which insists that the rightness or wrongness of an action is determined by its consequences for everyone affected. Early utilitarians claimed that the best consequences were those containing the greatest amount of happiness. A deontological way of reasoning, in contrast, will start out from basic notions of obligation or duty. The concept of deontological comes from the Greek word for duty, and explains what we ought to do. Deontological moral theories, of which Kant’s ethics constitute an example, insist that it is not merely the consequences of an action that matters.

In public discourse, we have observed examples of deontological reasoning and consequentialist reasoning. For instance, do we have duties to the fetus or should we prevent suffering? We have also observed examples whereby principles may be reconcilable with both deontological and consequentialist ethics. An example of this is constituted by the four principles of biomedical ethics which are frequently referred to in public discourse. According to Dieter Birnbacher, autonomy, one of these four principles, can for instance be endorsed, since it would result in the best consequences, e.g. liberty or happiness. However, the principle can also be endorsed

\(^{666}\) Whereas consequentialist and deontological ethics are often regarded as opposing, there have also been proposals to reconcile them. Paul Ricoeur, for instance, proposes mediation between consequentialist and deontological ethics. In his formulation of the ethical aim, Ricoeur speaks of just institutions: ‘aiming at the good’ with and for others, in just institutions’ (1992: 172). Ricoeur combines the Aristotelian characterization of ethics in terms of a teleological perspective - what is considered good - and the Kantian emphasis of the articulation of the moral aim in terms of norms - that which imposes itself as obligatory. John Mackie (1990), for instance, suggests a consequentialist and deontological framework. He retains the consequentialist structure of utilitarianism, but replaces the goal of utility or happiness with another concept of the good which is to be achieved. Mackie gives an example of a question on which both consequentialist and deontologists may agree: ‘Are all the guides of conduct that we want people to adopt, and all the constraints on conduct that we want them to accept, of the form ‘Act so as to bring about x as far as possible’, or are some of them of the form ‘do (or ‘do not do…’) things of kind y?’\(^{666}\) The answer for Mackie is affirmative.

\(^{667}\) Martha Nussbaum (1999) notes that, besides consequentialist and deontological traditions, another tradition is often considered as an alternative, namely virtue ethics. Virtue ethics entails taking an interest in the category of virtue while turning to the Greeks, particularly Aristotle. Virtue ethicists question neglecting the plurality of goods, a narrowly technical conception of reason, and a non-cognitive conception of emotion and desire. However, the risk, according to Nussbaum, is that we are turning away from an ethics based on Enlightenment ideals of universality toward an ethics based on tradition and particularity. Virtue ethics is not based upon principle, but on virtue. Furthermore, it is not based on systematic theories, but on wisdom embodied in local practices. Additionally, Bentham, in the utilitarian tradition and Kant in the deontological tradition, have their own theories of virtue and moral psychology. Whereas in public discourse sometimes is reasoned deontologically or consequentialist it is to a lesser extent observable that is reasoned on basis of virtue ethics.
because, in Kantian terms, it would enable citizens to determine the will through the moral law.668

As Birnbacher clarifies, autonomy belongs to the reconstructive model of bioethics, together with beneficence, nonmaleficence, and justice. The model is reconstructive since it relates ‘applied’ abstract principles, not to \textit{a priori} considerations, but to the reconstruction of moral convictions that are \textit{de facto} widespread. Not only does it describe the reconstructed principles, it also defends them.

According to Birnbacher, the reconstructive way of reasoning is primarily interested in the application of principles, rather than their justification. The difference with a foundational model, such as utilitarianism or deontological ethics, is that, in the latter case, justifications of rules are given in terms of basic principles. In the view of Birnbacher, who himself defends the foundational model of utilitarianism, the advantage of a reconstructive model is that it is possible to find agreement even if basic principles conflict.

Peter Singer defends a foundational, deductivist model of ethics. According to Bernward Gesang, deductivism claims that there is an ethical theory which applies to the entire field of morals, and from which may be deduced an evaluation of each individual case.669 Gesang also discusses whether or not there are moral experts. He believes that there are semi-experts and supports this claim by means of an appeal to coherentism. This entails a justified moral judgment occurring when four sources - ethical theories, moral experience, common-sense theories and non-moral knowledge - favor the same solution:

\begin{quote}
If the judgment ‘You shall not lie in situations’ is deducible from the best ethical theory and, if our moral intuitions agree and if the judgment is based on a right analysis of non-moral facts, then this judgment is very well justified.
\end{quote}

Is the coherence ethicist an expert? More accurately, in the view of Gesang, he or she is a semi-expert who can reach correct moral judgments with a higher probability than laypersons, insofar as there is a consensus of fundamental moral intuitions.

The problem is, of course, that our fundamental moral intuitions differ so often, as is the case in human reproductive cloning or animal genetic engineering. Given that our intuitions differ, what is a correct judgment? I find Gesang’s emphasis on the coherentist justification of judgments plausible. Still, ethicists may have varying intuitions and, in this sense, suggest conflicting ‘correct judgments’.

I believe, as I have already indicated, that ethicists are indispensable in improving public deliberation in terms of the justifications being given for judgments. However, we should engage in public deliberation since ethicists do not speak with one voice. We may believe in the prospect of endorsing the better reason and should, to this end, elaborate our reasons in terms of normative reasons. This is not

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668 Dieter Birnbacher (1994).
only a task for ethicists. Deliberative practices would have a legitimate role to play if reasons could be elaborated accordingly.

One possibility of justifying judgments is by seeking coherence between moral intuitions and principles, and other relevant beliefs. However, as I suggested, moral intuitions differ. Does that mean that we should abstain altogether from considering intuitions, or experience? In my view, articulating experience is still a relevant task. Let me illustrate this with a Dutch inquiry regarding prenatal screening.

In the inquiry concerning women’s experiences with prenatal tests, one of the results is that many women who chose to use the test were, to a certain extent, ambivalent.\(^\text{670}\) The offer of the test increases the awareness of risks while the tests lead to less uncertainty but no absolute certainty. Women have to deal with uncertainty due to the limited reliability of tests. The interviewed women faced dilemmas, considerations, doubts and emotions as far as the test is concerned. Hardly anyone knew of the tests before pregnancy and the women’s experience is that they cannot refuse the test. Despite positive emotions when the fetus had no aberration; for many, the uncertainty has influenced their pregnancy: the experience of their pregnancy has been inhibited as one woman puts it:

> It’s very detached, before it you feel pregnant, and then it starts and you’re facing the facts and enter an uncertain period and after it, it’s confirmed and you feel pregnant again.\(^\text{671}\)

This ambivalent experience of the so-called ‘tentative pregnancy’, women do not feel pregnant until the result of prenatal diagnosis or screening has also been referred to in Dutch public discourse.\(^\text{672}\) Ambivalence is typically present when we vacillate between different beliefs, expectations, feelings, attitudes or states of mind. It is present when we cannot make up our minds […] We consider two alternatives as just as good or bad, as valuable or as pointless.\(^\text{673}\)

The experience of ambivalence, in my view, needs to be addressed in public deliberation. How can we understand, for instance, the concept of harm in terms of moral experience vis-à-vis screening? It is in their application that such principles reveal their meaning, as is the case with the principle of respect for autonomy. Application is a kind of understanding.\(^\text{674}\) Understanding is always application since a text such as a law must be understood at every given moment, in every concrete situation, in a new and different way. The subsumption of particulars under universals is the essence of judgment.

\(^{670}\) Els Geelen et al. (2004).

\(^{671}\) My translation: ‘Het is heel afstandelijk, daar vóór voel je je zwanger en dan begint het en opeens wordt je met de neus op de feiten geduwd en dan krijg je zo’n beetje zo’n onzekere periode eigenlijk en eh ja daarna is het eigenlijk wel weer bevestigd, dan voel je je weer zwanger’ (an interviewee in Geelen et al. 2004).

\(^{672}\) The notion of tentative pregnancy has been introduced by Barbara Katz Rothman (1993).

\(^{673}\) Kristin Zeiler (2005: 208).

Considering particular cases, such as moral experiences, makes us sensitive to the particulars of the concrete situation, particulars that have to be subsumed under principles. The articulation of moral experiences is, arguably, a task for ethicists. This is a way of doing justice to the citizen’s experiences of the technologies that are being discussed.

I have defended a role for ethical expertise in public deliberation. As far as the role of moral expertise is concerned, I am more reluctant. If the ethicist has no special authority to make judgments of right (which does not entail that he or she cannot defend judgments of right in public), public deliberation becomes even more important. Public deliberation matters with regard to arriving at judgments which can be defended in the public sphere.

9.3 Judging and deliberating: the ideal of ethico-political judgment

So far, I have assumed that more public deliberation is desirable. This may enhance the legitimacy of decisions, give citizens influence, and result in our coming to an understanding: we can aim at a consensus or compromise or at tolerant attitudes if dissensus persists. Given the raison d’être for public deliberation, I defend the notion that the deliberative concept of ethico-political judgment is relevant, with its stress on giving and asking for normative reasons and aiming at impartiality of judgment.

As we have seen in the first chapter, there is agreement, among those who defend the expanded role of deliberation in a representative democracy, that public deliberation is desirable. I shall now discuss some critical notes concerning the prospect of a ‘deliberative democracy’. Critics urge us to be aware of some problems which require a critical stance, as far as public deliberation is concerned. This does not make the case for public deliberation weaker, however. The inquiry into public discourse, furthermore, enables to answer some of the critical observations.

An initial critical comment regarding public deliberation is that it neglects the extent to which moral disagreements in politics are actually shaped by differences in interest and power. We could, in replying, highlight the importance of an undistorted practical discourse in which the unforced force of the better reason counts, following Habermas’ defense of the principle of discourse. We can stress the concept of public justifiability in view of the persistence of moral pluralism. Moral

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675 According to Mats Hansson, ‘Kant made in his treatment of the beautiful and the sublime in the third Critique use of an operation of thought that, if applied to ethics, will enable us to be more sensitive to the particulars of each situation’ (2002: 38).
676 Trudy van Asperen (1993) defends the role of ethics in articulating experience. She argues that the role of ethics, besides formulating rules and principles, is the articulation of human experience which deepens our insight and makes us sensitive to situations.
677 Ian Shapiro (1999). Related to this is the argument that reasons of a stronger kind have to come from the viewpoints contending in the political arena (Stanley Fish 1999). There are no different or stronger reasons than. policy reasons: higher-order impartiality, mutual respect, the judgment of all mankind, this is nothing more or less than politics by another name.
questions should not be decided in accordance with the power constellation: there should be good reasons that can justify a certain course of action.

Still, public deliberation is to be found, for example, in an arena - the public political sphere - that is partly characterized by power and interest. In my view, the argument that deliberative democrats do not focus sufficiently on power and interest is legitimate: in order to make the case for public deliberation, we need to be aware of the obstacles to it. However, I see no other alternative, as far as questions concerning prenatal diagnosis are concerned, than emphasizing the merits of deliberation. We want there to be convincing reasons for decisions; reasons that can be justified, in the public sphere, to all citizens, regardless of the authority of politicians, government agencies, and experts (and we have encountered some viewpoints that are more authoritative than others in public discourse). Even those who have formal authority can be asked to defend their judgments in public: authority should be a question of the better reason.

A second critical comment regarding ‘the deliberative model’ concerns the notion that only the stronger argument is of importance to democratic legitimacy, while the other arguments are of no importance.678 It is argued that, to the extent which the actual decision-making procedure approaches the ideal deliberative situation, this procedure is blind to the question of how many citizens support a given view or argument, an argument that is not new. A political decision-making procedure should, accordingly, offer something else than the reasoned justification on which the dissenter can recognize the legitimacy of the winning decision.

I have argued that we should aim at ethico-political judgment whereby the stronger argument is a normative reason that is prescriptive, universal, and internal. This reason should offer sufficient support for a certain course of action. Legitimacy not only concerns the ‘what’ but also the ‘how’. What constitutes the best reason is a question to be addressed via public deliberation. If citizens are given a chance to engage in such deliberation, they may accept the fact that there is a strong reason to support a given course of action, even if they do not initially endorse the reason themselves.

What constitutes the best reason does not depend on how many endorse that reason; this would be a matter of voting, but on the compelling force of the reason. This does not mean that the reasons of those who do not subscribe to the better reason do not matter. Quite the contrary, a public course of action could be imagined where those reasons are given due respect. This is the point of ethico-political judgment: that we think from the standpoints of those who justify their judgments using different reasons. If a consensus regarding the better reason is unlikely, compromise may be appropriate whereby due respect is given to the various reasons.

A third critical comment is that some citizens are better than others at articulating their arguments in rational, reasonable terms.679 Taking deliberation as a signal of democratic practice works undemocratically since the views of those who are less

679 Lynn Sanders (1997).
likely to present their arguments in ways that are characteristically deliberative are discredited. Status and hierarchy shape patterns of talking and listening that exclude other perspectives.

In the former section, I have discussed the role of ethicists in the public debate. Ethicists are more likely than average citizens to articulate their reasons in terms of normative reasons. I have argued that the notion of a moral expert, on the other hand, is problematic, given that ethicists reason in different ways. Ethicists matter, however, for interpreting moral intuitions and principles. Still, some citizens are better equipped to deliberate. This is a serious criticism of the case for public deliberation. Deliberative practices such as Citizens Panels and Lay Panels are attempts to involve citizens. In this case, citizens may be able to articulate their reasons.

In my view, ‘the other’ who is affected should be involved in public deliberation in order to find out whether representations in public deliberation are adequate. Most likely, this will lead to a problematization of representations since ‘the pregnant woman’ or ‘the disabled person’ does not exist. We should conceive of them in the plural. As I have argued, this is a question of judgment in the sense of thinking from the standpoints of others, or ‘the other’ if appropriate. But is ‘the other’ able to articulate his or her reasons just as well as, for instance, an ethicist? My answer is that ‘the other’ should be able to raise his or her voice, and his or her experiences or viewpoints should be articulated by ethicists, among others. Rather than simply dismissing reasons that are not articulated in rational, reasonable terms - whatever that might entail - we should aim at conversation in order to come to an understanding of what we mean.

A fourth critical comment is that, in the account of Habermas and Rawls, pluralism is relegated to a non-public domain in order to insulate politics from its consequences. As we have seen, Habermas distinguishes between evaluative questions - concerning the good life - and morality. However, the domain of politics is not neutral terrain that can be insulated from the pluralism of values, where rational, universal solutions can be formulated.

I defend Habermas’ distinction between evaluative questions concerning the good and moral questions. Still, we are confronted by plurality when asking which judgment is justifiable in the public sphere. We can see the emphasis on a practical discourse as recognition of the fact of plurality. Public deliberation should deal with the dissensus in society concerning moral and political questions and, in this sense, plurality matters when it comes to investigating morality. We start with the lifeworld morality which is inherently subjective as well as intersubjective. Critical morality - the reflective consciousness of the right and the good - cannot ignore plurality. Asking whether a judgment is justifiable is being committed to dialogue and thinking from the standpoint of others. In this sense, the charge that ‘deliberative democracy’ suppresses plurality is, in my view, unwarranted.

680 Chantal Mouffe (2000, 90 ff.).
681 Ibid. (2000, 92).
A fifth critical comment I shall consider, in the context of bioethics, is that public deliberation is unlikely to result in consensus which may result in an undesirable pluriform supply in health care (for instance, at one hospital, prenatal screening is allowed while at another it is not). Rather, there should be a consensus within the medical profession concerning what is on offer and what is not in accordance with the criterion of ‘medical indication’ in order to ensure fair health care.

However, the question of what constitutes a medical indication is in itself a public discourse topic, as we have seen. Should we allow prenatal diagnosis for gender selection? Is this a medical indication? The question is controversial. In the medical profession itself, there may also be disagreement concerning moral and political questions. Given the plurality of viewpoints in society, it is defensible that we discuss questions of a moral and political nature in the public sphere. The government has the authority to propose a public course of action, and we should deliberate on this.

I have discussed five critical comments and argued that all these comments give us reason to further public deliberation, rather than search for alternatives such as majority rule. There are more reasons to support the case for public deliberation. There are not just interpretive differences with regard to the principles that I have examined by focusing on interpretive frameworks: it can even be questioned whether or not there is a common morality with regard to questions such as prenatal diagnosis and screening. Proponents are not likely to invoke the principle of human dignity in this case (even though they may support the principle in other cases); opponents are not likely to invoke the principle of respect for autonomy. At least, they do not refer to these principles in their argumentation.

There are interpretive differences over, for instance, human dignity or respect for autonomy. Even if we agreed on such principles, we would be likely to disagree about their application, and hence their meaning, in the case of moral and political questions. This means that we cannot merely proceed from principles to judgment without public deliberation. We need to have adequate understandings of principles and ‘read’ principles as a text in public deliberation. Furthermore, we have varying representations of ‘the other’ and we need to address these. This means that, in the sense of impartiality of judgment, we think from the standpoints of those who hold different representations in accordance with the maxim of judgment.

I have concerned myself with prenatal diagnosis and screening. Exactly which questions are to be addressed will vary with time. There may be ‘closure’ with regard to a certain question. There may be a consensus or compromise or we may reconcile our differences. What we initially might see as a threat to our lifeworld morality, and our experience of pregnancy, might finally result in changed valuations and norms: our lifeworld morality might not be left unaffected by new technologies. There is an interaction between new technologies and our lifeworld morality. This is an additional reason for ethical inquiry and for being reflectively conscious of the right and the good in relation to this changing morality.

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682 Margot Trappenburg (2005).
New moral and political questions might, on the other hand, become issues on the agenda for public deliberation. Euthanasia could, for instance, be a topic for public deliberation, in the sense that I understand it. The same applies to human enhancement technologies which question our very understanding of human nature.\textsuperscript{683}

I have elaborated on the conditions of ethico-political judgment on the basis of Kant’s ethics and his theory of judgment. The conditions are related: I choose the practical principles that others can act on. In order to be able to ‘legislate’ in a Kantian sense, we thus need to think from the standpoint of others. Kant’s ethics allow us to speak of justifying our judgment to others, to imagine a situation in which we think from the point of view concerning both myself and others.

In this sense, Kant’s ethics are not monological. They are closer to Jürgen Habermas’ urge to imagine a practical discourse in which we consider all those who are concerned then many commentators on Habermas suggest: for Kant, moral commands, namely, are not valid for ‘you and me alone’.

I have been critical of Hannah Arendt’s separation of political and moral judgment, on the one hand, and Kant’s practical philosophy, on the other. Still, I find her interpretation of ‘enlarged thought’, in terms of what I call impartiality of judgment, promising. Arendt speaks of an ‘anticipated communication with others with whom I finally come to some agreement’. I have defended the fact that one of the reasons to engage in public deliberation is precisely that we need to come to some form of agreement: we need to come to an understanding, whether it be consensus, compromise, or mutual respect, in view of the possibility of persisting dissensus.

Tristram Engelhardt does not give us the conceptual tools for thinking of public deliberation. Is not his urge to confront postmodern diversity related to a possible outcome of public deliberation in terms of mutual respect? This is not the case. Engelhardt is too minimalistic in speaking of mutual respect in terms of permission. Public deliberation matters, not only in terms of reaching a consensus, but also in terms of developing tolerant attitudes toward the others.\textsuperscript{684} We have in common, as

\textsuperscript{683} Thus, according to Hans Jonas (1984), modern technology has introduced actions of such novel scale, objects, and consequences that the framework of former ethics cannot even contain them. For him, the nature of human action has changed, and, since ethics is concerned with action, it should follow that the changed nature of human action calls for a change in ethics as well. Traditional ethics were founded on the premise that the human condition, determined by the nature of man and the nature of things, was given once for all. However, this premise is now being questioned by the development of, for instance, gene technology. If the mere role of ethics has become questionable, this is in my view an additional reason to engage in public deliberation. Is the challenge to ethics as profound as in the case of prenatal diagnosis and screening? Certainly, these technologies differ from ancient technologies in the sense that they are not merely neutral means to ends. They enable new ends in the sense that new ways of controlling reproduction are made possible. However, contrary to the prospect of germ line engineering, prenatal diagnosis and screening are hardly changing the ‘nature of men’. These technologies raise, in any case, intricate moral and political questions and are therefore suitable in an inquiry concerning judgment.

\textsuperscript{684} Public deliberation presupposes, however, a preparedness to reflect upon one’s own judgment (to ‘enlarge one’s mentality’): ‘A discourse theoretical concept of deliberative politics entails that the ‘forceless force of the better argument’ can change viewpoints and revise attitudes and understandings’ (Ole Brekke and Erik Eriksen 1999: 107).
citizens engaging in public discourse, the fact that we at least share a deliberative practice. This is more than moral strangers in the account of Engelhardt can share.

I have defended the fact that the Kantian concept of ethico-political judgment is precisely the ideal of public deliberation that we need in order to deal with the skepticism of Engelhardt as far as rational communication is concerned. What is the merit of a Kantian approach to ethico-political judgment regarding public deliberation? A Kantian approach to ethico-political judgment entails that we think of our reasons in terms of giving ourselves a law. It entails giving and asking for normative reasons and aiming at impartiality of judgment. Ethico-political judgment not only entails deliberation in the external-collective sense of the giving of and asking for reasons, but also deliberation in the internal-reflective sense in terms of exerting the faculty of judgment. The two kinds of deliberation - external-collective and internal-reflective, are inextricably intertwined.

In addition to the giving of and asking for normative reasons in an external-collective sense, we need to deliberate in an internal-reflective sense, in order to find out how others are affected by the law from which we derive our reasons: we want to articulate a normative reason and ask whether there is a law from which it can be obtained. We have to think of our reasons in terms of how they prescribe an action, whether or not they apply to all, and whether or not we are motivated accordingly. We are not solipsistic agents, but reason with other citizens from whose standpoints we have to think if we want to arrive at justifiable judgments that can be defended in the public sphere.

We have to adopt a universal standpoint that concerns others as well as ourselves. This standpoint can only be determined by thinking from the standpoints of others. In this way, we can reflect upon our own judgment. I believe, in conclusion, that Kant's ethics and his account of 'enlarged thought' are valuable from the point of view of public deliberation.

Is ethico-political judgment a realistic ideal of public deliberation or do the conditions of ethico-political judgment place too much burden on public deliberation? In my view, ethico-political judgment is a sound ideal. In order to make better and more justifiable judgments, we have no other choice than to elaborate on our reasons in order to justify our judgments and think from the standpoints of others. We do deliberate in the context of public discourse in the sense of justifying our judgments to others. We can, however, enhance public deliberation, and the concept of ethico-political judgment offers us the conceptual tools for doing so.

Public deliberation may foster tolerance. Tolerance entails more than tolerating the acts of the other. Indeed, it is a way of coming to an understanding of the other as other:

Hearing the other side is important for its indirect contributions to political tolerance. The capacity to see that there is more than one side to an issue, that a political conflict is, in fact, a
legitimate controversy with rationales on both sides, translates to a greater willingness to extend civil liberties to even those groups whose political views one dislikes a great deal.\textsuperscript{685}

Tolerance is a virtue that is intrinsically connected with the faculty of judgment. Hearing the other side is a matter of ‘judging’, this in the sense of imagining ourselves in the place of others as well as justifying ourselves in making judgments in the deliberative practice of giving and asking for normative reasons. Judging is a matter of ‘sharing-a-world-with-others’.

\textsuperscript{685} Diana Mutz (2007: 85).
LITERATURE


Levitt, Mairi (2003). ‘Public Consultation in Bioethics. What’s the Point of Asking the Public When They Have Neither Scientific Nor Ethical Expertise?’, Health Care Analysis 1: 15-25.


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**SOURCES**

**Public discourse in the Netherlands**


Beemer, Th. en Christiaans, M. ‘Elke ongeborene heeft recht op een zo goed mogelijke start’ [Each unborn has the right to a start that is as good as possible], *Trouw* August 24, 1989.


Cobben, Paul. ‘Er wordt geen leed voorkomen door embryo’s met een Down syndroom te aborteren’ [There is no prevention of suffering by aborting embryos with Down syndrome’], *NRC Handelsblad* May 8, 2004.


Utrecht: Deputatschap en de Raad voor de Zaken van Kerk en Theologie van de Nederlandse Hervormde Kerk en de Gereformeerde Kerken in Nederland.


Utrecht: Officiele standpunt van de Nederlandse vereniging voor obstetrie en gynaecologie.


Dupuis, H.M. en Galjaard, H. ‘Ongebornee heeft recht op een goede start’ [Unborn has the right to a good start], *NRC Handelsblad* July 28, 1989.


Feenstra, Gerbrand. ‘Fetus met oogziekte aborteren al jaren praktijk’ [Aborting fetuses with eye diseases has already been practice for years], *Volkskrant* October 13, 1995.


Hartogh, Govert den. ‘Het was beter als u er niet geweest’ [It would have been better if you had never existed], *Trouw* March 2, 1996.


Hoog, Arno van ‘t. ‘Rood haar reden voor abortus?’ [Red hair the reason for abortion?], *Volkskrant* October 14, 1995.

Hoven, Mariëtte van der, en Verweij, Marcel. ‘Zwangere voelt zich snel to test verplicht’ [Mother-to-be feels forced to test quickly], *Trouw* December 11, 2003.

Isarin, Jet (2002). ‘Als het maar gezond is. Over ongelukkige kinderen, ongelukkige ouders en ongelukkige beslissingen’ [If it is healthy. On unhappy children, unhappy parents and unhappy decisions], *Filosofie en Praktijk* 2.


Jochemsen, Henk. ‘Straks mág je niet eens een mongooltje hebben’ [Soon one will not be allowed to have a mongol], *Trouw* May 17, 2001.

Kammer, Claudia. ‘Meeste zwangere willen testen.’ Grens test bij 36 jaar is ‘arbitrair’ [‘Most mothers-to-be want a test.’ Limit at 36 years of age is ‘arbitrary’], *NRC Handelsblad* November 27, 2003.

Kate, Leo P. ten' De vraag is: wie mogen wij het leven aandoen' [The question is: who will live?], *Trouw* April 3, 1992.


Köhler, Wim. 'Ongefundene kritiek van politici op abortussen' [Unwarranted criticism of politicians over abortions], *NRC Handelsblad* October 13, 1995.

Kooijman, Hellen en Dobbelaar, Tanny. 'Luister eindelijk eens naar aanstaande ouders' [Listen, finally, to prospective parents], *Trouw* March 26, 2005.


Meeent-Nutma, E.M. van de 'Controle bij prenatale diagnostiek. Er zijn grenzen aan de autonomie van de ouders' [Control using prenatal diagnosis. There are limitations to the autonomy of parents], *Trouw* August 18, 1989.


Musschenga, Albert. 'Selectieve abortus is niet a priori immoreel' [Selective abortion is not a priori immoral], *NRC Handelsblad* August 5, 1994.


Nouwen, Sarah. 'Down-kind is tenminste zichzelf' [The Down child is himself at least], *Trouw* May 29, 2004.

Oosterwijk, Jan C. 'Minister Borst overschrijdt met haar uitspraak reeks grenzen' [Minister Borst’s opinions cross various boundaries], *Trouw* Januar 21, 1997.

Oudkerk, Rob. 'Een debat over de "consequenties van het weten"' [A debate about the "consequences of knowledge"], *Trouw* October 17, 1995.

Reinders, J.S. 'Gehandicapten en de twee boodschappen van de samenleving' [The disabled and the double messages of society], *Trouw* March 9, 1996.


Smit, Cees. 'Debat genetische screening gaat vooral over acceptatie gehandicapten' [Debate on genetic screening is particularly about acceptance of the disabled], *Volkskrant* May 9, 1994.
Public discourse in Sweden

Bischofberger, Erwin (1989). 'Fostret är en person med inneboende rätt till existens’ [The fetus is a person with the inherent right to exist], Läkartidningen 52


Conner, Peter et al. (2006). 'Upptäckt av kromosomrubningar hos foster - hög tid att ändra strategi’ [Detection of fetal chromosomal aberrations - high time to change strategy], Läkartidningen 41.


Egonsson, Dan (1994). 'Fosterdiagnostik och selectiv abort. De etiska problemen' [Prenatal diagnosis and selective abortion. The ethical problems], Tvärsnitt 2
Fridén, Lennart (m). 'Könsaborter'. Motion till riksdagen 200/01: So260 [Sex-selective abortions. Parliamentary Bill].
- (1989b). 'Fosterdiagnostik som trend och hot' [Prenatal diagnosis as trend and threat], Läkartidningen 41.
- (1989c). 'Fosterdiagnostiken behövs - men kan bantas' [Prenatal diagnosis is needed - but can be slimmed down], Läkartidningen 36.
Israelson, Margareta et al. (s) ‘Fosterdiagnostik’. Motion till riksdagen 1993/94: So488 [Prenatal diagnosis. Parliamentary Bill].
Johansson, Christina (1990). 'Den fullständige kontrollen' [Complete control], Svensk HandikappTidskrift SHT 1
Kjöller, Hanne. ‘Gravida oroas i onödan’ [Pregnant women are unnecessarily anxious], Dagens Nyheter March 26, 2001
Kommittén om genetisk integritet (2004). Genetik, integritet och etik [Genetics, integrity and ethics].
Kristoffersson, Ulf och Bent Nörgaard-Pedersen (1995). 'Serumanalys av gravida: allmän screening effektivt sätt upptäcka kromosomavvikelser - argument för och emot' [Serum analysis of pregnant women: general screening is an effective way of discovering chromosomal abnormalities - arguments for and against], Läkartidningen 12


*Genetisk integritet m.m. Regeringens Proposition 2005/06:64* [Genetic integrity. Government Bill 2005/06:64].


Seidal, Tomas (1989). 'Läkaretik måste avspeglas i utredning om fosterdiagnostik' [Medical ethics should be reflected in investigation on prenatal diagnosis], *Läkartidningen* 46.


- (1989c). 'Nyttomoralen bör vara grunden för ställningstagande till selektiv abort' [Utility morality ought to be the basis for stances taken on selective abortion], *Läkartidningen* 1-2.
- 'Fel anlag skäl till abort!' [Wrong disposition reason for abortion!], *Dagens Nyheter* August 4, 1989.


- 'Välj kön på ditt barn' [Choose the gender of your child], *Dagens Nyheter* March 24, 1996.

- 'Välj om barnet ska bli homosexuellt!' [Choose whether the child will be homosexual!], *Dagens Nyheter* March 22, 1998.

Tillander, Ulla m.fl. (c). 'Fosterdiagnostik m.m.'. *Motion till riksdagen 1991/92:So423* [Prenatal diagnosis. Parliamentary Bill].


Von Uexküll, Boris. 'Kunskap svår att förmedla. Samhället får inte uppmana till fosterdiagnostik' [Knowledge is difficult to mediate. Society should not encourage prenatal diagnosis], *Svenska dagbladet* May 12, 1995.
Wahlström, Jan. ‘Avstå från genetisk diagnostik av egenskaper ’ [Refrain from the genetic diagnosis of traits], *Göteborgs Posten* July 14, 1996)